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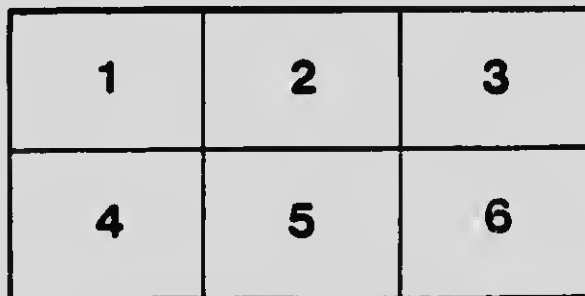
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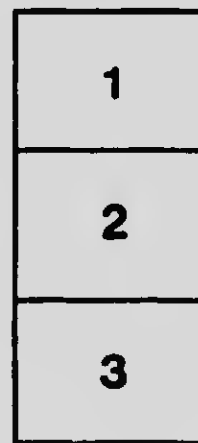
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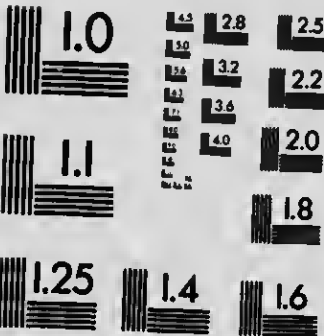
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NEGLIGENCE IN LAW

VOLUME I

GENERAL RELATIONS



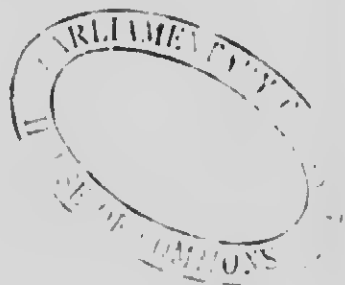
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BY

THOMAS BEVEN

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THIRD EDITION



VOLUME I

GENERAL RELATIONS

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PREFACE.

THE preparation of this edition of my book on Negligence has taken up a very large portion of my time during the last three or four years; and the result is not the mere bringing up to date which at regular intervals is necessary in order to keep a law book in life, but the presentation of a considerable body of new problems and conclusions.

Discussions on questions of negligence are of daily occurrence in the Courts; since the tendency of law freed from technical fetters to base claims on breach of duty rather than on some more refined or recondite reason; while the increasing complexity of social relations in modern life accentuates immensely the occasions of conflict, whether intentional or not, between those whose interests or rights are converging but not identical. A large proportion of, though not nearly all, the 1465 new cases introduced into this book, is due to this expansion of the subject and is the growth of ten years of active legal work. The residue is to be put down to what was improvidently omitted before, or what is material for new exemplification or is of historical interest.

Of the new cases some, like *Angus v. London, Tilbury, and Southend Ry. Co.* (at p. 144), *McArthur v. Dominion Cartridge Co.* (at p. 615), *The Winkfield* (at p. 735), *Colonial Bank of Australasia v. Marshall* (at p. 1329), or (on quite a lower plane) *Marney v. Scott* (at p. 60), and *Conroy v. Peacock* (at p. 716), supply problems of historical or juridical interest; others, like *De la Bere v. Pearson*, affirmed in the Court of Appeal, 24 *Times Law Report*, 120, but not noticing the points touched on in the text (at pp. 102, 1166), *Tozeland v. West Ham Union* (at p. 246), *Smith v. Giddy* (at p. 407), present a certain novelty in the colligation of the facts suggesting competing analogies, and invite analysis.

I have used considerable freedom in inquiring into the validity of the decisions arrived at. It may be, as Lord Coke tells us, that the whole common law of England resides in the breasts of the judges; but in welling from the sanctity of its source it is apt to flow into distractingly cross currents and to tinge itself with strong individual traces of the particular channel through which it is drawn. To find the true pure stream is a little difficult without the assistance of those methods which purge error in the realms of science or philosophy; and, at this time of day, no sensible man will deny their entire applicability to the refining process. An instance illustrative of this is presented to me though too late to notice in the body of this book.

In *Smith v. Prosser*, [1907] 2 K. B., 746, Williams, L.J., speaking of *Young v. Grote*, and *Ingham v. Primrose*, in an off-hand way pronounces that they "have indeed now ceased to be law." Reference to pp. 1317 and 1340 of this treatise will demonstrate that neither case can thus lordly be dismissed in a parenthesis even by a Lord Justice.

Again there is another class of cases, like *Sheffield Corporation v. Barclay* (at p. 1354), or *Ruben v. Great Fingull Consolidated* (at p. 1355), which clinch discussions of some difficulty and suggest the expediency of rearranging the classification of a number of cases that they affect; this too I have endeavoured to do.

There has also been much new legislation to be embodied, some of it bringing into existence new aspects of law; as the series of Acts which have, for the time being, resulted in the Motor Car Act, 1903. Whether these are properly treated under the heading of Occupation of Property (at p. 438) may admit of reasonable dispute, but considerations of convenience led me to deal with them there.

Many new cases too have had to be grouped under the Public Authorities Protection Act, 1893 (at p. 329), and have required detailed attention.

Then there were the topics which were so obviously imperfectly or confusedly dealt with in my last edition, that rewriting the portion relating to them was the only possible satisfactory way of treating them. This remedial process has been applied to the chapter on Corporations and Local Bodies, also to that on the Occupation of Property; while the chapters on Common Carriers by Water and on Collision on Water have been similarly transformed. The whole of Book VII. on Unclassified Relations has been rewritten. Of course, as the subject dealt with in the old and the new is the same, much of the difference that exists is only a difference of expression, and in many cases the old material has been used substantially unaltered where perhaps, even in my partial judgment, it is very capable of improvement; but with all deductions in these cases, what is now presented in this group is set forth for the first time.

There are other chapters, as for example that on Degrees of Negligence (a subject on which most lawyers are dogmatists), or the following chapter, on Limitations of Liability, which are altered, not so far as to affect their identity, but sufficiently to include a modifying amount of novelty.

Indeed the only chapter which is unaltered (except occasionally verbally) is that on the Duty to Answer for One's Own Acts, which is practically an examination of the grounds of the decision of *Stanley v. Powell*, that is introduced in a recent excellent and authoritative collection as a Leading Case. What a leading case means in this connection I cannot say; but in my opinion *Stanley v. Powell* is not an authority for anything, but was decided on quite wrong grounds; so I have left this chapter untouched.

To make room for the new matter considerable excisions and compressions have been made. Thus the discussion on *Victorian Ry. Commissioners v. Coultas*, which was spread over nine pages, is now confined to five; and this perhaps is still an excess in view of the recent trend of the authorities. *Woodley v. Metropolitan Ry. Co.*, which took eight pages, now occupies but two; and *Young v. Grote*, which was made to cover various discussions through twenty-seven pages,

is now focussed into eight. These are but illustrations of a general tendency throughout.

Many long and perhaps doubtfully relevant notes have disappeared. That some still standing might have followed may possibly be a pious opinion of the severely concise. But I am inclined to think that in this the partialities of the author should have indulgence shown to them. I confess to a weakness for attempting to trace the history of a principle or to suggest by what stages a doctrine has been deflected from its first significance. And, setting selfish predilections aside, I can conceive that there are lawyers to whom such notes, say as those at pp. 26, 114, 173, 353, or 576 in the first volume, or those in the second volume dealing with the early English or the Civil Law, *e.g.*, at pp. 752, 761, 763, 768, and 850, might be of interest or suggest research; and I do not recognise the validity of the representation made to me more than once that I should omit everything not fitted for the purposes of practitioners in a hurry. Law as a study I think admits of higher aims than that which inspires the genius of the mass of annotators of statutes.

I have also made some alteration in my point of view, though incompletely; for a third edition has not the flexibility of adaptation that manuscript notes may have. In the first instance I made an attempt to present the law of the United States side by side with our own. I am now convinced that such an attempt is impossible of success and also inexpedient. I have in my possession a vast American treatise on Negligence. It is in six volumes, has 7741 pages, and deals with 36,000 cases or thereabouts. Yet even in these generous limits very many American decisions on Negligence of the greatest weight are not included. What hope then of dealing with a body of law so enormous in addition to our prolific own? Moreover the study of this Encyclopædia of Negligence has made plain to me what I before suspected—that, though of the same parentage as ours, American law has in late years been developing along divergent lines, and accepts principles widely applicable that are to us not only novel but fundamentally unsound.

Two or three illustrations drawn from different branches of law may not be out of place to show what I mean:

(1) *Croaker (or Craker) v. Chicago & N. W. Rd. Co.*, 17 Am. R. 504, tells of the fortunes of a female passenger on the defendant railway who was kissed, she unwilling, by the guard in charge of the train. The delinquent was criminally convicted, sentenced to pay a fine, and sent to prison till he paid it. But the wrong done her still rankled, so that she brought an action against the railway company in respect of it, and was awarded, by an apparently highly incensed jury, heavy damages. These were secured to her by the decision of the full Court. The principle the Court enunciated is set forth thus: "As we understand it . . . if one hire out his dog to guard sheep against wolves, and the dog sleeps while a wolf makes away with a sheep, the owner is liable (?); but if the dog play wolf and devour the sheep himself the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*." In plain prose this imports that the master warrants the moral impeccability of the servant. And this "reasoning" has been received with applause and adopted as a forcible illustration of legal principle by the Supreme Courts of States from the Atlantic to the Pacific seaboard.

In England this fascinating plaintiff would have been nonsuited on the quite unheroic ground that her claim disclosed a wilful and independent trespass wholly outside the employment.

(2) Again the principle is well settled "in the highest Courts of New York (*Lawrence v. Fox*, 20 N. Y. 268) and in many other States" that a telegraph company is responsible not only to the sender of a message but also the addressee: that persons not parties to a contract may nevertheless sue for damages for its breach.

In England the contradictory principle is well settled; a person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may.

(3) In most of the United States the sale of intoxicating liquor at certain times or in certain circumstances is prohibited and made a crime. In *King v. Haley* (86 Ill. 106) a rum-seller was held liable to a man who was shot by a drunken man to whom the rum-seller had illegally sold whisky.

In England the law is reasonably plain that where a general obligation is created by statute and a specific remedy is provided, the statutory remedy is the only one.

Here then in three typical cases selected almost at random the principles of the American law and of the English law are in direct antagonism. And it was my conviction of the utter uselessness, for my purposes at any rate, of drawing out this opposition in detail, necessarily at considerable length, that induced me to abandon any attempt systematically to range and compare the two systems. Some three or four hundred American cases have in consequence dropped out of this edition. Yet the Americans have a genius for law; and the learning and brilliancy of the judgments found in Johnson's or Metcalfe's or indeed in any of the best American reports on the historical development of the common law is such that no English writer can afford to neglect them. They are the supplement, sometimes the substitute, for our own, and must always have a place in English treatises ambitious of excellence.

Where I have left the American decisions I have replaced them by the Colonial. The community of our laws may prove a stronger bond to unite us as one Empire with the Colonies than other influences more harped on. So long as there is an ultimate appeal to the Judicial Committee of the Privy Council and a suitably strong body of judges to determine the question of principle, the law as laid down by the House of Lords and by the Privy Council should be identical; and where not so is unsound; and thus the efforts of the Colonial judges will be directed to make for this community. Students of Colonial law must know that at this moment there are in our Colonies judges, such for example as Williams, J., of New Zealand, whose legal reputation constrains reference to their reported judgments which well repay perusal by their clear insight into the principles of the common law and their vivid presentment of them. Contrast the judgment of the last-named judge in *Brown v. Bennett*, 9 N. Z. L. R. 342, with that of the Privy Council in *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559, and the benefit to clear thinking and accurate knowledge from the perusal of the Colonial decision is apparent; and there are besides, other Colonial judges of an experience and learning which will not permit of their judgments being neglected without as appreciable loss as appears here. I have therefore systematically gone through

the Law Reports of our greater Colonies and have treated them on the same footing as I have the home decisions.

The quotations from the Civil Law are taken either from the Elzevir edition of 1663 or the Amsterdam edition of 1700 when some other source is not indicated.

My references to Pothier, that king of jurists, are to Bugnet's Paris edition of 1847. In most cases the edition of any book that I have referred to is indicated in the reference.

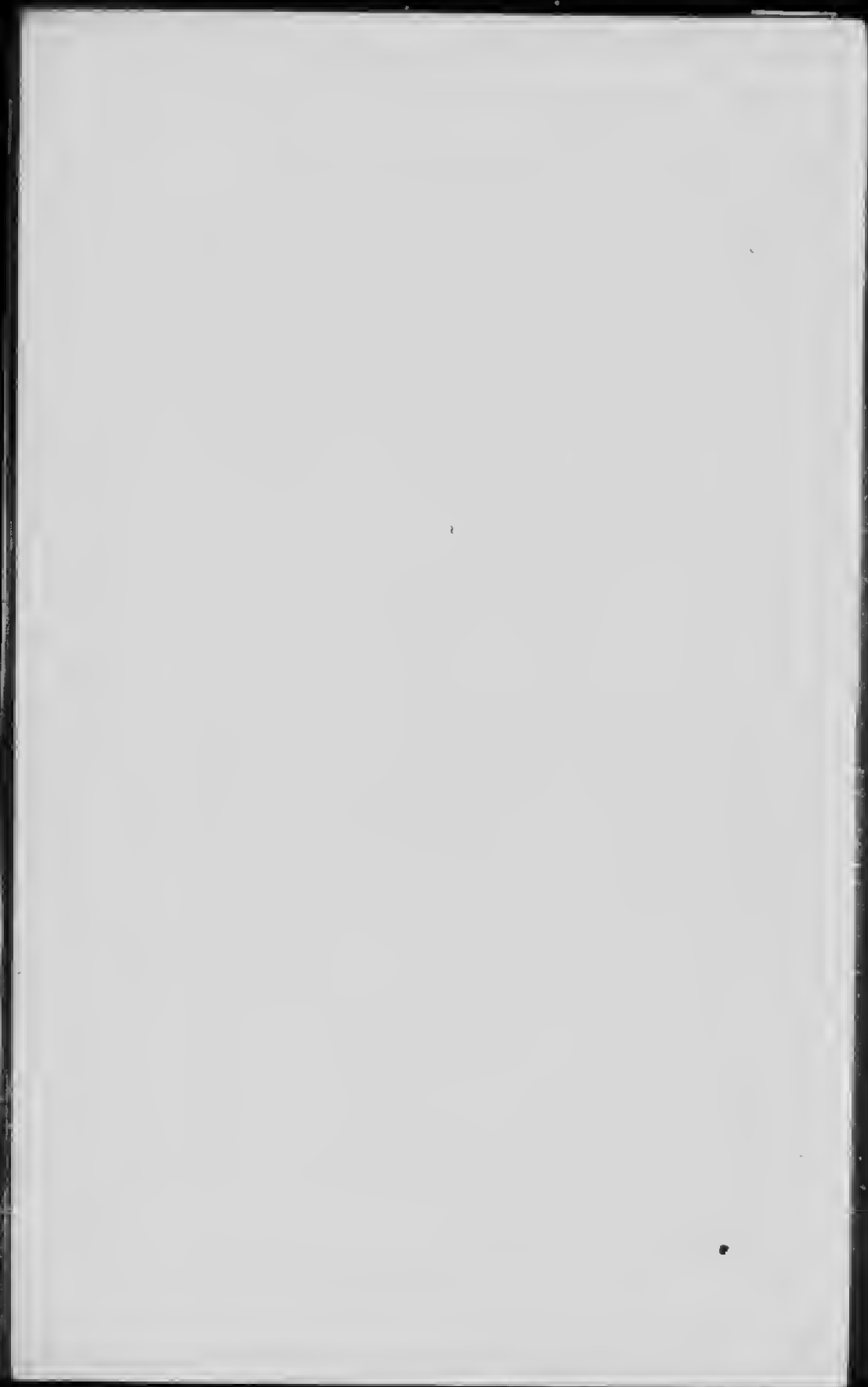
To the officers of the Inner Temple Library, a model institution, liberally and efficiently managed, well arranged and most accessible, my unqualified gratitude is due for the patience and courtesy with which during the past two years they have treated one whom they could not regard as other than a constantly recurring nuisance. The assistance I have had from the Librarian and his staff has enabled me to overcome many a difficulty that else I should have yielded to. To Mr. Snell specially are my thanks due for the courage and instant readiness with which he has, at some periods almost daily, mounted to the top rungs of ladders of unstable appearance and struggled to extricate from the obscurity of murky shelves, even at the risk of no inconsiderable bodily hurt, some mighty volume, may be of Meerman's Thesaurus or Beawes's *Lex Mercatoria*, to satisfy my passion for an absolutely authentic quotation or reference. We have both, I am happy to say, issued from the perils, he of falling, I of being fallen on, unscathed. Would that bulky books were kept on shelves on the floor!

Mr. Riches, the Librarian of the Inns of Court Bar Library, has again taken entire charge of the various tables of references. I know no one who can dispute precedence with him in this branch of the work of giving birth to a law book; and I know that he has loyally put at my disposal all his skill. Mr. Sydney E. Williams, of Lincoln's Inn, has most kindly relieved me of the charge of the Index. Himself an author of repute, I hope that the time he has bestowed on my work will not conduce to deprive the profession of the enlightenment it receives from his own.

Finally, for myself, I implore indulgence for the negligences and ignorances into which, in the course of this long and complicated work, I cannot but have again and again fallen. In extenuation may I urge—*Verum opere in longo fas est obrepere somnum.*

THOMAS BEVEN.

1 TEMPLE GARDENS,
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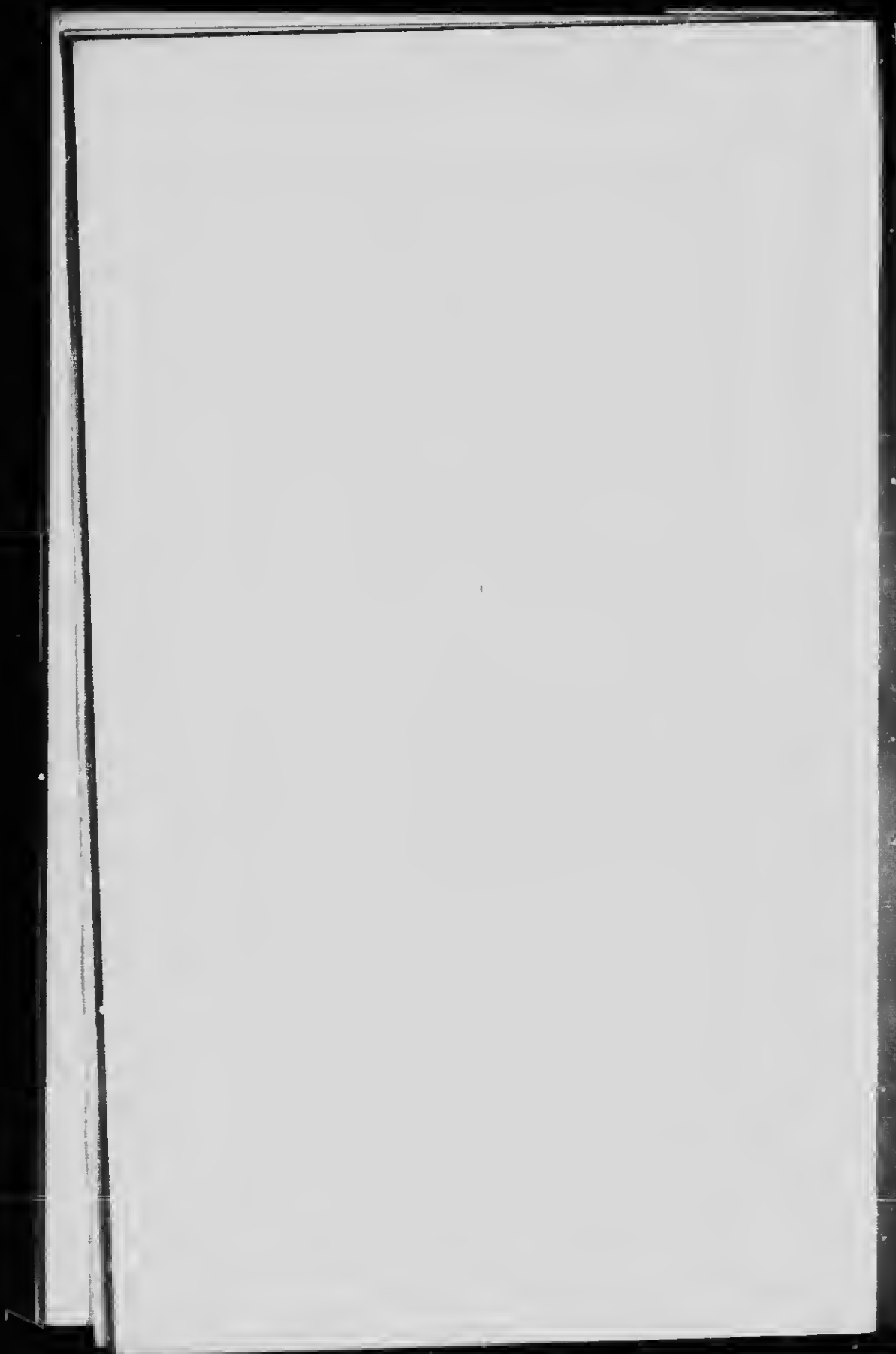


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BOOK I.
CONSTITUTIVE PRINCIPLES.

VOL. I.

A

NEGLIGENCE IN LAW.

BOOK I.

CONSTITUTIVE PRINCIPLES.

CHAPTER I.

PRELIMINARY MATTER.

THE investigation of Negligence in law, the subject of the ensuing The subject proposed. treatise, does not undertake the analysis of any particular class of legal relations. It has to do with legal duties generally, though in a special aspect; that is, with duties as they appear when the normal standard of performance is not attained; and is thus primarily occupied with considering defaults in conduct, and only in the second place with the adequate discharge of obligations. It deals with an aspect, not with a division, of law. A complete treatise on Negligence in law would be a commentary on the whole law of England, from the standpoint of a non-fulfilment of legal duties, excluding only intentional wrongdoing. This exclusion must be taken with the caution that intentional wrongdoing may frequently, at the option of the person injured by it, be treated as negligence—a failure of duty, and not a premeditated violation of duty; as in the case of deliberately driving against another's vehicle or property. Yet another caution must be had: if the act impugned is that of a servant, and the master shows it to be a wilful one, he discharges himself from liability (unless his choice of his servant was itself negligent).¹ In practice, a treatise on the non-fulfilment of legal duties would be unsatisfactory, as dealing obliquely with subjects more conveniently dealt with directly; and redundant, through much repetition, since the leading principles are constantly cropping up in very various details. The adequate treatment of Negligence in law must, notwithstanding, range over a very large number of topics and involve minute and repetitive treatment of not a few.

The definition of negligence most often given is that by Alderson. Alderson, R.'s B.²—"the omission to do something which a reasonable man, guided definition.

¹ *Gordon v. Roll*, 4 Ex. 335.

² *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, 784. In the Law Journal Report, 25 L. J. Ex. 212, 213, the words "guided upon those considerations which

upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Invaluable as a description, this formula is too wide for a definition; since its terms include even improvident business enterprises, which in their undertaking hold out employment, in their collapse involve ruin, perhaps to thousands; but which, in spite of omissions and commissions of which no reasonable man would be guilty, bring in their train no legal responsibility whatever.

Austin's.

The most formally scientific analysis of negligence is that of Austin.¹ He draws a distinction between negligence, heedlessness, and rashness, which, though closely allied, "are broadly distinguished by differences."

In cases of negligence, the party performs not an act to which he is obliged; he breaks a positive duty.

In cases of heedlessness or rashness, the party does an act from which he is bound to forbear: he breaks a negative duty.

In cases of negligence, he adverts not to the act which it is his duty to do.

In cases of heedlessness, he adverts not to *consequences* of the act he does.

In cases of rashness, he adverts to the consequences of the act; but by reason of some assumption *which he examines insufficiently* he concludes that those consequences will not follow the act in the instance before him.

Discussed.

The view of negligence which commends itself to Austin is that "it applies exclusively to injurious omissions—to breaches by omission of positive duties." Whatever its philosophic value, this view circumscribes negligence far too narrowly for the purposes of practical jurisprudence. For example, the servants of a farmer, to save themselves trouble, leave a roller by the side of a highway, with its shafts slightly projecting over the metalled part of the road. The plaintiff's pony shies at it as the pony is driven past, and plaintiff's wife is thrown out of her carriage and killed. In an action for wrongful and negligent user by the defendant of the highway, the plaintiff is entitled to recover.² Now this act does not appear to have been done by the servants with intention to test the *right* to act as they did, but merely to save themselves trouble; so that it is not comprehended in that class of nuisances which are wilful as distinguished from negligent; and being negligent is negligent in what is done, and not through the omission of precaution in the doing it. Again, the distinction drawn between negligence on the one hand and heedlessness and rashness on the other may be valid in the regions of pure speculation, yet for practical purposes the law can draw no distinction between the driver who runs into a vehicle without looking where he is going, and the

ordinarily regulate the conduct of human affairs" are omitted. Compare per Bigelow, C.J., in *Sweeney v. Old Colony and Newport Rl. Co.*, 92 Mass. 368, 372. Alderson, B.'s, language is amplified though his sense is closely followed in an approved United States definition of negligence, which, says Swayne, J., in *Railroad Co. v. Jones*, 95 U.S. (5 Otto) 439, 441, is "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion." That is, negligence is always relative to some circumstance of time, or place, or person, or thing.

¹ Lectures on Jurisprudence, lecture 20.

² *Wilkins v. Fay*, 12 Q. B. D. 110.

driver who runs into a vehicle because he does not trouble to draw up, or is willing to take the risk of rash action on the chance of the probable consequences being somehow averted. Whether an act is in Austin's sense negligent or heedless or rash, in law it is comprehended under the term negligent act—sharply distinguished on the one hand from that class of acts in which there is either actual intent, or those circumstances from which the law draws the conclusion of intent; and, on the other hand, from those acts which are the result of chance, and are known as accidents in the narrow sense.¹

Dr. Wharton² describes negligence in its civil relations as “such an Dr. Wharton's definition. inadvertent imperfection by a responsible human agent in the discharge of a legal duty as produces in an ordinary and natural sequence a damage to another.” Now inadvertence in its ordinary meaning Discussed. is closely allied, if not synonymous, with heedlessness; whereas the scope of negligence is much wider, and extends to neglects of which the consequences are clearly foreseen, though not willed; as the allowing a drain-pipe to be stopped and thereby causing a flood; where the injurious consequence has clearly been foreseen, though, through *inertia* of the person whose duty it was to clear it, no precaution is taken. This is neither an inadvertent act, since the consequences are foreseen, nor yet a wilful one, since they are not willed; the negligent person trusts to the chapter of accidents or to the act of some third person to save him from the consequences of his sluggishness.

Scientifically “inadvertence”³ may be a necessary element in negligence; legally it is not so. Negligence as a juristic word in practice connotes only default in duty. How the default arises is immaterial. A duty is to be performed; but the person obliged to it fails in performance. In most cases the person injured by the default does not trouble himself with the antecedents of the default; he brings his action for negligence whether the default was wilful or however else induced. In the old law he would have declared in *assumpsit*: a duty was owed to him and there was failure in performance and a *quasi* contractual remedy rose therefrom; or if not in *assumpsit*, then in trespass or case where, save for inflaming the damages, the question of intention was immaterial.

In *Heaven v. Pender*,⁴ Brett, M.R., gave his definition of negligence Brett, M.R.'s definition.—the definition of the practical and unscientific lawyer: “Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes a duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.” The patent objection to this is that it only deals with one kind Objections. even of actionable negligence; since all those cases where, from position or contract, one is bound to use more than ordinary care or skill towards another are excluded by the expression. Thus the law discriminates between children and adults,⁵ in the amount of care that must be

¹ There is a valuable discussion of the metaphysical conception of negligence, with a consideration of the Aristotelian definitions, in Poste, *Gaius*, 3rd ed. 12-15. See Hearn, *Legal Duties and Rights, Acts done at one's peril*, 100-111; *Cornish v. Accident Ins. Co.*, 23 Q. B. D., per Lindley, L.J., 456.

² Negligence, § 3.

³ Inadvertence is discussed by Williams, J., *Ex parte Clarke* (1892), 67 L. T. 232, and his definition there is adopted in C. A., *In re Safety Explosives, Ltd.* (1904), 1 Ch. 226.

⁴ 11 Q. B. D. 503, 507.

⁵ “The old, the lame and the infirm are entitled to the use of the streets, and more care must be exercised towards them by engineers than towards those who have

exercised, but the definition admits no flexibility in this respect whatever. Again, apart from the verbal objection, the definition introduces the conception of contributory negligence, a complex and more difficult term than negligence itself, which at present we are not in a condition to grapple with.

The same learned judge subsequently¹ defines negligence: "The doing of something which a person of ordinary care and skill under the circumstances would not do, or omitting to do something which such a person under the circumstances would do." This is practically an expanded form of the definition herein adopted, vitiated by the limitation to a person of "ordinary care and skill"; as if persons of more than an ordinary degree of care and skill were not bound to observe a rule of duty or a rule of duty was not laid down in law for those professing exceptional and peculiar skill.

Messrs. Shearman and Redfield's definition.

Messrs. Shearman and Redfield say: "Negligence constituting a cause of civil action is such an omission, by a responsible person, to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury, as, in a natural and continuous sequence, causes unintended damage to the latter."²

Objections.

But this introduces complex terms, *e.g.*, responsible person, natural and continuous sequence, legal duty, damage, which we are not yet in a position to grapple with and are more bewildering than the term we are to define. Again, an inadvertently unlawful positive act, as, for example, placing a roller on a highway, is not in any usual sense the "omission of care," &c., "for the protection of another person from injury," since, provided the act is to be done, it may be done with all circumstances of extremest care; the negligence is the failure to ascertain its unlawfulness previously to determining on the act. There is no omission to use care, diligence, and skill for the protection of another person; for all that the case admits of has by hypothesis been done. The negligence is acting at all, though the act, being determined on, is done with all possible precaution.

Analysis.

The analysis of a cause of action on negligence by the same authors seems unexceptionable. They say: Negligence consists in—

- (1) A legal duty to use care;
- (2) A breach of that duty;
- (3) The absence of distinct intention to produce the precise damage, if any, which actually follows.³

With this negligence, in order to sustain a civil action there must concur—

- (4) Damage to the plaintiff;
- (5) A natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect.

Sir James Stephen's definition.

Sir James Stephen⁴ defines negligence: "the omission to perform better powers of motion"; per Hunt, C. J., *O'Mara v. Hudson River Co.*, 38 N. Y. 445, 449.

¹ *Wakelin v. L. & S. W. Ry. Co.* (1896), 1 Q. B. 101.

² Shearman and Redfield, *Negligence*, § 3.

³ *I.e.*, the absence of distinct legal intention, which includes not only the absence of actual intention, but of those facts from which, independent of actual intention, the law presumes intention.

⁴ A General View of the Criminal Law of England (2nd ed.), 76; see also the same author's Digest of the Criminal Law, ch. 22, Art. 232. "Death or bodily injury caused by omission to discharge a legal duty." *The Queen v. Salmon*, 6 Q. B. D. 79; *Foster Crown Law, Discourse II. Of Homicide*, § 4, 262; *Roscoe, Criminal Evidence*

a duty imposed by law." Sir James Stephen continues: "The word [negligence] is used in criminal law principally in reference to the infliction of bodily injury by neglecting to perform one of the duties which are by law imposed on various persons for the preservation of human life." As a fact the accuracy of this statement is undoubted, as the statement of a principle of law it leaves much to be desired. The term criminal negligence has reference mainly to the authority by whom reparation is sought. An inseparable accident of criminal negligence may be that it is a violation of duty imposed for the preservation of human life. It is criminal because it constitutes a violation of obligations to the State, and which can only be remitted by the State. Criminal negligence *per se* does not differ from negligence simply. The same negligence as it affects the individual and the State is respectively gross negligence and criminal negligence; while it is the groundwork of reparation to the private individual, however heinous it may be, it is no more than negligence; so soon as it is the subject-matter in respect of which reparation is exacted by the State it becomes criminal negligence. For example, neglect to mend a road when made the subject of indictment is criminal negligence. When the subject of action by an individual in respect of special damage sustained through want of repair is negligence simply, though sometimes accentuated by the adjective "gross." That criminal negligence may consist in neglect of those duties which are imposed by law on various persons for the preservation of human life is due exclusively to the accident that the State does not, as a rule, intervene, except where life or limb is endangered, and leaves other injuries arising from negligence to be redressed at the suit of the individual. Criminal negligence then is negligence in such circumstances that it imposes an obligation remissible by the State, but irremissible by the individual actually damaged by it; and since the State will not lightly intervene criminal negligence must be some "substantial thing,"¹ and not mere casual inadvertence. Between criminal negligence, however, and actionable negligence there is no principle of discrimination, but a question of degree only.²

Bayley, J., in *Tessymond's case*,³ seems to refer exclusively to the consequences arising from negligence to determine whether the act is a mere civil wrong or a criminal act. This can scarcely be a correct standpoint, else the omnibus driver who merely knocks a foot-passenger down and bespatters him with mud would escape any criminal consequences, while if the foot-passenger's fall were beneath the wheels

Bayley, J.'s
view
criticised.

(12th ed.), 625; 1 Russell, *Crimers*, Bk. III., ch. 2, § 5 (5th ed.), 822. Of Criminal Negligence Blackburn, J., says in *Reg. v. Eyre*, Finlason's Report, 57: "It is a phrase constantly used in criminal cases, but the amount of negligence that would make a man so responsible cannot be defined. It is not a little failure in duty that would make him criminally responsible; a great failure of duty undoubtedly would. The line between the two is hard to define and must be left to a very great extent, in each individual case to the common sense of the jury whether or not the degree of failure of duty is criminal."

¹ Per Willes, J., *Regina v. Markus*, 4 F. & F. 539.

² *Regina v. Nook*, 4 F. & F. 920. "A fact," says Lord Erskine, C., in *Lord Melville's case*, 29 How. St. Tr. 764, "must be established by the same evidence, whether it be followed by a criminal or civil consequence; but it is a totally different question in the consideration of criminal as distinguished from civil justice how the person now on trial may be affected by the fact when so established." See per Garraway, *The King v. Cador*, 4 Esp. 117, 136; and the ruling of Hotham, B., 144; also per Lawrence, J., *Reg. v. Stone*, 25 How. St. Tr. 1314. See 29 L. J. Newsp. 233, an article, "Thy Duty to thy Neighbour."

³ 1 Lewin, C. C. 169.

of the vehicle he would be amenable to them.¹ In practice, it is true, proceedings would be left to the initiative of the injured person in the civil court, but the legal ingredients, the violation of the rules of public safety and the potential injury to the community would be ground for criminal proceedings; though in the instance given, the facts must warrant the inference of a public danger, to make them the subject of criminal proceedings.

Is nonfeasance
criminal?

A further point has been mooted—whether negligence in its criminal aspect can arise from mere nonfeasance; whether a man may be criminally convicted who has only abstained from acting. It is clear there is no legal duty on a man seeing another in the water drowning to plunge in and rescue him; nor yet on a passer-by seeing a child under the feet of a horse to pull him out and prevent his being run over; while there is a plain legal duty for a pointsman to turn on the switches at the approach of a train, and for a parent to provide food for an infant child.² While in *Reg. v. Barrett*,³ Wightman, J., enunciates the proposition that mere nonfeasance will not constitute criminal negligence, Lord Campbell, C.J., in *Reg. v. Lowe*, was “clearly of opinion that a man may by a neglect of duty render himself liable to be convicted of manslaughter or even of murder.”⁴ In this, however, there is no contrariety; the material consideration is whether there is a duty to act.⁵ The pointsman who undertakes an employment, the parent who is bound to the support of his child, are equally punishable whether they act with criminal negligence or with criminal negligence refrain from acting; because the position each occupies binds him to a particular course of conduct from which if he refrain he is as chargeable as if he act amiss. It is otherwise with the case of a drowning man; for with regard to him the bystander has undertaken no duty, not has the State imposed any. The case of an officer of the Royal Humane Society, apprised that a man is about to throw himself into the water, and who, notwithstanding, makes no effort, either for prevention or rescue, so that the man is drowned, may he put, and it may be objected that here is a duty and therefore a liability. But the duty is only a contractual duty, enforceable under the contract with the Humane Society. Neither the drowning man nor the State is party thereto, or has any right thereunder; and, apart from the contract, which is a matter of private concern, the State has in the case put imposed no obligation. A criminal liability may indeed, in some circumstances, arise from the violation of a contractual duty;⁶ but the mere omission to act where action would have prevented loss to another and inaction has brought it about does not raise a duty. “There are decisions to this effect both at law and in equity; see at law *Arnold v. The Cheque Bank*”⁷ decided by this Court during the last sittings, where the cases at law were fully considered. In equity, it is well settled now that the mere omission by a first mortgagee to obtain the title-deeds from the mortgagor is not sufficient to postpone the

¹ Cp. *Regina v. Bull*, 2 F. & F., 201; and the note to *Rich v. Pierpont*, 3 F. & F. 41.

² *Reg. v. Senior* (1899), 1 Q. B. 283.

³ 2 C. & K. 343.

⁴ 3 C. & K. 123.

⁵ Cp. *Reg. v. Smith*, 11 Cox, C. C. 210, and the remark of the editor in 1 Russell, Crimes (5th ed.), 835.

⁶ *Rex v. Pittwood*, 19 Times L. R. 37; *The Queen v. Instan* (1893), 1 Q. B. 450.

⁷ 1 C. P. D. 578.

first mortgage in favour of a subsequent mortgagee who *bonâ fide* advances his money in the belief that the property is unincumbered, and who obtains the deeds.¹ To postpone the first mortgage in such cases, there must be either fraud or such gross and wilful negligence as is equivalent to it.² But if there is no *duty* there can be no negligence.

Other definitions of negligence are—"Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design;"³ "want of diligence;"⁴ "want or omission of care or attention;"⁵ "want of due diligence;"⁶ "acting carelessly;"⁷ and, not to multiply examples, which might be done to a practically limitless extent, the definition of Willes, J.,⁸ which will be most frequently used in the following pages: "Negligence is the absence of care according to the circumstances;" or his alternative, though substantially identical, statement, "the absence of such care as it was the duty of the defendant to use;"⁹ and which he prefaces with the caution that "confusion has arisen from regarding negligence as a positive instead of a negative word."

The merit of Willes, J.'s definition appears when one notes that the same act may be negligent or not negligent wholly according to its circumstances; it is not the act that connotes the negligence but the circumstances; as where one sends a bank-note by post: if this is done without the authorisation of the creditor, and the note is lost in the transit, the sending by post is *primâ facie* negligent; if the sending by post is authorised by the creditor, the sending is not negligent; or an agent instructed not to part with property without payments hands it over on tender of a cheque, he is negligent; but if he takes a cheque in the ordinary course of his business, in doing so he is not negligent.¹⁰ In *Grand Trunk Ry. Co. v. Ives*,¹¹ again, it is very clearly pointed out that "the terms 'ordinary care,' 'reasonable prudence,' and such like terms applied to the conduct and affairs of men have relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence;" and Bramwell, B., who has forcibly stated so many legal principles, illustrates this also, by saying, in *Degg v. Midland Ry. Co.*:¹² "There is no absolute or intrinsic negligence; it is always relative to some circumstance of time, place, or

¹ *Evans v. Bicknell*, 6 Ves. 174, 183; *Hewitt v. Loosemore*, 9 Hare 449.

² *Keith v. Burrows*, 1 C. P. D. per Lindley, J., 734.

³ Per Fry, J., in *Kettlewell v. Watson*, 21 Ch. D. 685, 706.

⁴ Campbell, *Negligence*, 3.

⁵ Burrill, *Law Dictionary*, *sub nom.*

⁶ Bouvier, *Law Dictionary* (6th ed.), *sub nom.*

⁷ Wharton, *Law Lexicon*, *sub nom.*; see also a number of definitions of negligence collected in *Osborne v. McMasters*, 12 Am. St. R. 698 and note.

⁸ *Vaughan v. Taff Vale Ry. Co.*, in the Exchequer Chamber, 5 H. & N. 688. This is adopted by Paxson, J., in *Philadelphia v. Stinger*, 78 Pa. St. 225, and repeated by the same judge, then become C.J., *Ellis v. Lake Shore, &c. Rd. Co.*, 138 Pa. St. 506. To the same effect is Agnew, J., in *Philadelphia, &c. Ry. Co. v. Sparen*, 47 Pa. St. 305: "There is no absolute rule as to negligence to cover all cases. That which is negligence in one case, by a change of circumstances will become ordinary care in another, or gross negligence in a third. It is a relative term depending upon the circumstances, and therefore is always a question for the jury upon the evidence, but guided by proper instructions from the Court."

⁹ *Grill v. Gen. Iron Screw Collier Co.*, L. R. 1 C. P. 600, 612.

¹⁰ *Papé v. Westcott* (1894), 1 Q. B. 272, 278.

¹¹ 144 U.S. (37 Davis), 406, 417.

¹² 1 H. & N. 781.

person." "There can be no action except in respect of a duty infringed, and no man by his wrongful act can impose a duty."¹

Notion of duty, how formed.

This raises the notion of duty. Before the law every man is entitled to the enjoyment of unfettered freedom so long as his conduct does not interfere with the equal liberty of all others. Where one man's sphere of activity impinges on another man's, a conflict of interests arises. The debateable land where these collisions may occur is taken possession of by the law, which lays down the rules of mutual intercourse. A liberty of action which is allowed therein is called a right, the obligation of restraint a duty, and these terms are purely relative, each implying the other. Duty, then, as a legal term indicates the obligation to limit freedom of action and to conform to a prescribed course of conduct. The widest generalisation of duty is that each citizen "must do no act to injure another."²

When formed become rules of law.

What the particular acts are which are forbidden because they tend to injure others cannot be enumerated. They are worked out in the gradual evolution of society. In a primitive community they are few and simple; in an advanced civilisation they intrude into the most intimate relationships. Some acts manifestly could not coexist with civic union. These are matters forbidden by the criminal law. They, too, multiply with growing society. Others are inexpedient and discouraged, they must be atoned for where they are hurtful. This class also is continually advancing and pressing upon the residue of freedom left to the individual. As new relations arise the judges, drawing on the analogies given by pre-existing rules or decisions, and applying recognised principles of law and logic for their interpretation, formulate wider rules that shall comprehend them. The facts in each case are found by the jury. Collocations of fact of such frequent occurrence, that their significance becomes plain and indisputable, pass from the province of the jury and take their place as recognised cases under the new and wider rule. The interposition of the jury is dispensed with where the office of the jury often exercised in identical cases has stamped the character of the acts. So soon as their features are recognised they are seen to import a right or a duty or even some more complicated legal conclusion.

The duties which are incumbent on most of us in the common relations of life are mainly forbearances. A duty to act arises usually only where we have voluntarily placed ourselves in a situation from which it is the outcome. We are husbands or fathers, or masters or servants. Save in the second of the above relations the element of contract is prominent; and to it, in view of its vital importance to the national welfare, the State has attached special duties to act.

Rights of injured person engaged in wrongful act.

We may here dispose of the question, often put and uncertainly answered, whether a person can recover against a negligent wrongdoer, when at the time of sustaining the injury such person is engaged in an unlawful act, which is the cause of his presence in the place where he is injured. If the foregoing analysis is correct, the answer is plain. The injuring person is bound to certain forbearances to the person injured. Primarily then the test is what was the conduct of the injuring person. If the place of the injury is outside the sphere of his duty the infliction of injury does not raise a duty. If the duty exists the particular

¹ Bramwell, B., repeats this. *Ruck v. Williams*, 3 H. & N. 318.

² Per Bramwell, L.J., *Foulkes v. Metropolitan District Ry. Co.*, 5 C. P. D. 157
Sic utere tuo ut alienum non laedas.

position or occupation of the injured person cannot abate its consequences. A burglar is injured by the window he is forcing open falling on his arm, as the sash line is broken. He cannot recover for the injury he receives; not because he is committing a crime, not even because he is a trespasser; but because there is no duty to provide sashlines to facilitate his operations. A street trader in breach of the police regulations has erected his tabernacle in a highway. It is overthrown by a waggoner. That it is an illegal obstruction on a highway is nothing to the point. The duty of the waggoner was to avoid a collision with it. A would-be assassin in the middle of a road while taking aim at his victim is run over by a negligent cabman. The injured man has a duty to use ordinary care to avoid negligent calmen or others.¹ But he is engrossed in his attempt; his back is turned to the cabman; and the cabman's negligence will render him liable to an action despite the atrocity of the other's purpose. If, however, the cabman is alive to this, and to defeat it drives over the other, his act is no longer actionable. His action in pursuance of the endeavour to preserve life will justify him; a crime was being committed, and his action was necessitated by his duty to prevent it.²

The notion of duty, though in a different aspect, is illustrated by an American case. A householder in building a scaffold for the repairing of his house supported it by a rope thrown round the chimney of his

Illustrations.

Duty not to exercise one's rights so as to make a trap.

¹ *Butterfield v. Forrester*, 11 East 60.

² *Bird v. Holbrook*, 4 Bing. 628, "is a decisive authority against the general proposition that misconduct, even wilful and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue"; per Lord Denman, C.J., *Lynch v. Nurdia*, 1 Q. B. 37; as to the authority of *Bird v. Holbrook*, see *Jordis v. Crump*, 8 M. & W. 782; *Dugg v. Midland Ry. Co.*, 1 H. & N. 773. The duty to a trespasser is considered in *Petrie v. Owners of S.S. Rostrevor* (1898), 2 I. R. 576. The proposition that injury sustained while violating a legal duty cannot form the subject of an action, has been maintained in some cases; e.g., in some of the United States of America injury sustained while travelling on a Sunday, which is against the law, has precluded recovery in an action: *Becker v. Cheshire Rd. Co.*, 125 U.S. (18 Davis) 557. The decisions to that effect seem wrong in principle on the ground that "we should work a confusion of relations, and lend a very doubtful assistance to morality, if we should allow one offender against the law to the injury of another, to set off against the plaintiff that he too is a public offender"; *Mohney v. Cook*, 26 Pa. St. 342, 349; *Philadelphia, W. & B. Rd. Co. v. Philadelphia, &c. Tow-boat Co.*, 23 How. (U.S.) 200. In Massachusetts and Maine, under what was termed the Sunday law, an ordinary traveller on Sunday could not recover for injuries suffered from obstacles in the road or other negligence "unless for wanton or wilful injuries." But this application of the Sunday law has been repudiated by all the other Courts which have passed upon it": *Sheurman and Redfield, Negligence*, § 101. Mr. Lehatt states the principle: "Where the situation resulting from the servant's breach of duty merely amounts to the condition as distinguished from the cause of the injury his action is not barred," *Lehatt, Master and Servant*, 806. This he supports with his accustomed abundance of authorities. The cases under 29 Car. II. c. 7 go only to declaring void contracts made on the Lord's day, and this no further than in the case of executory contracts which the Courts were invoked to execute. *Crepps v. Durden*, 1 Sm. L. C. (11th ed.) 659. See also for the effect of an illegality on a claim, *Redmoul v. Smith*, 7 M. & G. 457, where the claim was contractual; and *Wetherell v. Jones*, 3 B. & Ad. 221. The dictum of Lord Lyndhurst, C.B., in *Colburn v. Patmore*, 1 C. M. & R. 73, 83, has obviously reference to a very different set of circumstances. He says: "I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime." "I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission." The principle here laid down would be effectual in the alleged case of the highwayman who instituted a bill in the Exchequer against his companion to account for his share of the plunder, founded on a supposed dealing as co-partners in rings, watches, &c. See *European Magazine*, 1787, vol. ii. 304, also *Noy, Maxims* (9th ed.), 205, note, and *L. Q. R.*, vol. ix. 197.

neighbour, who, concerned for the stability of his chimney, inspected it and meddled with the rope, making it insecure but leaving it in position. In consequence, the scaffold fell and a workman was injured; to whom the defendant who had intermeddled was held responsible. He had a right to remove the rope; and the act of putting it round his chimney was a trespass; but when he allowed it to remain he was under a duty to those about to rely on it not to intermeddle and increase the danger of using it.¹

Standard of care how determined.

Here another difficulty may be noticed; Erle, C.J., told a jury² that negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think reasonable considering all the circumstances. This view attributes too much to the jury, too little to the judge. In some cases, indeed, there is left to the jury so much as is here indicated; where, for example, there is a dispute as to facts; or where a question of conduct submitted to them is not proved directly, but is a matter of uncertain inference.³ What the jury have to do is not to fix the standard of care and diligence, but to determine the bearings of the conduct in the particular case; in doing so, incidentally they draw a legal conclusion, because such conclusion is not to be disentangled from the facts.⁴ Notwithstanding this, the legal standard of diligence is a thing apart from the interpretation of a jury in any case, and is fixed by the law with reference to the ordinary and usual diligence which a man of ordinary sense, knowledge, and prudence is used to show in his own affairs.⁵ Of this experience is the test; and the standard varies with the shifting of general public sentiment.⁶ Whether in any particular case this standard has been attained is for the jury, if the evidence will in any view allow of their saying that it has.⁷ But the facts may be admitted, and may be only susceptible of the inference of liability. Then the Court will direct the jury that, if they believe the evidence, the defendant is liable.⁸ For since there is no dispute as to facts or

¹ *Phillips v. Willpers* (1869), 2 Lams. (N.Y.) 389.

² *Ford v. L. & S. W. Ry. Co.*, 2 F. & F. 732.

³ Per Andrews, J., *Sutton v. New York Central Ry. Co.*, 66 N. Y. 243, 249.

⁴ *Killogg v. New York Central Ry.*, 79 N. Y. 72; *Brown v. G. W. Ry. Co.*, 52 L. T. 622.

⁵ Reference may be made to Co. Litt. 155, b: The most usual trial of matters of fact is by twelve such men (*liberi et legales homines*); for *ad questionem facti non respondent iudices*; and matters in law the judges ought to decide and discuss; for *ad questionem juris non respondent juratores*; to which passage there is a very learned note by Mr. Hargrave on the function of juries and their incidental right to decide questions of law; also *Bushell's case*, 6 How. St. Tr. 1013, where Hargrave's note is given.

⁶ *Grand Trunk Ry. Co. v. Ives*, 144 U.S. (37 Davis) 408, 417. In *Welfare v. Brighton Ry.*, L. R. 4 Q. B. 693, 696, Cockburn, C.J., says: "It is a matter of universal knowledge and experience that in a great city like this persons do not employ their own servants to do repairs on the roofs of their houses or buildings." "That being a matter of universal practice and of universal and common knowledge, I think this is a circumstance which the judge ought to take into account in determining whether there is evidence to go to the jury or not." See Best, Evidence (8th ed.), 281, Presumptions. Compare what Lord Chancellor Cottenham says as to the jurisdiction of the Court of Chancery: "I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy." *Wallworth v. Holt*, 4 My. & Cr. 619, 635. Any one wishing to consider the use in law of the word "care" with its qualifications and collocations, e.g., "ordinary care," "reasonable care," "proper care," "skill, care and caution" and the like, will find the authorities classified in Lehatt, Master and Servant, 20-23.

⁷ *Jackson v. Metropolitan Ry. Co.*, 3 App. Cas. 193.

⁸ *Skinner v. L. B. & S. C. Ry. Co.*, 5 Ex. 787.

inferences, the only point is whether the law attaches the legal consequence of negligence to them; if it does, it is for the judge to say so.¹ In the same way, if the inferences from the facts cannot, on the hypothesis most favourable to the plaintiff, attain the legal standard, the judge will take the case away from the jury. So long, however, as the dispute in the case is as to a matter of fact, the whole is for the jury. The difficulty arises in determining whether the alleged conduct of the defendant comes up to the legal standard, when it becomes the judge's duty to specify what that standard is. This he usually does by putting before the jury the various possibilities of the case, and instructing them what should be their conclusion in law in the event of their finding any one of these. To this the objection has been urged that the Court not infrequently submits the whole matter to the jury without referring them to any distinct standard. In this case, it has been pointed out,² that the position taken up by the Court is that, since there are no clear views of public policy applicable to the matter, a rule remains to be drawn from daily experience, and to that end the Court refers to the assistance of the jury what would be within its own province were the circumstances more familiar.³ Yet it will not go on doing this for ever; and, where similar circumstances are of frequent recurrence, the Court will formulate a standard for its guidance, embodying a rule, either by adopting the experience of former juries, or, if their decisions are indeterminate, by striking out a course of its own.

"Facts do not often exactly repeat themselves in practice; but Mr. Holmes's cases with comparatively small variations from each other do. A view. judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common-sense of the community in ordinary instances far better than an average jury. He should be able to lead and instruct them in detail, even where he thinks it desirable on the whole to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing."⁴

The difference between those cases where the intervention of the

¹ The facts may be so clear and decided that the inference of negligence is irresistible, and in every such case it is the duty of the judge to decide; but where the facts, or the inference to be drawn from them, are in any degree doubtful, the only proper rule is to submit the whole matter to the jury under proper instructions. It is in this sense and with this limitation that Lord Brougham's statement: "Negligence is a question of fact, not of law, and should have been disposed of by the jury": *Tobin v. Murison*, 5 Moore, P.C.C. 110, 126, is to be taken. But a jury can never say whether, for example, a sedilior has been negligent or not. All they can do is to find the facts: whether the facts connote negligence is a matter for the direction of the judge. The functions of judge and jury are investigated by Willes, J., *Ryder v. Wombwell*, L. R. 4 Ex. 32, 38. *Post*, 131.

² Holmes, *The Common Law*, 123.

³ Mr. Holmes refers to *Detroit & Milwaukee Ry. Co. v. Van Steinburg*, 17 Mich. 120, where Cooley, J., states the rule as follows: "It is a mistake to say, as it is sometimes said, that when the facts are undisturbed the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises, upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences must either be certain or uncontrovertible, or they cannot be decided by the Court." Cooley, *Torts* (2nd ed.), 800-806; Wharton, *Negligence*, § 420.

⁴ Holmes, *The Common Law*, 124. The distinction must be borne in mind between this gradual enlarging of the province of the judge and the claim made by Atkins, J., and refuted by North, C.J., in *Barnardiston v. Soame*, 6 How. St. Tr. 1905: "That the common law complies with the genius of the nation." "I admit," says the Chief Justice, "that the laws are fitted to the genius of the nation; but when that genius

View of the
Supreme
Court of the
United States
in *Railroad
Co. v. Stout*.

jury is necessary and those cases where it is dispensed with, is expounded in the judgment of the Supreme Court of the United States in *Railroad Company v. Stout*:¹ "It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the Court and not for the decision of the jury. This is true in that class of cases where the existence of such facts comes in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law." "If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coachdriver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury."² If then no recovery can be had upon any view which can properly be taken of the facts established by the evidence, the case should be withdrawn from the jury.³ Or if, on the other hand, a recovery would be had on any view of the facts, the jury must be directed to find for the plaintiff. Intermediate cases are the province of the jury.

Power to
nonsuit.

In England the judge at the trial of an action cannot nonsuit on counsel's opening⁴ without the consent of the counsel. The rule is otherwise in the United States. "It was held by this Court," says Brown, J.,⁵ "in *Oscanyan v. Arms Company*,⁶ that where it is shown

changes, the Parliament is only entrusted to judge of it, and by changing the law to make it suitable to it. But if the judges shall say it is common law because it suits with the genius of the nation, they may take upon themselves to change the whole as well as any part of it, the consequence "hereof may easily be seen: I wish we had not found it by sad experience." Atkinson, J.'s, claim was like that of certain more modern judges who exegigate congenial law by means of a principle resident in their breasts dubbed "public policy." But compare Craies (4th ed.), Statute Law 165 and note *post*, to chapter on Employers' Liability Act, *sub fin*. See further 6 How. St. Tr. 1107, 1115.

¹ 17 Wall. (U.S.) 657, 663.

² Any one wishing to pursue this subject further should study the judgment of Torrance, J., *Forrell v. Waterbury Horse Rd. Co.*, 60 Conn. 239.

³ Per Fuller, C. J., *Texas & Pacific Ry. Co. v. Cox*, 145 U.S. (38 Davis) 593, 606.

⁴ *Fletcher v. L. & N. W. Ry. Co.* (1892), 1 Q. B. 122.

⁵ *Butler v. National Home for Disabled Soldiers*, 144 U.S. (37 Davis) 64, 74.

⁶ 103 U. S. (13 Otto) 261. Involuntary nonsuits (*eo nomine*) are not allowed in

by the opening statement of the plaintiff's counsel that he has no case, the Court may direct the jury to find a verdict for the defendant without going into the evidence." Lord Esher, M.R., gives as the reason for the English rule that: "the opening of counsel may be incorrect in consequence of his having had wrong instructions," and Lopes, L.J., adds: "It very frequently happens that though the evidence so far as the plaintiff's solicitor knows it, is fully set out in the proofs, yet when the witnesses come into the box they give other evidence (quite truthfully) which very much alters the case in the plaintiff's favour. Moreover, when the plaintiff in such a case as the present comes to be cross-examined, evidence may be elicited which has not occurred to any one before—evidence generally, no doubt, highly detrimental to the plaintiff, but sometimes very favourable to him."

This proves too much; for, admitting the validity of the argument, a judge would be not only wrong in nonsuiting without consent of counsel, but further wrong in nonsuiting on the opening with the consent of counsel whose consent might be "in consequence of his having had wrong instructions;" and yet again, wrong in nonsuiting after evidence in chief and before the plaintiff or, for the matter of that, any other principal witness "comes to be cross-examined." Probably the great American judges who are responsible for the American rule would be as "simply startled" as Kay, L.J.,¹ to realise that under their practice "a suitor may lose his cause because his counsel in his opening happens by some accident to have omitted to state, or to have misstated, some fact which, if proved, and the case had gone to the jury, might have so influenced them as to induce them to decide in the suitor's favour." A verdict entered for defendant in such circumstances as Kay, L.J., depicts is, at least, as unlikely to occur with the sanction of the Supreme Court of the United States as with that of the most authoritative of English tribunals. The whole theoretic difficulty (for it is hard to conjecture one in practise) would be removed by pointing out to counsel the weakness in his opening and ascertaining whether he could supplement his facts.²

English Rule considered.

the Federal Courts. The head note in *Oscanyan's case* is, "where it is shown by the opening statement of counsel for the plaintiff that the contract on which the suit is brought is void as being either in violation of law or against public policy, the Court may direct the jury to find a verdict for the defendant."

¹ (1862) 1 Q. B. 121.

² The case in the Court of Appeal seems to ignore, or at any rate does not lay stress on, a distinction that will harmonise the American and English rules, and bring into working efficiency the old principles of the law in the matter of nonsuits. If in point of law it is clear that the action will not lie, the judge may nonsuit. But where the question is one of fact it should be submitted to the jury unless plaintiff's counsel expressly assents to a nonsuit; mere acquiescence is not enough: Tidd, Practice, 867. In *Ward v. Mason* (1821), 9 Price 291, 294, Graham, B., is reported as follows: "The judge has certainly a right to put the party out of Court wherever the case is once resolved into a pure question of law. On the other hand it is the duty of the judge who tries the cause to leave the case, if it turns on a question of fact, to the jury. As to the acquiescence of counsel in not interposing, I do not consider that binding on them. I take the distinction to be that where the counsel for plaintiff ask to be nonsuited they cannot afterwards move to set it aside; but where the judge orders it without their concurrence, I think they are not precluded, although they do not object at the time." Per Wood, B.: "No man is obliged to submit to be nonsuited on the opinion of the judge upon the weight or sufficiency of the evidence which he brings forward to support his case." In *Edger v. Knapp*, 5 M. & G. 753, plaintiff having been nonsuited on the opening of his counsel, afterwards by affidavit showed a good cause of action not stated in the opening speech, and was allowed a new trial by the Court on the payment of costs. See *Alexander v. Barker*, 2 C. & J.

Criticised by
Collins, L.J.,
and Lord
Alverstone,
M.R.

Collins, L.J., in *Isaacs v. Evans*,¹ said in *Fletcher v. London and North Western Ry. Co.* that it "came as somewhat of a surprise to the profession," but as a decision of the Court of Appeal, was binding on him. The learned judge, however, added that "where a case was tried before a judge without a jury and the counsel for the plaintiff had, as he might be trusted to do, stated his case up to the very high-water mark of what he was able to prove, and the judge was against him, he thought it would be a waste of public time to hear the evidence." Lord Alverstone, M.R., also expressed hesitation in accepting the full consequences of the decision.

Conclusion.

We conclude then that the degree of care to be observed in each case where a legal duty exists implies a standard in law with reference to which liability is to be determined, and towards a definite expression of which the law is continually tending. In all the more common relations this standard has been long fixed. And when these arise, it is the office of the judge not to leave to the jury to fix such a degree of care as to them may seem fit, but to direct them what standard the law has seen fit to adopt in each of the states of fact which, on the materials before them, they may find to exist. Where the law has not yet fixed, or approximated to, a standard, the function of the jury is in proportion enlarged. Yet this extension of their functions is merely provisional, and only lasts till the Courts have before them sufficient material to adjust a standard to the newer development of facts, and then the function of the jury becomes limited to the determination of whether the facts are such as make the test applicable. Where, however, the inferences from the facts may lead to more than one conclusion, the power of drawing the particular conclusion cannot be withheld from the jury.²

The test.

Mr. Holmes³ points out that the test imposed by law is an inquiry what would be blameworthy in the man of ordinary intelligence and prudence; not making allowances for minute differences of character, but saving from liability such as are wanting in faculties, deficiency in which is recognisable by all and implies an absolute inability to safeguard against the consequences of such deficiency. A blind man, for instance, is not required to see; nor an infant to know; nor a man of pronounced insanity to act at his peril. In fine, the law presumes a man to possess ordinary capacity to avoid harming his neighbours; and in general it does not hold him liable for unintentional injury unless a man of ordinary intelligence and forethought would have been to blame for acting as he did.⁴

Conduct,
not intent,
determines
liability.

But the standards of the law are external standards; and, since the law is wholly indifferent to the inner motive of an act if its external manifestation comes up to what the law requires, there is no liability, though the motive is wrong; and, though the motive be one which the law approves, yet, if its manifestation is short of that which the law requires in the class of acts to which it belongs, the actor is not free from liability so far as his action does not attain to the standard.⁵

¹ 133; *Sweet v. Lee*, 3 M. & G. 452; *Davis v. Hardy*, 6 B. & C. 225; *Lush's Practice* by Dixon, 632; and *Vin. Abr. Nonsuit*. ² 16 T. L., R. 480.

² *Cp. Dublin, Wicklow & Wexford Ry. v. Slattery*, 3 App. Cas. 1155, 1165.

³ *The Common Law*, 108.

⁴ *Brown v. Collins*, 53 N. H. 442, 16 Am. R. 372, and *Titus v. Bradford Rd. Co.*, 136 Pa. St. 618, 20 Am. St. R. 644: "The standard of due care is the conduct of the average prudent man."

⁵ Holmes, *The Common Law*, lecture iii., *Trespass and Negligence*.

There is another side to the question. As the duty imposed by law has reference to the man of ordinary intelligence, capacity, and prudence; so, in the absence of any limitation fixing with notice of a higher degree of care, his actions are blameless if governed by that care and caution which would be sufficient in ordinary circumstances. A man driving along a road would not be affected with a greater amount of liability because he ran over a lame or a blind man, if he had no reason to suspect one crossing the road in front of him to be thus disabled. If he had knowledge of the disability his duty would be increased in consequence. Again, with regard to precautions against injuring children, a man is not entitled to regulate his duty on the assumption that he will only be brought into contact with adults; for it is one of the conditions under which he lives that children are found about the streets; and this fact must enter into his consideration. The right to the enjoyment of property is even more extensive than the exercise of the personal right of using the highway which we have just been considering. Notice of the infirmity of a bystander affects us with a higher degree of care towards him than towards one not afflicted. But knowledge of the infirmity of a neighbour induces no limitation of the ordinary right of property. This is well pointed out in a Massachusetts case,¹ where a man afflicted with sunstroke brought an action against the bell-ringer of a neighbouring church for damages for seffering caused by the ringing of the bell for the usual services. His action was dismissed, the Court saying: "If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyse industrial enterprise. The owner of a factory containing noisy machinery with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or hoarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbour on a particular night. Legal right to the use of property cannot be left to such uncertainty. When an act is of a nature to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial."

Duty tested by ordinary circumstances.

Bell-ringing.

Noisy machinery.

It is difficult to draw any distinction between the two cases on principle, for almost every word in the passages just quoted applies to the case of a man walking in the street or in the exercise of any other right which brings him into contact with a multitude of people; in which case his rule of conduct must constantly fluctuate as they may be blind or lame or deaf or incompetent. The best explanation is that given by Ashhurst, J., in another connection.² "It has been said that there is a principle of law on which this action might be

Reason of rule.

¹ *Rogers v. Elliot*, 146 Mass. 349; 4 Am. St. R. 310.

² *Russell v. Men of Devon*, 2 T. R. 673.

maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." While, however, a fluctuating rule would not be of any considerable moment to the individual, a fluctuation in the duty respecting property would strike it with a sterility most baneful to national prosperity.

Duty to a
person
specially
situated.

Where, however, a duty is undertaken with reference to some particular person, the duty varies as do the circumstances in which the duty is undertaken. A stockbroker undertakes to advise a client in his investments: he owes that client no more care than is involved in the ordinary conduct of his business. But the client is a woman, and unbusinesslike: more care is owing than in the case of a business man in the full possession of his faculties; or the client may be a rash and headstrong boy, and then the amount of care to be looked for might rise to the level of that required at the hands of a guardian or a trustee.

Conclusion.

To conclude then, the definition of negligence is hard to express, since the developments of negligence are so multiform; still the ingredients of negligence are not doubtful.

There must be:

- (1) A legal duty to exercise control, and
- (2) A failure in the exercise of the control necessary in the circumstances of any particular case.

Where these two elements are found a case of negligence in law exists.

The duty of control being the main element for consideration, negligence may be treated by classifying it with reference to the various matters over which control must be exercised.

This may be:

- I. A general duty directly arising out of the constitution of society.
- II. A special duty arising from the free will, or from the exigencies of particular men or particular classes.

I. The most general relations in which a man is called on to exercise control are:

- (1) Where he has the control of property.
- (2) Where he personally comes into contact with others, and that either directly or through the intervention of others.

II. The special control which a man has to exercise is referable to the terms of the various species of contracts into which the circumstances of his life are the occasion of his entering.

We shall accordingly consider negligence in law under these leading divisions.

CHAPTER II.

DEGREES OF NEGLIGENCE.

THERE is no matter within the range of jurisprudence that has been the subject of more troublesome controversies than the determination of the existence of degrees of negligence, and, their existence being conceded, the conditions under which they exist, and may be discriminated. The subject is of slight practical interest. Negligence in no case can be disentangled from the circumstances, and the learning concerning degrees of negligence is scholastic, yet it should not be disregarded, for the analysis cannot fail of practical suggestions.

The confusion that has grown up in this regard is due, in part at least, to the habit of regarding negligence as a positive rather than as a negative word. The rule of law prescribes diligence, that is, the attainment of a certain standard. If the person bound to use diligence fails to attain the standard, he becomes guilty of negligence, that is, he falls short of the amount of care required; from the greater frequency of conformity to the standard than of aberration from it, the degrees of aberration rather than those of conformity become most prominently noted.

Negligence
a negative
conception.

Negligence indicates want of care. The positive quality is "care according to the circumstances"; and the more logical course would be to group subjects with reference to the amount of care required in their management. On the ground of convenience only, this is not done; and absence, rather than presence, of care is the feature fixed on for discrimination. Substantially, however, the presence of care is never lost sight of; since the subject dealt with is purely a relation, and so the mention of one aspect implies the mental presence of the other. Thus liability for a slight degree of negligence implies the duty to use a great degree of care; and the obligation to use a slight degree of care is only another aspect of immunity in cases where moderate diligence has been shown.

There are two schemes of division between which the authorities on the subject have divided themselves. One that had the approbation of the older writers¹ divided negligence into three degrees: gross neglect, said to be equivalent to the *lata culpa* of the Romans; ordinary neglect, said to correspond to their *levis culpa*; and slight neglect, answering to *levissima culpa*. The other, which is adopted by the most recent writers² on Roman law and jurisprudence, divides negli-

Two schemes
of division of
negligence.

¹ Story, *Bailm.*, § 17 and note; Sir William Jones, *Bailm.*, 21 *et seqq.*, and the authorities there cited.

² Accepting the analysis of Hasse, *Culpa des Römischen Rechts*; Maynz, *Éléments*

gence into two classes: *culpa levis*, the lack of such diligence as a good business man would show in a transaction similar to that investigated, where such transaction relates to his business; and *culpa lata*, neglect of the ordinary care that should be used by ordinary folk in the everyday conduct of affairs. Of these, the former, notwithstanding much confusion in the adjustment of the various degrees, was recognised in the English and American courts and by text-writers without question till quite recently. The latter is the outcome of investigations into the doctrine of the Roman law, the result of which is embodied in Hasse's "*Culpa des Römischen Rechts*"; the conclusions expounded in which are sought to be imported into Anglo-American law by Dr. Wharton¹ and the writers who follow him.

Hasse's view.

The division of negligence into three degrees was first expressly adopted in practical English law, as distinguished from law as expounded by text-writers, in the judgment of Holt, C.J., in *Coggs v. Bernard*;² and he took the division from Bracton, who, like most early text-writers, was overshadowed by the influence of the Roman law; and had conformed his expression of the law to the divisions and doctrines then in vogue amongst the teachers of the civil law. German writers on the Roman law having very generally adopted the views presented by Hasse, a number of writers have concluded that certain practical results follow in English law. Their conclusions may be presented in three propositions.

Three propositions founded on it.

I. English law to be conformed to it.

II. The theoretic rule of English law in practice obsolete.

III. Incompatible with practical needs.

I. Must English law be brought into harmony with the Roman?

(1) That "the classic Roman law, which was the law of business Rome," having been misinterpreted, on the discovery of that misinterpretation the (assumed) rule of convenience in the English law, which was suggested by what was wrongly considered to be the rule of the Roman law, should be abandoned along with the misapprehension from which it took its origin.

(2) That there is no need to drop the principle of three divisions of negligence, since, in practice, it does not exist.³

(3) That if this principle of division did exist it would be an inconvenience and "incompatible with the necessities of business."

These positions are now to be considered from the standpoint of English law and on the assumption that the basis of them, the proof of his position by Hasse, is conclusively made good.

As to the first of them, it may be pointed out that the common law is of independent growth from that of Rome. Roman law doctrines, assimilated in the common law, are matters of suggestion and not of legislation, dependent for their acceptance, not on their origin, but on their practical value in the circumstances to which they are applied. If the doctrine accepted is bad Roman law but suitable English law, disproof of its authenticity in the Roman system will not affect its recognition by the English Courts. For example, when *Southcote's case* was overruled by the judgment in *Coggs v. Bernard*, it certainly never entered the minds of any of the judges who were parties to that judgment, that it was a matter of the slightest practical importance whether "the business jurists of Rome when at ber prime"

de Droit Romain, vol. ii. 16, n. 1; Wharton, Negligence, § 58 *et seq.*; Goudsmit, Roman Law, § 75, 76; Holland, Jurisprudence (10th ed.), 109.

¹ Negligence, § 62-69.

² 1 Sm. L. C. (11th ed.), 173.

³ Wharton, Negligence, § 64. The exact expression is that, "while it" (the theory of three degrees of negligence) "hangs still in English and American text-writers, is practically dropped by our Courts": § 58 (3)

had adopted the division of bailments which was found in Bracton ; but it must have been of the extremest moment to them whether their judgment embodied the spirit of the law of England as underlying the daily transactions of business men. The point is too plain to require argument, and therefore the authorities in proof cited in the former edition of this book are omitted.¹

The second position is, that while the rule of the three degrees of negligence survives, through the conservative tendencies or want of research of text-writers, "it is practically dropped by our Courts."²

II. What is the existing practice of the Courts.

The validity of this assertion depends on an ambiguity in language. It is true that, given any particular case, the law does not concern itself with grades of negligence or diligence in that case ; but there may be comparison of cases and very various grades of negligence as applied to them. If the analysis which differentiates the senses in which the word negligence is used by lawyers is rejected, one term, without any systematic explanation, will come to be used for things widely apart in their application, and a fruitful source of fallacies will be fostered.

This is a matter easily tested. In the well-known case of *Readhead v. Midland Ry. Co.*,³ the Court of Queen's Bench (Blackburn, J., dissenting) held the defendants not liable for an accident caused by the breaking of the tyre of a wheel of a carriage in which the plaintiff rode, as there is no warranty by a carrier of passengers that his carriage is absolutely road-worthy, and as the defendants had used all diligence in providing a safe carriage and examining it both before starting and in the course of the journey. The plaintiff appealed. The Exchequer Chamber said that "due care" "undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed, or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected."⁴ In the Irish case of *Burns v. Cork and Bandon Ry. Co.*,⁵ the obligation of a carrier of passengers is stated to be that of warranting "that the vehicle in which he conveys them is, at the time of the commencement of the journey, free from all defects, at least as far as human care and foresight can provide, and perfectly road-worthy." Again, in *Christie v. Griggs*,⁶ Sir James Mansfield, C.J., expresses the same in almost the same words, stating the obligation as one that, "as far as human care and foresight could go, he would provide for their safe conveyance." These are cases where the right of action arises on a contract.⁷

Rule in contract—*Readhead v. Midland Ry. Co.*

Burns v. Cork and Bandon Ry. Co.

In regard to tort the case is simpler. The judges in *Weaver v. Ward*.⁸

¹ See Austin, Lectures on Jurisprudence (3rd ed.), vol. ii. 655.

² Wharton, Negligence, §§ 58, 64.

³ L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

⁴ L. R. 4 Q. B. 379, 393.

⁵ 13 Ir. C. L. R. 543, 546. See too *Francis v. Cockrell*, L. R. 5 Q. B. 501.

⁶ 2 Camp. 79, 81.

⁷ The rule of the Roman law is, where a contract is for the interest of both parties, though their interests may be adverse, *In contractibus fidei bonæ servatur, ut si quidem utriusque contrahentis commodum versetur, etiam culpa ; sin unus solius, dolus malus tantum modo præstatur*, D. 30, 108, 12. Where it is for the benefit of one, *Is qui utendum accepit, sane quidem exactam diligentiam custodiendæ rei præstare jubetur* : Inst.

Rule in tort—*Weaver v. Ward.*

Ward¹ express the law: "No man shall be excused of a trespass . . . except it may be judged *utterly* without his fault." And this is exemplified in the famous judgment of Blackburn, J., in *Fletcher v. Rylands*:² "The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damaged without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

Rule in contract
discussed.

In *Readhead v. Milland Ry. Co.*,³ the requirement is to exercise "all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order." The standard must, *prima facie*, be alike for all. *Spondet peritiam artis*; and the *peritiam* is that of the age and country and circumstances in which it is demanded. But even within these limits there are different degrees. Thus, where one man took another in his carriage with him gratuitously, without previously examining the bolts and fastenings of his carriage, and during the journey an accident happened, the failure to examine the vehicle was held not to be negligence sufficient to charge the owner.⁴ Again, a railway company made an examination of a track, but not sufficient to discover a crack in an axle, through which an accident subsequently happened. A jury found that the defect "might have been discovered by a sufficiently minute examination," yet the company were held not liable; since they were not bound in the circumstances to "an examination of a very minute character," "but certain precautions were taken by the workmen employed on this duty, which are usually taken by railway companies in such cases, and are generally found by experience to be sufficient."⁵ Once more: a person hired a carriage, a pair of horses, and a driver from a jobmaster; a bolt in the under part of the carriage broke, the splinter-bar became displaced, the horses started off, the carriage was upset, and the hirer injured; the Court held that the jobmaster's duty was "to supply a carriage as fit for the purpose for which it is hired as care and skill can render it."⁶

Comparison
of degree of
duty exacted.

Now, to compare these cases—all modern and of authority—with the new test suggested. In the first place, they are all three included under that heading, called *culpa levis*, which signifies "the lack of such diligence as a good business man would show in a transaction similar to that investigated, such transaction relating to his business." They are cases arising out of matter in the nature of contracts; they relate

3. 14, 2; while in the other case, *Quin etiam paulo remissius circa interpretationem in doli mali debere nos versari: quoniam (ut dictum sit) nulla utilitas commodantis interveniat*, D. 47, 2, 61, § 6.

¹ Hob. 134.

² L. R. 1 Ex. 265, 280.

³ L. R. 4 Q. B. 379, 393.

⁴ *Moffatt v. Bateman*, L. R. 3 P. C. 115.

⁵ *Richardson v. G. E. Ry. Co.*, 1 C. P., D. 342.

⁶ *Hyman v. Nye*, 6 Q. B. D. 685. Cf. *Inghall v. Bills*, 50 Mass. 1.

to the safety of persons conveyed by the defendants; and they depend upon the amount of care exercised. Yet in the one case the care is sufficient that submits the vehicle once in three months to a blacksmith. In the second case an examination of the defective vehicle was made; and though it was not minute enough to discover the defect which caused the accident (which yet might have been discovered), still the examination was held to satisfy legal requirements. In the third case nothing less than the minute examination which was held not necessary in the second case was required. To quote Dr. Wharton,¹ "it must be again remembered that the test is that of the *good*, not of the *perfect*, business man; and this, as has already been shown, because, among other reasons, no perfect business man exists." But the precise difference between the second and third cases is the difference between the *good* and the *perfect* man of business, as expounded in the very passage beginning with the quotation just cited. The decision of the Court in the second case was that the defendants had used the precautions "which are usually taken by railway companies in such cases, and are generally found by experience to be sufficient"; or, to follow the words of Dr. Wharton, had adopted "all improvements which, when tested by experience, seem likely to add to the security of those entrusted to his care, provided that such improvements can be applied without, by their cumbrance or expense, impeding the transportation which such persons desire." In the third case the duty was to supply an article as fit as care and skill could render it without any qualification whatever. If, then, either of these was the care of the "good man," the other must be different, either more or less; certainly not the same. Now the diligence required in the third case, namely, to make the carriage "as fit and proper as care and skill can make it,"² is precisely Dr. Wharton's *diligentia diligentissimi*, "the utmost diligence."³ Further, in the first case cited⁴ the diligence required was also the diligence of the specialist—it was found that "the carriage was regularly examined by a blacksmith every three months," and this was held sufficient. Yet obviously much less care was used than in the second or third cases; still it was enough; since a different standard was resorted to in each.

To approach the subject from the side of negligence arising from tort—the same requirement of a diligence exceeding that of the mere good and diligent man is found not infrequently exacted. A master orders his servant to lay down a quantity of rubbish near his neighbour's wall, though so as not to touch the wall. "The servant, by extraordinary care, might have prevented the rubbish touching the plain man's wall." "The servant used ordinary care in the course of executing the master's order, and, notwithstanding that, the rubbish ran against the wall." The master is held liable as a trespasser.⁵ Again, a contractor is employed by a local board to construct a sewer under a highway, in the course of which he digs a trench, which is afterwards filled in with earth, and the roadway apparently made good. The work is done under the directions and to the satisfaction of the surveyor

Rule in tort discussed.

¹ Negligence, § 635.

² Per Lindley, J.: "The expression 'reasonably fit' denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great": *Hymas v. Nye*, 6 Q. B. D. 685, 688.

³ Negligence, § 636.

⁴ *Moffatt v. Bateman*, L. R. 3 P. C. 115.

⁵ *Gregory v. Piper*, 9 B. & C. 591.

of the defendants, who inspects the road for three months at the risk of the contractor, till, being in a satisfactory state, it is handed over to the local board. The surveyor continues to inspect and to pass over the road up to the time of the accident, eight months later, when, as the plaintiff's horse drawing a spring cart is going along the road, its fore feet suddenly sink through a coating or crust of macadam into a cavity. Neither the engineer nor the surveyor can account for the existence of the cavity. Yet the local board is found guilty of negligence.¹ Or to take a different class of actions: a person keeping an animal whose nature is to do mischief, with knowledge of its propensities, is liable for any damage done by it, "since negligence is presumed without express averment."² In each of these cases the standard of diligence is far higher than any that could be required of an ordinarily prudent and careful man. In the first, the facts show that this standard was actually attained; yet the act of the servant doing a thing in itself lawful, and with care adequate to the rule of ordinary diligence, is held to affect the master with liability. In the second, though ordinary skill is exerted, the defendants are held liable for what they can neither discover nor explain. In the third, negligence is presumed without any fault *dans locum injuriæ*, and though the keeping of a monkey is not illegal. Neither of these cases seems to fall short even of that infinitesimal negligence which Dr. Wharton regards as an impossible standard; and certainly none of them falls below the test that Sr William Jones lays down—the omission of that care which very attentive and vigilant persons take of their own goods, or, in other words, of very exact diligence.³

III. To exact a minute diligence is impracticable. Argument that no person can be habitually diligent. *issimus* examined.

Thirdly, it is said that if the principle of division of negligence into three degrees did exist, the degree of *culpa levissima* would be an inconvenience, "and incompatible with the necessities of business."

Wharton,⁴ summarising Hasse,⁵ asks where is the *diligentissimus* or *exactissimus* to be found who is to be taken as the standard by which the *diligentia diligentissimi*, with its antithesis of *culpa levissima*, is to be gauged. "This question is put," says he, "by Le Brun, without any reply from his astute antagonists; and it is repeated by Hasse with the confident assertion that the search is one that will be made in vain." Possibly Le Brun's "astute antagonists"—Pothier was one—while quite ready to admit the search would be unproductive, did not think it expedient to let the controversy wander into so devious a bypath, since their contention was not based on a question of *diligentia in concreto*, a standard dependent on the existence of any particular man, but of a *diligentia in abstracto*, a standard to which, though none might habitually attain, all must in particular cases conform.⁶ Had

¹ *Smith v. West Derby Local Board*, 3 C. P. D. 423.

² *May v. Burdell*, 9 Q. B. 101.

³ *Bulm.*, 22.

⁴ Negligence, § 65.

⁵ *Culpa des Römischen Rechts*.

⁶ This may be illustrated by a passage from Lady Holland's *Life of the Rev. Sydney Smith*, "It requires a long apprenticeship to speak well in the House of Commons. It is the most formidable ordeal in the world. Few men have succeeded who entered it late in life; Jeffrey is perhaps the best exception. Bobus used to say that there was more sense and good taste in the whole House, than in any one individual of which it was composed," vol. i. 347. So too, the taste in literature or art of a class may be more correct than that of any writer or performer—e.g., the taste in architecture at the present day formed on the models of bygone times. What incongruity, then, in fixing a standard of conduct in certain emergencies higher than the habitual practice of the individual?

they felt inclined for such futile inquiries, they might with equal readiness have issued a retaliatory challenge for a "good specialist" who never makes a mistake. The true answer to either challenge is that the law does not in either case contemplate such. The standard of conduct is not that of any man, however excellent, but the average conduct of men in the community or class or calling, and in the circumstances, of him whose conduct in the instance in point may happen to be arraigned, though no individual man has ever habitually attained it. The reference is not made to a course of diligence, but to a point of diligence—diligence in the particular phase of the matter as to which inquiry is being made. That even Caesar, to quote an example of Hasse's drawn from the discussions of the schoolmen and cited with approbation by Dr. Wharton,¹ "sometimes yielded to a *negligentia* which was not merely *levis* but *lata*," and was therefore not up to the mark of the standard of the mythical *diligentissimus*, is a good reason why Caesar in the cases of his shortcoming should be held liable, though none that other less happily endued persons should be allowed to be guilty of *negligentia* either *levis* or *lata*; nor that they should be allowed immunity for *culpa levissima* in the sense imposed by English authority—of very exact diligence.²

Hasse's illustrations of Caesar's diligence considered.

The citation of any such instance as that of Caesar tends rather to lead astray from the point than to clear it. The theory of negligence has nothing at all to do with Caesar's "intense sensibility during a crisis to impending dangers, his incomparable fertility in expedients, and his almost preternatural coolness, promptness, and intrepidity in applying the right remedy at the right moment to the right thing."³ It demands care according to the circumstances; and the sole question is whether this care, which in the cases of most frequent occurrence is that to be looked for from men of ordinary skill in the matter in hand, is in all cases adequate; or whether in certain circumstances the law does not demand an exceptional attention which cannot justly be described as that which a good business man would show in a transaction similar to that investigated. To say that "no one more diligent than Caesar could be found"—a very questionable assertion even in the narrowest sense—may be an eminently interesting piece of historical information, but has not the remotest bearing on the point which the proposition is advanced to prove; since the only relevant proposition—that Caesar is not liable for negligence when he is negligent, because he is Caesar—is too obviously untrue (under the law of England) to need examination.⁴

Criticism.

The writers above alluded to⁵ assume that *culpa levissima* implies a failure of some species of transcendent and impossible diligence.⁶ In fact, the fallacy is perpetrated of treating *culpa levis* and *culpa lata*

Argument that the standard is an impossible one.

¹ Negligence, § 45.

² Jones, Bailm., 22.

³ Wharton, Negligence, § 45. This "eloquent" writing calls to mind an anecdote of Charles V., who, being shown the tomb of some French knight bearing an inscription announcing the entombed hero as the bravest of the brave, who never knew fear, observed, "Then he could never have snuffed a candle with his fingers."

⁴ If it did *Cheproni re v. Mason* (the bath bun case), 21 Times L. R. 633 in C. A. would dispose of the proposition.

⁵ *Ante*, 19.

⁶ *Mackintosh v. Mackintosh* (1861), 2 Macph. 1357, is cited as deciding in Scotland that the only degrees of negligence which the law recognises, are *culpa lata* and *culpa levis*, and that the distinction between *culpa levis* and *culpa levissima* is not well-founded. A reference to the case will show that this statement is a mere adoption of Lord Mackenzie's statement in his *Roman Law*, 186, and that this is a summary of the position taken up by Hasse, and in neither case the result of independent opinion.

as relative terms, while *culpa levissima* is taken to imply an absolute standard—the highest degree of care and diligence the human mind can conceive of. This is manifestly absurd, and inconsistent with any definition of *culpa levissima* given for any other purpose than to refute its existence.¹ *Qui enim cum non adhibent diligentiam quam solent potestfamilias ad rem attentissimi, culpam levissimam; qui omittunt diligentiam, a frugi patre familias adhiberi solitam, levem; qui, denique, ne eî quidem diligentia, qua omnes, etiam dissoluti homines, uti solent, utuntur, latam committere dicuntur.*² If *culpa levis* is negligence arising from the lack of such diligence as the average business man would show, then *culpa levissima*, as contrasted with it, is a failure of compliance with some severer standard not necessarily specified save by reference to the *culpa levis*. Or again, if *culpa levissima* marks shortcomings in very exact diligence, then *culpa levis* is failure to reach the accustomed standard.³

¹ *Levissimam scilicet culpam de eo qui summam diligentiam debuit nec eam prestitit (sic) sed mediocrem tantum: Lexicon Juridicum (1593), sub voce Culpa.* In this article five species of negligence are enumerated, and it is added *nam non solum tres aut quinque sed infinitos cuius gradus significant Imperatores.* Sir William Jones, *Bailm.*, 22, 118.

² Story, *Bailm.* § 18, citing Heinec, *Elem. Jns. Inst.* lib. 3, tit. 14, § 787; which, however, is not the passage in the text, though to the same effect. Compare Heinec, *Par. 3*, *Pamphletar.* lib. 13, § 116: *Culpe enim infiniti gradus esse possunt.*

Summary of
conclusions of
Roman law
writers.

³ Since the doctrines of the English law are unaffected by historical discoveries in the civil law, any prolonged consideration of the conclusions of its professors would be not only unnecessary, but irrelevant, in the present treatise. The view put forward in the text, however, requires some reference to the controversy in the Roman law. The argument of Hasse is summarised by Prof. Maynz in his *Éléments de Droit Romain*, vol. ii. 17. First, the term *culpa levissima* it is said, is only found in a fragment in Ulpian, and there has no technical signification. The passage alluded to is D. 9, 2, 44, p. *In hoc Aquilii et levissima culpa revit.* Secondly, since *culpa levis* is the want of care of a man essentially attentive and careful, *culpa levissima* must mean more than this; but the Roman law nowhere requires a higher degree of diligence than that of a good father of a family—that is, of a man essentially careful and attentive. Thirdly, the Roman law never mentions any other degree than *culpa levis* when it requires to discriminate between *casus* and *culpa lata*. Fourthly, the argument from the use of the term *exactissima diligentia* in the civil law—e.g., I. iii. 27, 1; D. 17, 2, 72; D. 44, 7, 1, § 4—to the existence of its correlative, *levissima culpa*, is invalid, since the passages have no technical signification. Fifthly, that to require a greater degree of care than that of a good father of a family would be inequitable.

To this it may be urged that whether the fragment from Ulpian has any technical signification or not, it is the expression of an exceptional fact that under the *lex Aquilia*, as a general rule, the mere existence of *culpa* in its slightest form raises the presumption of liability (see Maynz, vol. ii § 260 at 16); whereas in other branches of law this is not necessarily so. To this the reply is that, there being so strict a rule in regard to the *lex Aquilia*, there is neither *culpa lata* nor *culpa levis* under it, and therefore degrees do not apply. But the degrees of diligence to which we are bound ought to be determined by reference to ourselves, not with regard to any one external object, one degree being owed to one thing, another to another, and the highest degree to a third; and if a higher degree is habitually required in cases that come under the *lex Aquilia* than is habitually applied in contracts, this rather argues that the degrees exist than the contrary.

In the Greek translation in the *Basilica* of the passage in the *lex Aquilia*, which mentions *culpa levissima*, the word used, says Sir William Jones (*Bailments*, 33), is *παθημία* (60, 3, 5), while the word corresponding to *culpa levis* is *ἀμέλεια*. Now this is very nearly a *contemporanea expositio*; for though the *Digest* was published A.D. 533 and the *Basilica* not till A.D. 884, still this code was merely a collection of those translations of the Roman law which had been long in actual use in the courts of law, and were received by the legal schools as authoritative (Finlay, *History of the Byzantine and Greek Empires*, vol. ii. 287), while the earliest of the scholastic commentators, Accursius, was three centuries later (1182-1260).

It is true that the explanation of such a passage as that relating to the diligence of the *negotiorum gestor*, *Inst.* iii. 27, 1, *ad exactissimum quisque diligentiam compellitur reddere rationem; nec sufficit talem diligentiam adhibere qualem suis rebus adhibere soleret, si modo alius diligentior commodius administraturus esset negotia*, is that the

The division of negligence into *culpa levis*—designating the lack of such diligence as a good business man would show in a transaction similar to that investigated where such transaction relates to his business—and *culpa lata*—designating the neglect of the ordinary care that is taken by persons not specialists—is not a division, properly speaking, of degrees of negligence, but rather of kinds.¹ Between the negligence which does not know what all know, and does not see what all see,² and the negligence of a business man in his speciality, there is

The Roman law writers' division not into degrees, but into kinds.

diligentia diligentis et studiosi paterfamilias marks the rule *exactissima diligentia*, and that *diligentia quam quis rebus adhibere solet* is an individual exception which, being dependent on the personal circumstances that call for its application, does not come under any rule but that of the particular instance; and this seems to be so. The same holds good as to the rule under the title *Pro Socio*, D. 17, 2, 72: *Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit ratio talem diligentiam circumstantibus rebus adhibere qualem suis rebus adhibere solet; quia qui parvam diligentiam circumstantibus adquisit, de se queri debet.* The same meaning is not equally clear in the title *De Obligacionibus*, D. 44, 7, 1, § 4: *Is vero, qui utendum accepit, si majore casu, cui humana infirmitas resistere non potest (veluti incendium, ruina, naufragio) rem quam accepit, amiserit, securus est. Alia tamen exactissimum diligentiam custodiende rei prestare compellitur; nec sufficit ei eandem diligentiam adhibere, quam suis rebus adhibet, si alius diligentius custodire poterit. Sed et in injuriis casibus si culpa ejus intererint, tenetur; veluti si quasi amicos ad cenam invitaturus argentum quod in eam rem utendum acceperit, peregre proficiscens secum portare voluerit, et id aut naufragio, aut prædonum hostiumve incursum misserit.* The principle involved in the requirement of *exactissimam diligentiam* is the absolute highest standard to be found—*si alius diligentius custodire poterit.* If, then, this is the *diligentia* of the *diligens et studiosus paterfamilias*, then the *levis culpa*, the normal standard of the Roman, is the same as the *levissima culpa* of Sir William Jones and the other English and American authorities—the omission of that care which very attentive and vigilant persons take of their own goods. It is hard to suppose that in practical business power was available to remit the rigorous application of the test *Si alius diligentius custodire poterit*, as indicated by Dr. Wharton, *Negligence*, § 53. See Hasse, 133, who quotes a text of a duty to perform a journey *quo plerique ejusdem conditionis homines solent pervenire.* The result is that in the civil law *levis culpa* marks *minima negligentia id est non intelligere quod omnes intelligunt* (D. 50, 16, 213, § 2); *culpa levis* or *culpa* merely (for, when *culpa* only is mentioned, *culpa levis* is intended to be signified; Taylor Civil Law (4th ed.), 174) is the *culpa* which exists when a person bound to a special duty neglects to enter upon and discharge it with the diligence belonging to a *diligens, bonus, studiosus paterfamilias, qui sobrie et non sine exacta diligentia rem suam administrat* (Wharton, *Negligence*, § 30); and *homo diligens est et studiosus paterfamilias cuius personam incredibile est in aliquo facile errasse* D. 22, 3, 25. But there are two tests of this diligence—(1) *Si alius diligentius custodire poterit*; (2) *Quo plerique ejusdem conditionis homines solent pervenire.*

Discussed.

Further, in the *lex Aquilia*, which was the general remedy of the Roman law for positive damage (*damnum corpore corpori datum*), *la plus légère faute suffit déjà pour nous rendre responsable du dommage qui en a été la suite*; but the most authoritative commentators on the Roman law consider this to be comprehended in the term *culpa levis*. There is a notable syllogism of Donellus which illustrates this: *Quorum definitioes verdam sunt, ea inter se sunt eadem; levis autem culpa et levissima non et eadem definitio est; utriusque igitur culpa eadem.* Yet the distinction between the highest diligence of the specialist and the ordinary diligence of the specialist could not fail sometimes in judicial proceedings to need discrimination; and the two tests above mentioned enable this to be done. The later stages of the law distinguished two different things by different names, which in the Digest are comprehended under one name, and have explicitly enounced what always implicitly existed. The French doctrine on the question of degrees of negligence is treated by Laurent, *Principes de Droit Civil*, vol. xvi., De la faute, § 213, 216. What is said in this passage has, however, reference to *l'exécution des obligations*. See Code Civil, Art. 1137. For the rules applicable *dans les délits et les quasi délits*, see Code Civil, Arts. 1382-1386.

Shearman and Redfield, *Negligence* (4th ed.), § 47, conclude: "That three degrees of care are, and should be recognised and enforced by the law of modern times"; and Campbell, *Negligence* (2nd ed.), 4, speaks of a departure from *exacti diligentis* or *culpa levissima*. See Mayle, *Justinian's Institutes*, Excursus 6, criticising adversely Poste, *Gaius*, 478-481.

¹ "Kinds are classes between which there is an impassable barrier; and what we have to seek is, marks whereby we may determine on which side of a barrier an object takes its place": Mill, *Logic* (4th ed.), vol. ii. 268.

² Hasse, 111.

Illustrated.

an intrinsic difference, and not a mere difference in degree; there is an impassable barrier forbidding a transfer from one of these classes to the other by the mere addition or subtraction of the quality of care. The *differentia* of the classes is possession of special knowledge or acquired skill. The possession of this may not be necessary to rank any person with those who are under the necessity of showing care conjoined with knowledge; since one may estop himself from denying the possession of the knowledge that his conduct represents him to possess; and then, though he has not, he becomes bound as though he had. The standard of the one class presupposes special knowledge; the standard of the other presupposes the absence of special knowledge. Now the highest degree of care and caution does not bridge the interval between what is required of the specialist from what is required of the non-specialist. For example, a dangerous surgical operation is to be performed by a specialist. The question of the care or want of care in the conduct of it is based on a special knowledge of the mechanical means of carrying out the operation needed, and an acquired skill in the use of those means. One not a medical man is invited to undertake it. Even if the circumstances bound him to a perfect care in the conduct of the operation, he would not rise to the level of the diligence of the specialist, though the care exacted from him might be tenfold that which the specialist is expected to afford; for in the specialist's case there would be required the additional factor of special knowledge. Thus, though the non-specialist might exercise unflinching care, he would not be on the same plane with the specialist, whose efficiency would be determined by two factors—knowledge and care guided by knowledge, as against care merely unrelated to knowledge. If he failed in care to an extent that would in the absence of knowledge make him liable on the basis of *culpa lata*, his failure would still be referable to his duty as a specialist; and if he failed in knowledge, it would still be the same test—that of the specialist—that would be applied.

It is not, then, correct to describe the division of negligence into *culpa lata* and *culpa levis* as a division into degrees of negligence.¹ The negligence designated by these words is not a negligence that shades down gradually the one into the other, but connotes different kinds of negligence that will run on, each in its own course, without nearer approach through all their phases.

Consideration
of the import
of this
division.

When in place of the Latin terms we use their English equivalents and speak of gross and slight negligence, their meaning is even plainer. The terms "gross" and slight are quantitative merely and apart from their standard of comparison have no positive signification. When, however, they are brought into relation they become terms of great value, and applicable to the whole field of law that is occupied with rights arising out of contract, and wrongs independent of contract.

They may be considered in the following coordination:

I. *Culpa lata* (*non intelligere id quod omnes intelligunt*).²

(a) In the case of rights arising out of contract.

(b) In the case of wrongs independent of contract.

II. *Culpa levis* (lack of the diligence of the good business man in his business).

¹ As to the distinction between *culpa lata* and *levis* in *abstracto*, or in *concreto*, see Laurent, *Principes de Droit Civil*, vol. xvi., *De la faute*, § 213. Compare with this vol. xx., *Faute Aquilienne*, § 462-465.

² D. 50, 16, 223.

(a) In the case of rights arising out of contract.

(b) In the case of wrongs independent of contract.

The duty to exercise the care of the non-specialist is far more likely to arise in cases of tort, and the duty to exercise the care of the specialist is more likely to arise in cases of contract. For the making a contract, or the entering into a relation from which a relation analogous to a contract arises, implies an undertaking to exercise the amount of skill necessary for its efficient performance—*Spendet peritiam artis*; or at least to adopt positive precautions against causing injury to those with whom we are to act; while those positions into which people are thrown without premeditation or design are mostly of a sort that require no more care or skill in their performance than is required from ordinary persons, indiscriminately and universally, to refrain from acts which may cause injury to others. As the circumstances out of which the duties arise are more or less fortuitous, so the duties themselves do not require for their performance any special acquirement as distinguished from special care. Though under the head of *culpa lata* many cases may be found where the liability for absence of care is to be referred to a contractual obligation; and under the head of *culpa levis* breaches of duty which are referable to the class of wrongs independent of contract; yet, broadly speaking, the cases where liability arises from neglecting the amount of care expected of every citizen are cases of tort; ¹ the cases where liability arises from neglecting the amount of care such as a good business man would show in a transaction similar to that investigated are cases of contract.

Where the division of negligence to which cases are to be referred is clearly *culpa lata*, it does not hence follow that the amount of default which imputes negligence in each case is the same. Within the limits of the class to which the standard of *culpa lata* is applicable there are very varying degrees required to fix liability. Three leading classes may be indicated:

I. Those cases where the act complained of is an infringement of a right in the injured person superior to the right of the injurious person to act in the manner which produces the act complained of. Three classes of *culpa lata*.

II. Those cases in which the person injured by the act complained of is in the exercise of a right equal to that exercised by the person who injures him.

III. Those cases in which the person injured by the act complained of is acting in a manner subordinate to the right of the person to do the class of acts by which the person is injured.

I. The person injured by the act complained of is in a superior position where, save for the presence of the negligent person, his right to be where he is (or to exercise the right in respect of which he is injured) is a right attaching to property. Thus, in an early case of trespass *quare clausum fregit*, the defendant pleaded that he owned land adjoining that of the plaintiff upon which there was a thorn hedge; that he cut the thorus, and that they against his will (*ipso invito*) fell on the plaintiff's land, and the defendant went quickly upon the same and took them; which was the trespass complained of. Judgment on demurrer was given for the plaintiff. Choke, C.J., said:

First class:
Injured person exercising superior right.

¹ Cases like *Doorman v. Jenkins*, 2 A. & E. 256, are possibly an exception, though *quære* whether there the duty was not that of the *business man* as against the duty to know what all know and to see what all see.

"When the defendant cut the thorns and they fell on my land this falling was not lawful; and as to what was said about their falling in *ipso in se*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all in his power to keep them out."¹ Here the owner of the land was entitled to the enjoyment of his land free from any molestation whatever, and any damage done, unless the doer was absolutely free from blame, was actionable. Of this kind are all acts in the nature of trespass. The act *per se* imports an actionable wrong; and unless the act is shown to have been inevitable the defendant is liable.

Second class:
Injured person exercising an equal right.

II. Those cases in which the person injured by the act complained of is in the enjoyment of a right equal to that exercised by the person who injures him.

Every subject within the realm has *prima facie* a right to pass and repass along the public highways of the realm. If, in exercising this right, any subject receives damage from another in the exercise of his right, such subject has to bear his own loss unless he can establish that that other is in fault and liable to make it good. "And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner."² The maxim of the law is *culpa tenet suos auctores tantum*; or loss lies where it falls; so that where the defendant bought a horse at Tattersall's and the next day took him out to try him in a public thoroughfare, where the horse became restive, ran upon the pavement, and killed a man, his administratrix was held not entitled to maintain an action; because the duty on the defendant was only to use due care and skill³—the *quæ a prudente provideri possunt* of the Roman law. A distinction was drawn between the case of a carrier bound to provide for the safe conveyance of his passengers as far as human skill and foresight can go; and a case, like that before the Court, of one doing no more than he was rightfully entitled to do—viz., to ride in a public place, until he is shown to be guilty of some description of unskillfulness or imprudence.⁴

Scott v.
London and
St. Katharine's Dock
Co.

If both parties to the accident are in the exercise of their public rights no action can be sustained, unless one is affirmatively shown to have fallen short of that care and caution which is ordinarily to be expected from persons in the enjoyment of similar rights. If, however, the person charged with the injury is not in the exercise of his public rights a severer liability is affixed to his act. Thus, where a sack or a barrel falls from a house and injures a passenger in the public street, the fall, though unaccounted for, is sufficient to put the defendant to disprove negligence.⁵ The case here becomes assimilated to that noticed under the first class; and the plaintiff, while exercising his public right, is protected to the same extent as he would be if the accident had happened to him while on private property, where he is entitled to be. The accident must be referred to an occurrence which rebuts any supposition that it happened in the exercise of a public right. The defendant is a wrongdoer, and the plaintiff is entitled to the same extent as if the injury were inflicted on private property.

¹ Y. B. 6 Ed. IV. 7, pl. 18 (A. D. 1466), cited in Ames, Cases in Tort, 69.

² *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, 747.

³ *Hammack v. White*, 11 C. B. N. S. 588; *Manzoni v. Douglas*, 6 Q. B. D. 145.

⁴ Cp. *Skinner v. L. B. & S. C. Ry. Co.*, in Ex. Ch. 5 Ex. 787.

⁵ *Scott v. London, &c. Dock Co.*, 3 H. & C. 506; *Byrne v. Boodle*, 2 H. & C. 722.

If the injury had arisen from an ordinary casualty of the highway negligence in addition to accident would have to be proved to affect the defendant with liability. No soon as it is clear that the accident was not one of those incident to the highway, the occurrence of it raises a presumption of the defendant's default.¹

Again, to take the sort of case of which *Indermaur v. Dames*² is the leading example, where one man comes on the premises of another for the purpose of transacting some business with him, or in the pursuit of some object that implies an inducement held out from the owner for him to go there; at first sight it would appear that his position is subordinate to the rights of the owner of the premises. Yet, in fact, this is not so, since the law presumes a right on the part of the stranger to all reasonable and proper provision for his safety. The right of the one to use his property in what way he pleases is in *equilibrium* with the right of the other to visit the premises in safety; and the owner's duty is to take reasonable care of his visitor's safety while on his premises, and to light, guard, or protect in his interest all those portions of the premises from which unusual danger may be anticipated.

Indermaur v. Dames.

III. Those cases in which the person injured by the act complained of is acting in a manner subordinate to the right of the person to do the class of acts by which the person is injured.

Third class: Injured person exercising a subordinate right.

Thus, where one goes to a house as a visitor, and not on business, and sustains injury from the condition in which the premises happen to be, he will not be able to recover;³ or if the owner of a dangerous way permits the way to be used by one knowing of the danger, who is injured thereby, he cannot recover; because he is not obliged to use the way, and the owner is not obliged to make it any safer because he allowed it to be used.⁴ The condition of the way, though defective with regard to those who would use it by invitation, whether expressed or implied, is not defective with regard to those who use it by permission,⁵ that is, who choose to go there of their own accord and are not hindered by the owner. Nevertheless if, after giving permission to use a way, some act is done which renders the user of the way more dangerous than it was at the time of granting permission to use it, the defendant is liable.⁶

In the instances we have considered, very different amounts of proof are requisite to establish a *prima facie* case of negligence. In the first class, the mere happening of an accident is enough. In the second, some independent circumstances of fault is needed in addition. In the third, there must be evidence of a positive misdoing. In all, the fault is *lata* in the sense of being non-expert. In the first class, the negligence is the omission of that care which very attentive and vigilant persons take of their own goods, of very exact diligence.⁷ In the second, the negligence is the want of that diligence which the generality of mankind use in their own concerns—of ordinary care.⁸ In the third, the negligence is that want of slight diligence which Story describes as "gross negligence."⁹

Distinction of degrees of blame.

¹ *Tarry v. Ashton*, 1 Q. B. D. 314. Cp. *The European* (1885), 10 P. D., 99, 101.

² L. R. 2 C. P. 311.

³ *Southeote v. Stanley*, 1 H. & N. 247.

⁴ *Bolch v. Smith*, 7 H. & N. 736; *Gautret v. Egerton*, L. R. 2 C. P. 371.

⁵ *Indermaur v. Dames*, L. R. 2 C. P. 311.

⁶ *Corby v. Hill*, 4 C. B. N. S. 556; *Sweeney v. Old Colony & Newport Rl. Co.*, 92 Mass. 368; Bigelow, L. C., on Torts, 660.

⁷ *Jones, Bailm.* 22, 118. Cp. *Gregory v. Piper*, 9 B. & C. 591.

⁸ *Jones, Bailm.* 22, 118. ⁹ *Bailm.* § 17.

Chadwick v. Trower.

This is illustrated by Parke, B., in *Chadwick v. Trower*,¹ delivering the judgment of the Exchequer Chamber. The question was, in what circumstances a person who pulled down his wall was bound to give notice to the owner of an adjoining vault. After pointing out the difference between the case where there is knowledge of the existence of the adjoining vault, and where there is not, the learned judge said: "For, one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction." Here then, there is no doubt on the part of the Exchequer Chamber of how many degrees of negligence there are, and how they may be discriminated.

Three classes of *culpa levis*.

Turning to the division of negligence known as *culpa levis*, in the sense of failure of an expert to bestow the amount of diligence required of him—a division that will be found to be concerned mainly with relations arising out of contract—a similar difference in the amount of the evidence necessary to raise the presumption of negligence will be found.

The normal case of expert diligence.

Care of an average reasonable man.

Minute care
Simson v. London General Omnibus Co.

The notion of a contract suggests a principle of give and take, which places the parties, theoretically at least, on an equality; and therefore the typical case of a contract would require from each party to it the care and prudence of an average reasonable man of the time when, and in the circumstances with respect to which, the contract is entered into. This assimilates the general rule in contract with the second of the classes we have considered in tort. Further, there are circumstances from which contractual obligations arise or are constituted, which exact duties of greater or less stringency than those of the most ordinary occurrence. Thus, a passenger in an omnibus is injured by a blow from the hoof of one of the horses, which kicks through the front panel of the vehicle. There is no evidence that the horse is a kicker; but it is proved that the panel bears marks of other kicks, and that no precaution has been taken by the use of a kicking strap or otherwise, against the possible consequences of a horse striking out. This was held evidence of negligence;² Bovill, C.J., going the length of saying that the fact of a horse kicking out "alone presents a case that calls for some explanation on the part of the proprietors." If that be so, it is difficult to imagine a case that realises more nearly Dr. Wharton's most exacting translation of *levissima culpa*, "infinitesimal negligence," the fact of a horse kicking where there is no evidence that he ever before so transgressed—no evidence of *scienter*. But assuming the statement to be too wide, and the decision to turn on the absence of a kicking-strap, it does not seem to have been contested that "it is not the practice to apply a kicking-strap to horses drawing private carriages"; "is an omnibus proprietor bound to use a higher degree of care and caution in this respect than any gentleman adopts for the safety of himself and family?" This, says Bovill, C.J., "becomes a fair question for the jury": there is some evidence of negligence in a case of this kind, in not adopting greater precautions

¹ 6 Bing. N. C. 1, 10. Speaking of Parke, B., Blackburn, J., describes him, in *Brinsmead v. Harrison*, L. R. 7 C. P. 547, 554, as "the most acute and accomplished lawyer this country ever saw."

² *Simson v. London General Omnibus Co.*, L. R. 8 C. P. 390, the declaration was in tort, but the tort arose out of a contract. *Patterson v. Eiman*, 8 N. S. W. R. Law 488.

than the ordinary business man adopts in his private concerns. The other judges, or at least Grove, J., lay principal stress on there being "other kick marks on the panel of omnibus."

As the other extreme, take the case where a railway company have on their platform a portable weighing machine, the foot of which projects about six inches above the level of the platform, in which the plaintiff, being pushed about in a crowd, catches his foot, falls over, and is injured; it is not negligence in the company so to have it.¹

The bank that:

- (1) allows a deposit of deeds in its vaults; ²
- (2) receives them in the way of business as a pledge for advances; ³
- (3) receives them for some temporary purpose for its own advancement; ⁴

Three kinds of a banker's liability.

is bound in the first case to slight diligence, the absence of which is gross negligence; in the second, to ordinary diligence; and in the third, to great diligence. To render a defendant liable, it is not sufficient to bring him within either of the classes that later writers on the Roman law have determined to be the criteria in that law; a further inquiry is necessary, whether, after the character of specialist, say, has been found applicable to the person to be charged, the degree of his default is enough to render him liable in the circumstances; whether general slackness of attention must be proved; or whether proof of lack of ordinary business prudence is needed; or whether there need only be shown a failure of diligence of that unusual kind, which only exceptional confidence, bestowed on the defaulter and raising a corresponding duty in him, could bind him to exhibit.

Once more—in that vast class of cases in which the power of steam is applied to providing for human requirements, the duty to take care imposed on those using it, is far in excess of that required of those concerned with the feebler agencies of former times; and, in the opinion of very eminent judges, has become so extremely exacting that it is difficult to express the amount of care required in terms of too great strictness. Thus, to quote an eminent United States judge: "When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence"⁵ and similar and even stronger expressions are constantly to be found in the judgments of both English and American judges in this connection.⁶

More potent agencies demand greater care in proportion to their danger.

While foreign jurists have attacked the theory of degrees of negligence, mostly by denying the existence of *culpa levissima*, as a distinct

The meaning of gross negligence.

¹ *Cornman v. Eastern Counties Ry. Co.*, 4 H. & N. 781; cp. *Sturges v. G. W. Ry. Co.*, 8 Times L. R. 231.
² *Giblin v. McMullen*, L. R. 2 P. C. 317, 338; *Foster v. The Essex Bank*, 17 Mass. 479.
³ 2 Kent, Comm. 580.
⁴ *Exactissimam diligentiam custodiendam rei præstare compellitur; nec sufficit ei eandem diligentiam adhibere, quam suis rebus adhibet, si alius diligentior custodire poterit*: D. 44, 7, 1, § 4.
⁵ Per Grier, J., *Philadelphia & Reading Rd. Co. v. Derby*, 14 How. (U.S.) 468, 480. As to three degrees see *Tracy v. Wood*, 3 Mason (U.S.) 132.
⁶ *New World v. King*, 16 How. (U.S.) 409, 474. "That under such circumstances the defendant was bound to use the highest degree of care and prudence, the utmost human skill and foresight, is the settled law," per Earl, J.: *Coddington v. Brooklyn*, 102 N. Y. 66, 69. "He," the carrier of passengers, "is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill": per Harlan, J., *Pennsylvania Rl. Co. v. Roy*, 102 U.S. (12 Otto) 451, 456.

phase, several eminent English judges, assailing the other end of the scale, have repudiated the existence of *gross* negligence as a separate degree.¹

Hinton v. Dibbin.

Hinton v. Dibbin,² the earliest decision under the Carriers Act, 1830,³ is the first of this class. The decision was that since the carrier was protected against liability for negligence, this must be held to include gross negligence. In the course of his judgment, Lord Denman, C.J., said: "When we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether between 'gross negligence' and negligence merely any intelligible distinction exists."

To appreciate this rightly it must be borne in mind that the Act of Parliament which was being interpreted had to do exclusively with carriers—that is, with specialist negligence, the *levis culpa* of Dr. Wharton. Consequently from his point of view gross negligence or non-specialist negligence could not have been involved at all. The term must therefore be used in another sense. Manifestly the question was whether the negligence of the specialist could be so subdivided that one degree should import immunity, under the protection of the Act, while a further degree would imply liability because of its aggravated character. The decision by implication goes the length of admitting degrees of negligence within the range of *levis culpa*, though declining in the circumstances present to note them or to attempt their discrimination.

Wilson v. Brett; dictum of Rolfe, B.

The next case, *Wilson v. Brett*,⁴ is famous for the *dictum* of Rolfe, B.: "I said I could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet;" which has been repeated again and again as conclusive of the whole matter. The defendant in *Wilson v. Brett* was a person conversant with horses, and was entrusted with one by the plaintiff for the purpose of riding it to show to an intending purchaser. While he was showing the horse it fell down and broke its leg. Rolfe, B., left it to the jury to say whether the defendant was guilty of "culpable negligence" in the manner and in the circumstances in which he rode the horse, and directed them that the defendant, "being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it."

Considered.

Adopting Dr. Wharton's and the "classic jurists'" notation, the care the defendant was to exercise was that of the specialist; his negligence then was *culpa levis*. A new trial was moved for on the ground that Rolfe, B., misdirected the jury by telling them that the rule applicable was the rule of specialist diligence, and not of ordinary diligence, and that *culpa lata*, not *culpa levis*, indicated the class of default under which the defendant must be brought to make him liable; and that the test applicable was that of the knowledge of an ordinary person, knowing nothing particular about horses, not that of a person conversant with horses and their management.⁵

¹ In *Cornish v. Accident Insurance Co.*, 23 Q. B. D. 453, Lindley, L.J., 457, affirms the existence of degrees of negligence.

² Q. B. 646, 661.

³ 11 Geo. IV. & Will. IV. c. 68.

⁴ See argument of Serjt. Byles, *l.c.* 114.

⁵ 11 M. & W. 113.

"If," said Rolfe, B., on the argument of the rule, "a person more skilled knows that to be dangerous, which another, not so skilled as he, does not, surely that makes a difference in the liability." It would follow then that the defendant being bound to exercise the skill of an expert, and, failing to do so, would be guilty of negligence, and liable for such failure; so that whether the judge had charged the jury that such failure was negligence, or negligence with a vituperative epithet, in either case the term connotes the lack of the diligence a person of competent skill would use in the circumstances. That Rolfe, B., never intended his words to be taken as the expression of an opinion that the term "gross negligence" does not signify any distinctive degree of negligence, or, if he did, that afterwards and in a position of even greater responsibility, he deliberately adopted a contrary view, may be seen from subsequent judgments of his when Chancellor and in the House of Lords. *Colyer v. Finch*¹ is a case in point. There the subject discussed was in what circumstances a first mortgagee, having the legal title, but not having possessed himself of the title-deeds, is to be postponed to a subsequent purchaser or mortgagee. The matter would range itself under Dr. Wharton's division of *culpa levis*, want of expert diligence. Mere negligence in obtaining the deeds, Lord Cranworth points out, is not enough; there must be a higher degree; "the party claiming by title subsequent must satisfy the Court that the first mortgagee has been guilty either of fraud or gross negligence, but for which he would have had the deeds in his possession." "What are the circumstances," the Lord Chancellor continues, "which will amount to, or be evidence of, gross negligence it is difficult to define beforehand; but I think that *prima facie* a mortgagee who, knowing that his mortgagor has title deeds, omits to call for them, or who omits to make any inquiry on the subject, must be considered to be guilty of such negligence as to make him responsible for the frauds which he thus has enabled his mortgagor to commit." Hence it is obvious that Lord Cranworth's authority is not to be engaged on the side of that view which identifies negligence and gross negligence apart from the circumstances of some particular case where the distinction may be irrelevant.

The same learned lord, speaking in the House of Lords in a not dissimilar case² dealing with the consequences attending the neglect of a mortgagee to inquire into the facts on which a recital in a mortgage deed of a joint judgment for a specific sum was based, said: "I am clearly of opinion that it would have been what we must call gross negligence in any intended mortgagee or purchaser to be satisfied with merely ascertaining that there was no judgment exactly answering the description of that contained in the deed."³

Gross negligence is considered once again in *Beal v. South Devon Ry. Co.*⁴ There the question was whether a condition excepting from liability, save in the cases of gross neglect and fraud, was a reasonable condition within the provisions of the Railway and Canal Traffic Act, 1854,⁵ s. 7. The division of negligence to which this is referable

¹ 5 H. L. C. 905, 928.

² *Montefiore v. Brown*, 7 H. L. C. 241, 268. Cp. *Aldbrough v. Allen*, 11 H. L. C. 549, 563, where Lord Westbury, C., sets out on an examination into the facts of the case before him to determine whether they disclose "wilful default or gross negligence."

³ See also the same learned judge's expressions when advising the H. L. in *Peck v. North Staffordshire Ry. Co.*, 10 H. L. C. 473, 528.

⁴ 3 H. & C. 337.

⁵ 17 & 18 Vict. c. 31.

Judgment of
Crompton, J.,
in the
Exchequer
Chamber.

is again the *culpa levis* of Dr. Wharton. The carrier is an expert, and bound to expert diligence. The rule laid down in *Wilson v. Brett* is that where a bailment is entrusted to one possessed of special skill the implication is that he is to use his skill, in the phrase of the civil law, to use that *diligentia quam suis rebus adhibere solet*. "The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use." The expectation, in short, was the motive of the bailment. "In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty," says Crompton, J., in the Exchequer Chamber,¹ "gross negligence includes the want of that reasonable care, skill, and expedition, which may properly be expected from persons so holding themselves out and their servants. It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the Court below, where he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.' The authorities are numerous, and the language of the judgments various, but for all practical purposes the rule may be stated to be that the failure to exercise reasonable care, skill, and diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence, such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment. The company, therefore, properly speaking, exclude their liability as insurers, and not their liability for a want of reasonable care, skill, and expedition. This is well illustrated by the case of actions against attorneys, where the law only attaches in the case of gross negligence, which a jury has always been supposed competent to deal with under the directions of a judge; and it seems to us that the degree of negligence which the law points out as that which is necessary to make a professional paid agent liable is not an unreasonable criterion of the reasonableness of the limit to which the carrier seeks to restrict his liability."

What gross
negligence is.

Now, though there are expressions in the above judgment that point to different considerations, the negligence for which alone attorneys are to be held liable is clearly indicated in well-known cases² to be *crassa negligentia*; which Lord Campbell, in the House of Lords, thus describes:³ "You can only expect from him [the attorney] that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee, binding themselves, in giving legal advice and conducting suits of law, to be always in the right." The distinction between gross and ordinary negligence is

¹ *1 Beal v. South Devon Ry. Co.*, 3 H. & C. 341.

² *Pitt v. Yalden*, 4 Burr. 2000; *Baillie v. Chandless*, 3 Camp. 17; *Godfrey v. Dalton*, 6 Bing. 460; *Purves v. Landell*, 12 Cl. & Fin. 91. See also Bell, Commentaries, vol. i. (7th ed.) 483.

³ *Purves v. Landell*, 12 Cl. & F. 91, 103.

here intelligibly intimated, if not positively expressed. Gross negligence is not presumed from the existence of mistake if there is no falling short in integrity or diligence. Mistake, though conjoined with integrity and diligence, will raise the presumption of negligence where the matter, with regard to which the mistake is made, is part of the ordinary course of business.

In *Grill v. General Iron Screw Collier Co.*,¹ Willes, J., expresses his agreement "with the dictum of Lord Cranworth in *Wilson v. Brett*,² that gross negligence is ordinary negligence with a vituperative epithet—a view held by the Exchequer Chamber: *Beal v. South Devon Ry. Co.*"³ We have just seen what the view held by the Exchequer Chamber was. The present case was an action on a bill of lading to recover against the shipowner for the loss of certain goods, which he was to carry, "barratry of master or mariners, accidents or damage of the seas, rivers, or navigation of whatever nature or kind soever excepted." The goods perished in a collision due to the negligence of those on board the carrying vessel. At the trial a verdict was entered for the plaintiff. The defendant moved, *inter alia*, on the ground that the Lord Chief Justice in directing the jury had made no distinction between gross and ordinary negligence, gross negligence being pleaded in the replication, while the jury had no opportunity of finding whether there was gross negligence or not. Here again, the diligence required of the carrier is specialist diligence, and the negligence which had to be shown was *culpa levis*. "A person," says Willes, J., "who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care is negligence." Negligence in this sense was admitted. The contention was that the negligence to support the replication must be gross as distinguished from negligence merely. The answer in effect was that negligence having been found, the liability attached; and since, whether the negligence were called gross or merely negligence without any adjunct, the term would have had to be explained to the jury⁴ in identical terms, the presence or omission of the adjective was immaterial. This is obviously so with reference to the facts in the case. It does not touch the subject of the greater or lesser negligence required to found liability in other circumstances.

Where negligence is found to exist in certain circumstances, it is immaterial whether the actual amount with regard to the actual case is more or less; since, when the standard of liability is reached, excess will not affect the result. There is a difference where a comparison of circumstances is to be made. Then the same subject-matter may elicit different degrees of care, just as the position of those with a duty in regard to it may vary. To bring a case within the rule of liability more negligence may have to be shown if it is to be referred to one class of cases rather than to another class of cases. As between the two classes the different amounts of negligence may be discriminated

¹ L. R. 1 C. P. 606, which report is both confused and confusing: the case is much better reported 35 L. J. C. P. 321.

² 11 M. & W. 113.
³ 3 H. & C. 337. Again, in *Lord v. Midland Ry. Co.*, L. R. 2 C. P. 339, 344, the same learned judge says: "Any negligence is gross in one who undertakes a duty and fails to perform it. The term 'gross negligence' is applied to the case of a gratuitous bailee who is not liable unless he fails to exercise the degree of skill which he possesses."

⁴ See L. R. 1 C. P. per Montague Smith, J., 614. *Austin v. Manchester, Sheffield & Lincolnshire Ry. Co.* (1852), 10 C. B. per Creswell, J., 474.

Grill v. General Iron Screw Collier Co.

Case stated.

Willes, J. s.
dictum considered.

Negligence,
how classified.

as negligence merely, or gross negligence, or slight negligence. But when once an act or default has been shown which is negligent with reference to any particular class of cases further proof is unnecessary; for the distinction of degrees of negligence is between different classes or heads of liability, not between different cases referable to the same class. So soon as the point of view of the person with regard to the subject-matter is fixed, there is no room for degrees of negligence within the range of *dolus* on the one side or the minimum that imports liability on the other. Where different persons are related to the same subject-matter, it is plain their relation to it is not necessarily the same. One may be liable for acts that the other may do with impunity, and be excused for acts that render a third liable; and this though all may be bound to the diligence of specialists. This variation is conveniently discriminated by the terms slight, ordinary, and gross negligence. As Montague Smith, J., in this very case says:¹ "There is no doubt that the expression 'gross negligence' is to be found in some of the decisions; but it is only one mode of expressing, perhaps, that in a particular case there is a less degree of care required than there might be in other cases." Assuming liability to exist, it will not be affected by more or less negligence, where negligence is found to exist; yet it may be material, where liability is not found to exist, to discriminate that which will import liability in one case from the degree of negligence which will import it in another.

Gross negligence discussed in *Cushill v. Wright*.

The subject of gross negligence was much discussed in *Cushill v. Wright*,² where misdirection was alleged in failing to point out to the jury the degrees of negligence that would import liability, and the Queen's Bench made a rule absolute for a new trial. There Erle, J., said: "It does not appear that there was any information given to the jury as to what they were to understand by gross negligence. If they were told to understand by gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, as seems to have been the meaning given to gross negligence in some of the modern cases cited before us, the direction as to the degree of negligence might not have been objectionable; but the legal meaning of gross negligence is greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to *dolus*."³ To the like purport is the description given by Swayne, J.:⁴ "Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing."

Ambiguity of the use of the term "gross negligence."

It is apparent from the preceding considerations that the term gross negligence is used in distinct senses. Sometimes it is used to signify non-specialist negligence. Sometimes it is used to express a different amount either of specialist or non-specialist negligence; for example, to discriminate between the negligence of a banker as gratuitous bailee of his customers' securities, and as entrusted with them for some purpose of his own sole advantage; and sometimes it is used as indicating a greater negligence than ordinary in some particular, where

¹ *Grill v. General Iron Screw Collier Co.*, 35 L. J. C. P. 321, 331. Cp. *Railroad Co. v. Lockwood*, 17 Wall. (U.S.) 357, 382, where are references to the French law.

² 6 E. & B. 891, 899.

³ See *Taylor v. Russell* (1891) 1 Ch. 8, judgment of Kay, J., and *post*, Estoppel.

⁴ *National Bank v. Graham*, 100 U.S. (10 Otto) 699, 702. "Gross negligence" is fully discussed by Bradley, J., *Railroad Co. v. Lockwood*, 17 Wall. (U.S.) 357, 382; see also *Briggs v. Spaulding*, 141 U.S. (34 Davis) 132, 151.

ordinary negligence would yet suffice to affix liability. It is in the confusion of these various senses of the term that any obscurity or difficulty in the treatment of gross negligence takes its rise. But the fact that a term with a distinctive value is somewhat promiscuously and vaguely used is no reason for discarding it, though it is a reason why more precision should be observed in using it.

The point has been well put by the Chief Justice of Victoria in *Giblin v. McMullen*¹ speaking of bailments: "The nature of the duty varies with the existence or absence of reward. That of gratuitous bailees is very different from that of bailees for hire; the distinction between these several kinds of duty is a legal one, determined or determinable by recognised principles. If a jury, not the Court, are to decide on the distinction, it would depend on matters of fact, not on known principles of law; and if the Court must decide on some, we think, as put during the argument, they must decide on all such questions. The defining the duty, too, necessarily involves the deciding on the sufficiency of the evidence to go to a jury. For if the Court, having defined the duty, is of opinion that there is no evidence of a breach of that duty, the plaintiff should be nonsuited, unless actions for negligence are to be tried in a mode different from all others. There may be evidence of negligence, but that is not sufficient, there must be evidence of actionable negligence, of a breach of the duty imposed on the defendant. It is not disputed, that if there is any evidence for the jury, they constitute the proper tribunal to decide thereon. There are, doubtless, some observations in *Doorman v. Jenkins*² on which the plaintiff relied, as tending to show that the question of negligence is for the jury. But in that case there was, in the opinion of the Court, evidence of gross negligence; it was unnecessary, therefore, to pronounce decisively on the point for which the case is now cited; and some of the learned judges abstain in marked terms from expressing any decided opinion on an extrajudicial question. Before and since that decision there have been numerous cases in which plaintiffs have been nonsuited on the grounds of the insufficiency of the evidence adduced."³

But we must not pass from the evaluation of gross negligence without treating of its relation to fraud. In *Perry Herrick v. Attwood*⁴ Lord Cranworth speaks of a man being "guilty of something which the law calls fraud or gross negligence;" and in the well-known case of *Evans v. Bicknell*⁵ Lord Eldon speaks of "that gross negligence that amounts to evidence of fraud," and a few lines further on, "of that gross negligence that amounts to evidence of a fraudulent intention." Fry, L.J.,⁶ regards this expression as "certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention; whereas a fraudulent intention is a design to commit some fraud, and leads men to do or omit doing a thing not carelessly, but for a purpose." Fry, L.J.'s, expression is not happy—perhaps not correct. Negligence is "the absence of care according to the circumstances" whether in doing or not doing; and in law the most deliberate act which either shoots beyond, does not attain to, or deflects from the rule of duty may be treated as a negligent wrong;

Sir Wm. Stowell, C.J., in *Giblin v. McMullen*.

Gross negligence as related to fraud.

¹ L. R. 2 P. C. 324.

² 2 Ad. & E. 256.

³ These the learned judge cites and, in this instance, comments on.

⁴ 2 De G. & J. 37.

⁵ 6 Ves. 174, 190.

⁶ *Northern Counties of England Fire Insurance Co. v. Whipp*, 26 Ch. D. 489; *Manners v. Mex*, 29 Ch. D. 725.

Can negligence in law be wilful?

as for example where one designedly abstains from inquiry for the purpose of avoiding notice.¹ A limitation too must be put on the universality of this statement, where the matter treated of involves agency. Quain, J., points this out in *M'Cauley v. Furness Ry. Co.*:² "Negligence, even gross, is the very thing which the contract stipulates that the defendants shall not be liable for; and 'wilful' cannot carry the case any further, especially as the company would not be liable for a wilful act of commission by a servant, though they would be for his gross negligence." Lord Selborne, a judge habituated to the most careful nicety in the use of language, uses the phrase "wilful neglect";³ and so does James, L.J., in a passage in which he gives an illustration of what he means by it. "He [the equitable mortgagee whom it was sought to postpone] 'must have been guilty of fraud or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud. If a man abstains from inquiry under such circumstances that the Court will infer that he abstained in order to deprive himself of knowledge, then he will not be allowed to hold the property merely because he did not inquire. He has in such a case wilfully shut his eyes to the facts.'" James, L.J., was referring to *Hunt v. Elmes*,⁴ where Turner, L.J.'s, expression is: It is "now well settled by many authorities that a legal mortgagee cannot be postponed by reason of his [the mortgagee] not having possession of the title deeds, unless there has been fraud or gross and wilful negligence on his part." The same collocation of "fraud or gross and wilful negligence, which in the eye of this Court amounts to fraud," is found in *Hewitt v. Loosemore*,⁵ and is accepted by Lindley, M.R., in *Oliver v. Hinton*.⁶

Wilful negligence and fraud.

Between "wilful negligence" and "fraud" the dividing line may be so fine as to be barely perceptible.

In *Jackson v. Sounders*⁷ Lord Eldon refused to discriminate the quality between "long neglect and culpableness" and "fraud"; while in *Borrett v. Burke*⁸ Lord Redesdale contrasts "mere neglect" which it is the practice of equity to relieve against and that which "ceases to be mere neglect and becomes wilful."

Doctrine of the Civil Law.

The subject receives illustration from the civil law. Thus Gaius:¹⁰ *Neque enim lex facere potest, ut qui manifestus fur non sit, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter out homicida non sit, adulter vel homicida sit; at illud sone lex facere potest, ut perinde aliquis poena teneatur atque si furtum vel adulterium vel homicidium admisisset quamvis nihil eorum admisisset.* And this distinction is recurrent in the Digest. Thus *Lata culpa plane dolo comparabitur*;¹¹ *Dissoluta enim negligentia prope dolum est*;¹² *Si fraus non sit admissa sed lata negligentia, quia ista prope fraudem accedit, removeri hunc quasi suspectum oportet*;¹³ *Magnam tamen negligentiam placuit in dolo crimine cadere*;¹⁴ *Culpa dolo proxima dolum representat*;¹⁵ and *Magna negligentia culpa est; magna culpa dolum est*.¹⁶

¹ *Jones v. Smith*, 1 Hare 55. Cp. *Agra Bank v. Barry*, L. R. 7 H. L. per Lord Cairns, C., 149.

² L. R. 8 Q. B. 63

³ *Dixon v. Muckleston*, L. R. 8 Ch. 155, 160.

⁴ *Ratcliffe v. Barnard*, L. R. 6 Ch. 654.

⁵ 2 De G. F. & J. 578, 596.

⁶ 1 Hare 440.

⁷ (1809) 2 Ch. 264, 274; also by the same judge *Keith v. Burrows*, 1 C. P. D. 735.

⁸ 2 Dow (H. L.) 437, 456.

⁹ 5 Dow 1, 16.

¹⁰ Bk. 3, § 104.

¹¹ D. 11, 6, 1, § 1.

Cp. *Inglis v. Mansfield*, 3 Cl. & F. 368 n.

¹² D. 17, 1, 29.

¹³ D. 26, 10, 7, § 1.

¹⁴ D. 44, 7, 1, § 5.

¹⁵ D. 47, 4, 1, § 2.

¹⁶ D. 50, 16, 226.

With reference to this word *dolus*, Ulpian says :¹ *Non fuit autem contentus Prætor DOLUM dicere, sed adjecit MALUM, quoniam veteres dolum etiam bonum dicebant et pro solertia hoc nomen accipiebant : maxime, si adversus hostem latronemve quis machinetur. Dolum malum, he says,² Servius quidem ita definiit, machinationem, quandam alterius decipiendi causa, cum aliud simulatur, et aliud agitur. Labeo autem, posse et sine simulatione id agi, ut quis circumveniatur : posse et sine dolo malo aliud agi, aliud simulari : sicut faciunt qui per ejus modi ; dissimulationem deserviant et tuentur vel sua vel aliena. Itaque ipse sic definiit, dolum malum esse OMNEM CALLIDITATEM, FALLACIAM, MACHINATIONEM AN CIRCUMVENIENDUM, FALLENDUM, DECIPIENDUM ALTERUM ADHIBITAM. Labeonis definitio vera est.*

Meaning of *dolus* in the Civil Law.

In the civil law then, gross negligence may be equivalent to fraud.³

In a New Zealand case,⁴ however, Lord Denman, C.J., has been cited as an authority for the proposition that gross negligence cannot carry the consequences of fraud. The authority is not a high one, even if accurately interpreted. Lord Denman's words are :⁵ "Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine." It is evident that the only affirmation is as to the non-identity of the two concepts, not as to the possibility of identity in some case of their consequences in law. Thus the same judge is found five years later saying :⁷ "Between wilful mischief and gross negligence the boundary line is hard to trace ; I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice." A very high authority indeed, Tindal, C.J., contemporaneously with Lord Denman's later *dictum*, says, speaking of the misconduct of arbitrators :⁷ "The mistake and act of carelessness is so great as to amount, although not in a moral point of view, yet in the judicial sense of that term, to *misconduct* on the part of the arbitrators. *Lata culpa* or *crassa negligentia* both by the civil law and our own approximates to, and in many instances cannot be distinguished from, *dolus malus* or *misconduct*."

Doctrine of the Common Law.

Lord Lyndhurst also,⁸ referring to Alderson, B.'s, decision in *Whitbread v. Jordan*,⁹ said : "The learned judge was satisfied that the transaction was not *bonâ fide*, and that the party had purposely abstained from making inquiry, the money being advanced for securing a pre-existing debt ; that, in short, there was wilful blindness. That was evidently the impression on the mind of the learned judge, but he said that even if it were not so, the facts of the case were such as to amount to negligence of so gross a nature that it would be a cloak to fraud if it were permitted."

There are many authorities following this view which are collected by Mr. Spence in his "Equitable Jurisdiction of the Court of Chancery."¹⁰

¹ D. 4, 3, 1, § 3.

² D. 4, 3, 1, § 2.

³ D. 11, 6, 1, § 1.

⁴ *Smith v. Essery*, 9 N. Z. L. R. 464 (C. A.)

⁵ *Goodman v. Harvey* (1830), 4 A. & E. 876. Cp. *Wigram v. C. Jones v. Smith*, 1 Haro 43, 71.

⁶ *Lynch v. Nurdin* (1841), 1 Q. B. 38.

⁷ *In re Hall & Hinds*, 2 M. & G. 852.

⁸ *Jones v. Smith*, 1 Ph. 253.

⁹ 1 Y. & C. (Ex.) 303.

¹⁰ Vol. ii., 755. Cp. *Agra Bank v. Barry*, L. R. 7 H. L. per Lord St. Albans, 157.

Here it is enough to transcribe the principle which that very learned author extracts from them: "There may be a degree of negligence so gross that a Court of Equity will treat it as evidence of fraud—impute a fraudulent motive to it—and visit it with the consequences of fraud, although, morally speaking, the party charged may be perfectly innocent: but gross negligence is not in all cases to be treated as fraud, they are not to be treated as the same thing."¹

Lord
Cranworth's
view.

The words of Lord Cranworth, C., in moving the judgment of the House of Lords, are authoritative: "What are the circumstances which will amount to or be evidence of gross negligence it is difficult to define beforehand; but I think that *prima facie* a mortgagee who, knowing that his mortgagor has title-deeds, omits to call for them, or who omits to make any inquiry on the subject, must be considered to be guilty of such negligence as to make him responsible for the frauds which he has thus enabled his mortgagor to commit."

Bowen,
L.J.'s.

Bowen, L.J., treats this subject with his customary felicity while pointing out the source of the error of the Courts below the House of Lords in their treatment of *Derry v. Peek*: "There must be fraud in order to found an action of fraud. There are two reasons, I think, why there has been some confusion in the minds of some people with regard to that almost elementary proposition. The first is the fact that equity judges had to decide questions of law and fact together. An equity judge, when he had to deal with a question of fraud, discussed his reasons for coming to the conclusion that there had been fraud, and it very often happened that an equity judge decided that there was fraud in a case in which gross negligence had been proved. If the case had been tried with a jury, the judge would have pointed out to them that gross negligence might amount to evidence of fraud, if it were so gross as to be incompatible with the idea of honesty, but that even gross negligence in the absence of dishonesty did not of itself amount to fraud. Cases of gross negligence, in which the Chancery judges decided that there had been fraud, were piled up one upon another, until at last a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all those cases fraud and dishonesty were the proper *ratio decidendi*, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendant's conduct had been dishonest." Only one exception seems necessary to be taken to this statement. Gross negligence might be such as, unexplained, to suffice to warrant the conclusion of fraud. The inference is always one of fact, not of law. The law as to malice is the same and an exact analogy. "Undoubtedly there may be cases in which there is either *m. fides* or that *crassa negligentia* which implies malice."⁴

Vindictive
damages.

The existence of "gross negligence" has sometimes been considered of importance with reference to the assessment of vindictive or exemplary damages. There is no doubt that, in actions for seduction or for malicious injuries, juries have been allowed to give vindictive

¹ See also the Scotch cases, which adopt the civil law rule, and are cited by the Dean of the Faculty *arguendo*, *Rae v. Meek*, 14 App. Cas. 565.

² *Colyer v. Finch*, 5 H. L. C. 928. Cp. Lord Cranworth, C., in *Roberts v. Croft*, 2 Dr. G. & J., 1, 6.

³ *Le Lievre v. Gould* (1893), 1 Q. B. 500. Cp. *Wilde v. Gibson*, 1 H. L. C. 605.

⁴ *The Strathnaver*, 1 App. Cas. 58, 67, before the Privy Council, where *The Evangelismos*, 12 Moo. P. CC. 352, is cited. *The Water D. Waller* (1893) P. 202.

damages, taking all the circumstances of the case into consideration; ¹ and so too in any case in which the process of the Court has been abused, and outrage has been committed under the forms of law.² In the case of negligence there is no difference, and the law will not allow punitive damage unless the conduct complained of is more than negligent, and amounts to gross misconduct.³ The reason for the difference is indicated by Davis, J., in *Milwaukee, &c. Ry. Co. v. Arms*.⁴ "Redress commensurate to such injuries," he says, "should be afforded. In ascertaining its extent the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. . . . The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.⁵ It is insisted, however, that where there is 'gross negligence' the jury can properly give exemplary damages. There are many cases to this effect. The difficulty is that they do not define the term with any accuracy." When, then, gross negligence amounts to *dolus*, within the meaning of the maxim *Magna negligentia est, magna culpa culpa dolus est*,⁶ or there is an injury, wilful or negligent, which is accompanied with expressions of insolence,⁷ then, and then only, will it be matter for exemplary damages.

Where there is gross misconduct.

¹ *Berry v. Da Costa*, L. R. 1 C. P. 331; *Terry v. Hutchinson*, L. R. 1 Q. B. 509. *Doe v. Fuller*, 13 M. & W. 47, 51; *Mercer v. Harvey*, 5 Taunt 412; *Whitman v. Kershaw*, 16 Q. B. 11, 613, per Bowen, L.J., 618. Vindictive damages are said to be allowable in *Denver, &c. Ry. v. Harris*, 122 U.S. (15 Davis) 597, 609, "in actions of trespass where the injury has been wanton or malicious, or gross and outrageous"; see also *Lake Shore, &c. Ry. Co. v. Prentice*, 147 U.S. (40 Davis) 101, 107; per Gray, J. "In this Court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called smart money, if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." This principle of assessment is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or servant.

² *Gregory v. Stoman*, 1 E. & B. 360, 370; *Duke of Brunswick v. Stowman*, 8 C. B. 317, 329.

³ *Cleghorn v. New York Central Rd. Co.*, 56 N. Y. 44.

⁴ 91 U.S. (1 Otto) 489, 493.

⁵ That is, negligence in the third sense indicated above. ⁶ D. 50, 16, 220.

⁷ *Emblem v. Myers*, 6 H. & N. 54; *Bell v. Midland Ry. Co.*, 30 L. J. C. P., 273, 281. In *Wilkes v. Wood*, 19 How. St. Tr. 1153, at 1167, Pratt, C.J., said: "Notwithstanding what Mr. Solicitor-General has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself;" s. c. Loft 18. See per Lord Blackburn, *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 39. The subject of "nominal damages" and the circumstances in which they are applicable are considered in *Stanton v. New York, &c. Ry. Co.*, 59 Conn. 272, 21 Am. St. R. 110. In *Spokane, &c. Co. v. Holzer*, 26 Am. St. R. 842, 846-850, "punitive damages" are discussed, and the awarding them is stated to be "unsound in principle and unfair and dangerous in practice"; but see the more authoritative statement in 2 Kent, Comm. 15 n (a) where the rule is thus expressed: "If a case be free from fraud, malice, wilful negligence, or oppression, the compensation is taken strictly for the real injury or actual pecuniary loss to the party, and, perhaps, the natural and legal consequences of the act complained of, and the actual costs and expenses sustained. But if fraud, malice, or *mala mens* mingle in the controversy, the claim goes beyond absolute compensation, and punitive, vindictive, or exemplary damages by way of punishment and for example's sake seem to be admitted." Cp. *Forde v. Skinner*, 4 C. & P. 239.

CHAPTER III.

LIMITS OF LIABILITY.

Introductory. THE general definition of negligence, that we have adopted, is "absence of care according to the circumstances." The breadth of this generalisation manifestly contemplates the formation of a number of subordinate principles applicable to the special heads under which liability for negligence may be grouped. To these special heads, then, must be referred the more detailed consideration of the subject. Yet certain comprehensive principles there are which mark out the scope within which these subordinate principles operate, and which specify more definitely than the general definition the limits within which legal negligence is to be sought.

Accountable
agency
necessary
to found
liability.
Scott v.
Shepherd.

Blackstone,
J.'s, dissent.
Judgment of
the Court as
expressed by
De Grey, C.J.

At the outset, it is clear that to found a liability for negligence there must be some person, as distinguished merely from some agency, to whom legal liability may be imputed. The leading case illustrating this position is *Scott v. Shepherd*.¹ Defendant threw a lighted squib in a market which fell upon the standing of one Y; a bystander W "instantly, and to prevent injury to himself and the said wares of the said Y, took up the said lighted squib from off the said standing and threw it across the said market-house, where it fell upon another standing of one R, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and in so throwing it struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter, then bursting, put out one of the plaintiff's eyes." That the defendant was guilty of an actionable wrong all were agreed. The question was whether trespass or case was the proper form of action in which to sue. Blackstone, J., dissenting from the rest of the Court, was of opinion that the wrong was not a trespass. De Grey, C.J., said: "Every one who does an unlawful action is considered the doer of all that follows; if done with a deliberate intent, the consequences may amount to murder; if incautiously, to manslaughter (Fost. 261). So, too, in 1 Vent. 295: a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay; and 2 Lev. 172 that it need not be laid *scienter*. I look upon all that was done subsequently to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new

¹ 3 Will. 403, 1 Sm. L. C. (11th ed.) 454.

direction and new force flow out of the first force, and are not a new trespass. The writ in the Register 95a for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act needs not to be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the interposition of a free agent will make a difference; but I do not consider W and R as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation."

So long as an injurious agency is operating through the direct and undiverted impulsion of a responsible agent, so long the liability of the agent continues, though the force is transmitted through a variety of stages. The only condition seems to be that in none of these stages is an originating or diverting power exercised. There has indeed been considerable discussion about *Scott v. Shepherd*, turning not so much on the validity of the principles laid down therein as on the suitability of the actual facts to illustrate them. Accepting the view of De Grey, C.J., that W and R's acts were done "under a compulsive necessity for their own safety and self-preservation," his conclusion seems inevitable; and it has since been generally accepted as sound except in the case of *Fitzsimons v. Inglis*;¹ where the reporter remarks, "the Court slighted the authority of this case." It accordingly becomes important to consider who the law regards as responsible agents.

Principle deducible.

I. WHO ARE RESPONSIBLE AGENTS.

(1) Dr. Wharton² says positively, "neither an idiot nor a maniac can be a juridical cause. And the same reasoning applies to persons so young and inexperienced as to be unable to exercise intelligent choice as to the subject-matter."³ Messrs. Shearman and Redfield⁴ are equally positive the other way. "Infants and lunatics are liable for their wrongful acts causing injury to others; and therefore they are liable for tortious negligence, though not for their negligence in the performance of a contract." "We are unable," they say, "to find any direct authority for holding infants responsible for the want of more care than might reasonably be expected of their age; but, as no degree of care could be expected from violent lunatics, who have, nevertheless, been held civilly responsible for their trespasses, there does not seem to be any sound reason for making such a distinction!"⁵

Idiots, maniacs, and children too young to exercise any discretion.

The Roman law is pretty clear. In the *lex Aquilia*⁶ there is the Roman law.

¹ 5 Taunt. 534. I do not find that this case has been subsequently noticed, and it has itself been "slighted" to the extent of being omitted from the Revised Reports. The principle of *Scott v. Shepherd* is forcibly stated in *Mahogany v. Ward*, 27 Am. St. R. 753, 755, citing Wharton, §§ 134, 145, 909.

² Negligence, § 88.

³ *Dixon v. Bell*, 5 M. & S. 198; Bac. Abr. Infancy (H); Simpson, Infants (2nd ed.), 44, 103; *Latt v. Booth*, 3 C. & K. 292; 37 & 38 Vict. c. 62; *Valentini v. Canali*, 24 Q. B. D. 106. For the law as to infants under seven years of age, see 1 Russ. Crimes (5th ed.), 108; *Marsh v. Loder*, 14 C. B. N. S. 535, 1 Hale, Pleas of the Crown, 17-19.

⁴ Negligence, § 121.

⁵ *Krom v. Schoonmaker*, 3 Barb. (N.Y.) 647, is the case of a lunatic magistrate who was held liable for issuing process which had he been sane would have been malicious. There it was said: "In respect of the lunatic, as he has properly no will, it follows that the only measure of damages in an action against him for a wrong is the mere compensation of the party injured."

⁶ D. 9, 2, 5, § 2.

following: "*Et ideo querimus, si furiosus damnum dederit an legis Aquiliae actio sit? Et Pegasus negavit; quæ enim in eo culpa sit, cum sue mentis non sit? Et hoc est verissimum. Cessabit igitur Aquiliae actio: quemadmodum si quadrupes damnum dederit, Aquilia cessat, aut si tegula ceciderit. Sed et si infans damnum dederit, idem erit dicendum. Quod si impubes id fecerit, Labeo ait, quia furti tenetur, teneri et Aquilia eum; et hoc puto verum, si sit jam injuriæ capax.*"

This follows naturally on the preceding fragment; which indicates that legal injury may be done by a person who does not intend to do harm, and is by way of an exception to the rule there stated, and based on the absence of any capacity to exercise intention, however willing.

Weaver v. Ward.

Considered.

The question in English law may, in the state of the authorities, still be looked at as one of principle. The cases simply follow the dictum in *Weaver v. Ward*.¹ To a declaration in trespass, the defendant set up that the plaintiff and he were skirmishing in a trainband, and that when discharging his piece he wounded the plaintiff by accident and misfortune and against his own will. In giving judgment the Court distinguishes between a criminal act and a civil trespass by a lunatic, pointing out that in the former case there is no felony "if a lunatic kill a man or the like, because felony must be done *animo felonico*, yet in trespass, which tends only to give damages according to hurt or loss, it is not so, and therefore if a lunatic hurt a man he shall be answerable in trespass." Still it was hard to see why, in the case of the lunatic, an exception should be made to the general rule that one is excused responsibility for the consequences of his act if, in the words of the judgment in *Weaver v. Ward*, "it may be judged utterly without his fault"; or supposing there be no exception, why "if a man by force take my band and strike you," I should not be liable; while if a lunatic—not in the sense of one merely of defective intelligence, but of one wholly without intelligence—hurt a man he is answerable.² The reason for non-liability that the act is "judged utterly without his fault" in the one case would avail at least equally in the other, so long as the law treats the "act of God" as in the case of the carrier, as exempting from a liability otherwise absolute. If the reason given is good, and the illustration is in some cases inconsistent, it would seem that the illustration should bend to the reason and not contrariwise.³

¹ Hob. 134. The defendant in *Weaver v. Ward* had no business to let his piece go off; perhaps even no business to have had it loaded. There is no reason to suppose that the English law differs from the Roman. Where a man is killed by a javelin thrown by a soldier in *campo loco*, *ubi solitum est exercitari*, Inst. 4, 3, 4, the *culpa* is all his own; and *quod quis ex culpa sua damnum sentit non intelligitur damnum sentire*, D. 50, 17, 203.

² In *Vin. Abr. Trespass (D)*, 4, it is said: "If a lunatic beats a man this shall not excuse him in trespass, because it is but to repair him in damages"; *Krom v. Schoonmaker*, 3 Barb. 647; and in *Com. Dig. Battery (A)* note (d) (Hammond's ed.): "A man may in the eye of the law be deprived of all control over his will in three ways—either by the motive of self-preservation, by that of preserving others from destruction, or by the visitation of God, namely, in the case of idiocy and madness. It is difficult upon principle to discover any distinction between the instance last supposed and the two former cases; however, authority has declared that if a lunatic hurt a man, he shall be answerable in trespass, Hob. 134." But this was merely an illustration and a dictum. In *Holdon v. Ancient Order of United Workmen*, 50 Am. St. R. 183, the proposition that an insane person is liable for his torts is expressly affirmed.

³ As to the defence of insanity in an action on contract when brought against the party contracting, see *Imperial Loan Co. v. Stone* (1892) 1 Q. B. 599. For the history of the change in the law see the judgment of Fry, L.J., at 601. In 2 Kent, Comm.

In the case of partial comprehension of his act by the lunatic no difficulty can arise; while in the case of utter irresponsibility, where alone the point can arise, the lunatic would in most cases only be able to do harm through the neglect of some responsible agent who would be answerable in *propria persona*. The injured person would, therefore, not be remediless even where the lunatic (*furiosus*) is without fault; in most cases the remedy against the responsible keeper of an asylum, or, in the case of patients under private control, against him under whose control they are, would be ample. In the event of sudden fury falling on a man who thus afflicted kills another, no action would lie under Lord Campbell's Act; ¹ for there would be "no wrongful act, neglect, or default" in the sense in which the law understands those terms, neither would there be any action for various reasons at common law. If the injury were not mortal there seems no greater reason that damages should be recovered than for an explosion utterly without fault, or a collision by inevitable accident. Or again, the rule of law is that loss falls where it lies if *culpa* is not imputable to some other person; the onus then would be to show a cause of action, what Dr. Wharton terms a "juridical cause"; and on proof of the utter irresponsibility of the lunatic, the plaintiff would have to discharge this onus. Again, the better view is that liability for trespass is not absolute and in any event, but dependent on the existence of fault; and here, by hypothesis, there is no fault. The case is much stronger than "if a man by force take my hand and strike you," which is an exception from liability for trespass, according to *Weaver v. Ward*, for it is the act of God which produces the injury.² No case concludes the matter; and the principle that liability has its root in some personal fault,³ points to the exoneration of one irresponsible for his act;⁴

Principle of the irresponsibility of lunatics.

451, it is said: "The principle advanced by Littleton (sec. 405) and Coke (*Berkeley's case*, 4 Co. R. 123. Litt. 247a), that a man shall not be heard to stultify himself, has been properly exploded as being manifestly absurd and against natural justice." See notes to the 13th edition.

¹ 9 & 10 Vict. c. 93.

² In the American case of *Long v. Chicago, &c. Rd. Co.*, 30 Am. St. R. 271, it is said that an insane person is civilly liable to make compensation in damages to those injured by his acts, and *Cross v. Andrews*, Cro. Elis. 622, is cited as authority for the proposition. But that case only decides that an innkeeper cannot plead insanity as a discharge of liability for not keeping the goods of his guest safely. This is manifest enough. Business was carried on either by or for the lunatic, and in either case he could not avoid responsibility. The chief difficulty turns on the definition of insanity—a word that is more consistent with a slight aberration than with entire absence of mental capacity.

³ Holmes, *The Common Law*, 81; *Willets v. Buffell, &c. Rd. Co.*, 14 Barb. 585, 592.

⁴ Lord Penzance's *dictum* in *Mordaunt v. Mordaunt*, L. R. 2 P. & D. 109, 129, was abolished) held to bail, just the same as a sane man. There is no need at common law for the appointment of a guardian, or the nomination of any one to act in the lunatic's place; the suit proceeds in all respects as if the defendant were sane." This is obviously so, for sanity is to be presumed till the contrary is proved; lunacy may be matter of defence, but is clearly not a bar to an action. The case of *Mordaunt v. Mordaunt* itself has no analogy to the question now being considered. It is undoubtedly true that a lunatic or insane person may from the condition of his mind not be a competent witness. Still his incompetency on that ground, like incompetency for any other cause, must be passed upon by the Court, and to aid the judgment of the Court evidence of his condition is admissible; consequently *prima facie* a lunatic is a competent witness. *Reg v. Samuel Hill*, 5 Cox C. C. 259. As to the true test of insanity, see judgment of Sir John Nicholl, *Dew v. Clarke*, 3 Addams Eccl. C. 79, affirmed by Lord Lyndhurst, 5 Russ. 163; also *Faring v. Waring*, 6 Moo. P. C. 341; the judgment of Cockburn, C. J., in *Banks v. Goodfellow*, L. R. 5 Q. B. 549; and per Sir J. Hannen in *Boughton v. Knight*, L. R. 3 P. & D. 73, and *Smev v. Smev*, 5 P. D. 84. "This part of the law," says Cockburn, C. J., *supra*, at 566, "has been extremely

while the authority of the Roman law is clearly in the same direction. Dr. Wharton's view, therefore, seems the correct one. Although, whatever may be the legal conclusions with regard to lunatics, there is no doubt that weakness or hodily illness may bring the consequences of negligence. For a weak man without experience to undertake the management of high-spirited horses, or for one debilitated from sickness to undertake the carrying a heavy load through a crowded thoroughfare, in the case of injury arising to other persons through their incompetency would be imputed to negligence; as the Roman law says: "*nec videtur iniquum si infirmitas culpæ adnumeretur; cum affectare quisque non debeat, in quo vel intelligit vel intelligere debet, infirmitatem suam alii periculosam futuram.*"¹

Infants.

The remainder of Dr. Wharton's proposition refers "to persons so young and inexperienced as to be unable to exercise intelligent choice as to the subject matter." Here, too, it would seem that *culpa* being an element of liability there can be none in its absence; and the presumption is in favour of incapacity till the infant attains the age of fourteen, but this presumption is rebuttable; for *malitia supplet ætatem*.² A young child blinds its nurse, or drops a toy and breaks some valuable article. Plainly, no action would lie against the child even though entitled to a large property. Cases of this sort are, however, so implicated with the negligence of the person in charge of the child or of the contributory negligence of the person injured by the child's act, that the legal position of the child is not necessarily brought into sight. The case of a child unable to exercise intelligent choice is referable to the principle stated by Vaughan, C.J.:³ "A duty impossible to be known can be no duty; for civilly, what cannot be known to be, is as that which is not."

Persons under compulsion.

(2) A person under compulsion cannot be viewed as a person legally responsible. The illustration in *Weaver v. Ward*,⁴ goes to establish this. "If a man by force take my hand and strike you . . . so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence," he shall not be liable.⁵ The compulsion which discharges from liability is not physical only; but that which arises from terror or the instinct of self-preservation. We have already seen an instance of this in *Scott v. Shepherd*.⁶

Alternative perils.

In another case, a coach proprietor neglected to provide a proper coupling rein; and a passenger was placed in such a perilous position, in consequence of the breaking of the one supplied, that he jumped off the coach and broke his leg. Lord Ellenborough⁷ directed the jury, that "it is sufficient, if the plaintiff was placed by the misconduct of well treated in more than one case in the American Courts," which he cites. To those cited add *District of Columbia v. Arnes*, 107 U.S. (17 Otto) 519. By the Roman Dutch law a contract made by an insane person is void: *Molyneux v. Natal Land, &c. Co.* (1905) A. C. 555.

¹ D. 9, 2, 8, § 1.

² 1 Bl. Com. 465. This subject is discussed at length under Contributory Negligence.

³ *Sheppard v. Gosnold*, Vaugh. 159, 166, cited by Tindal, C.J., *Barrow v. Arnaud*, 8 Q. B. 608.

⁴ Hob. 134.

⁵ Cp. *Brown v. Collins*, 53 N. H. 442, 16 Am. R. 372, where there is a very instructive judgment by Doe, J.

⁶ 3 Wils. 403; 1 Sm. L. C. (11th ed.) 454.

⁷ *Jones v. Boyce*, 1 Stark'e, N. P. 493, "which," says Lindley, L.J., in *The City of Lincoln*, 15 P. D. 15, 18, "I have always regarded as sound law." *Pennsylvania Co. v. Stegemeier*, 10 Am. St. R. 136; *Coulter v. American Express Co.*, 56 N. Y. 583, also 5 Lans. 67. The Civil Law says: *Vani timoris justa excusatio non est*: D. 50, 17, 184.

the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover." The inquiry, therefore, is whether the injured person was placed in such a situation as to render what he did a prudent precaution for the purpose of self-preservation. The law is settled in the same sense in America.¹

A consequence that follows is, that, had the plaintiff in leaping injured a person going along the road in the circumstances supposed, he would not be liable; for his act would not be a voluntary act, but the consequence of a third person's wrongful act, and done in the effort to avoid injury to himself.² A further aspect of the same principle is given in *Barton v. Springfield*,³ where the facts showed that as the plaintiff was walking along the street, she was frightened by the attempt of a man to molest her, and in her eagerness to escape fell into a hole, that was negligently left in the side way, but of whose existence she was well aware. Contributory negligence was alleged. The Court held that previous knowledge of a defect, though always an important and often a decisive circumstance in a case, was not necessarily conclusive; since "it is not required that the traveller's thoughts should be constantly on the condition of the way over which he passes or its want of repair," and that fright would justify a momentary forgetfulness of the remoter danger, so as not to disentitle a plaintiff to recover for the defendant's neglect.⁴

Lord Blackburn emphasises this principle while he defines its limits in his opinion in the House of Lords in *The Khedive*; ⁵ alluding to the judgment of Brett, L.J., in the Court of Appeal, he says: "I agree also in what he (Brett, L.J.,) says, that a man may not do the right thing, nay, may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill; and I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much. If, to take the example Lord Justice James gives, the driver of a van cracking his whip makes the horses of a carriage suddenly unmanageable, the fact that the driver of the carriage pulled the wrong rein would be much less cogent evidence of want of reasonable

No liability for injury to bystander.

Previous knowledge of defect not conclusive.

Lord Blackburn's statement of principle in *The Khedive*.

¹ *Stokes v. Saltonstall*, 13 Peters (U.S.) 181; *Twomley v. Central Park Rl. Co.*, 69 N. Y. 158.

² *Holmes v. Mather*, L. R. 10 Ex. 261; *Lowery v. Manhattan Rd. Co.*, 99 N. Y. 158, should particularly be referred to. In *Wakeman v. Robinson*, 1 Bing. 213, the facts show "that the defendant in his alarm pulled the wrong rein." Messrs. Shearman and Redfield, Neg. § 19 n. 1, are of opinion that on this account the decision is not to be supported, since the defendant acted under sudden terror; yet even if this were so, "the accident was clearly occasioned by the default of the defendant," who would therefore be liable for putting himself in such circumstances. Dallas, C.J., clearly states: "If the accident happened entirely without default on the part of the defendant or blame imputable to him the action does not lie." This decision, which is absolutely unimpeachable, is justified (1891), 1 Q. B. 80.

³ 110 Mass. 131.

⁴ *Cp. Reg v. Pitts*, Car. & Mar. 284. Where A by the wrongful act of B loses his presence of mind, and in consequence runs into danger and receives an injury from the act of B, the latter is not protected even though he gave warning to A immediately before the accident: *Woolley v. Scovell*, 3 Man. & Ry. 105.

⁵ 5 App. Cas. 891.

skill or of reasonable care on his part, than if he did the same thing when driving along in the ordinary way, but it would still be evidence." The same principle was acted on in *St. Louis, &c. Ry. Co. v. Murray*,¹ an action by a passenger to recover damages for an injury received in leaping from a railway train to avoid a threatened peril, which it was admitted would have passed by harmlessly had the passenger quietly remained where he was. It was there held that the opinions, declarations and acts of other passengers at the time are admissible in evidence to show how the situation appeared to the person injured and to his fellow-passengers, and that he acted as a man of ordinary prudence would have acted in the same circumstances.

Unconscious agents.

Thomas v. Winchester.

(3) Closely akin to constrained agencies are unconscious agencies. What the position of an intermediate unconscious agent between two conscious agents is in law is illustrated by a leading American case, *Thomas v. Winchester*.² The plaintiff's wife being ill, plaintiff purchased what was believed to be the medicine prescribed from a store of a druggist; the druggist had purchased it of a dealer in New York; the man in New York bought it of defendant. The jar from which the medicine was taken was labelled as " $\frac{1}{2}$ lb. of dandelion prepared by A. Gilbert, 108, John St., N.Y. Jar 8 oz.," at which address, and under the name of Gilbert, the defendant carried on business. The contents of the jar proved to be belladonna, and the plaintiff's wife was seriously injured by taking it. The judge charged the jury that if either of the intermediate druggists was guilty of negligence in not inquiring more particularly into the contents of the jar, the plaintiff was not entitled to recover. The jury found they were not any of them guilty of negligence. The Court of Appeals declined to decide whether the dealer from whom the plaintiff immediately purchased was justified in selling the article on the faith of the defendant's label. The Court held that so far as the plaintiffs were concerned, it did not lie in the mouth of the defendant to aver the negligence of the intermediate salesmen, and thereby to avoid the consequences of his own neglect; and that the plaintiff could recover. Had any such duty to test the article sold existed on the part of the intermediaries, it could not have been said that the injurious result to the plaintiff's wife would certainly have followed; and if the intermediate chemists had a duty of examination, their failure to discharge the duty would have absolved all antecedent agents; for subsequently to their neglect, there would have been the intervention of an independent volition. In which case the neglect of the defendant was not the cause of the injury; since had it only been his neglect the spurious article would never have reached the plaintiff's wife; but the subsequent neglects directed the injurious agency, otherwise innocuous, against her. The train which events follow

Sequence of causes.

¹ 29 Am. St. R. 32.

² 6 N. Y. 397, and *Bigelow, L.C.*, on Torts, 602. There are many cases which establish that the act of an unconscious agent is the act of the party who sets him in motion: per Alderson, B., *Langridge v. Levy*, 2 M. & W. 519, 525. *Davis v. Guarneri*, 4 Am. St. R. 548, is also a case of the negligent sale of poison by a druggist whereby plaintiff's wife was injured. In *Blood Balm Co. v. Cooper*, 20 Am. St. R. 324, the medicine sold was not a deadly poison and no label was affixed calculated to deceive, yet the vendor to the druggist who sold it was held liable. In *Dalziel v. Osborne*, 20 Dmlop 55, the case of a tradesman supplying through ignorance or carelessness a deadly poison in place of a salutary medicine, a defence that he had only undertaken to procure the medicine from another party, was held maintainable. *Bowater v. Smith*, 3 Times L. R. 187.

seems to be—A sets B in motion; C receives B from A. If C does his duty he arrests any irregular effects of A's action on B; if C is negligent he either gives an additional impulse to them, or produces an original irregular effect. C transmits B to D. If D does his duty he arrests any irregular effects of A's or C's actions; if D is negligent he again either accelerates the existing effects, or produces new ones himself; so that if there is no duty upon either C or D to do more than transmit—if they are mere conduit pipes—A, who sets B in motion is liable all through, on the ground that no new force has intervened. There has been a mere transmission of the effects of his originally wrongful act. If there is a duty of examination on C and D, it is difficult to see any principle on which their negligence can be condoned, and A be made liable, which would not, at the same time, land us in obvious absurdities; for the act of A does no harm but for the subsequent neglect of C or D or both.

As a general principle of jurisprudence, every person pursuing his lawful affairs in a lawful way has a right to assume and act on the assumption, that every other person will do the same thing.¹ In general then it is not negligence not to anticipate a failure of duty on the part of those with whom we co-operate.² Nor if we have gone wrong is it to be anticipated that others coming after will slavishly act upon our wrongdoing.³

The law, as laid down by the judge in charging the jury, is correct. Correct. And the jury having found that neither of the intermediate agents principle. was more than an irresponsible conduit, the decision is a right one.⁴ Brett, M.R., as reported in *Heaven v. Pender*,⁵ seems to doubt this; but it is obvious on reference to the authority to which he refers for the facts of the case, that the direction of the judge of first instance was not before him, and that his doubts are confined to the decision of the Court of Appeals.⁶ While, on the one hand, one knowingly putting on the market a death-dealing fluid cannot claim immunity, "because he sent it through many hands,"⁷ on the other, a person who knowing the perilous character of a compound which he has bought, yet hands on the compound to a third person,⁸ destroys, by his negligent act, the causal connection between the first person concerned and the ultimate injury sustained.⁹ Of course this immunity, by reason of absence of negligence, only holds good in actions *ex delicto*; in actions *ex contractu* the contractual relation binds the defendant to

¹ *Jetter v. New York, &c. Rd.*, 2 Keyes 154; *Murphy v. G. N. Ry. Co.* (1897) 21 R. 301.

² *Daris v. New York, &c. Rd.*, 150 Mass. 532.

³ *Callerne v. London & Suburban General Permanent Building Society*, 25 Q. B. D. 485, 489. To exonerate, "a new wrongful act by independent persons" must be "the real cause of the loss;" of course if the negligences co-operate, it is otherwise. All engaged are liable.

⁴ See, too, *Brass v. Maitland*, B. E. & B. 470; *Farrant v. Barnes*, 11 C. B. N. S. 553.

⁵ 11 Q. B. D. 503, 514. *Phillips v. Wilders* (1869), 2 Lans. (N. Y.) 389; *ante*.

⁶ A similar view of the law to that taken in the text and giving the go-by to the view of the Court of Appeals, is taken by Gray, J., in *Wellington v. Downer Kerosine Oil Co.*, 104 Mass. 64, 68, who limits the druggist's liability to the case where "there is no negligence on the part of the intermediate sellers or of the person injured." The cause of action was selling naphtha without giving notice of its dangerous qualities.

⁷ Per Agnew, C.J., *Elkins v. McKean*, 70 Pa. St. 493, 502.

⁸ There is a duty cast on a vendor who knows of the dangerous character of goods which he is supplying, and also knows that the purchaser is not, or may not be, aware of it, not to supply the goods without giving some warning of the danger to the purchaser. *Clarke v. Army & Navy Co-operative Society* (1903), 1 K. B. 155.

⁹ *Carter v. Towne*, 103 Mass. 507; see also 98 Mass. 567; *Wellington v. Downer Kerosine Oil Co.*, 104 Mass. 64.

the performance of his contract, whatever it is, even if the wrong or injury is the work of an intermediary.¹

Distinction between goods supplied by maker and goods indicated by a trade mark.

A distinction may be noted here also. The contract may be either for some article supplied by the vendor out of his ordinary stock, or for some special brand obtainable only from the maker. If, for example, bottled beer were ordered and vitriol by mistake supplied, the seller would not only not have performed his contract, but would have rendered himself liable for any damages caused by his mistake. If, however, Bass's bottled ale being ordered, the vendor obtained properly labelled bottles from the proper source,² which in the result proved to contain vitriol, from tasting which the purchaser was seriously injured, there would seem to be a difference in the vendor's liability. He would not have supplied Bass's bottled ale, and so on the principle of *Wieler v. Schilizzi*,³ the purchaser would be entitled to reject the article; or if he had paid for it to recover the price as money had and received for his use,⁴ and also, if there were a warranty in the sale, damages arising as a natural consequence;⁵ though not if the contract, as seems most probable, were held to be fulfilled by supplying an article authenticated by Bass, or the bottler, as Bass's bottled beer. Setting this point aside, the case now put differs from the other case in the circumstance that though the vendor might be liable for the price, he would not be liable for the serious consequences of the mistake. Since not only is there no duty on him to examine and satisfy himself that what he sells is Bass's bottled beer,⁶ but the very act of breaking the label would be a breach of his duty and destroy the value of the commodity he was to supply.⁷ This was held in a Scotch case⁸ where an action was brought against a retail grocer for selling tinned salmon that proved inedible. "A grocer who gets a quantity of tins of preserved food and sells them to the public as he got them, cannot be liable for the condition of the contents of the tins if he buys from a dealer of repute."⁹ *Cramb v. Caledonian Ry. Co.*¹⁰ must be noted in this connection. It was an action brought against carriers and a grocer in respect of death caused by eating poisoned sugar.

Cramb v. Caledonian Ry. Co.

¹ *Burrows v. March Gas Co.*, L. R. 5 Ex. 67; Ex. Ch. L. R. 7 Ex. 96; *Eaton v. Boston, &c. Rd. Co.*, 93 Mass. 500.

² The case of a patent medicine with a Government stamp affixed is even stronger.

³ 17 C. B. 619; *Randall v. Newson*, 2 Q. B. D. 102.

⁴ *Chantler v. Hopkins*, 4 M. & W. 399.

⁵ *Smith v. Green*, 1 C. P. D. 92; 56 & 57 Vict. c. 71, s. 53; *Jones v. Just*, L. R. 3 Q. B. 197; *Jones v. Pudgett*, 24 Q. B. D. 650.

⁶ The Merchandise Marks Act, 1887, 50 & 51 Vict. c. 28, s. 17, does not imply a warranty of the beer, but only that the "mark is a genuine trade mark and not forged or falsely applied"; as to this last see s. 5, sub-s. 3; and that the trade description is not a false trade description, see s. 3, sub-s. 1. Cp. *Burnby v. Bellott*, 16 M. & W. 644; *Emmerton v. Matthews*, 7 H. & N. 586; *Smith v. Baker*, 40 L. T. 261. See Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 14, and *Hard v. Hobbs*, 4 App. Cas. 13. Under s. 14, sub-s. 1, whether the purpose for which an india-rubber hot water bottle was required was made known to the seller was held a question of fact in *Preist v. Last* (1903), 2 K. B. 148; milk was held self-descriptive in *Frost v. Aylesbury Dairy Co.* (1905), 1 K. B. 608. Beer supplied at a tied house was held a sale by description, and thus with an implied warranty under s. 14, sub-s. 2 in *Wren v. Holt* (1903), 1 K. B. 610; *Chaproniere v. Mason*, 21 Times L. R. 633.

⁷ The purchaser could sue the bottler on the warranty contained on the label and recover all damages; though this was not decided in *George v. Skivington*, L. R. 5 Ex. 1, it was in *Blood Balm Co. v. Cooper*, 20 Am. St. R. 324. *Bostock v. Nicholson* (1904), 1 K. B. 725, indicates the measure of damages where on a sale by description of sulphuric acid commercially free from arsenic the goods supplied were not so free.

⁸ *Gordon v. M'Hardy*, 6 Fraser 219.

⁹ Per Lord Justice-Clerk Macdonald, *loc. cit.* 212.

¹⁰ 19 Retue 1654.

The sugar had been delivered to the Caledonian Ry. Co. as carriers; they had packed it in proximity to some weed-killer they were carrying, the properties of which they were ignorant of. When the sugar was delivered it was wet; this was shown to be a usual incident in the carriage of sugar, and not necessarily injurious. The grocer, to whom the carriers delivered it, sold some to a person, in respect of whom the pursuer sued. After eating of the sugar those partaking were very seriously affected, and two of them died in consequence. It then appeared that the weed-killer was an arsenical preparation, the exudation from which poisoned the sugar. The consignors of the weed-killer consented to pay damages (they had set in motion a deadly agency without warning those dealing with it), but the Court was of opinion that neither the grocer who sold the sugar nor the carriers were liable in the absence of knowledge or means of knowledge of the injurious ingredients of the weed-killer. This decision seems correct Criticised. as the case was presented. Had the grocer been sued in England on the warranty that the sugar was fit for food, or under the sale of Goods Act 1893, s. 14, sub-s. 1, which Collins, M.R., says consolidated the law, "which seems to me to be just the same under the statute as it was under the common law," he would probably not have escaped. At common law "the giving of any person unwholesome victuals not fit for man to eat, *lucris causa*, or from malice or deceit, is undoubtedly in itself an indictable offence";¹ and consequently actionable for any one who sustains special and particular damage.

The principle that to fix liability for injuries brought about through a complicated state of facts, the last conscious agency must be sought; and the consideration that, if, between the agency setting at work the mischief and the actual mischief done, there intervenes a conscious agency, which might or should have averted mischief, the original wrongdoer ceases to be liable, afford the clues for the unravelling the cases. On the other hand, it must be borne in mind that, though there may intervene various stages in the development of the mischief, yet, if none of these is due to a conscious volition, the last conscious agent continues to be liable.

*Heaven v. Pender*² is the case most often cited on this point. A *Heaven v. Pender*. The dock owner supplied and put up a staging as incident to the use of his dock, so that vessels there might be painted and repaired. The ropes by which the staging was slung were scored and unfit for use, and were supplied without a reasonably careful attention to their condition. The plaintiff, a ship-painter working under an employer who had a contract with the shipowner to paint his ship in dock, while engaged on the work, fell, and was injured. He brought his action against the dock owner. A Divisional Court held that as there was no contract between plaintiff and defendant, no fraud on the defendant's part, and no breach of duty to tell the truth, the defendant was entitled to judgment. The Court of Appeal reversed this judgment; Cotton and Bowen, L.JJ., on the ground that "the dock owner was

¹ 2 East P. C., 822.

² 11 Q. B. D. 503; 9 Q. B. D. 302; distinguished in the H. L. in *Caledonian Ry. Co. v. Warwick*, 25 Rottie (H. L.) 1. overruling the Court of Session, and negating a duty on a railway company to take care that their waggons were in good condition after they had been taken by the consignees of the goods in them by permission of the railway company beyond the place of delivery by the company and for the convenience of the consignees. *Cp. King v. G. W. Ry. Co.*, 24 L. T. N. S. 583.

Ground of the decision of the majority. Cotton and Bowen, L.JJ.

under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they were employed.”

Brett, M.R.'s
proposition.

Brett, M.R., however, formulated the proposition, that “ whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.”

Suggested
ground of
the decision.

It is submitted that the principle underlying the decision in *Heaven v. Pender* is, that the dock owner, having undertaken to supply the staging, thereupon undertook the obligation to supply a fit staging, which obligation the plaintiff was justified in assuming he would discharge.¹ Had there been a duty on the shipowner or on the ship-painter to examine the staging, the chain of connection between the plaintiff and the dock owner would have been broken. The decision must, therefore, be taken to imply that there was no duty on the part of any one, subsequent to the dock owner, to test the staging supplied; but that, when the dock owner undertook to supply staging, there was an obligation that the staging supplied should be reasonably fit for the purpose for which it was to be used;² so that those coming to use it might trust to the performance of the dock owner's duty without any independent examination of their own. The difficulty of the case is to determine between those cases where the obligation to inquire arises, and those cases where there is no such obligation. The presence or absence of this obligation, in each case, marks the intervention of that new conscious agency or its absence which discriminates whether the right of action exists in the original negligent person or is diverted. Tried by this test the cases are entirely consistent, as may be shown by an examination of them.

One of the earliest is *Milne v. Smith*.³ A plasterer was employed on a building and in the course of his work cut an opening in the staircase and made a communication with an adjoining house. When he left his work he neglected to protect the opening, and the passage was used by other workmen for the purposes of their work. Plaintiff was a journeyman carpenter who, going up the staircase in the dark (the point was not taken that this was contributory negligence), fell through the opening and was injured. In giving his opinion in the House of Lords, Lord Redesdale said “ the injury did not arise from the opening of this passage, which was lawful, but from not properly closing it up, or guarding it at night when they left working.” Defendant “ had quitted the premises and had left others working there, and it was

¹ *Edwards v. Hutcheon*, 16 Rettie 694, illustrates the same principle. A person knowingly supplying a defective dangerous machine is liable to those injured by it, who in the ordinary course of their duty have to work the machine in the circumstances of danger he has created. The case, however, was apparently decided on the contract to furnish a reasonably fit machine, which was not performed, whereby the farmer, the contracting party, was injured through the injury done to his daughter. See remarks of the judges as to the difference of English law.

² *Randall v. Newson*, 2 Q. B. D. 102.

³ 2 Dow 390.

their duty" to close it up. Admitting that the making of the hole was wrongful, so soon as it was accepted and used by others the wrongful act ceased so far as the original wrongdoer went to carry the liability here contended for.

In *Langridge v. Levy*,¹ the father of the plaintiff bought a gun of *Langridge v. Levy*. the defendant for the use of himself and his sons. The defendant fraudulently warranted the gun to have been made by a celebrated gunmaker. The plaintiff used it; it exploded and injured him. On suing the defendant, the plaintiff recovered on the ground that, as there was "fraud and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." The case may be put thus: the plaintiff having the professional knowledge of the vendor to act on, was not bound himself to test the gun, and might rely on the representation of the vendor. If this were so, the fraud of the vendor was an expression larger than was necessary to state the ground of the decision, that the conduct of the gunmaker was such as to absolve the plaintiff's father and the plaintiff from making any independent inquiry;² and since there was no call for an independent volition to intervene between him and the accident, and none in fact did intervene, the liability for the consequences could be referred back to him.

*Longmeid v. Holliday*³ brings out the point even better. The defendant, a lamp-seller, sold a lamp called the Holliday patent lamp to the plaintiff for the use of himself and his wife. The lamp was defectively constructed, though the defendant did not know it; and the jury found that he was not guilty of any fraudulent or deceitful representation, but sold the lamp in good faith. The lamp exploded, and plaintiff's wife was injured. The Court of Exchequer held that no action lay. "It would be going too far," said Parke, B., "to say that so much care is required in the ordinary intercourse of life between one individual and another, that if a machine, not in its nature dangerous—a carriage, for instance—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care—should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it." The lamp, without fraud, is handed from one person to another, and there is no consciousness of any defect; while the duty of inquiring is negatived. So the defendant is not liable because he is a mere conduit pipe, and has not been required to exercise any independent volition in the matter.

Had the case occurred subsequently to the decision in *Preist v. Last*⁴ it is difficult to see how the same conclusion would have been come to; for "the fact that by the very terms of the sale itself, the

¹ 2 M. & W. 519, 4 M. & W. 337; *Pilmore v. Hood*, 5 Bing. N. C. 97.

² "The father having bought the gun, for the very purpose of being used by the plaintiff, the defendant made representations, by which he was induced to use it"; per Alderson, B., *Winterbottom v. Wright*, 10 M. & W. 109, 115. See, too, per Lord Cairns, *Pick v. Gurney*, L. R. 6 H. L. 377, 412, approving Wood, V.C., in *Barry v. Croakey*, 2 J. & H. 117-18-23; *Gerhard v. Bates*, 2 E. & B. 476, 491.

³ 6 Ex. 761, 20 L. J. Ex. 430. Both the reports state that the evidence was that the lamp "was sold to the plaintiff's wife for the purpose of being used by him and his wife." The declaration, however, states that it was sold to the plaintiff himself. See 56 & 57 Viet. c. 71, s. 14.

⁴ (1803) 2 K. B. 148.

article sold purports to be for use for a particular purpose cannot possibly exclude the case from the rule that, where goods are sold for a particular purpose, there is an implied warranty that they are reasonably fit for that purpose."¹

Winterbottom v. Wright.

*Winterbottom v. Wright*² comes next. Defendant contracted with the Postmaster-General to provide coaches to convey the mails. One Atkinson was under contract with the Postmaster-General to supply horses and coachmen for the coaches so supplied, and to use no others. The plaintiff was hired by Atkinson as one of the coachmen. Through failure of the defendant to perform his contract properly, the plaintiff was injured and brought his action. The Court of Exchequer were agreed that the plaintiff could not recover. Lord Abinger, and Alderson, B., on the unsatisfactory ground that unless the operation of such contracts was confined "to the parties who entered into them the most absurd and outrageous consequences, to which I can see no limit, would ensue;" and Rolfe, B., on the ground that there was no duty to the plaintiff from the defendant. Lord Abinger gives the further reason: "By permitting this action we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him."

Heizer v. Kingsland and Douglas Manufacturing Co.

In an American case, *Heizer v. Kingsland and Douglas Manufacturing Co.*³ the principle is very clearly put. One who makes and sells a piece of machinery is not liable to persons other than the vendee for injuries caused by its breakage, unless such machinery is of an inherently dangerous character, and the maker has failed to make known its true nature; or has sold it, knowing it to be defective, without informing the vendee of the defect. The fact that the defendant must be charged with the knowledge, that the machinery would be worked by other people, is not in itself a sufficient reason for holding the vendor liable to them for the consequences of mere negligence, on his part, in using poor materials or putting them together unskillfully.⁴

*Winterbottom v. Wright*⁵ was held to conclude *Earl v. Lubbock*,⁶ where a wheel came off a van and the driver sued his employer's contractor for breach of duty under his contract to repair, from which the driver sustained damage. The proposition of Brett, M.R., in *Heaven v. Pender* was cited only to be definitely rejected. A contractual obligation as such is weighted with no duty to the world at large. If fraud enters into it, the legal consequences of fraud attach to the author so far as they flow. His conduct has blinded the owner, and the chattel has gone into the world and worked mischief; for this the author of the fraud is answerable. If the thing supplied is dangerous, that is, possesses any latent property that may probably work mischief unless precaution is observed, the transferee must be warned; otherwise the liability of setting a dangerous agency in motion may attach.⁷ If the contract is merely a contract to supply something

¹ Per Collins, M.R., *l.c.* 153.

² (1842) 10 M. & W. 109. See *Roddy v. Missouri Pacific Ry. Co.*, 24 Am. St. R. 333.

³ 33 Am. St. R. 482.

⁴ As to implied conditions as to quality or fitness between the parties, 56 & 57 Vict. c. 71, s. 14.

⁵ 10 M. & W. 109.

⁶ (1905) 1 K. B. 253.

⁷ Cp. *Clarke v. Army and Navy Co-operative Stores* (1903), 1 K. B. 155.

not intrinsically dangerous, and an accident happens through its use, no liability attaches to the person who supplies it. The contract may be for the very thing supplied in its plain condition. At any rate, a liability to all the world for accidents arising through the use of low-priced articles, or those repaired in a particular or makeshift way, is not to be traced back beyond the person under whose authorisation they are in use. He has the duty to examine and approve.¹

*George v. Skivington*² was treated in the Divisional Court in *Heaven v. Pender*³ as irreconcilable with *Winterbottom v. Wright*. It is not so, *George v. Skivington*. but quite consistent. Moreover, the consequences of using the thing were dangerous in the sense just defined. Plaintiff purchased a chemical hairwash for his wife which proved extremely deleterious, and produced injury to her health. "The article was, to the knowledge of the defendant, supplied for the use of the wife and for her immediate use."⁴ The Court of Exchequer held an action on behalf of the wife maintainable. The profession of a special skill by the defendant, and the description of the hairwash as a chemical composition, which implied that ordinary persons would be unable to test it, even if desirous to do so, were circumstances that exonerated the plaintiff from the duty of any independent examination in the matter. Had the case gone to a jury, the judge would probably have asked them whether they considered the plaintiff or his wife should have inquired into the constitution of the chemical that was given them. The decision was, moreover, on demurrer, and cannot be held to establish more than that such a state of facts as is set out in the declaration raises no necessary implication that the plaintiff or his wife had a duty to examine the goods supplied them; and that, failing a finding of the jury to the contrary, they are presumed to be justified in not exercising their independent judgments in the matter, and in trusting to the chemist who supplied them.⁵ Considered.

*Corby v. Hill*⁶ belongs to another class of cases. An obstruction was placed on a private road leading to a house; and the plaintiff while lawfully using the road was injured by the obstruction. The Court of Common Pleas held that he could recover. The opening the road was an intimation that it did not differ from the ordinary condition of similar roads; the placing the obstruction was the negligent act of a conscious agent which, till counteracted by some subsequent voluntary agency, rendered the actor liable for the consequences. So, too, in *Indermaur v. Dames*.⁷ The premises were not in the condition of an ordinary safe warehouse, though they ought to have been. The neglect to take some step to make their condition, with regard to *Corby v. Hill*. *Indermaur v. Dames*.

¹ *Caledonian Ry. Co. v. Mulholland* (1898), A. C. 216, was commented on in *Trull v. Actieselakabai Dalbrattie*, 6 Fraser 798, where rope was supplied by shipowner to stevedore, and stevedore's labourer was hurt through its insufficiency. *Wood v. Mackay* (1906), 8 Fraser 625.

² (1869) L. R. 5 Ex. 1. See, too, *Pippin v. Sheppard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing. N. C. 733; *Strelton v. Holmes*, 19 Ont. R. 286.

³ 9 Q. B. D. 302.

⁴ *Heaven v. Pender*, 11 Q. B. D. 503, per Brett, M.R., 512.

⁵ Chitty, J., followed *George v. Skivington* in the very different case of *Cunn v. Willson*, 39 Ch. D. 39, 43, which was overruled in *Le Lievre v. Gould* (1893), 1 Q. B. 491, but on another ground than that raised here: *l.c.* 497, 502, 503, 504. In *Cavalier v. Pope* (1905), 2 K. B. 757, Collins, M.R., 761, after citing it adds: "Even assuming that the latter case can be supported."

⁶ 4 C. B. N. S. 556.

⁷ (1866) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

strangers lawfully doing business there, of such safety that no greater than ordinary care would be required to avoid accident, was the negligent act whence flowed the liability. No conscious will intervened between the negligent act and the accident, and those responsible for the negligence were liable.

Smith v. London and St. Katharine Docks Co.

This is also the explanation of *Smith v. London and St. Katharine Docks Co.*¹ A dock company provided gangways which afforded the only access for persons having business with the ships in their docks. The plaintiff passed over the gangway to a ship in the dock in safety. Before he returned, it had been rendered unsafe by the defendants' servants, and in returning he was injured. Assuming the plaintiff's right to pass on to the ship (and if he had no such right he would come under a different principle)² he was entitled to assume that the means of ingress and egress provided were suitable. The negligent act causing liability was the interfering with the condition of the gangway so as to render it insecure, and was the last act of a conscious will previous to the accident; hence a liability on those responsible for it.

Gautrel v. Egerton.

*Gautrel v. Egerton*³ illustrates the other side of the rule. A duty on canal proprietors was there averred to keep the bridges and paths of their canal in a safe condition for the benefit of all who chose to go along them and were not hindered by the canal authorities. The Court held that the declaration was demurrable, because there was no allegation that the canal proprietors *did* anything to make the place dangerous; and mere licensees must take the places they visit as they find them. There was no act of the will, and so no liability.

Collis v. Selden.

The next case is *Collis v. Selden*:⁴ an action was brought against the defendant (apparently a fitter) for negligently hanging a chandelier in a public-house. The plaintiff was in the public-house—in what character did not appear from the declaration—and was injured by the fall of the chandelier. The Court held he could not recover. He might have been a guest, and that alone would not give him a cause of action;⁵ and, further, no breach of duty was shown. The proprietor might, consistently with the declaration, have contracted with the defendant for a certain kind of fitting, or that it should be put up in a merely temporary manner. The same considerations as weighed in *Winterbottom v. Wright* and *Earl v. Lubbock* were present here also. At any rate, assuming the householder's liability, there is a duty on every householder to see to the state of his own premises;⁶ and between the wrongful act of the fitter (if indeed his act was wrongful) and the injury to the plaintiff, there was the opportunity for the intervention of the will of the proprietor, and, may be, a duty on him to intervene; thus on this, if on no other ground, the plaintiff could not recover.

¹ (1868) L. R. 3 C. P. 326; *Campbell v. Morrison* (1891), 19 Rottie 282.

² (1862) *Holch v. Smith*, 7 H. & N. 730.

³ (1867) L. R. 2 C. P. 371. In *Bulman v. Furness Ry. Co.*, 32 L. T. N. S. 430, a distinction was drawn between the passive negligence alleged in *Gautrel v. Egerton* and "active negligence" as alleged in this case; and a declaration was held good on demurrer which stated that plaintiff was "lawfully" in the place where he sustained injury by an act of "active negligence" on the part of the defendants.

⁴ (1868) L. R. 3 C. P. 495.

⁵ *Southcote v. Stanley*, 1 H. & N. 247.

⁶ For the defective repair of "premises let to a tenant, the occupier and the occupier alone being *primi facie* liable," per Lopes, J., *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311, 313.

*Francis v. Cockrell*¹ may be cited in further confirmation of this principle. A stand was erected by contractors for the defendant, who let out seats there for hire; the construction of the stand was improper and negligent, though there was no want of care on the part of the defendant, and there was no evidence that if he had inspected it he would have found the defect. The stand fell: the plaintiff was injured, brought his action and recovered. Hannen, J., after saying there was no distinction between the liability of the defendant and that of a carrier of passengers, goes on: "The passenger does not know whether the carrier has himself manufactured the means of carriage or contracted with some one else for its manufacture. If the carrier has contracted with some one else, the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control; while the carrier can introduce what stipulations and take what securities he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care, the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier." The duty of the defendant to the plaintiff raised an implied warranty that due care had been used in the construction of the stand. By letting out the work he, in a manner, subdivided his responsibilities without affecting the total of them. For all his own acts he remained as liable as if he himself had done the work. In addition, his undertaking was that the contractors should not fall short of the standard his own work was bound to reach. He had a duty to test the whole. The failure of the contractor's work was the breach of duty from which damage arose; and, the defendant being responsible for it, the plaintiff rightly recovered.

The same principle explains the Scotch case of *M'Gill v. Bowman*,² where Lord Young says: "If I have painters to work in my house and undertake to supply the ladders to the master's satisfaction and do so, am I subject to an action by one of the painters if the ladders prove too weak? Surely not. I think that would be an entirely erroneous proposition;" because the contract is to supply ladders to be approved. The approval implies examination; the person supplying is, therefore, not necessarily bound to the supplying of safe ladders, but only of ladders to satisfy the person with whom his contract is.

A stevedore is not called on to look to the security of the fastenings on board a ship on which he has to work. If the charterer warrants

¹ (1870) L. R. 5 Q. B. 184, 501, discussed *Faux v. Williamstown Bathing Co.*, 29 V. L. R. 459. *Duncan v. Perthshire Cricket Club*, 42 Sc. L. R. 327 (collapse of a stand); *Glass v. Paisley Race Committee* (1902), 5 Fraser 14; the sub-letting of a portion of a race-course for a stand does not as matter of law exonerate the lessee from liability for the instability of the stand; but in *Philippa v. Humber*, 6 Fraser 814, the defendant, the lessee of waxworks to which a shooting gallery was attached and sublet, was held not liable for negligence of the sub-tenant. *Kendall v. Boston (City of)* (1875), 118 Mass. 234, does not seem correct.

² 18 Rettie 206, 211.

³ *M'Lachlan v. S.S. Peveril*, 23 Rettie 753; *Simpson v. Paton*, 23 Rettie 590; *Biddle v. Hart*, 23 Times L. R. 262, appears to be irreconcilable with these. The Courts seem to have been at cross purposes in this case. The Divisional Court held that it was plain from the evidence that the defective plant was part of the ship's tackle. But the President of the Probate Division in the C. A. appears to have concluded that the stevedore borrowed it, and therefore was under a duty, and so

Francis v. Cockrell.

Judgment of Hannen, J.

the duty of

M'Gill v. Bowman.

Stevedore's and charterer's duty not identical.

the plant he supplies and the plant proves inadequate, the stevedore is liable to his men; because there is a duty on him to see that his plant is adequate. As between himself and the charterer he is entitled to trust to his warranty; as between himself and his men he is in default in not supplying them with proper plant; but he is entitled to recover from the charterer the amount which he has to pay to the workmen as damages.¹ The existence of this warranty rendered an appeal useless in *Marney v. Scott*.² There Bigham, J., negated a duty on the charterer of a ship "to have the vessel surveyed from stem to stern for the purpose of ascertaining that every little appliance that may come into use is in perfect order" before admitting the stevedore's men to load. "Business would be impossible if such a duty were cast upon him." "But I cannot help thinking that when a vessel comes into port after a voyage, though it is only a coasting voyage and though the vessel is in ballast, some slight attention ought to be devoted to the condition of the tackle and appliances which the stevedore's labourers are to use." In ordinary course the stevedore's duty is to see that the ship is reasonably fit for his men to work on—the duty is the same as that of any other employer. Bigham, J., assumes that the charterer's duty to the stevedore's men is the same as the stevedore's duty to them. But the stevedore's relation to the charterer is contractual only—to take in hand a certain work on a certain thing on terms.³ As to the shipowner's liability to the workmen, Cotton and Bowen, L.JJ.'s, principle in *Heaven v. Pender*⁴ seems to apply: there was "an obligation to take reasonable care that at the time the appliances provided for immediate use were provided" "they were in a fit state to be used—that is, in such a state as not to expose those who might use them to any danger or risk not necessarily incident to the service in which they were employed."⁵

Marney v. Scott.

Bigham's, J.'s, judgment criticised.

Robertson v. Fleming.

Robertson v. Fleming,⁶ in the House of Lords, at first sight may not seem to accord with our principle. "I never had any doubt of the unsoundness of the doctrine," says the Lord Chancellor,⁷ "that A employing B, a professional lawyer, to do any act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C, if through the gross negligence or ignorance of B in transacting the business C loses the benefit intended for him by A, C may maintain an action against B and recover damages for the loss sustained." The principle, however, determining the right of action is that every man has a property in life, liberty, estate, and reputation, so that if these are violated the law gives a remedy. But the law does not recognise expectations, except so far as they have their root in property.⁸ Thus, says Comyns:⁹ "An action upon the case does

Law does not recognise expectations, except so far as they have their root in property.

failed to grapple with the decision in the Divisional Court that the accident arose from the things on which the stevedore was engaged to work, not with what he borrowed.

¹ *Mowbray v. Merryweather* (1895), 2 Q. B. 640. ² (1899) 1 Q. B. 986, 993.

³ *Murray v. Currie*, L. R. 6 C. P. 24; *Earl v. Lubbock* (1905), 1 K. B. 253. *Ante*, 50.

⁴ 11 Q. B. D. 515. *Le Lievre v. Gould* (1893), 1 Q. B. 491, per Bowen, L.J. 502.

⁵ *Scott v. Foley, Aikman & Co.*, 5 Com. Cas. 53, where defendant in *Marney v. Scott* recovered in an action against the shipowners on their warranty.

⁶ 4 Macq. 167. *Tully v. Ingram*, 19 Rettie 65.

⁷ Lord Campbell, 177. The rest of the Court, consisting of Lord Cranworth, Wensleydale, and Chelmsford, approved.

⁸ "It is sufficient to say that no one can maintain an action unless there is some injury to something to which the law recognises his title": per Cotton, L. J., *Hurdman v. N. E. Ry. Co.*, 3 C. P. D. 168, 175. Com. Dig. Action (A) 2; *Ashby v. White*, 1 Smith L. C. (11th ed.) 240.

⁹ Com. Dig. Action on the Case (B) 1.

not lie when there is not any temporal damage; as against a woman who pretends herself single, and inveigles a man into a marriage, whereby he was disturbed in conscience. Nor does it lie for refusing to administer the sacrament; nor for not reading divine service to him and the tenants of his manor. Nor for a legacy, for it is only due by the spiritual law." The benevolent intention of a testator to a legatee does not raise in the legatee any legal right whatever; for the legatee has received no injury to person, property, or right, apart from a probability that, if the course of things had been other than it actually turns out, a right would have vested in him. The law draws the line at a vested right, and will not entertain expectancies of rights as importing obligations.¹ Neither person nor property is injured, only hopes or calculations; there is no contract between the person injuring and the person injured, and no fraud.

Hawkins, J.,² in *Thrusell v. Handyside*, cites with approbation *Thrusell v. Handyside*. Brett, M.R.'s, proposition; though for the decision of the case, in the learned judge's view of the facts, it was sufficient to say that a dangerous business was being carried on without precaution, and injury resulted. In which case in any view there would be a liability; since it is undoubted that a dangerous business is not to be carried on with a neglect of any reasonable precautions. In the earlier case of *Elliott v. Hall*,³ the Court seems studiously to avoid the invitation to adopt the principle laid down by the Master of the Rolls, at least with any of the width of interpretation of which the language is susceptible. Defendant, a colliery owner, consigned coals sold by him to the buyers by rail in a truck rented by him from a waggon company for the purposes of the colliery. Through the negligence of the defendant's servants the truck was allowed to leave the colliery in a defective state. In consequence of the defect in the truck, injury was caused to the plaintiff, one of the buyer's servants, who was employed in unloading the coal. The Court held the plaintiff entitled to recover, "quite independently of the decision of the Court of Appeal in *Heaven v. Pender*;" because "it was clearly part of the contract for the sale of the coal to the plaintiff's employers that it should be conveyed in a truck to the buyer's, and it must necessarily have been contemplated that, when it arrived at its destination, the truck would be unloaded by the buyer's servants, I think it is plain that under these circumstances a duty arose on the part of the defendant towards the plaintiff. If vendors of goods forward them to the purchasers, and for that purpose supply a truck or other means of conveyance for the carriage of the goods, and the goods are necessarily to be unloaded from such means of conveyance by the purchaser's servants, it seems to me perfectly clear that there is a duty on the part of the vendors towards those persons who necessarily will have to unload or otherwise deal with the goods to see that the truck, or other means of conveyance, is in good condition and repair, so as not to be dangerous to such persons."⁴

In the New York Court of Appeals, some years previously to the decision in *Heaven v. Pender*, a case⁵ was decided on facts very similar *Coughtry v. Globe Woolen Co.*

¹ Cp. *Rogers v. Rajendro Dutt*, 13 Moore, P. C. C. 209.

² 20 Q. B. D. 363.

³ 15 Q. B. D. 315.

⁴ Per Grove, J., 15 Q. B. D. 319.

⁵ *Coughtry v. Globe Woolen Co.* (1874), 56 N. Y. 124. See *Horne v. Meakin*, 115 Mass. 326.

to those in *Heaven v. Pender*, and in the same way, without resorting to any such proposition as that suggested by Brett, M.R. A scaffold was erected by the defendant upon his own premises for the express purpose of accommodating workmen engaged under a contract to do work there. A workman of the contractor, while using the scaffold, fell by reason of its negligent construction, and was killed. His representatives sued for damages for his death. A nonsuit was entered at the trial, and affirmed by the general term of the Supreme Court. The Court of Appeals unanimously reversed this and ordered a new trial, on the ground that the defendant actually furnished the scaffold for the express purpose of enabling and inducing the men, who were to do the work, to go upon it; and as it was erected by the defendant, was in his possession, and was in use on his premises, with his permission, for the very purpose for which it had been furnished, and by the persons for whose use it had been provided, a duty was raised thereby to those who were rightfully using it. This almost in terms conforms to the test already suggested, that between the time when the defendant last exercises control, and the time of the occurrence of the accident, there is no interval in which a new conscious agency operates.

American
opinion.

The supposed canon of Brett, M.R., has, however, been accepted in the United States as "accurately expressed;"¹ and a disposition has been shown there to adopt the entire breadth of signification of which the expression of this generalisation is capable; yet, to judge from Messrs. Shearman and Redfield's book, without an appreciation of what was sought to be enunciated. They say:² "As it is admirably put by Mr. Horace Smith, 'The true question always is, has the defendant committed a breach of duty apart from contract? If he has only committed a breach of contract he is liable to those only with whom he has contracted; but if he has committed a breach of duty he is not protected by setting up a contract in respect of the same matter with another person.' This principle is not stated positively in any decision or judicial opinion, except the masterly opinion of Lord Esher in *Heaven v. Pender*, which was not concurred in by a majority of the Court." It may be pointed out, however, that the majority of the Court did not withhold assent from the proposition, that breach of contract imports liability; nor from the proposition, that if a man has been guilty of a tort he is not protected from its consequences by reason of having a contract in the same matter. The proposition the majority of the Court would not accept, was rather that the test of breach of duty towards the world at large, is, whether ordinary people of ordinary prudence could foresee injury as likely to arise from conduct.³

Le Lievre v.
Gould.

The limits of *Heaven v. Pender*⁴ are indicated in *Le Lievre v. Gould*⁵ as not going beyond a duty to take due care when the person or property of one is in such proximity to the person of another, that if due care be not taken damage may be done by the one to the other; though, as Smith, L.J., observed,⁶ the case "is often cited in support of all kinds of untenable propositions." Lord Esher, M.R.'s, own state-

¹ *Wabash, &c. Ry. Co. v. Locke*, 2 Am. St. Rep. 193, 199; *Harriman v. Pittsburg, &c. Ry. Co.*, 4 Am. St. Rep. 507, 518.

² Negligence, § 116.

³ *Cp. Dickson v. Reuter's Telegram Co.*, 3 C. P. D. 1.

⁴ 11 Q. B. D. 503.

⁵ (1893) 1 Q. B. 491.

⁶ (1893) 1 Q. B. 491, 504.

ment may with advantage be cited after the glosses¹ that have been put on his meaning. The case of *Heaven v. Pender* "established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. For instance, if a man is driving along a road it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage. In the same way it is the duty of a man not to do that which will injure the house of another to which he is near. If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood. That is the effect of the decision in *Heaven v. Pender*."²

Lord Esher, M.R.'s, statement of the effect of *Heaven v. Pender*.

It will be observed that the instances given by Lord Esher, M.R., have no necessary relation whatever to the principle in *Heaven v. Pender*. That principle had reference to a coming on property or the use of property belonging to another, or at least contact with it. The illustrations given merely illustrate the principle that the exercise of legal rights is subject to equal enjoyment of rights by others.

Criticised.

The principle affirmed in *Heaven v. Pender*, says Collins, M.R.,³ is, "that where a person having a common interest with another invites that person to use certain premises or chattels, the person so inviting incurs a responsibility with regard to the condition of the premises or of the chattels as the case may be." In short, it was only an affirmation of the principle of *Indermaur v. Dames*.⁴ The dock company had invited the workman to come upon their staging, and "they were responsible if the man so invited was led into the trap by means of which he was injured."⁵

Thus explained, *Heaven v. Pender* falls in with the current of decisions. In the absence of contract or fraud one man is not liable to another for injury sustained by such other from reliance on his acts or words. A man places a plank across a stream for his own purposes; another uses it and falls into the stream because it is insecurely placed; there is no liability. One man publicly expresses his intimate confidence that certain securities are a first-rate investment, whereby another hearing him invests on the faith of the correctness of his opinion and loses his money. The statement creates no liability.⁶ There is no liability if one man leaves a pail of dangerous chemical on the highway which another accidentally stumbles over and a third man is injured by it. "If," says Willes, J., "a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard*."⁷

Comment.

To this class also belongs *Parry v. Smith*,⁸ where Lopes, J., held

Parry v. Smith.

¹ *E.g.*, *Cann v. Wilson*, 39 Ch. D. 39.

² (1893) 1 Q. B. 493, 497. See also per Bowen, L.J., 502.

³ *Earl v. Lubbock* (1905), 1 K. B. 257. ⁴ L.R. 1 C. P. 274.

⁵ Per Lord Herschell, *Caledonian Ry. Co. v. Mulholland* (1898), A. C. 210, 227.

⁶ *Cp. De la Bere v. Pearson* (1907) 1 K. B. 483.

⁷ *Skellton v. L. & N. W. Ry. Co.*, L. R. 2 C. P. 631, 636.

⁸ 8 C. P. D. 325.

that: A duty "attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury was caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance." An escape of gas was the particular negligence complained of in *Smith v. Parry*. Now there is no absolute duty to prevent gas escaping from pipes under all conditions.¹ Gas is only greatly dangerous in a confined area; while a pair of pipes in certain positions, however extreme its dilapidation, might be entirely free from possibility of causing injury; and under other circumstances might be the means of causing equal injury with escaping gas. As the one becomes highly dangerous when escaping into a confined area, so the other, when used in a certain way, as, for instance, in the way it was used in *Heaven v. Pender*, becomes fraught with a similar danger, and, in the absence of a duty arising on the part of the person using it, carries with it a liability on those through whom it is used in its insecure condition.

O'Neil v. Everest.

Lord Herschell, C.

O'Neil v. Everest,² in the Court of Appeal, well brings out the principle contended for. It was decided on the ground of the intervention of a responsible agency between the negligence (assumed for the purposes of the decision) of the defendant and the particular neglect which immediately preceded the accident. The action was by a stevedore's man who received injuries by falling down into the cabin of a barge through the hatchway which had been left open. The defendant, in whose possession the barge was, had made a sub-contract with another man, who had control of the barge at the time of the accident. The breach of duty alleged was that the defendant had not provided a cabin top. It was pointed out in the Court of Appeal that in order to recover the plaintiff must show that the accident was the direct result of the defendant's breach of duty. "If," said Lord Herschell, C.,³ "the cover had been there and the hole was open, it is admitted that the defendant would not have been liable. But if there was no negligence on the part of the defendant in the hole being left open, supposing the cover to have been provided, it is difficult to see how there was negligence in not providing a cover for the hole." It was the duty of the person in charge of the barge, for whose acts or defaults the defendant was not responsible, to see that the hole was properly protected at the time of the accident; it was the neglect of this duty—the neglect by a responsible agent—and not by the defendant—of a duty that might have been performed in many ways without the existence of a cover—that caused the accident; and therefore the defendant was not liable. Yet, further, it might successfully have been contended that no duty was shown to exist; it was not contended that the barge without a cabin cover was "inherently dangerous," and there was no concealment. "Everybody accustomed to do anything on these barges knows perfectly well that there is a cabin, knows perfectly well that there is an opening by which access is obtained to that cabin, and knows perfectly well that even if there is a cabin-top it might not be on;"⁴ and any one thus taking the risk

¹ *Jackson v. Carshalton Gas Co.*, 5 Times L. R. 69.

² (1892) 61 L. J. Q. B. 453.

⁴ Per Cave, J., 61 L. J. Q. B. 454.

³ L.c. 455.

is disentitled in the case of an accident happening to recover in respect of it.¹

Two American cases must be noted. The first is *Guille v. Swan*.² *Guille v. Swan*. Defendant, who had gone up in a balloon, came down in plaintiff's garden. A multitude of persons rushed into the garden to see defendant and his balloon, trampled down the shrubs and flowers, and otherwise injured plaintiff's property. The New York Court held that the plaintiff could recover for the damage done. This decision does not seem sustainable, for it assumes the matter of fact which should have been submitted to the jury, as decided against the defendant—that is, whether the act of the crowd in rushing into the garden and doing the mischief was the natural and probable consequence of the act of the defendant, and one which the defendant ought to have and might have foreseen. The defendant could not justly be made responsible for all the acts of the crowd; but for those only of which his own acts were the proximate exciting cause. What the impulses or deterrents urging or withholding persons from any definite line of conduct may be cannot be matter of law. Whether a subsequent act is the necessary sequence of a preceding one as matter of causation, or is merely subsequent in time without causal connection, is most generally matter for a jury, not matter of law; and on the determination of this precedent question the legal conclusions, as to which the judge directs the jury, depend. This was pointed out by Agnew, J., in the case of *Fairbanks v. Kerr*³ in the Supreme Court of Pennsylvania, *Fairbanks v. Kerr*. the second of the cases to be noticed. A man mounted a pile of flagging stones placed in the street, by the side of the way, in readiness to be used in the paving of the street, and delivered a political speech. A crowd of hearers gathered about, some of whom got on a heap of flagging stones, though not on the heap on which the speaker was standing, and broke them. The speaker was held not necessarily liable for the breakage, on the ground that it was not a legal conclusion that he was liable for the trespasses of the crowd; and that it was a question for the jury whether the making of the speech was the proximate or remote cause of the injury.

The First Division of the Court of Session decided in accordance with this view in *Scott's Trustees v. Moss*,⁴ where the facts were very like those in *Guille v. Swan*, with, however, an important difference. The proprietor of certain gardens advertised that a balloon would ascend from his grounds, and that a descent from the balloon by parachute would also take place in the grounds at a certain time. A crowd collected outside the gardens to see the descent, which, instead of being made in the gardens, took place in a field of turnips on a farm adjoining the gardens. The crowd broke down the fences,

¹ In *Loader v. London and India Docks Joint Committee*, 8 Times L. R. 5, the breach of duty alleged was the non-performance of a voluntary act, which was held not to import liability. Lord Esher, M.R., said that in order to recover the plaintiff would have to show "that he had been induced by the defendants to believe that they were going to do it (the act in question) again (though he doubted whether even that would render them liable)."

² 19 Johns. (N. Y.) 381; *Gibney v. State*, 33 Am. St. R. 690. An attempt to assert a similar liability to that in *Guille v. Swan*, was made in *Scholes v. N. Lond. Ry. Co.*, 21 L. T. N. S. 835, and was supported by a reference to *The King v. Moore*, 3 B. & Ad. 184; but Keating, J., distinguishing the cited case on the ground that it was a case of indictment, refused to make the defendants "liable for the wrongful act of other persons." (1)

³ 70 Pa. St. 86, 10 Am. L. 664.

⁴ 17 Rettie 52.

rushed upon the field and did damage. The Lord Ordinary held that the facts raised no case of liability against the proprietor of the gardens. The Court of Session reversed his decision and laid down the principle, that "if the collection of the crowd and the actings of the crowd are the natural and probable consequences of the action of the defender—a consequence which the defender ought to have foreseen—then the case is relevant." This seems correct. The distinction between *Guille v. Swan* and the present case appears to be that in the former there was no attempt to collect a body of people; and the place of the balloon's descent was a matter of entire uncertainty depending upon the shifting of air currents and other matters as uncertain; in the latter people were collected by advertisement and the place of descent was precisely indicated—the collection of people in the neighbourhood was thus premeditated. The facts therefore raised a question for the jury whether the damage that resulted was the natural and probable consequence of the train of events prepared by the defendant.

Intervening
cause.

"Much consideration," it is said in a Canadian case,¹ "has been given in the Courts of the United States to the subject of 'intervening cause,' and it has been held there that the intervening cause must be culpable, and if the intervening person's act is innocent, the intervention is no defence;" "nor is it if the intervener is a child of tender years and immature intellect, or a person of weak mind;" "or not a free agent—going back to the old case *Scott v. Shepherd*, 2 W. Bl. 893."

The question of whether the intervention of a conscious or responsible agency may be inferred, is a question for the judge; whether it ought to be, is for the jury in each case as it arises.²

Victorian
Ry. Com-
missioners v.
Coultas.

(4) The decision of the Privy Council in *Victorian Ry. Commissioners v. Coultas*³ must be considered with some care. The gate-keeper of a crossing over a railway negligently opened a gate over the line so that the plaintiff and his wife, who were driving in a huggy, might cross; they were already on the farther line when a train was seen approaching. The gate-keeper directed Coultas to go back, but he shouted to the gate-keeper to open the opposite gate and went on. He got the buggy across the line so that the train passed close to the back of it and did not touch it.⁴ The wife fainted, and the medical evidence showed that she "received a severe nervous shock" which produced a miscarriage,⁵ and "that the illness from which she afterwards suffered was the consequence of the fright." The judgment of the Privy Council continues, "one of the plaintiffs' witnesses said she was suffering from profound impression on the nervous system, nervous shock, and the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage; he put down her symptoms to nervous shock."

Judgment of
the Privy
Council.

The Supreme Court of Victoria held that an action was maintainable by plaintiff and his wife for the injuries caused. The Privy Council reversed this decision on the ground that "Damages arising from mere sudden terror unaccompanied by any actual physical

¹ *McKelvin v. The City of London*, 22 Ont. R., per Falconbridge, J., 77.

² *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas., per Lord Cairns, C., 197.

³ 13 App. Cas. 222.

⁴ In the report of the case before the Supreme Court of Victoria, it is said the evidence showed that "a train came past and just scraped the wheels of the vehicle in which the plaintiffs were": 12 Vict. L. R. 895.

⁵ See the Victorian Law Report as above.

injury, but occasioning a nervous or mental shock, cannot under such circumstances "be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident, caused by negligence, had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists, in case of alleged physical injuries, of determining whether they were caused by the negligent act would be greatly increased, and a wide field open for imaginary claims."¹ Their decision is expressed to be "that the first question,² whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants."

The starting-point of this reasoning is, that nervous shock and mental shock are identical,³ and that they are opposed to actual physical injury. Now, it is undoubted law that mental pain or anxiety alone, unattended by any injury to the person, cannot sustain an action.⁴ What the law understands by mental suffering may be gathered from what was said in *Blake v. The Midland Ry. Co.*, by

Reasoning examined.

¹ In the judgment in *The Corsair*, 145 U. S. (38 Davis) 335, 348, it is incidentally remarked: "Fright for a few minutes is too insubstantial a basis for a separate estimation of damages." A statement that looks as if in the opinion of the Supreme Court of the United States fright might be an element of legal damage.

² The points reserved were: (1) Whether the damages awarded by the jury to the plaintiffs or either of them are too remote to be recovered. (2) Whether proof of "impact" is necessary in order to entitle plaintiff to maintain the action. (3) Whether the female plaintiff can recover damages for physical or mental injuries, or both, occasioned by fright caused by the negligent acts of the defendant.

³ See to this as a scientific position, see Sir William Hamilton, *Lectures on Metaphysics*, vol. i. *lect. xv. n. a*, and App. II.; as a legal position per Palles, C.B., *Bill v. G. N. Ry. Co.*, 26 L. R. Ir. 428, 441.

⁴ *Lynch v. Knight*, 9 H. L. C. 577, 598. See a very full examination of the cases in *Johnson v. Hells*, 3 Am. R. 245. It has sometimes been assumed that a person injured cannot recover for mental suffering. This is not correct. The ordinary direction to a jury in a personal injury case is, that they must allow something for pain and suffering. And the distinction between the damages allowed under Lord Campbell's Act and those recoverable in a common law action for personal injury is, that in the former case the jury "cannot take into consideration the mental suffering of the survivors or loss of society which they have sustained": *Roseau, Nisi Prius* (16th ed.), 707; in the latter the wrongdoer is responsible "for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct": *Bigby v. Hewitt*, 5 Ex. 240, 243. The expression is perhaps not minutely accurate, although for present purposes it is sufficient. In *Blake v. Midland Ry. Co.*, 18 Q. B. 93, 111, Coleridge, J., delivering the judgment of the Court, said: "When an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can with little difficulty award him a solatium for his mental sufferings alone, with an indemnity for his pecuniary loss." He seems there to refer to the common law, which in the succeeding passage is contrasted with the law under Lord Campbell's Act. In *Kennon v. Gilroy*, 131 U. S. (24 Davis) 26, Gray, J., said: "The action is for an injury to the person of an intelligent being; and when the injury, whether caused by wilfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded." This was said in affirmance of an instruction to a jury which had been questioned—that they were to take into consideration the plaintiff's "bodily and mental pain and suffering both taken together, but not his mental pain alone," and such as "inevitably and necessarily resulted from the original injury." There seems to be an analogy to the cases under the Lands Clauses Act, 1845, which distinguish between compensation for lands taken, when compensation is also given for consequential damage to other lands of the same owner injured

Coleridge, J. : " If the jury were to proceed to estimate the relative degree of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of the defendants."¹ The notion at the bottom of this has evidently relation to the moral or intellectual sense.² The law will not compensate, cannot compensate, for mental suffering in this sense ; because it is not a consequence that in the long run has any objective symptoms, or can be submitted to any reasonable tests. If " mental suffering " is not limited to suffering caused to the intellectual or moral sense, and is used, interchangeably with nervous shock, to signify the same class of effect, then " nervous shock " in animals, apart from physical contact, like " nervous or mental shock " in human beings (for the Privy Council treats the two states as co-extensive), will not give ground for action. Now a negligent act, apart from " impact " or actual physical contact, which frightens a horse and causes him to bolt so that he is injured, is a ground of action.³ " Mental shock," then, and " nervous shock " do not cover precisely the same ground ; else we should be driven to the conclusion that the law laid down that nervous shock, which would found an action when

but not taken, and damage done to the property of an owner, none of whose land is taken, and who therefore cannot recover for injuries merely consequential on the improvement ; and this (as is said by Lord Bramwell in *Couper Essex v. Local Board for Acton*, 14 App. Cas. 153, 171) is not to " give opportunity for vague and unfounded claims." There is a power to order a personal examination of the injured person in railway cases under 31 and 32 Vict. c. 119, s. 26. No such power, however, exists apart from the Act. In the *Gardner Peerage Case* (*Le Marchant, Gardner Peerage Claim*, 78, 172, 175), it is taken for granted that the statements of a patient to a physician of symptoms and complaints are competent and admissible. In *Arson v. Kinnaird*, 6 East, 188, 195, Lord Ellenborough says : " What were the complaints, what the symptoms, what the conduct of the parties themselves at the time are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing."

¹ 21 L. J. Q. B. 233, 238.

² Sir William Hamilton, Lectures, as above.

³ *Blower v. Adam*, 2 Taunt. 314 ; *Manchester South Junction, &c. Ry. v. Fullarton*, 11 C. B. N. S. 54 ; *Harris v. Mobbs*, 3 Ex. D. 268 ; *Wilkins v. Day*, 12 Q. B. D. 110 ; *Brown v. Eastern and Midlands Ry. Co.*, 22 Q. B. D. 391. In *Sinkin v. L. & N. W. Ry. Co.*, 21 Q. B. D. 453, there was no action, not because the horse was only frightened, but because there was no negligence on the defendant's part in frightening him. *Guler v. Rawson*, 6 Times L. B. 17. In *New York Rd. Co. v. Estill*, 147 U. S. (40 Davis) 591, it was held that the owner of pregnant cattle could recover for damages caused by abortion, resulting from the negligence of a railway company. The animus was on the plaintiff to show that the abortions were the direct result of the accident. That being done, " it was not necessary for the plaintiff to show that the defendants had notice at the time of shipment that the heifers were in calf, in order to render it liable for the depreciation in their market value in consequence of the abortions." " It was not claimed by the plaintiffs that on account of the heifers being with calf any special care was necessary in transporting them ; and the suits were not brought on account of the absence of any such special care."

In *Wilkinson v. Downton* (1897), 2 Q. B. 57, 61, Wright, J., says : " Some English decisions—such as *Jones v. Boyce*, 1 Stark, 483, *Wilkins v. Day*, 12 Q. B. D. 110, *Harris v. Mobbs*, 3 Ex. D. 268—are cited in *Beven on Negligence* as inconsistent with the decision in *Victorian Railway Commissioners v. Coultas*. But I think that those cases are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or of the horse was really the result not of that act, but of a fright which rendered that act involuntary, and which, therefore, ought to be regarded as itself the direct and immediate cause of the damage." I fail to follow the learned judge's reasoning. A fright is a nervous shock, not the less because it results in an involuntary act. The involuntary act is plainly not a cause of action (*Gibbons v. Pepper*, 1 Ld. Raym. 38), neither is the fright which produces it. There is no legal duty not to be frightened. Only the unlawful act, the cause of the fright, remains. Possibly Wright, J., had not in mind the judgments of the majority in *Scott v. Sheppard*, 1 Sm. L. C. (11th ed.), 454. Cp. per Kennedy, J., *Dudieu v. White* (1901), 2 K. B. 689, 674, 679.

communicated to a horse, would not found one when it affected a human being, though the cause was in both cases the same. There is, so far, no evidence of a distinction so arbitrary. The differentiation is manifestly between those shocks which naturally produce physical deterioration, and those shocks which primarily work on the moral nature, to the exclusion of actual physical injury.

Perchance it may be urged that the possession and non-user or mis-user of intellectual or moral faculties may differentiate the cases, and take away the right of action where a human being is concerned, and leave it where a horse is concerned. This, however, is well established not to be so.¹

The loss of friends or fortune, or those results ordinarily associated with the notion of mental shock, do not, on a comparison of the long run of cases, produce appreciable injury to the physical health; and, where they do, would not, on the ground that this result is not the ordinary and reasonably to be looked-for result, be the subject of damages. This consideration is independent of the other ground, of the impossibility of fixing a standard for their estimation. On the other hand, the effect of terror is nervous disorder; as the judgment of the Privy Council says: "The shock from which she suffered would be a natural consequence of the fright;" not through the action of intelligent or moral feelings on the bodily frame, but directly and in regular sequence. Nervous disorder, manifesting itself by a miscarriage and a long illness, is somewhat ludicrously described as "mental shock." A main distinction between mental shock and nervous shock may be indicated as being that, where "mental shock" is produced, the operation on the nervous system is through a distinct set of causes. The mind, the intellectual principle, is affected, and may press on the health. Where nervous shock is produced, the terror is merely another expression for a direct effect on the nervous system—a portion of the physical organisation. Yet injury which a man inflicts on himself, through fright, may import an actionable wrong for which damages are recoverable, as in *Jones v. Boyce*.² Then, whether the subject of terror be man or beast, where the terror is followed by physical consequences, an action would seem to lie. If, in the case under discussion, the wrongful and negligent act of the defendant had caused the plaintiff's wife to fling herself from the buggy, and a miscarriage had been produced, and a long illness attendant thereon, the plaintiff could have recovered.³ While, because the terror was so great that she fainted, instead of springing out of the buggy, though identical consequences may have been produced by the defendants' act, the learned judges in the Privy Council are of opinion that she cannot recover. The damages, say they, are occasioned "by a nervous or mental shock."

But if, in natural and ordinary sequence, physical illness is produced through the action of the nervous system disorganising the condition of the physical frame, it is a strange conclusion to be compelled to arrive at that what, when done in relation to a horse or an ox, is actionable, may be done with impunity in relation to a human being.

Distinction between "mental shock" and "nervous shock."

Actual physical inconvenience following nervous shock.

¹ *Jones v. Boyce*, 1 Stark. N. P. 493; *Buel v. N. Y. Central Rd. Co.*, 31 N. Y. 374; *Cnutler v. The American Union Express Co.*, 5 Lans. 67, 56 N. Y. 585.

² 1 Stark. (N.P.) 493.

³ *Jones v. Boyce*, 1 Stark. (N. P.) 493. See, per Martin, B., *Wilson v. Newport Dock Co.*, L. R. 1 Ex. 177, 187.

because to the physical effects an agony not produced in the other case is superadded.¹ On principle, accordingly, a cause of action seems to exist.²

To approach the subject from another point of view;—in the judgment of the Supreme Court of Victoria the following case is put: "If a person were wantonly and mischievously to come close behind another person, who was suffering from heart or nervous disease, and discharge a gun, causing a severe shock to such person's nervous system, could it be said that an action would not lie for damages in respect of the physical and mental injuries arising from that wanton and mischievous act?"³

The same line of illustration is adopted by Sir James Stephen.⁴

Again, as far as intentional wrongs go, the law is plain, that actual contact ("impact") is not necessary in order to give a right of action for trespass; and, since in trespass the intent is immaterial,⁵ it follows that "impact" is not necessary to enable a person injured by negligence to recover. In the case under discussion, the defendants were admittedly guilty of negligence, which produced fright or nervous shock, which manifested itself as a "natural consequence" in miscarriage and illness. It is thus exceedingly difficult to maintain *Victorian Railway Commissioners v. Coultas* by reference to principles of law extraneous to the case and apart from the authority of the Court as constituted when it was decided.⁶

In Ireland the Exchequer Division, after having the question very fully argued in *Bell v. Great Northern Ry. Co.*,⁷ refused to follow *Victorian Railway Commissioners v. Coultas*. Pales, C.B., pointed out that the same question raised before the Privy Council had been considered four years previously in Ireland and decided in a sense

Stephen,
Sir J.
Illustrated
from the law
of trespass.

Irish decisions
conflicting
with *Victorian
Ry. Commis-
sioners v.
Coultas*.

¹ *Conklin v. Thompson*, 29 Barb. (N. Y.) 218.

² In *Fitzpatrick and Wife v. The Great Western Ry. Co.*, 12 U. C. Q. B. 645, the declaration stated that plaintiff, being pregnant, at the request of defendants became a passenger in one of their carriages to be safely conveyed by them for reward; that the defendants received her as such passenger, and it was their duty to use due care in conveying her, yet the defendants not regarding, &c., so negligently conducted themselves that a collision took place with another train, by means whereof the carriage in which the plaintiff was, was broken, &c., and thereby the plaintiff was much affrighted and alarmed, whereby she became sick, sore, and disordered, and so continued from thence, litierte and thereby also by reason of the terror and alarm occasioned to her by the said collision and of such sickness caused thereby, she had a premature labour and bore a still-born child. This was held on general demurrer to disclose a cause of action.

³ 12 Viet. L. R. 895.

⁴ History of the Criminal Law, vol. iii. 5. And see *The Queen v. Holliday*, 61 L. T. 701; *Rex v. Evans*, O. B. Sept. 1812, MS.; Bayley, J., cited 1 Russ. Crimes (5th ed.), 651; *Rex v. Hickman*, 5 C. & P. 151; *Reg. v. Pitts*, C. & M. 284; Bishop, Crim. Law, vol. i. (6th ed.), § 564; Hawk, P.C., bk. 1, ch. 13, § 7. A fortiori there is a civil liability. *Mogul Steamship Company v. McGregor*, 23 Q. R. D. 598; (1892) A. C. 25.

⁵ *Stephens v. Myers*, 4 C. & P. 349, per Tindal, C.J.; Addison, Torts (4th ed.), 569; *Read v. Coker*, 13 C. B. 850; Y. B. 21 Hen. VII. 27, jd. 5, a. d. 1500, cited by Holmes, The Common Law, 87; *Covell v. Laming*, 1 Camp. 497.

⁶ Cp. per Channell, R., *Smith v. L. & S. W. Ry. Co.*, L. R. 6 C. P. 21, adopting what was said by Bramwell, B., in *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, 785. *Seger v. Town of Barkhamsted*, 22 Conn. 290. In *Huxley v. Berg*, 1 Stark. (N. P.) 98, the action was by the husband for trespass and battery. The wife was dead, and therefore any possible right of action died with her; and if it did not, damage for personal injury to her was not claimed. In *Shearman and Redfield, Negligence* (4th ed.), § 742, note 2, is a collection of American cases that may be referred to in this connection.

⁷ 26 L. R. Ir. 423.

adverse to the Privy Council's decision, "first in the Common Pleas Division, then presided over by the present Lord Morris, and afterwards in the Court of Appeal, in a judgment delivered by the late Sir Edward Sullivan" in an unreported case of *Byrne v. Great Southern and Western Ry. Co.* In that case, adds the Chief Baron, "there was nothing in the nature of impact." This decision of *Byrne v. Great Southern and Western Ry. Co.*, the Irish Exchequer Division preferred to *Victorian Railway Commissioners v. Coultas*. Pallett, C.B., thus sums up his Pallett, C.B.'s view. opinion: "As the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any Court to lay down as matter of law, that if negligence cause fright, and such fright in its turn so affects such structures as to cause injury to health, such injury cannot be a 'consequence which in the ordinary course of things would flow from the' negligence, unless such injury 'accompany such negligence in point of time.'"

The later English cases run strongly against accepting *Victorian Railway Commissioners v. Coultas* as a case to be followed. In *Pugh v. London, Brighton and South Coast Ry. Co.*,¹ the plaintiff in the discharge of his duty as signalman endeavoured to prevent an accident to a train by signalling to the driver. The excitement and fright arising from the danger to the train produced a nervous shock which incapacitated him from employment. He sued his employers on a contract of insurance to pay him a weekly allowance, on the ground of his being "incapacitated from employment by reason of accident sustained in discharge of his duty in the Company's service." *Victorian Railway Commissioners v. Coultas* was much discussed during the argument. In giving judgment Lord Esher, M.R., distinguishes the case before the Court, pointing out that the Privy Council case turned on negligence, while the case before the Court was on the construction of an insurance policy; he then says: "I should not like to express an opinion as to whether we ought to follow it until I am forced to do so;" and presently adds: the plaintiff "was incapacitated from employment by reason of a shock which operated physically to prevent him from doing his work. That physical disease was caused by the excitement and fright which arose in consequence of the immediate and serious responsibility which was thrown upon him. The fright which he underwent seems to me to be the accident which happened in this case."

Shortly after, Wright, J., distinguished *Victorian Railway Commissioners v. Coultas* in *Wilkinson v. Downton*.² Defendant as a practical joke told the plaintiff that her husband had met with a serious accident. The plaintiff believed the statement, and was so affected that she became seriously ill. The inquiry Wright, J., proposed to himself was "whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced, that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind." He answers his question: "I think that it was."

A more elaborate examination into the principle applicable — as *Dulieu v. White* made in *Dulieu v. White*.³ Plaintiff was behind the bar of her husband's

¹ (1896) 2 Q. B. 248.

² (1897) 2 Q. B. 57.

³ (1901), 2 K. B. 669. *Cooper v. Caledonian Ry. Co.*, 4 Fraser 880.



public-house when a pair-horse van was so negligently driven by the defendant's servant, that it went into the public-house. The shock caused to the plaintiff rendered her seriously ill, and she was prematurely confined. Kennedy and Phillimore, JJ., held that she was entitled to damages; Kennedy, J., on the ground that nervous shock occasioned by negligence producing injury and arising from a reasonable fear of immediate personal injury to oneself, may ground an action if the jury are satisfied, upon proper and sufficient medical evidence, that physical injury follows the shock as its direct and natural effect; Phillimore, J.,¹ because "terror wrongfully induced and inducing physical mischief gives a cause of action." "Once get the duty and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being mental only makes no difference." Phillimore, J., tries to evade the force of *Victorian Railway Commissioners v. Coultas* rather than to go counter to it, and suggests that "it is not certain that as between people travelling on highways there is any duty so carefully to conduct yourself or your vehicle as not to frighten others." The duty of travellers on highways is stated in a well-known passage by Blackburn, J., delivering the judgment of the Exchequer Chamber in *Fletcher v. Rylands*;² but nowhere is so unlimited a right to be careless hinted even. If negligence "according to the circumstances" is proved, liability attaches. The distinction seems to be this: In the case of an accident on a highway negligence must be proved affirmatively; the maxim *res ipsa loquitur* has no application: where the accident is on private property it has.

Smith v. Johnson.

The unreported case of *Smith v. Johnson & Co.*,³ decided in January, 1897, by a Divisional Court consisting of Wright and Bruce, JJ., must be noted. A man was killed by the defendant's negligence in the sight of the plaintiff. The shock of seeing the man killed made the plaintiff ill. The Court held the damage was too remote. The consequence was manifestly an extraordinary and non-natural sequence.

Principle of the objection to allowing recovery in cases like *Victorian Ry. Commissioners v. Coultas* considered.

The only objection in principle to a recovery for injuries occasioned, without physical impact, seems to be the difficulty of testing the statements of the sufferers alleging them. An allowance of recovery of damages in respect of such nervous injuries affords opportunities for simulation very difficult to be dealt with, and considerations of policy may well disallow any claim in respect of injury purely subjective. When the physical frame is visibly affected considerations of this kind are no longer paramount. The objection goes rather to the proof of the injuries than to the legal appraisal of damages in respect of them when proved. Medical science can deal with them as it is constantly doing with alleged nervous affections arising in railway collision cases. A safeguard against imposition seems to be to bear steadily in view the elementary rule that before a plaintiff can recover he must show a damage naturally and reasonably arising from the negligent act—the *onus* is on him, and the absence of objective symptoms is a circumstance of suspicion.⁴

¹ L. c. 683.

² L. R. 1 Ex. 265, 286. Cp. the same judge in H. L., *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, 767.

³ (1901) 2 K. B. 675.

⁴ Sedgwick (Damages, 8th ed., § 861) regards *Victorian Commissioners v. Coultas* as a wrong decision. Coultas's case was distinguished and observed on in *Rea v. Balmain New Ferry Co.*, 17 N. S. W. L. R. 62—a plank used as a gangway tilted, causing plaintiff a severe shock to her nervous system, which afterwards developed into a serious disease called exophthalmic goitre. *Felmoths v. Phillips*, 20 N. S. W. L. R.

In this place an extraordinary Irish case may be noted. *Walker v. Great Northern Ry. Co. of Ireland*¹ is an action for damages against a railway company. The statement of claim alleged that at the date of the injuries complained of the plaintiff's mother was quick with child, namely, with the plaintiff, to whom she afterwards gave birth, that being so quick with child the plaintiff's mother was received by defendants as a passenger, &c.; but that the defendants so negligently and unskilfully conducted themselves in carrying the mother and the plaintiff, being then *in ventre sa mère*, that the plaintiff was thereby wounded, permanently injured and crippled. To this there was a demurrer, which was sustained.

Walker v. Great Northern Ry. Co. of Ireland.

58. In *North British Ry. Co. v. Wood*, 18 Rettie (House of Lords) 27, the question was raised but not decided. *Ewing v. Pittsburg, &c. Rd. Co.*, 147 Pa. St. 40, 30 Am. St. R. 709, is an unflinching upholding of the view, that mere fright or mental agony caused by a railway accident, unaccompanied by some physical injury to the person, is too remote to sustain an action for negligence, *although it produces permanent injury to the nervous system*. The wrongful acts alleged were a collision of cars upon the railway of the defendants, by which the cars "were broken overturned and thrown upon the track and fell upon the lot of ground and premises of the plaintiffs and against and upon the dwelling-house of the plaintiffs, and thereby and by reason thereof greatly endangered the life of the said Eva Ewing then being in said dwelling-house and subjected her to great fright, alarm, fear, and nervous excitement and distress, whereby she then and there became sick and disabled and continued to be sick and disabled from attending to her usual work and duties and suffered and continues to suffer great mental and physical pain and anguish and is thereby permanently weakened and disabled." The decision was on demurrer to this declaration. A similar result has followed in other American cases. In *Hail's Curator v. Texas, &c. Ry. Co.*, 60 Fed. Rep. 557, a passenger rendered insane by a railway accident, was held to have no cause of action, because the result was "not a probable or ordinary" one. The reason is conclusive *Et quæ raro accidunt, non temere in agendis negotiis computantur*, says the Civil Law, D. 50, 17, 84. *Ad ea quæ frequentius accidunt leges adaptantur*, says the English Law, 4 H. L. C. 405, 9 H. L. C. 52; *Hawtayne v. Bourne*, 7 M. & W. 568. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107 is referred to at length by Kennedy, J., *Dulieu v. White* (1901), 2 K. B. 669, 678. A woman waiting for a tram car was nearly run over by the negligence of the defendants' servants; she fainted, and subsequently had a miscarriage. The judgment is based on a *petitio principii*. "Assuming," says Martin, J., "that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom." The next ground advanced is also one not lightly occupied by English lawyers. Speaking of a right to recover in cases where "shock" is the foundation of the claim, Martin, J., holds "that such a doctrine would be contrary to principles of public policy." The next ground, if the facts supported it, is fully adequate to sustain the decision: "The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action." The preferable way of stating this would be that the occasion being extraordinary there was no duty. The question of remoteness is not reached. In *Spade v. Lynn, &c. Rd. Co.*, 168 Mass. 285, a drunken man in a tram by his reeling and conduct frightened a woman. The jury were charged "that a person cannot recover for mere fright, fear or mental distress occasioned by the negligence of another which does not result in bodily injury; but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury and for all the pain, mental or otherwise, which may arise out of that bodily injury." An exception was taken to this, that there can be no recovery for such physical injuries as may be caused solely by mental disturbance where there is no injury to the person from without. This was allowed. The judgment of Allen, J., seems, however, directed to another aspect of the case: "The general conduct of business . . . must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength." "As a general rule, a carrier of passengers is not bound to anticipate or guard against an injurious result which would only happen to a person of peculiar sensitiveness." The case came again before the Court after a second trial (172 Mass. 488). Holmes, J., decided against the plaintiff's right to recover on the ground that the injuries were sustained through plaintiff's exceptional sensitiveness. Exceptional sensitiveness plainly does not raise a legal duty in circumstances like these.

¹ 28 L. R. Ir. 69. See L. Q. R., vol. xx. 156: The status of the *factus in ventre sa mère*. *Sir Robert Burdet v. Hopegood*, 1 P. Wms. 486.

The contention was that the infant was not at the time of the accident a person in *rerum natura*, and therefore could not sustain the action; that the liability of the railway company depended on contract express or implied, and there was neither with the plaintiff; and that the case of the George and Richard¹ under Lord Campbell's Act was governed by the principles which apply to cases of an infant's property or rights as the child of its parents.

Judgment of
O'Brien, C.J.

The Chief Justice O'Brien disposed of the case "upon a single ground, namely, that there are no facts set out in the statement of claim which fix the defendants with liability for breach of duty as carriers of passengers. This is not a case of trespass. It is now settled law that railway companies do not warrant the absolute safety of passengers; all they undertake with regard to passengers is a duty to carry with due and reasonable care, and their liability is for negligence arising from a breach of that duty."² Harrison, J., while concurring that "no cause of action as against the defendants could

Judgment of
Harrison, J.

. . . then exist on the part of the plaintiff or arise after the plaintiff was born from the mere fact that her mother had been received by the defendants as a passenger, being at the time *enceinte* of the plaintiff, and that while she was a passenger an accident occurred through the defendant's negligence, which after the plaintiff's birth it appeared had injured her," yet on the assumption that such a cause of action could exist, was of opinion that in the case before the Court "the plaintiff is not averred or shown to have been on the defendants' railway 'with the defendants' authority' when the accident occurred."³ "In the present case it is not even averred that the defendants knew of the pregnancy of the plaintiff's mother when they received her as a passenger." O'Brien, J., decided that two elements necessary to a contract were wanting—"the right and the consideration";⁴ and Johnson, J., in a judgment in which a great mass of authorities is reviewed, comes to the conclusion—"at that time (*i.e.* of the accident) the plaintiff had no actual existence; was not a human being; and was not a passenger—in fact, as Lord Coke says,⁵ the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which is not *in esse* in fact, and has only a fictitious existence in law so as to render a negligent act a breach of that duty."⁶

Judgment of
O'Brien, J.

Judgment of
Johnson, J.

Cases con-
sidered.

The point of the particular form of the pleading in this case need not take time to examine. The inquiry is rather, assuming proper pleading, is there any and what liability from a railway company to an infant injured, while *en ventre sa mère*, by the railway company, and

¹ L. R. 3 A. & E. 466.

² 28 L. R. Ir. 78.

³ L. c. 80.

⁴ L. c. 83. The closing sentence of O'Brien, J.'s judgment merits reproduction: "In law, in reason, in the common language of mankind, in the dispensations of nature, in the bond of physical union, and the instinct of duty and solicitude, on which the continuance of the world depends, a woman is the common carrier of her unborn child, and not a railway company." Assuming the above to be an argument and not a joke, the answer is, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents and though its contents are ever so valuable if he does not make a special acceptance: *Kenrig v. Eggleston*, Aley 93; *Hart v. Pennsylvania Rd. Co.*, 112 U. S. (5 Davis) 331, 340. True, the case in point is the case of a passenger; but then the carrier is guilty of negligence. Cp. *New York, &c., Rd. Co. v. Estill*, 147 U. S. (40 Davis) 591, 617.

⁵ *Earl of Bedford's case*, 7 Rep. 7 h., 8 h.

⁶ 28 L. R. Ir. 83.

whose injuries are developed subsequently at birth? One of the judges' objected: "the inherent and inevitable difficulty or impossibility of proof." This consideration has already been gone into in the discussion on *Victorian Railway Commissioners v. Coultas*. It is for the plaintiff to prove his case; if he does so there is no difficulty; if he does not there is no liability. The case therefore may be considered unfettered by difficulties of that kind. The civil law is clear. *Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partus quaeritur; quanquam alii, antequam nascatur, nequaquam prosit;*² and again, *qui in utero sunt in toto pæne jure civili intelliguntur in rerum natura esse. Nam et legitime hereditates his restituntur.*³ *Si quis prægnantem uxorem reliquit, non videtur sine liberis decessisse.*⁴ In the case of *Blasson v. Blasson*,⁵ moreover, Lord Westbury, C., cites the civil law as affording a guide to the English law; while in *Villar v. Gilbey*⁶ the Court of Appeal, dissenting from Lord Westbury's proposition that "the fiction or indulgence of the law which treats the unhorn child as actually horn applies only for the purpose of enabling the unhorn child to take a benefit which if horn it would be entitled to," affirms the wider one "that, *prima facie*, in the absence of sufficiently weighty considerations to the contrary, for the purposes of devolution of property in connection with intestacies or wills, no distinction ought to be drawn between a child born at a particular time and a child at that time *en ventre sa mère* and subsequently born alive."

Texts of the
Civil Law.

Some of the Irish Judges were of opinion that *Richards v. Richards*⁷ is in favour of their view. This is a mistake; for the decision was not on the ground that the infant *en ventre sa mère* was "considered not in existence," but on purely feudal reasons; that as "the person on whom the law threw the burthen was in consequence held entitled to that which flowed from the burthen, namely, the enjoyment of the rents and profits."⁸

Richards v. Richards distinguished.

It may be pointed out in answer to the Chief Justice that the railway company, quite apart from any theory of contracts, are bound to carry on their business without negligence; and in the present case were in default by their negligence. Since, then, the company were in default, they become liable to any one, injured through a natural and necessary consequence of their default, who was not contributory to the injury by being also in default. True, the plaintiff was not carried with "the defendants' authority," if by that is signified the direct authorisation of the defendants. On the other hand, it is plain that, whatever her rights, she was not in default; while the injury was caused by the wrongdoing of the defendants. The point of contract then on which the majority of the Court seems to decide becomes inapplicable. The case may be put better that the child

Question of
contract.

¹ O'Brien, J., L.C.

² D. 1, 5, 7.

³ D. 1, 5, 20.

⁴ D. 50, 17, 187.

⁵ 2 De Gex, J. & S. 665, 670. See *Thellusson v. Woodford*, 4 Ves. 227, 11 Ves. 112; 6 Cruise, Digest, 430, 451, 458; and the authorities cited in a note by Blunt to *Bennett v. Honeywood*, Anb. 712; 1 Spence Eq. Jur. 617; 2 Spence Eq. Jur. 164; 2 Wms. Saund. 380, 387. *Nurse v. Yerworth*, from Lord Nollingham's MSS, printed 3 Swans 608 (App.); *Trower v. Butts*, 1 Sim. & St. 181; *Pearce v. Carrington*, L. R. 8 Ch. 989.

⁶ (1906), 1 Ch. 583; reversed in H. L. 23 Times L. R. 392.

⁷ Johns. (Ch.) 754.

⁸ L.C. per Page Wood, V.C., 762.

⁹ *Op. G. N. Ry. Co. v. Harrison*, 10 Ex. 376; *Skinner v. L. & B. Ry. Co.*, 5 Ex. 787.

when born is injured without fault by the default of the railway company. As was said in argument in *Darley Main Colliery Co. v. Mitchell*,¹ "an injury has not occurred till it is known to be an injury." The wrongful act of the railway company produced its injury on the birth of the child; and even if the right of action was not vested before, it became so then, there being a breach of the duty of the company not to be negligent followed at birth with damage to the plaintiff, who was free from fault. This would seem the sufficient answer to Johnson, J. Further, the want of authority from the defendants for the child to be where it was, if in truth there was any such want of authority, would not in this case disentitle, because the element which alone makes want of authority material is absent—i.e., fault in the person there without authority. If a person were hound and placed by a railway line against his will, and were there injured by the negligence of the railway company's servants, it would be no answer to an action to say "the plaintiff was not there by the defendants' authority." Or if it were, the point would be sufficiently answered by showing the plaintiff was where he was without his fault.

Johnson, J.'s judgment criticised.

"Then," says Johnson, J., "it is contended that this action lies in analogy to the criminal law, that if a child born alive afterwards dies of injuries received *in utero*, there is murder in the person who inflicted them;² but I think that there is no true analogy between crime and tort in this case;" because, in short, the punishment of crime is for the public benefit, while the remedy in tort is for private redress. So far from there being no analogy, crime and tort are in any individual case merely different aspects of the same set of facts. "In all cases," says Comyns,³ "where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages," and admitting Johnson, J.'s assumption, that in some cases there is no analogy, in many cases the analogy is so close that something more than the bare assertion is necessary in the case in question to carry conviction of the justice of the assertion.⁴

In *Dulieu v. White*,⁵ a claim that in consequence of the shock sustained by the plaintiff, the child with which she was pregnant was born an idiot was treated as untenable; and rightly so, for the causation does not seem to have been traced; the idiocy may have been a concomitant of the shock and not a result. In *Walker's case* the demurrer admitted the causation. The author received a letter from one of the counsel in this case, informing him that it was taken to the Court of Appeal and that "after a prolonged argument the Court reserved judgment and allowed some considerable time to elapse, when the child (the plaintiff) died. Judgment on the appeal was never pronounced."

Co-operating causes.

I. Injury through defect in condition of a way, and negligence.

(5) The case may arise of the co-operation of two or more influences in producing a result injurious to some person to whom a duty is owing. The question then comes, how far is each liable? To quote an instance given by Dr. Wharton: Where an injury to a passenger on a highway is occasioned partly by ice with which the road is covered, and partly by a defect in the structure of the road,

¹ 11 App. Cas. 127, 130. See, also, per Lord Blackburn, at 142.

² 1 Russ. Crimes (5th ed.), 646 n (e).

³ Action upon the case (A). See *Doc dem. Lancashire v. Lancashire*, 5 T. R. 40, per Grose, J., 63.

⁴ Cp. *Wells v. Abrahams*, L. R. 7 Q. B. 554, and that class of cases.

⁵ (1901) 2 K. B. 669, 670.

the parties responsible for the defectiveness of the road are liable, notwithstanding the fact that the ice contributed to the injury. The ice was a *condition* of the injury; the negligent construction of the road its cause.¹

Again, one person may be negligent, and by the negligent or wilful act of another, the negligent act of the first may cause injury to a third; then a distinction is to be taken. If the first negligent act is not in its nature such that the second might be looked for, as a natural and probable sequence, then the first negligent person is not responsible.² If the subsequent negligence is likely to follow from the antecedent negligence, then the first negligent person is liable,³ and the question must be left to the jury whether the first wrongdoer's act was the proximate cause of the plaintiff's injury. Even though the first wrongdoer may be liable, the second is not therefore discharged,⁴ since each is liable for the total results of the joint wrong—that is, where the consequences are not referable to the separate agency of each in their just proportions.⁵

The decision in *Burrows v. Marsh Gas Co.*⁶ in the Court of Exchequer was implicitly based on this ground. "The defendants," said Kelly, C.B., "having been guilty of negligence by which the accident was caused, the plaintiff is entitled to maintain his action to recover compensation." Yet, as is pointed out in a treatise of authority,⁷ the true ground for the decision is that which is taken by Cockburn, C.J., in the Exchequer Chamber "The action is not for negligence in its ordinary sense, but for the breach of a contract whereby the defendants promised to supply the plaintiff with a proper and sufficient service pipe from their mains to a gas-meter within his premises, and

II. Where one negligent act is prior to the other.

Burrows v. Marsh Gas Company.

¹ He cites (§ 806) *City of Atchison v. King* (1872), 9 Kan. 550. Plato happily illustrates the distinction between causes and conditions in the *Phædo* (Bek. ed.), § 108 *et seq.* Socrates explains that the cause of his sitting talking to his friends, instead of avoiding death by escaping to Megara, is not his having body and sinews; they are but the conditions. The cause is his obligation to obey the laws of the State. Hume's comment on the duty to obey founded on a promise is: "The only passage I meet with in antiquity, where the obligation of obedience to government is ascribed to a promise, is in Plato's *Crito*, where Socrates refuses to escape from prison because he had tacitly promised to obey the laws. Thus he builds a *Tory* consequence of passive obedience on a *Whig* foundation of the original contract." Hume, *Essays: Of the Original Contract*. "That condition," says Appleton, C.J., *Moulton v. Sundford*, 51 Mo. 127, 134, "is usually termed the cause whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event." The distinction between a cause and a condition was brought out in the Pennsylvania case of *Berry v. Sugar Notch*, 191 Pa. St. 345, in which breach of a borough by-law regulating the speed of electric cars was alleged in defence by the borough authority as the cause of injury to a motor car driver on whom a tree fell as his car passed under it. If the speed of the car had conformed to the ordinance and had gone slower, it was urged, the car would not have been under the tree when it fell. Other American illustrations are collected in Labatt, *Master and Servant*, 806. The judgment of Finch, J., *Taylor v. Yonkers*, 105 N. Y. 202, contains a very valuable examination of the principle of law applicable "when two causes combine to produce an injury to a traveller upon a highway, both of which are in their nature proximate."

² *Clark v. Chambers*, 3 Q. B. D. 327; *Collins v. Middle Level Commissioners*, L. R. 4 C. P. 279; *Carter v. Towne*, 103 Mass. 507; *Hofnagle v. N. Y. Central Rd.*, 55 N. Y. 608. The Roman law on this point is:—*Si vulneratus fuerit servus non mortifere, negligentia autem perierit, de vulnerato actio erit, non de occiso* (D. 9, 2, 30, § 4).

³ *Lane v. Atlantic Works*, 111 Mass. 136, 139.

⁴ *Lake v. Milliken*, 62 Me. 240, 242.

⁵ Co. Litt. 232 a. *Sutton v. Clarke*, 6 Taunt. 29; *The Bernina*, 12 P. D. 58, 93, per Lindley, L.J.; *The Aron and Thomas Joliffe*, per Butt, J. (1891), P. 7, 8.

⁶ L. R. 5 Ex. 67, L. R. 7 Ex. 96. *On City Gas Co. v. Robinson*, 99 Pa. St. 1; *Gulf &c. Rd. Co. v. McWhirter*, 19 Am. St. R. 755.

⁷ Bigelow, L. C., on Torts, 611.

the question is whether there has been a breach of this contract." The accident arose from a defect in the pipe causing an escape of gas, which exploded when the servant of a third person negligently took a lighted candle into the room where the escape was. Dr. Bigelow points out that the negligence in the case was not joint but successive, and states the true principle, on which to determine the liability, as "not whether the defendants' conduct afforded the means for the intervening party to do the act which resulted in the injury, but whether the plaintiff can prove that the defendants' conduct caused the damage." As Cresswell, J., puts the point in *Thorogood v. Bryan*:¹ "It seems strange to say that A shall not be responsible for his negligence because B has been negligent likewise, C being the party injured;" or as Maule, J.,² in summing up in a case of manslaughter says: "It is no defence for one who was negligent to say that another was negligent also, and thus, as it were, to try to divide the negligence among them." The distinction has been already indicated. It is between a cause and a condition. If the conduct impugned is a cause, even though not the cause—in the sense of the sole cause of the accident—the author of it continues liable. But if the first negligence has, so to speak, fallen dead and is inoperative without the second agency working, the first negligence has ceased to be a cause; it has become a condition—the material with which the second chooses to work.

Cresswell, J.'s,
statement of
the ground of
liability.
Maule, J.'s.

*Paterson v.
the Mayor,
&c. of
Blackburn.*

The decision in *Paterson v. The Mayor, &c. of Blackburn*,³ is important in this connection. In disconnecting the supply of gas from a meter, the gas authorities' workmen merely plugged their own pipe; though it was held they had knowledge that the owner of the meter was going to have it removed, so that there would be no necessity for the continued existence of their pipe. In the course of the work of removing the meter, the pipe got broken, gas escaped in large quantities, and a terrible explosion ensued; for the consequences of which the gas authorities were held liable. Assuming there was no negligence in those removing the meter this decision is obviously right; as, by assuming neglect of ordinary precautions on their part, it seems very dubious. There is, however, an intermediate state in which the consequences may be regarded as naturally and probably arising from the want of care in the company, without scrutinising minutely the conduct of those removing the meter, to see whether all was done that could be required of them. As in *Burrows's case*, the thoughtlessly taking a candle into a room with knowledge of a gas escape there results in a consequence a prudent person might reasonably anticipate, so in the present case the blundering of common workmen, oblivious to a danger not actually manifest, is a consequence against which a diligent gas authority ought to guard. The distinction is that in *Burrows's case* there was a wrongful agency, attributable to the gas company, actually in operation and progressively increasing in influence;⁴ while, in the other case, there was no active cause of harm

¹ 8 C. B. 115, 121. Cp. *Hill v. New River Company*, 9 B. & S. 303; *Collins v. Middle Level Commissioners*, L. R. 4 C. P. 279; *Nield v. L. & N. W. Ry. Co.*, L. R. 10 Ex. 4; *Whalley v. Lancashire and Yorkshire Ry. Co.*, 13 Q. B. D. 131.

² *Reg. v. Haines*, 2 C. & K. 368; *Reg. v. Swindall*, 2 C. & K. 230.

³ 9 Times L. R. 55. See post, Gas and Water Companies.

⁴ In the first place, the negligence of the gas company must, unless checked, ultimately cause an explosion—e.g., come in contact with fire. In the second place, no explosion can occur without the intervention of another agency.

till one was set in motion by a person over whom the gas authority had no control; but the consequence attendant on the gas authority's servants' act was so probably that they are not to be exonerated from its consequences. The familiar doctrine of the "trap" will also explain the case. The workmen might reasonably be held to have concluded that the pipe might be taken off with impunity.

In this connection *Engelhart v. Farrant*¹ may be considered. The driver of a horse and cart left it for a temporary purpose, and a lad in the cart, while wrongfully and against orders attempting to drive, ran into the plaintiff's carriage. The point taken for the defendant was that leaving the cart was not negligence of the driver; and that, if it were, the intervention of the lad's act by which the injury was brought about was not a consequence raising liability on the part of the master. The Court of Appeal held that the driver was negligent in leaving the cart; and that the consequence of the negligence did not cease to flow by the lad's intervention, which was a probable sequence of the original wrongful act. The act of the driver was thus an "effective cause," in the opinion of Lord Esher, M.R., of the subsequent damage to the plaintiff; and made the master liable. Rigny, L.J., denounced as "not law" the proposition that "wherever between the negligence of a servant and the incident the act of some third person intervenes and is the proximate cause of the accident, the employer is not liable." Probably stated in this bare manner, no competent person ever alleged that it was. The very negligence chargeable to the servant may be admitting the intervention or affording facilities for it.² But to take only one case—if the servant's duty is to forward non-poisonous material to one to be analysed and tested before being circulated in commerce and instead he negligently sends poisonous material, which through the negligence of the chemist gets into circulation, the master is not liable, because "the act of some third person intervenes."³ But this proposition has already been fully considered.

Engelhart v. Farrant.

Rigny, L.J.'s dictum.

Once more, the negligence may consist in concurrent acts or omissions; then, unless the injuries caused by the concurrent acts can be plainly separated (when the author of each will be liable only for what he has himself caused),⁴ each wrongdoer is liable jointly or severally for the whole damage.⁵ The case just cited⁶ also lays down that "it is no defence for a person against whom negligence, which caused damage, is proved to prove that without fault on his part the same damage would have resulted from the act of another." And this is certainly good sense. If I had not injured you some one else would, is scarcely an available defence either in criminal or civil law. My duty is to observe towards you a particular course of conduct;

III. Where the negligent acts are concurrent.

¹ (1897) 1 Q. B. 240.

² Cp. *Hidge v. Goodwin*, 5 C. & P. 190; *Whatman v. Pearson*, L. R. 3 C. P. 422.

³ The remarks of the judges in the C. of A. on *Mann v. Ward*, 8 Times L. R. 690, become more important in view of the practice of leaving motor cars unattended on the street.

⁴ *Nitro-phosphate, &c. Company v. London and St. Katharine Docks*, 9 Ch. D. 503. As to the damages recoverable where owing to the negligence of defendants, plaintiff's estate is injured by a flood, see *Rust v. Victoria Graving Dock Company and London and St. Katharine Dock Company*, 36 Ch. D. 113.

⁵ *Slater v. Mesereau*, 64 N. Y. 138; *Byrn v. Wilson*, 15 Ir. C. L. R. 332.

⁶ *Slater v. Mesereau*, 64 N. Y. 147. On the authority of *Webster v. Hudson River Rl. Co.*, 38 N. Y. 260; which, however, does not touch the proposition; since there is no attempt to allege even that the same injury would have resulted apart from the negligence of the defendant.

somebody else's conduct is hardly in point when mine has done the damage.

The rule.

To revert to the first instance given on this point—the illustration from Dr. Wharton's book.¹ If both the defect of the road and the existence of the ice were due to responsible agents, then an action is maintainable against either. The fact of only one of the two being due to a responsible agent does not lessen his liability; though the difference between responsible and irresponsible agency may make all the difference in those who can be proceeded against; so that it may be taken as a rule that when the act of a responsible agent, in ordinary circumstances and not interrupted by causes independent of the actor's will, directly tends to produce the event in question in the natural sequence of events, the agent who sets the force in motion is liable for such of its consequences as may be reasonably anticipated to arise in ordinary course. Or, to vary the expression: if a responsible agency, in conjunction with irresponsible agencies, produces an effect not in ordinary course produced without the operation of the responsible agency, then the responsible agent is liable for the effect produced; and the responsible agent continues liable for the natural consequences of his act (though not for more than such consequences) until the intervention of some other responsible agency. When a new agent is introduced with a capacity to will, and who does will, or refrain from willing, if there be a duty on him to will, the liability of the antecedent responsible agent ceases.²

Operations of Nature.

For the operations of Nature, purely as such, undirected by human power, it is manifest no one can be legally accountable. The tendency of heavy bodies to fall, of liquids to flow, of fire to burn, and, generally, of the forces of Nature to follow out their laws of working, imposes liability on no one.³ The ordinary and accustomed workings of Nature form the *conditions* under which alone human action is possible; and, while they impute liability to no one, form the basis from which all imputability must arise. Yet a further distinction must be taken, between those operations of Nature which are occasioned by the elementary forces of Nature wholly unconnected with the agency of man, and those which owe their injurious influence on man to the agency of man.⁴

Remarks of Cockburn, C.J., in *Nugent v. Smith*.

"The rain which fertilises the earth, and the wind which enables the ship to navigate the ocean," says Cockburn, C.J.,⁵ "are as much within the term 'act of God,' as the rainfall which causes a river to burst its banks, and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom.

¹ Negligence, § 86, and *ante*, 76.

² See *Marble v. City of Worcester*, 70 Mass. 395. As to "concurring negligence," see *Wormsdorf v. Detroit City Ry. Co.*, 13 Am. St. R. 453.

³ *May v. Burdell*, 9 Q. B. 101; *Card v. Case*, 5 C. B. 922; *Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. N. S. 376; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Smith v. Fletcher*, L. R. 7 Ex. 305; Ex. Ch. L. R. 9 Ex. 64; *Ross v. Fedden*, L. R. 7 Q. B. 661; *Hurdman v. North Eastern Rd. Co.*, 3 C. P. D. 168.

⁴ "Inanimate objects may bear to one another all the same relations which we observe in moral agents; though the former can never be the object of love or hatred, nor are consequently susceptible of merit or iniquity. A young tree which overtops and destroys its parent stands in all the same relations with Nero when he murdered Agrippina; and if morality consisted merely in relations, would no doubt be equally criminal."—Hume, *Essays: An Inquiry concerning the Principles of Morals*, Appendix I.; Concerning Moral Sentiment, IV.

⁵ *Nugent v. Smith*, 1 C. P. D. 423, 435.

Yet the carrier, who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails here he becomes liable, from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so." The liability that arises in the case of the rain or the wind is, however, not a liability arising from the operations of Nature. In themselves, the fall of rain and the blast of wind bring liability to no one; liability arises where duties have been undertaken that involve guardianship against these elements, and it is from the failure to discharge these duties that negligence is imputed.

As to the other class of natural agencies, James L.J.,¹ thus expresses himself: "The 'act of God' is a mere short way of expressing this proposition: A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight, and pains, and care, reasonably to have been expected from him."

This exception may be referred under a principle already alluded to that the law provides only for that which is common, not for that which is unusual. In extraordinary cases the principle that loss lies where it falls prevails.

All purely natural forces being thus excluded, a responsible agency for the purpose of inferring liability, comprehends all those with capacity to exercise moral choice, that is—with certain exclusions, which have been already noticed²—all human beings, and none but them. Yet one more distinction must be noted before we part from this aspect of our subject. Where the negligence of a person concurs with some ordinary cause, and the conjunction produces an effect injurious to some other person, it is manifest from what has been said, that the operation of such an ordinary cause extraneous to the negligent person will not excuse his liability for the whole of the joint effect. The law is otherwise, where an extraordinary cause is the primary means of setting in motion an injurious agency and by co-operating with the negligence of a person produces injury to some other person. In this case the negligent person is not liable; for not only would his negligence alone fail to produce the injurious effect (this circumstance, however, is common to the two cases, and, notwithstanding this, in the former there is no immunity from liability), but the exciting cause being an "extraordinary occurrence" or an "act of God" was not reasonably to be anticipated, nor guarded against.³ The negligent act is not followed by injurious results in natural and probable sequence,

¹ *Nugent v. Smith*, 1 C. P. D. 423, 444. In *Nitro-phosphate Co. v. St. Katharine Docks Co.*, 9 Ch. D. 503, 515, Fry, J., says: "I do not think that the mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence—when, in other words, it does not imply any law from which its recurrence can be inferred—places that phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within that rule, it is not in my opinion necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. That appears to me the view which has been taken in all the cases, and notably by Lord Justice Mellish in the recent case of *Nichols v. Murkland*," 2 Ex. D. 5.

² *Ante*, 45.

³ *Schaffer v. Jackson*, 30 Am. St. R. 702.

but only by the occurrence of something abnormal and not to be anticipated.

No liability
for statement
of a witness.

A witness in a Court of justice is absolutely privileged in anything he may say as a witness having reference to the matter in hand.¹ In *Hynce v. Governor and Company of the Bank of England*² the plaintiff had been convicted of forgery despite an *alibi* he set up, on the evidence of an officer of the bank; which evidence plaintiff alleged "to have been erroneous and given from erroneous and negligently prepared records," and given "falsely, negligently and in breach of their duty." The Court of Appeal affirmed an order striking out the claim on the ground that so long as the conviction stood, "no one against whom it is producible shall be permitted to aver against it;": but assuming no conviction, the principle of *Seaman v. Netherliff* is equally conclusive. This does not affect the case of expert witnesses. For example, a surveyor, requested to give evidence as to estate value, makes a contract with the party for whom he gives evidence that he will "qualify," that is in... a himself of the facts in the case, and apply reasonable scientific professional knowledge for their elucidation. If he does not do so, an action on his contract lies against him. If, however, he gives evidence against the person calling him, he does so with impunity, provided, that is, his evidence does not suffer from lack of knowledge. It was the fault of the party calling him. Even if he perjures himself, there is no private remedy; he is answerable to public justice; but the highest interest of the suitor is that testimony given in the witness-box should be wholly free from fear of private suits.

II. CAUSAL CONNECTION.

Proximate
and remote
cause.

We are next to inquire for how long, and in what circumstances, the law imputes responsibility for the consequences of a wrongful act or negligence.

Lord Bacon's
paraphrase.

The starting-point in these inquiries is most usually the maxim: *In jure non remota causa sed proxima spectatur*; with Lord Bacon's paraphrase:³ "It were infinite for the law to consider the causes of causes and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking for any further degree."

What is a *proxima causa*, or immediate cause,⁴ in law is a matter so largely dependant on the individual facts, that any formula seems unattainable. It is accordingly advisable to trace the principle through the chief cases where it has entered.⁵

As far back as the time of James I.⁶ it was recognised law that if a horse escape from a field through a gap in a fence permitted by the negligence of the defendant, and come to injury, the owner can recover.

¹ *Seaman v. Netherliff*, 2 C. P. D. 53.

² (1902) 1 K. B. 407.

³ Bac. Max. Reg. 1. There is an article on the maxim, 4 Am. Law Review, 201; see also the exhaustive note on "Proximate and Remote Cause" to *Gilson v. Delaware & Hudson Canal Co.*, 36 Am. St. R. 807-861.

⁴ Wharton, Criminal Law, bk. 1, ch. vii. Causal Connection, §§ 152, 169.

⁵ For a collection of cases on the law generally on this subject, see *Fieart v. Wilcocks*, 2 Sm. L. C. (11th ed.) 519. The various aspects of the maxim in its reference to insurance law are illustrated by Erie, C.J., *Ionides v. Universal Marine Insurance Company*, 14 C. B. N. S. 259. See also the remarks of Lord Selborne, *Inman Steamship Company v. Bischoff*, 7 App. Cas. 670, 676; also per Lord Blackburn, 683; and Story, J.'s, judgment in *Peters v. Warren Insurance Company*, 14 Peters 99, 111, where *D. Fanz v. Salvador*, 4 A. & E. 426, is examined and questioned.

⁶ *Holback v. Warner*, Cro. Jac. 666.

The law was again stated by the Court of King's Bench in the case of *Rooth v. Wilson*,¹ where a gratuitous bailee sued for damages incurred from the death of a horse caused by the neglect of the defendant to fence; and in *Powell v. Salisbury*,² where, in similar circumstances, a horse was killed by the fall of a haystack on defendant's land. But the first case where a general principle is laid down to govern in all cases where injury results, not immediately and obviously arising out of the wrongful act, is *Davis v. Garrett*.³ Defendant's barge had deviated from her course without justifiable cause, and whilst out of her course, met with stormy weather and water washed over amongst the lime which formed her cargo and caused a fire. The master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were lost. Tindal, C.J., pointed out that the legal consequences must be the same, whether the loss is immediate, as by the sinking of the barge in a heavy sea, when out of her course, or by a connected chain of causes producing the same event. The defendant objected, that there was no natural and necessary connection between the wrong of the master in taking the barge out of her course and the loss itself. The Chief Justice answers this thus:⁴ "No wrongdoer can be allowed to apportion or qualify his own wrong; and as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done."

*Walker v. Goe*⁵ illustrates the other aspect of the principle. Commissioners were empowered by an Act of Parliament to lease a canal; and were required to give notice to the lessees if during the continuance of the lease the navigation was allowed to get out of repair; and in case the lessees should make default in executing the repairs pointed out, the Commissioners were further authorised⁶ to take possession of the tolls and themselves to do the repairs. The lease having been granted, during its continuance one of the locks of the canal became out of repair; yet the Commissioners gave no notice of it to the lessee though a sufficient time had elapsed for the giving of such notice. A barge entered the canal while the lock was so out of repair, but was prevented from getting out again by the falling in of the lock. On these facts it was held by the Court of Exchequer, and affirmed by the Exchequer Chamber, that no action lay by the owner of the barge against the Navigation Commissioners. "To say," says Pollock, C.B.,⁷ "that the damage could be the consequence of the wrongful act or

¹ (1817) 1 B. & Ald. 59.

² (1828) 2 Y. & J. 391. *Lawrence v. Jenkins* (1873) L. R. 8 Q. B. 274. There is an obligation for the owner of minerals so to fence that the horse or cattle of the owner of the surface are not injured through falling into excavations: *Groucott v. Williams*, 32 L. J. Q. B. 237. There is no implied obligation on the part of a lessor to keep up the fences of closes which he retains in his own hands, and which abut upon the tenant's land, to prevent the tenant's cattle from straying: *Erskine v. Adeane*, L. R. 8 Ch. 756. He must keep his cattle on his land, but is not bound to prevent his neighbour's cattle from straying: *Hilton v. Ankersson*, 27 L. T. N. S. 519. *Ponting v. Noakes* (1894), 2 Q. B. 281.

³ (1830) 6 Bing. 716, approved and followed in *Lilley v. Doubleday*, 7 Q. B. D. 511; *Smeed v. Foord*, 1 E. & E. 602.

⁴ (1858) 3 H. & N. 395, in the Ex. Ch. 4 H. & N. 350.

⁵ 6 Bing. 724.

⁶ "It shall be lawful for the Commissioners, and they are hereby authorised."

Wightman,
J.'s, judg-
ment in the
Exchequer
Chamber.

omission is in our judgment to assert a false proposition of law. The surmise is—if the notice had been given the repairs would have been done and the lock would not have fallen in, and so not giving notice caused the lock to fall in. As we have said, this is not proved; but it is not the proximate, necessary, or natural result of not giving notice. The not giving of notice is not sufficient to bring about the result; the giving of it would not be sufficient to hinder it.” Wightman, J., in the Exchequer Chamber, thus deals with the same point: “It is argued that if notice had been given the repairs would have been done, and if they had been done the lock would not have fallen in. Suppose, however, the Commissioners had given notice, it does not follow that the lessee would have repaired, and if he did not the Commissioners were not bound to repair. Therefore the falling in of the lock cannot be considered as the natural and necessary consequence of the omission of the Commissioners to give the lessee notice to repair.”¹

Conclusion.

The two above-quoted cases give the contrasted aspects of what is a natural and probable consequence. On the one hand, it is not sufficient in order to escape liability to show that the same consequence *might* have happened without the negligence that founds the liability. On the other hand, it is not sufficient to show that the negligence, and the injury that might flow from it, did exist, without showing that the injury would in ordinary course flow from the negligence.²

Lee v. Riley.

Cases of straying horses have been already noticed. In *Lee v. Riley*³ a more complicated state of facts existed. Defendant's duty was to repair the fences of a field where he kept a mare. This duty he neglected, and the mare got through a gap into a field, where the plaintiff had a horse, which was kicked by the defendant's mare, and so injured that he had to be slain. The plaintiff was held entitled to recover his value, on the ground that the foundation of the action was the negligence of the defendant in omitting properly to keep up this fence; and that it was through this negligence the defendant's mare strayed from her own pasture; and that it was impossible her owner could know how she would act when coming suddenly in the night-time into a field among strange horses. The distinction drawn by the Court between this and those cases where the question of a ferocious or vicious disposition was raised⁴ is—in those cases a knowledge is presumed, from the nature of animals, as to their probable conduct; in the present case such knowledge was impossible. This distinction appears at best very flimsy and unsatisfactory. If an animal is *mansuetæ naturæ*, and gives an “unexplained kick,” the owner is not liable,⁵ on the ground that the general disposition of the animal is such that the owner can, without negligence, assume that it will not act in

Distinction
drawn.

¹ Very like this in principle is *Glover v. L. & S. W. Ry. Co.*, L. R. 3 Q. B. 25, where plaintiff was wrongly ejected from a railway carriage, and left behind his opera glasses which he lost, but was disentitled to recover in respect of them, because the loss “was not the necessary consequence of the defendant's act, but owing to the plaintiff's own negligence or carelessness.”

² See remarks at the end of judgment of Pollock, C.B., in *Harrison v. The G. N. Ry. Co.*, 3 H. & C. 231, 238.

³ (1865) 13 C. B. N. S. 722. In *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10, the defendant was held liable in trespass for the injuries done by his horse in biting and kicking the plaintiff's mare through a fence which separated the plaintiff's and defendant's fields, irrespective of any question of negligence on the part of the defendants.

⁴ *Cox v. Burbidge*, 13 C. B. N. S. 430. *Read v. Edwards*, 17 C. B. N. S. 245.

⁵ *Cox v. Burbidge*, 13 C. B. N. S. 430, per Erle, C. J., 434. The question here is, whether the owner of an animal *mansuetæ naturæ* is liable for an unexplained kick.

a ferocious manner. If, then, he may assume that, surely he cannot reasonably be held liable when the assumption proves unwarranted, and when there was nothing to lead him to suspect the act to be possible. "It was impossible," says Erle, C.J., "that her owner could know how she would act;" if so, the animal being *mansuetos nature*, the owner was discharged from more than ordinary precautions. The true ground of the distinction between this and the other cases seems to be that here the defendant was guilty of an act of negligence, a result of which was that his mare trespassed on the land of his neighbour, and, while a trespasser, did an injury which would certainly have been avoided had the defendant not been negligent;—an injury, too, not so remotely connected with the negligence as to be other than a consequence probably arising out of it in a case where, apart from defendant, only irresponsible agencies were involved. The defendant's mare being a trespasser through the defendant's negligence, a presumption arises that the defendant is liable for all acts done during the trespass, unless they are such that, looking to the nature of the trespassing animal, they could be said not to be natural or probable consequences of its disposition. Although, when a horse is in a place where it has a right to be, any disposition to kick that it may suddenly manifest does not import a liability on its owner;¹ when the horse is where it should not be, and kicks, the kicking is not so far remote from what is to be expected from the natural disposition of horses that the injury cannot be said to follow in the natural and obvious sequence from the original wrongful act which allowed the horse to get where an opportunity of doing injury is given.²

If this is the explanation of the case, the decision becomes noteworthy as indicating a distinction all-important for understanding this branch of the law; between acts from which injurious consequences in the result flow to others, but which are not negligent in law, because these consequences would not antecedently have been anticipated to flow as natural results; and acts which carry liability because their probable outcome is injurious acts, though, in fact, the consequences which flow are not those anticipated. As will be pointed out later, an act is negligent if the doer of it by thinking might anticipate loss and injury as a natural and probable consequence to some third person with regard to whom or his property he has a duty not to be negligent. Further, the doer of a negligent act is responsible for the consequences flowing from it in fact, even though antecedently, to a reasonable man, the consequences that do flow seemed neither natural nor probable. As Tindal, C.J., shortly states the principle in the Exchequer Chamber, in *Barrow v. Arnaud*, the defendant "should answer for all the loss resulting from his act."³ But a man is not responsible for the consequences of an act (not a trespass) from which the ideal reasonable man⁴

Distinction between consequences constituting a negligent act, and consequences following a negligent act and the subject of damages.

¹ *Hammack v. White*, 11 C. B. N. S. 588.

² The converse case—the duty to refrain from injuring horses trespassing—is considered in *Hurd v. Grand Trunk Ry. Co.*, 15 Ont. App. 58, where horses being on a railroad line, the driver started his engine so soon as they were clear of the line and before they were beyond the influence of fright caused by the noise of the engine. It was held there was no duty. Hagarty, C.J., asks (at 63): Because the engine-driver "miscalculated the extent of the horse's nervousness, and damages resulted, does his conduct therefore amount to actionable negligence?" and adds: "This is one of the strongest illustrations that I remember of the *post hoc propter hoc* doctrine": he means one of the strongest illustrations of the thus named fallacy.

³ 8 Q. B. 604, 610.

⁴ I.e., a person of ordinary common sense using it and his opportunities of observation, in the particular matter.

would not anticipate injurious consequences, even though in fact such consequences in fact follow. The doing of the act is not negligent; therefore the consequences are irrelevant.

*Hill v. New
River Com-
pany.*

In *Hill v. New River Co.*,¹ an open ditch, insufficiently fenced and protected, ran along the highway. The New River Company caused a stream of water to spout on the highway to a height of about four feet above the level of the road. This jet was left unguarded by the servants of the company. The plaintiff's carriage was being driven along the highway between the spouting stream and the ditch; the horses took fright at the spouting stream and, swerving aside, fell into the ditch. The defendants resisted the plaintiff's claim on the ground that the unfenced excavation was the *causa proxima*; but the Court² was of opinion that the spouting water was really the *causa causans* of the accident, and that without the negligence of the defendants the accident would not have happened; and so they were responsible for its consequences.³

*Collins v.
Middle Level
Commissioners.*

Collins v. Middle Level Commissioners is a curious case.⁴ An Act of Parliament authorised commissioners to construct a cut with proper gates and sluices to keep out the waters of a tidal river, and a culvert under the cut for the purpose of draining the lands of the plaintiff and others on the east side of the cut. The Act of Parliament required the culvert to be kept open at all times. In consequence of negligent construction the waters of the river flowed into the cut and, bursting the western bank, flooded the adjoining lands. The plaintiff closed the lower end of the culvert and thus prevented a considerable extent of damage; thereupon the occupiers of the lands on the west side removed the obstruction, and caused a large addition to the water on the plaintiff's land. The defendants contended that the increase being caused by the wrongful act of those who removed the obstruction which the plaintiff had rightfully placed there, the defendants were not liable for the enhanced damage. The Court,⁵ held otherwise, upon two grounds:

- (1) The culvert by Act of Parliament was to be kept open at all times; consequently, those who removed the obstruction were no more wrongdoers than those who placed it there.
- (2) Assuming that those removing the obstruction were wrong, "the primary and substantial cause of the injury was the negligence of the defendants; and it is not competent to them to say that they are absolved from the consequence of their wrongful act by what the plaintiff or some one else did."

The second ground is too broadly expressed. Had the owners on the west removed the obstruction wantonly, their conduct could scarcely be regarded as a natural or probable consequence flowing from the negligent act. Their act takes its colour from the consideration that they were owners, and "imagining that if the neighbouring lands on the east were also overflowed the injury to themselves would be diminished."⁶ A man may be guilty of a breach of his statutory duty—that does not justify another who is only affected by the common loss of all the realm to set things right *forti manu*.

¹ (1868) 9 B. & S. 303.

² Mellor, Lush, and Hannon, JJ.

³ For the difference between *causa causans* and *causa causata*, see *East of Shrewsbury's case*, 9 Co. Rep. 50 b.

⁴ (1868) L. R. 4 C. P. 279. Cp. *Corporation of Raleigh v. Williams* (1893), A. C. 540.

⁵ Montague Smith and Brett, JJ.

⁶ L. R. 4 C. P. 279, 287, per Montague Smith, J.

*Smith v. London and South-Western Ry. Co.*¹ is the leading case on the matter we are now dealing with. The company's servants had cut the grass and trimmed the banks and hedges at the side of their line. The cut grass and hedge trimmings were then raked into heaps between the rails and the hedge, and there left for a fortnight in extremely hot weather. The heaps became very dry and inflammable, and were set on fire by sparks from one of the company's engines. A high wind prevailed at the time: the fire burnt up the hedge, passed over a stubble field and a public road, and destroyed the plaintiff's cottage about two hundred yards from the line. Brett, J., in the Court of Common Pleas, thought there was no case to leave to the jury; for "no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubble field and so get to the plaintiff's cottage at the distance of two hundred yards from the railway, crossing a road in its passage." Bovill, C.J., and Keating, J. held there was evidence: "Under ordinary circumstances it may be that hedges are not expected to ignite; but, if there be collections of grass and hedge trimmings near them in a very dry and inflammable condition, and these by some means become ignited, it may fairly be presumed that the hedges will be in danger, and who is to say where the danger will stop?" "It is not, however, for us to decide whether the injury complained of was a probable consequence of the conduct of the defendants' servants." The dissent of Brett, J., is to the proposition that admitting the negligence that produces the fire, the destruction of the cottage at a distance of two hundred yards was a natural and probable consequence of the fire. The two other judges held that the negligent act was cutting grass and hedges and leaving the cuttings to dry in heaps in a position where when dry they would most readily take fire. If from this negligent act injurious consequences naturally and ordinarily flowed, a liability to answer for them was shown.

Smith v. L. & S. W. Ry. Co.

Brett, J.'s view.

Judgment of the Court of Common Pleas. Bovill, C.J., and Keating, J.

In the argument in the Exchequer Chamber much stress was laid by the defendants on the *dictum* of Bramwell, B., in *Blyth v. Birmingham Waterworks Co.*² "It would be monstrous to hold the company liable for negligence because they did not foresee an event that was so remote from probability that for many months it could not be found out what was the cause of the injury to the plaintiff's premises." This Channell, B., in giving judgment, explained thus: "I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell, B., in his judgment in *Blyth v. Birmingham Waterworks Co.*"; "but when it has been once determined that there is evidence of negligence the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."³ And this opinion was adopted by Blackburn, J., in

Judgments in the Exchequer Chamber.

Channell, B.'s explanation of Bramwell, B.'s *dictum*.

Channell, B.'s view adopted by Blackburn, J.

¹ (1870) L. R. 5 C. P. 98, in the Ex. Ch. L. R. 6 C. P. 14. In *Admiralty, The Mellona*, 3 W. Rob. 7, where Dr. Lushington ruled that the presumption is that eventual loss is to be presumed due to the collision, and not to any new cause intervening. *Canada Southern Ry. Co. v. Phelps*, 14 Can. S. C. R., per Henry, J., 148.

² 25 L. J. Ex. 214: "Reasonable and probable" consequences are considered in *Holdam v. Wells*, 60 L. J. Ch. 156, where, in consequence of pugilistic entertainments at a club late at night, crowds collected and noise was occasioned; see also *Barber v. Penley* (1893), 2 Ch. 447.

³ L. R. 6 C. P. 21. The Irish case of *O'Gorman v. O'Gorman* (1903), 2 I. B. 573, is noteworthy here. Defendant kept bees, and had twenty hives of them on the border

his judgment : " What the defendants might reasonably anticipate is," said he, " only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." " If the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road, where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused ; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent ; but if a person fires across a road when it is dangerous to do so and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family and cannot set up that he could not have reasonably expected to have injured any one hut a labourer." On this all the Court were agreed. Blackburn, J., however, doubted " whether, since the trimmings were on the verge of the railway on the company's land, if the quickset hedge had been in its ordinary state they might not have been burned only on the company's premises, and done no further harm, and whether the injury, therefore, was not really caused by the hedge being dry, so that it caught fire, and by the fire thus spreading to the stubble field and thence to the plaintiff's cottage."¹

And the rest
of the Court.
Blackburn,
J.'s, doubt.

Considered.

This decision establishesthat, when negligence is once shown to exist, it carries a liability for the consequences arising from it whether they be greater or less until the intervention of some diverting force, or until the force put in motion by the negligence has itself become exhausted.² In discussing it confusion has been caused by not separating the two points which were mainly argued : (1) Was there any evidence of negligence to leave to the jury ; (2) if there was evidence of negligence to go to the jury, for how many of the consequences flowing from the negligence were the defendants liable ? It was with respect to the first point only that any doubt was felt by the judges—excepting Brett, J. The doubt may be thus stated—the defendants being authorised by Act of Parliament to run engines on their line, and the emission of sparks being necessarily incidental to doing so, the mere fact of fire thence arising would not affect them with liability apart from negligence ;³ while, in an ordinary season, the heaping of cuttings along the line would not in natural and probable sequence

of his land near plaintiff's stables, but remote from his own. Defendant " smoked " his bees at a time that plaintiff was " tackling " his horses. The bees stung the horses, which starting, dragged plaintiff along, threw him violently against a wall, and injured his spine. The jury found that the bees were kept negligently. The Court refused to disturb the verdict. The damage was not too remote.

¹ *Cp. Dennis v. Victorian Ry. Commissioner*, 28 V. L. R. 576.

² The American case of *Haverly v. State Line, &c., Rd. Co.*, 135 Pa. St. 50 ; 20 Am. St. R. 848, is very similar. See, too, *Ehrgott v. New York*, 96 N. Y. 264, where a man recovered for injuries suffered from a defect in a highway, resulting, months after, in a spinal disease. Whorton, § 77, is clear and precise in his statement of the principle, and cites *Higgins v. Dewey*, 107 Mass. 404, which is similar in its facts to *Smith v. L. & S. W. Ry. Co.*, Gray, J., there saying that one who negligently sets fire to his land is liable for injury done to his neighbour's property, " whether he might or might not have reasonably anticipated the particular manner in which it is actually communicated."

³ See now *Railway Fires Act (1905)*, 5 Edw. VII., c. 11. The Act is limited to agricultural land or to agricultural crops.

produce the fire. Bearing these two facts in mind, was the heaping of cuttings along the line in a way that in ordinary circumstances would not kindle fire from sparks alighting, evidence of negligence when done in a season of exceptional dryness, when fire might be caused by them in ordinary course, if a spark alighted? And again, it being matter of common knowledge that engines do emit sparks, was there evidence for the jury that the fire originated in sparks from one of the company's engines? Was the duty of the railway company limited to taking ordinary precautions, or did the knowledge of extraordinary circumstances bind them to use greater precautions? On the second point, in the Exchequer Chamber at any rate, there was no doubt at all. Yet some writers, by transferring the doubt on the first point to the decision on the second, have been landed in perfectly unnecessary difficulty in discriminating the natural consequences of a negligent act, for which a wrongdoer is liable in damages;² since

Duty to take greater care where there is greater danger.

¹ See *Daniel v. Metropolitan Ry. Co.*, L. R. 5 H. L. 45, per Lord Hatherley, C., 56.

² The expressions used by Lord Esher, M.R., in stating the rule of law, applied indeed to a very different class of cases, do not seem accurate. In *In re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Walk Schools*, 24 Q. B. D. 326, 329, he is reported as saying, "the rule seems to me to be that where a plaintiff has a cause of action for a wrongful act of the defendant, the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act, and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from the act." This is the very proposition he laid down and which was overruled in *Smith v. L. & S. W. Ry. Co.* It has been pointed out before that there are two inquiries in the application of the test of what is a natural and reasonable consequence: 1st, an inquiry whether the act causing injury was wrongful; that being established, then, 2nd, what are the actual continuous consequences of the wrongful act? The liability is determined by looking a post not ab ante. The defendant's view of the possibilities of his act is very material to determine whether his act is negligent or not; it is utterly immaterial to limit liability when once negligence has been established. Cp. *The Lincoln*, 15 P. D. 15. According to the formula in the *Gower's Walk Schools* case, it would, for example, have been hard for the plaintiff to have recovered in *Gilbertson v. Richardson*, 5 C. B. 502. Defendant's carriage was driven against the wheel of plaintiff's chaise, the collision threw a person who was in the chaise upon the dashing board, the dashing board fell on the back of the horse, the horse kicked and injured the chaise; it was held that the plaintiff could recover for the whole series of misadventures. Of course, the comment on such a case as this is, that liability is to be considered, not from the probable anticipation of particular consequences, but from the probability of an injurious consequence resulting. Again, in the Supreme Court of the United States in *Smith v. Bolles*, 135 U. S. (25 Davis) 125, 130, it was laid down that damages must always be the natural and proximate consequence of the act complained of; and the test was adopted "that those results are proximate which the wrongdoer from his position must have contemplated as the probable consequence of his fraud or breach of contract. This does not seem satisfactory if for no other reason, yet for that given in the Year Book, 17 Edw. IV, 2, pl. 2, *car comen erudition est que l'entent d'un home ne serra trie, car le diable n'ad conusance de l'entent de home*. Who can say what the wrongdoer contemplated? and, if a stupid wrongdoer, he probably contemplated nothing or little. The rule in *Pasley v. Freeman*, 3 T. R. 51, seems less open to objections: "If a man wickedly asserts that which he knows to be false, and thereby draws his neighbour into a heavy loss, he is responsible for it, or for so much of the loss as was the necessary, natural, or probable and known consequences of the misrepresentation; or as it has been otherwise expressed, "all the loss naturally and necessarily flowing from the wrongful act or default." *Harrison Ainslie & Co. v. Muncaster* (1891), 2 Q. B. 680. A railway company in the course of doing statutory work left a hole in premises through which a thief crept and stole goods. The company was held liable for the loss: *Marshall v. Caledonian Ry. Co.*, 1 Fraser 1060. In *Rarris v. Cameron*, 29 Am. St. R. 891, the question was considered of the responsibility of a person giving a child dangerous toys whence injury results. The conclusion arrived at, which seems correct, is, that there is no such liability where the injury arises from the abuse and not from the use of the article in question—in the case under consideration, an air-gun. Two questions were considered: 1. Was the defendant guilty of an act of negligence in buying an air-gun? 2. If so, could he have reasonably anticipated a dangerous and improper use of it? Both were answered in the negative.

it is clear from the judgments that no discrimination is admissible, and that, negligence being shown, the person guilty is answerable for all the consequences "whether he could have foreseen them or not."¹

Sir Wm.
Grant,
M.R.'s, view.

The same principle crops up in very different surroundings in the judgment of Sir William Grant, M.R., in *Caffrey v. Darby*²—a case of trustees' negligence letting eight years go by in which they only received £250 out of £800. To the argument, in effect that the consequences of their conduct were too improbable to warrant charging them, Sir William Grant said:³ "Even supposing they are right in saying, this was a very doubtful question, and they could not look to the possibility of its being so decided, yet, if they have been already guilty of negligence, they must be responsible for any loss in any way to that property: for whatever may be the immediate cause, the property would not have been in a situation to sustain that loss, if it had not been for their negligence. If they had taken possession of the property, it would not have been in his possession. If the loss had happened by fire, lightning, or any other accident, that would not be an excuse for them, if guilty of previous negligence. That was their fault."

Bailiffs of
Romney Marsh
v. Trinity
House.

*Bailiffs of Romney Marsh v. Trinity House*⁴ accentuates the decision in *Smith v. London and South-Western Ry. Co.* Defendants' vessel being driven upon a seawall, became a wreck and could not be removed without breaking her up. To do so would have caused valuable property on board to be sacrificed. The defendant first removed the property with all reasonable speed and then broke up the vessel. While the work of unloading was going on increased damage was done to the wall. The defendants contended that they were only liable for the original negligence and not for the damage done while the ship was on the wall and the property was being removed; because it was not reasonable to break up the ship while containing valuable property, and reasonable care was all the defendants were bound to observe. The fallacy of this contention is that it assumes the consequences of the negligence of the defendants to terminate when once the ship was on the wall, and the wall was being injured by the humping on it through the action of the waves and tide, and no longer by the force of the impact; whereas the injuries inflicted were direct consequences of the negligence in allowing the ship to get on the wall. Between the decision in the Exchequer and the hearing in the Ex-

A liability was held to exist where a dangerous substance was not kept out of the reach of boys at school, when injury resulted from one taking it and causing an explosion, which injured a playfellow, in respect of whose injuries action was brought: *Williams v. Eady*, 9 Times L. R. 637, affirmed (C.A.) 10 Times L. R. 41. The distinction between the cases seems to be in the one case, a boy was given a proper plaything, whose use he abused; in the other, a boy was not prevented meddling with what was dangerous and not a plaything. In *Thompson, Negligence*, § 700, a vigorous protest is made against the decisions which hold a father "guilty of no negligence in putting into the hands of a boy a toy gun or revolver, in consequence of which such a trifling accident as the putting out the eye of a man or a boy follows." The ground for liability suggested is "for a father to put into the hands of a boy of tender years such a dangerous instrument or to allow him to have it and keep it in tantamount to maintaining a public nuisance." Perhaps the case is a little overstated. According to the circumstances, it may be, and the jury will protect the community when it is one. *Malins v. Piggott*, 20 Can. S. C. R. 188.

¹ Cp. Street, *Foundations of Legal Liability*, vol. i. 90.

² 6 Ves. 488.

³ L. C. 436.

⁴ (1879) L. R. 5 Ex. 204, in Ex. Ch. L. R. 7 Ex. 247. Cp. *The Douglas*, 7 P. D. 151; *The George and Richard*, L. R. 3 A. & E. 466.

chequer Chamber, *Smith v. London and South-Western Ry. Co.* was decided in the Exchequer Chamber and the law was established to be that, "if the negligence were once established it would be no answer that it did much more damage than was expected;"¹ and the defendants were liable for all the attendant consequences. So long as the original wrongful position of the ship continued, the liability attached through all the consequences. Fault founded the liability of the defendants, and continued the measure of it, till it ceased its working. Had the defendants not been in default, the maxim that loss lies where it falls would apply.² A duty to remove the ship in a reasonable time and manner would attach to its owners, and till default no liability for damage could arise.³ The defendants' view was untenable that when their ship was at rest on the wall, the negligence that got her there had worked out all its consequences.

*Wilson v. Newberry*⁴ was decided on demurrer. The declaration alleged a duty on the defendant to prevent the clippings of his yew trees, which to the knowledge of the defendant were poisonous to cattle, and actually caused the death of the plaintiff's horses through eating of them, from being placed upon land other than that occupied by the defendant. The analogy sought to be established was with the case of *Fletcher v. Rylands*;⁵ the Court refused to recognise any such analogy, and the more so as, by the terms of the declaration, the duty sought to be established was not only to prevent the clippings from escaping on to his neighbour's land, but was so broadly expressed as to cover the case of their being placed there by a stranger.

Next comes the interesting case of *Sharp v. Powell*.⁶ Defendant's servant, in breach of the Police Act,⁷ washed a van in the public street. The waste water ran down the gutter towards a grating leading to a sewer some few yards off. The grating was frozen over, and the water, after flowing for some way, froze also. The plaintiff's horse, while being led along the road, slipped on the ice and broke his leg. The Court of Common Pleas upholding the decision of the judge at the trial, who directed a nonsuit, held that "the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated or for which he is responsible." "The expression the 'natural' consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression."⁸

The act of the defendant in washing his van in the public street was wrongful as against the public, though not an act in itself conferring any right of action on a private individual.⁹ If the water had

¹ Per Blackburn, J., L. R. 6 C. P. 14, 22.

² *The Woodrop Sims*, 2 Dods. 83.

³ See per Kelly, C. B., L. R. 5 Ex. 207.

⁴ (1871) L. R. 7 Q. B. 31. *Ponting v. Noakes* (1894), 2 Q. B. 281.

⁵ L. R. 3 H. L. 330.

⁶ (1872) L. R. 7 C. P. 253. *Stevens v. McKenzie*, 25 V. L. R. 115; *Munt Cottrell v. Reynolds*, 24 N. Z. L. R. 806. Cp. the two cases, *Singleton v. Eastern Counties Ry. Co.*, 7 C. B. N. S. 287; *Williams v. G. W. Ry. Co.*, L. R. 9 Ex. 157, in one of which there was, and in the other there was not, a negligent act proved.

⁷ 2 & 3 Vict. c. 47, s. 54.

⁸ Per Grove, J., L. R. 7 C. P. 253, 259.

⁹ An act may be negligent judged by an abstract standard; it is not an actionable negligent act (1) till it inflicts injury on some other person; (2) which injury is a natural and probable result to be foreseen by a reasonable person at the time of acting.

at once formed a puddle and frozen, and the accident had followed on the spot where the negligence had been committed, the plaintiff would probably have been held entitled to recover, not by virtue of the Police Act, but because of a nuisance on the highway from which the plaintiff sustained particular damage. When the water had flowed away and had run into the channel provided for waste water, the natural and probable effects of the plaintiff's act were exhausted. The water was in its proper channel. Subsequently, another agency, the frost, prevented the flow of the water. How the water came in the gutter was immaterial; the gutter was there for the reception of waste water. The question then arose was there any duty on the defendant, after seeing that the water placed on the public road by his wrongful act had flowed away in the channel provided, to trace it along its course.¹ The Court held that there was no such duty; for that when the water had got into its natural course the consequences of his wrongful act ceased. This implies that the mere act of throwing water down the gutter was lawful; if otherwise, the effect of the wrongful act would have been continuous, and the decision probably different.

The Douglas.

It must not be forgotten that the consequences of a negligent or wrongful act last no longer than the negligent or wrongful consequences are actually operative. This is well illustrated by *The Douglas*.² A ship having sunk in the waterway of a river it was sought to make her owner liable for collision with another vessel on any one of three grounds—1st, that the vessel having sunk there was an obligation to

¹ See per Pollock, C.B.: "That a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur:" *Greenland v. Chaplin* (1850) 5 Ex. 243, 248: but compare what the same learned judge says in *Rigby v. Hewitt*, 5 Ex. 243: "Where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury." In *The Bernina*, 12 P. D. 61, Lord Esher says that the common law is clear that "if no fault can be attributed to the plaintiff, and there is negligence by the defendant . . . the plaintiff can maintain an action for all the damages occasioned to him." Cp. *In re London and General Bank* (No. 2) (1895), 2 Ch. 680 at top of page. This—that the wrong alleged is a tort—is the ground of the decision in *Mullett v. Mason*, L. R. 1 C. P. 559, where defendant was held liable "for all the direct consequences of" his fraud. Pothier, *Traité des obligations*, Part I., c. 2, art. 3, discusses the same case. His conclusion is: *On ne doit pas comprendre dans les dommages et intérêts dont un débiteur est tenu pour raison de son dol, ceux, qui non seulement n'en sont qu'une suite éloignée, mais qui n'ont pas une suite nécessaire, et qui peuvent avoir d'autres causes.* In *In re United Service Co.*, L. R. 6 Ch. 218, James, L.J., says: "Suppose the bailee of a key carelessly allowed the key to fall into the possession of a man who committed a burglary, and by means of that key opened a box which contained valuable property. It is scarcely possible to hold that the negligence of the bailee with regard to the key would be followed by responsibility for the loss of every article obtained by the burglar through the instrumentality of the key." This accords with the other cases. When the key falls into the hands of the burglar the natural consequences of the loss are exhausted. He—a responsible agency—gives a new direction to the consequences, and terminates the original sequence. *Hughes v. Quentin*, 8 C. & P. 703, does not seem correct. The case is omitted in R. R. It is cited in *The Gretna Holme* (1897), A.C. 596, 600, but that decision seems irreconcilable with it, 602. See, however, *Greenbirt v. Smee*, 35 L. T. 168, 172. In Mayne, *Damages* (7th ed.), 439, it is said to be "clearly bad law." *Sharp v. Powell* is on this point analogous to the *American Sunday Travelling cases*: see Jones, *Negligence of Municipal Corporations*, § 225. The fact that defendant has not observed the law does not increase plaintiff's right against him, for what is, if any thing, an independent wrong. "It must appear that the disobedience contributed to the accident, or that the statute created a right in the defendant (here the plaintiff) which he could enforce. But the object of the statute is the promotion of public order and not the advantage of individuals," per Danforth, J. (1882), *Platz v. City of Cohoes*, 89 N. Y. 219. Cp. *Ward v. Hobbs*, 4 App. Cas. 13.

² 7 P. D. 151, 160.

light the wreck; 2nd, that an indictable offence had been committed by the defendants in the channel of a navigable river; 3rd, that there was a duty to give notice where the wreck was lying. The ship had sunk through negligence, and if she had not sunk no accident could have happened; yet Brett, L.J., negating actual negligence in those responsible for the ship after she had got into the position whence the danger arose, points out "that no greater liability can exist against the defendants than if their steamship had sunk without negligence." The negligence had worked out its effects, and any accident was the result of a new cause, not of the original wrongful agency.¹ The distinction between this case and *Bailiffs of Romney Marsh v. Trinity House*² is that between a negligent act which had become inoperative and one where the negligent act was still working.

*Sneesby v. Lancashire and Yorkshire Ry. Co.*³ very usefully illustrates a point left untouched in *Sharp v. Powell*. There was admitted negligence on the part of the servants of the defendant company in moving down trucks from a siding while cattle were crossing the line, whereby the plaintiff's cattle were separated from the drovers, frightened, and dispersed. Most of the cattle were recovered. Some, however, were found lying dead upon another part of the railway, whither they had strayed through a defect in the fence of a garden or an orchard, and which, though in fact on the defendants' railway, for the purposes of the case was treated as if it had been the railway of some other company, or as if the straying cattle had fallen down an unguarded quarry. It was contended that this damage was too remote. "The rule," says Blackburn, J. "is sometimes difficult to apply, but in a case like the present this much is clear, that so long as the want of control over the cattle remains, without any fault of the owner, the *causa proxima* is that which caused the escape, for the consequences of which he who caused it is responsible. Suppose, for instance, in former times, a reclaimed falcon were frightened and escaped, the natural consequence would be that it would be lost altogether, and the person who negligently frightened it would be liable. The natural and proximate consequence was that it would not be got back at all. So if you have lost control of cattle and cannot get them back under your control till they have run into danger and are killed, the death is a natural consequence of the negligence which caused you to lose control of them. It is the most natural consequence of cattle being frightened, that they should go galloping about and get into a dangerous position, and, being in the neighbourhood of railways, should get on the line and be run over by a passing train, whether that of the defendants or not is immaterial. When once it is established that the cattle were driven out of the control of the plaintiff by the defendants' negligence, and that the control could not be recovered till they were killed, the liability of the defendants is beyond dispute."⁴ Lord Cairns, C., on appeal puts the matter more shortly: "Every-thing that occurred or was done after that (*i.e.*, after the cattle were frightened and infuriated) must be taken to have occurred or been done continuously."⁵

Sneesby v. Lanc. & Y. Ry. Co.

Blackburn, J.'s, statement of the law.

Lord Cairns's summary.

¹ *Flower v. Adam*, 2 Taunt. 314. In *McKelvin v. The City of London*, 22 Ont. R. 70, plaintiff's sleigh was overturned through defendant's negligence. In attempting to raise his horse, which had fallen, plaintiff sustained bodily injury. The damage was held not too remote.

² *Ante*, 90.

³ (1874) L. R. 9 Q. B. 263, 1 Q. B. D. 42.

⁴ L. R. 9 Q. B. 263, 267.

⁵ 1 Q. B. D. 42, 44.

Considered.

The liability is, therefore, made dependent, not on the nearness of the wrongful act, but on the absence of power to divert or avert its consequences, and continues through the various consequences till the first impulse either spends itself, as by the death of the cattle, or is diverted by some independent agency intervening. The difference between the result in *Sharp v. Powell*¹ and *Sneeby v. Lancashire and Yorkshire Ry. Co.*² does not flow from any difference of principle involved; for the subject of inquiry in each case is different. In the former the inquiry is—was there any negligence? The answer is no; because the effects of the act charged as negligent were not natural and probable and to be foreseen. In the latter the inquiry is—what consequences of their negligence are the defendants liable for? The answer is, all, till the consequences are exhausted or diverted.

Pearson v. Cox.

*Pearson v. Cox*³ corroborates *Sharp v. Powell*.¹ Injury was caused to a passer along a public footpath by a "straightedge," a plasterer's tool, falling from the window of a house that was being built adjacent to the footpath. The outside had been completed, the internal work only was in progress. The jury found that there was no occasion for the hoarding to remain after the outside of the house was finished. One of the plasterers, walking along a plank, caused the tool to epring, and so threw the "straightedge" out of window. "The accident was highly improbable, and a man need not guard against highly improbable accidents." The Court was of opinion that there was in these circumstances no evidence of liability against the general builders for neglect to guard against general dangers in the course of the building. If an action lay it was probably against the sub-contractor for the plastering; a negligent act was not established; had the conduct of the defendant been negligent the consequences would not have been too remote.⁴

Clark v. Chambers.

*Clark v. Chambers*⁵ is a leading case. Defendant occupied premises abutting on a private road, which were used for athletic sports. The defendant put up a barrier along the road to prevent carts and vehicles being drawn up there for the purpose of overlooking his exhibitions. This barrier was made by a hurdle set up lengthways next the footpath, then two wooden barriers armed with spikes, commonly called *chevaux de frise*, then an open space through which a vehicle could pass, then another large hurdle set up lengthways, which blocked the rest of the road. The space between the two divisions of the barrier was usually left open for vehicles to pass to any of the other premises down the road. When sports were going on, a pole was carried from one part of the barrier to the other, and the road was effectually blocked. On the evening of the accident the plaintiff was visiting one of the houses down the road; in returning along the middle of the road, in the dark, the plaintiff having made his way safely through the opening in the barrier, turned to the footpath, intending to walk along there the rest of the way; but one of the *chevaux de frise* hurdles had been moved and placed in an upright position across the footpath. The plaintiff had not gone more than a few steps when his eye came into collision with one of the spikes, and he was blinded. It did not appear by whom the *cheval de frise* hurdle had been removed. The jury found

¹ 1 R. 7 C. P. 253.² (1877) 2 C. P. D. 369.³ L. C. per Brett, L. J. 373.⁴ 3 Q. B. D. 327; *Powell v. Deveney*, 57 Mass. 300.⁵ 1 R. 9 Q. B. 263; 1 Q. B. D. 42.

that this was not done by the defendant or by his authority. The defendant's act in erecting the barrier was unauthorised and wrongful, and the plaintiff was lawfully using the road. The defendant contended, that as the immediate cause of the accident was not the act of the defendant, but that of the person who removed the *cheval de frise*, he could not be held responsible in law for the act of another.¹

The Court held that the plaintiff could recover; though there is an apparent indisposition to state any formula embracing the principle governing their decision. However, after quoting the judgment of Bovill, C.J., in *Sharp v. Powell*,² Cockburn, C.J., says: "At the same time, it appears to us that the case before us will stand the test thus said to be the true one. For, a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen; and, if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near: thus, if the obstruction be to the carriage way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that if a person places a dangerous obstruction in a highway or in a private road over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences."³

Cockburn, C.J.'s, statement of the law.

Clark v. Chambers differs from *Sharp v. Powell* in a wrongful act as against the plaintiff being at the root of it. The defendant had no right to place his *cheval de frise* anywhere on the footway. So long as it was there it was a continuing wrongful act. When some other person removed it from the position in which the defendant had placed it, because the presence of it interfered with his rights, he was doing no more than he was entitled to do. If he had set a trap for the plaintiff and had done a wilful and malicious act, another aspect of the case would be presented; in merely removing an obstruction from his path he was, in the circumstances, acting after the course indicated in *Scott v. Shepherd*, and the defendant's act did not lose its original wrongfulness by the shutting of the *cheval de frise*. Its being there at all was wrongful; and when actual injury resulted the defendant became liable for the consequences.

The law discussed.

*Metropolitan Ry. Co. v. Jackson*⁴ is on the same lines. The decision there is that the defendants' act was not a negligent one in the sense in which it was complained of; and therefore the consequences alleged

Metropolitan Ry. Co. v. Jackson.

¹ The other aspect of the case where the erection of a barrier was lawful and the defendant was held not liable for injury caused by its surreptitious removal, is illustrated by *Park v. City of Cohoes*, 10 Hun 531, affirmed 74 N. Y. 610. The defendant, a city corporation, had erected barriers to guard an excavation in the road, made by it as the water authority. The city was held not liable because "it was not necessary that the barricade should have been made other than temporary, nor of such heavy material as to prevent its removal by human agency. The defendant was not bound to anticipate mischievous or wrongful acts on the part of others, hence was not required to guard against them, and omitting to do so was not negligence."

² L. R. 7. C. P. 253.

³ 3 Q. B. D. 327, 338.

⁴ (1877) 3 App. Cas. 193.

are immaterial since no foundation of liability is laid.¹ The detailed consideration of this important case must, however, be postponed.

*The City of
Lincoln.*

The judgment of the Court of Appeal in *The City of Lincoln*² is only explicable on the ground now presented. A collision took place between a steamer and a harque. The steamer was solely to blame for the collision. The steering apparatus of the harque was lost through the collision; nevertheless the captain tried to make for a port, but through lack of the instruments of navigation and without negligence the harque was lost; and this loss flowing in ordinary sequence from the steamer's negligence rendered the owners chargeable.

*Bull v.
Mayor,
&c. of
Shoreditch.*

The judgment of Collins, M.R., in *Bull v. Mayor, &c. of Shoreditch*³ deals with the point now being considered. Plaintiff was upset in a cab in the defendants' district. The road where the cab was being driven was foundrous, and to avoid this the driver crossed to the other side and ran upon a heap of rubbish which some wrongdoer had shot there. Collins, M.R., said that the point was whether the defendants were responsible for the act of the wrongdoer. "A breach of duty as between the defendants and the plaintiff was clearly established. There was an immediate duty on the part of the defendants towards the plaintiff as one of the class of persons for whose benefit the duty of maintaining the roads had been imposed on the defendants and whom they must contemplate as being likely to use the roads. There was an obligation on the defendants to safeguard the plaintiff, and under those circumstances, in his opinion, if there was a chain of causality connecting their breach of duty with the ultimate mischief, then, unless there was a *novus actus interveniens*,⁴ they were responsible even for the consequences of the act of an independent wrongdoer."⁵ These remarks of the M.R. are, however, only *obiter*.

¹ *Cowell v. Mansford*, 3 Times L. R. 1, depends on a special fact. The defendant's dog attacked the mare of the plaintiff while plaintiff was driving her in a gig. The mare fell and was injured, as was also the gig, the plaintiff, and his clothes. Bowen, L.J., held that the plaintiff could only recover for the damage done by the dog to the mare. This, though it does not appear from the report, was probably on the ground that the only right of action, where *scientia* of the disposition of the dog is not proved, is under the Act 28 & 29 Vict. c. 60, s. 1, the words of which are: "The owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog." The damages were thus limited to injuries done to the mare. This Act is now repealed by 6 Edw. VII. c. 32 (The Dogs Act, 1906), where the corresponding words are "the owner of a dog shall be liable in damages for injury done to any cattle by that dog." *Glover v. L. & S. W. Ry. Co.*, L. R. 3 Q. B. 25, is a case where loss arising out of a wrongful act is not legally a consequence of the act, and so not a subject of damages. The special facts on which the case is decided may very possibly never recur. Had the case been plainly one of wrongfully removing a passenger who in the hurry caused by the wrongful act left valuable property behind, the principle of *Jones v. Boyce*, 1 Stark. (N. P.) 493, would apply.

² (1889) 15 P. D. 15.

³ 19 T. L. R. 64. For some not apparent yet presumably sufficient reason, this very important judgment is not to be found in the Reports of the Incorporated Council of Law Reporting.

⁴ This phrase occurs in Lord Chelmsford's opinion, in the H. L. in *Holroyd v. Marshall*, 10 H. L. C. 191, 226, and is derived from Lord Campbell's judgment below where he says: "My judgment rests upon Lord Bacon's maxim *L. est dispositio de interesse futuro sibi inutilis, tamen fieri potest declaratio procedens quæ sortitur effectum interveniente novo actu*": 2 De G. F. & J. 603. Speaking of damages recoverable from a tenant who maliciously sets fire to his house Pothier quotes Dumoulin (cited 2 Sn. L. C., 11th ed., 553): *Et adhuc in doloso intelligitur venire omne detrimentum tunc et proxime secutum, non autem damnum postea succedens ex novo casu, etiam occasione dictæ combustionis sine qua non contigisset: quia istud est damnum remotum, quod non est in consideratione.*

⁵ *Halestrap v. Gregory* (1895), 1 Q. B. 561, is a clear illustration of the same principle, though Wills, J., was under the impression that it was "on the borderline." Cp. *Dunham v. Clare* (1902), 2 K. B. 292.

Kennedy, J.'s, judgment in *McDowall v. Great Western Ry.*,¹ till *McDowall v. G. W. Ry. Co.*² reversed in the Court of Appeal,³ greatly extended the limits of liability for owners of property: if they had means of knowledge that their property might be misused to the detriment of third persons, and continued to use it in their accustomed way, they made themselves liable in damages on injury being suffered through the misdoings of trespassers. Servants of the Great Western Railway shunted trucks and a brake-van on a siding on an incline running down to a lever which crossed a highway. On the siding was a catch point which would have prevented the vehicles if set in motion running down the incline. Instead of using it the railway servants screwed down the brake of the van and properly "spragged" the trucks. To set the vehicles in motion was thus a more difficult operation than merely moving the catch-point. Some boys trespassed on the van, unfastened the screw couplings and released the brake. The van ran down the incline, smashed the gate separating the railway from the highway, and knocked down the plaintiff, who was lawfully walking there. Kennedy, J., held the railway company liable on certain findings of the jury: "The finding of the jury . . . that the defendants at the time of placing and keeping the van where they did, knew of the danger to those on the highway of such interference as caused the plaintiff's hurt appears to me to be conclusive." To arrive at this conclusion Kennedy, J., appears to have assumed that knowledge, a word that here has to cover mere conjecture, of the mischievous proclivities of neighbours, disentitles to the natural and ordinary use of property the use of which they, possibly, may pervert. The Court of Appeal held that there was no evidence of this to leave to the jury. Had property been hailed to the railway company and, placed in the dangerous situation, had been injured, the railway company would clearly have been liable to their hailors. It is a proposition belonging to quite a different branch of law to urge a liability on the railway company for some trespassers' misuse of the company's belongings. The most available principle to invoke is that of *Dixon v. Bell*,⁴ that those possessing instruments of danger should keep them with the utmost care; but there, apart from other discrepancies, negligence existed before the injurious agency was set in motion; while a railway van properly secured is hardly an instrument of danger. The only other principles from which a liability could flow that suggest themselves are a "public duty" or nuisance. There is no pretence of alleging a nuisance, and a public duty has to be created for the occasion. The Court of Appeal confined their reversal of Kennedy, J.'s, judgment to holding that there was no evidence to warrant the findings of the jury. They might have gone further and held that no legal duty was shown to warrant the leaving the questions to the jury at all.⁵

Cited.

This brings us to some American cases. In *Insurance Co. v. American Insurance Company v. Tweed*,⁶

¹ (1902) 1 K. B. 618.

² (1903) 2 K. B. 331.

³ 5 M. & S. 108.

⁴ Cp. *Reedie v. L. & N. W. Ry. Co.*, 4 Ex. 244; *Lane v. Cox* (1897), 1 Q. B. 415; *Cavalier v. Pope* (1900), A. C. 428. Kennedy, J., also regards (p. 623) the act of the railway company in providing a catch point for their own purposes as imposing no legal duty to use it for the benefit of third persons. This is incorrect: *Sketton v. L. & N. W. Ry. Co.*, L. R. 2 C. P., per Willes, J., 636. But see the Scotch decisions *Murphy v. Smith*, 23 Sc. L. R. 709; *Horsburg v. Skeach*, 3 Fraser 268; *Innes v. Fife Coal*, 3 Fraser 335.

Tweed,¹ the facts showed that cotton in a warehouse was insured against fire, the policy containing an exception against fire happening "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, *explosion*, earthquake, or hurricane." An explosion took place in another warehouse situated directly across a street which threw down the walls of the first warehouse and scattered burning embers about. The fire was not communicated directly from the warehouse in which the explosion took place to the warehouse where the cotton was, but came more immediately from a third building which was itself fired by the explosion. Wind was blowing (with what force did not appear) from this third building to the one in which the cotton was stored. The whole fire was, however, a continuous affair from the explosion, and under full headway in half an hour. In holding the cause an explosion within the exception in the policy, the Court said: "We have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and been decided in the Courts in a great variety of cases. It would be an unprofitable labour to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by fire burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favour the progress of the fire towards the warehouse be considered a new cause."

*Milwaukee,
&c. Ry. Co.
v. Kellogg.*

In the next case,² the plaintiff's mill and timber were burned as a consequence of the burning of a grain elevator, which was set on fire by the negligence of those on board defendants' steamer. "The true rule," said the Court, "is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it." "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

¹ 7 Wall. (U. S.) 44, 52. In *Scheffer v. Rd. Co.*, 105 U. S. (15 Otto) 249, this case is said to have gone "to the verge of the sound doctrine."

² *Milwaukee and St. Paul Ry. Co. v. Kellogg*, 94 U. S. (4 Otto) 469, 474.

In *Scheffer v. Rd. Co.*,¹ through the negligence of the defendant company, a passenger was so injured that he became insane, and, eight months after the accident, committed suicide. An action brought by his personal representative was defeated on the ground that deceased's own act being the proximate cause of his death the defendants were not liable. In giving judgment the Court said: "The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rules in both these cases (*i.e.*, the two cases already cited), a new cause and a sufficient cause of death. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible, or even logical argument, would lead back to that 'great first cause least understood,' in which the train of all causation ends."

Scheffer v. Rd. Co.
Insanity through accident.

One must pause here. If any course leads back to the "great first cause" without interruption, no negligence can have counteracted it, and no liability can have been incurred in its progress. The whole point of the case under consideration is that an act out of due course—the negligence of the defendants—had deranged the sequence of effects; in which event the consequences of the derangement would affect those inducing them with liability. But the Court seem to shrink as well from tracing an effect back step by step to its first cause as from tracing an act of negligence to its ultimate catastrophe. Yet since in the one case, whatever the result, if it is brought about by natural agencies without a negligent intervention, liability can be transferred to no one; so, in the other, it would seem that an act arising from negligence should not be divested of the consequences merely because they are postponed; that is, if it can be shown that they are direct and natural consequences, not attributable to the intervention of any other accountable agent. A wrongdoer clearly ought not to escape the consequences of his action because he works by circuitous contrivances and refrains from simply producing the injurious result.

Considered.

The judgment then continues: "The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity as a cause of his final destruction was as little the natural and probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes intervening between the act which injured him and his death." If this is a correct expression of the American doctrine, it certainly is not in accord with the English doctrine as laid down by Blackburn, J., in *Smith v. London and South-Western Ry. Co.*² If disease is produced by a railway accident, and suicide is the result of disease, neither can be looked upon as "casual or unexpected causes." They are both the natural outcome of the injuries arising from the accident. True, to take the latter of them, the suicide might be the voluntary expression of the sufferer's despair at his desperate state. In that case there would be the intervention of a conscious agency, which diverts the course of the disease; then

Judgment of the Court continued.

Considered.

¹ 105 U. S. (15 Otto) 249.

² L. R. 5 C. P. 98; in Ex. Ch. L. R. 6 C. P. 14.

there would be no liability on the defendants for an act not necessarily and unaided growing out of their wrongful act. But whether the suicide were the effect of the disease, or whether it were the voluntary act of an, at least, partially responsible agent would be a matter for a jury to pass their opinion on. From the English point of view in the former case the defendants would not, in the latter they would, be discharged.¹

Brintons v. Turvey.

The subject came up in the House of Lords in *Brintons v. Turvey*,¹ where Lord Halsbury, C. said: "An injury to the head has been known to set up septic pneumonia, and many years ago I remember, when that incident had in fact occurred, it was sought to excuse the person who inflicted the blow on the head from the consequences of his crime because his victim had died of pneumonia and not, as it was contended, of the blow on the head. It does not appear to me that by calling the consequences of an accident¹ injury a disease, one alters the nature or the consequential results of the injury that has been inflicted."

Injury to a delicate person.

The considerations we have been examining apply also to the case where the injuries inflicted are the more severe from the fragility of the sufferer, or from his suffering from a disease at the time of the injury which intensifies its consequences. In this case, in the United States, the rule laid down by Messrs. Shcrman and Redfield² has been adopted: "Though the plaintiff be afflicted with a disease or a weakness which has a tendency to aggravate the injury, defendant's negligence will still be held to be the proximate cause; and the defence that the sufferer died from an independent disease is not made out, unless it is clearly shown that death must have ensued independently of the injury."³ There does not appear to be any English case stating this in terms, yet the conclusion accords with English principle.⁵

Holmes, J.'s, ruling in *Spade v. Lynn, &c. Rd. Co.*

The citation of an American case, a judgment delivered by Holmes, J., in *Spade v. Lynn, &c. Rd. Co.*,⁶ here may be permissible. The plaintiff claimed for the effects of fright caused while travelling in a train-car, caused by the presence and conduct there of a drunken man, who while being removed was hustled over her. The plaintiff was said to be "a particularly sensitive person." As to the actual injuries received Holmes, J., said: "If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks which she (plaintiff) assumed when she took her passage." But on the assumption that a wrongful act had been done by the defendants' servants, he said: "If the defendants' servant did commit an unjustifiable battery on the plaintiff's person, the defendant must answer for the actual consequences of that wrong to her as she was, and cannot cut down her damages by showing that the effect would have been less upon a normal person."⁷ This conclusion accords with our previous investigation.

The principle is well illustrated by the New Zealand decision,

¹ The authorities are most ably examined in *McDonald v. Snelling*, 96 MASS. 290, 293, a case upon the consequences following a horse running away.

² (1905) A. C. 230, 233.

³ Negligence, § 742. *Louisville, &c. Rd. Co. v. Snyder*, 10 Am. St. R. 60, see note 64-66.

⁴ Cp. *State v. Londgraf*, 6 Am. St. R. 26; see 27 Sc. L. R. 20.

⁵ *Tait v. Railway Passengers' Assurance Co.*, 22 Q. B. D. 504.

⁶ 172 Mass. 488.

⁷ In *Governor Wall's case*, 28 How. St. T. 144, Macdonald, C.B., lays down the law as to excessive severity in normal cases.

*Linklater v. Minister of Railways.*¹ Plaintiff was injured in a railway collision: if he "had been in ordinary state of health the injury would not have occurred." The law was thus stated: "A person suffering from any complaint who travels by railway must take any risks that a person in his condition would be likely to incur through a railway journey;" but "the fact that the plaintiff at the time of the injury was suffering from a disease or weakness, curable or incurable, though its tendency was to aggravate the injury caused by the negligence, does not impair the plaintiff's right to recover." This may be taken to express the correct view.

Closely related to the cases we have just been considering are those where the injury sustained is aggravated by a refusal to submit to treatment or to some particular treatment. Here, again, there are no English authorities in point. In a New York case, however,² it was contended that the plaintiff should not be allowed to recover because the injured man, plaintiff's intestate, at first rejected the advice of his physician and refused to have his leg amputated as he was advised. The Court considered that if the refusal was fatal to the patient the defendant had no cause to complain, for death limits a verdict to a less sum than a jury might think proper to award to a living but crippled man. On the general question the opinion was that: "It certainly cannot be said as matter of law that a patient may not, without imputation of negligence, trust to natural results without the complication of scientific experiments." And it cannot be laid down, as matter of law, that no refusal to accept medical or surgical help will disentitle him to recover. Indeed, the case is not impossible in which the very effect of the accident is a nervous perturbation that forbids the performance of operations which in health might be submitted to without risk or undue anxiety. While, on the one hand, the act of the sufferer who tears the bandages from wounds in their nature not serious, and bleeds to death as the direct result, would disentitle his representatives to recover in respect of more than the ordinary and natural results of the injuries inflicted; so, on the other hand, those responsible for an injury should derive no mitigation of their liability from the sufferer refusing to submit to some severe operation with balanced probabilities of a fatal issue or of recovery.

The only rule that seems applicable is that each case must be left to the jury on its merits, with a direction to consider whether the particular conduct in fact conducted to the death or aggravated injury; and in the event of the jury being of opinion that such was the result, to say further whether the conduct of the sufferer was justifiable in the particular circumstances, regard being had to the mental and bodily condition to which he has been reduced by the wrongful act of the defendant.³ Wilful aggravation of an injury would, of course, disentitle the guilty person to recover in respect of it; while aggravation arising from ignorance alone will not be effectual. There is, indeed, a duty on an injured person not wantonly, carelessly, or needlessly to do any act which would aggravate his injury. But he has other duties incumbent on him as well, and a defendant cannot shift his responsibility by showing mere defect of judgment in the

Injury aggravated by wrong treatment.

Jury to decide.

¹ 18 N. Z. L. R. 536.

² *Sullivan v. Tioga Ry. Co.*, 112 N. Y. 643, 648, 8 Am. St. R. 793.

³ There is a note on the special duty of a railway company to take care of sick, aged, or feeble passengers, *New Orleans Rd. Co. v. Statham*, 97 Am. Dec. 499.

plaintiff. For example, a workman injured apparently only slightly is not required by any principle of law to abandon his work and lie by, sacrificing his earnings, and putting his family to privations in order cheaply to exonerate the wrongdoer from possible developments of the injury his wrongdoing has caused. If from not lying by in time serious consequences develop, the determination of whether these are the natural outcome of the defendant's wrongful act or the product of the plaintiff's own contributory negligence, must be governed by the consideration whether plaintiff's action was due to mistaken judgment or to want of good faith. In the former case the defendant (subject to the verdict of a jury) is responsible; in the latter he will be discharged from liability.¹

Injured person not bound to employ surgeon of greater than "ordinary skill."

It follows from what has been said, that an injured person is not bound to employ the most skilful surgeon who can be found, nor yet to incur lavish expenditure of any kind in the treatment of the injuries he has sustained. If his medical man treats him erroneously, no claim to exoneration of the wrongdoer from full liability is thereby established, if only the medical man employed is of good standing and repute. As was said in one case,² the plaintiff is not bound to insure not only the surgeon's professional skill, but also his immunity from accident, mistake, or error in judgment.³

Responsibility for advice-columns in newspapers, *De la Bere v. Pearson*.

Similar considerations to these must prevail in another class of cases that modern business competition has produced, and that a very recent decision⁴ (if correct) may make numerous. A paper designated *M.A.P.* was used to publish some columns headed "Spare Cash and Advice. Readers of *M.A.P.* desiring financial advice in these columns should address their queries (with full name and address) to the City Editor." A purchaser of the paper responding to this invitation wrote for aid in the labour of investing £800, and for the name of a good stockbroker. The City Editor banded the letter to a person whom he had been consulting on similar matters for "six or eight months;" and whom he knew "as a man with the reputation of being a man of wealth who always kept a bargain;" but who was an "outside broker;" not a member of the Stock Exchange; and who was, though this the City Editor did not know, an undischarged bankrupt. The "outside broker" thereupon opened a correspondence with the intending investor, resulting in the latter parting with £1400. The whole of this money disappeared, and no securities of any sort were purchased, though those proposed by the "outside broker," and in anticipation of obtaining which the money was sent, were not objected to. An action was then commenced by the intending investor against the proprietors of the paper "for breach of a contract whereby the defendants promised to give the plaintiff financial advice with due care, diligence and skill, and for negligence in the performance of the contract."

Lord Alverstone, C.J.'s, rule of liability.

The case was tried by Lord Alverstone, C.J., who found that it was part of the regular business of the City Editor to answer inquiries of the sort made by the plaintiff, and that frequently a very large number of letters of inquiry had to be dealt with. The Chief Justice also held that the rule of law is well established "that if the

¹ *Foels v. Tonawanda*, 59 Hun (N. Y.) 567.

² *Stover v. Bluehill*, 51 Me. 439.

³ *Lyons v. Erie Rd. Co.*, 57 N. Y. 489; *Loeser v. Humphrey*, 52 Am. R. 86. See the remarks of O'Brien, J., *Byrne v. Wilson*, 15 Ir. C. L. R. 332, 342, 343.

⁴ *De la Bere v. C. A. Pearson*, 23 Times L. R. 264 (1907), 1 K. B. 483.

defendants' breach of contract or duty is the primary and substantial cause of the damage sustained by the plaintiff, the defendants will be responsible for the whole loss, though it may have been increased by the wrongful conduct of a third person, and although that wrongful conduct may have contributed to the loss;" and gave judgment for the plaintiff. This proposition thus introduces a new term "substantial cause" into this well-trodden path of the law, and does not define it; while the last clause of it appears only to reduplicate the clause preceding it, without added illumination. At any rate it is not readily reconcilable with the authorities, beginning with *Scott v. Shepherd*, treated in the earlier portions of this chapter, and to which the reader is referred. Though the question of damage will undoubtedly be the subject of much further discussion, here we are concerned only with duty. The duty exacted (if any) is plainly to use the care and skill to be reasonably looked for from a City Editor of the class of papers to which *M.A.P.* belongs—not the care and skill of the City Editor of the *Times* or the *Bullionist* or the *Economist*, the class of highly reputed business and financial authorities, but something less. Till the mandate is entered on there is no obligation to undertake it; but undertaking it binds the undertakers to apply the rule of diligence appropriate to its kind. Had the case been tried with a jury it would have been for them to say whether an inquirer as to investments and the capabilities of stockbrokers was justified in the circumstances to look for more than the exercise of honesty and such judgment as a City Editor of a paper of the position of *M.A.P.* might reasonably be expected to possess. The assumed duty for the City Editor to make inquiries into subjects with which he is not fully conversant for each and all of the "very large number" of inquirers is one that cannot as yet be looked on as established. The undertaking appears rather to answer with care and honesty according to knowledge in the case, not to search out information.¹

One point of interest does not seem to have been raised throughout the case. The City Editor is, from the facts found, obviously a person of a very wide range of information and of a great faculty of judgment. In the case under discussion his fitness for his position was not impugned. What the paper offers is that the City Editor shall reply to inquiries; and he does so; but "the liability of a master for the act of his servant attaches in the case where the will of the master directs both the act to be done and the agent who is to do it." "The master is held responsible, upon the ground that he has put the servant in his place to perform a service ordered by himself and over which he has absolute control at all times."² If analogy goes for anything, the proprietors having used skill and judgment in the appointment of their specialist and not having notice of any incompetence would not be liable if his expert advice were wrong, or if he were negligent.³ If there were fraud, the case is even more obvious. The analogy of the responsibility of the proprietor for any libel whatever that appears in the paper has misled some on this subject. The proprietor is responsible for every publication doing damage within the limits of the law of libel, that is, to the reputation of the person injured;

¹ *Haycraft v. Crensy*, 2 East 92; *Pasley v. Freeman*, 2 Sm. L. C. (11th ed.) 66, 82, Street, Foundations of Legal Liability, vol. i. 408.

² *Tobin v. The Queen*, 16 C. B. N. S., per Erle, C.J., 350.

³ *Cp. Hall v. Lees* (1904), 2 K. B. 602; *Evans v. Mayor, &c. Liverpool* (1906), 1 K. B. 160.

Examined.

Is the proprietor a warrantor of the Editor's skill and judgment?

but he is not responsible for consequences that spring from things that appear in his publication that are not libels. These must be judged by their own law. No editor would be responsible for an opinion expressed in a leading article as to the prospect of a movement, say, in French *rentes* through acting on which the reader of the paper speculated and lost his property.

III. DAMAGES.

Consideration whether there is any difference in the law of rule as it has to deal with contracts.

Hadley v. Baxendale.

The rule we have hitherto been considering deals with the consequences of tortious acts; the liability for breach of contract can usually be more definitely marked.¹ There, as a general rule the primary and immediate result is alone to be looked to. Thus, in the case of non-payment of money, no matter what the inconvenience sustained by the plaintiff, the measure of damage is no more than the interest of the money.² With regard to the limitation of liability in the case of contract, there is consequently not the difficulty that arises in cases of torts. The leading case of *Hadley v. Baxendale*,³ is invariably referred to on this head of law. There the Court said: "We think the proper rule . . . is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the

¹ *Mayne*, *Damages* (7th ed.), 10.

² *Fletcher v. Tayleur*, 17 C. B., per Willes, J., 29. Pollock & Maitland, *Hist. of English Law* (2nd ed.), vol. ii. 523.

³ 9 Ex. 341, 354. For what are damages that the parties would "reasonably contemplate," see *Hammond & Co. v. Bussey*, 21 Q. B. D. 73, where *Baxendale v. L. C. & D. Ry. Co.*, L. R. 10 Ex. 35 is distinguished: This rule is adversely criticised by Jessel, M.R., *Wallis v. Smith*, 21 Ch. D. 257. *Aguis v. G. W. Colliery Co.* (1899) 1 Q. B. 413. In *Lepla v. Rogers* (1893), 1 Q. B. 31, 37, Hawkins, J., says: "It is not in my opinion essential to prove that the damage (i.e., from breach of covenant) must inevitably follow such breach; it is sufficient to show that it was a probable and not unlikely result." For some valuable remarks on general and special damages, see the judgment of Bowen, L.J., *Ratcliffe v. Evans* (1892), 2 Q. B. 524. *M'Laurin v. N. B. Ry. Co.*, 19 Rettie 346, is a Scotch case on the elements proper to consider in assessing damages for personal injuries. Future damages may be estimated, *Washington and George Town Rd. v. Harmon*, 147 U. S. (40 Davis) 571.

⁴ "Great difficulty," says Grove, J., in *Smith v. Green*, 1 C. P. D. 96, "no doubt arises from the use of the word 'natural' in these cases. It is used by Lord Campbell and by Erle, J., in *Randall v. Paper* (E. B. & E. 84), and has been used in many cases; and it may not be easy to substitute a better word to express what is meant. Normal, or likely, or probable of occurrence in the ordinary course of things, would perhaps be the more correct expression."

parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."¹

This exposition was intended to settle the law,² and has been adopted here and in America. In a later case³ it has been summarised into three inquiries, as follows: "First, whether the damage is the necessary consequence of the breach; secondly, whether it is the probable consequence; and, thirdly, whether it was in the contemplation of the parties when the contract was made. Those two last are rather questions of fact for a jury, than of law for the Court to determine." With regard to the last consideration, Cotton, L.J., in the same case pointed out a necessary modification—that since parties to contracts in making them usually contemplate their performance and not their breach, the rule should rather be expressed, "that the damage recoverable is such as is the natural and probable result of the breach of contract."⁴ The same consideration had long previously been even more forcibly insisted on by Martin, B., in *Prehn v. The Royal Bank of Liverpool*.⁵ "Special damages are given in respect of any consequences reasonably or probably arising from the breach complained of. This test has been put in another form, namely, that they must be such as a court or jury may reasonably consider to be those which the parties would certainly contemplate. I do not believe that to be the true test; for those who make contracts mean to fulfil them; it is therefore idle to enter into the consideration of what will happen if the contract is broken."

Summarised
in three
inquiries.

Parties to
contracts con-
template their
performance,
not their
breach.

Lord Esber, M.R., in *The Notting Hill*,⁶ affirms the identity of the principles of the estimation of damages in contract and in tort. That was an action for damages caused by collision at sea, where an attempt was made to obtain damages for loss of market. The Court in deciding against the claim followed *The Parana*,⁷ where it was held that "in all such speculative and uncertain cases damages ought not to be recovered." The inquiry was: What damages were the defendants liable for? The answer was those naturally and probably flowing from the breach; but loss of market was too remote a consequence, and so not recoverable. Thus the principles referred to as identical in contract and tort is the principle that governs in determining the liability. There is then the second inquiry that assumes a liability and traces its consequences. This second inquiry is not applicable in the case of breach of contract;⁸ because the consequences of performing

*The Notting
Hill.*

¹ What is said as to notice must be taken in connection with the opinion of the majority of the Ex. Ch. in *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131, and the judgment in *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, to which Lush, J., who dissented in Horne's case, was a party. See Mellish, L.J.'s, judgment in *The Parana*, 2 P. D. 118; also *Gribert Borgnis v. Nugent*, 15 Q. B. D. 85.

² Per Pollock, C.B., *Wilson v. Newport Dock Co.*, L. R. 1 Ex. 177, 189. The leading case in America is *Griffin v. Colver*, 16 N. Y. 489; *Sedgwick, Lond. Cas. on the Measure of Damages*, 269. *Western Union Telegraph Co. v. Hall*, 124 U. S. (17 Davis) 444.

³ *McMahon v. Field*, 7 Q. B. D. 591, per Brett, L.J., 595, questioning *Hobbs v. L. & S. W. Ry. Co.*, L. R. 10 Q. B. 111. *Toronto Ry. Co. v. Grinstead*, 24 Can. S. C. R. 570—rheumatism and bronchitis following wrongful ejection from a street car were held matter for legal damages.

⁴ The judgment of Earl J., *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. R. 622, is very instructive on what are "natural and proximate" consequences.

⁵ L. R. 5 Ex. 92, 100.

⁶ 9 P. D. 105.

⁷ 2 P. D. 118, explained *Dunn v. Bucknall Brothers* (1902), 2 K. B. 614.

⁸ See per Brett, M.R., citing Mayne, *Damages* (3rd ed.), 39, (7th ed.), 40; *The Notting Hill*, 9 P. D. 105, 113.

the contract being in law foreseen between the parties, when the contract is not performed, the consequences of the breach must be judged by the same standard. In contract no consequences beyond those that may be presumed in the mind of a reasonable man at the time of entering on the contract can be accounted of. In tort the rule is the same in determining whether an act imports actionable negligence or not. After this stage the rules diverge. In contract no other damages can be recovered, unless specially. In tort the negligent consequences run their course, though they could not be anticipated. Damages that could not be antecedently anticipated are not recoverable in contract; in tort they can to the fullest extent to which they flow in the ordinary course of their actual, not their probable, sequence from the originating force.

General
damages.
Special
damages.

The division of damages into the classes of "special damage" and "general damage" has a more particular relation to tort than to contract. "General damages" are such as the law will presume to be the direct, natural or probable consequence of the act complained of. "Special damages," on the other hand, are such as the law will not infer from the nature of the act. As they are exceptional in their nature so they must be claimed specially and proved strictly. In cases of contract special damages cannot be claimed unless they are within the contemplation of both parties at the time of the contract.¹ While on the nomenclature of damages, Lord Halsbury, C.'s, connotation² of "nominal damages" may be added: It "means that you have negatived anything like real damage, but you are affirming by your nominal damages that there is an infringement of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages."

Nominal
damages.

*The
Argentino.*

Sir J. Hannen
follows the
rule in *The
Clarence.*

The law was fully considered in *The Argentino*; ⁴ where a ship, engaged to collect cargo at Antwerp for Batoum, in consequence of a collision was, necessarily, put under repair, and thus lost her engagement. Sir J. Hannen was of opinion that the owners of *The Argentino* were entitled to prove the loss of the freight from their anticipated journey, and to recover it as part of the damage arising out of the collision. In holding this, Sir J. Hannen followed Dr. Lushington in *The Clarence*,⁵ who thus stated the principle: "It does not follow as a matter of necessity that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as for example where a fishing voyage is lost, or where the vessel would have been beneficially employed. The *onus* of proving her loss rests with the plaintiff, and this *onus* has not been discharged on the present occasion. Had the owners of *The Clarence* proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted. I therefore pronounce against the objection."

Affirmed in
the Court of
Appeal.

In the Court of Appeal Lord Esher, M.R., dissented from the

¹ The term is analysed and the ambiguities involved are pointed out in *Ratdiff v. Evans* (1892), 2 Q. B., per Bowen, L.J., 528.

² *Ströms Bruks Aktie Bolag v. John & Peter Hutchinson* (1905), A. C. 515, 525.

³ *The Mediana* (1900), A. C. 116.

⁴ 13 F. D. 61, 191, and 14 App. Cas. 519.

⁵ 3 Wm. Rob. 283.

majority of the Court (Lindley v. Bowen, L.JJ.), on the ground that damages in respect of the loss of the agreement for the future hiring of the ship were too remote. The test he applied¹ was: "The damage relied on must, therefore, be an *actual* damage proved in the particular case. It must, besides that, be the *reasonable, natural, consequential result* of the act complained of;" and the conditions of the test he held were not complied with. Bowen, L.J., in delivering the judgment of the majority of the Court, mainly affirming the judgment of Sir J. Hannen, points out that the English law adopts the principle of *restitutio in integrum* in the estimation of damages, subject to the restriction that they must be such damages as flow "directly and in the usual course of things from the wrongful act," and that in the case of a breach of contract the law includes "such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach." He then goes on:² "There is no difference in principle between such a loss (*i.e.*, the loss of a ship) and the loss which the owner of a serviceable threshing machine suffers from an injury which incapacitates the machine, or the loss which a workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her."

The view of Lindley and Bowen, L.JJ., was affirmed in the House of Lords, Lord Fitzgerald adopting entirely the joint judgment. Lord Herschell formulates the question before the House: "Whether if this were an action brought in the Courts of Common Law and tried by a jury, the judge ought to have directed the jury that these damages could not be recovered on the ground that they were too remote."³ He answers it thus: "I think that damages which flow directly and naturally, or in the ordinary course of things from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel, and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But further than this, I agree with the Court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship while prosecuting her voyage should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision." *The Argentine*, though directly concerned only with Admiralty law, is also an authority as to the common law rule, since it was undisputed that the rule of the common law and the rule followed in the Court of Admiralty are identical.⁴

And in the
House of
Lords.

¹ 13 P. D. 191, 198.

² L.c. 201. Cp. *The Atlas*, 93 U. S. (3 Otto) 392.

³ 14 App. Cas. 522.

⁴ 13 P. D. 191, per Lord Esher, M.R., 195, and Bowen, L.J., 200; *The City of*

Williams,
L.J.'s
criticisms in
The Racine.

Williams, L.J., in *The Racine*,¹ while admitting that the rule in *The Argentino* is now law, repines against it: "It seems to me difficult to be satisfied with a rule which would make the measure of damages where the wrongful act is absolutely the same in two cases differ absolutely according to the loss which has been sustained by the person who is injured by the collision—though the wrongful act of the wrongdoer is identical in both cases." This objection was belated even at the time when, according to tradition, Lord Ellenborough shouted to his coachman to turn his runaway horses into "something cheap." The test suggested is obviously the wrong one—in a civil suit; there the test is not the *mala mens* of the actor but the *damnum et injuria* to the sufferer. Every railway accident case illustrates this, even where two passengers killed may have equally large incomes, but the one is derived from an estate and the other from personal earnings. The Lord Justice appears not to differentiate the damages in breach of contract from those in tort.²

The Greta Holme.

The Greta Holme,³ according to Collins, L.J.,⁴ upset "a long line of authorities before this Court." They appeared to establish the proposition that to entitle to damage for the loss of a chattel, direct estimable loss and strict valuation are necessary. In *The Rutland*,⁵ where harbour authorities claimed for the loss of the use of dredger damaged by collision, Sir James Hannen deduced the corollary that where the injured chattel is not employed for the purposes of gain there can be no damages recovered for disabling it. The House of Lords, however, in *The Greta Holme*,⁶ enunciated as the true rule the proposition that one deprived of the use of a chattel through the default of another is entitled to recover damages, even though he is unable to prove the loss represented by any definite sum of money flowing from the injury. This rule applies universally, even in the case of trustees of a public undertaking which they are unable to carry on at a profit. The facts were substantially identical with *The Rutland*.⁷ Lord Halsbury, C., says: "This public body has to pay money like other people for the conduct of its operations, and if it is

Peking, 15 App. Cas. 438; "explained" in *The Mediana* (1900), A. C. 113; *Venables v. West*, 3 S. R. (N. S. W.) 54; *The City of Lincoln*, 15 P. D. 15. The rule of the Roman Law is instructive: *Nec solum corpus in actione hujus legis [Aqui in] æstimatur; sed sane si servo occiso plus dominus capiat damni quam pretium servi sit, id quoque æstimatur; velut si servus meus ab aliquo heres institutus, ante quam jussu meo hereditatem cerneret, occisus fuerit; non enim tantum ipsius pretium æstimatur, sed et hereditatis amissa quantitas. Item si ex gemellis vel ex comardis vel ex symphoniaciis unus occisus fuerit, non solum occisi fit æstimatio, sed eo amplius quoque computatur quod ceteri qui superavit depretiati sunt. Idem juris est etiam si ex pari mularum unam vel etiam ex quadri, in eorum unum occiderit.*—Gaius, III. § 212. I do not doubt but that the law of England is the same, though I know of no case in point. If a stone is lost out of a ring the measure of damages is not the value of the stone, but the depreciation of the ring. If one of a pair of vases is broken, the measure of damages is the loss on the pair. If one of two carriage horses is injured, the damages would be estimated not by the injury to the one, but by the depreciation in the match.

In *American Braided Wire Company v. Thomson*, 44 Ch. D. 274, 280, the Attorney-General, *arguendo*, said: "There are two leading principles as to damages for tort—(1) that the loss for which they are given must be the direct consequence of the wrongful act; and (2) that if the loss can be minimised by the act of the plaintiff, he is bound to do it." And see per Cotton, L.J., 288.

¹ (1900) P. 273, 277.

² *Ante*, 105.

³ (1897) A. C. 596.

⁴ *The Mediana* (1899) P. 139.

⁵ *Supra*. The principle is worked out in detail in *The Marpessa* (1906), P. 14, (C. A.) 95.

⁶ (1906) P. 195 n. (2).

⁷ *Supra*.

deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights which other people possess of obtaining damages for the loss occasioned by the negligence of the wrongdoer." In the subsequent case of *The Mediana*¹ Lord Halsbury, C., emphasises this: "When I say deprived of their vessel [the thing damaged was a light ship for which a substitute, kept in reserve, was provided], I will not use the phrase 'the use of their vessel.' What right has a wrongdoer to consider what use you are going to make of your vessel?" "I know very well that as a matter of common sense what an arbitrator or a jury very often do is to take a perfectly artificial hypothesis and say, 'Well, if you wanted to hire [e.g.] a chair, what would you have to give for it for the period?' And in that way they come to a rough sort of conclusion as to what damages ought to be paid for the unjust and unlawful withdrawal of it from the owner."

The primary measure of damages then, whether in contract or tort, Summary. in Admiralty or at common law, is the amount of the party's loss; and this loss may be analysed into two components—actual outlay and anticipated profits. Failure to prove loss of profits will not, it is obvious, prevent recovery for loss of outlay in those cases where profits are sought to be recovered but not proved. And where a wrongful act deprives the owner of his chattel in its integrity, during the period of deprivation he is entitled to a sum equivalent, at least, to the interest on the money spent on the purchase. In contract the common measure of damages for loss of profits is the difference between the cost of doing the work and what the contractor was to receive for doing it;² but when a party to a contract who is injured by the stoppage of work under it elects to rescind, he cannot recover any damages for the breach either for outlay or loss of profits. He recovers the value of his services actually performed, as upon a *quantum meruit*.³

In tort the principle has been laid down "that if a profit would arise from a chattel, and it is left with a tradesman for repair, and detained by him beyond the stipulated time, the measure of damages is *prima facie* the sum which would have been earned in the ordinary course of employment of the chattel in the time."⁴

IV. GAMES.

The law as to injuries received in playing games must be noticed. Games. In the *lex Aquilia* there are several passages referring to this. The *Lex Aquilia* broad rule discriminates *ingenui* from *servi*, games *gloria causa et*

¹ (1900) A. C. 113, 117.

² *United States v. Behan*, 110 U. S. (3 Davis) 338; *Fletcher v. Tayleur*, 17 C. B. 21; *Smeed v. Foord*, 1 E. & E. 602. As to the law when interest is recoverable, *L. C. & D. Ry. Co. v. S. E. Ry. Co.* (1893) A. C. 429, and especially per Lindley, L. J. (1892), 1 Ch. 142; *Calton v. Bragg*, 15 East, 223. For the law in the United States, *Washington, &c. Rd. Co. v. Harmon*, 147 U. S. (40 Davis) 571, 589; *New York, &c. Rd. Co. v. Estill*, 147 U. S. (40 Davis) 591, 620. For *mora debitoris* in the Roman law, see Moyle, *Just. Inst.*, note to Bk. III. 19, 26.

³ *Planch v. Coburn*, 5 C. & P. 58, 8 Bing. 14; *Goodman v. Pocock*, 15 Q. B. 576; *Inchbald v. Western Neigherry Coffee Co.*, 17 C. B. N. S. 733. See 2 Sm. L. C. (11th ed.) 42.

⁴ *Ex parte Cambrian Steam Packet Co.* L. R. 4 Ch. 112, per Lord Cairns, 117. As to damages recoverable in the case of personal injuries, see *post*, chapter on Lord Campbell's Act. Damages payable for negligence do not constitute a deduction from profits under the Income Tax Acts: *Strong v. Woodfield* (1905), 2 K. B. 350.

virtutis from games of sport merely, like that of ball. *Si quis in colluctatione, vel in pancratio, vel pugiles dum inter se exercentur, alius alium occiderit, si quidem in publico certamine, cessat Aquilia; quia gloriæ causæ et virtutis, non injuriæ gratia videtur lammum datum. Hoc autem in seruo non procedit; quoniam ingenui solent certare; in filio familias vulnerato procedit. Plane, si cedentem vulneraverit, erit Aquilia locus; aut si non in certamine servum occidit, nisi si domino committente hoc factum sit, tunc enim Aquilia cessat.*¹ The *lex Aquilia* does not apply to public pugilistic combats, or to wrestling matches, in which a freeman is wounded. But if a slave is wounded while engaged in such sports the exception does not operate, since only freemen were accustomed to contend in them. Games, like the game of ball, are different. Here all may play, and injury received in consequence of participation brings no liability with it. *Cum pila complures luderent, quidam ex his servulum, cum pilam percipere conaretur, impulit, servus cecidit et crus fregit; quærebatur, an dominus servuli lege Aquilia cum eo, cujus impulsi ceciderat agere potest? Respondi non posse; cum casus magis, quam culpa, videretur factum.*² This difference is to be explained by the consideration that the game of ball was a mere game, and not *gloriæ causæ et virtutis*. The underlying principle is, that injuries received while engaged in sports or exercises occasion no liability where they are accidental and sustained in the course of the exercise or sport. If, however, the games are of a kind that the law considers not befitting a slave to take part in, those who play at these games with slaves and injure them are liable for the injury. If the games are not of this sort, a slave is in the same position as a freeman. In any case, the protection only avails during the progress of the game, and in regard to injuries that are natural consequences of it.

With the passages already set out must be taken a third—*Cum stramentu ardentiu transilirent duo, concurrerunt, umboque ceciderunt et ulter flamma consumptus est; nihil eo nomine potest ugi, si non intelligitur, uter ubi utro eversus sit.*³ In this case—arising out of the practice at Rome at the feast of the Palilia⁴ of jumping over heaps of burning straw and hay—there is, in the one case, either absence of evidence of how the event came about, or else contradictory negligence; in the other, the collision is not a natural consequence of taking part in the game, and, therefore, he who does the injury is liable in respect of it. But exercises, even those *gloriæ causæ et virtutis*, must only be practised in the proper place. *Sed si per lusum jaculantibus servus fuerit occisus, Aquilia locus est.*⁵ On the other hand, if, while they are being lawfully practised, and in the place appropriate for them, injury is caused, there is no liability unless the act causing the liability be an intentional one. *Sed si cum alii in campo jacularentur, servus per eum locum transierit, Aquilia cessat; quia non debuit per campum jaculatorum iter intempestive facere. Qui tamen data opera in eum jaculatus est, utique Aquilia tenebitur;*⁶ and a quotation from Paulus is added—*nam lusum quoque noxius in culpa est.*⁷ In crossing the *campus*

¹ D. 9, 2, 7, § 4.

² D. 9, 2, 52, § 4.

³ D. 9, 2, 45, § 3.

⁴ Or more accurately Palilia, a festival of the *dies natalitius* of Rome in honour of Palas, when sheep were more effectually purified by being compelled to run through the fire, and at which the shepherds did the same. Smith, Dictionary of Greek and Roman Antiquities, *sub nom.*

⁵ D. 9, 2, 9, § 4.

⁶ *Ibid.*

⁷ D. 9, 2, 10.

jaculatorius, the slave would be guilty of contributory negligence. This would not excuse a wilful injury.

A curious case is stated by Ulpian: ¹—*Item Mela scribit, si cum pila quidam luderent, vehementius quis pile percussu in tonsoris manus eam dejecerit et sic servi, quem tonsor radebat, gula sit preciosa adjecto cullallo; in quocumque eorum culpa sit, eum lege Aquilia teneri. Proculus in tonsore esse culpam; et sane, si ibi tondebat, ubi ex consuetudine ludebatur, vel ubi truncatus frequens erat, est quod ei imputetur; quamvis nec illud male dicatur, si in loco periculoso sellum habenti tonsori se quis commiserit, ipsum de se queri debere.* Ulpian's case

The law of England does not differ from the civil law.

"The law," says Dr. Bigelow,² "as to injuries received in games and sports, was, and (as far as the games are lawful³) doubtless is still, Law of England as to games.

¹ D. U. 2. 11. pr. The Roman law drew a distinction between such acts as knocking money out of one's hand (*nammos tibi excussit*) to assist a thief and in a joke. In the latter case the remedy was the *actio Aquilia utilis*, *Ulpian*, III. § 202.

² L. C. on Torts, 329, citing Fulton, *De Pace Regis*, 7, described as "A work of the beginning of the seventeenth century." There is a copy of this work in the Inner Temple Library, in black letter, bearing date 1600; the title-page of which, after specifying the scope of the work, &c., describes the material of it as "collected out of the Reports of the Common Law; of this realm, and of the statutes in force, and out of the painfull workes of the reverend Judges, Sir Anthonic Fitzherbert, Sir Robert Brooke, Sir William Stanford, Sir James Dyer, Sir Edward Coke, Knights, and other learned writers of our lawes." The reference there is § 22.

³ The determination of what are lawful games is of some interest, and may excuse a note. In the proclamation of James I., dated the 24th of May, 1618, and called the Book of Sports, what are lawful games is indicated. This proclamation, says Hallam (*Constitutional History*, 8th ed. vol. ii. chap. viii. 55), was a renewal of that issued in the late reign, that certain feasts or wakes might be kept, and a great variety of pastimes used, on Sunday after Evening Service. It is said to have originated in an order made by Richard III., at the request of the justices of the peace, for suppressing these feasts. The Privy Council, at the instance of Archbishop Laud, reprobated the judge, and directed him to revoke his order. 3 Kennett, 71; Rush, *Abr.* ii. 166, 1 Campb. Chief Justices, 396. The proclamation which, says Hallam, was "perfectly legal and according to the spirit of the late Act" (1 Car. I. c. 1), followed on one of the preceding year published in Scotland, and ordained that, "as for our good people's lawful recreation our pleasure likewise is, that after the end of Divine Service, our good people be not disturbed, letted, or discouraged from any lawful recreation, such as dancing—either men or women—archerie for men, leaping, vaulting, or any other such harmless recreation; nor from having of May games, Whittain ales and Morris dances, and the setting up of Maypoles, and other sports therewith used, so as the same be had in due and convenient time without impediment or neglect of Divine Service; and that women shall have leave to carry rushes to the Church for the decking of it, according to their old custom; but, withall, we doe here account still as prohibited all unlawful games to bee used upon Sundayes only as bears and bull baitings, interludes, and at all times in the meaner sort of people, by law prohibited, bowling." The proclamation is given at length in 2 Somers, Tracts, 51 (Scott's edition). Unlawful games are penalised by the statute 33 Hen. VIII. c. 9. "An Acte for maintynance of Artyllarie and debarring of unlawful games." The object of which was to promote the practice of archery, which, through the invention of "many and sondrie newe and crafty games and plays" "ys sore decayed, and dooly is lyke to be more mynished." This Act was in extension of an earlier Act, 11 Hen. IV. c. 4, which prohibits the following games as unlawful—"hall as well handball as football and other games called coits, dice, bowling, cails, and other such unthrifty games;" and this was a confirmation of a yet earlier Act, 12 Richard II. c. 6. Another of this series of Acts is 17 Edw. IV. c. 3. In *Bac. Abr. Gaming (A.)*, it is said, "that by the common law, the playing at cards, dice, &c., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful nor punishable as any offence whatsoever"; citing 2 Vent. 175, 5 Mod. 13, Salk. 100, and the preamble to 16 Car. II. c. 7. See 8 & 9 Vict. c. 109, and 26 & 27 Vict. c. 125. The subject is treated in *Comyns, Digest*, art. Justices of Peace (B 42); *Game—Unlawful Sports*, and in Dalton, *Country Justice*, c. 46. See, too, Strutt, *English Sports and Pastimes* (2nd ed.), 1810, and Reeves, *Hist. of the Engl. Law* (2nd ed.), vol. iii. 171, 238, 293, vol. iv. 176, 292, 454. As to prize-fighting, *The Queen v. Coney*, 5 Q. B. D. 534 *Regina v. Orton*, 39 L. T. 201, as to a sparring exhibition. A foot-race is a lawful game, *Billy v. Marriott*, 17 L. J. C. P. 215; so are billiards, *Parsons v. Alexander*, 24 L. J. Q. B. 277; dominoes, chess, and draughts, *Reg. v. Ashton*, 22 L. J. M. C. 1;

thus: 'If two or more do agree together to run at tilt, joust, harriers, or to play at hacksword, bucklers, football, or such like, and one of them doth heat, hruise, or wound another, the party grieved shall not have an action of trespass, of assault, and battery against the other; for that it was a combat by consent, and put in practice to try their strength, valour, or agility, and not to break the peace. But if the same day or some other after that the pastime is at an end and they departed asunder, one will assault or heat another in respect of some wrong conceived to be received in the time of the said play, then an action for trespass, of assault and battery, may be pursued by him that is so heated, against the trespasser.'"

The distinctions taken are (1) between lawful and unlawful games, and (2) between injuries received while engaged in lawful games, and injuries subsequently inflicted.

Boulter v. Clark.

In *Boulter v. Clark*,¹ Parker, C.B., in an action for assault and battery, held that fighting being unlawful, the defence that the plaintiff consented to fight would be no bar to action. But in Buller's "*Nisi Prius*,"² citing Dalton,³ it is laid down that if two by consent play at cudgels and one hurt the other it is no battery.⁴ Stephens⁵ regards this as inconsistent with previous decisions. It may be reconciled if cudgel playing is a lawful game, whereas fighting is in any event a breach of the peace, as to which there is no privilege.

Fitzgerald v. Cavin.

The distinction between lawful and unlawful games does not seem to have been adverted to in the extraordinary Massachusetts case of *Fitzgerald v. Cavin*.⁶ This may have been due to the fact that the verdict passed for the plaintiff, and the only point for the Court was whether the charge of the judge was sufficiently favourable to the defendant. It is quite consistent with the report that in the opinion of the Court, the judge's summing up at the trial was unduly favourable to the plaintiff; and it may be noted that his direction to the jury was on the assumption that "the parties were lawfully playing with one another by mutual consent." The jury were told that if in these circumstances "the act done by the defendant was no other than the plaintiff had good reason to believe would be in such play, the defendant is not liable." If, however, the plaintiff had good reason to anticipate the act complained of, in the circumstances the play could scarcely be lawful, or if the play were lawful the act was not to be anticipated.

and perhaps cards, *Patten v. Rhymcr*, 29 L. J. M. C. 189; *Jenks v. Turpin*, 13 Q. B. D. 505; but "gaming" which is illegal is not less so because the game played is not *per se* unlawful, *Bew v. Harston*, 3 Q. B. D. 454; *Dyson v. Mason*, 22 Q. B. D. 351.

¹ Bull. N. P. 16. See 2 Ex. 677, n. In *Reg. v. Martin*, 9 C. & P. 213, it was held not possible to consent to a misdemeanour. See *The Queen v. Coney*, 8 Q. B. D. 534, per Stephen, J., 550. Misdemeanour is the offence against the State, not against the individual. In *Grotton v. Glidden*, 84 Me. 589, 30 Am. St. R. 413, it was laid down that if two persons voluntarily engage in a fight (in anger) either may maintain an action against the other to recover damages for injuries received. The fact that the fight was voluntary is admissible only in mitigation of damages. This seems correct in principle, and in *Commonwealth v. Collberg*, 119 Mass. 350, 20 Am. R. 328, where two persons by mutual agreement engage in a fight with each other, each is guilty of an assault and battery, although there is no anger or ill-will. Cp. *James v. Campbell*, 5 C. & P. 372, where two persons fighting at a parish dinner, one of them unintentionally gave a third person two black eyes; *The Queen v. Latimer*, 17 Q. B. D. 359. ² 15.

³ Cap. 22. I am unable to find the reference. The chapter in the Country Justice on "Games and Plays" is 46. Chapter 22 is about Cattle. The substance of the statement in the text is to be found in Cap. 121, Sureties for the Peace, 282 (d).

⁴ Cp. *The Queen v. Johnson*, 34 L. J. M. C. 192. ⁵ *Nisi Prius*, vol. i. 211
⁶ 110 Mass. 153. The ground of action was that defendant "seized hold of plaintiff by the testicles and squeezed them severely," whereby plaintiff was seriously injured. The defence was that the plaintiff and defendant were engaged in a game together.

The fullest statement of the liabilities incurred by playing games is to be found in a Scotch case.¹ Four farm labourers were engaged in building a straw stack. Three amused themselves by knocking each other down in the straw. Either intentionally, or by accident, one of the three thus romping knocked the fourth off the stack and injured him, and he brought his action against the aggressor. Lord Young said: "When people engage in a game involving risk, or in a game generally safe, but in which accidents may happen, every player taking part in it takes on himself the risks incident to being a player, and he will have no remedy for any injury he may receive in the course of it, unless there has been some undue violence or unfair play on the part of some of the others. He takes the risks incident to the game, and the result of these risks must lie where they fall. I should say that the same principle must govern where romping suddenly arises among people collected together, whether workpeople or others—they take the risk of the romping, and unless there is foul play, there will be no liability for unintended injury by one romper to another. I should even go the length of saying that if two men voluntarily engage in a pugilistic encounter, each must take the black eyes or the bloody noses which the other inflicts²—or, if two men voluntarily engage in a bout of single stick, each must take the raps he gets from his opponent—and if there be no foul play, there can be no injury giving rise to a claim of damages by the one against the other." Here there was a romp, which the pursuer took no part in; and when he received injury without having consented to take the risk of it, there arose an actionable wrong.

Roid v. Mitchell.

Lord Young's statement as to the liability for injuries inflicted in play.

The distinction between lawful and unlawful games, between a fight and a match at single stick, does not seem regarded. In other respects the decision bears out the English cases.

Very like what we have seen was the Roman law is laid down in Comyns's Digest:³ "If a soldier, in muster, discharge his gun and another go cross, whereby he inevitably and against his will hurts him," it is not a battery in law. But he must set out the circumstances, and make it appear that he was not in any fault; for it is not enough to show it was *casualiter et per infortunium et contra voluntatem suam*.⁴ If one is injured while looking on, the doer of the injury is *primâ facie* liable;⁵ and where several persons are engaged in playing at ball in the public highway and a traveller is accidentally hit, the game not being a lawful one in such a place, not only is the person whose negligence caused the accident held liable in trespass, but also all those who are of the party.⁶

Comyns's statement.

¹ *Roid v. Mitchell*, 12 Rettie 1129.

² But see *Boulter v. Clark*, Bull. N. P. 16, and *Grotton v. Glidden*, 30 Am. St. R. 413, 84 Me. 589.

³ Battery (A). See *Moody v. Ward*, 13 Mass. 299.

⁴ *Weaver v. Ward*, Hob. 134.

⁵ *Underwood v. Hewson*, Bull. N. P. 16.

⁶ *Vosburgh v. Moak*, 55 Mass. 453. In *Ball, Lead. Cas. on Torts*, 423, is the following: "The defence of leave and licence also arises where the parties were engaged in any lawful games. In such a case, indeed, the plea has a somewhat different signification; for obviously it is not any specific blow which is authorised, but a series of acts, some one of which, by misadventure, may result in a blow to one or other of the parties. See *Christopherson v. Bare*, 11 Q. B. 447 (*sic*), where the assault complained of was a blow from a cricket-ball, the parties having been engaged in a game together." As reported in 11 Q. B. 473, *Christopherson v. Bare* is a special demurrer to a plea of leave and licence to a declaration in trespass, charging that the defendant assaulted plaintiff, imprisoned him, and kept him in prison for the space of one month and twenty-five days. There is no mention of cricket or any other game throughout the report, unless the remark of Coleridge, J., can be so regarded. "If the plea had been only not guilty, the defendant might have shown that the act was done in the course of sport between the parties and by the plaintiff's leave." See *Domat*, 2, 8, 4.

CHAPTER IV.

ONUS OF PROOF.

Introductory. MANY of the most difficult questions of law are to be solved by the answer to the question, On whom is the *onus* of proof? since it not infrequently happens that beyond evidence of the fact of the occurrence of an accident, there is no evidence available to show how or when or why the injury sued on was caused. In some of the circumstances where this is found, the mere happening of the accident suffices to put the defendant to disproof of his liability. In others, this is not sufficient; but affirmative evidence has to be given charging the plaintiff; while in almost all cases the *onus* at times fluctuates during the progress of the cases, sometimes being on one party, sometimes on the other.

Bowen, L.J.'s,
canons of *onus*
of proof.

Bowen, L.J., in a well-known case,¹ lays down the canons of this subject as follows: "Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing he fails; if he makes a *prima facie* case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or *onus* of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that, as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the *onus* of proof shifts, and at which the tribunal will have to say that, if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of *onus* of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises it ceases to be a question of *onus* of proof. There is another point that must be cleared." "As causes are tried the term '*onus* of proof' may be used in more ways than one. Sometimes, when a cause is tried, the jury is left to find generally for either the plaintiff or the defendant, as it is in such a case essential that the judge should tell the jury on whom the burden of making out the case rests,

¹ *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440, 456.

and when and at what period it shifts. Issues, again, may be left to the jury, upon which they are to find generally for the plaintiff or the defendant, and they ought to be told on whom the burden of proof rests; and indeed it is to be observed that very often the burden of proof will be shifted within the scope of a particular issue by presumptions of law, which have to be explained to the jury. But there is another way of conducting a trial at *Nisi Prius*, which is by asking certain definite questions of the jury. If there is a conflict of evidence as to these questions, it is unnecessary, except for the purpose of making plain what the judge is doing, to explain to the jury about *onus* of proof, unless there are presumptions of law, such as, for instance, the presumption of consideration for a bill of exchange, or a presumption of consideration for a deed. And if the jury is asked by the judge a plain question, as, for instance, whether they believe or disbelieve the principal witness called for the plaintiff, it is unnecessary to explain to them about the *onus* of proof, because the only answer which they have to give is 'Yes' or 'No,' or else they cannot tell what to say. If the jury cannot make up their minds upon a question of that kind, it is for the judge to say which party is entitled to the verdict. I do not forget that there are canons which are useful to a judge in commenting upon evidence and rules for determining the weight of conflicting evidence; but they are not the same as *onus* of proof." In considering the subject, however, these matters do not readily admit of separate treatment; for, though the consideration of whose obligation it is to give evidence in order to succeed is necessarily prior to the consideration of what is sufficient evidence to attain success, the solution of both problems, especially where contributory negligence is involved, is very frequently the same.¹

The general principle on the question of *onus* is thus formulated: General rule of law.

"The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the Court that it was occasioned by the negligence or default of the other party, he cannot succeed,"² or, in the terms of the Latin maxim, *Ei incumbit probatio qui dicit; non qui negat*.

I. RES IPSA LOQUITUR.

We shall, then, in the first place, consider in what circumstances a *prima facie* case of negligence may be raised, calling for an answer from the defendant without any further proof of actual default on his part than is involved in the mere happening of the injurious event: what, in other words, is the legal import of the phrase, *res ipsa loquitur*?³

The two aspects of the inquiry—i.e., the consideration of what is not sufficient to raise a presumption of negligence—and the consideration of what is sufficient to raise a presumption of negligence—are treated respectively in the leading cases of *Hammack v. White*⁴ and *Byrne v. Boadle*.⁵

¹ *Wakelin v. L. & S. W. Ry. Co.*, 12 App. Cas. 41.

² Per Lord Wensleydale, in *Morgan v. Sim*, 11 Moo. P. C. C. 307, at 311.

³ Broom, *Legal Maxims* (7th ed.), 246.

⁴ (1862) 11 C. B. N. S. 588; *Manzoni v. Douglas*, 6 Q. B. D. 145, which is discussed in *Crawford v. Upper*, 16 Ont. App. 440; *Shaw v. Croall* (1885), 12 Rettie 1186. Unavoidable accident is not actionable, *Davis v. Saunders*, 2 Chitty (K. B.) 639; *Wakeman v. Robinson*, 1 Bing. 213; Laurent, *Principes de Droit Civil*, vol. xx. § 468.

⁵ (1863) 2 H. & C. 722.

How a *prima facie* case of negligence can be raised.

Hammack v. White.

Hammack v. White is the leading authority for the former of these. Defendant was riding a horse he had bought at Tattersall's the day before, at a slow pace, in Finsbury Circus, to try it. The horse was restless, and the defendant held the reins tightly, omitting nothing to avoid an accident. The horse, however, swerved on to the pavement, where the deceased was walking, knocked him down, and injured him fatally. An action was brought under Lord Campbell's Act. The Court¹ thought the facts did not disclose any cause of action. If it had been shown that the defendant knew the horse to be vicious and unmanageable, that might fix him with liability. *Primâ facie*, a man found riding on the footpath was in the wrong, but the witness that proved that showed that the defendant was there against his will. "I am of opinion," said Erle, C.J., "that a man is not to be charged with want of caution because he buys a horse without having had any previous experience of him. There must be horses without number ridden every day in London of whom the riders know nothing. A variety of circumstances will cause a horse to become restive. The mere fact of restiveness is not even *primâ facie* evidence of negligence." The witness who deposed to the fact of the defendant being on the footpath, also deposed to the fact that he was there unwillingly, and thus displaced the presumption of negligence that his evidence had raised. The only question was as to the effect of restiveness in a horse unaccompanied by any other fact implying negligence. The decision of the Court in effect was, that the use of horses for riding and driving being recognised, and certain places being proper for them to be used in, while their natural disposition is uncertain, those who ride them do not guarantee against the effects of the waywardness of their dispositions.² A doubt has been suggested whether Finsbury Circus was a proper place "to try" a horse in. Though it was not contested so to be in the year 1862, the point might be disputed to-day. It could scarcely be said that a man trying a horse in Cheapside or the Strand is in the exercise of "due care in the circumstances."

Erle, C.J.'s judgment.

Rule as to *onus* stated in *Watson v. Weekes*.

The rule as to *onus* in this class of cases is given by Smith, J., in *Watson v. Weekes*,³ where, proof having been given that the defendant's horse, harnessed to a cart, ran away unattended along a highway where the plaintiff lawfully was, and injured him, the learned judge refused to nonsuit; for the facts "were more consistent with the absence of ordinary care in the superintending the horse than with such care having been used." The same view is taken by an eminent Canadian judge:⁴ "I think," he says, "the reasonable view of the law and of the ordinary transactions of human life is that, if a man's horses, galloping through a street, run on and injure a passenger on the side walk, a case of *primâ facie* wrong is shown. It may be fully explicable, but I think it calls for explanation." *Simson v. London*

Crauford v. Upper.

¹ Erle, C.J., Williams, Willes, Keating, JJ.

² The rationale of the law is investigated in *Brown v. Collins*, 53 N. H. 412, 16 Am. R. 372. The conclusion is that the plaintiff must come prepared to show either that the intention was unlawful or that the defendant was in fault; "if the injury was unavoidable and the defendant free from blame he will not be liable. See *Shaws v. Croall* (1885), 12 Rettie 1186, where a horse started from a cab-rank while the driver was putting away a bag of oats. Held no *culpa*. This case may be referred to for the construction of a municipal bye-law that the driver should either sit on the box or stand by the horse's head.

³ Not reported, but referred to by the same learned judge in *Tolhausen v. Davies*, 57 L. J. Q. B. 392, 394.

⁴ *Crauford v. Upper*, 16 Ont. App. 440, per Hagarty, C.J., 444.

*General Omnibus Co.*¹ points the same conclusion. "Proof having been given that the horse in question had misconducted itself in the way charged, the burthen of showing that he was not habitually a kicker, or something to account for his having kicked on this particular occasion, lay on the defendants. The mere fact of his having kicked out was, I should say, *prima facie* evidence for the jury."

Simson v. London General Omnibus Co.

In *Byrne v. Boodle*,² a barrel of flour fell from a warehouse over a shop which the defendant occupied, knocked down the plaintiff, who was walking along the public highway, and injured him. It was contended that these facts did not disclose any evidence of negligence, as the doctrine of presumptive negligence only applied in cases like that of two trains upon the same lines, both being the property and under the management of the same company,³ and the law will not presume a man guilty of a wrong. The Court held that "it is the duty of persons who keep barrels in a warehouse to take care that they do not roll out;" "such a case would, beyond all doubt, afford *prima facie* evidence of negligence."

Byrne v. Boodle.

The distinction between this case and *Hammack v. White* seems to be that here the cause of the injury was inanimate, there animate. A man who has barrels on his premises is bound to put them in such a position that they will not fall out on the highway; if they do, as they have no powers of motion in themselves, the very fact of movement argues negligence. A man who has a horse is also bound to take care that he does not do damage; but since the horse has a power of motion of his own which it is not necessary for the owner in all cases to provide against his exerting, an accident caused by the exercise of this power does not necessarily argue want of care in the owner; for the motion of the horse may arise from his own unforeseen impulse, and then the owner is not liable; thus, while in the case of the barrel it is enough to show that it moved from its position and caused injury; in the case of the horse mere movement unexplained will not warrant the same conclusion.⁴

Cases distinguished.

¹ L. R. 8 C. P. 390, per Bovill, C. J., 393. Cp. *Templeman v. Haydon*, 12 C. B. 507.

² (1863) 2 H. & C. 722; *White v. France*, 2 C. P. D. 308; *Lyons v. Rosenthal* 11 Hun (N. Y.) 46.

³ *Skinner v. L. B. & S. C. Ry. Co.*, 5 Ex. 787; *Carpue v. L. & B. Ry. Co.*, 5 Q. B. 747.

⁴ In *G. W. Ry. Co. of Canada v. Braid*; *G. W. Ry. Co. of Canada v. Fawcett*, 1 Moo. P. C. C. N. S. 101, 116, Lord Chelmsford giving judgment says: "There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount *prima facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it. However, the plaintiffs did not rest their case solely on the fact of the falling in of the embankment, but called witnesses to give their opinion as to the cause of the injury. It was objected "that this evidence amounted only to theory and conjecture, and that the jury ought not to have been permitted to act upon it. To this it may be answered, that although the circumstances which occasioned the accident were facts to be proved, yet the cases which produced this state of circumstances were necessarily matters of opinion and judgment." The statement of Lord Chelmsford as to what will amount to *prima facie* evidence of improper construction of a railway has been greatly controverted. For example, in *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 14, on its being urged in argument, Willes, J., said: "That case (i.e., Fawcett's case) has been much remarked on. The late Chief Justice of this Court (Erie, C.J.) protested against the *onus* of proof in such a case being thrown on the railway company;" and in *Bale v. Canadian Pacific Ry. Co.*, 14 Ont. R. 625, 642, Galt, J., while holding a declaration of law by the Privy Council binding on a Canadian Court, yet intimated concurrence with the opinion expressed in *Czech v. General Steam Navigation Co.* *Gleeson v. Virginia Middle Rd. Co.*, 140 U. S. (33 Davis) 435.

Scott v. London and St. Katharine Docks Co.

In *Scott v. London and St. Katharine Docks Co.*¹ a distinction was taken between the law applicable to the facts as proved there and those found in *Byrne v. Boadle*; on the ground that the place of the accident was not a public highway, but a dock, the property of the company. The plaintiff was an officer of Customs, who being ordered on duty from one part of the docks to another, on his way was knocked down by six bags of sugar falling upon him. The Court was agreed as to the principle of law to be applied to the case; they differed as to its application. Erle, C.J., states the principle: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."² This appears to comprehend both cases, of *Hammack v. White*³ and *Byrne v. Boadle*.⁴

Principle as formulated by Erle, C.J.

Summary.

There must be *reasonable evidence* of negligence; and the mere occurrence of an injury is sufficient to raise a *prima facie* case:

- (a) When the injurious agency is under the management of the defendant;
- (b) When the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care.⁵

Over inanimate things this duty of care is absolute; over animate things it only goes to guard against injury from their customary habits.

Briggs v. Oliver.

The difficulty in drawing the line is exemplified in *Briggs v. Oliver*.⁶ A packing-case, belonging to the defendant, was put against the wall of his premises, and his servant was watching it. Through its own weight, and from having been insecurely propped, it fell on the plaintiff and injured him. The Court were divided in opinion. Pigott and Bramwell, B.B., held that these facts constituted evidence of the defendant's negligence; since "Packing-cases carefully placed in a proper position do not naturally tumble down of their own accord; and we have no right to assume that the fall of this packing-case was caused by the act of some one who was not the defendant's servant." Martin, B., dissented on the ground that "the fallacy which appears

Dissent of Martin, B.

¹ In the Ex. Ch. (1865), 3 H. & C. 596. A very similar case was *Woolley v. Scovell*, 3 Man. & Ry. 165, where goods were being thrown from an upper story, and a warning having been given, the plaintiff still thought he had time to get past, but was injured in the attempt. It was held that where A by the wrongful act of B loses his presence of mind, and in consequence runs into danger and receives injury from the act of B, B is not protected on the ground that he warned A just before the accident. *Faukes v. Poulson*, 8 Times L. R. 725 (C. A.).

² This rule was the ground of the decision in *Burke v. Manchester, Sheffield, & Lincolnshire Ry. Co.*, 22 L. T. (N. S.) 442, where plaintiff was injured by a jolt occasioned by the train in which he was passenger going against two stationary buffers in such a way that plaintiff was thrown forward and injured. Evidence was given that the train ought to have been brought up to the buffers without a jolt. It was held that such being the case the mere fact of the accident happening was evidence to go to the jury. *Flanagan v. Harris*, 17 N. S. W. (L. R.) 403; *Hannah v. Dalgarno*, 3 S. R. (N. S. W.) 494—the falling of a telegraph wire in a public highway.

³ 11 C. B. N. S. 588.

⁴ 2 H. & C. 722.

⁵ *Tuttle v. Chicago Rd. Co.*, 49 Iowa 236.

⁶ (1866) 4 H. & C. 403; see *Higgs v. Haynard*, 12 Jur. N. S. 765, where a ladder falling through a window was held not evidence of negligence, as "not necessarily an event occurring in the course of the defendant's business" (?). Another and perhaps safer ground for the decision was that "the ladder was not shown to have been under the management of the defendant or his servants." Cp. *Pearson v. Cox*, 2 C. P. D. 369.

to me to underlie these cases is that the plaintiff is to be excused from proving negligence, because the person who really knows whether there is negligence or not, is the defendant's servant. Here the defendant might have called him; it is not to be assumed that he would have committed perjury, nor is it for the defendant to disprove negligence."

The dissent of Martin, B., appears due to a misconception of the meaning of Erle, C.J.'s, *dictum* in *Cotton v. Wood*,¹ which he quotes, that where the evidence is equally consistent with the existence or the non-existence of negligence it is not competent to the judge to leave the question to the jury. This is only so if the inferences are *equally consistent* with the facts proved. The Court must assume that every inference of fact that a jury might legitimately draw has been drawn, and must add such inferences to the other facts of the case. Where there are two inferences equally consistent with the facts proved, one of them cannot reasonably be drawn to the prejudice of the other. The plaintiff, therefore, fails. Where though either of two inferences might be drawn, one involving negligence is more reasonable or likely than the other, then the case cannot be taken away from the jury.² It is not sufficient to exonerate a defendant merely to point out that the facts proved are susceptible of another conclusion than that of negligence; it must also be shown that, of the two inferences that can be drawn, there must be a probability of the inference that acquits him either equal to or greater than that which points to negligence. Martin, B., appears to have adopted the view that it is sufficient, if it is consistent with the evidence, that there was no negligence. This, it is submitted, is a wrong view of the law, and would narrow responsibility very unduly; besides being inconsistent with the cases.

Fitzgibbon, L.J., regards the law as established which he states in the proposition:³ "Where there are two *hypotheses*, one involving and the other not involving the liability of a defendant, each equally consistent with the evidence, the plaintiff cannot get a verdict, and the defendant is entitled to a non-suit." But this must imply that the judgment on them is passed after the evidence is given and there is no preponderance of that either way. The exclusion of this last consideration invalidates the statement of Devens, J., in *Kendall v. City*

¹ 8 C. B. N. S. 568. Cp. *Ruddy v. L. & S. W. Ry. Co.*, 8 Times L. R. 658 (C. A.); and *Bryant v. North Metropolitan Tramways Co.*, 6 Times L. R. 396. Driving over a person in the street in broad daylight was held *prima facie* evidence of negligence in *Forwood v. The City of Toronto*, 22 Ont. R. 351, 357. Cp. *Bridges v. N. L. Ry. Co.* L. R. 6 Q. B. 377, per Channell, B., 391.

² *Flannery v. Waterford & Limerick Ry. Co.*, Ir. R. 11 C. L. 30; *Smith v. First National Bank*, 99 Mass. 605; *Scarles v. Manhattan Rd. Co.*, 101 N. Y. 681. In *Muddle v. Stride*, 9 C. & P. 380, Lord Denman, C. J., 382, directed a jury on this point as follows: "If on the whole, in your opinion, it is left in doubt what the cause of the damage was, then the defendants will be entitled to your verdict, because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out in the consideration of the case that the injury may as well be attributable to the one cause as the other, then, also, the defendants will not be liable for negligence." Cp. *Midland Ry. Co. v. Bromley*, 17 C. B. 372, and *Kent v. Midland Ry. Co.*, L. R. 10 Q. B. 1, where the declarations were in contract. In Canada the accepted rule is: No employer is responsible to a servant unless the latter proves that the negligence of the master is the immediate necessary and direct cause of the injury he sustains: *Montreal Rolling Mills Co. v. Corcoran*, 26 Can. S. C. R. 595; distinguished *Billing v. Semmens*, 7 Ont. L. R. 340, 8 Ont. L. R. 540; *Tooke v. Bergeron*, 27 Can. S. C. R. 567; *Cowans v. Marshall*, 28 Can. S. C. R. 161; *Geo. Matthews Co. v. Bouchard*, 28 Can. S. C. R. 580.

³ *Powell v. M'Glynn* (1902), 2 I. R. 154, 190.

Discussed.

Fitzgibbon, L.J.'s, proposition.

of *Boston* :¹ "It is not sufficient for the plaintiff to show that the injury may have been occasioned by the negligence of those whom he seeks to charge with it. If there were other causes which also might have produced it, he is in some way to show that these did not operate." The fall of a statue in a hired hall, which the letter was bound to let in a reasonably safe state for the purpose for which the hall was let—a public concert—seems a case of *res ipsa loquitur*.

Willes, J.'s,
statement of
the law in
*Smith v. G. E.
Ry. Co.*

The remarks of Willes, J., in giving judgment, in *Smith v. Great Eastern Ry. Co.*,² are much in point. "It is not enough," he says, "to show that the damage may have occurred through the negligence of the defendants' servants, even coupled with the suggestion that no sufficient explanation was given of the dog's conduct. The plaintiff must show something which the defendants might have done, and which they omitted to do, before they can be held responsible for the misfortune which has happened." The same learned judge, in *Czech v. General Steam Navigation Co.*,³ happily illustrates the way in which the presumption of negligence may be raised or not raised by a set of facts, differing only in one particular. "If a shipment of sugar," says he, "took place under a bill of lading, such as the present one, and it was proved that the sugar was sound when put on board, and had become converted into syrup before the end of the voyage, if that was put as an abstract case, I think the shipowner would not be liable,⁴ because there may have been storms which occasioned the injury, without any want of care on the part of the captain or crew; the injury alone, therefore, would be no evidence of negligence on their part. But if it were proved that the sugar was damaged by fresh water, then there would be a strong probability that the hatches had been negligently left open, and the rain had so come in and done the injury, and, though it would be possible that some one had wilfully poured fresh water down into the hold, this would be so improbable that a jury would be justified in finding that the injury had been occasioned by negligence in the management of the ship."

In *Czech v.
General Steam
Navigation
Co.*

*Welfare v.
L. & H. Ry.
Co.*

*Welfare v. London and Brighton Ry. Co.*⁵ is an extreme instance of an accident which was held not to constitute *prima facie* evidence of liability. Plaintiff went to the defendants' station to make inquiries about the departure of their trains, and was told by a porter to look at a time-table hanging up under a portico in the station. While there a plank and a roll of zinc fell through a hole in the roof and injured him. The Court⁶ were unanimous that he could not recover, both on the ground that the plaintiff had not shown that the accident

Judgment.

¹ (1875) 118 Mass. 234.

² (1866) L. R. 2 C. P. 4, 10.

³ L. R. 3 C. P. 14, 19; followed in *The Glendaroch*, 10 Times L. R. 269 (C. A.).

⁴ I. e., under a bill of lading which contained an exception from liability for "breakage, leakage, or damage."

⁵ (1869) L. R. 4 Q. B. 693; *Curran v. Warren Chemical Co.*, 36 N. Y. 153, is also an authority that the mere fact of injury occurring on a person's premises raises no presumption of wrong against him. It is otherwise if the injured person is on the highway and injured by something falling from premises: *Clare v. National City Bank*, 31 N. Y. Sup. Ct. (1 Sweeny) 539. In *Huff v. Austin*, 15 Am. St. R. 613, an employé of the vendor of a saw-mill, while assisting in setting up and getting the mill in order, was injured by the explosion of the steam-boiler in the mill; it was held that the mere happening of the accident did not raise a *prima facie* presumption of negligence in the management of his business. *M'Arthur v. Dominion Cartridge Co.* (1905), A. C. 72, is discussed in connection with the master's duty to supply machinery. *Post*, Dangerous machinery and tools. The decision is sustainable as a case of *res ipsa loquitur*. By verdict of the jury the respondents had not discharged the *onus* on them.

⁶ Cockburn, C.J., Mellor, Lush, Blackburn, J.J.

had happened through the defendants' servants' negligence, and also on the broad principle that the mere occurrence of the accident did not warra t the inference of negligence. Blackburn, J., said: "In this case the duty is cast on the railway company to insure that no plank shall fall. Their duty is to take reasonable care to keep their premises in such a state as that those whom they invite there shall not be unduly exposed to danger. No doubt the case might occur where, knowing the state of the premises, the company could not send a man on the roof to repair it without necessarily incurring a great danger of the roof falling down, and, if the premises are out of repair to this extent, it would be a breach of duty to send a man upon the roof during the hours when persons would be frequenting the premises. But then, in order to make out such a case, something more must be shown than the mere fact that the accident occurred. In this case there was a total absence of evidence to show that the premises were really dangerous so as to make the company responsible."¹

In examining this decision we note that, though the first requisite of Erle, C.J.'s, rule in *Scott v. London and St. Katharine Docks* is met, as for the purposes of the decision, the injurious agency is assumed to be under the management of the defendants' servants, the accident was not such as, in the ordinary course of things, would be likely to happen. "Where a person desires to have the roof of a building repaired, he employs some one, not only to repair the roof, but to see to its condition," "and to see how far it will support him or his workmen in doing the necessary work." Therefore, in the absence of anything else, as, for instance, the fact that the man was unacquainted with his business, or that the roof was rotten, the accident could not be expected to happen in the ordinary course of things. Lastly, there was nothing in the evidence to show that the company had, or could have, any knowledge of its insecurity. The presence of the workmen was an indication that they were attending to the condition of the roof, and it was not to be inferred from their attention to its condition that they were guilty of negligence in respect of it. There was, indeed, a duty to use reasonable and ordinary care, but no duty absolutely to prevent the falling of anything from the roof. Mere evidence of something falling did not satisfy the conditions necessary to raise a *prima facie* case. There was needed something to suggest the want of reasonable and ordinary care. The Court's decision amounts to the assertion that the occurrence of an unusual accident on a defendant's own premises, without more, is not sufficient to raise this.²

¹ L.c. 609. If the person receiving damage visits the premises with a knowledge of their condition, the fact of his receiving damage while there is not sufficient evidence of want of reasonable care to justify leaving the case to the jury: *Manchester, Sheffield, and Lincolnshire Ry. Co. v. Woolcock*, 25 L. T. (N. S.) 335. The fact of water flowing from a pipe in upstairs premises and damaging the goods of the occupier of the lower portion of the house, actual negligence being negatived, does not imply a duty on the tenant of the upstairs premises to keep in the water at his peril: *Ross v. Fedden*, L. R. 7 Q. B. 661; *Stevens v. Woodward*, 6 Q. B. D. 318.

² *Lay v. Midland Ry. Co.*, 30 L. T. (N. S.) 529, per Bramwell, B., 531. "What may happen now after this accident it is impossible to say. Whether the defendants ought or ought not henceforth to preclude the possibility of children tumbling themselves through in this way, may be a question; but up to the time when this child tumbled through, in this unusual manner, no one ever heard it suggested that such a thing could or would happen. Now, however, that it has happened it may possibly be the duty of the company to alter this fence. But to say that this occurrence

*Moffatt v.
Bulmer.*

*Moffatt v. Bulmer*¹ before the Privy Council is the next case. Plaintiff, a decorator and gardener in the service of the defendant, was given a lift by him in his buggy. In the course of driving, the horses and the front wheels of the carriage separated from the hinder wheels, possibly from coming in contact with the branch of a tree laid across the road; and plaintiff was injured. The majority of the Supreme Court of Victoria was of opinion the plaintiff could recover on the authority of the principle laid down in *Scott v. London and St. Katharine Docks Co.*; though, indeed, the bearing of that case on the present seems at first sight not a little remote. They held that certain facts had been proved from which inferences might legitimately be deduced that there was evidence to justify a verdict either for plaintiff or defendant, according as the jury accepted the version of one or the other. Williams, J., dissented.²

Lord
Chelmsford
distinguishes
*Scott v.
London and
St. Katharine
Docks Co.*

Lord Chelmsford, in delivering the judgment of the Privy Council, thus distinguished *Scott v. London and St. Katharine Docks Co.* "Undoubtedly in that case there was the strongest *prima facie* presumption of negligence, because it is not in the ordinary course of things that loaded bags should fall out of a warehouse on a person below. But this case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver, and, therefore, no *prima facie* presumption of negligence having been raised," "it was necessary for the plaintiff in the case to give affirmative evidence of there being gross negligence on the part of the appellant occasioning the accident."

*Kearney v.
L. B. & S. C.
Ry. Co.*

The principle *res ipsa loquitur* was next applied to what was described as "certainly as weak a case as can well be conceived," in *Kearney v. London, Brighton and South Coast Ry. Co.*³ As plaintiff was passing under a railway bridge a brick fell from the perpendicular wall on which one of the girders of the bridge rested and injured him. Hannen, J., directed the jury that "if they thought the bare circumstance of a brick falling was not evidence of negligence, they would find for the defendants."⁴ The jury found for the plaintiff, and the majority of the Court⁵ upheld the verdict, on the ground that the company, who constructed the bridge, were bound to construct it in a proper manner, and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it; and the fact that a brick was loose and fell afforded *prima facie* a presumption that the defendants had not used reasonable care and diligence. Hannen, J., dissented, considering that it lay on the plaintiff to show that by an inspection anybody might have seen that the brick was about to fall

ought to have been foreseen, or to have been anticipated, that the man who made the fence ought to have foreseen the possible result of so making it, and that if he had not been negligent he would have foreseen it, is really absolute downright nonsense." S. C. 34 L. T. (N. S.) 30.

¹ (1869) L. R. 3 P. C. 115.

² He cited *Templeman v. Haydon*, 12 C. B. 507, a case apparently decided more on the effect of the County Courts Act than involving any legal principle.

³ L. R. 5 Q. B. 411, in Ex. Ch. L. R. 6 Q. B. 759; *Crisp v. Thomas*, 62 L. T. 810; (C. A.) 63 L. T. 755; *Beaumont v. Mayor, &c. of Huddersfield*, 19 T. L. R. 97; *Bisland v. Shields* (1904), 7 Ont. L. R. 210.

⁴ This is not accurate. It is for the judge, not for the jury, to say whether there is evidence. Hannen, J.'s, opinion was that there was no evidence. He probably left the case to the jury to get their finding, assuming that he was wrong in thinking there was no evidence for them.

⁵ Cockburn, C.J., and Lush, J.

down. The Exchequer Chamber¹ unanimously affirmed the judgment of the Queen's Bench.

Any difficulty in the case comes from its superficial similarity to *Welfare v. London, Brighton, and South Coast Ry. Co.*² In argument in the Queen's Bench the distinction between them was said to be³ that in *Welfare's* case the man who caused the accident "was not shown to have been guilty of any negligence, or to have been in the employ of the defendants." A sounder distinction seems to be that in *Welfare's* case the accident happened on the company's own premises, in respect of a matter not only in no way connected with the course of their business, but one which the recognised practice entrusts to persons not the defendants' own servants. In the present case, the defendants constructed their bridge over a highway, and so became liable to keep the bridge and every part of it in such a state of repair that no damage should arise from its defective condition. The accident raised a presumption against them.

It has been held in America that the happening of an accident by reason of something falling from a building upon a street and injuring persons lawfully there, is negligence in the absence of explanatory circumstances; and the burden is on the owner to show the use of ordinary care.⁴ Again, where a passenger on the highway was injured by a hot cinder falling from defendants' locomotive, the Court held, that since the plaintiff was merely exercising his ordinary rights, the presumption was that the defendant would not have interfered with him if he had exercised due care.⁵

The distinction drawn in *Kearney v. London, Brighton, and South Coast Ry. Co.*⁶ forms the basis of the judgment in *Huey v. Gahlenbeck.*⁷ "We are not prepared," it was there said, "to sustain the doctrine that the owner of property is liable for every injury that may occur to another therein or thereon;" "The mere fact that something fell on the plaintiff's head, without more, is not evidence of negligence on the part of the defendant."⁸ This decision seems to be sound in holding that the owner of premises is not liable for injury sustained by another though lawfully upon them, in the absence of any evidence of the direct cause of the injury.⁹ Very similar in principle is *Gleeson v. Virginia Midland Rd. Co.,*¹⁰ where the sides of an embankment slipped down from natural causes over the roadway; and it was held that the accident raised a presumption of negligence. The Court, after comparing the case with *Tarry v. Ashton,*¹¹ continued; "If such be the law, as to persons who, for their own purposes, cause projections to overhang the highway not constructed by them, a fortiori must it be the law as to those who, for their own purposes of profit, undertake to construct the highway itself, and to keep it serviceable and safe, yet who allow it to be practically overhung from considerations of economy or through negligence." "It is not a question of negligence in failing

¹ Kelly, C.B., Martin, Channell, and Cleasby, BB., Willes, Byles, and Keating, JJ.

² L. R. 5 Q. B. per Cockburn, C.J., 413.

³ *Mullen v. St. John*, 57 N. Y. 567.

⁴ *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158.

⁵ 121 Pa. St. 238, 248, 6 Am. St. R. 790, see the note. Cp. *Landreville v. Gouin*,

6 Ont. R. 455—Snow falling from roof on a passenger.

⁶ *Scott v. London & St. Katharine Docks Co.*, and *Briggs v. Oliver*, are distinguished in the judgment.

⁷ 1 Q. B. D. 314.

⁸ 140 U. S. (33 Davis) 435.

⁹ 140 U. S. (33 Davis) 442.

Considered.

American cases.

Huey v. Gahlenbeck.

Gleeson v. Virginia Midland Rd. Co.

to remove the obstruction, but of negligence in allowing it to get there."¹

Scotch Cases.

Macanlay v. Huisl.

Expressions upon this question of *onus* in some of the Scotch decisions might lead to uncertainty if considered in isolation from others in which they have been explained. Thus, in *Macanlay v. Huisl*,² Lord Fullerton said: "I cannot adopt the principle which was evidently assumed in the able argument on the part of the defenders, viz., that the verdict must be held to be against evidence, unless the pursuer proved the specific defect of the machine or specific neglect of the defenders which occasioned the accident;" referring to which statement Lord Jeffrey said: "I concur in the view of Lord Fullerton that in all cases of this kind the proprietor (the defenders were owners of machinery which went wrong) is entitled to no presumption of innocence. He must prove that it (the occurrence causing the injury sued on) was an accident, which in this case it is impossible to do, as all the machinery has been shattered to pieces." The inference from this apparently is that, given an accident, blame is presumed against the defender till he shows that he is free from the imputation. This, as we have seen, holds good in only a very limited number of cases. Here, however, the expression is without any limitation.

Walker v. Olsen.

In *Walker v. Olsen*³ the accident arose from failure in tackling, for which the owner was found liable; "I think," said the Lord Justice-Clerk, "there was an obligation on the shipowners to provide safe and sufficient tackling, and *prima facie* that obligation had not been complied with when this accident occurred, without the tackling being exposed to any unusual strain;" and in the case of *Fraser v. Fraser*⁴ in the same volume, but reported a few pages earlier, similar expressions may be found tending to impugn the rule settled in the English and American cases. A careful consideration of each of the cases just mentioned will, however, make manifest that there is no necessary contrariety to the current of decisions involved in them. For instance, in *Fraser v. Fraser* the sufficient ground of the decision is that there was a duty to provide a fit rope for a dangerous operation, which duty was neglected, by reason of the rope not being examined as it should have been. In short, there was evidence of negligence.

Macfarlane v. Thompson.

In *Macfarlane v. Thompson*⁵ these earlier decisions were explained by the Lord Justice-Clerk Moncreiff as follows: "It has been sought to interpret these opinions as authority to the effect that you must presume from the fact that an accident has occurred that there was some defect in the machinery" (through which it was occasioned); "I do not think that any such interpretation can be put upon what I said there.⁶ What I did say was that, provided that it is proved that some defect in the machinery or plant caused the accident, it is not necessary to show the precise nature of that defect, and an *onus* is thrown upon the master to show that the defect was one for which he was not to blame. But that is a totally different thing from saying that you must infer faults or defects in the machinery where there is no evidence to that effect in any of the surrounding circumstances."

Comment.

An accident that may happen from a variety of causes, any of which is equally probable, and some of which may be due to default of

¹ 140 U. S. (33 Davis) 443.

² (1846) 9 Dunlop 245, 247.

³ 9 Rettie 596. Cp. *Senior v. Ward*, 1 E. & F. 355.

⁴ (1883) 12 Rettie 232; *Milne v. Townsend*, 19 Rettie 830.

⁵ In *Walker v. Olsen*, 9 Rettie 946.

⁶ (1882) 9 Rettie 946.

the master, while others are due to influences for which he is not responsible, is not to be presumed to fix him with liability; since it lies always on the plaintiff to prove his cause of action. But if an accident happens due to one of half a dozen causes, all of which involve blame to the defendant, he is not exonerated because the matter may be mixed in such confusion that the plaintiff cannot accurately specify which of the possible causes of his injury is the actual one. This is manifestly good sense.

It was probably through not having these considerations present to his mind that Lord Lee was prompted to dissent in *Gavin v. Rogers*; ^(Gavin v. Rogers.) which case he expressed himself unable to reconcile with *Walker v. Olsen and Fraser v. Fraser*. In *Gavin v. Rogers*, however, there was no defect shown, nor any want of inspection; antecedently to the accident, for all that appeared, the security against accident was ample. The majority of the Court held in these circumstances that the plaintiff had not discharged the *onus* on him by showing blame on the defendant. But Lord Lee was of opinion that "the defence of latent defect is one which the defender must prove." That is, if the accident happens from some cause which does not import liability, it is for the defendant to show it. In other words, there is an exception to the rule that the plaintiff must prove that he has been injured by the negligence of the defendant; and in the case of an accident where the plaintiff is unable to show negligence, the defendant has to clear up the obscurity by showing there is none. This is how the result works out where the maxim *res ipsa loquitur* is applicable; the occurrence presumes liability and the defendant has to clear himself of the imputation. In the circumstances proved in *Gavin v. Rogers* fault was absent. In a case where a labourer employed by the contractor for the brickwork of a building was injured by the breaking of a step put in by a mason under another contract, and the master was sued, the principle was correctly enunciated that "one tradesman is entitled to assume that material supplied by another tradesman is sufficient for the purpose for which it is supplied."² Two things are to be shown by the plaintiff: first, that the accident happened through a discoverable defect; secondly, that there was fault in the defendants not discovering it.³

The *onus* of proof may be shifted by acts of the one party rendering ^{(onus shifted by conduct.} the discharge of the *onus* normally resting on the other party more difficult, as in *Rooney v. Allans*,⁴ where the injury sued on was caused by the breaking of a chain. In ordinary course the pursuer would have been put to show negligence. But the defender's superintendent flung the broken piece into the Clyde. "This very indiscreet act," said Lord Young, "shifts the *onus* of proving its (the chain's) condition upon the defenders, whose chief official thus excluded the possibility of a scientific examination." The principle involved is the same as that in the well-known case of *Armory v. Delamirie*,⁵ where the Chief Justice directed the jury, "that unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages"—*omnia præsumuntur contra spoliatores*.

¹ (1838) 17 Rettie 206.

² *M'Inulty v. Primrose*, 21 Rettie 442.

³ Per Mellish, L.J., *Richardson v. G. E. Ry. Co.*, 1 C. P. D. 342, 346.

⁴ (1833) 10 Rettie 1224, 1227. Cp. *Murphy v. Phillips*, 35 L. T. (N. S.) 477.

⁵ 1 Sm. L. C. (11th ed.), 353; *Cornman v. Eastern Counties Ry. Co.*, 4 H. & N. 781; *U. W. Ry. Co. v. Davis*, 39 L. T. 475.

In regard to railway companies, it has been contended that the occurrence of a railway accident is, in itself, *prima facie* evidence of negligence; and for this *Bird v. Great Northern Ry. Co.*¹ has been cited. The decision there, however, is that the mere occurrence of an accident is not sufficient evidence of negligence to entitle the plaintiff to a verdict without anything more. In argument, *Carpue v. London and Brighton Ry. Co.*² was cited as establishing the proposition that the occurrence of the injury itself is *prima facie* proof of negligence. On this Pollock, C.B., said: "That depends on the nature of the accident; as, for instance, if it arises from a collision of different trains on the same line, then it may be so. Here it was otherwise; the accident was of a nature consistent with the absence of negligence."³

This seems to indicate correctly the principle of differentiation. A presumption of negligence does not arise in each and every case of an accident on a railway. If, for example, the occurrence of an accident is *prima facie* proof of carelessness in somebody, it does not necessarily follow that the carelessness is the carelessness of the company. It may be evidence of negligence in the party injured or in some third person. On the other hand, if the injury arose from some defect in the road, vehicle, or other apparatus used by the railway company, or by any other kind of carrier, and over which the carrier has complete control, or in the agencies employed, the presumption of negligence is raised in the absence of proof to the contrary; because they have control, and, when any accident happens, an inference is raised thereby that such control has not completely been exercised.⁴

Flannery v. Waterford & Limerick Ry. Co.

The judgment of Palles, C.B., in the Irish case of *Flannery v. Waterford and Limerick Ry. Co.*,⁵ well deserves study on this point.

¹ 28 L. J. Ex. 3. In *Rigg v. Manchester, Sheffield, and Lincolnshire Ry. Co.*, 14 W. R. 834, it was held that the mere statement of witnesses of their opinion that a platform was dangerous, was not any evidence for a jury.

² 5 Q. B. 747. As to *Carpue v. L. & B. Ry. Co.*, Brett, J., says in *Hanson v. L. & Y. Ry. Co.*, 20 W. R. 297, 298: "Lord Denman's ruling" "was a ruling at *Nisi Prius*, not reviewed by the Court, and I find this in reference to it in *Hodges on Railways* (4th ed.), 531: 'Although in one case it was ruled otherwise by Lord Denman, it seems now to be clearly established that in order to render the company liable for negligence, it is necessary to give affirmative proof of negligence on their part; and it is not sufficient merely to prove the occurrence of an accident, and to rely on that as *prima facie* evidence of negligence. In some cases *res ipsa loquitur*, the accident may be of such a nature as that negligence may be presumed from the mere occurrence of it. But when the balance is even, the onus is on the party who relies on the negligence of the other to turn the scale.' This is, I think, a correct exposition of the law." See *Ayles v. S. E. Ry. Co.*, L. R. 3 Ex. 146.

³ 28 L. J. Ex. 3. The same judge, in *Dawson v. Manchester Ry. Co.*, 5 L. T. N. S. 682, held that a carriage running off the line was *prima facie* evidence of negligence. The American rule is laid down as follows: "Whenever it appears that the accident was caused by any deficiency in the road itself, the cars or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arises; it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have foreseen or discovered it." *Curtis v. Rochester Rd. Co.*, 18 N. Y. 534, 537; *Brohm v. G. W. Rd. Co.*, 34 Barb. (N. Y.) 256. See *Burke v. Manchester, &c. Ry. Co.*, 18 W. R. 604; *Latch v. Rumner Ry. Co.*, 27 L. J. Ex. 155.

⁴ See Story, Bailm. (9th ed.), § 601a, n. 1, where the authorities are fully collected and considered.

⁵ Ir. R. 11 C. L. 30. As to the duty of a railway company to examine trucks, see *Richardson v. G. E. Ry. Co.*, 1 C. P. D. 342, reversing L. R. 10 C. P. 486. In *Mullen v. St. John*, 57 N. Y. 567, the fall of a building into the street was held presumptive evidence of neglect of proper care on the part of the owner. In *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234, a child was found in a well, in a sidewalk, two or three feet from the flagging. The well was provided with a cover, having a lid opening on hinges. Held not presumptive evidence of negligence against defendant, the owner of the well.

The plaintiff was injured through some empty waggons, next the engine in the train in which she was travelling, getting off the line. No evidence was given as to the cause of their leaving the rails, but it was stated that they were not likely to get off the line. The question was, whether these circumstances constituted evidence fit to be submitted to the jury that the injuries were caused by defendants' negligence. "The obligation of the defendants," said the Chief Baron,¹ *Palles, C.B.'s*
 "was to use all due and proper care and foresight, and to provide for judgment.
 the safe conveyance of the plaintiff. Everything connected with the conveyance was under their exclusive management." "The case, then, is one in which negligence of any one of three classes would, if sufficiently connected with the injuries, be sufficient to maintain the action; firstly, negligence in the supervision or maintenance of the permanent way at the point where the waggon left the line; secondly, negligence in the supervision or maintenance of the waggon itself; thirdly, negligence in the driving of the engine. Negligence in any one of these three particulars would be an obvious explanation of the waggon leaving the line. On the other hand, the circumstance of the waggon leaving the line is not inconsistent with inevitable accident nor with the malicious act of a third party; but it will not, I apprehend, be contended that the latter assumption, involving as it does a criminal offence, ought to be made in the absence of any evidence pointing in that direction. I take it, therefore, that the problem to be solved involves a choice between at least two states of fact, in one of which the defendants would be irresponsible . . . I therefore assume, in favour of the defendants, that the alternative of inevitable accident is not only a possible, but a reasonable one." After pointing out that where a reasonable inference against the plaintiff may be drawn, yet an inference the other way is also reasonable, the case is for the jury, the learned judge continues: "(although some of the propositions in decided cases upon this subject are not as clearly expressed as might be desired) I have a strong opinion that to impute to any judge an intention to lay down the opposite doctrine is to misconstrue his language. If I am right in this, the sole question in the case is, whether the jury might have legitimately drawn from the facts proved the inference that the waggon left the rails in consequence of defect in the wheel, defect in the rail, or mismanagement of the engine. No doubt, in determining whether this inference of fact might *reasonably* be drawn, we, although not jurors, must avail ourselves of our knowledge of the ordinary affairs and incidents of life. Without this knowledge we cannot determine, as we are bound to do, whether a particular inference can reasonably be drawn.² Now, applying my own experience of railway travelling, I find it impossible to say that it

In *Stokes v. Saltonstall*, 13 Peters (U. S.) 181, in accordance with *Christie v. Griggs*, 2 Camp. 79, it was held in an action against a stage-coach proprietor, that the fact the coach was upset, and the plaintiff injured, raised a presumption of negligence or want of skill in the driver: *Inland and Seaboard Coasting Co. v. Tolson*, 139 U. S. (32 Davis) 551.

¹ Ir. R. 11 C. L. 30, 35.

² In *Shepherd v. Midland Ry. Co.*, 25 L. T. (N. S.) 879, the Court of Exchequer drew the inference of negligence from the presence of ice on a platform, on which the plaintiff slipped and was injured. Pigott, B., said: "It is a question of degree. If there had been only a very small piece of ice in a place where the railway servants had no opportunity of seeing it, there may have been no negligence; but where we have a layer of ice three-quarters of an inch thick, and extending half across the platform, and that, too, at three o'clock in the afternoon, there was plenty of opportunity for them to have seen it and to have removed it." In argument, the case of a piece of orange-peel on the platform was suggested as not suggesting negligence on the part

is in the ordinary and accustomed course of things that a waggon should leave the rails when all reasonable precautions are taken. To state that such an occurrence happens in the usual and normal state of things, without negligence, is to state that the inevitable result of waggons leaving the rails when travelling at a high rate of speed—viz., the destruction of the entire train and the loss of the lives of numbers of the passengers, are ordinary incidents of railway travelling—nay, of railway travelling conducted with due care. I emphatically refuse to be a party to such a proposition. I believe such an occurrence to be exceptional. That it can happen with due care is, according to my experience, no doubt *possible*, but extremely improbable. If I required, which I do not, evidence in support of this view, I find it in the testimony of the defendants' foreman, that empty waggons are not likely to get off the line."

Rule in the
United
States.

In the United States the law is clearly laid down:¹ "the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred." "Since the decisions in *Stokes v. Saltonstall*, 13 Pet. 181, and *Railroad Co. v. Pollard*, 22 Wall. 341, it has been settled law in this Court (the Supreme Court of the United States) that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight."²

*Daniel v.
Metropolitan
Ry. Co.*

*Daniel v. Metropolitan Ry. Co.*³ is a decision of the House of Lords, which, as Lord Westbury said,⁴ "will greatly tend ultimately to bring the liability of railway companies to a position in which it may be found to be more consistent with law and less with feeling and excitement, than it has hitherto been." Contractors, not under the control of the defendants, were constructing a work for another corporation under an Act of Parliament, and, in the course of construction, were placing heavy iron girders upon the walls running along the line of railway. A girder overbalanced and fell on a passing train and injured a passenger; by whom the defendants were sued. It was contended that, as the company were liable for the wrongful acts or wilful neglect of their servants, so they were liable for the acts and negligence of persons, not in their employ, by which travellers on their

of the company, and the same learned judge said: "It may have been (negligence) if the orange-peel had been allowed to remain a long time upon the platform without being swept up." In *Ayles v. S. E. Ry. Co.*, L. R. 3 Ex. 146, where various companies had running powers over a line of railway, it was presumed that a train that caused an accident belonged to, or was under the control of, the company owning the line.

¹ *Gleason v. Virginia Midland Rl. Co.*, 140 U. S. (33 Davis) 435, 445.

² L. C. 443. See also *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. (32 Davis) 551.

³ (1871) L. R. 5 H. L. 45. In *Cliff v. Midland Ry. Co.*, L. R. 5 Q. B. 258, it was held no evidence of negligence that a railway company had left off keeping a gate-keeper at a level crossing, and had not exercised powers they had obtained to make a new road, and to discontinue the level crossing. In an Irish case, there was an equal division of opinion as to whether the presence of cattle on a line of railway, and evidence that a gate which should have been kept locked had been unlocked on other occasions, and that the post to which it should have been locked was loose at the time of the accident, constituted evidence of negligence to leave to the jury: *Patchell v. Irish N. W. Ry. Co.*, 6 Ir. R. C. L. 117. See the remarks of Cleasby, B., in *Harris v. Midland Ry. Co.*, 25 W. R. 63, on *onus of proof of breach of contract*, under 17 & 18 Vict. c. 31, § 7. The cases under the Act are collected *post*.

⁴ L. R. 5 H. L. 45, 62.

lino were injured. The Court of Common Pleas held defendants liable; the Exchequer Chamber reversed this. The Court of Common Pleas committed, as Lord Westbury said,¹ "a complete *petitio principii*"; since the contractors being undoubtedly liable, the question was, whether in law the railway company had a right to rely on their fulfilling the duty on them. The Exchequer Chamber held they had; and the House of Lords unanimously affirmed the judgment.

The general principle applicable to test liability where negligence is alleged, as stated by Willes, J., in the Common Pleas, has been often cited and approved. "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken."² The decision of the Common Pleas was given upon another point, having reference to the interposition of contractors and the conditions of their working, when employed to do work that may be dangerous. The rejection of their reasoning by the House of Lords leaves the more general position stated by Willes, J., unaffected. Lord Westbury said: "If it were necessary to go into it (which I think it is not), it is plain to my understanding that the accident in this case arose from circumstances of which the railway company could not have been aware—circumstances which it belonged entirely to the province of the contractors to observe and regulate—that it arose from the unusual circumstance that a peculiar motive power, namely, that of a small steam-engine, had been substituted by the contractors, for the first time, in moving the girders, which did not move them with a sufficiently regular and gradual motion; so that being moved by jerks, a jerk was applied to the girder at a time when the train happened to be passing by. It was, therefore, an undefined and unknown contingency which, even if you put the contract out of the question, it could not have entered into the minds of the railway company to foresee as possible and therefore to guard against."³

General principle stated by Willes, J.

Lord Westbury's opinion.

The maxim *res ipsa loquitur* does not apply to an accident on a highway. Those who go on the highway or have their property adjacent and sustain personal hurt there or damage to their property lying beside it can only show a right to recover by affirmative evidence of fault in the person doing the damage. The fact of an accident raises no presumption.⁴ A man crossing the road is knocked down by a cart. Merely to prove this shows no cause of action. The plaintiff must go further and specify some breach of duty on the part of the defendant: the cart was driven too fast, or was on the wrong side of the road, or swerved, or was not properly constructed, or was overloaded—hence the accident: some fact imputing blame as the cause of the accident. It is as much the duty of foot-passengers attempting

¹ L. c. 61.

² L. R. 3 C. P. 222. "We entirely agree with the law laid down by the Court below": per Blackburn, J., in the Ex. Ch., L. R. 3 C. P. 593. *Griffiths v. Hamilton Electric Light Co.* (1903) 6 Ont. L. R. 296. See *Hayes v. Michigan Central Rd. Co.*, 111 U. S. (4 Davis) 241: "The question is, was it *causa sine quâ non*—a cause which, if it had not existed, the injury would not have taken place—an occasional cause? And that is a question of fact, unless the causal connection is evidently not proximate."

³ L. R. 5 H. L. 82. There are some very valuable and striking remarks of the Lord Chancellor, too long to quote, to the same effect, at 54, 55.

⁴ *Fletcher v. Rylands*, L. R. 1 Ex. per Blackburn, J., 286.

Res ipsa loquitur does not apply between master and servant.

to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers.¹ There must be evidence from which the jury "might reasonably and properly conclude that there was negligence."² Neither does the maxim *res ipsa loquitur* apply in master and servant cases. The common law rule is that a master is not liable for damage caused to his servant for any occurrence in the course of the employment, unless a foundation is laid in fault. Fault must be proved affirmatively.³ "It is not enough for the plaintiff to show that he has sustained an injury under circumstances that may lead to a suspicion or even a fair inference that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation."⁴ The exception that we are now considering is recognised in the United States. In the Supreme Court⁵ the principle is thus stated: "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured *employé* to establish that the employer has been guilty of negligence." In a Pennsylvanian case⁶ there is a broad and valuable generalisation: "Excepting where contractual relations exist between the parties, as in the case of carriers of passengers and others, negligence will not be presumed from the mere happening of the accident and a consequent injury; but the plaintiff must show either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence." The statutory modifications of the Common law have not altered the rule of *onus*. Under the Employers' Liability Act, 1880,⁷ the mere occurrence of an accident will not found liability. Besides evidence has to be given which shows personal injury caused by reason of some of the defects or negligences enumerated in sec. 1.; and even under the Workmen's Compensation Act, 1897,⁸ the occurrence of the accident and the existence of the relation of master and servant does not raise a presumption of liability, unless the accident is shown to be one "arising out of and in the course of the employment."⁹ By English law, the fact of an accident having happened to a servant while working for his master is, in no case, sufficient to raise the presumption that the servant has a claim against his master for legal compensation.

Evidence of opinion.

Smith v. Midland Ry. Co.

Not infrequently the circumstances proved are of a neutral kind, and evidence of opinion is tendered to accentuate them to liability. *Smith v. Midland Ry. Co.*¹⁰ is an instance of this where, under a special contract limiting liability to cases of negligence, cows safely loaded in a railway truck, at the end of the journey, were found to be injured. As the contract was a special one, the *onus* was on the plaintiff to give evidence of negligence; since the fact of animals sustaining injury while in the custody of a bailee does not raise any presumption against

¹ *Cotton v. Wood*, 8 C. B. N. S. 568, per Erl. C.J., 571.

² *Toomey v. L. B. & S. C. Ry. Co.*, 3 C. B. N. S. 146.

³ *Paterson v. Wallare*, 1 Macq. (H. L. Sc.) 748.

⁴ *Lovegrove v. L. B. & S. C. Ry. Co.*, 16 C. B. N. S., per Willes, J., 602.

⁵ *Pallon v. Texas, &c. Ry. Co.* (1901), 179 U. S. 653, 663.

⁶ *Stearns v. Ontario Spinning Co.* (1898), 184 Pa. St. 523. In *Labatt, Master and Servant*, 2298, columns of cases supporting this conclusion are cited.

⁷ 43 & 44 Vict. c. 42.

⁸ 60 & 61 Vict. c. 37.

⁹ *Pomfret v. Lancs. & Y. Ry. Co.* (1903), 2 K. B. 718; *Billing v. Simmons* (1904).

¹⁰ 7 Ont. L. R. 310, 8 Ont. L. R. 540; *Brown v. Waterous Engine Works Co.*, 8 Ont. L. R. 37.

¹⁰ 57 L. T. 813.

him.¹ He attempted to do this by giving "expert evidence," stating in effect that from the facts he was of opinion the accident happened through negligence. A Divisional Court, however, set aside the verdict based on this evidence, holding that it was not admissible; since the plaintiff did not come within the rule allowing expert evidence; and the facts proved, independently of his opinion, were ambiguous, and equally consistent with injury caused by restiveness of the animals as by negligence of the defendants.

A claim to interpret facts should obviously be very narrowly scrutinised;² and the instances, where what is not evidence of fact may, by interpretation, be turned into evidence to charge a defendant, should be strictly defined. To justify the admission of expert testimony two elements must co-exist:

- (1) The subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.
- (2) The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.

The nearest analogy is the interpreting of evidence given in a foreign language. The object of expert evidence is not to ekc out a case, but to explain the effect of facts of which otherwise no coherent rendering can be given.³

II. EVIDENCE OF NEGLIGENCE FOR THE JURY.

The difficulty of discriminating the functions of judge and jury respectively was the occasion for a long controversy, in the course of which many and conflicting views were propounded. The general rule is laid down in the Exchequer Chamber, in the case of *Ryder v. Wombwell*.⁴ The question was whether articles supplied by the plaintiff to the defendant, an infant, were necessaries. Willes, J., thus discusses the point: "The first question is, whether there was any evidence to go to the jury that either of the above articles was of that description? Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject, no doubt, to the control of the Court, who may set aside the verdict, and submit the question to the decision of another jury; but there is in every case, not merely on those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a non-suit, if the *onus* is on the plaintiff, or direct a verdict for the plaintiff, if the *onus* is on the defendant."⁵

This has been accepted as a correct statement of the law. Its application has been a matter of greater difficulty; and two distinct views grew up, according as judges were impressed with the frequently unjust decisions of juries in favour of injured people against wealthy corporations, or with the necessity of protecting the individual, even perhaps at the cost of injustice, against the negligent tendencies of

¹ *Cooper v. Burton*, 3 Camp. 5 note to *Dunn v. Keate*, 3 Camp. 4.

² *Cp. Rigg v. Manchester, Sheffield and Lincolnshire Ry. Co.* 14 W. R. 834.

³ *Carter v. Boehm*, 1 Sm. L. C. (11th ed.), 491; Phipson, Evidence (4th ed.), 355.

⁴ L. R. 4 Ex. 32.

⁵ L. C. 38.

Province of
judge and
jury
respectively.
Ryder v.
Wombwell.

Willes, J.'s,
statement of
the law.

Two views as
to its applica-
tion.

One view :
question of
common sense
for the judge.

The other
view :
question of
common sense
for the jury.

*Bridges v.
N. L. Ry. Co.*

powerful bodies whose wealth and influence often led them to acts of absolute oppression. The former view may be thus stated : " Where the facts are certain, where there is no other material fact to be inferred from them, either as causing them or as resulting from them, and the question is not one for experts, but for that common sense which is common to all of us in a greater or less degree, the matter is for the judge." The other view is, that where the question of liability " appears to be a matter of ordinary reasoning, which the jury, as ordinary reasoning men of this world, might properly and justly have arrived at, it is for the jury."

After a multitude of irreconcilable decisions,¹ the case of *Bridges v. North London Ry. Co.*² came before the House of Lords. Deceased was a passenger in the last carriage of a train going from Broad Street to Highbury Station. Before coming to the Highbury Station there is a tunnel for some short distance, down which there is a continuation, though narrower, of the station platform. On the occasion in question the night was dark and misty; the train did not draw up at the platform; and the carriage in which the deceased was, continued in the tunnel after the front part of the train had stopped at the platform. The deceased, who was shortsighted, got out on hearing the porter call the name of the station; and, the carriage in which he was, being still in the tunnel, and opposite a heap of dry rubbish, that sloped down from the end of the narrower portion of the platform, he fell, broke his leg, and sustained internal injuries from which he died. The servants of the company subsequently called to passengers to keep their seats; yet this was not until another passenger, who was in the next carriage to that in which the deceased was, had got out. Hearing a groan he went into the tunnel, and found the deceased there and injured.

Mr. Justice Blackburn was of opinion that there was no evidence of negligence to leave to a jury; the Queen's Bench sustained his ruling; in the Exchequer Chamber four judges sustained the nonsuit; three dissented. The judges called in to advise the House of Lords were unanimous in finding evidence of negligence; and this opinion was upheld by the House.

*N. E. Ry. Co.
v. Wantless.*

Between the argument in *Bridges's case* and judgment in House of Lords, *North-Eastern Ry. Co. v. Wantless*³ was decided. There is a statutory duty⁴ where a railway crosses a highway on the level, and where there are gates for the protection of " horses, cattle, carts, or carriages," for the company's servants to keep them closed when a train is approaching. This duty was neglected, and a boy got on the line and was injured by a train of coal-trucks. Lord Cairns, C., delivering the judgment of the House, said that " the circumstance that the gates at this level crossing were open at this particular time, amounted to a statement and a notice to the public that the line at that time was safe for crossing, and that any person who, under those circumstances,

¹ *Siner v. G. W. Ry. Co.*, L. R. 3 Ex. 150; 4 Ex. 117, is a sample of the one class of decisions. *Foy v. L. B. & S. C. Ry. Co.*, 18 C. B. N. S. 225, of the other class. " As I understand the observations of the L.C.J. (Cockburn), he would himself have been of opinion, with a certain qualification, that there was evidence of negligence to go to the jury; but he said if a rule was granted, it would be certain, in that Court, to be discharged, and therefore it was refused": *Bridges v. N. L. Ry. Co.*, L. R. 7 H. L. 213, per Lord Cairns, C., 239. ² L. R. 7 H. L. 213.

³ L. R. 7 H. L. 12.

⁴ Under 8 Vict. c. 20, s. 47. *Williams v. G. W. Ry. Co.*, L. R. 9 Ex. 157; *Wakelin v. L. & S. W. Ry. Co.*, 12 App. Cas. 41, with Lord Halsbury, C.'s, comment, 43.

went inside the gates with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the circumstance that the gates were open." The evidence of negligence was thus based on the non-performance of a statutory duty.

In *Robson v. North-Eastern Ry. Co.*, Brett, J.A.,¹ thus states what he conceives to be the effect of the decision in *Bridges's case*: The judgment of the House of Lords put "an end to a long controversy, not as to the law, but as to the mode of dealing with these cases. Some of the judges seem to have been of opinion that these cases should as much as possible be withdrawn from the jury, and that the Court ought to say what was reasonable for the passenger to do. The House of Lords held, that as the carrying of railway passengers was conducted in the ordinary affairs of life, the jury was the proper tribunal to decide."²

Brett, J.A.'s, view of the rule laid down in *Bridges's case*.

Amphlett, J.A., in *Jackson v. Metropolitan Ry. Co.*,³ with the assent of Cockburn, C.J.,⁴ took a somewhat extreme view of the province of the jury consequent on the judgment of the House of Lords. He regarded it as settled "that the question whether in cases of this sort negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding judge." Lord Cairns, C., in *Metropolitan Ry. Co. v. Jackson*,⁵ however, in the House of Lords, states authoritatively the principle underlying *Bridges's case*. "I am bound to say," he says, "that I cannot look at the case of *Bridges* as in any degree establishing the proposition which it appeared to Lord Justice Amphlett to establish, namely, that whether in cases of this sort negligence can be inferred from any given state of facts, is itself a question of fact for the jury, or as establishing the proposition which it appeared to the Lord Chief Justice to establish—namely, that the jurors are the proper judges whether, if once any negligence is proved, the accident which has occurred is to be connected with such negligence as its cause or as materially contributing thereto. Your Lordships in the case of *Bridges* did not lay down, and I am satisfied your Lordships did not mean to lay down, any new rule upon this subject. It is, indeed, impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the judge must say whether negligence *can* legitimately be inferred, and the jury whether it *ought* to be inferred."

Amphlett, J.A.'s, and Cockburn, C.J.'s, view.

Lord Cairns, C., in *Metropolitan Ry. Co. v. Jackson*.

dissents from the rule as expounded by Amphlett, J.A., and Cockburn, C.J.

Although *Bridges v. North London Ry. Co.* was discussed, and its *ratio decidendi* was more explicitly enunciated in *Metropolitan Ry. Co. v. Jackson*, in the House of Lords, the question there was whether, in order to warrant the leaving a case to the jury, it was sufficient to prove negligence in the train of events that resulted in the accident, or was necessary to show negligence bearing an actual and immediate relation to the injury. The facts were as follows: The respondent took a ticket on the appellant's line. The compartment, into which

Metropolitan Ry. Co. v. Jackson.

¹ 2 Q. B. D. 85, 89. *Rose v. N. E. Ry. Co.*, 2 Ex. D. 248.

² In the House of Lords, in *Metropolitan Ry. Co. v. Jackson*, Lord Blackburn, referring to this rule, said: "I quite agree that this consideration ought never to be lost sight of, but I cannot think it decisive." "The utmost extent to which your Lordships' decision in that (*Bridges's*) case can be fairly pressed is, that in such cases the judges should be cautious, before they say that the jury could not legitimately draw the inference which in fact they did draw; and to this I agree": 3 App. Cas. 193, 209.

³ 2 C. P. D. 125, 127.

⁴ *L.c.* 145.

⁵ 3 App. Cas. 193, 200.

he got, gradually filled up, till all the seats were occupied. At the next stoppage after the carriage was full, three persons forced themselves in, and had to stand. When the train stopped again, the three extra passengers still remained standing in the compartment, the door of which was opened and then shut. Just as the train was starting there was a rush, and the door of the compartment was opened a second time by persons trying to get in. Thereupon the respondent partly rose and held up his hand to prevent any more persons coming in. After the train had moved, a porter pushed away the people and slammed the door to, just as the train was entering the tunnel. At that very moment the respondent, by the motion of the train, fell forward, and, putting his hand upon one of the hinges of the carriage door to save himself, his thumb was caught and injured. The negligence in allowing too many people in the carriage was admitted.

Lord Cairns's judgment.

Lord Cairns, C., thus deals with the case:¹ "I do not find any evidence from which, in my opinion, negligence could reasonably be inferred. The negligence must in some way connect itself, or be connected by evidence, with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria dans locum injuriæ*. In the present case there was no doubt negligence in the company's servants in allowing more passengers than the proper number to get in at the Gower Street Station; and it may also have been negligence if they saw these supernumerary passengers, or if they ought to have seen them, at Portland Road, not to have then removed them; but there is nothing, in my opinion, in this negligence which connects itself with the accident that took place. If, when the train was leaving Portland Road, the overcrowding had any effect on the movements of the respondent; if it had any effect on the particular portion of the carriage where he was sitting, if it made him less a master of his actions when he stood up or when he fell forward, this ought to have been made matter of evidence; but no evidence of the kind was given."

To the two points of negligence mainly relied on below, that there was no attempt made to remove the extra passengers, and that there was an uncontrolled action on the part of a number of persons on the platform,² the answers given in the House of Lords were: as to the first, that it was in no way connected with the accident; as to the second, that the action of the porter and its effectiveness negatived the fact of any such uncontrollable action as was alleged.

Rule in Jackson's case— that the evidence of negligence must be connected with the accident.

The rule to be extracted from the case seems then to be, that although there may be evidence of negligence in the conduct of the defendants in some part of their relations to the plaintiff, that in itself is not sufficient to entitle the plaintiff to have his case submitted to the jury; but the evidence of negligence must be connected with the accident by having more or less contributed to produce it.³

Bridges v. North London Ry. Co. decides that where there are facts from which negligence can be inferred the jury must have the oppor-

¹ 3 App. Cas. 193, 198.

² In the Irish Court of Appeal it has been directly decided that the presence of an excited, riotous, or drunken crowd on a platform is not in itself a state of things that a railway company is to be held accountable for: *Cannon v. Midland G. W. Ry. of Ireland*, 6 L. R. Ir. 199; *Fraser v. Caledonian Ry. Co.* (1902), 5 Fraser 41. *Prima facie* it is evidence of negligence, but is rebuttable.

³ Cp. *Callender v. Carlton Iron Co.*, 9 Times L. R. 646 (C. A.), affirmed in H. L. 10 Times L. R. 306. *Headford v. McClary Manufacturing Co.*, 24 Can. S. C. R. 291; *Phillips v. Grand Trunk Ry. Co.* (1901), 1 Ont. L. R. 28.

tunity of drawing that inference. The *Metropolitan Ry. Co. v. Jackson* defines the negligence that is to be inferred, as negligence having a causal connection with the accident. The *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery*¹—the third and last of this group of negligence cases, decided by the House of Lords—establishes that where facts, from which negligence can be inferred, are given in evidence, their effect cannot be neutralised by other evidence contradictory of them, and that the whole must be left to the jury to draw what inference they may please;² subject, of course, to an application to the Court *in banc* to set aside the verdict as not being “such as reasonable men might find.”³

The decision in *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery* was the occasion of an extraordinary division of judicial opinion. The jury having found for the plaintiff, damages £1205, a motion to set aside that verdict was discharged by three judges in the Irish Court of Common Pleas. On appeal, the judges in the Irish Exchequer Chamber were equally divided. In the House of Lords the decision of the Irish Court of Common Pleas was affirmed, by a majority of five to three.

The material facts were: Plaintiff's husband went to one of the defendants' stations to see a friend off by train. To get a ticket it was necessary to cross the line. The train was then slowly coming into the station. He safely crossed and got a ticket. The train had in the meantime arrived, and was stationary. He began to recross the line to rejoin his friend, and went at the back of the train. His view of the down line was impeded by the stationary train, and as he got there an express train caught and killed him. It was a rule that the express train should always whistle on approaching the station. The driver of the express swore that he whistled twice. Nine other persons, “including every person whose evidence could be supposed to have been material, all of whom seem to me to be entirely unimpeached and unimpeachable,”⁴ said they heard the whistling. Two persons, on the other hand, said they did not hear a whistle, and one that he did not hear a whistle hut would not swear there was no whistling. The negligence alleged was the absence of whistling. The question was,

¹ 3 App. Cas. 1155, affirming Ir. R. 10 C. L. 250, and distinguished, *Hudson v. Victorian Ry. Commissioner*, 26 V. L. R. 200. In *Wright v. G. N. Ry. Co.*, 8 L. R. Ir. 257, a man, in a position of safety, seeing a train approaching, left his safe place to cross the railway line, and being injured, was held disentitled to recover. A point was made that members of the jury from their independent knowledge of the place of the accident suggested facts of negligence which might have warranted their verdict.

² The Pennsylvania case of *Citizens' Passenger Rd. Co. v. Foxley*, 107 Pa. St. 537, lays down the same proposition.

³ *Metropolitan Ry. Co. v. Wright*, 11 App. Cas. 152, where, per Lord Halsbury, the rule in *Solomon v. Bitton*, 8 Q. B. D. 170, should be altered by the substitution of the word “might” for “ought to.” “It is idle,” said Lord Esher, in *Webster v. Friedeberg*, 17 Q. B. D. 737, “to say that, in determining whether a verdict was against the weight of evidence, you must not take into serious consideration the opinion of the judge who tried the case. No one has ever said that his opinion is conclusive, but it is a matter to be taken into serious consideration.” See also *Commissioners for Railways v. Brown*, 13 App. Cas. 133; *Phillips v. Martin*, 15 App. Cas. 194; *Brown v. Commissioners for Railways*, 15 App. Cas. 240. The Court of Appeal may in a proper case enter judgment instead of ordering a new trial: *Alcock v. Hall* (1891), 1 Q. B. 444. The first instance of a new trial, with reference to the merits of the case on the evidence, is in the year 1665: *Style*, 462, 466. New trials in ejectment where the verdict went for the defendant, were not permitted even then, because the verdict in ejectment was not conclusive: *Argent v. Darrell*, 2 Salk. 648. It was otherwise if the verdict was for the plaintiff.

⁴ 3 App. Cas. per Lord Cairns, C., 1164.

whether on these facts the judge ought to have withdrawn the case from the jury or not.

The view of the majority—the valuation of evidence is for the jury.

The view of the majority, upholding the decision of the Irish Court of Common Pleas was—that whenever evidence has been given from which legal negligence may be inferred, and other evidence is subsequently given inconsistent with the first, the decision which is the more credible must always rest with the jury; and the duty of the judge is confined to pointing out to the jury the rules to guide them in their findings, and the consequences that would respectively attach to them.

The view of the minority—the valuation of evidence is only for the jury where, in the opinion of the judge, there could be a reasonable difference of opinion about it.

The view of the minority was, that when the evidence, assuming it to be true, shows a state of things in which no reasonable person could be expected to say that the negligence of the defendants, without any concurrence of negligence on the plaintiff's part, was established, there is no evidence to be submitted to a jury, and the judge should direct the jury to find for the defendants.¹

It was agreed that whether there was whistling or not was a question for the jury; and that the remedy for a wrongful verdict was to move for a new trial on the ground that the verdict was against the weight of evidence.

The chief difference of opinion in the House of Lords turned on the question, whether the conduct of the deceased had not so clearly proved him the author of his own injury that there was no evidence of the defendants' negligence to go to the jury.

Skelton v. L. & N. W. Ry. Co.

To establish that, if this were so, the matter might be removed from the jury, Lord Blackburn cited the case of *Skelton v. London and North-Western Ry. Co.*² There the Court held that the only act of negligence alleged against the Company—that of not fastening the gate—was not negligence—i.e., was not of such a character as to call for an answer from the defendants. The case, therefore, is not one where the defendants' negligence and its effect on the accident were brought into any relation whatever with the act of the plaintiff. It is merely the ordinary case of a plaintiff not giving evidence enough to raise a legal presumption against the defendants; and shows only that where no negligence of the defendants was established, the Court commented on the negligence of the plaintiff that brought about the accident.³ Lord Blackburn also cited the opinion of Brett, J., advising the House of Lords, in *Bridges v. North London Ry. Co.*,⁴ in which, after pointing out that before directing the jury in terms, the judge first determines whether the plaintiff has been injured by the defendant; next, whether the injury was the result of negligence; he thus continues: the third question the judge should ask himself is—"Are there facts in evidence upon which, if unanswered, men of ordinary

The actual point decided there.

Brett, J.'s opinion in *Bridges v. N. London Ry. Co.*

¹ Compare the view taken in the Supreme Court of the United States, *Schofield v. Chicago, Milwaukee, & St. Paul Rd. Co.*, 10 U. S. (7 Davis) 615. In *Randall v. Baltimore & Ohio Rd. Co.*, 108 U. S. (2 Davis) 478, the rule is laid down, that where the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict if returned must be set aside, the Court may direct a verdict for the defendant.

² L. R. 2 C. P. 631. In this case Willes, J., at 636, cites *Wyatt v. G. W. Ry. Co.*, 6 B. & S. 709, as an authority that the Court is bound to consider the question of contributory negligence in deciding whether there is any evidence to go to the jury of the defendant's liability. This is, however, disputed by Lord Blackburn, 3 App. Cas. 1211. And a reference to the judgment of Cockburn, C.J., 6 B. & S. 717, will make it clear that the decision in that case was merely upon 8 & 9 Vict. c. 20, s. 47, importing a legislative prohibition.

³ 3 App. Cas., per Lord Penzance, 1178.

⁴ L. R. 7 H. L. 233.

reason and fairness might fairly say that the plaintiff had not, in a manner contributing to the accident, done anything or omitted to do anything, which a person of ordinary skill, under the same circumstances, would not have done or would have done?" Lord Blackburn relied on this passage as showing that in the opinion of Brett, J., a judge could in such circumstances withdraw the case from the jury. Yet in *Radley v. London and North-Western Ry. Co.*,¹ Brett, J., having directed the jury in accordance with that view of the law, was held by the House of Lords, Lord Blackburn assenting, to have made a statement of the law "contrary to the doctrine established in the case of *Davies v. Mann*;²" and the case was ordered for a new trial. If then a case were removed from the jury on evidence of such acts, the Court *in banc* would be constrained to order a new trial, since acts of the character indicated—viz., those showing want of ordinary skill—would not necessarily import liability. The inquiry in all such cases is, could the *defendant*, by the exercise of ordinary care and diligence, have avoided the mischief; and if he could, the plaintiff's negligence will not excuse him.³ This is subject to the observation that in all cases there must be sufficient evidence of fault of the defendant to call on him to answer; there must be a *prima facie* case made out.

His direction in accordance with it in *Radley v. L. N. W. Ry. Co.* overruled by the House of Lords. Brett, J.'s view considered.

There must first be evidence of negligence on the part of the defendant; then the defendant may show, either by calling witnesses or out of the plaintiff's own case—not that the plaintiff has been guilty of negligence, for the plaintiff is entitled to say, I may be just as negligent as I please, that does not excuse your injuring me; you—the defendant—must show that you were ordinarily prudent and careful, and that you could not avoid injuring me:—that it was negligence of the plaintiff that produced the accident, though the defendant used all due care. A negligent plaintiff is not to be made the victim of a recklessly negligent act. The proof, then, of facts, however condemnatory of the plaintiff, is not sufficient; he is entitled to be negligent:⁴ what changes the *onus* is the finding that the effect of his acts could not be avoided by the ordinary care of the defendant. As Lord Blackburn says,⁵ "If there is some farther inference of fact which may be drawn from the undisputed facts, it is still for the jury to say whether they will draw that inference." A drunken man falls asleep in the middle of the road; the defendant drives over him. The evidence shows that the road is wide and straight, and the driver skilful. The judge must not nonsuit on the ground of contributory negligence;⁶ for contributory negligence, which "arises when there has been a breach of duty on the defendants' part, not where *ex hypothesi* there has been none,"⁷ cannot be established without proof of the proposition, "that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him." As

Rule of law analysed.

Contributory negligence involves comparison of facts.

¹ 1 App. Cas. 754, per Lord Penzance, 760; *Inland & Seaboard Coasting Co. v. Tulson*, 139 U. S. (32 Davis) 551.

² 10 M. & W. 549.

³ *Radley v. L. & N. W. Ry. Co.*, 1 App. Cas. 754, 759.

⁴ *Ante*, 11, n. 2.

⁵ 3 App. Cas., 1201.

⁶ *Clayards v. Dethick*, 12 Q. B. 439, per Coleridge, J., 44.

⁷ *Thomas v. Quartermaine*, 18 Q. B. D. 685, per Bowen, L. J., 697.

and is to be decided by the jury.

this proposition involves a comparison of facts, it must be for the jury.¹ *Wakelin v. London and South-Western Ry. Co.*² accords with this: the plaintiff's evidence failed to show a *prima facie* case. On the whole evidence of the plaintiff, a case equally consistent with the presence or with the absence of negligence was shown; while the burden was on the plaintiff to show facts more consistent with negligence than with the other alternative. In *Slattery's case* the onus on the plaintiff had been discharged; on the plaintiff's evidence as it stood at the close of her case there was evidence, which, uncontradicted, would warrant a verdict for her. The defendants had indeed subsequently given evidence that to a fair-minded person was conclusive; nevertheless, the conflict of evidence had come into being and could only be settled by the jury. In *Wakelin's case* no *prima facie* case for the plaintiff was made out; in *Slattery's* only a dubious one; yet bad though it was, it must go to the jury, for there was a dispute as to fact.

Principle.

The difference may be stated thus: where the plaintiff's evidence shows on the whole that he has not made out his case; one portion of his evidence may colour another portion, and the whole be neutralised; the judge may then nonsuit. But contributory negligence implies a *prima facie* case established by the plaintiff. To displace a *prima facie* case by showing contributory negligence implies a preference of one of two differing views. This preference is the prerogative of a jury.

Bearing of *Slattery's case* on the point.

The question of contributory negligence is, however, only incidentally involved here. In *Slattery's case*³ the inquiry was whether when evidence is given which by itself raises a presumption of negligence, which afterwards, by reason of other evidence, has its force diminished, it can, in any circumstances, be considered so far obliterated as to warrant the judge in removing the case from the jury.

The contention of the minority in the Lords was that, where the contradictory evidence could be regarded as admitted, the effect was to obliterate the evidence that showed negligence. Now though the facts of the manner of crossing and the approach of the train were admitted in *Slattery's case*, the conclusions drawn from the admitted facts were not admitted. On the one hand, the conclusion suggested was, that *Slattery* was guilty of negligence; on the other, that he got into his perilous position through the neglect of the engine-driver to whistle and give him proper warning. Though the bare facts were admitted, the conclusion from them being consistent with either of two states of facts, one of which the one side adopted, the other the other; and evidence having been given which threw the onus of proof on the defendants, and raised a presumption, though a very slight one, in favour of the plaintiff, the question had to be left to the jury. Where both evidence and conclusions from evidence are admitted, there can be nothing to leave to the jury; but this is a state of things of rare occurrence; since usually where facts are admitted the inferences from them are disputed, where inferences are not disputed then the facts are.

Conclusions from *Slattery's case*.

Slattery's case establishes that it is competent to, and the duty of,

¹ *Radley v. L. & N. W. Ry. Co.*, 1 App. Cas. 754, 759.

² 12 App. Cas. 41. *Kirby v. Victorian Ry. Commissioner*, 24 V. L. R. 657.

³ 3 App. Cas. 1155.

the judge to say whether there is evidence to go to the jury on any issue; and he is not precluded from taking the case from the jury when the plaintiff, in proving negligence, proves also other facts of such a character that no reasonable men could find in his favour.¹ But it is not competent for him to say that any one issue is proved more than any other, and to withdraw the case from the jury. Further, where there are either facts or conclusions from facts in dispute the decision of them is for the jury.²

The effect of the decision in *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery*³ was canvassed in *Davy v. London and South-Western Ry. Co.*⁴ The facts, as stated by Lord Coleridge, C.J., were: the plaintiff "caused the accident by walking straight into a train that he might have seen." On this the judge nonsuited the plaintiff; a rule was then obtained on the ground that, "if there is evidence of negligence or a breach of duty by the defendants without which the accident would not have happened, there is a case for the jury; and it is well settled that evidence of contributory negligence, however strong, cannot entitle a judge to withdraw the case from the jury." The Divisional Court discharged the rule, and Lord Coleridge, C.J. (one of the dissentient judges in *Slattery's case*), laid down the law in the following terms: "It is for the plaintiff to show, before he can recover, that there was negligence on the part of the defendant, and that such negligence caused the injury to the plaintiff. In the present case the plaintiff must therefore make out two things: first, that the defendants, through their servants, did or omitted to do something which a reasonably careful person would not have done or omitted to do; and, secondly, that the plaintiff's injury was thereby occasioned. It has certainly been determined in several cases, which have not been overruled so far as I am aware, that if the plaintiff, in attempting to establish his case, not only does not show any act or omission of the defendants from which the accident arose, but, on the contrary, does show that he himself caused the damage, then his case fails, because he proves affirmatively that he himself is the author of his own wrong. If, therefore, by the uncontradicted facts, on the truth of which the plaintiff must rest his own case, it is shown that the damage to the plaintiff was caused by himself, it seems to me that the learned judge was right in nonsuiting the plaintiff, because he failed in sustaining the *onus* which he was bound to sustain, viz., of showing that the injury resulted from the defendants' acts."

Davy v. London and South-Western Ry. Co.

Judgment of Lord Coleridge, C.J.

Denman, J., concurred in this; but Manisty, J., had doubts whether the question of reasonable precautions was not for the jury. On appeal, the decision was sustained by Brett, M.R., and Bowen, L.J.,

Denman, J., concurs; Manisty, J., doubts. Divisional Court affirmed in the Court of Appeal;

¹ *Wright v. Midland Ry. Co.*, 51 L. T. 539; *Mitchell v. New York, &c., Rd. Co.*, 146 U. S. (39 Davis) 513.

² In the United States the rule is the same; *Washington & Georgetown Rd. Co. v. Harmon*, 147 U. S. (40 Davis) 571.

³ 3 App. Cas. 1155. The law in the United States is indistinguishable; *Dunlap v. N. E. Rd. Co.*, 130 U. S. (23 Davis) 649.

⁴ 11 Q. B. D. 213-217, 12 Q. B. D. 70. *Reading and Columbia Rd. v. Ritchie*, 102 Pa. St. 425. *Cornish v. Accident Insurance Co.*, 23 Q. B. D. 453, is a decision on a policy of insurance against accident happening "by exposure of the insured to obvious risk of injury." The insured met his death through attempting to cross the main line of a railway in front of an approaching train. The Court held that injuries occasioned by negligence were not in all cases excepted by such a clause. Bowen, L.J., inclined to construe "obvious" as "evident to the senses." *Captain Boyton's World's Water Show, &c., v. Employers' Liability Assurance, &c.*, 11 Times L. R. 384.

Baggallay,
L.J., dissents.

Baggallay, L.J., dissenting.¹ The dissent of Baggallay, L.J., was based upon an illustration used by Lord Cairns in giving judgment in *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery*.² "If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think that the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death." The Lord Justice was of opinion that the case showed both negligence on the part of the defendants, and an absence of contributory negligence on the part of the plaintiff. The majority of the Court, however, were of opinion that no negligence of the defendants had been shown.³

Judgment of
Bowen, L.J.,
with reference
to Lord
Cairns's
illustrations.

Bowen, L.J., thus deals with Lord Cairns's illustration:⁴ "The question for the House of Lords was, whether the learned judge at the trial should have nonsuited or not; and that question divided itself into two parts: First, whether there was evidence of negligence in the railway company to go to the jury; and secondly, whether, even assuming there was such, that was negligence which could have caused the accident, or whether there was not such clear contributory negligence on the part of the plaintiff as rendered it impossible for a reasonable person to suppose the accident was caused by anybody except the plaintiff himself. Now, the observations of Lord Cairns in that case, it will be observed, arise solely on this second branch. Lord Cairns thought that, on the admitted facts, it could not be said that there were not two views open of the plaintiff's conduct, and the reason he thought so was because the plaintiff was a person who was simply crossing, in the night-time, a station where the trains ought to whistle when they were passing such crossing in the night-time, and on the ground that the facts there did admit of two reasonable views, Lord Cairns thought that the judge ought not to have nonsuited. If the facts here had been exactly as they were in that case, one would have come to the same conclusion in the present case, but it is because I think they do not fall within the facts of that case, but, on the contrary, do not leave open two views which can be reasonably taken of the plaintiff's conduct that I think the judge was right in nonsuiting."⁵

¹ 12 Q. B. D. 70, 74.

² 3 App. Cas. 1166.

³ Cp. *Greenwood v. Philadelphia, &c. Rd. Co.*, 124 Pa. St. 572, 10 Am. St. R. 614, as to what is not merely evidence of negligence but "negligence *per se*" in a traveller.

⁴ 12 Q. B. D. 78.

⁵ See *Brown v. Midland Ry. Co.*, 1 Times L. R. 406, with note of *Wright v. Midland Ry. Co.*, where Davy's case is commented on by Brett, M.R. In *Curtin v. The Great Southern & Western Ry. Co. of Ireland*, 22 L. R. Ir. 219, it is again discussed. See, too, *M'Donnell v. The Great Southern & Western Ry. Co.*, 24 L. R. Ir. 369. Lord Esher, M.R., subsequently (*Mich. Term 1890*), on Davy's case being cited, said he hoped he should never hear that case cited again, as he was now of opinion that the judgment of Baggallay, L.J., was right. Bowen, L.J., who was sitting with the Master of the Rolls, did not express concurrence. (*Ex mea relatione*.) But subsequently in *Smith v. S. E. Ry. Co.* (1896), 1 Q. B. 178, Lord Esher, M.R., said that it would be convenient for the profession if the judgments of the C. A. in *Wakelin's case* were appended to the report of *Smith's case*; and the M. R. is there reported to have said (191): "I do not retract any part of the statement which I made in the case of *Davey v. L. & S. W. Ry. Co.* as to the principle of law in relation to the proof of the cause of action in cases of this kind." In 1899, in *White v. Farry Ry. Co.*, 15 Times L. R. 475, Smith, L.J., is reported: "It is true that in *Davey v. L. & S. W. Ry. Co.*, this Court did hold in a case somewhat like the present, that it was the duty of the judge to nonsuit the plaintiff because it was apparent that he had been guilty of contributory negligence. Baggallay, L.J., however, dissented, and Lord Esher had since expressed a doubt

In these level-crossing cases the tendency of the English Courts has been, and is, to lay stress on the practically resistless power of the steam-engine and the severity of the duty to be exacted from the railway company. The other side of the duty, that of the passenger to avoid danger, though as imperative, is rarely made prominent. The duty of the passenger to avoid danger is as stringent as neglect of it is irreparable. The railway line, the signals, the gates, the level crossing, apprise him of the probable rush past of a train. His duty is to be alert, to anticipate and to avoid danger; the greatest care is necessary; he should look both up and down the line and search for manifestations of approaching danger. If he would only use his ears many fatal accidents would never have occurred. If he elects not to be careful he must abide the consequences. If he risks crossing without precaution, he and not the company is to blame if his adventure brings disaster, and that too whether his act is prompted by ignorance or had judgment or obstinate recklessness. "A mutual duty is enjoined and a mutual liability results from a failure to perform that duty; and a party who fails in performing his own part thereof, is in no condition to enforce the penalty of a breach on the other party."¹

In *Wakelin v. London and South-Western Ry. Co.*,² plaintiff's husband was found dead on the defendants' railway, near a public footpath, and nothing was known about how he got there. Brett, M.R., in the Court of Appeal, once more expressed his opinion that: The plaintiff "was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was also bound to give *prima facie* evidence that the deceased was not guilty of negligence contributing to the accident; and that by reason of the plaintiff having been unable to give any evidence of the circumstances of the accident, she had failed in giving evidence of that necessary part of her *prima facie* case."³ In the House of Lords, however, the correct view was determined to be that the plaintiff was required to give evidence only on the first head, that the accident was caused through the negligent act of the defendants. Lord Watson⁴ pointed out that this was not inconsistent with *Slattery's*

Wakelin v. L. S. W. Ry. Co., Brett, M.R., repeats his view in the Court of Appeal.

But is over-ruled in the House of Lords.

Lord Watson's opinion.

whether the judgment of himself and Bowen, L.J., was right." In the House of Lords, 17 Times L. R. 644, the judgment of the C. A. was reversed, and a new trial ordered on the misdirections of the judge at the trial. The difference between the English and the Canadian systems is marked in *Canadian Pacific Ry. Co. v. Fleming*, 22 Can. S. C. R. 33, 44. Negligent delay in opening gates across a highway is actionable: *Boyd v. G. N. Ry. Co.* (1895), 2 I. R. 555. Cp. *Jones v. Grand Trunk Ry. Co.*, 16 Ont. App. 37, and *Fallet v. Toronto Street Ry. Co.*, 15 Ont. App. 346, the case of walking a horse against a tramcar—very like *Allen v. North Metropolitan Tramway*, 4 Times L. R. 561. In *Pearl v. Grand Trunk Ry. Co.*, 10 Ont. App. 191, Davey's case is considered at length. *Ruddy v. L. & S. W. Ry. Co.*, 8 Times L. R. 658, is the case of a boy being run over by a van; *Dallas v. G. W. Ry. Co.*, 9 Times L. R. 344, a level crossing case, where judgment was entered for plaintiff in C. A.; *Newman v. L. & S. W. Ry. Co.*, 7 Times L. R. 138, a nonsuit in a level crossing case. In *Harrison v. N. E. Ry. Co.*, 29 L. T. (N. S.) 844, there was said to be no duty upon a railway company which allows people to cross their line, but in no definite track, to use care to protect them. *Sim v. Grand Trunk Ry. Co.*, 10 Ont. L. R. 330; *Pearl v. Grand Trunk Ry. Co. (Privy Council)*, 10 A. R. 191, 10 Ont. L. R. 753. The American law is very fully discussed in *Grand Trunk Rd. Co. v. Ives*, 144 U. S. (37 Davis) 408, 419 *et seq.*

¹ *Wilde v. Hudson River Rd. Co.*, 24 N. Y. 430, 441.
² 12 App. Cas. 41. *Barker v. L. & S. W. Ry. Co.*, 8 Times L. R. 31, where the C. A. case, *Coburn v. G. N. Ry. Co.*, is appended in a note. *Grand Trunk Ry. Co. v. Hainer*, 36 Can. S. C. R. 180. Cp. per Lord Wensleydale, *Morgan v. Sim*, 11 Moo. P. C. C. 311.

³ 12 App. Cas. 43. Brett, M.R.'s judgment in *Wakelin's case* is printed as a note to *Smith v. S. E. Ry. Co.* (1896), 1 Q. B. 189.

⁴ 12 App. Cas. 48.

case. "I am of opinion," he said, "that the *onus* of proving affirmatively that there was contributory negligence on the part of the person injured, rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour. That opinion was expressed by Lord Hatherley and Lord Penzance in the *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery*.¹ I agree with these noble Lords in thinking that, whether the question of such contributory negligence arises on a plea of 'not guilty,' or is made the subject of a counter issue, it is substantially a matter of defence. And I do not find that the other noble Lords who took part in the decision of *Slattery's case* said anything to the contrary. In expressing my own opinion, I have added the words 'in the first instance,' because, in the course of the trial the *onus* may be shifted to the plaintiff so as to justify a finding in the defendants' favour, to which they would not otherwise have been entitled." Lord Blackburn concurred with Lord Watson.

Lord Halsbury's opinion

Lord Halsbury, C., said: "It is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved.¹ If that fact is not proved, the plaintiff fails, and if in the absence of direct proof, the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition: *Ei qui affirmat non ei qui negat incumbit probatio*."²

"If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence, as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because *in pari delicto potior est conditio defendentis*. It is true that the *onus* of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue—i.e., in this case the negligent act done—has discharged herself of that burden. I am of opinion that the plaintiff does not do this unless she proves that the defendants have caused the injury in the sense which I have explained."³ But, "a person on whom the burden of proof lies, may always, in order to discharge himself of that burden, vouch what is proved for him by his opponent."⁴

It often happens in these cases, that while the plaintiff has been striving to prove negligence, he indicates facts which show contributory

¹ 3 App. Cas. 1169, 1180.

² *Ei incumbit probatio, qui di it; non qui negat*: D. 22, 3, 2. *Semper necessitas probandi incumbit illi qui agit*: Inst. 2, 20, 4. See a remark by Pallett, C.B., in *Hill v. The G. N. Ry. Co. of Ireland*, 26 L. R. Ir. 255, 254, on "the ordinary principles as to *onus* of proof."

³ 12 App. Cas. 44. *Pomfret v. Lancs. & Y. Ry.* (1903), 2 K. B. per Collins, M. R. 721.

⁴ *Kimber v. The Press Association* (1893), 1 Q. B. 65, per Lord Esher, M. R., 71.

negligence. In this event, before he can recover, he has not only to show affirmatively the negligence of the defendant, but some facts to answer the implication of negligence on his part, also arising from his evidence.¹ Such proof depends on the gap in his own proof, not on any obligation in advance to disprove his antagonist's case. He has given evidence of something which unexplained destroys his cause of action. He has to explain it, else he has not laid proper foundations to go to the jury. The *onus* on the plaintiff is to show that the defendant's negligence caused the accident, and where the plaintiff gives evidence of a state of things equally consistent with the wrong being caused by his own negligence or by the negligence of the defendant he has not proved his case.² Save in this connection the plaintiff has nothing to do with disproof of contributory negligence as the foundation of his case.³

The cases were reviewed by Palles, C.B., in *Coyle v. Great Northern Ry. Co. of Ireland*⁴ and judgment was entered for the defendants, as the undisputed facts showed affirmatively that C crossing the railway line acted negligently, and that this negligence, if not the sole was at least a contributory cause of the accident. Palles, C.B., deduces the following principle: "That to justify the judge in leaving the case to the jury, notwithstanding the voluntary act of the injured person, which contributed to the injury complained of, the circumstances must be such as either, firstly, to make the question whether that act is negligent (either *per se*, or having regard to the conduct of the defendants inducing or affecting it), a question of fact; or, secondly, the circumstances must be such as to render reasonable an inference of fact that the defendants, by using due care, could have obviated the consequences of the plaintiff's negligence. If the case is so clear that the determination of those two questions involves no inference of fact, it is for the judge and not for the jury;" and this expression has been accepted as correct by the High Court of Australia.⁵

In *Smith v. South Eastern Ry. Co.*,⁶ the Court of Appeal seemed more uncertain as to the ground of their decision than as to the decision itself. A resident in the neighbourhood of a level crossing called upon the gate-keeper at the lodge. The duty of the gatekeeper was to leave his lodge when a train is signalled and, by day, to show a white flag, by night, a white light. The visitor found the gates open as for a train. The gatekeeper, however, omitted to leave his lodge for

¹ Cp. *Clyde Navigation Co. v. Barclay*, 1 App. Cas., per Lord Chelmsford, 792, 793, Lord Selborne, 796. *Aris v. G. E. Ry. Co.*, 8 Times L. R. 693.

² The rule in the United States is, that where the evidence, given at the trial with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff—i.e., where such a verdict, if returned, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant: *Goodlett v. Louisville, &c. Rd.*, 122 U. S. (15 Davis) 391, 411. "It would be an idle proceeding to submit the evidence to the jury where they could justly find only in one way: *Anderson County Commissioners v. Beat*, 113 U. S. (6 Davis) 227, 241"; per Field, J., in *North Pennsylvanian Rd. Co. v. Commercial Bank of Chicago*, 123 U. S. (16 Davis) 733.

³ *Holland v. North Metropolitan Tramways Co.*, 3 Times L. R. 245; where Manisty, J., said that Davey's case was no longer an authority on this point. In *Cole v. G. N. Ry. Co. of Ireland*, 20 L. R. Ir. 409, all the cases are reviewed by Palles, C.B. There judgment was entered for defendant, as the undisputed facts showed affirmatively that C crossing the line acted negligently, and that this negligence, if not the sole was at least a contributory cause of the accident.

⁴ 20 L. R. Ir. 409, 418. *Grand Trunk Ry. Co. v. Birkett*, 35 Can. S. C. R. 296; *Palles v. Grand Trunk Ry. Co.* (1901), 1 Ont. L. R. 224.

⁵ *The Commissioner of Railways v. Leahy*, 2 C. L. R. (Australia) 54.

⁶ (1896) 1 Q. B. 178.

signal. The visitor was thus induced to cross, and lost his life. Kay, L.J., suggests that if the duty to signal were to the driver of the engine, in the absence of the signal on this particular occasion, it was the duty of the engine-driver to stop, and that he did not do so was evidence of negligence. The first suggestion of this appears to be in the learned Lord Justice's judgment. But he concurs with Lopes, L.J., in holding that the duty of signalling "in such a position as to be conspicuous both to the engine-driver and guard of the train," was a warning "not only to the engine-driver but also to the general public." If a hardy, this is a conclusive reason for not nonsuited: there was a breach of duty to the deceased as one of the public. Lord Esher, M.R., held that even though there were no duty to the public to signal, yet that "under the circumstances it was not a want of reasonable care on the part of the deceased to presume that as Judges [the man killed] remained in his house, no train was coming, and therefore he might go over the crossing in safety without taking the precaution of looking up and down the line, or any other such precaution as might otherwise be necessary." This proposition strikes one as being as pregnant with startling consequences as the same judge's famous and sweeping generalisation in *Heaven v. Pender*, and as being eventually condemned to the same fate. The consequences of accepting any such proposition are too obvious and too ludicrous to require pointing out in detail here. Every act of a methodical man's daily life would be building up a system to result in law-suits if he changed his habits, and his neighbour who had acted on a faith in their continuity, or the trustworthiness of his servants in observing his ways, was led into loss by doing so. On Lopes and Kay, L.J.'s, ground that there was a duty to the public, the decision merely follows law long laid down.¹ Equally clear is it that if there was no duty to the public, there was no liability.²

Lopes, L.J.'s, suggestion.

Lord Esher, M.R.'s, ratio decidendi.

Angus v. London, Tilbury and Southend Ry. Co.

*Angus v. London, Tilbury and Southend Ry. Co.*³ reaches a conclusion so directly in opposition to insuperable authority that it might be passed unnoticed save that it is a judicial utterance of Lord Loreburn, C., giving the judgment of the Court of Appeal.

Plaintiff, a traveller in an up-line express of the defendants', was injured by shock caused by the train being suddenly brought to a standstill just before a station at which it was not timed to stop. The defendants explained the occurrence by calling the driver, who said that he applied the emergency brakes as the only means of avoiding running over a man on the line. It appeared that the man was a passenger newly alighted from a down train that had stopped at the station, who was attempting to cross the line by a level crossing at the end of the platform, where was a highway protected by large gates, and which gates at the time of the occurrence were locked for the coming train. There were also kissing gates for foot-passengers to go through, and a foot-bridge over the line. Instead of going to these the passenger went down the incline of the platform on to the line and walked towards the level crossing. A porter was alleged to have shouted a warning, which was not attended to. A jury found for the plaintiff. A motion for a new trial on the ground that there was no evidence of negligence was dismissed. There was no dispute that the driver was not negligent in putting on the emergency brakes

¹ *N. E. Ry. Co. v. Wadless*, L. R. 7 H. L. 12.

² *Skelton v. L. & N. W. Ry. Co.*, L. R. 2 C. P. 631, per Willes, J., 636.

³ 22 Times L.R. 222.

to save life; nor could there be any arguable point made adverse to Lord Loreburn, C.'s, statement that the railway company were bound further to show that "the cause which led to the necessity of stopping the train was not brought about by any negligence upon their part."

Lord Loreburn, C., however, assumes that a man being on the line is evidence of negligence until his presence there is accounted for. If the man were a workman of the company's this view might be tenable. But the company had rebutted this by showing that he was a passenger, and how he got there. *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery*¹ is apparently in point. That a man was on a railway line and killed by an express train was held not to raise any presumption of negligence against the railway company;² though there was evidence that a crossing over the line and unprotected, was used with the assent of the railway company by passengers, notwithstanding a notice was posted up which forbade its use. The sole negligence alleged in the case was neglect to whistle, as the train approached the station. Again in *Wakelin v. London and South Western Ry. Co.*,³ the presence of a man on the railway line was held no evidence of negligence: though in this case there was the admission that "the company did not give any special signal nor take any extraordinary precautions while their trains were travelling over the crossing." Rightly or wrongly," says Lord Halsbury, C.,⁴ "the Legislature have permitted the railways to cross roadways on a level, and it must be taken that the Legislature, wherever they have given that authority, and without requiring special measures of precaution, have left to the railway company the discretion of using their lines in a reasonable and proper fashion." This then disposes of any suggestion that the jury were entitled to find that some special safeguard satisfactory to their own judgments should be adopted. Lord Watson⁵ adds: "Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove not merely that they were negligent, but that their negligence caused or materially contributed to the injury."

Reverting to the opinion of Lord Halsbury, C., we find:⁶ "If in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition: *ei qui affirmat non ei qui negat incumbit probatio.*" Lord Blackburn's authority may be added:⁷ "Putting the matter at the lowest, I think your Lordships will be safe in adopting the view of Bramwell, L.J., 'supposing the evidence to be consistent with negligence, namely, that negligence may have caused the matters complained of, it is equally consistent with no negligence, namely, that the matters proved may have been caused otherwise than by negligence, and it is

¹ 3 App. Cas. 1155.

² Cp. *Singleton v. Eastern Counties Ry. Co.*, 7 C. B. (N. S.) 287, with *Williams v. G.W. Ry. Co.*, L. R. 9 Ex. 157, from which it is differentiated by the breach of a statutory duty in the latter case.

³ 12 App. Cas. 41.

⁴ L. C. 40.

⁵ L. C. 47.

⁶ L. C. 45.

⁷ *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 206.

an elementary rule that when the evidence is consistent as much with one state of facts as with another it proves neither.'” Further, to raise a case of negligence not only must neglect of some precaution be shown, but “the plaintiff should also show with reasonable certainty what particular precaution should have been taken.”¹ The presence of the passenger on the railway line not being *per se* evidence of negligence and his presence there being the sole reason for the stoppage of the train, the plaintiff manifestly fails in proving facts from which the conclusion of negligence may be legally drawn. There is then no case for the jury.² Possibly the true inwardness of the decision can best be expressed in the language of the civil law: *ex his, quæ forte uno aliquo casu accidere possunt, jura non constituuntur.*³

*Delany v. The
Dublin United
Tramways
Co.*

Judgment
of the
Exchequer
Division

reversed in
the Court of
Appeal,
Barry, L.J.,
dissenting.

Case com-
mented on.

*Delany v. The Dublin United Tramways Co.*⁴ presents some features that may be noticed here. The plaintiff, being drunk, got on the defendants' tramcar while in motion. The conductor pushed him off; he fell, and received serious injuries, in respect of which he recovered in an action. The Judge expressed himself “judicially satisfied” with the result. On appeal, the only question was whether the Judge should have directed a verdict for the defendants. Palles, C.B., and Murphy, J., in the Exchequer Division, held it competent to a jury to find that to push the plaintiff off while the car was in motion was an unreasonable and dangerous mode of removing him; and that though it was admitted that the plaintiff's conduct contributed to the accident, the issue whether the accident was caused by the defendants' negligence could not be withdrawn from them. In the Court of Appeal this decision was reversed (Barry, L.J., dissenting) by Lord Ashbourne, C., and Fitzgibbon, L.J. The majority of the Court held that the plaintiff was acting illegally and wrongfully in forcing his way when intoxicated into the tramcar; that by doing so he placed himself in a position of peril and the conductor in a position of difficulty; and assuming the conductor not to act with the most perfect presence of mind, it could not be said that he acted with such want of care as to cause the accident. The verdict was accordingly set aside, and judgment entered for the defendant. Barry, L.J., was of opinion there was evidence to go to the jury, and that the verdict was maintainable. An appeal to the House of Lords was abandoned. This is to be regretted since the decision as it now stands is out of harmony with the authorities.

It is indisputable that where the issue of contributory negligence arises, the matter cannot be withdrawn from the jury.⁵ If then there was evidence of negligence, the circumstances of plaintiff's conduct would not avail to exclude that evidence from the jury. The majority in the Court of Appeal assumed that the plaintiff's conduct throughout was illegal and wrongful. Consideration will show this was not so. It

¹ Per Willea, J., *Daniel v. Metropolitan Ry. Co.*, L. R. 3 C. P. 222, affirmed L. R. 5 H. L. 45. Again: “It is not enough for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; he must go on, and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation”: per Willea, J., *Lovegrove v. L. & B. Ry. Co.*, 16 C. B. N. S. 692.

² See as to *onus* of proof per Blackburn, J., *Dublin, Wicklow & Wexford Ry. Co. v. Slattery*, 3 App. Cas. 1201, 1209.

³ 30 L. R. Ir. 725. The rights of other passengers against a company carrying a drunken man who does damage to them, are considered, *Adderley v. G. N. Ry. Co.* (1905), 2 Ir. 378.

⁵ *Dublin, &c. Ry. Co. v. Slattery*, 3 App. Cas. 1155.

is not illegal or wrongful for a drunken man to travel in a tramcar. The company have an option to refuse to carry him; they may also, if they please, carry him without any illegality. The assumption on the drunken man's part that they will carry him, is, at the worst, an erroneous one. Till the company have elected whether they will exercise their right of refusal, he has a right to tender himself as a passenger. He did this by getting on the tramcar while in motion. When there, the company by their conductor exercised their option not to carry him; and though their election could have no effect, on the previous conduct of one lawfully on the tramcar, till the option was exercised, he then became, what the Court of Appeal terms, a wrongdoer. Yet, having got there lawfully—or there being some evidence¹ that he was there lawfully—the company were bound to give him reasonable facilities to alight. Here, then, is a question that cannot be withdrawn from the jury. Further, the judgment of the majority of the Court of Appeal, assumes the conductor not to have acted "with the most perfect presence of mind." This must have reference to his pushing a drunken man off a moving car. Yet, if the considerations pointed out above are correct, this pushing was simultaneous with the election of the company, not to carry a man whom they perfectly well might had they chosen; and so their conductor acted without due care in regard to one at the moment neither acting illegally nor wrongfully on the car.

In a Scotch case² it was sought by admitting the negligence sued on to shut out the pursuer from giving evidence of the facts constituting it, which were of an aggravated character. The Court defeated the attempt, holding that "the defenders are not entitled to step forward and say, because we admit our liability, you are not entitled to prove to the jury how the accident happened": for it might be that the circumstances in which the accident happened would be ground for consideration in estimating the damages. In England, the same has, in effect, been decided on a motion for a new trial in the Exchequer against an alleged misdirection by Wilde, B.,³ that the jury ought to consider "the occasion and the motive and all the circumstances of the case." The action was for negligence, and it was admitted that in trespass the direction would have been right, but it contended that where the gist of the action was negligence, the rule was different. The Court were, however, unanimous that the considerations objected to were admissible as elements for the consideration of the jury in the estimation of the damages. Pollock, C.B., pointed out the distinction between damage purely the result of accident for which the party responsible may be liable to compensate, though perfectly innocent, and damage the result of wilfulness or negligence accentuated so as to make the wrong an insult as well as an injury.⁴ The learned judge, however, safeguards his expression by saying, "not that in this case what is called vindictive damage should have been given, but a different measure of damage might be fairly given according to the nature of the injury." Channell, B., added:

Evidence of
aggravation,
Cooley v.
Edinburgh &
Glasgow &
Ry. Co.

Emblen v.
Myers.

¹ That of the priest, 30 L. R. Ir. 727. Fitzgibbon, L.J., *l.c.* 750, says; "The plaintiff was acting unlawfully in trying to get up, the conductor was acting lawfully in preventing him." But there was evidence that the plaintiff had both feet on the car.

² *Cooley v. Edinburgh and Glasgow Ry. Co.* (1845), 8 Dunlop 288.

³ *Emblen v. Myers* (1862), 30 L. J. Ex. 71, where the passage cited on the next page is given very much fuller than in 6 H. & N. 54.

⁴ As to vindictive damages, *ante*, 42.

"I can see no reason why that" (i.e., damage beyond the actual injury sustained) "should be limited to one kind of action of tort, viz., trespass, and should not extend to an action which, in substance, is for negligence committed under circumstances which might have supported an action of trespass."

Presumption
against
criminal
neglect.

Another rule with regard to *onus*, rather in the nature of an exception to the principle expressed by Lord Halsbury's maxim, *Ei qui affirmat non ei qui negat incumbit probatio*, must be noticed; by which, where an act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative and throws the burthen of proving a non-performance—that is, of proving the negative on the other side; thus, the law will presume that a parson has read the Thirty-Nine Articles, where loss of his benefice is the penalty for omitting to do so.¹

Summary.

Generally it may be said that the burthen of proof lies on the party who substantially asserts the affirmative of the issue. *Ei incumbit probatio, qui dicit; non qui negat.*² The tests of this are:

- (a) to consider which party would succeed if no evidence were given on either side;³
- (b) to consider the effect of striking out of the record the allegation to be proved.⁴

To this general rule there are two main heads of exceptions:

- (1) Where there is a presumption of law in favour of an affirmative allegation, the party who supports the negative must call witnesses to rebut the presumption.⁵
- (2) Where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it.⁶

Most questions relative to the burthen of proof will be solved by the application of these tests.

¹ *Monke v. Butler*, 1 Rol. Rep. 83. *Lord Halifax's case*, Bull. N. P. 298. *Williams v. The East India Co.*, 3 East 192. ² Dig. 22, 3, 2.

³ *Amos v. Hughes*, 1 M. & Rob. per Alderson, B., 464.

⁴ *Mills v. Barber*, 1 M. & W. 425, per Alderson, B., 427.

⁵ *Williams v. East India Co.*, 3 East 192; *Toleman v. Portbury*, 39 L. J. Q. B. 136.

⁶ *Dickson v. Evans*, 6 T. R. 57, per Ashurst, J., 59; *R. v. Turner*, 5 M. & S. 206, per Bayley, J., 211.

CHAPTER V.

CONTRIBUTORY NEGLIGENCE.

THE rule of the Roman law on contributory negligence is short and explicit : *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire*.¹ (The harm I bring upon myself I must bear myself.) This is illustrated by a decision of Paulus : *Ei, qui irritatu suo feram bestiam vel quancumque aliam quadrupedem in se proritaverit, eaque damnum dederit, neque in ejus dominum neque in custodem, actio datur*.²

Rule of the Roman law.

The question, What is the harm I bring upon myself ? admits of the widest differences of interpretation. Two separate views have been expressed, and have (each in its time) received judicial sanction. The first is : the plaintiff must satisfy the jury that the injury complained of was caused solely by negligence for which the defendant is answerable.³

Two theories in English law.

The second contention is summed up in two propositions : First, the plaintiff, though guilty of negligence, is not disentitled to recover if the defendant might have prevented the injury by the exercise of ordinary care.⁴ Secondly, the defendant, though guilty of negligence, is not liable to the plaintiff if the plaintiff might have prevented the injury by the exercise of ordinary care.⁵ This, in effect, makes the question of liability to turn on a finding of fact which of the two

¹ Dig. 50, 17, 203. Cp. D. 9, 2, 9, § 4 ; D. 9, 2, 11, pr. ; D. 9, 2, 28, pr. ; D. 9, 2, 31, pr.

² Sent. Rec. I, 15 § 3. The *actio in dominum* is the *actio de pauperie*, which is applicable if an animal has done damage to another *contra naturam sui generis*. D. 9, 1, 1, §§ 5, 6, 7. The *actio in custodem* is the Aquilian action.

³ See a series of cases, *Vanderplank v. Miller* (1828), 4 Bing. 628 ; *Pluckwell v. Wilson* (1832), 5 C. & P. 375 ; *Luzford v. Large*, 5 C. & P. 421 ; *Hawkins v. Cooper* (1838), 8 C. & P. 473 ; *Martin v. G. N. Ry. Co.* (1855), 16 C. B. 179 ; this case goes rather on the ground of defendants' acquiescence in a wrong direction ; and per Brett, J., L. R. 7 H. L. 213, at 232-3 ; also charging the jury in *Radley v. L. & N. W. Ry. Co.*, 1 App. Cas. 755 ; again the same judge, in *Davey v. L. & S. W. Ry. Co.*, 12 Q. B. D. 70, at 71, with the following addendum : "Solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident, because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident." *Ante*, 139.

⁴ *Smith v. Peleh* (1747), 2 Str. 1264 ; *Bird v. Holbrook* (1828), 4 Bing. 628 ; *Vennall v. Garner* (1832), 1 Cr. & M. 21 ; *Marrist v. Stanley* (1849), 1 M. & G. 568 ; *Smith v. Dobson* (1841), 3 M. & G. 59, where the Court refused, on the motion of the defendant, to grant a new trial on the ground that the jury had reduced the damages because they thought that the plaintiff was partly in fault ; *Springett v. Ball*, 4 F. & F. 472, with an exhaustive note of the earlier cases.

⁵ *Flower v. Adam* (1819), 2 Taunt. 314, a case that admirably illustrates the reason of the rule of law as to contributory negligence ; *Lack v. Seward* (1829), 4 C. & P. 1081 ;

parties, plaintiff or defendant, was guilty of the last act of negligence previous to the injury—that is, the last act without which the accident would not have happened.¹ In this view the question of contributory negligence can never be withdrawn from the jury; for the decision of it necessitates the discriminating between different sets of facts, and this is their peculiar province.

Butterfield v. Forrester.

The case usually referred to as the first which definitely formulated the rule of law is *Butterfield v. Forrester*.² Plaintiff, who was riding violently, rode against an obstruction in the highway placed there by defendant and was injured. Bayley, J., directed the jury that, if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care, they should find for the defendant; which they accordingly did. A rule was moved for on the authority of a passage in Buller's "*Nisi Prius*:" "If a man lay logs of wood across a highway, though a person may, with care, ride safely by, yet, if by means thereof my horse stumble and fling me, I may bring an action." Lord Ellenborough, C.J., in refusing it, said: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." This was approved and adopted by the Court of Exchequer in *Bridge v. Grand Junction Ry. Co.*³ Parke, B., saying: "The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*; and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong."

Statement of the rule by Lord Ellenborough, C.J.

Bridge v. Grand Junction Ry. Co.
Statement of the rule by Parke, B.

Adopted by the Court of Common Pleas.

Two years later,⁴ the Court of Common Pleas adopted the same rule, by refusing a new trial on the ground of misdirection, in directing the jury, in an accident case, that, if the plaintiff had been so deficient in reasonable and ordinary care that he had brought the accident upon himself, he was disentitled to recover. In *Davies v. Mann*,⁵ again,

Woolf v. Beard, 8 C. & P. 373; *Sills v. Brown* (1840), 9 C. & P. 601; *Raisin v. Mitchell*, 9 C. & P. 613.

¹ *Tuff v. Warmon*, 5 C. B. N. S. 585; *Walton v. L. B. & S. C. Ry. Co.*, H. & R. 424.

² (1809) 11 East 60. In giving judgment in the *Hernino* (No. 2), 12 P. D. 70, Lord Esher, M. R., says: "The rule of law was laid down with perfect correctness in 1809, in the case of *Butterfield v. Forrester*; and the rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover."

³ (1838) 3 M. & W. 244. In *Holden v. Liverpool New Gas & Coke Co.*, 3 C. B. 1, negligence on the part of the plaintiff was held an admissible defence under the plea of not guilty. Contributory negligence need not be pleaded, in the sense that the plaintiff is required to make out his own case, and defendant may take advantage of any evidence given by him which shows that defendant's negligence was not the cause of the injury, but plaintiff's own. Contributory negligence, however, should be pleaded if it is to be established by material facts on which the defendant relies. R. S. C. 1893, Order xix. r. 4. *Dakin v. Brown*, 8 C. B. 92: a plea denying liability for the consequences of negligence is bad.

⁴ (1840) *Morriott v. Stanley*, 1 M. & C. 568.

⁵ (1842) 10 M. & W. 546. The question is, "Whether the defendant, by ordinary care and skill, might have avoided the accident?" *Dovell v. General Steam Navigation Co.*, 5 E. & B. 195. Where a vessel is run down by night, and there is evidence of neglect of Admiralty regulations in not displaying a light, such negligence, if not the immediate cause of the accident, does not disentitle from recovering damages

cited, probably, more often for the peculiarity of the facts than for any additional clearness in the exposition of the law there, the rule in *Butterfield v. Forrester* is declared to be correct.

The cases of *Rigby v. Hewitt*¹ and *Greenland v. Chaplin*² require to be noticed. In the former, the plaintiff was a passenger on the top of an omnibus which was struck by the defendant's omnibus, both omnibuses going with great speed. The omnibus on which the plaintiff was, not being able to be drawn up, ran against some obstacle, causing the plaintiff to be thrown off with considerable violence. Rolfe, B., directed the jury to ascertain whether the mischief arose from the negligence of the driver of the defendant's omnibus. This was objected to; and a new trial was moved for on the ground that the direction should have been that if the mischief was, in part, occasioned by the misconduct of the person driving the omnibus on which the plaintiff was, the defendant would not be responsible. The Court, however, held that, "generally speaking, where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury." *Greenland v. Chaplin* is to the same effect. A steamboat, belonging to the defendant, negligently ran against a steamboat on board which the plaintiff was a passenger; in consequence of which an anchor was displaced, fell over, and broke the plaintiff's leg. Pollock, C.B., directed the jury that if they thought that there was negligence in the stowage of the anchor, or that the accident arose from the plaintiff being in a part of the vessel where he ought not to have been, they ought to find for the defendant. The jury found as facts that neither the one nor the other of those matters in reality existed. A new trial was moved for on the ground that the verdict was against the evidence; but the Court refused a rule, Pollock, C.B., saying: "I may add that, on consideration, I am of opinion that the law as laid down by me in this respect was not correct. I entirely concur with the rest of the Court that a person who is guilty of negligence, and thereby produces injury to another, has no right to say 'Part of that mischief would not have arisen if you yourself had not been guilty of some negligence.' I think that where the negligence of the party injured did not, in any degree, contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action; and certainly I am not aware that, according to any decision which has ever occurred, the jury are to take the consequences and divide them in proportion according to the negligence of the one or the other party."³

Rigby v. Hewitt and Greenland v. Chaplin.

The question, What amount of negligence disentitles the plaintiff to recover? was considered in the Exchequer Chamber in *Tuff v. Warman*.⁴ Plaintiff's barge was proceeding down the river with two men on board, one at the helm, but with no look-out. A steamer on her right side, and taking such precautions that, if the barge had done

What amount of negligence disentitles the plaintiff to recover: *Tuff v. Warman*.

against the injuring vessel. *Morrison v. General Steam Navigation Co.*, 8 Ex. 733. In *Mayor of Colchester v. Brooke*, 7 Q. B. 339, it was held that the fact that a nuisance is constituted by property of the plaintiff, is no excuse for negligently injuring it. And, in *Dimes v. Peley*, 15 Q. B. 276, a private individual cannot justify damaging the property of another on the ground that it is a nuisance to a public right, unless it does him a special injury. ¹ (1850) 5 Ex. 240. ² 5 Ex. 243.

³ An attempt by the jury to do so was made in *Agres v. Bull*, but was corrected by the Divisional Court, 5 Times L. R. 262. *Smith v. Johnson*, 3 M. & G. 59.

⁴ 2 C. B. N. S. 740, 5 C. B. N. S. 573, 585. This decision is made the occasion for verses, "Contributory Negligence, A Law Lay," 17 Law Mag. and Law Rev. 234.

the same, would have avoided any collision, ran into the barge and caused the injuries for which redress was sought. The jury found, on the direction of the judge, that the defendant directly caused the injury. Objection was taken that the judge left to the jury whether the plaintiff by his negligence, "*directly*" contributed to the misfortune; and it was contended for the defendants that whether he directly or indirectly contributed was immaterial, if he contributed to it by his negligence at all. In the Court of Common Pleas, Cockburn, C.J., said: "The true question in these cases is, whether the damage having been occasioned by the negligence of the defendant, the negligence of the plaintiff has directly contributed to it; and I think that in this case, if the defendant could have made out negligence on the part of the plaintiff that would have been an answer to the action. The way in which it was put on the part of the defendant was this, that by his own negligence in omitting to keep any look-out, the plaintiff contributed to the accident. If that had been established to the satisfaction of the jury, the plaintiff would have been directly contributory, and the defendant would have been entitled to a verdict." Crosswell, J., concurs in the result, but cites the words of Lord Campbell in *Dowell v. General Steam Navigation Co.*,² adopting the view expressed in *Davies v. Mann*³ as his reason for arriving at his conclusion. Williams, J., based his concurrence on the same decision, and added: "I dissent entirely from the proposition urged by Mr. Collier, that the plaintiff is disentitled to recover if his negligence is either proximately or remotely connected with the accident. But I feel great difficulty in dealing with the question whether the negligence was proximate or remote, and I certainly feel great difficulty in getting rid of that question of law by leaving it to the jury." In giving the judgment of the Exchequer Chamber,⁴ Wightman, J., said: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for that negligence or want of ordinary care and caution the misfortune *could*⁵ not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."

¹ 2 C. B. N. S. 755.

² 5 E. & B. 206.

³ 10 M. & W. 540.

⁴ 5 C. B. N. S. 585.

⁵ In *Walton v. L. B. & S. C. Ry.*, 11 & R. 430, Willes, J., quotes this as "would not have happened"; and further on, in the judgment, takes exception to the use of the word "could" for "would." And where the same passage is cited in the argument in *Radley v. L. & N. W. Ry. Co.*, in the House of Lords, 1 App. Cas. 757, the word is "would," not "could." The word "could" occurs in the Law Journal Reports, 27 L. J. C. P. 322, but in the Jurist, 5 Jur. N. S. 222, the word is "would." This last report is by far the best. The word "could" is obviously a mistake; common sense satisfies us that what the Court intended to negative, was not *possibility*, what could have happened; but *probability*, what would have happened. The rule laid down in *Tuff v. Warman* has been unfavourably criticised in *Murphy v. Deane*, 101 Mass. 455, 463.

Judgment of
Cockburn,
C.J., in the
Court of
Common
Pleas.

Of Crosswell,
J.

Of Williams,
J.

Judgment
of the
Exchequer
Chamber
delivered by
Wightman, J.

The decision of Cockburn, C.J., is based on an assumed finding of the jury that the plaintiff had not omitted to keep a look-out, and that he had not contributed to the injury. If the finding had been the other way, and the jury had found that the plaintiff had omitted to keep a look-out, it would seem that Cockburn, C.J., would have been prepared to enter a verdict for the defendants. This is on the ground that any negligence on the part of the plaintiff would entitle the defendant to the verdict; for he says: "I think that in this case if the defendant could have made out negligence on the part of the plaintiff, that would have been an answer to the action." "If that had been established to the satisfaction of the jury (*i.e.*, that by his own negligence in omitting to keep any look-out, the plaintiff contributed to the accident) the plaintiff would have been directly contributory, and the defendant would have been entitled to a verdict." The other judges do not hold this opinion; since Williams J., thus summarises the principle of *Dowell v. General Steam Navigation Co.*,¹ on which they acted: "If the negligence or default of the plaintiff was in any degree the proximate cause of the damage he cannot recover, however great may have been the negligence of the defendant; but that if the negligence of the plaintiff was only remotely connected with the accident, then the question is, whether the defendant might not, by the exercise of ordinary care, have avoided it." Williams, J.'s, doubt was, "What is meant by the negligence of the plaintiff being *proximately*, or *directly contributory*, or *only remotely connected* with the accident." The difficulty, in his view, was that whether the negligence was proximate or remote was for the jury. This, then, is inconsistent with the judgment of Cockburn, C.J. The jury, in effect, have to find, first, the negligence of the defendant, then the negligence of the plaintiff, then whether the negligence of the plaintiff was proximately or remotely the cause of the accident. In the view of Cockburn, C.J., when negligence has been established against the plaintiff he is thereon disentitled to recover. The question of *proximity* or *remoteness* does not enter into his judgment; but is the source of the perplexity of Williams, J. The Exchequer Chamber is clear in holding that the plaintiff's negligence must be such that "but for that negligence or want of ordinary care and caution, the misfortune 'would not' have happened."

Williams, J.'s summary of the principle of *Dowell v. General Steam Navigation Co.*

In *Walton v. London, Brighton, and South Coast Ry. Co.*,² Willes J., summarised *Tuff v. Warman* as deciding that the use of the words "directly causing" was not wrong; since, in cases where there has been negligence on the part of the plaintiff, the question is, whether that was the direct cause of the accident or proximately contributed to it. The learned judge thus alludes to Williams, J.'s, doubt: "It ought" "to have been left to the jury to say whether there was negligence on the part of the plaintiff. If there was evidence of negligence on the part of the plaintiff, the further question arises whether that negligence was the proximate or direct cause of the accident."

Willes, J.'s view of *Tuff v. Warman*.

Rudley v. London and North Western Ry. Co. definitely fixed the law.⁴ The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was crossed by a bridge, and on which the defendants were in the habit of conveying the plaintiffs' trucks from

Rudley v. L. & N. W. Ry. Co.

¹ 5 E. & B. 195.

² See previous *in c.* note.

³ H. & B. 121.

⁴ (1874) L. R. 9 Ex. 71; in Ex. Ch., L. R. 10 Ex. 100; in H. of L., 1 App. Cas. 754; followed in *Inland and Seaboard Coasting Co. v. Tolson*, 139 U. S. (32 Davis) 551, 558.

their line, the plaintiffs removing them thence as they thought fit. The defendants brought to the plaintiffs' siding and left there, after working hours, trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at plaintiffs' works, the defendants, after dark, pushed on to the siding other trucks of the plaintiffs, and pushed the loaded trucks up to the bridge, by which means the train of trucks was arrested. The defendants' servants, not being aware of the cause of the obstruction, pushed the train of trucks forward with so much force that the loaded trucks knocked down the bridge.¹ The plaintiffs brought an action against the railway for negligence. Brett, J., told the jury:² "You must be satisfied that the plaintiffs' servants did not do anything which persons of ordinary care, under the circumstances, would not do, or that they omitted to do something which persons of ordinary care would do." "It is for you to say entirely as to both points, but the law is this: The plaintiffs must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own—in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants." The jury found contributory negligence on the part of the plaintiffs, and the verdict to be entered for the defendants, with leave to move. A rule for a new trial was made absolute by the Court of Exchequer, on the ground that there was no evidence of contributory negligence, and also that the judge had misdirected the jury. The Exchequer Chamber reversed this on both points. On appeal, the House of Lords reversed the judgment of the Exchequer Chamber, and restored that of the Court of Exchequer. Lord Penzance, who delivered the leading opinion in the House of Lords, declared the law to be contained in two propositions: "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first—namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet, if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."³

Brett, J.'s direction to the jury.

Lord Penzance's judgment adopted in the House of Lords.

¹ The foregoing statement is copied from the head-note to the report in L. R. 9 Ex. 71.

² 1 App. Cas. 755.

³ 1 App. Cas. 759. In America it was sought to limit contributory negligence by requiring that before the plaintiff should be disentitled to recover, it should be shown that his own negligence contributed "in a material degree" to the accident. This rule, which is firmly established in Illinois, is referable to the judgment of Breese, J., in *Galena Rd. Co. v. Jacobs*, 20 Ill. 478. But in the Supreme Court of Pennsylvania a direction to the jury to that effect was held wrong: *Monongahela City v. Fisher*, 111 Pa. St. 9; and the correct doctrine was laid down, that if the negligence of the party contributed in any degree to the injury he cannot recover. "This," said Paxson, J. (L.C. 14), "is a safe rule, easily understood, and cannot well be frittered away by the jury. But, if we substitute the word 'material' for the word 'any,' we practically abolish the rule, for a jury can always find a way to avoid it." The vastly preponderating weight of American legal opinion is in favour of this view. *Sutton v. Wauwatesa*, Bigelow, L.C., on Torts, 711. Cp. *Spaigh v. Tedcastle*, 6 App.

Much of the difficulty in fixing the meaning of contributory negligence arises from the ambiguous use of the phrase, "contributing to the injury." This may indicate any of the whole set of antecedents necessary to produce the effect, or that one of them which marks their final completion and the actual calling into being of the effect. The *causa sine qua non* of an accident is not that on which depends the legal imputability of the accident. The liability depends not on that, but on the *causa efficiens*.¹ In fact the same test is applicable to the ascertaining what negligence contributes to an injury, as we have already applied to the ascertaining negligence itself. We must trace the negligent consequences to the last responsible agent, who, either seeing the negligent consequences or negligently refusing to see them, has put into motion the force by which the injury was produced. To constitute a responsible agent there must be an accountable human will.

Ambiguous use of the phrase "contributing to the injury."

Viewed in this light, contributory negligence is but the recognition under special circumstances of a principle running through the whole law of negligence—that where a responsible agent is placed in such a position with regard to the person or property of any one possessing rights that want of ordinary care on the part of such responsible agent would, according to the accustomed course of events, produce injury to either person or property, a duty arises to use ordinary care, so that when injury happens from the absence of ordinary care an actionable wrong is the result. The peculiarity, in the case of contributory negligence, is that it proceeds on the assumption that both plaintiff and defendant have been guilty of some breach of duty; and the inquiry is limited to which of the two, by exercising ordinary care, had the last opportunity of preventing the occurrence.² In a case of ordinary negligence, the inquiry is whether the defendant is guilty of want of ordinary care, and, if so, whether, after his neglect, any other agency whatever has or might have diverted the course of the operations. The conclusion is, that contributory negligence is no more than a case of negligence, not dependent on any different rule of law, though presupposing the limitation of the issue of negligence to an inquiry to which of two persons its final impulsion should be imputed.

Import of the rule of law as to "contributory negligence."

Conclusion.

The rule that contributory negligence disentitles the injured person to recover is limited to those cases where there is a causal connection between the plaintiff's negligence and the injury. The point decided in *Scott v. Shepherd* was that the act of the intermediate

Cas. 217. In Scotland, Lord President Inglis, in *Florence v. Mann*, 18 Rettie 247, 249, says: "I do not know any better exposition of the doctrine of contributory negligence than that given by Lord Wood in *M'Naughton v. Caledonian Ry. Co.*, 21 Dunlop, 166."

¹ The Aristotelians recognised four kinds of causes:—1. τὸ τί ἦν εἶναι—the essence, the formal cause; 2. τὸ τίνας ἄλλων ἀνάγκη τοῦτ' εἶναι—the necessitating conditions, the material cause; 3. ἡ τί πρότερον ἐκίνησε—the proximate mover, the efficient cause; 4. τὸ τίνας ἐνεκα—that for the sake of which, the final cause (Anstyt. Post. II. xi. 94, a 21-36.) Grote, Aristotle, vol. i. 354. The second of these might be the contribution of the plaintiff to the result, but would not preclude his recovering, if the third, the efficient cause, was the negligence of the defendant. The subject of causation is scientifically investigated by J. S. Mill, *Logic*, Book III. c. v.: Of the Law of Universal Causation, developing the suggestions of Hume's Inquiry Concerning Human Understanding. For illustrations of the *causa causans* and the *causa proxima*, see judgment of Brett, L.J., *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 10 Q. B. D. 531.

² *Spaight v. Tedcastle*, 6 App. Cas. 217; *Cayzer v. Carron Co. The Margaret*, 9 App. Cas. 873, distinguished in *The Ornydian Gramp* (1902), p. 208. As applied to his Majesty's fleet, *H.M.S. Sans Pareil* (1900), p. 267. *Greaves v. Lond. Gen. Omnibus Co.*,

Exceptional cases.
Sudden terror.

persons who threw the squib was involuntary and unpremeditated, and without distinct and independent volition; and as this act was instinctive, the actual proximate agent of the injury was not the responsible agent. The same reason operates to take from acts done in certain states of mind, or by certain classes of people, the note of responsibility; and enables the doers of such acts to recover, notwithstanding that their conduct, if divested of the exceptional conditions surrounding and colouring it, would impute contributory negligence to them. For example: Persons who, in a sudden emergency, are distracted by terror, and thus, between two courses, choose the wrong one, are not disentitled to recover.¹ This is plain; for the very state of incapacity to judge calmly, which induces the improvident act, is produced by the negligent act of the defendant. To hold that a plaintiff is disentitled to recover in such a case would be to hold that the defendant can set up the state of terror produced by his wrongful act as a protection against the consequences.² This principle is thus laid down by Johnson, J., in the New York Court of Appeals:³ "There can be no rule of law which imposes it as a duty upon one, over whom danger impends by the negligence of another, to incur greater danger by delaying his efforts to avoid it until its exact nature and measure are ascertained. The instinctive effort on the part of the plaintiff to avoid the danger did not relieve the defendant from responsibility."

Negligence not imputed to effort to save human life.

In the Court of Appeals of New York there was a striking case⁴ on this branch of the law, in which the Court laid down a rule that it will not impute negligence to an effort to preserve human life. A little child of three or four years old got on the railway track in East New York as a train of cars was coming along at a rate of speed estimated, by the plaintiff's witnesses, at from twelve to twenty miles an hour; by the defendants', at not over seven or eight. The plaintiff's husband, seeing the danger of the child, ran on the track, threw the child clear, but was himself caught by the train and killed. The jury found negligence on the part of the defendants. An exception was taken, on the ground that the deceased's negligence contributed to the injury. The majority of the Court of Appeals held that the deceased "owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself." Two of the Court dissented, on the ground that "principles of law cannot yield to particular cases;" that the act of the deceased was

17 Times L. R. 249, is an omnibus case where Grantham, J.'s, direction to the jury, that if they thought that it was not entirely the fault of the plaintiff in telling the conductor to go on they should give damages to the plaintiff, was held inaccurate in the use of the word "entirely."

¹ *Jones v. Boyce*, 1 Stark. (N. P.) 493. The case of an engineer remaining at his post, and so injured, scarcely comes under this principle. Yet it has been held in America that such an one "is not necessarily negligent." *Central Rd. v. Crosby*, 58 Am. R. 463.

² *Jones v. Boyce*, 1 Stark. (N. P.) 495.

³ *Coulter v. The American Merchants' Union Express Co.*, 56 N. Y. 585, following *Buel v. New York Central Rd. Co.*, 31 N. Y. 314.

⁴ *Eckert v. Long Island Rd. Co.*, 43 N. Y. 502; approved, *Linnahan v. Sampson*, 126 Mass. 506. In *Donahoe v. Wabash Rd. Co.*, 53 Am. R. 594, 595, the principle is stated: "It is only when the railroad company by its own negligence created the danger, or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such person and recover for an injury he may sustain in the attempt." See *Peyton v. Texas, &c., Pacific Ry. Co.*, 41 La. Ann. 861; 17 Am. St. R. 430; *Gibney v. State*, 137 N. Y. 1; 33 Am. St. R. 690.

"a voluntary act, the performance of a self-imposed duty, with full knowledge and apprehension of the risk incurred."¹

It is clear that, if the defendants were not guilty of negligence, the plaintiff could not have recovered. Their negligence, in the case, seems to have been the going at too great speed through a town. The ground on which the decision is justified—"instinctive humanity"—is somewhat vague and rhetorical though possibly sound, and is at any rate recognised by Cockburn, C.J., in *Scaramanga v. Stamp*,² when he says "the impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity." There are expressions in some of the judgments that point to the conclusion that the act of intervention must be in circumstances where the intervener can act "without incurring great danger to himself." This is assuredly a wrong test. By the negligence of the defendants human life is endangered. "The duty of important obligation," which the judges held to have been owing by the deceased to the child, does not become less by the greater imminency of the danger. The justification of the act is, that the negligence of the railway company, working through feelings akin to those which prompted the rash leap in *Jones v. Boyce*, has caused an act that is either instinctive or obligatory;³ and which, having been rendered necessary or expedient by the failure of the railway company to perform its duty, affects them with responsibility for its consequences. If the act of the deceased were instinctive, it comes under the class of cases to which we have already alluded; if it were deliberate, its justification must be sought on some such ground as the existence of a duty⁴ cast on the deceased by reason of the default of the defendants. If they had not been in default, the consequences from which the injury resulted would not have befallen. The duty of the deceased cannot be better stated than in the words of Lord Macnaghten, dealing, however, with a different state of facts: "To protect those who are not able to protect themselves is a duty which every one owes to society,"⁵ not a legal duty but a moral one, the performance of which, when rendered necessary by the default of others, they are not allowed to gainsay. Moreover, the liability may be broader based even than this. To entitle one to relief from the

Eckert v. Long Island Rd. Co. discussed.

Diction of Lord Macnaghten.

Suggested rule.

¹ In *Cook v. Johnson*, 55 Am. R. 703, it was held that one injured while exposing himself to danger in order to save his property was guilty of contributory negligence; and *a fortiori* if he were endeavouring to save any one else's. *Town of Prescott v. Connell*, 22 Can. S. C. R. 147, applies the doctrine of *Jones v. Boyce* to the case of a man who threw himself in front of a runaway horse frightened by an explosion in blasting found to be carried on negligently. The case resolves itself into a finding of fact, and the Court's, at first sight, seems bold.

² 5 C. P. D. 304.

³ "To preserve one's life is, generally speaking, a duty; but it may be the plainest and highest duty to sacrifice it": *Queen v. Dudley*, 14 Q. B. D. per Lord Coleridge, C.J., 287. The caution given by an eminent legal writer (Holmes, *The Common Law*, 148)—"Moral predilections must not be allowed to influence our minds in settling legal distinctions"—must most specially be observed in a case like *Queen v. Dudley*. The note that followed in the former edition is omitted, not retracted.

⁴ The moral duty may be clear enough. The difficulty arises in passing from moral to legal principles. The child could not have maintained an action against the plaintiff's husband for not rescuing it; therefore there was no legal duty which required him to put himself in the position he did; but his act, without legal sanction, was voluntary, and if so, how could he recover, except on the ground that the defendant's negligence estopped them from setting up the plaintiff's act?

⁵ *Jenoure v. Delmege* (1891), A. C. 77. *Stevens v. McKenzie*, 25 V. L. R. 115, where the admitted negligence of the defendants had ceased to operate, and the return of the deceased to the danger zone was absolutely his own voluntary act for which the defendant could not be held responsible.

consequences of another's negligence, it is by no means necessary that the injured party should have been at the time of receiving the injury in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act; and an attempt to save life endangered by the negligence of another whether obligatory as a duty or not is certainly in itself a thing lawful; while the wrongdoer is liable for the results of his negligence.¹

The line of defence that in risking life the person injured is a volunteer, has been met by the suggestion that the employer gives "an implied order, in case of danger to life, to assist as much as possible."² This seems invoking a quite superfluous *deus ex machina*.

The implied order is not from master to servant, but arises from the general duty to preserve human life, and is universal. The defendants have not done their duty; else there had been no emergency; how can they be allowed to escape liability by alleging that one in the performance of the "plainest and highest duty" had been injured in his instinctive effort to neutralise their default.³

*Wilkinson v.
Kinnell, &c.
Co.*

The Scotch Courts have had this problem before them and were not agreed on the solution of it.⁴ A boy working with an "elderly man" saw a runaway waggon descending upon them. He got out of the way, but seeing the danger to the life of his companion endeavoured to stop the course of the waggon. In the attempt he was injured, and sued his employers for their negligence in allowing the waggon to be at large. Negligence was admitted. The case was argued before seven judges. They were divided in opinion, four against three. Lord Young held that in a claim based on an attempt to save life endangered by defendants' negligence the defendants were estopped from alleging that the injuries incurred in the effort were voluntarily risked. Lords McLaren, Kinnear and Moncreiff were agreed in accepting the proposition that where two persons are exposed to a common danger through the fault of a third person, and one of the two persons, who might have saved himself, is injured in consequence of having, on the impulse of the moment, interposed to save his companion, it is a question for the jury whether these injuries are not fairly attributable to the fault of the person which gave rise to the common peril. The Lord Justice-Clerk, Lord Adam, and Lord Trayner were of opinion that the boy's injuries were due to a risk voluntarily incurred by him outside the scope of his employment, and after he had put himself out of danger. It is plain that no English Court would adopt such an interpretation of the maxim, *volenti non fit injuria*.

*Woods v.
Caledonian
Ry. Co.*

Woods v. Caledonian Ry. Co.,⁵ a previous case but not so elaborately argued, raised a very similar point. A young woman was killed while endeavouring to drag her companion out of danger from an approaching train. Counsel for the defenders asked the judge to direct the jury that, if the young woman encountered a seen danger, she was not entitled to recover, even though her object was to rescue her companion. On the other hand, the pursuer's case was put as high as—that though the deceased was acting with great recklessness,

¹ *Pennsylvania Co. v. Langendorf*, 20 Am. St. R. 553.

² *Roebuck v. Norwegian, &c. Titanic Co.*, 1 Times L. R. 117, per Day, J. Lehall, Master and Servant, 935.

³ Cp. *Rees v. Thomas* (1899), 1 Q. B. 1015, under the Workmen's Compensation Act, 1897.

⁴ *Wilkinson v. Kinnell Canal & Coking Coal Co.*, 24 Rettie 1001.

⁵ 23 So. L. R. 798.

and was guilty of what, in other circumstances, would have been contributory negligence, yet, if she was engaged in an effort to save life and, through alarm and her perturbed and excited feelings, became insensible to her own danger, she was not legally negligent, and disentitled to recover. There was negligence on the part of the railway company. On a bill of exceptions and motion for a new trial, the Second Division of the Court of Session refused to lay down either proposition or to formulate one; but held that the whole matter was rightly left to the jury as to whether there was contributory negligence, and did not call for a particular direction in point of law.

Scottish view
that the whole
is question for
the jury.

There can be no doubt that this gives a working solution of the problem. There was negligence of the railway company, and conduct of the deceased, which was an element in the accident. There was thus that conflict of fact the decision of which is not to be taken from a jury. Had the complexion of the deceased's conduct been admitted, that not only was her conduct in fact what it was, but further that the correct conclusion was to find negligence, the duty of the judge would have been to take the case from the jury. Where contributory negligence is alleged these cases must be for the jury; since admitting the facts the conclusion to be drawn from them is always in dispute; whether of reckless negligence or of a high estimate of the value of human life.¹

The latest American decisions adhere to the principle asserted in *Eckert's case*. A man rescued a boy at the sacrifice of his own life from an approaching train. The man's widow brought an action against the railway company who were in default and succeeded, on the ground that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless the exposure is clearly rash and reckless."² The man's act in this case appears to be spontaneous and without an interval for reflection. The principle does not extend to attempts to rescue from the consequences of a disaster already befallen. There the act is deliberate, and the principle of *Sharp v. Powell* seems applicable. The valid excuses for the father not mentioning the defect to the son might be very many. As against the son the defendants were in default; and to make out a duty on the father to avert the consequences of their default in his own case would require facts indicative of that gross negligence which is evidence of fraud.

American
decisions.

Further, the mere fact of an injured person being of unsound mind,³ or drunk,⁴ or blind,⁵ or deaf⁶ does not of itself deprive of the right to recover in the event of injury. It is quite another matter if the person under infirmity acts so as himself to produce the peril from which he suffers. Thus it has been held to be negligence for a deaf person to drive an unmanageable horse across a railway track when a train was

Persons of
unsound
mind, drunk,
blind, or deaf.

¹ Cp. *Wilkinson v. Kiuncd Canal & Coking Coal Co.*, 24 Rettie 1001, where Lord Young draws the distinction between an effort to save life and an effort to save property.

² *Ridley v. Mobile, etc. Ry. Co.* (1905), 86 S. W. Rep. 606. The facts are set out. Street, *Foundations of Legal Liability*, vol. i. 133.

³ *Pati quis injuriam, dum se non sentiat, potest: facere nemo, nisi qui scit se injuriam facere, dum se nesciat cui faciat*: D. 47, 10, 3. § 2. *McFarland v. Stewart*, 19 N. Z. L. R. 22.

⁴ "If a man is lying drunk on the road, another is not negligently to drive over him. If that happened, the drunkenness would have made the man liable to the injury, but would not have occasioned the injury": *Clayards v. Dethick*, 12 Q. B. 439, per Coleridge, J., 445.

⁵ *Neff v. Wellesey*, 148 Mass. 487; *Harris v. Uebelhoer*, 75 N. Y. 169.

⁶ *Rez v. Walker*, 1 C. & P. 320; *Reg. v. Longbottom*, 3 Cox C. C. 439.

approaching.¹ So, too, if intoxication contributes to the injury, the plaintiff cannot recover.²

While deafness or blindness or any similar infirmity does not put the sufferer under civil disabilities, neither does it confer greater rights unless the existence of it is known to the injuring person. If, however, he comes to the knowledge that the person in front of him is deaf or blind or lame, he must regulate his conduct accordingly. Knowledge engenders a greater duty. Till there is knowledge or the means of knowledge of infirmity he is justified in carrying on the course of conduct he would be entitled to adopt on the assumption that the person in front of him is normally constituted. The opinion of a very distinguished judge to the contrary sometimes cited from a newspaper report in County Courts is probably inaccurately reported, or, if not, is contrary to legal authority and principle, which regulates conduct by the rule of the normal and not of the abnormal.

Husband and wife.

The negligence of the husband at common law was said to be imputable to the wife;³ or, at least, where the negligence of the husband had contributed to the injury to the wife, there could be no recovery of damages; for the damages assessed for the wife would be recovered for the husband.⁴ Now, under the Married Women's Property Act, 1882,⁵ a married woman can sue alone, as though she were a single woman, for torts done to herself, and the damages recovered by her become her separate property.⁶ All question of imputability in this case is therefore avoided.

Garmon v. Bangor, where one of two people has knowledge of defect, but injury is caused by the other, who is ignorant, acting for the first.

A curious contention was advanced in *Garmon v. Bangor*,⁷ where plaintiff sued for an injury received through defect in a highway, of which he was aware, but of which his son, who was driving him, and through whose ignorance the injury happened, was ignorant. The knowledge of the plaintiff, it was urged, was the knowledge of the son; and the plaintiff was therefore disentitled to recover by reason of contributory negligence. The Court refused their assent to so novel a principle, and were of opinion that the defendant was not prejudiced by a direction that, if the plaintiff did not inform his son of the defect, it was for the jury to determine whether he was guilty of neglect or want of ordinary care in neglecting so to inform him; if he were, he was not entitled to recover.

Imputability of the negligence of parents or guardians to young children.

I. Fathers and masters suing in their own names.

II. Two classes of cases—

(i.) Where the child itself is guilty of negligence.

(ii.) Where the persons having charge of the child are guilty of negligence.

In considering the question of the imputability of the negligence of parents or guardians to young children, the cases of fathers suing in their own names for injury to their children and masters suing for injury to apprentices must be first moved out of the way. In these cases the negligent adult sues, on his own behalf, not for the benefit of

¹ *Illinois Central Rd. Co. v. Buckner*, 28 Ill. 299. In *M'Kechnie v. Couper*, 24 Sc. L. R. 252, though the injured man was deaf, and so did not hear the defender coming in his cart behind him, yet he was held entitled to recover because the defender had not himself taken precautions; the decision may also be put on the ground that it is the duty of the driver of a carriage to pull up and avoid a passenger, irrespective of the question of deafness: *Anderson v. Blackwood*, 23 Sc. L. R. 227. Deafness was alleged in *Smith v. Browne*, 28 L. R. Ir. 1.

² *Maguire v. Middlesex Rd. Co.*, 115 Mass. 239, 240.

³ *Peck v. New York, &c., Rd. Co.*, 50 Conn. 379, 392; but see *Platz v. City of Cohoes* for the opposite contention, 17 Hun (N. Y.) 101, affd. 89 N. Y. 219.

⁴ *Newton v. Hatter*, 2 Ld. Raym. 1208; *Dalton v. Midland Counties Ry. Co.*, 13 C. B. 474.

⁵ 45 & 46 Vict., c. 75, s. 1, sub-s. 2.

⁶ *Beasley v. Roney* (1891), 1 Q. B. 509.

⁷ 38 Me. 443. "Ordinary care" is discussed in this case; also in *Beers v. Housatonic Rl. Co.*, 19 Conn. 560.

the infant ; and it is contrary to all rule to allow one of sound mind and understanding to profit by a negligence of which he is partially the cause.¹ These cases are quite clear; the difficulty only arises where the damages are sought for the benefit of the young child injured. A twofold division of the cases under this head may be made :

- (1) those where the child personally is guilty of what in an older person would be negligence ; and
- (2) those where the persons having charge of a child have negligently placed the child, or permitted it to be, in a position in which it sustains injury.²

*Lynch v. Nurdin*³ is the most often cited case of a child acting in a way that would constitute negligence in an older person. Defendant negligently left a cart unattended ; the plaintiff, a child of seven, got upon the cart in play ; another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt. It was held that the plaintiff could recover, on the ground, as explained by Parke, B., in a subsequent case,⁴ that the plaintiff had taken as much care as could be expected from a child of tender years—in short, that the plaintiff was blameless in the matter. To guard against a natural, perhaps, though illicit extension of this principle, in a subsequent case it was laid down that the mere fact of an accident occurring to a very young child will not raise a presumption of negligence any more than in the case of an adult.⁵ Negligence, which is the sole ground of liability, must be proved in the defendant : the fact that injury has resulted, and to a child himself incapable of negligence, will not import liability.

(i.) Where the child itself is guilty of negligence.

*Mangan v. Atterton*⁶ is at variance with *Lynch v. Nurdin*. Defendant exposed a machine for crushing oil-cake in the street, and without superintendence. Plaintiff, a boy of four years old, was coming past the machine from school in company with his brother, aged seven, and, by direction of his brother, put his fingers in the cogs and got them crushed. The Court held that an action was not maintainable : by Martin, B., on the ground that, admitting negligence, the negligence "was too remote a cause of the mischief" to make the defendant liable ; "the accident was directly caused by the act of the boy himself ;" by Bramwell, B., because : "The defendant is no more liable than if he had exposed goods coloured with a poisonous paint and the child had sucked them. It may seem a harsh way of putting it, but, suppose the machine had been of a very delicate construction,

Mangan v. Atterton.

¹ *Glassey v. Hustonville, &c. Rd. Co.*, 57 Pa. St. 172, 174.

² *Gardner v. Grace*, 1 F. & F. 359.

³ 1 Q. B. 29 ; *Lay v. Midland Ry. Co.*, 34 L. T. (N. S.) 30. Cp. *Powell v. Deveney*, 57 Mass. 300.

⁴ *Lygo v. Newbold*, 9 Ex. 302, 305.

⁵ *Singleton v. Eastern Counties Ry. Co.*, 7 C. B. N. S. 287. *Williams v. G. W. Ry.*, L. R. 9 Ex. 157, is very similar to Singleton's case ; but here a neglect to fence on the part of the railway company was shown, and the plaintiff was held entitled to recover. *Fenna v. Clare* (1895), 1 Q. B. 199, is concluded by *Williams v. G. W. Ry. Co.* There was a nuisance ; the defendants were in fault and in a particular relevant to the action ; while the injured child was too young to have contributory negligence imputed to her. The general rule is undoubtedly : that "if in a case that turns on a question of negligence, the evidence leaves the matter in doubt, those who set up the negligence must fail, for it is not sufficient to show only that the state of facts is consistent with negligence" : per Rigby, L.J. *Scholfield v. Earl of Landborough* (1895), 1 Q. B. 573 ; *Daniel v. Metropolitan Ry. Co.*, L. R. 3 C. P. 591 ; *ibid.*, 5 H. L. 45 ; but here the nuisance maintained by the defendants would reasonably explain the accident. Hagarty, C.J., in *Hurd v. Grand Trunk Ry. Co.*, 15 Ont. App. 58, 66, expresses dissatisfaction with the decision in Singleton's case. *Tabb v. Grand Trunk Ry. Co.* (1904), 8 Ont. R. 203.

⁶ L. R. 1 Ex. 239. A very similar Scotch case is *Campbell v. OrJ*, 1 Fette 140.

and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tortfeasor? This shows that it is impossible to hold the defendant liable."¹ This method of reasoning is now quite out of date. The illustration put, if the case were to arise, would probably result in a decision that people exposing dangerous goods must do so subject to the risk from the mischievous habits of children to whom they are an allurements, and they must suffer for neglect to guard them.² While the answer to an action against a "boy of four years" for injury to a delicate machine standing in the street, would be the wholesome doctrine laid down by Lord Blackburn in *River Wear Commissioners v. Adamson*,³ with reference to property adjoining a highway: "the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good."³

Hughes v. Macfie.

A case cited in *Mangan v. Atterton* as an authority for the decision was *Hughes v. Macfie*⁴—also a decision of the Court of Exchequer. The defendants placed the shutter of their cellar against the wall in a public street, and the dress of a child, who was playing in the street, and jumping off the shutter, caught the corner of the shutter, which fell upon and injured him. It was ruled that the defendants were not

¹ In 35 H. VI. 11 pl. 18, it was said, per Moyle and Billing, JJ., that trespass lies against an infant though only four years of age. See Bro. Abr. Coronr. pl. 6.

² Cp. *Jewson v. Gatti*, 2 Times L. R. 441; *Stiejohn v. Brooke*, 5 Times L. R. 684.

³ 2 App. Cas. 787. Little children have a right to go into the streets of a city for air and exercise, and if reasonable provision is made for their safety, are under the protection of the law against wrongdoers who disregard their rights. Whether the provision made for the rare of the plaintiff was reasonable under the circumstances, and whether reasonable care was taken of him, must be left for a jury to determine: *Mulligan v. Curtis*, 100 Mass. 512. To the same effect is *Martin v. Ward*, 24 Sa. L. R. 386, where the Lord Justice-Clerk said: "I know of no case in which a child has been run over in a public thoroughfare in which the defence has been successfully stated that the child had no business to be there and to get in the way of the vehicle." In *Lygo v. Newbold*, 9 Ex. 302, Alderson, B., says, 305: "It seems strange that a person who rides in his carriage without a servant, if a child receives an injury by getting up behind for the purpose of having a ride, should be liable for the injury." And Pollock, C.B., adds: "The case last put raises a doubt as to the authority of *Lynch v. Nurdin*." But in the case put there is no negligence on the part of the "person who rides in his carriage." If it were negligence to ride in a carriage without a servant, and the accident happened in consequence, the facts in *Lynch v. Nurdin* might be paralleled.

⁴ *Abbott v. Macfie*, 2 H. & C. 744. *Findlay v. Angus*, 14 Rettie 312, a Scotch case, is inconsistent with this. There a shutter fastened by a bolt was meddled with by children and fell, injuring one. The owner was held liable, though the Court were of opinion the protection afforded was enough "if not tampered with, in respect of any ordinary pressure that might be exerted," but, "having regard to the risks to which in the locality where it was, it was exposed," it was not enough. The mischievousness of children in a particular district and the absence of restraint on their proclivities seem somewhat peculiar grounds on which to raise a legal liability. Cp. the summing up of Tindal, C.J., *Daniels v. Potter*, 4 C. & P. 262. In *Duff v. National Telephone Co.*, 16 Rettie 675, the owner of a two-wheeled harrow left it in a lane in a town. Two children began to play with it, and, whilst doing so, brought it down on, and fatally injured, a child of three years who was playing with them. The father of the child brought his action against the owner of the harrow, but it was dismissed on the ground that the father's negligence had contributed to the child's accident, and disentitled the father from suing. A remark of the Lord President (Ingis) may be noticed. He says: "I do not intend to say that people are justified in leaving wheelbarrows in the public streets, but that was not the case here. The harrow was left in a narrow lane." The legal test of liability cannot be a question of the greater or lesser width of a highway in which a vehicle unattended is left; moreover, it is a common experience that in narrow lanes the swarming of children is greater than in wide streets. The justification of the decision is that the owner of the harrow was in the exercise of his rights and not in default. The leaving of the harrow unattended might have been negligent. Then the action would have been unobtainable.

liable to an action by the child, on the ground that an adult could have maintained no action, as he would have voluntarily meddled for no lawful purpose with that which, if left alone, would not have hurt him; and the fact of the plaintiff being of tender years made no difference.

This case, too, seems to ignore the doctrines we have just noticed.

These cases, then, broadly state a proposition that a child, when a trespasser, differs in no respect as to liability from an adult.

Mangan v. Atterton and Hughes v. Macfie considered.

In *Lynch v. Nurdin*¹ the plaintiff's improper conduct in mounting a cart was a trespass to the defendant's chattel; the decision was that the plaintiff could recover, on the ground that "he merely indulged the natural instinct of a child in amusing himself with the empty cart." "The child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them."

The duty of the adult is so to conduct his affairs that he is not negligent. Children of very tender years are not to have negligence imputed to them. If they are injured by negligence, conduct that in an adult would disentitle him to recover, works them no disability. In intercourse with them adults are to use a greater than ordinary care, because of their greater volatility and the infirmity of their judgment. To be free from liability where young children are concerned, adults must show that they have not failed to attain the standard of duty the circumstances demand. If they have so failed, their default in duty is not condoned by conduct conducing to the injury, which would be contributory negligence, but for the fact that the injury is inflicted on a young child, to whom contributory negligence is not imputable. Considerations such as these invalidate the Scottish decision *M'Lelland v. Johnstone*,² where a contractor of a sewer in a highway was held not guilty of negligence in leaving a brazier necessary for the work he was doing but unfenced and unguarded on the public path, whereby a child of five was seriously burned. This aggression on the public rights certainly cannot be regarded as in law not negligent. At least the necessity of curtailing the public rights must be shown, and according to all analogy, this can only be done with the observance of all reasonable precautions.

Adult's duty to children not to be negligent is absolute.

The American cases accord.³

The case of *Bailey v. Neal*⁴ is decided in accordance with the principles we have enunciated. A heavy street roller with reversible shafts was left standing in a street, duly secured by a strong rope, which would have held it immovable. The plaintiff, a child of nine and a half, and another child meddled with it. The other child cut the rope, and plaintiff's fingers were crushed in the wheels of the reversible shaft. On the ground that the defendant had not been

Bailey v. Neal.

¹ 1 Q. B. 29. In *Mann v. Ward*, 8 Times L. R. 699, Lord Esher, M.R., speaking of *Lynch v. Nurdin*, says: "It has always been doubted." This remark is probably a slip. *Mangan v. Atterton* was most likely the case in his lordship's mind. Cp. *Clark v. Chambers*, 3 Q. B. 11, 339; *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 445 (Davis) 202, per Harlan, J., 270; *Harrold v. Watney* (1898), 2 Q. B., per Smith, L.J., 322; *Lynch v. Nurdin* "has never been overruled, but has been treated in subsequent cases as sound law." Lord Esher, M.R., in *Engelhart v. Farrant* (1897), 1 Q. B. 244, doubts whether *Mann v. Ward* is "fully reported."

² 4 Fraser 459.

³ *Birge v. Gardiner*, 19 Conn. 507, 512; *Daley v. Norwich & Worcester Rd. Co.*, 26 Conn. 591; *Rd. Co. v. Gladman*, 15 Wall. (U. S.) 401; *Rauch v. Lloyd*, 31 Pa. St. 358.

⁴ 5 Times L. R. 20.

guilty of any negligence—the shaft having been secured—the plaintiff was nonsuited. Two propositions apparently were assumed :

- (1) that if the defendant had been negligent in leaving the roller, though the negligence was not the cause of the injury, the plaintiff could recover ;
- (2) that contributory negligence of the plaintiff would not affect this right.

A distinction seems to have been taken between leaving the roller on the highway in a negligent state—that is, with its shafts unfastened—and placing it there, unlawfully, in a safe condition. From the point of view that contributory negligence is not to be attributed to children in certain circumstances, it, at first sight, appears immaterial in what condition the machine was placed on the highway if its being there arose from negligence. This, however, is not so. It is one thing to impute liability when the intervening agency that sets the mischief at work is the mere ordinary thoughtlessness and ignorance of children, who may be expected to play with an object like a roller left in their way ; and it is quite another to contemplate the deliberate cutting of a strong rope—an act that is scarcely an ordinary and natural incident attendant on the neighbourhood of young children. The Scotch case of *M'Gregor v. Ross*¹ is very similar, though there no evidence was produced of how the rope which secured the machine was undone. It was assumed that, if not wilfully interfered with, the precautions taken were sufficient to render it harmless.

Harrold v. Watney.

*Harrold v. Watney*² is another illustration. "A rotten fence close to a highway is an obvious nuisance." A child of four years put one foot on the fence and was about to put another when it gave way and he was injured. The owner of the fence was in default ; the child recovered damages. The act of climbing the fence was one to be expected of a young child. Smith, L.J., goes further : "The boy was lawfully using the highway." *Horsburgh v. Sheach*³ gives the other aspect of the principle. Building material was (lawfully) heaped against a wall eight feet high abutting on a highway to within thirty inches of the top ; on the other side of the wall was a pond. A child of seven, playing on the highway and running up and down the heap, clampered over the wall and fell into the pond. These facts were held not to raise any case of negligence. Had the heap been to the top of the wall, following the cases of inducements held out to children, there might have been evidence of negligence. The margin of thirty inches between the top of the heap and the wall repelled any presumption of insufficient protection for young children. Had the placing of the heap there been illegal, liability would have attached. As it was the defendant was not in default.

American decisions.

The American decisions are by no means uniform. For example, in the case of *Rd. Co. v. Stout*⁴ where a child of six years of age was

¹ 10 Rettie 725. In *Slade v. The Victorian Railways Commissioners*, 15 Vict. L. R. 190, there was the additional factor that the injured boy was a licensee on defendant's pier. But it was rightly decided this made no difference in the principle applicable.

² (1898), 2 Q. B. 320. Cp. *Fenna v. Clare* (1895), 1 Q. B. 179. ³ 3 Fraser 268.

⁴ 17 Wall. (U. S.) 657. As to this case, in *Frost v. Eastern Rd.*, 10 Am. St. R. 396, 64 N. H. 220, Clark, J., very sensibly says : "We are not prepared to adopt the doctrine . . . that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused

injured through playing with a turntable on the premises of the defendant railway company, the Supreme Court of the United States held that if the situation of the turntable was such that children would probably resort to it, and if children had in fact resorted to it within the knowledge and observation of the officers of the company, there is a duty on the company to take precautions in the matter, the neglect of which exposed them to liability. Freedom from fault is not required of an infant.

On the other hand, in Connecticut, in the elaborately argued case *Nolan v. New York Rd. Co.*¹ another view is presented. A child of seven was attracted on a railway line by something he saw. The State Court held the age of the child injured ineffectual to raise a duty where none otherwise existed. With regard to duties to the public at large, children, women, and men are upon the same footing. Precautionary measures having for their object the protection of the public, must, as a rule, have reference to all classes alike; though there are duties to infants where a different degree of care is requisite than is due to adults.

The view is expressed by Henry, C.J., in *Schmidt v. Kansas City Distilling Co.*² that an owner of property must not place temptations upon it to allure any one to a dangerous place upon his premises, nor yet place dangerous things so near a public street or highway as to endanger persons thereon; and the fact that young children are in the habit of resorting to the neighbourhood is an element in determining what is alluring,³ and what safeguards should be adopted. This doctrine is approved in *Jewson v. Gatti*, yet is not free from difficulties.⁴ Though a sound principle, there is often uncertainty in its application; for example, in *Klix v. Nieman*,⁵ a child fell into an unfenced pond, which was found to be dangerous to the lives of children living in the neighbourhood and who might be attracted thereto for amusement or otherwise. The Court, however, negatived any duty to fence, on

to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or inclose it or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit." *Reary v. Louisville Ry. Co.*, 40 La. An. 32, 8 Am. St. R. 497. On the same point *Rodgers v. Lee*, 140 Pa. St. 475, 23 Am. St. R. 250 may be consulted. The consideration of proximity or rather adjacency to the highway, which was the determining factor in *Jewson v. Gatti*, 2 Times L. R. 441, is absent here. Cases may be put where the doctrine of *Jewson v. Gatti* will be hard of application, e.g., fruit trees divided from adjoining children by a thorn hedge; golden carp in a pond in a public pleasure ground railed off by a fence of a single twisted wire; or delicate flowers blooming just out of reach; these allurements may perhaps be held forbidden pleasures. If so, the distinction seems one of degree and not of kind.

¹ 53 Conn. 461.

² 50 Am. R. III, 2

³ An allurements seems to be some attraction added to land, not the mere effect of land in its natural state: *Evansville Rd. Co. v. Griffin*, 50 Am. R. 783.

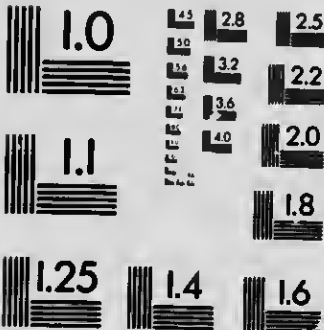
⁴ 2 Times L. R. 441; in the Div. Court, at 381. *Stiefmahn v. Brooke*, 5 Times L. R. 1094, per Fry, L. J.; cp. *Findlay v. Angus*, 14 Rettie 312. The same principle, with regard to alluring children, is laid down in America in what are known as the turntable cases: *Hastley v. W'ona Rd. Co.*, 24 Am. St. R. 220.

⁵ 10 Am. R. 854. *Ross v. Keith*, 16 Rettie 86, is similar; only there children had to pass along a private road to get to the pond, and the negligence alleged was leaving the gate of the private road open. In *Royan v. M'Leannan*, 17 Rettie 103, Lord Young distinguishes the case of the child of a "farm servant who had a house on the farm not far from the place at which the child was drowned." In English law, at least, there is no ground for the distinction. If *M'Feat v. Rankin's Trustees*, 6 Rettie 1043, is an authority, the distinction may exist in Scotland, however opposed to principle it may be. As to *M'Feat's case*, see *post*, Duty of Occupiers of Property. See also *Gibson v. Glasgow Police Commissioners*, 20 Rettie 466 and *Hamilton v. Hermand Oil Co.*, 20 Rettie 995, out of Scotland a more than doubtful decision.



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the authority of *Hardcastle v. South Yorkshire Ry. Co.*¹ and *Hounsell v. Smyth*,² and no other decision appears tenable.³ A possible principle is that the duty to children and adults is substantially the same, only that, in the case of children, trespassers allured by some attraction⁴ are allowed wider limits of deviation than in the case of adults. In *Kliz v. Nieman* the decision might have been supported on the ground that from all that appeared the land was in its natural condition.

Extent of the protection of infants.

The next inquiry is to what extent this special protection of infants goes. There does not appear to be any definite English rule. In America the subject is discussed in *Nagle v. Ailegheny Valley Rd. Co.*,⁵ it was conceded that if the boy for whose death damages were sought, and who was between fourteen and fifteen, were regarded as an adult, he had been guilty of rashness, which would have defeated the action. But the contention was that his tender years rendered him not responsible for negligence. The Court refused to leave this to a jury, holding that it was a question of law for themselves. They fixed the age of fourteen as that at which an infant is presumed to have sufficient capacity and understanding to be sensible of danger and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age.⁶

The measure of responsibility varies with each additional year. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of the intelligence, prudence, foresight, or strength usual in those of such age.⁷

Tendency of the Scotch Courts.

A Scotch case⁸ seems to countenance the imposition of a similar test of age: though in that case a "child" was defined by the Factory and Workshop Act, 1878,⁹ "to mean a person under the

¹ 4 H. & N. 67.

² 7 C. R. N. S. 731.

³ But see *Haughton v. North British Ry. Co.*, 20 Rettie 113.

⁴ See per Cockburn, C.J., *Corby v. Hill*, 4 C. R. N. S. 562.

⁵ 88 Pa. St. 35, 39.

⁶ In accordance with this view, and on the authority of it, the law under the code in Georgia has been succinctly stated in *Rhodes v. Georgia Rd. Co.*, 20 Am. St. R. 362. (1) *Prima facie* an infant under the age of ten years has not sufficient capacity to be sensible of danger or to have the power to avoid it; and this presumption will continue until overcome by proof showing the contrary. "Ten years" seems to have been substituted for "seven" by the Georgian Code, § 4295. In *Gibson v. Glasgow Police Commissioners*, 20 Rettie 466, the Scotch judges in the Court of Session considered the law in an unsettled condition as to whether a child at five can be guilty of contributory negligence. *Lebatt, Master and Servant*, 558, 890, collects all the authorities. (2) An infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger, and to have power to avoid it, and this presumption will stand till overthrown by clear proof of the absence of such discretion. (3) An infant between the age of ten and fourteen years must be shown to have capacity, in the particular instance, to understand and avoid danger.

⁷ *Kehler v. Schwenk*, 144 Pa. St. 348, 27 Am. St. R. 633.

⁸ *Sharp v. Pulkhead Spinning Company*, 12 Rettie 574. In *Carty v. Nicoll*, 6 Rettie 194, a different rule was applied; but there what amounted to a statutory authorisation to do the work was urged; secondly, the point of non-accountability was not taken; and thirdly, the sheriff-substitute found contributory negligence as a fact. In *Grant v. Caledonian Ry. Co.*, 9 Macph. 258, it was decided that a child of six may contribute by negligence to an injury to itself; while in *M'Gregor v. Rose*, 10 Rettie 725, a child of four was held not capable of contributing.

⁹ 41 Vict. c. 16, ss. 11, 12, 26, 96. See now 1 Edw. 7 c. 22, s. 156 (1): a "child" is "a person who is under the age of fourteen years, and has not, being of the age of thirteen years, obtained the certificate of proficiency or attendance at school

age of fourteen," and reference to the general law was unnecessary. In *Grizzle v. Frost*,¹ the "young person" injured was sixteen years of age. The work she was set to was in connection with dangerous machinery, with the use of which she was quite inexperienced, and as to which there were statutory restrictions on employment. Knowledge of dangerous machinery requires greater intelligence than knowledge of ordinary dangers; and the character of the particular work rebuts the presumption of capacity to avoid the dangers of it. The duty was expressed by Smith, M.R., thus:² "It was not sufficient for the master to say that the child knew of the danger, but there was a duty on the master to order the child what to do in order to keep out of the danger."

There is, then, a graduated scale. If the child engaged in work, from which injury happens, is so young that it cannot know the character of contributory negligence, as matter of law, it can recover, whenever the defendant is in default in the observance of due care and caution, whereby the child is injured; if the child can understand, it is for the jury to say, in the ascending scale of age and imputability, whether any particular act which may be negligent—and would be looked at as negligent if done by an adult—is negligent.

In the case of young people working at dangerous machinery, greater consideration is shown in proportion to the greater risk of the work; and a jury may find that, through immaturity of judgment, they are exposed to risks beyond the measure of their capacity to appreciate.

This is the ground of the decision of the Court of Appeal in *Crocker v. Banks*,³ where a girl of seventeen, in the employment of a soda-water manufacturer, was injured by the bursting of a soda-water bottle, which she was engaged at a machine in filling. The machine had an automatic guard during the period of filling and corking the bottles; so soon as it became necessary to take the bottle from the machine, the guard dropped. Masks were provided for use at this time, but the plaintiff did not put hers on, and in consequence was injured. Contributory negligence was set up. The girl had sworn at the trial that she did not know the danger, or that she ought to wear the mask at that particular period. The Court of Appeal⁴ based their opinion on her statement, and held that "it was not negligence for a girl of her age to omit to put on the mask if she did not know that she was bound to do so at that period of the operation."⁵

Secondly, where the persons having charge of a child have negligently placed the child or permitted it to be in a position in which it sustained injury.

The leading case is *Waite v. North-Eastern Ry. Co.*, in the Exchequer Chamber:⁶ an action on behalf of an infant by his next friend. The infant, which was five years of age, was with its grandmother; who took a half-ticket for the child and a ticket for herself to travel by the

mentioned in Part iii. of this Act." Young person is "a person who has ceased to be a child, and is under the age of eighteen years."

¹ 3 F. & F. 622, at *Nisi Prius*, before Cockburn, C.J.

² *Robinson v. W. H. Smith*, 17 Times L. R. 423.

³ 4 Times L. R. 324 (C. A.). *Moore v. Moore* (1902), 4 Out. L. R. 167.

⁴ *L.c.* per Lord Esher, M.R., 325.

⁵ The Scotch Courts take the same general view, but apparently are not inclined to be so liberal as the English Court of Appeal: *Forbes v. Aberdeen Harbour Commissioners*, 15 Rettie 323. See, too, *McIntyre v. Buchanan*, 14 Up. Can. Q. B. 581.

⁶ E. B. & E. 719.

Summing up
of the cases.

*Crocker v.
Banks.*

(ii.) Where the
negligence is
that of those
in charge of
the child.
*Waite v.
N. E. Ry. Co.*

Cockburn,
C.J.'s, judg-
ment in the
Exchequer
Chamber.

defendants' line; as they were crossing the railway the child was injured by a passing train. The jury found that the defendants were guilty of negligence, and that the grandmother was guilty of negligence, which contributed to the accident, whilst there was no negligence of the infant plaintiff. A verdict was entered for the plaintiff, with leave to move. In the Queen's Bench, the verdict was entered for the defendants, without calling on them to argue, on the ground that the infant was identified with its grandmother. In the Exchequer Chamber, Cockburn, C.J., thus stated the principle of the decision:¹ "When a child of such tender and imbecile age is brought to a railway station, or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. Such care not being used, where the child has no natural capacity to judge of the surrounding circumstances, a child might get into serious danger from a state of things which would produce no disastrous consequences to an adult capable of taking care of himself." Lindley, L.J., subsequently² thus more tersely expressed the decision: "The defendants had a right to expect that proper care would be taken of the child, and if such care had been taken, there would have been no accident." The child further had a right to expect that the company should not be guilty of negligence, even though the contract brought him on the premises;³ and had the company's violation of this duty been the cause of the accident there is no reason why the fact that the injured person was in charge of any one else, or was on the premises in pursuance of the terms of a contract, should lessen the consequence to the railway of their own negligence. If, however, the company's negligence was merely a condition, and not the cause of the injury, then they would not be liable in any case and quite irrespective of any question of identification.

Case con-
sidered.

The fact according to Lindley, L.J., is that it was not the lack of care on the part of the railway that caused the accident, but the lack of care on the part of the grandmother; for "if such care had been taken there would have been no accident." The decision, therefore, goes no further than to hold that where a railway company would not be liable for an accident to an adult, their liability is not increased because the person injured is a helpless child, and the immediately preceding negligence is that of the child's keeper. But this explanation is too vague to be satisfactory; and besides does not accord with many expressions in the judgments. We must accordingly take a closer view of the facts. The alleged negligence of the railway company was in not notifying to the grandmother, at the time she took her ticket, or subsequently, the danger of crossing the line. The negligence of the grandmother was in not taking sufficient caution in crossing. Thus, had there been no contract, the grandmother and the child would have been mere licensees, if not actual trespassers. They were on the line with, at the utmost, the permission of the company, who would not undertake any duty to them further than that of not increasing the risks to which they were exposed by the ordinary conduct of the

¹ 1 E. B. E. 733.

² *The Bernina* (2), 12 P. D. 92.

³ "There would be that duty which the law imposes on all, namely, to do no act to injure another": *Foulkes v. Metropolitan District Co.*, 5 C. P. D., per Bramwell, L.J., 159.

company's business.¹ If, then, they were either trespassers or licensees, the railway company would not have been in default; for there was no negligence alleged in the running of the train. So that the only duty violated was a contractual one; and the contract, as Lord Campbell points out,² was that in consideration of the grandmother taking ordinary care of the child the company would undertake to convey him. But the grandmother broke the contract in such circumstances as to discharge the company; while the circumstances raised no duty apart from contract. If this is the right view of the case the head-note is not accurate. Moreover, it is plain from Lord Campbell's judgment that the negligence was not joint but successive. If these conclusions, or either of them, are accurate, very much of the criticism on this case is beside the point, and it is no authority for the proposition for which it is most often vouched.

*Burchell v. Hickisson*³ has points of similarity with *Waite's case*. *Burchell v. Hickisson*. The plaintiff, a boy of four years old, went with his sister to defendant's house. A few steps, protected on either side by railings, led up to the front door. One of the rails at the topmost step had been for some time broken away, leaving a gap, across which ropes had been interlaced but had worn away. The plaintiff was told to stop, at the bottom of the steps, while the sister went in the house. He, however, came up the steps, and falling through the gap into the area below, was injured. Lindley and Lopes, J.J., held that the plaintiff could not recover; on the ground that the defendant never invited such a person as the plaintiff to come unless he was taken care of; and if he was in charge of others, there was no concealed danger—that is, there was no duty from the defendant to the plaintiff which had been violated, and consequently no negligence.⁴ The distinction between this case and *Lay v. Midland Ry. Co.*⁵ is that there the bridge, which was found by the jury to be dangerous, was for use by the public, and the plaintiff had consequently a right to use it; while in the present case the plaintiff had no right to be where he was when he met with the accident. Had the gap been in the railings abutting on the street, the decision must have been different.⁶

A word must be added on joint negligence. In *Abbott v. Macfie*,⁷ *Abbott v. Macfie*. the Court said: "If he [the plaintiff] was playing with Hughes so as to be a joint actor with him, he cannot maintain this action. If not, we think he can, as his injuries would then be the result of the joint Injury from joint negligence."

¹ *Gautret v. Egerton*, L. R. 2 C. P. 371; cp. *Batchelor v. Fortescue*, 11 Q. B. D. 474.

² E. B. & E. 719, 727.

³ 50 L. J. Q. B. 101.

⁴ There is no legal obligation to fence an excavation, unless it be so near a public road as to constitute a public nuisance: *Hounsell v. Smyth*, 7 C. B. N. S. 731; *Hardcastle v. South Yorkshire Railway Company*, 4 W. & N. 67. See ante, 165, as to where there is an allurement.

⁵ 34 L. T. 30.

⁶ In America it was held that where a child of seven was out walking with his father, and, stepping aside to elasp in sport a post forming part of a bridge they were crossing, fell through a hole in the planking into the water and was drowned, there was no evidence of contributory negligence: *Gulline v. Lowell*, 144 Mass. 491; also note to 59 Am. R. 104. On the general question whether, assuming contributory negligence of a parent, an infant is barred, there is considerable difference of opinion. The Pennsylvania Courts answer it in the negative, *Smith v. O'Connor*, 48 Pa. St. 218; *Erie, City, &c. Co. v. Schuster*, 113 Pa. St. 412; 57 Am. R. 471, and note 474. So too in *Bellefontaine, &c. Rd. Co. v. Snyder*, 18 Ohio St. 399, at 408, and post, 173, *et seq.* On the other hand, see *Fitzgerald v. St. Paul, &c. Ry. Co.*, 43 Am. R. 212, and note 216.

⁷ 2 H. & C. 744. *Hughes v. Macfie*, *id.*

negligence of Hughes and the defendants." It is clear that if the negligence were the joint negligence of Hughes and the defendant, and the plaintiff was free from negligence, the plaintiff could recover against both, or either. But assuming that the defendant was guilty of negligence, and plaintiff and Hughes were playing together, and acted in a way that in the case of an adult would be negligent, the first point to decide would be whether in view of the propositions enunciated above, the child were capable of negligence. If the child were capable of negligence, the opinion of the jury would have to be taken, whether the child were guilty of the particular negligence alleged; and if this were resolved affirmatively, recovery would be precluded; for the negligence causing the action would not be the defendant's negligence.

Absence of control.

The cases hitherto examined are cases where the child is said to be under the control of an older person at the time of the happening of the accident; or, may be, injured in circumstances where no duty had been violated by the defendant. There remains the case where the absence of control is the cause of the child sustaining injury.

The only reported English case on the point is at *Nisi Prius*.¹ Defendant was driving, when the plaintiff, aged three years and a quarter, ran out into the road, was knocked down, and run over. Channel, B., said: "The doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover it must be shown that the injury was occasioned entirely by his own negligence."

The point that there was any such duty on the parent, the neglect of which would disentitle the infant to recover, does not seem to have been taken; and there does not appear to be any reported English case in which it has been mooted.²

American cases.

There is a multitude of American cases on this subject, and the doctrines laid down by them very materially vary.

Contrary view.
"Vermont rule." Judgment in *Robinson v. Cone*.

"The Vermont rule"³ formulates the principle that "although a child or idiot or lunatic may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so ho *improperly* there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one knew that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but *ordinary* neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child or one known to be incapable of escaping danger." The expression "ordinary neglect" here used is inaccurate, since proof of "ordinary neglect" on a highway would be sufficient to charge the person guilty of it. What is meant is that conduct, or want of care, not actionable where an adult is concerned; may yet be actionable when a young child is injured thereby. Thus interpreted the decision is good sense, and is approved and developed

¹ *Gurdner v. Grace* (1858), 1 F. & F. 359; followed *Merritt v. Hepcnstal*, 25 Can. S. C. R. 150.

² In *Martin v. Wards* (1887), 14 Rettie 8 14, the point was taken in Scotland, where two children, aged three and five respectively, were run over, the driver being negligent. In an action by the father it was contended that his negligence contributed to the accident by allowing such young children to be in a place of danger without some one in charge of them. This was held not to show any defence. See, however, *Duff v. National Telephone Co.*, 16 Rettie, per the Lord President, 476; *ante*, 162.

³ *Robinson v. Cone*, 22 Vt. 213.

in a late New Jersey case,¹ where the Court says: "The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive, or forfeit, any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but on the contrary is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission." Having stated the assumed theory of law to be that the custodian of the infant is the agent of the infant, the judgment continues: "Such custodian cannot surrender or impair a single right of any kind that is vested in the child nor impose any legal burden upon it." "In the language of an ancient authority this doctrine is thus expressed. 'The common principle is, that an infant in all things which sound in his benefit shall have favour and preferment in law, as well as another man, but shall not be prejudiced by anything to his disadvantage' (9 Vin. Abr. 374).² And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert by construction of law the connection between himself and his custodian into an agency to which the harsh rule of *Respondent superior* should be applicable." . . . "The sensible and legal doctrine is this—an infant of tender years cannot be charged with negligence, nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being that he can, in no case, be considered to be the blameable cause either in whole or in part of his own injury. There is no injustice nor hardship in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance." Whatever the ultimate course taken by the English Courts, there can be no doubt this view has the merit both of common sense and humanity.³

Newman v. Phillipsburg Horse Car Rd. Co.

There is a Pennsylvania decision⁴ holding that where a father knew of his son's employment at dangerous work and allowed him to remain without objection, the father is chargeable with contributory negligence and is not entitled to recover. In this case it must be remembered that the action is by the father,⁵ even with this fact in view the

Father assenting to infant son's employment at dangerous work not entitled to recover for injury to him.

¹ (1890) *Newman v. Phillipsburg Horse Car Rd. Co.*, 52 N. J. Law, 446. The judgment is printed in a note to Jones, Negligence of Municipal Corporations, § 215.

² *Enfant* (A. 2.)

³ On the other hand, it is held in New York, Massachusetts, Indiana, and perhaps Illinois, that an infant is personally chargeable with negligence, or fault of its guardian, whereby it is exposed to injury. The leading case for this view is *Hartfield v. Roper*, 21 Wend. (N. Y.) 615. See also *Weil v. Dry Dock, &c. Rd. Co.*, 119 N. Y. 147; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, where it was held not negligence as matter of law for the parents of a child four and a half years old to permit it "with proper instruction and directions against going into the street to play upon the side-walk without an attendant." *Casey v. Smith*, 152 Mass. 294; *Lealie v. City of Lewiston*, 62 Me. 468. In a New York case, *Moebus v. Herrmann*, 108 N. Y. 349, where a child under seven years of age was run over, the direction given was: "The rule of vigilance applies to children as well as to adults, but a child of immature years, whilst bound to exercise care, is held to no higher degree of forethought than you would expect of its age." "If you say that the child did what an ordinarily careful child would have done, then it is not negligence"; and "if the boy failed to adopt the means known to him to be effective in protecting him against danger, and was injured thereby, the plaintiff cannot recover." This was sustained by the Court. See, too, *Collins v. South Boston Rd. Co.*, 142 Mass. 301; and *post*.

⁴ *Schwenk v. Kehler*, 122 Pa. St. 67; 9 Am. St. R. 70. Cp. *Hemmingway v. Chicago, &c. Ry. Co.*, 7 Am. St. R. 823, as to the duty of a railway company to an infant passenger; and the negligence of a parent.

⁵ In *Pratt Coal and Iron Co. v. Brawley*, 3 Am. St. R. 751, where an action was

Doctrine criticised.

decision is difficult to follow, having regard to the language of the report:¹ "There was testimony from which it was claimed that the car-track was not in proper condition, that the appliances in use for detaching the mule from the car were unsafe and essentially unlike those in use at some other collieries in the vicinity." In the event of the jury finding defective condition of the plant it seems an extreme position to take up, that the possible previous negligence of the parent should disentitle him to recover. Surely the father was justified in assuming that the machinery actually provided was adequate. If the accident had happened from a danger inherent in the work, the case might be arguable. The actual danger, however, seems to have been superadded, and on the defendant's work, to which it does not appear that the father had right of access or inspection. In England at least there are other vital objections to the validity of this decision, since the judgment of the House of Lords in *Smith v. Baker*,² which will be apparent to any one referring to and continuing the quotation just made.³

Father permitting son to engage in dangerous work cannot recover.

The Supreme Court of Pennsylvania maintained its doctrine in *M'Cool v. Lucas Coal Co.*⁴: a father who suffers his son of tender years to engage in a dangerous service cannot recover where the son is killed through going without directions to a dangerous place to comply with a proper order and when there was a perfectly safe place that he might have gone to. The decision is placed on the ground of the father's duty of protection. There is no doubt that cases may occur, if rarely, where the father's conduct is so flagitious that he would be disentitled from it to recover for an injury to his child. The jury should be the discriminators of these. On the other hand "con-

brought on behalf of a child, contributory negligence of the father was held no defence; but otherwise where the father sued on his own behalf. In the latter case negligence of the custodian appointed by the father is negligence of the father. This seems right.

¹ 122 Pa. St. 68.

² (1891) A. C. 325.

³ A question that often arises may be here noted, viz., Can the medical or surgical expenses of a child that is injured by an accident, be recovered as part of the damages in an action brought by the father as next friend of the child? The contract with the medical man is most usually with the father. Sums paid by the father are not necessarily, nor ordinarily, damages recoverable by the child. The jury have a liberal limit for the assessment of damages in accident cases; but where there is no jury the judge may have to decide what damages are legally recoverable. If then the medical expenses are alleged to be incurred by the father on his contract, they are as such not recoverable. But medical attendance is a necessary for which the child may contract: Co. Litt. 172 a, § 259, "If an infant is wounded, an action will lie on his promise to the surgeon." *Pickering v. Gunnin*, *Palmer*, 528; *Keane v. Boycott*, 2 H. Bl. 511. A contract with the child might thus in some cases be alleged; or a contract with the father, as agent for the child, in a contract for necessaries. An infant can authorise an agent to do any act for his benefit, Story, Agency, § 6. The liability where the father did not obtain medical assistance for his child, is determined by 57 & 58 Vict. c. 41 s. 1. *The Queen v. Downes*, 1 Q. B. D. 25; *The Queen v. Morby*, 8 Q. B. D. 571; *The Queen v. Senior* (1899), 1 Q. B. 283. If the infant live with the father, who provides him with the necessaries of life, he cannot contract: *Hainbridge v. Pickering*, 2 Wm. Bl. 1322. If the father do not provide the necessaries, then the child can contract for them; and if he do not live with the father, he can; and if he can, there does not seem any objection in law to the child having the father as his agent for his benefit, as well as any other person. Again, if the child has separate estate, and the father is guardian, a contract might be presumed with reference to that estate made by the father as agent for the child. Any difficulty, however, may be avoided by joining a claim by the father for the expenses on the writ, with the claim for damages on the part of the child, or by an amendment to the same effect. See per Lord Kenyon allowing recovery of apothecary's expenses by the father of a child who died from the bite of a mad dog, *Jones v. Perry*, Peake, Law of Evidence, § ii., Actions founded in Negligence, 292.

⁴ 150 Penn. St. 638.

tributory negligence *per se*," the phrase used in Pennsylvanian cases, is not recognised in England.¹

To return, however, to our immediate subject, the position of young children with regard to their disability to recover by reason of their own or their guardian's contributory negligence. It is a sound principle that since young children are not capable of contributory negligence in the sense in which adult persons are, the duty of adults towards them should be commensurate with their own feebleness and inability to safeguard themselves. There is no injustice in requiring people in their dealings with young children to avoid being negligent at all; and in fixing them with liability if they are negligent, notwithstanding that the children's own negligence contributes to the injury.²

A person negligently flings a fire-brand; it may fall harmless; then, though the act is wrongful, there is no damage; if it fall into a basket of hay and ignite it, the measure of damage is the value of the hay, which is inconsiderable; but if the brand fall among valuable silke and satins and ignite them, the measure of damage is the value of the goods destroyed. Thus the same act done in the same circumstances may incur very different consequences; and there seems no valid reason why an act of negligence, which is without legal consequences when affecting one class of the community, should not bear a very different aspect when done with regard to another.

A child has independent legal rights even against its father or guardian, in cases where the property of the child is injured.³ It would seem contrary to principle, then, that, where the child receives a personal injury, the negligence of the father could be set up as a bar to recovery. A distinction may, however, be drawn between injuries resulting from the parent negligently omitting and negligently committing certain acts. It has been said that the parent is, by common law, under no legal obligation to safeguard his child. Assuming this to be so (which by the way would involve a very strong argument against the doctrine of identification) there are yet cases where the parent's actual negligence causes injury to the child, and where no legal principle denies the child's right of action. The parent is guilty of negligence if the child is injured by the joint negligence of the parent and a third person. If the negligence had been joint negligence of persons unconnected with the child, the child could maintain an action against both or either of the wrongdoers.⁴ There seems no reason then why the parent's negligence should exonerate from the con-

¹ Shearman and Redford, § 52 n.

² A good instance of a child too young to be responsible for contributory negligence held disentitled to recover against a railway company by reason of the railway company's freedom from negligence, is to be found in *McMullen v. Pennsylvania Rd. Co.*, 19 Am. St. R. 591. Cp. the Scotch cases, *Grant v. Caledonian Ry. Co.*, 9 Macph. 258; *Morran v. Waddell*, 11 Rettie 44; *Haughton v. North British Ry. Co.*, 20 Rettie 113. Also *ante*, 160.

³ 9 Vin. Abr. *Enfant* (H. 6), *Actions*. How they must be sued.

⁴ *Burrows v. March Gas Co.*, L. R. 5 Ex. 67, 71. For a joint trespass a plaintiff may sue all the trespassers jointly or each of them separately, and each is liable for joint trespassers. *Rights against the act of all*, Co. Litt. § 376, 232a; *Cubell v. Vaughan*, 1 Wms. Saund. 291 *et. seq.*; *Sutton v. Clarke*, 6 Taunt. 29. Where two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other; because both are equally culpable or *participes criminis* and the damage results from their joint offence. This rule does not apply when one does the act or creates the nuisance, and the other, though not joining therein, is yet exposed to liability and suffers damage. Such a person may recover against him, whose wrongful act has exposed him to pay damages, an indemnity for what he has had to pay. The rule that wrongdoers cannot have redress or con-

sequences that would otherwise follow, except on the consideration that the duty of the parent not to be negligent is, if there is any difference, greater than in a case where the relation does not exist.

tribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. *Palmer v. Wick & Pulteney's own Steam Shipping Co.* (1894), A. C. 318; *The Englishman and The Australia* (1895), P. 212; *The Frankland* (1901), P. 161. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him, *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 134 N. Y. 401, 30 Am. St. R. 685. On the point whether, where plaintiff has gone against one and recovered, he can subsequently proceed against another, American and English decisions have diverged. In America, in *Livingston v. Bishop*, 1 Johns. (N. Y. Sup. C.) 290, after a minute examination of the earlier English cases, and professing to decide in accordance with *Heydon's case*, 11 Co. 5a, Kent, C.J., stated the rule thus: "that where you elect to bring separate actions for a joint trespass, you may have separate recoveries and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made his election, he is concluded by it, and that if he should afterwards proceed against the other defendants, they shall be relieved on payment of their costs." This view was sustained in the Supreme Court of the United States, in *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, at 10, where, the later English cases to the contrary, *King v. Hoare*, 13 M. & W. 494, and *Huckland v. Johnson*, 15 C. R. 145, were considered. The English Exchequer Chamber, however, in *Brimmond v. Harrison*, L. R. 7 C. P. 547, followed *King v. Hoare*, 13 M. & W. 494 and Comyns, Dig. Action (K. 4), in regarding *Brown v. Woolton*, Cro. Jac. 73, Yelv. 67 *sub nom.* *Broome v. Woolton*, as "a satisfactory and binding authority," and held that a judgment in an action against one of two joint tortfeasors is a bar to an action against the other for the same cause. See also *Ex parte Drake*, *In re Ware*, 5 Ch. D. 966; *Edevain v. Cohen*, 41 Ch. D. 503, 43 Ch. D. 187. The American view is fully presented in Cooley, Torts, 2nd ed. 152-162. As to joint and separate liability in the law of Scotland, see *Liquidators of Western Bank of Scotland v. Douglas*, 22 Dunlop 447, 476.

English and American decisions in conflict.

Scotch view.

Signification of transit in rem judicatum.

Irish decision.

Effect of judgment without satisfaction.

In the law of England there is a limitation to be borne in mind which is thus expressed by Lord Ellenborough, C.J., in *Drake v. Mitchell*, 3 East 258: "I have always understood the principle of *transit in rem judicatum*, to relate only to the particular cause of action in which the judgment is recovered, operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it is made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have." *Drake v. Mitchell* is distinguished in *Cambefort v. Chapman*, 19 Q. B. D. 229, see especially per Manisty, J., at 234, which is dissented from *Wegg-Prosser v. Evans* (1894), 2 Q. B. 101, (1895), 1 Q. B. 108. In *Windsor and Annapolis Ry. Co. v. The Queen*, 10 Can. S. C. R. 390 *et seq.* Fournier, J., considers the authorities in the French law, which he says are in accord with the rule stated by Lord Ellenborough in *Drake v. Mitchell*, that a judgment recovered in any form of action, is still but a security for the original cause of action until it be made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have. See also per Henry, J., *l.c.* 412. The same has been held in Ireland; *Wakefield v. Smythe*, 16 Ir. C. L. R. 173. Bruce, J., has held (*Chancellor v. Webster*, 9 Times L. R. 568) a distress illegal after judgment for the rent which remained unsatisfied. The premises were held under a lease. Lord Ellenborough's dictum in *Drake v. Mitchell*, and the adoption of it in *Vestry of Bermondsey v. Ramsey*, L. R. 6 C. P. 247, 251, and *In re Davson*, 13 Q. B. D. 50, do not appear to have been cited. In 2 Kent Comm. (12th ed.) 389, the conclusion is reached that a judgment *in trover*, without satisfaction, does not vest the property in the goods in the defendant, though there is much confusion and conflict in the cases. The principle approved is that property does not pass by the judgment but only by satisfaction of the judgment. See also 3 Kent Comm. 31 n. (a), 32. In *Bantleon v. Smith*, 2 Binney 146, it is distinctly held that, in Pennsylvania, judgment in debt for rent without satisfaction does not take away the remedy by distress. For the effect of having levied a distress, which is still in distrainer's hands unsold, on the right to bring an action on the covenant, see *Lehain v. Philpott*, L. R. 10 Ex. 242. A covenant not to sue one of a number of joint tortfeasors does not release the others from liability, *Duck v. Mayou* (1892), 2 Q. B. 511. The rule in the civil law is *si duo dolo malo fecerint, in vicem de dolo non agent*, D. 4, 3, 36. In *Price v. Harris*, 10 Bing. 331, a new trial was granted on the application of the plaintiff against one of two defendants, damages being assessed against the other defendant, who did not oppose the application. But the Court considered

The case of *Waite v. N. E. Ry. Co.*¹ is not an authority to the contrary; for that case was decided, and is to be supported on the contract. In the ordinary case of a young child playing in the street, where, according to an American decision,² young children have a right to be "for air and exercise," no question of contract comes in. Lord Campbell, C.J.'s, suggestion in the Queen's Bench, in *Waite v. N. E. Ry. Co.*, of a baby only a few days old, carried in the nurse's arms, and injured through negligence, to which the nurse had contributed, seems to raise all the difficulties.

Waite's case distinguished.

The "identification" on which Lord Campbell bases his decision is not "complete."³ For the child, by next friend, can clearly maintain an action for negligence against the nurse. The immunity of the railway company, in the words of Cockburn, C.J., in the Exchequer Chamber, is duo to the fact that there is an "implied condition that the child is to be conveyed, subject to due and proper care on the part of the person having it in charge."⁴ Eliminating, then, this contractual condition, there seems no reason why the child should not have an action against the joint tortfeasor with its nurse, in a case where the nurse is carrying a child across a road and is run down and the child injured, her negligence contributing, with that of the negligent driver, to produce the result. They are both negligent, and their co-operating act—not, as in *Waite's case*, successive acts—works an injury to the child, which it can certainly recover for against the nurse with whom its identity has been asserted. Again, for the wilful act of the parent or guardian—e.g., throwing the child down a well—the child, suing by next friend, upon every ground of reason and principle, should recover; so, too, for negligence relating to property. What distinction, then, can be drawn as to person? And if the child could have an action for the negligence of the father or guardian, there seems no reason why there should not be an action against the person whose negligence co-operated with the parent in producing the injury; nor yet against that person singly.

Case suggested by Lord Campbell, C.J., examined.

In *Waite's case* the assumption was made throughout, that if the plaintiff's grandmother had acted with ordinary caution and prudence, neither she herself nor the infant would have suffered;⁵ and this assumption is the foundation of the decision.⁶

He ought not to be prejudiced by any new assessment of damages, and that the sum already assessed against him should be considered the maximum to which he could be made liable; so that though he might be liable to less, he should not in any circumstances be charged in execution for more. In *Doe dem. Dudgeon v. Martin*, 14 L. J. Ex. 128, it is stated that the new trial in *Price v. Harris* was granted with the consent of the defendants. The effect of a judgment against one joint debtor as regards the other is considered, *McLeod v. Power* (1898), 2 Ch. 295; *Mord v. Earl of Westmorland* (1904), A. C. 11. *Rice v. Reid* (1900), 1 Q. B. 54, is a question of waiver of tort in the case of joint tortfeasors. A judgment against one is generally not even evidence against another not party to it. But where a principal sues his agent for negligence in order to prove his damage he may produce the record of a judgment obtained against him by a third party for the negligence, and the verdict is evidence as to the quantum of damages, though not as to the fact of the injury; *Green v. New River Co.*, 4 T. R. 589.

¹ E. B. & E. 719.

² *Mulligan v. Curtis*, 100 Mass. 512, 514. In *Bliss v. South Hadley*, 145 Mass. 91, where a child of eight was sent with a child under two years old into a street for air and exercise, and the baby was injured, it was held not negligence as matter of law on the parent's part, but to be a question of fact for the jury, depending on how much the street was used, and the intelligence and experience of the elder child.

³ E. B. & E. 727.

⁴ L. C. 733.

⁵ L. C. per Lord Campbell, 726.

⁶ See per Lindley, L. J., *The Brinnia*, 12 P. D. 58, 92.

Proceeding one step further, if the father is guilty of positive negligence, if such a term is admissible—of doing something without care or precaution through which the child suffers injury—the child has *prima facie* an action against him. On what ground can the alleged immunity of the father be placed, so that the *prima facie* right of the child to have an action is rebutted? If the child is injured through the contributory negligence of the father, it is manifest that the father is not entitled to recover for loss of services; for his own act brought about the loss for which he seeks to recover. But why should the child be identified with him? Not because of the father's moral duty; which, however strong, is wholly apart from legal obligation; while no legal obligation, to which the father's alleged immunity can be referred, is evident.

Conclusion.

In principle, then, there seems to be no reason why the child should be disentitled by reason of the parent's negligence, in placing it or permitting it to be in a position in which it has sustained injury. In America, indeed, there are conflicting decisions on the point;¹ while in England the point does not seem to have been directly decided, at least in any reported case;² probably because juries have taken the matter into their own hands in cases where the defendant has been negligent, and negatived contributory negligence.

Thorogood v. Bryan and The Bernina.

The conclusions above arrived at derive support from the decision in the case of *The Bernina*.³ Previously to that decision the case of *Thorogood v. Bryan*,⁴ though more often acquiesced in than approved,⁵ and occasionally dissented from,⁶ was generally followed as an authority, binding tribunals below the rank of a Court of Appeal, for the proposition that a passenger is identified with the driver of the vehicle in which he is, although the driver is not his servant, but the servant of third parties. While this was regarded as law, an insuperable obstacle was presented to the recovery of damages by a child insured through the contributory negligence of a nurse or guardian when under the actual control of such nurse or guardian. *Thorogood v. Bryan*

¹ *Lynch v. Smith*, 104 Mass. 52; *Bahrenburg v. R. R.*, N. Y. Court of Appeals, 1876, cited in Wharton, Negligence, § 312, note 2; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; the greater part of the judgment in this case is based on the assumption that the defendant was not negligent; *Mangum v. Brooklyn City Rd. Co.*, 36 Barb. (N. Y.) 236, 38 N. Y. 455; *Munn v. Reed*, 86 Mass. 431. The Massachusetts decisions have been thus summed up: "That if a child of two years and four months is unnecessarily sent unattended across and down a street in a large city, he cannot recover for a negligent injury (*Callahan v. Bean*, 91 Mass. 401); that to allow a boy of eight to be abroad alone is not necessarily negligent (*Carter v. Towne*, 98 Mass. 567); and that the effect of permitting a boy of ten to be abroad after dark is for the jury; (*Lovett v. Salem & South Danvers Rd. Co.*, 91 Mass. 557), coupled with the statement, which may be ventured on without authority, that such a permission to a young man of twenty possessed of common intelligence has no effect whatever": Holmes, *The Common Law*, 128. In *Westbrook v. Mobile, &c. Rd. Co.*, 14 Am. St. R. 587. It is laid down on the authority of *Beach on Contributory Negligence*, § 43, that when the action is brought by the infant or for his benefit, the better rule is that the negligence or misconduct of the parent or custodian of the child shall not be imputed to the child. See also the note to the above cited case in which the American cases are collected; and the subsequent case of *Norfolk, &c. Rd. Co. v. Grosceclose*, 29 Am. St. R. 718.

² See, however, *Austin v. G. W. Ry. Co.*, L. R. 2 Q. B. 442, where conduct on the part of the mother was held not to disentitle an infant to recover where the injury arose out of an implied contract.

³ 12 P. D. 53, 13 App. Cas. 1 (*sub nom. Mills v. Armstrong*).

⁴ 8 C. B. 115.

⁵ *Child v. Hearn*, L. R. 9 Ex. 170; *Armstrong v. Lancs. & Y. Ry. Co.*, L. R. 10 Ex. 47.

⁶ *The Milan*, Lush. 388, 31 L. J. Adm. 105; *Adams v. Glasgow & S. W. Ry. Co.*, 3 Rettie 215.

was, however, definitely overruled by the Court of Appeal in *The Bernina*,¹ on the ground that "the proposition maintained in it is essentially unjust and inconsistent with other recognised propositions of law," and that the doctrine of identification, as laid down in *Thorogood v. Bryan*, is "quite unintelligible," and "leads to results which are wholly untenable—e.g., to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd."²

The facts in *Thorogood v. Bryan* showed that : The deceased was getting out of an omnibus while the omnibus was in motion, and without waiting for it to draw up; the omnibus of the defendant coming up very fast behind, the deceased was unable to get out of the way of it, and was run over and killed. The Court of Common Pleas said that the plaintiff "chose his own conveyance, and must take the consequence of any default of the driver whom he thought fit to trust." The decision of the Court of Appeal, affirmed by the House of Lords, in *The Bernina* is, that this is not law. If, then, the plaintiff is not identified with the driver when there is at least a determination of the will that he should go rather than refrain from going in the conveyance, it would seem that much less would there be any doctrine of imputability when the conduct of the plaintiff had been altogether without self-determination, as in the case we have been considering of very young children.

In the House of Lords, which affirmed the decision of the Court of Appeal, Lord Bramwell, though concurring in the decision on the case before the House, in a written opinion, which, however, was not delivered, supported the decision in *Thorogood v. Bryan* on the pleading.³ The declaration was, that the defendant, by her servant, so carelessly drove and directed the carriage and horses, that, by the negligence and improper conduct of her servant in that behalf, they ran against the deceased and knocked him down, &c., and by reason of the premises he died. The plea was "not guilty." Upon that issue it was for the plaintiff to prove that the deceased was killed by a negligent act in the defendant's driver; but this was not done by showing that he was killed by a negligent act of the defendant's driver, and another negligent act in the driver of the vehicle in which he was riding. Lord Herschell doubted⁴ whether, even as a pleading point, it would have been effectual if the facts were properly averred; since, in the case of a collision between two vehicles, if a person unconnected with either were injured, and were to sue either wrongdoer in respect of the injury, the defendant would not be able to maintain a defence that, but for the negligence of another person, the accident would not have happened; and the case of a passenger in no way differs.

The judgment of the House of Lords, however, was based on the broad ground of disapprobation of the doctrine of "identification," which, says Lord Herschell, "appears to me to beg the question, when it is not suggested that this identification results from any recognised

¹ 12 P. D., per Lord Esher, M.R., 82. The Supreme Court of the United States had previously declined to follow *Thorogood v. Bryan* in *Little v. Hackett*, 116 U. S. (9 Davis) 371: "We have only to consider," said the Court, "whether the relation of master and servant stated between them"—i.e., the passenger and the driver: and this had been decided adversely to the existence of the relation so far back as *Quarman v. Burnett*, 6 M. & W. 499.

² *L.c.* per Lindley, L.J., 87.

³ *Sub nom. Mills v. Armstrong*, 13 App. Cas. 1.

⁴ *L.c.* 9.

principles of law, or has any other effect than to furnish that defence, the validity of which was the very point in issue."¹

Lord
Bramwell's
test cases.

Lord Bramwell, in his opinion, puts several test cases,² which he considers are involved in the proposition affirmed by the House of Lords—viz., that a passenger is not identified with those in charge and control of the vehicle in which he is being carried in respect of their negligence, so as to be disentitled to recover for the negligence of third persons, in conjunction with that of those in charge and control of the vehicle which produced the injury. "If," says he, "the passenger can maintain the action, why cannot the owner of the carriage for injury to it?" Plainly, because he is in default. His duty was to provide a suitable vehicle; and, as against third persons, if he had servants, servants who would not be guilty of negligence; if he himself took charge he had to see that he himself was free from negligence. He has chosen to act in the engagement of servants; it is but fair, as against the third person, that he should not recover when, but for his default in the engagement of them, or at least for their defaults after he had engaged them, he sustains injury, which, had he not had negligent servants, would not have happened. If, as Lord Bramwell says, the maxim *Qui facit per alium facit per se* does not apply, the allied maxim *Respondet superior* would seem to do so.

The same reasoning applies where the owner is a passenger. The law contemplates him as driving his own vehicle; if he prefers to do it by deputy there seems every reason why he should answer for the hand he uses instead of his own, as if it were his own. "Suppose," says Lord Bramwell, again, "the owner's wife is a passenger, and injured, can she maintain such an action?" True, she cannot for personal injuries; because her position is a wholly exceptional one.³

Test proposed
by Lord
Watson.

The solvent proposed by Lord Watson for all these difficulties is the inquiry, Does the servant in charge of the vehicle look for orders to the passengers; or have they any further right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety? It has now been held that the proper question for the jury in this class of case must amount to, Did the negligence of those in charge of the vehicle, other than that in which the plaintiff was, in whole or in part, cause the accident? If the jury find it did, then the verdict must be for the plaintiff.⁴

American
cases.

The American cases had, previously to *Mills v. Armstrong*, most generally adopted the line of decision there marked out.⁵ There is a curious case, however, in the Supreme Court of the United States holding that where a person is injured on a vessel, through a "marine tort" arising partly from the negligence of the officers of the vessel and partly from his own negligence, and sues in Admiralty for damages

¹ *L.c.* 7.

² *L.c.* 13.

³ But by ss. 2, 12 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), she may obtain redress, as regards her husband by the same remedies, for injuries done to her property as any other person. In short, her husband may break her leg with civil impunity, but not her watch.

⁴ *Mathews v. London Street Tramways Co.*, 58 L. J. Q. B. 12. A curious case is *Nicholls v. G. W. Ry. Co.*, 27 Upp. Can. Q. B. 382.

⁵ See *Borough of Carlisle v. Brisbane*, 57 Am. R. 483, and notes 488-511. There is an instructive judgment, subsequent to the overruling of *Thorogood v. Bryan*, in *Dean v. Pennsylvania Rd. Co.*, 129 Pa. St. 514, 15 Am. St. R. 733, where the peculiar doctrine of the Pennsylvania Courts on this point is reconsidered, and where, on the special facts, a guest riding with the driver was held precluded from recovering.

for his injuries, he is not debarred from all recovery because of the fact that his own negligence contributed to his injuries.¹ This, whatever the merits of the decision, is clearly not the law of England. The Court of the United States, however, seems to have gone on the consideration that the rule of dividing damage between negligent shipowners is a rule of Admiralty practice, not merely in the case of ships injured by reciprocal negligence, but applicable generally in Admiralty suits. In the English cases, however, the rule is limited to ships² and does not extend to persons. But, further, the rule does not seem applicable to persons. The rule is, that the damage to both parties is to be divided by half. This, where the parties are ships, is intelligible, and there is reciprocity. Where one party is a person, the other a ship, all community ceases. The rule becomes one which allows a person injured in a marine collision for which he is somewhat to blame, to recover for a proportion of his injuries—a principle of which no traces can be found in Admiralty law, and which bears no relation to the principle which governs where ships only are concerned. The ship may be sold to compensate him, but he cannot be sold to compensate the ship. The damage he may do the ship will not unlikely be the merest scratch. The damage the ship will do him, will not improbably verge on destruction. The rule as applied to ships is founded on a rough equity that starting from an assumption of some equality of forces works out a theory of compensation on a common basis where there is common blame. As applied to a man and a ship, there is no common basis by which the relative damage can be appraised, neither does the policy of encouraging shipping avail. The reason of the rule ceasing, it is only natural that the rule itself should not apply.

Rule of dividing damage does not apply to personal injury in Admiralty.

¹ *The Max Morris*, 137 U. S. (30 Davis) 1. *Lebatt, Master and Servant*, 783, gives the cases; see also *The Samuel S. Thorpe* (1900), 99 Fed. R. 108, from which it may be inferred that the law in this sense is not yet fixed. See *Owen's case, The Bernina* (2), 12 P. D. 58, 84, 96.

² *The Myan*, 31 L. J. Adm. 105. *Chartered Mercantile Bank of India v. Netherland's India Steam Navigation Co.*, 10 Q. B. D. 521, 538, 546. The rule is stated, Addison, *Torts* (4th ed.), 401. *Reynolds v. Tilling*, 19 Times L. R. 539, only needs notice from the disagreement of the jury whether the defendant could have avoided the accident by the use of reasonable care. To entitle plaintiff to recover they must find this. If, as is suggested, the accident arose from driving a truck into an omnibus, there is a plain trespass, and recondite discussion on contributory negligence is not necessary. *Butterly v. Mayor, &c. Drogheda*, (1907) 2 I. R. 134.

CHAPTER VI.

LORD CAMPBELL'S ACT.

(9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95, otherwise called The Fatal Accidents Act, 1846. See Short Titles Act, 1896: 59 & 60 Vict. c. 14.)

*Actio person-
alis moritur
cum personâ.*

THE common law maxim, *Actio personalis moritur cum personâ*,¹ is not applicable to causes of actions on contracts; it relates to actions in tort alone where the remedy dies with the person, unless statutory law makes an exception.² Thus, at common law, no executor or administrator could maintain an action for the loss of the life of his testator or intestate; and for two reasons—first, because the law provides remedy for such mischiefs only as affect legal rights; and a man has not such a legal right in the life of his parent, or of his child, as he has in his own; for the relation between parents and their children give rise merely to what moralists call “imperfect obligations;”—and secondly, because it was considered impossible to form an estimate of the value of human life either to a man himself or to others connected with him.³

¹ Noy, Maxims, 14; *Wheatley v. Lanc.* 1 Wms. Saund. 216; 1 Wms. Exors. 10th ed. 604; Broom, Legal Maxims (7th ed.) 631; Com. Dig. Administration. (B 13.); Covenant (B 1.); Bac. Abr. Executors (N); *Le Mason v. Dixon*, Sir William Jones 173; *Morley v. Polhill*, 2 Ventr. 56. Sir John Hawles gives as a reason for the abatement of a civil action by the death of the defendant, that there may be matters of defence in his personal knowledge which are unknown to his representatives: 11 How. St. Tr. 476. “The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys”: *Phillips v. Homfray*, 24 Ch. D. 439, per Bowen, L.J., 454; 11 App. Cas. 466; 44 Ch. D. 694; *Finlay v. Chirney*, 20 Q. B. D. 494; *Boucker v. Evans*, 15 Q. B. D. 565. *In re Duncan* (1899), 1 Ch. 387. The early history of the maxim is given, Pollock and Maitland, History of English Law (2nd ed.), vol. ii. 258. Street, Foundations of Legal Liability, vol. iii. 60. Law Magazine, vol. 24, No. 310. “The maxim, *Actio personalis moritur cum personâ*, has a very limited application in the law of Scotland; and in evidence of that proposition. I need do no more than refer to the elaborate opinions of Lord Neaves and other judges in *Auld v. Shairp*, 2 Rettie 191”: *Wood v. Gray and Sons* (1892), A. C. 576, per Lord Watson, 580. *Bern's Executors v. Montrose Asylum*, 20 Rettie 859. L. Q. R., vol. x. 182. In Canada the maxim is discussed in *Monaghan v. Horn*, 7 Can. S. C. R. 409. By 15 & 16 Vict. c. 76 (The Common Law Procedure Act, 1852), s. 139. “The death of either party between the verdict and the judgment shall not hereafter be alleged for error so as such judgment be entered within two terms after such verdict.” This enactment applied to all actions whether they would have survived to an executor or not; *Kramer v. Waymark*, L. R. 1 Ex. 241. See, however, 46 & 47 Vict. c. 49, ss. 3, 7, and Order xvii. r. 1, R. S. C. 1883; *Sabbald v. Grand Trunk Ry. Co.*, 19 Ont. R. 164; *Waddell v. Ross*, 13 N. S. W. R. (Eq.) 13.

² Per Lord Abinger, C.B., *Raymond v. Fitch*, 2 C. M. & R. 597.

³ Per Parke, B., *Armsworth v. S. E. Ry. Co.*, 11 Jur. 758.

The earliest reported statement of the law as thus laid down is said to be in *Higgins v. Butcher*.¹ Plaintiff's wife died of an assault and battery by the defendant, for which plaintiff brought an action for damages. Tanfield, J., gave as the reason of the Court for their judgment: "If a man beat the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery, and loss of service, because, the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into a felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost." The reason is clearly wrong in the light of modern decisions;² the fact probably right with reference to established doctrine. Lord Ellenborough's *Nisi Prius* ruling in *Baker v. Bolton*,³ has in modern times been looked on as of determining weight on that point. Plaintiff seeking to recover damages for loss of his wife's services, the jury were directed that "the damages as to the plaintiff's wife must stop with the period of her existence;" since "in a civil court the death of a human being could not be complained of as an injury."⁴ This decision was generally followed both here and in America⁵ till 1873; when, in

history of
the law,
Higgins v.
Butcher.

Baker v.
Bolton.

¹ Yelv. 89. See *Midland Insurance Co. v. Smith*, 6 Q. B. D. 568.

² *White v. Spettigue*, 13 M. & W. 603. *Midland Insurance Co. v. Smith*, 6 Q. B. D. 561. See *Ex parte East* in *re Shepherd*, 10 Ch. D. 667.

³ (1808) 1 Camp. 493.

⁴ Bramwell, B., impugns this decision (L. R. 8 Ex. 96) thus: "This is only a *nisi prius* case, the plaintiff got £100 and probably was content. No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument." The decision is Lord Ellenborough's, reported by Lord Campbell, never questioned till *Osborn v. Gillett*, then approved. In 1839 the Attorney-General (Sir John Campbell), in arguing *Duncan v. Findlater*, 6 Cl. & F. 898, before the House of Lords, distinguishes the Scotch law from the English: "By the English law, if a man's wife or son should be killed on the spot, he could have no action against the person whose negligence had caused the death. The English law allows no *solatium* in this respect. The Scotch law, however, says more sensibly, that in such a case a *solatium* shall be granted." In *The Vera Cruz* (1884), 9 P. D. 101, Bowen, L.J., says: "The killing of the deceased *per se* gives no right of action at all, either at law or under Lord Campbell's Act." It is irrelevant whether "Lord Bramwell's judgment is unanswerable on principle"—that is, on moral principle with reference to modern ideas, or juristic principle derived from some abstract standard outside the province of an expositor of the law; to quote the words of Kelly, C.B., L. R. 8 Ex. 100: "We must leave it to the Legislature to provide for a case like this," and "we ought not to take upon ourselves to create a new cause of action which would be to make and not to expound the law." *Osborn v. Gillett* was much considered in *Monaghan v. Horn*, 7 Can. S. C. R. 409, especially by Taschereau, J., who regards the case as concluding the point raised. Cp. Bell, Principles of the Law of Scotland (9th ed.), § 2029.

⁵ See the cases cited in the defendant's argument in *Osborn v. Gillett*, L. R. 8 Ex. 88. The whole course of the authorities is to be found in *The Harrobury*, 119 U. S. (12 Davis) 199. There, after examining the rule in most of the chief legal systems, the common law rule in America is determined to be identical with that established by the English decisions. There is also a mine of learning illustrative of the Roman, Spanish, French, and English authorities bearing on the proposition:—"An action for damages caused by the homicide of a free human being cannot be maintained" in *Hugh v. New Orleans & Carrollton Rd. Co.*, 6 La. Ann. 495; and *Hermann v. New Orleans & Carrollton Rd. Co.*, 11 La. Ann. 5. See *The Corsair*, 145 U. S. (38 Davis) 335, 348. The liability of one, through whose wrongful act another has been killed, to compensate third persons for damages caused by the wrongful act has been several times discussed. In *Connecticut Mutual Life Insurance v. New York, &c. Rd. Co.*, 25 Conn. 265, an insurance company sued unsuccessfully a railway company for the value of a policy they had been compelled to pay by reason of the death of the assured through the railway company's negligence; and the principle was formulated that, where one person has contractual relations with another an injury inflicted on the latter, which disastrously affects those relations, does not constitute a legal injury to the former. A similar conclusion is expressed in *Insurance Company v. Brame*, 95 U. S. (5 Otto) 754; *Lee v. Hill*, 24 Am. St. R. 666. *Malcahey v. Washburn Car Wheel Co.*, 145 Mass. 281, 1 Am. St. R. 458, decides that if a person

Osborn v. Gillett.

Osborn v. Gillett,¹ the Court holding that, where the relation of master and servant exists, a master cannot maintain an action for injuries which cause immediate death to his servant; Bramwell, B., dissented very strongly on the ground that no reason can be given for such a rule; while to establish such a rule without reason requires very clear authority. This dissent occasioned a vigorous onslaught against the doctrine approved by the Court; till the matter was set at rest by the decision of the Court of Appeal in *Clark v. London General Omnibus Co.*,² holding that neither at common law nor under Lord Campbell's Act can a father recover the expenses incurred by him in burying an infant daughter residing with him and whose death was caused by defendants' negligence. The reason for the common law rule is not hard to find by those who are acquainted with the history of the working classes previously to the immense reduction in their numbers by the visitation of the Black Death in 1348, which in the opinion of the landowners made necessary the Statute of Labourers³ and its successors. In times when yearly hirings were the universal rule and the servants lived in the master's house, while the supply of labour was in excess of the demand, an injury which left a sick servant on the master's hands was a cause of expense and loss. A servant killed made way for another glad for the preferment.

9 & 10 Vict.
c. 93.

By 9 & 10 Vict. c. 93, the common law is so far limited that an action is given against a person who by his wrongful act occasions the death of another.

Section 1 of that statute enacts that "Whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

By section 2, "Every such action shall be for the benefit of the wife, husband, parent, and child⁴ of the person whose death shall have been so caused, and shall be brought by, and in the name of, the executor and administrator of the person deceased, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties

mortally injured survives but a moment, and suffers, a right of action accrues and survives to the personal representatives. Thompson, *Negligence*, §§ 6976-7149.

¹ L. R. 8 Ex. 88; *Appleby v. Franklin*, 17 Q. B. D. 93, 94.

² (1906) 2 K. B. 648, overruling *Bedwell v. Golding*, 18 Times L. R. 436.

³ 23 Edw. 3. The preamble runs thus: *Quia magna pars populi et maxime operariorum et seroientium nuper in pestilentia moriebatur, nonnulli videntes necessitatem Dominorum et paucitatem seroientium, servire noluerunt, nisi salaria reciperent excoactiva, et alii mendicare valentes in otio quam per laborem perquirere victum suum.* Chapter 8 of this statute provided that the taker of more wages than is accustomedly given shall pay the surplussage to the town where he dwelleth, towards a payment to the King of a tenth and a fifteenth granted to him.

⁴ The mother of an illegitimate child has by the law of Scotland no right to sue in respect of negligence causing its death: *Clarke v. The Carfin Coal Co.* (1891), A. C. 412; *Wood v. Gray and Sons* (1892), A. C. 576.

in such shares as the jury by their verdict shall find and direct."¹
 This section was amended by 27 & 28 Vict. c. 95, s. 1, which provides 27 & 28
 that where no action is brought within six months by the representative, Vict. c. 95.
 then an action may be brought by persons for whose benefit such
 action would have been brought if it had been brought by the personal
 representative. Section 2 provides that the defendant may pay
 money into court in one sum without specifying the shares into which
 it is to be divided.

By section 3 of the principal Act (9 & 10 Vict. c. 93) "Not more
 than one action shall lie for and in respect of the same subject-matter
 of complaint;" and "Every such action shall be commenced within
 twelve calendar months after the death of such deceased person."

By section 4 the plaintiff on the record is to deliver full particulars
 of the person or persons on whose behalf any action shall be brought
 and of the nature of the claim made; and section 5 defines the word
 "parent" as used in section 2 as including respectively father and
 mother, grandfather and grandmother, stepfather and stepmother;
 and the word "child" as including son and daughter, grandson and
 grand-daughter and stepson and stepdaughter.

The first point that arose under the Act was to determine by what
 legal principles the right to compensation should be determined. Legal prin-
 In *Armsworth v. S. E. Ry. Co.*, Parke, B., thus der' with it:² ciples deter-
 "You cannot estimate the value of a person's life to his relatives. No mining the
 sum of money could compensate a child for the loss of its parent; and right to
 it would be most unjust if, whenever an accident occurs, juries were compensation
 to visit the unfortunate cause of it with the utmost amount which they under the
 think an equivalent for the mischief done. Here you must estimate Act.
 the damage by the same principle as if only a wound had been inflicted. Parke, B.'s,
 Scarcely any sum could compensate a labouring man for the loss of ruling in
 a limb, yet you don't in such a case give him enough to maintain *Armsworth v.*
 him for life; and in the present case you are not to consider the value *S. E. Ry. Co.*
 of his existence as if you were bargaining with an annuity office; for
 in that view you would have to calculate all the accidents which might
 have occurred to him in the course of it, which would be a very difficult
 matter. I therefore advise you to take a reasonable view of the case,
 and give what you consider a fair compensation."

The main principle is that compensation is to be determined by
 considering what the man himself would be entitled to if he were alive Considered.
 and suing, and not his representatives. This involves a compensation
 for pain and suffering, but excludes payment for wounded feelings due
 to the death. Where the deceased worked for a weekly wage—it
 would be identical with the loss of wages, with a deduction to meet
 the contingency of the means of earning wages being defeated by other
 circumstances, plus the pain, suffering, and expenses during a long
 illness. In cases of instant death it admits the loss of wages as far as
 the survivors had expectation of benefit from them only, subject, as
 before, to contingencies that might have prevented their being earned.
 In cases where the deceased was in possession of an income from

¹ For the wrongful killing of his infant ward, a guardian has no right of action
 except to reimburse the ward's estate for expenditure made for care and medical
 attendance or for funeral expenses; the right of action for loss of services during
 minority is for the father or mother. *Louisville, &c. Ry. Co. v. Goodykroontz*, 12
 Am. St. R. 371; note (Measure of damages) 375-383. As to funeral expenses, see per
 Bramwell, B., L. R. 8 Ex. 99; but also *Dalton v. S. E. Ry. Co.*, 4 C. B. N. S. 290.

² (1847) 11 Jur. 760.

invested property, it would seem to give compensation for pain and suffering, but for nothing further. The case of a man with a fixed annual income—a pension, say—terminable by death alone, could not possibly be met “by the same principle (of assessing damage) as if only a wound had been inflicted,” so far as the death affects the surviving relatives.

Parke, B.'s,
test inadequate.

The test suggested was, therefore, obviously inadequate, as far as it professed to be positive; in so much as it did not clearly discriminate between the principle of damages applicable under the Act and the general principles of damages in the case of actions for personal injuries; and between the different position the plaintiff is placed in when suing for the death of another under the Act, and the case of a plaintiff in an ordinary action of personal injury suing for damages to himself. In its negative aspect it indicates that the loss to the survivors in the inclusive meaning of the term, embracing as well the sentimental affections as the pecuniary interests, could not be the right principle, and thus it tends to eliminate one uncertain element. The inclusion of sentimental regards as matter for compensation was, however, contended for, in the next reported case, by Sir Frederick Thesiger before Pollock, C.B.,¹ in the Court of Exchequer. Evidence tending to show circumstances that accentuated the loss, yet which did not go to pecuniary loss was there rejected. “It is,” said the C.B., “a pure question of pecuniary compensation, and nothing more, which is contemplated by the Act, no matter who or what the survivors may be.” “The meaning of this enactment is this:—If a man's life be valuable to his family by reason of his possession of an annuity, his family have now a right to say, ‘We have lost the life on which this annuity hung,’ and they may claim compensation for that loss, but nothing more; they cannot enter into the question of the shock to their feelings.”²

Pollock,
C.B.'s,
opinion in
Gillard v.
Lancs. &
Y. Ry. Co.
Modified in
Pym v. G. N.
Ry. Co.

This opinion was to some extent qualified by Pollock, C.B., in *Pym v. G. N. Ry. Co.*, where he says:³ “I am not prepared to say that what is imputed to me [in *Gillard v. Lancs. & Y. Ry. Co.*] is correct law—namely, that the statute enables the family to recover that which the deceased would himself have sued for, had the accident not terminated fatally; probably the case of a tenant for life of a large landed property was not within my contemplation. I agree, however, in the doctrine that the damages must be given for pecuniary loss alone.”

Blake v.
Midland
Ry. Co.
Direction of
Parke, B.

The two cases we have already considered were rulings at *Nisi Prius*; *Blake v. Midland Ry. Co.*,⁴ the next case, went to the Court of Queen's Bench. Parke, B., told the jury “be thought there was great difficulty in fixing any measure but that of pecuniary injury; but that, if they considered the plaintiff entitled to any compensation for the bereavement she had sustained, beyond the pecuniary loss, they were to make their estimate accordingly.” The learned judge suggested to the jury to estimate the pecuniary loss by taking as

¹ *Gillard v. Lancs. & Y. Ry. Co.* (1848), 12 L. T. (O. S.) 356.

² Sir Frederick Thesiger, in showing cause in *Blake v. Midland Ry. Co.*, remarked on this ruling of the Chief Baron: “The learned judge entertains views which may probably be deemed peculiar on the subject of compensation for personal suffering. When at the bar, his lordship, as counsel for the plaintiff in *Carpue v. L. & B. Ry. Co.*, avowedly withdrew from consideration as a subject of damages the bodily suffering which the plaintiff had undergone.”

³ 4 B. & S. 402.

⁴ (1852) 18 Q. B. 93, 96.

much of the annual income as a wife living with her husband, and maintained according to her station in life, might be supposed to enjoy, and, considering this as an annuity, to reckon its value at so many years' purchase as it was worth, reference being made to the ages of the husband and wife; then to deduct any sums the wife might be entitled to by reason of the death of the husband, and to award the balance as compensation under the statute. It was objected that allowance was not made for contingencies which might lessen the annual amount supposed to be enjoyed by the wife during the husband's lifetime; and the learned judge admitted these should be considered, although they were very difficult to estimate. The jury having found for the plaintiff, a new trial was moved for, on the ground, first, that the damages, if calculated on pecuniary loss alone, were excessive, and that the jury had not been directed with sufficient exactness; secondly, that they should have been expressly directed to take nothing into consideration in the assessment of damages except actual pecuniary loss. A considered judgment was delivered by Coleridge, J. He clears away the difficulty of those cases not provided for by the rule as originally laid down by Parke, B.,¹ where the deceased suffered in a long illness, and where, if the measure of damages was what was a fair compensation to the deceased, damages would be recoverable for the pain and suffering, by the observation: "This Act does not transfer this right of action to the representative, but gives to the representative a totally new right of action on different principles."² The measure of damages is defined to be, "not the loss or suffering of the deceased, but the injury resulting from his death to his family." The conclusion of the Court is, "that the learned judge at the trial ought more explicitly to have told the jury that, in assessing the damages, they could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband; and that, as the damages certainly exceeded any loss sustained by her admitting of a pecuniary estimate,³ they must be considered excessive." The law has since been considered settled in this sense.

Judgment of the Queen's Bench delivered by Coleridge, J.

The next point raised was, whether the pecuniary loss resulting to the plaintiff from the death in respect of which he sues, must arise from an actual benefit receivable, or whether reasonable expectation of pecuniary benefit is sufficient. In *Franklin v. S. E. Ry. Co.*,⁴ the plaintiff, who was old and infirm, had received assistance

Question whether damages must be confined to those arising from actual legal obligation, or whether a reasonable expectation of pecuniary benefit should be admitted. *Franklin v. S. E. Ry. Co.*

¹ *Armsworth v. S. E. Ry. Co.*, 11 Jur. 758, 760.

² In *Senior v. Ward*, 1 E. & E. 393, Lord Campbell said: "We conceive that the Legislature, in passing the statute on which this action is brought, intended to give an action to the representatives of a person killed by negligence only where, had he survived, he himself, at the common law, could have maintained an action against the person guilty of the alleged negligence."

³ The Scotch law, which was referred to in the argument, is different from the English, and admits of a solatium for wounded feelings, and also for the pain and suffering inflicted on the deceased: Bell, Principles of the Law of Scotland (9th ed.), § 2029; *Dow v. Brown*, 6 Dunlop, 534; *Neilson v. Rodgers*, 16 Dunlop 325, 603; *Auld v. Shairp*, 2 Rettie, 191; *M'Master v. Caledonian Ry. Co.*, 23 Sc. L. R. 181; *Aitkin v. Gowlley*, 5 Fraser 585. By that law a party whose interests had been injured by a murder might maintain a civil action for damages called an action of *assythement* against the murderer. A verdict finding the prisoner guilty of the murder would be conclusive against him, but an acquittal was not conclusive in his favour as against the claim for damages. *MacLarty v. Campbell*, Morr. Dict. 12541, cited *Ralston v. Rowat*, 1 Cl. & F. 428. The dissection of a human body without the consent of a near relative has by the same law been held ground of action for solatium. *Pollak v. Workman*, 2 Fraser 354.

⁴ (1858) 3 H. & N. 211.

from his son to the extent of 3s. 6d. a week. The son was killed by the negligence of the defendants; the father brought an action for compensation. Bramwell, B., left to the jury whether the plaintiff had a reasonable expectation of any, and what, pecuniary benefit from the continuance of the life of the deceased. The jury found for the plaintiff. The Court made absolute a rule for a new trial, solely on the ground that the damages were excessive. On the question of what was the right direction, the direction of the judge was upheld. Pollock, C.B., said: "We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough; and such reasonable expectation might well exist, though, from the father not being in need, the son had never done anything for him." Nevertheless, the loss must be one arising out of the relationship, and not merely from the determination of a contract between them; as where the son was a skilled workman employed at the market rate of wages.¹

Bramall v. Lees.

Franklin v. S. E. Ry. Co. merely follows *Bramall v. Lees*.² A chemist by mistake for tincture of rhubarb sent laudanum, which was administered to a child and caused death. The child was only twelve years old. It was proved that at the time of the administration of the laudanum the child was living at home getting nothing, and was, pecuniarily, a burden to its parents. Notwithstanding this the plaintiff, the father, obtained a verdict; but Crompton, J., doubting whether the plaintiff could recover, a rule was moved for, and granted, as stated by Pollock, C.B., "not so much on the doubt the Court entertain, as from the importance of the question, and there having been, undoubtedly, a view taken by the learned judge which, I believe, he does not now entertain." The rule was, however, afterwards abandoned.³

Dalton v. S. E. Ry. Co.

The Common Pleas, in *Dalton v. S. E. Ry. Co.*,⁴ expressed their "entire concurrence" with the judgment of the Court of Exchequer in *Franklin v. S. E. Ry. Co.*, that "legal liability alone is not the test of injury in respect of which damages may be recovered under Lord Campbell's Act." As to a further question, whether the expenses of the funeral and mourning should be allowed, the Court said: "The subject-matter of the statute is compensation for injury by reason of the relative not being alive; and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral or in putting on mourning for his loss."

Funeral and mourning expenses not allowed.

Duckworth v. Johnson.

What is "reasonable expectation" of pecuniary benefits from the life of the deceased was again mooted in *Duckworth v. Johnson*.⁵ A father sued for damages for the death of his son, aged fourteen years, caused by the defendant's negligence. Two years and a half before the accident the boy earned 4s. a week, though at the time he was killed he was not in any employment. A verdict was given for plaintiff.

¹ *Sykes v. N. E. Ry. Co.* (1875), 44 L. J. C. P. 191.

² (1857) 29 L. T. O. S. 111.

³ 29 L. T. (O. S.) 166.

⁴ (1856) 4 C. B. N. S. 296. See per Bramwell, B., in *Osborn v. Gillett*, L. R. 8 Ex. 99.

⁵ (1859) 4 H. & N. 653. *Condon v. Great Southern & Western Ry. Co.*, 16 Ir. C. L. R. 415, is a similar case. A widow sued for damages upon the death of her son, a boy of fourteen, who had never earned wages, but whose capability was valued at sixpence a day. The Irish Court of Exchequer held that the probability of his earning more and devoting part of his earnings to his mother is evidence to go to the jury upon the question of damages; also that his past filial conduct is evidence.

The Court refused a new trial on the ground that the question of value to the father was a matter to be submitted to the jury. The test applied is whether there is "some evidence of a prospect of benefit."¹ Bramwell, B., was reluctant to leave so wide an issue to the jury; "for if the jury are solely to judge in such matters in every case where a child is killed it will be difficult to prevent them from giving damages by way of solatium; whereas if the plaintiff is compelled to give evidence of the value of the child's services and the cost of maintaining him it might keep the matter straight and prevent injustice being done."²

In *Pym v. G. N. Ry. Co.*,³ the facts showed that the deceased was a man of considerable landed property, which, by his death, went in greatest part to his eldest son. The property was thus undiminished, though the mode of its distribution was affected. An objection was taken, that since had death not ensued from the effects of the accident, deceased could have had no right of action against the defendants in respect of a pecuniary loss, arising only on his death the action could not be maintained by his representatives, & hose right was a mere continuance of that which would have accrued to the deceased if he had lived. This was thus met by Cockburn, C.J.: "The condition that the action could have been maintained by the deceased if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default, complained of. Thus, if the deceased had, by his own negligence, materially contributed to the accident whereby he lost his life, as he, if still living, could not have maintained an action in respect of any bodily injury, notwithstanding there might have been negligence on the part of the defendants, the present action could not have been supported. But supposing the circumstances of the negligence to have been such that, if death had not ensued, the deceased might have brought an action in respect of any injury arising to him from it, we are of opinion that his representative may maintain an action in respect of an injury arising from a pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to the deceased had he lived."⁴

Assuming a right of action, it was next contended that, as the deceased was possessed of a fortune, which would not be diminished by his death, and which passed to the class of relatives whom the statute meant to protect, there was no loss caused by his death. The short answer to this, as given in the Exchequer Chamber, is, that the remedy is given, not to a class, but to individuals; and therefore those of the class who sustain actual pecuniary loss may sue, though others of the class are large pecuniary gainers by the death. "The principle which governs these cases," says Erle, C.J., is "to consider whether there was evidence of a reasonable probability of pecuniary benefit

Pym v. G. N. Ry. Co.

Right of action not a mere continuance of deceased's right.

Right of action not for the benefit of a class but of individuals.

The principle.

¹ 4 H. & N., per Watson, B. 659.

² *Chapman v. Rothwell* (1858), E. R. & E. 168, as far as it relates to Lord Campbell's Act, is only on a pleading point whether plaintiff, suing as administrator, could recover without express allegation of pecuniary damage.

³ (1862) 2 B. & S. 759, 4 B. & S. 306.

⁴ 2 B. & S. 767. In *Seward v. Vera Cruz*, 10 App. Cas. 59, 70, Lord Blackburn described the action under Lord Campbell's Act "as an action which is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent or child, who under such circumstances suffers pecuniary loss by the death."

to the parties if the death of the deceased had not occurred; and was it lost by reason of that death, caused by the wrongful act, neglect, or default of the defendants? If this were so, then there is a case which the judge must leave to the jury."¹

Distinction between expenses caused by the injury and by the death.

A distinction was drawn in *Boulter v. Webster*² between expenses caused by the injury and by the death. *Dalton v. S. E. Ry. Co.*³ had declared that a claim for funeral expenses could not be maintained. In *Boulter v. Webster* it was sought to substantiate a claim for medical expenses incurred during the illness of the child consequent upon the accident. The Court refused to entertain it, and ruled that the damages recovered under the Act must, in all cases, be in the nature of special damage, and that no action is maintainable upon the Act for merely nominal damages.

Condon v. G. S. & W. Ry. Co.

This is consistent with the Irish case of *Condon v. Great South and Western Ry. Co.*,⁴ where it was suggested that "any service, however small," such as might, if rendered by a daughter to a parent, enable the parent to sustain an action for her seduction, would constitute a sufficient ground to entitle the plaintiff to damages under Lord Campbell's Act. The Court refused "any sanction to that argument," and added: "Between the small amount of service which may be sufficient in many cases to save the plaintiff from a nonsuit on the technical ground on which an action for seduction is still held unsustainable, without some proof of actual services showing that the female, who had been seduced, was, at the time of the seduction, the plaintiff's servant, and the pecuniary loss which must be proved in an action under Lord Campbell's Act, there is no sort of analogy."

Bourke v. Cork & Macroom Ry. Co.

This doctrine was further expounded in two other Irish cases, *Bourke v. Cork and Macroom Ry. Co.*,⁵ and *Holleran v. Bagnell*.⁶ In the former, the father, a respectable tradesman, whose position made him independent of any earnings his son might have afterwards been competent to gain, sued for damages for the death of the son caused by the defendants' negligence. The Exchequer Division held him not entitled to recover; on the ground, first, that a reasonable expectation must be shown that profit would be made by the continuance of life; and secondly that there must also be a reasonable expectation that some part of the profit so made would become the property of the person on whose behalf damages are claimed either as

¹ 4 B. & S. 406. Cp. *Beckett v. Grand Trunk Rd. Co.*, 13 Ont. A. R. 174; and *St. Lawrence & Ottawa Rd. Co. v. Lett*, 11 Can. S. C. R. 422, where it was held that although on the death of a wife caused by the negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife which have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother. At 433 Ritchie, C.J., said: "I think the term injury in the statute means substantial injury as opposed to mere sentimental." . . . "I am free to admit that the injury must not be sentimental, nor the damages a mere solatium, but must be capable of a pecuniary estimate, but I cannot think it must necessarily be a loss of so many dollars and cents capable of calculation." Gwynne and Taschereau, J.J., dissented, on the ground that pecuniary compensation proportionate to an injury done to a person by such a person being deprived of anything, should be the value expressed in money of the thing of which they have been deprived; and that where a money standard is not accurately applicable there can be no recovery. The controversy in Canada is settled by *Grand Trunk Ry. Co. v. Jennings*, 13 App. Cas. 800. See also *post*, 191, note 1.

² (1865) 11 L. T. (N. S.) 598.

³ 4 C. B. (N. S.) 296.

⁴ (1865) 16 Ir. C. L. R. 421.

⁵ (1879) 4 L. R. Ir. 682; *Johnston v. G. N. Ry. Co.*, 26 L. R. Ir. 691.

⁶ 6 L. R. Ir. 333.

of bounty or of right. "*Bridges v. North London Ry. Co.*," says Pales, C.B. Pales, C.B., "and other cases, decide that in determining the preliminary question whether there is evidence to go to the jury in support of any particular proposition, we must take notice of, and, to a certain extent, act upon, the ordinary experiences of human life. Acting upon this experience, my view is, that this boy would have been more likely a source of expense than of profit to his father. But, be this as it may, it is clear that, up to the moment of the unfortunate occurrence in which he met his death, he had never contributed one sixpence to the support of the family. It is equally clear that the position of the father was such as to put him far beyond the necessity of resorting for his support or otherwise to the earnings of his child. The case is one in which there was no moral duty upon the part of the child to contribute any portion of his earnings to the parent or family."

In the other case² the child killed was about the age of seven, and the only evidence of pecuniary loss was that she had been in the habit of rendering trifling household services. The language of Morris, C.J., falls somewhat short of that used in *Bramall v. Lees*,³ and *Duckworth v. Johnson*.⁴ He states once again that "the loss must be a pecuniary loss, actual or reasonably to be expected, and not as a solatium;" and adds a proposition, eminently reasonable in itself, but which is not found in the English cases: "And there should be distinct evidence of pecuniary advantage in existence prior to, or at the time of, the death. This advantage must be a benefit to the plaintiff." "There is no instance," says the learned judge, "of an action for loss caused to a plaintiff by the death of a person of the tender age of the deceased"—seven years.

The rule suggested by Morris, C.J., that there must be distinct evidence of pecuniary advantage in existence prior to, or at the time of the death (interpreting the term "pecuniary advantage" by the clause "actual or reasonably to be expected"), would go to meet the difficulty pointed out by Bramwell, B., in *Duckworth v. Johnson*.⁵ Still the rule, as suggested, can scarcely be reconciled with *Bramall v. Lees*.⁶ for there, though the child was twelve years old, she had never earned anything, and, beyond the mere fact that she was five years older, there do not seem to have been any facts warranting an inference more in favour of her ability to earn than in the case of *Holleran v. Bagnell*.

The Irish Court of Exchequer considered the matter again in *Hull v. The G. N. Ry. Co. v. Ireland*.⁷ The action was brought by the plaintiff, a laundress, for the death of her mother, who was killed in a railway accident. Negligence was admitted by the defendants, who traversed plaintiff's pecuniary loss. It was proved that the deceased lived with the plaintiff, by whom she was lodged and maintained; and that the deceased assisted in the laundry, in keeping house and cooking and serving meals. It was not, however, shown that the value of the services of the deceased exceeded the cost of her

¹ L. R. 6 Q. B. 377; L. R. 7 H. L. 213.

² 29 L. T. (O. S.) 111.

³ 4 H. & N. 653.

⁴ 6 L. R. Ir. 333.

⁵ 4 H. & N. 653.

⁶ 29 L. T. (O. S.) 111.

⁷ 26 L. R. Ir. 289, per Pales, C.B. 294. In *Wolfe v. G. N. Ry. Co.*, 26 L. R. Ir. 542. Fitzgibbon, L.J., said, at 562, "I accept the Chief Baron's judgment in *Hull v. The G. N. Ry. Co.* as to the onus of proof . . . but I cannot admit with Murphy, J., that it overruled *Duckworth v. Johnson*. It could not do so; and though Murphy, J., disapproved of *Duckworth v. Johnson*, the Chief Baron distinguished it, and only went so far as to share the doubt expressed by Lord Bramwell."

Palles, C.B.'s, judgment. support. "I entertain a clear opinion," says Palles, C.B., "that the verdict cannot stand, having regard to the ordinary principles as to *onus* of proof. To maintain the action there must have been pecuniary loss to the plaintiff caused by the death. The existence, therefore, of such loss must be affirmatively established. To do so, it is not sufficient to prove a state of facts which is as consistent with the absence, as with the existence, of such loss. It follows that if that loss depends upon something which may or may not exist, but the existence of which has not been proved, and cannot reasonably be inferred from the facts in proof, the plaintiff must fail; and if the fact in question be one nearly within the knowledge of the plaintiff and not of the defendants, the difficulty of inferring it when not directly proved is increased." "I doubt whether *Duckworth v. Johnson* is an authority in favour of the plaintiff. There the boy's wages were fixed—four shillings a week. The alleged vagueness was in the value of his support; but if the gross earnings of the family were proved (as possibly they may have been, although it does not appear in the report), the decision of the three judges who thought the evidence sufficient would be correct. For myself, however, taking the evidence in that case as reported, I share the doubt expressed by Lord Brnmwell in his judgment; and if the decision can be pressed to the extent of sustaining the present verdict, I must, with great deference, decline to follow it." "Following the principle acted upon in this Court in *Bourke v. Cork and Macroom Ry. Co.*,¹ I hold that the evidence at this trial was insufficient to sustain the plaintiff's case, and that the verdict must be set aside. But for *Duckworth v. Johnson* I should be of opinion that this verdict should be entered for the defendants; but as there is some doubt whether the omission to give evidence of the pecuniary value of the services was not in consequence of that decision, which was to a certain extent recognised in this Court in *Condon v. Great Southern and Western Ry. Co.*,² I think that the plaintiff ought not to be concluded by it, and that consequently there should be a new trial."

Wolfe v. G. N. Ry. Co. of Ireland.

In the subsequent case of *Wolfe v. G. N. Ry. Co. of Ireland*, Fitzgibbon, L.J., said: "I think the true question is stated by the Chief Baron in *Hull v. G. N. Ry. Co.*,³ viz.—has the plaintiff sustained the primary *onus* of proof? If he has, the *onus* of rebutting it is shifted to the defendants. This question must be determined in each case on its own facts, and authorities are material only as instances." The facts showed that a child of ten who had been negligently killed on the defendants' line did "the work of the house" for her father and mother; and there was further evidence that the parents were obliged to hire a substitute at three-and-sixpence a week and her keep. This the six judges of the Irish Court of Appeal held to be evidence sufficient to go to a jury, and which would justify them in concluding that the services were of pecuniary value exceeding the cost of maintenance and education. Any expressions then in *Duckworth v. Johnson*⁴ which go to lay down a rule that in every case where a child is killed, the jury are to determine whether damages have been sustained, must be taken to be seriously discredited by the doubts both there and in the succeeding cases.

In what circumstances services are to be considered as rendered gratuitously or for remuneration was the subject of decision in a Scotch

Services—
whether
gratuitous or
remunerated.

¹ 4 L. R. Ir. 682.

² 16 Ir. C. L. R. 415.

³ 26 L. R. Ir. 548, 566.

⁴ 26 L. R. Ir. 289.

⁵ 4 H. & N. 653.

case,¹ which indicates that the question of remuneration depends, not upon any general presumption, but on the consideration of the whole surroundings in which the services are performed; if any general presumption in favour of services exist, it is at best a weak one, and easily rebutted by indications that the services are intended to be gratuitous.

A somewhat different aspect of the question just discussed was treated in *Hetherington v. N. E. Ry. Co.*,² where a father, fifty-nine years of age and infirm, sued for the death of a son who had contributed to his support five or six years previously, while the father had been out of health, and who had not done so since. "I have always," said Field, J., "understood the rule laid down by the decisions in such cases to be that there must have been a reasonable expectation of pecuniary advantage to the relation from the life of the deceased. The defendants' counsel alleges that there is no evidence of any such reasonable expectation in this case. I cannot come to that conclusion."

Hetherington v. N. E. Ry. Co.

The elements of "pecuniary loss" were considered in *Rowley v. L. & N. W. Ry. Co.*³ The plaintiff sued, for the benefit of the mother, wife, and children of the deceased. The mother was entitled to an annuity of £200 during the joint lives of herself and the deceased, secured by his personal covenant. Kelly, C.B., told the jury that "they might, if they thought proper, calculate the damages which the mother of the deceased was entitled to recover, by ascertaining what is the sum of money which would purchase an annuity of £200 for a person sixty-one years of age (the age of the mother), according to the average duration of human life; that, according to the Carlisle Tables, it had been stated that the average duration of the life of a man in good health and vigour, who had arrived at the age of forty years [the age of the deceased], is twenty-seven years and a fraction; and that they might, if they thought proper, take as a guide in their calculations of the damages recoverable for the wife and children that such was, according to these tables, the probable duration of the life of a man of forty years of age in the circumstances in which the deceased was."

Rowley v. L. & N. W. Ry. Co.

Kelly, C.B., summing up.

To this direction, so far as it referred to the case of the mother, three errors were assigned. First, that she had lost an annuity for the joint lives of herself and her son, and that an annuity for her own life only would be of considerably greater value. An oversight to this extent was admitted, and the matter was treated as an obvious slip, which must have been corrected had it been pointed out.

Errors alleged. Annuity for joint lives lost.

Secondly, that the value of an annuity would be that on an average life; and the jury ought to have been told to make an allowance for any defect in the health of the life.

Value of annuity on an average life.

On this point, Blackburn, J., said: "The particular life on which an annuity is secured may be unusually healthy, in which case the value of the annuity would be greater than the average; or it may be unusually bad, in which case the value would be less than the average;" . . . "We think" "the jury might properly be directed to consider

¹ *Thomson v. Thomson's Trustees*, 16 Rottie 333, per Lord Shand, 335. See a discussion on "reasonable expectation of benefit," *Mason v. Bertram*, 18 Ont. R. 1. "What," says Fitzgibbon, L.J., in *Wolfe v. G. N. Ry. Co.*, 26 L. R. Ir. 566, "is the 'pecuniary damage' of which the plaintiff must give evidence? In my opinion damage capable of being estimated in money and of being compensated by money."

² (1882) 9 Q. B. D. 160.

³ (1873) L. R. 8 Ex. 221. *Central Vermont Ry. Co. v. Franchere*, 35 Can. S. C. R. 68.

the lives in question as average lives, unless there was some evidence to the contrary; and if there was evidence to the contrary, the party excepting ought to have placed it on the bill of exceptions."¹ That is, there being evidence of damage to go to a jury, it is not a misdirection to tell them they must assume it is a normal and not an abnormal case. Honyman, J., dissented from this, without giving his reasons.

Value must be on Government or other very good security. Further exception as to the probable duration of the man's life. Majority of the Court held that the probable duration by actuaries' tables was an element for the consideration of the jury. Brett, J.'s, dissent.

Thirdly, that "the value of the annuity spoken to in the evidence was the value of an annuity on Government or other very good security; and that the annuity lost was that secured by the personal covenant of the deceased, and therefore of much less value." This also was allowed.

There was further an exception that the learned judge should not have directed the jury that they "might, if they thought proper, take as a guide, in the calculation of the damages recoverable for the wife and children of the deceased, that the probable duration of the life of a man of forty years of age in the circumstances in which the deceased was is twenty-seven years, according to the Carlisle Tables." Blackburn, J., and the majority of the Court construed the meaning of the judge to be that this was an element to be taken into consideration by them with the rest of the evidence; and held that if so, it was unexceptionable. Brett, J., dissented,² on the ground that the invariable direction to juries, from the time of the earliest cases on the statute until then had been "that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, *under all the circumstances, a fair compensation.*" "I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount, which would be an equivalent for the pecuniary injury, would be unjust. Founding my opinion on that conviction, on the declaration of it by Parke, B.,³ and on the ordinary directions of judges, which directions have not been for years challenged, I conclude that the direction that I have enunciated is the legal, and only legal, direction. A direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law."⁴ Brett, J., was

¹ In *Vicksburg, &c. Rd. v. Putnam*, 118 U. S. (11 Davis) 545, Gray, J., says, 556, "Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what the jury in this case had to consider was the probable duration of the plaintiff's life, and of the injury to his capacity to earn his livelihood."

² L. R. 8 Ex. 231. Possibly the great mercantile experience of the learned judge suggested the two kinds of indemnity obtainable under a contract of insurance. See 3 Kent, Comm. 335; *Pitman v. Universal Marine Insurance Co.*, 9 Q. B. D. 192.

³ *Armsworth v. S. E. Ry. Co.*, 11 Jur. 758. Reference to the case will show that Parke, B., was speaking of "an equivalent for the mischief done," in the sense of full compensation, not only for actual loss, but for injured feeling. *E.g.*, "No sum of money could compensate a child for the loss of its parent." This is even more obvious from the sentence, "Scarcely any sum could compensate a labouring man for the loss of a limb." If it were merely the calculation of the money loss, this would not be true. The *Nisi Prius* ruling of Parke, B., and the considered judgment of Brett, J., oscillate between the two meanings.

⁴ Another consideration in favour of the rule which he considered to be law is thus stated by Brett, J., in an earlier part of the same judgment: "If juries do give such damages, poor defendants will be ruined, and the defendants most liable to such actions will not be able to carry on their business upon the same terms to the public as now." Are, then, rich wrongdoers to be more lightly dealt with, than poor wrongdoers may

therefore of opinion that evidence of the present value of an annuity was "necessarily misleading and legally irrelevant," and should not have been admitted.¹

In *Phillips v. L. & S. W. Ry. Co.*,² which came twice before the Court of Appeal on the question of the assessment of damages, the case of *Rowley v. L. & N. W. Ry. Co.* was considerably discussed; in giving judgment on the second appeal, Brett, L.J., thus expressed himself: "It was *in effect* decided in *Rowley v. L. & N. W. Ry. Co.* that it is a misdirection to tell the jury they ought to try to give a perfect compensation; by that I apprehend was meant a perfect arithmetical compensation." "The Court of Exchequer Chamber were of opinion that this attempt to give a nearly perfect compensation was wrong, because a jury must necessarily leave out a multitude of circumstances which they ought to take into consideration in order to estimate a perfect compensation, but which no human ingenuity and no evidence could bring before them. We are therefore bound by a decision of the Court of Exchequer Chamber."

Brett, L.J.'s view of the effect of *Rowley v. N. W. Ry. Co.* in *Phillips v. L. & S. W. Ry. Co.*

A reference to the judgments will, however, show that Brett, L.J., misapprehended the effect of the decision he refers to. The Chief Baron's direction was "that, according to the Carlisle Tables, it had been stated that the average duration of the life of a man in good health and vigour who had arrived at the age of forty years is twenty-seven years and a fraction; and that they might, if they thought proper, take as a guide, in their calculations of the damages recoverable for the wife and children, that such was, according to these tables, the probable duration of the life of a man of forty years of age in the circumstance in which the deceased was." Blackburn, J., giving the judgment of the majority,³ disallowed the exception that was taken to this. "We think this cannot be construed as meaning more than that this was an element to be taken into calculation by the jury with the rest of the evidence; and, if so, it was unexceptionable." Brett, J., dissented, as the direction left "it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law. And such, in my opinion, was the direction in the present case of the Lord Chief Baron."⁴ Brett, J.'s, view did not prevail.

Kelly, C.B.'s direction to the jury.

Further, this statement of the law by Brett, J., was called in question in the appeal on the first trial in *Phillips v. L. & S. W. Ry. Co.*⁵ Brett, L.J., there asks Sir John Holker during the argument, "What do you say would have been the correct direction to the jury in *Rowley's case*?" The answer was that the jury must take into account the value of an annuity during the joint lives of the covenantor and covenantee, having regard to the mode in which it was secured, and to all the circumstances of the covenantor.

not suffer beyond measure? or is the fear that large employers "will not be able to carry on their business upon the same terms to the public as now" a legal deterrent from compensatory pecuniary damages?

¹ Cp. *Phillips v. L. & S. W. Ry. Co.*, 5 Q. B. D., per Field, J., 79: "Perfect compensation is hardly possible, and would be unjust." *Amblin v. South Eastern Ry. Co. of Canada*, 5 App. Cas. 352.

² 5 C. P. D. 280; 5 Q. B. D. 78. See *Pennsylvania Co. v. Roy*, 102 U. S. (12 Otto) 451, where the plaintiff having been allowed to give evidence as to the number and ages of his children, in face of the objection of the defendant, a new trial was ordered on the ground of misreception of evidence. Evidence of plaintiff's means was also disallowed. See *White v. The Australasian United Steam Navigation Co.*, 13 N. S. W. R. (Law) 177; *Burrows v. London General Omnibus Co.*, 10 Times L. R. 298.

³ L. R. 8 Ex 228.

⁴ L. C. 231.

⁵ 5 Q. B. D. 84.

James, L.J.'s, And James, L.J., subsequently says :¹ "The proper direction to the jury, as it seems to me, would have been to tell them to calculate the value of the income as a life annuity, and then make an allowance for its being subject to the contingencies of the plaintiff retiring, failing in his practice, and so forth." And presently, turning to the facts of the case before him, the Lord Justice said : "I think that what Field, J., meant to say was : 'So far as the injury results in actual pecuniary loss, you must give the plaintiff full compensation for that loss ; but so far as he is entitled to damages for the suffering of being made a helpless cripple, you cannot proceed upon the principle of making full compensation.'"² In giving the judgment of the Court, in which Brett, L.J., concurred, James, L.J., says :³ "You are to consider what his income would probably have been, how long that income would probably have lasted, and you are to take into consideration all the other contingencies to which a practice is liable."

Bramwell, L.J.'s, view in *Phillips v. L. & S.W. Ry. Co.*

In the second case in the Court of Appeal, Bramwell, L.J., very clearly expresses the same view :³ "I have tried as judge more than a hundred actions of this kind, and the direction which I, in common with other judges, have been accustomed to give to the jury has been to the following effect : 'You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering. Of course, it is almost impossible⁴ for you to give to an injured man what can be strictly called a compensation,⁵ but you must take a reasonable view of the case, and must consider, under all the circumstances, what is a fair amount to be awarded to him.' I have never known a direction in that form to be questioned. I may take the common case of a labourer receiving an injury which has kept him out of work for perhaps six months. His evidence may be that before the time of the accident he was earning twenty-five shillings a week, that during twenty-six weeks he has been wholly incapacitated for work, that for ten weeks afterwards he has been able to earn only ten shillings a week, and that he will not get into full work again for twenty weeks. The plaintiff will be entitled to twenty-five shillings for each of the twenty-six weeks, and to fifteen shillings for each of the ten and twenty weeks.⁶ He is also entitled to some amount for his bodily sufferings and for his medical expenses ; and in this manner the compensation to be awarded to him is estimated."

Lord Blackburn's view in the House of Lords in *Livingstone v. Rawyards Coal Co.*

To these authorities must be added the authority of Lord Blackburn. Speaking in the House of Lords in *Livingstone v. Rawyards Coal Co.*,⁷ he says : "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise—such,

¹ *L. C.* 84.

² *L. C.* 87.

³ 5 *C. P. D.* 287.

⁴ The Lord Justice does not say that it is not legal, and that the elements which would enable an approximation to it are not admissible evidence ; he says merely, it is "almost impossible" to do so.

⁵ *I. e.*, to restore to him the possibilities of the future.

⁶ There must be deducted from this, however, to make it strictly and theoretically correct, the possibility of some occurrence that might prevent his earning the money, as is done in the case of the annuity.

⁷ 5 *App. Cas.* 39.

for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer—many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong, and various things of that sort.”¹

Another aspect of this controversy is presented in *Præd v. Graham*.² Lord Esher, M.R., there formulates a rule regulating the granting of a new trial on the ground of excessive damages: “If the Court having fully considered the whole circumstances of the case, come to this conclusion only, ‘We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them,’ then they ought not to interfere with the verdict.” Exception to this was taken in *Johnston v. G. W. Ry. Co.*,³ the case not of death but of disabling injury based upon the law as laid down in *Phillips’s two cases* and the proposition approved was that “it may sometimes be right to order a new trial, although it cannot be said that the damages are so large that twelve sensible men could not reasonably have given them—that is, in a case in which, although the Court cannot come to the conclusion that the damages are perversely large, yet the amount enables the Court to say that the jury must have disregarded a direction as to the measure of damages that they ought to have regarded.” Williams, L.J., then cites⁴ “the rule laid down” in *Rowley’s case*, “that the jury may not properly assess as damages a sum of money equal to the present price or value of an annuity equal to that income which would probably have been earned by the plaintiff but for the accident” and approves a direction: “There are the accidents of life and other elements which have to be taken into consideration which ought to prevent you giving him such a sum as would be simply an investment for him and enable him to do nothing. Still he is entitled to a fair sum, considering the position for which he was fitted and the position in which he is now.”

Lord Esher,
M.R., in
Præd v.
Graham.

Johnston v.
G. W. Ry. Co.

The conclusion arrived at by the most authoritative Court in the United States is in accord with the preponderance of English authority. In *Vicksburg Rd. Co. v. Putnam*⁵ the rule is laid down that for a personal injury a plaintiff is entitled to recover compensation so far as it is susceptible of an estimate in money for the loss and damage caused to him by the defendants’ negligence, including not only expenses incurred for medical attendance and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of his capacity of earning by the wrongful acts or defaults of the defendants. Further, that standard annuity tables are admissible as evidence of the capital value of loss, though they are subject to

The view of
the Supreme
Court of the
United States
accords with
the English
rule.

¹ See the remarks as to damages by De Grey, C.J., in *Mastyn v. Fabrigas*, 20 How. St. Tr. 175, 181, on motion for new trial on the ground of excessive damages.

² 24 Q. B. D. 53.

³ (1904) 2 K. B. 255.

⁴ L. C. 259.

⁵ 118 U. S. (11 Davis) 545, 554; *District of Columbia v. Woodbury*, 136 U. S. (29 Davis) 450, 466; *The Atlas*, 93 U. S. (3 Otto) 302.

Effect of insurance upon a claim under Lord Campbell's Act.

observations of the same species as we have been discussing in the English cases which disentitle them to be taken as absolute guides by the jury.¹

The pecuniary loss caused to the relatives, from termination of a life income by reason of death, is often lessened or prevented altogether by an insurance having been effected on the life of the deceased. In *Bradburn v. G. W. Ry. Co.*,² a case under the general law of negligence, Bramwell, B., expressed himself "dismayed" at the proposition that the damages that could be recovered from a wrong-doer should be diminished by the providence of the injured person in insuring; and he cited *Dalby v. India and London Life Assurance Co.*³ as an authority that the injured person does not recover for the accident, but on the contract, and that his right arises as a *quid pro quo* by reason of the payment of the premiums. And the New Zealand Court of Appeal correctly laid down that evidence to be admissible in diminution of the loss sustained by the death of a parent in an action under the corresponding New Zealand Act, must be of acquisition of property "coming into the possession of the family at the death of the parent acquired or accruing by the death of the parent," and not of a fund subscribed or a contribution made in consequence of the death from extraneous sources.⁴

Under Lord Campbell's Act this is not so; for there the damages are to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of life. If, therefore, the person claiming damages were put by the death of his relative into possession of a large estate, there is no loss; he is a gainer by the event; and similarly whatever comes into the possession of the family who have suffered by the death of their relative, by reason of his death, must be taken into account.⁵ This is in accord with Lord Campbell's ruling in *Hicks v. Newport, Abergavenny, and Hereford Ry. Co.*,⁶ who directed a jury: "If there be an insurance for £1000 by some company that insured him (the deceased) against accidents, by railways, and they being entitled

Direction of Lord Campbell, C.J., in *Hicks v. Newport, Abergavenny, and Hereford Ry. Co.*

¹ Cp. *The Argentino*, 13 P. D. 61, 191, 14 App. Cas. 519. In *District of Columbia v. Woodbury*, 136 U. S. (29 Davis) 450, evidence that a medical man had contributed to scientific journals, though he got no pay for doing so, and which contributions he was obliged to discontinue as a consequence of injuries, caused by appellants' negligence, was held admissible as tending to show the extent of the physical and mental injuries he had received.

² L. R. 10 Ex. 1; approved *Jebson v. East & West India Dock Co.*, L. R. 10 Ex. 1, P. 300. *Clark v. Blything* (Hundred of), 2 B. & C. 254. The principle of law is that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against, or reimbursed himself for, the loss. *Simpson v. Thomson*, 3 App. Cas. 279, 284; *Mobile and Montgomery Ry. Co. v. Jurey*, 111 U. S. (4 Davis) 584; *Regan v. New York & New England Rd. Co.*, 60 Conn. 124, 25 Am. St. R. 306. In *Morison v. Bartolomeo*, 5 Macph. 848, which was an action for collision, where the pursuers had been paid insurance, but had also procured an assignment by the underwriters of all their rights, as against the defenders, the fact that pursuers had been paid insurance money was held not admissible to reduce liability. *Yates v. Whyte*, 4 Bing. N. C. 272, following *Mason v. Sainsbury*, 3 Doug. 60.

³ 15 C. B. 365.

⁴ *Greymouth P. M. & C. Co. v. McIvor*, 16 N. Z. L. R. 256, 267.

⁵ See per Bramwell, B., *Bradburn v. G. W. Ry. Co.*, L. R. 10 Ex. 3. *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association* (1891), 1 Q. B. 402. There is a note to *Paul v. Travellers' Insurance Co.*, 8 Am. St. R. 763-766, "What is death by accidental means?"

⁶ Only reported in a note in 4 B. & S. 403. The American cases differ. They are collected in the judgment of Hagarty, C. J., *Berkett v. Grand Trunk Ry. Co.*, 13 Ont. App. 181, affd. 19 Can. S. C. R. 713. Cp. *Farmer v. Grand Trunk Ry. Co.*, 21 Ont. R. 299.

to receive £1000 upon that policy, it is quite clear that there ought to be a deduction from the aggregate amount in respect of that £1000. Then with regard to the policies upon his life, independently of accident, if you allow any deduction (and I think you will probably consider that some deduction ought to be allowed), it will only be in respect, I should think, of the premiums that would be paid by the family, or which would have been paid by himself if this fatal accident had not happened."

The passage is obscure, but Lord Campbell's meaning seems to be that, with regard to an insurance against accidents by railways, the whole of such insurance should be deducted from the amount that the jury would have considered recoverable had there been no insurance. With regard to ordinary life assurance, however, the gross income of the deceased should first be ascertained; there should then be deducted all outgoings, including the premium on the life policy; after having thus ascertained the net income, the loss the family would sustain by reason of being deprived of it must be computed for the number of years the deceased would probably have earned it, taking into account the ordinary expectation of life and deceased's continued ability to earn the same income and other like circumstances.¹

The difference indicated by Lord Campbell between the two cases of insurance is due probably to the fact that insurances against accidents by railways secure a payment that is only made on the happening of the injury in respect of which compensation is claimed; the payment is therefore, so far as it goes, pure pecuniary gain; since the happening of an accident is the condition precedent to the obtaining the insurance, and if no accident happened no sum is payable. Life insurance, on the other hand, secures a sum payable absolutely, though at an uncertain time; and the fact that the injury makes the time of the payment certain is no ground for diminishing the compensation payable in respect of the injury; since the payment of the sum is in no way dependent on the happening of the injury, though the time of payment is accelerated by it.

The suggestion of Lord Campbell in *Hicks's case*, that the benefit the widow derived from the acceleration of payment might be counter-vailed by deducting from the estimate of the future earnings of the deceased the amount of the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy, was approved by the Privy Council in *Grand Trunk Ry. Co. of Canada v. Jennings*,² where it was also held that the receipt of insurance money is merely one of the circumstances to be left to the jury in estimating the pecuniary loss suffered by the claimants from the death; and such payment of insurance money is not to be regarded as a deduction to be made from the full amount awarded. The jury is not to arrive at a sum sufficient to compensate the claimants, and from that to deduct insurance money paid to them, but is to consider the receipt of insurance money amongst the elements determining them in fixing the sum they award.³ What elements are to be considered are indicated by Patterson, J.A.'s, distinction between proper

¹ Per Burton, J. A., *Beckett v. Grand Trunk Ry. Co.*, 13 Ont. App. 187, on appeal 16 Can. S. C. R. 713. See Railway Passengers Assurance Companies Act, 1864, 27 & 28 Vict. c. cxxv. s. 35.

² 13 App. Cas. 800.

³ *Beckett v. Grand Trunk Ry. Co.*, 13 Ont. App. 198.

Considered.

*Grand Trunk
Ry. Co. of
Canada v.
Jennings.*

acquired by the death to which otherwise the successor had no title, and property the possession of which has been merely accelerated. In the latter case he is of opinion the deduction spoken of by Lord Campbell should be in respect of the acceleration alone, and not of the value of the estate.

Damages recoverable in respect of the personal estate subsequent to recovery under Lord Campbell's Act. *Barnett v. Lucas.*

Lord Campbell's Act, we have seen, only enables those damages to be recovered which arise from pecuniary loss sustained by the representatives consequent on the death, through the defendants' negligence, of him as whose representatives the plaintiffs sue. In *Barnett v. Lucas*,¹ after damages had been recovered under Lord Campbell's Act, an action was commenced by the widow of the deceased as administratrix of her husband, to recover damages for injuries caused by the same negligence to the "personal chattels" of the deceased. The principle on which the Irish Court of Common Pleas decided in favour of the plaintiff was that the action under Lord Campbell's Act is brought by the personal representative—not for the estate, but as a trustee for those beneficially entitled; and that an injury to the personal estate gives a distinct cause of action to the personal representative not to be confounded with the statutable right to recover pecuniary loss sustained through the death. The decision of the Common Pleas was upheld by the Exchequer Chamber, on the ground that the cause of action under Lord Campbell's Act cannot be the same as that brought on behalf of the estate by the administratrix, since damages recovered under Lord Campbell's Act can never be assets of the deceased. Fitzgerald, B., dissented, on the grounds, first, that there was but one cause of action—viz., the default of the defendants; of which the injury to the chattels and the injury to the person are but different aspects, and do not constitute independent rights of suing; secondly, that Lord Campbell's Act, as interpreted by *Read v. G. E. Ry. Co.*,² gave no new right of action, and therefore a second action was incompetent. "It is the same cause of action sued upon with two inconsistent assumptions—viz., that it was independently of the statute determined by death, and that it continued independently of the statute notwithstanding death." With the omission of the word "inconsistent" this might well happen. The action for the injury to the estate undoubtedly continued independently of the statute, notwithstanding death;³ while, independently of the statute, with equal certainty no executor or administrator could maintain an action for the loss of life of his testator or intestate.⁴

Dissent of Fitzgerald, B., in the Irish Exchequer Chamber.

Meaning of "same cause of action."

Read v. G. E. Ry. Co.

In *Read v. G. E. Ry. Co.*, Blackburn, J., says:⁵ "The prin-

¹ (1870) Ir. R. 5 C. L. 140, in the Irish Ex. Ch. Ir. R. 6 C. L. 247. As to Scotch law, see *Wood v. Gray* (1892), A. C. 576.

² 9 B. & S. 714.

³ *Wheatley v. Lane*, 1 Wms. Sannd. 216; 1 Wms. Notes to Sannd. 239.

⁴ *Armsworth v. S. E. Ry. Co.*, 11 Jur. 758.

⁵ 9 B. & S. 719. The Law in Lower Canada, holding that under the Code of 1866 the action analogous to that under Lord Campbell's Act is one independent of the deceased, is set out in *Robinson v. Canadian Pacific Ry. Co.* (1892), A. C. 481, and followed in *Müller v. Grand Trunk Ry. Co.* (1906), A. C. 187, where the Privy Council, overruling *The Queen v. Grenier*, 30 Can. S. C. R. 42, held that membership of a Provident Society subscribed to by the employers on the terms that no member should have any claim against them for compensation on account of injury or death from accident, did not operate as "indemnity or satisfaction" within the meaning of Art. 1056 of the Code of Lower Canada against the representatives of a workman killed by the negligence of the employers. The English cases are fully considered

ciples on which the damages are to be assessed are new, as is correctly said in *Blake v. Midland Ry. Co.*,¹ and *Pym v. G. N. Ry. Co.*;² but the action is not new, in the sense that there is an independent cause of action vested in the representatives of the deceased in their own right." Lush, J., further explains this as meaning that, "The object of the Legislature was not to make the wrongdoer pay damages twice, or to give the representatives of the deceased a new action, but to give a right of action to the representative when the deceased had not obtained compensation, and when there was at the time of the death a subsisting cause of action which the maxim, *Actio personalis moritur cum personâ*, prevented from being enforced." And in *Haigh v. Royal Mail Steam Packet Co.*,³ Brett, M.R., delivering the judgment of the Court of Appeal, said: "It is clear the executors can only recover if the deceased man could have recovered supposing that everything did happen to him which, had he not been killed, would have entitled him to bring an action."

In the former of these cases the statement that there was no new right of action was in connection with the negation of the assumed right of the representatives to recover after satisfaction had been made in the lifetime of the deceased to him personally; and in the latter case the statement was made where the deceased had contracted away the right to recover for injuries or death.

Once more in *Blake v. Midland Ry. Co.*,⁴ Coleridge, J., in answer to the contention that the deceased if alive could have recovered a solatium, and, therefore, so could his representatives on his death, says: "This Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action on different principles." And in *Pym v. G. N. Ry. Co.*,⁵ in the Exchequer Chamber, Erle, C.J., said: "The statute gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on different principles." That again was in answer to a contention that, as the deceased was possessed of a fortune which would not be diminished by his death, he could not have sued for anything besides his personal suffering and the pecuniary loss in consequence.

The inability for the representative to recover where the deceased had bargained away his right of action was conceded in *The Stella*.⁶ There it was determined that travelling by a free pass granted on the condition that the holder should not be entitled to an action "for any injury, delay, loss or damage however caused that may be sustained by the person or persons using this pass" was such a bargain; since the deceased as a railway officer must be taken to have known the import of the conditions on which he travelled.

The decisions, therefore, are not inconsistent. Their effect is, that while the representatives may be altogether defeated of the action by the conduct of the deceased—as if, for example, he were guilty of

in the Supreme Court of Canada, 14 Can. S. C. R. 105. Cp. *Zimmer v. Grand Trunk Ry. Co. of Canada*, 19 Ont. App. 693; *Farmer v. Grand Trunk Ry. Co.*, 21 Ont. R. 299.

¹ 18 Q. B. 110.

² 4 B. & S. 406.

³ 52 L. J. Q. B. 640. As to the law apart from Lord Campbell's Act, see *McCawley v. Furness Ry. Co.*, L. R. 8 Q. B. 57.

⁴ 18 Q. B. 110.

⁵ 4 B. & S. 406.

⁶ (1900) P. 161.

Blake v. Midland Ry. Co.

Decisions no inconsistent.

contributory negligence,¹ or in any way had so conducted himself, that, had he survived, he would have disentitled himself to bring an action for personal injuries—the action which they may maintain, is not the mere continuation of the deceased's right, but an action he could never himself have brought, and one peculiar to them as his representatives and not arising till his death. The historical antecedents are the same as in cases of personal injury; the subsequent direction the right of action takes before it fructifies is entirely new. A reference to the preambles of Lord Campbell's Act may help to clear up this point. It is thus expressed: "Whereas no action by law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person; and it is oftentimes right and expedient that the wrongdoer in such a case should be answerable in damages for the injury so caused by him." The wrong to be remedied is the escape of a person, who, by his wrongful act or default, has caused the death of another person, from answering in damages for the injury—not primarily the loss to the survivors. The damages are to be paid to them, and to be assessed on an estimate of their pecuniary loss; but the wrong is the death, coupled with immunity from legal liability for compensation. Contributory negligence removes the liability for the wrong by eliminating the first element in the cause of action; payment of compensation preceding the decease of the injured person, or a valid contract to waive the right to compensation in the event of injury or death eliminates the second. In so far as these antecedent circumstances—common to the right of action possessed by the injured man if he survive, and to his representatives if he die from the effect of his injuries—are at the basis of both, there is no new right of action; and that is the sense in which the cases so holding are to be understood; whilst, in so far as the representatives have a right arising on the death from injury through negligence, the right is entirely a new right for which, previous to Lord Campbell's Act, there was no precedent in the law.

Lord Selborne
in *Seward v.*
The Vera Cruz.

This is apparent from what Lord Selborne says in *Seward v. The Vera Cruz*:² "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, *Actio personalis moritur cum personâ*; because the action is given in substance, not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, nor that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action." And as Lord Blackburn says:³ an action "new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent or child who under such circumstances suffers pecuniary loss by the death."⁴

Lord Campbell, C., in *Attorney-General v. Brunning*,⁵ carries this

¹ *Tucker v. Chaplin*, 2 C. & K. 730.

² 10 App. Cas. 67.

³ *L.c.* 70.

⁴ *Davidson v. Hill* (1901), 2 K. B., per Kennedy, J., 614.

⁵ 8 H. L. C. 256.

further saying: "The sum to be recovered in case of death by negligence [under 9 and 10 Vict. c. 93] certainly would not be subject to probate duty, for it is not made part of the estate of the deceased; and on the contrary, the Act of Parliament directs it to be apportioned among the members of the family of the deceased, according to the pecuniary loss which they are supposed respectively to have suffered from the bereavement." But where the deceased never had, or in his lifetime lost, the right to bring an action, the representative can have none. Thus in *Senior v. Ward*¹ the contributory negligence of the deceased disentitled; in *Haigh v. Royal Mail Steam Packet Co.*² the taking a passenger ticket with a condition exempting from liability; in *Read v. G. E. Ry. Co.*³ acceptance of satisfaction by the deceased; in *Griffiths v. Earl of Dudley*⁴ a contract not to claim compensation; in *Markey v. Tolworth Joint Isolation Hospital District Board*⁵ the failure to bring the action within six months of the death; and in *Williams v. Mersey Docks and Harbour Board*⁶ non-compliance with the requirements of sec. 1 (a) of the Public Authorities Protection Act, 1893.⁷

Lord Campbell in *A. G. v. Brunning*.

The decision of *Read v. G. E. Ry. Co.*⁸ leaves open the question whether the cause of action sued on in *Barnett v. Lucas* was the same, in the sense in which alone the question is material, as that for which damages had been previously recovered. What it decides is that damages cannot be recovered independently of the deceased, or, rather, antagonistically to him; and that where the deceased either voluntarily or involuntarily has placed himself in a position that, if he had survived, he could not bring an action for personal injury, at his death no new right of action is conferred to replace that which, through his own conduct, has never arisen or has been extinguished. But it left untouched the question whether, assuming the deceased had left the rights which were united in him unaffected, they were capable of disjunction by his death and of being sued on separately.

Effect of the decision in *Read v. G. E. Ry. Co.*

*Brunsdon v. Humphrey*⁹ decides this in the affirmative. A cabman recovered damages for injury caused, by the defendant's negligence, to his cab. He subsequently commenced another action claiming damages for personal injuries sustained through the same negligence. It was held by the Court of Appeal, overruling the Divisional Court, Lord Coleridge dissenting, that he could maintain the action; Bowen, L.J., observing, "The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second;" and Brett, M.R., suggests as a test—though not an exclusive test—"whether the same sort of evidence would prove the plaintiff's case in the two actions."¹⁰

Brunsdon v. Humphrey decides the point left in doubt in *Read v. G. E. Ry. Co.*

¹ 1 E. & E. 385.

² 52 L. J. Q. B. 640.

³ L. R. 3 Q. B. 555.

⁴ 9 Q. B. D. 357.

⁵ (1900) 2 Q. B. 454.

⁶ (1905) 1 K. B. 804.

⁷ 56 & 57 Vict. c. 61.

⁸ 9 B. & S. 714.

⁹ (1884) 14 Q. B. D. 141. *Roberts v. Eastern Counties Ry. Co.*, 1 F. & F. 460, is identical in principle. See *Serrao v. Noel*, 15 Q. B. D. 549; *Clarke v. York*, 52 L. J. Ch. 32; *Stevenson v. Pontifex*, 15 Rettie 125.

¹⁰ Lord Coleridge, C.J., dissented on the ground that "it seems to me a subtlety, Lord not warranted by law, to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if, besides his arm and leg being injured, his trousers which contain his leg, and his coat-sleeve which contains his arm, have been examined torn." The following quotation from Mr. John Stuart Mill seems in point: "The last of the modes of erroneous generalisation to which I shall advert is that to which we may give the name of False Analogies. This fallacy . . . consists in the mis- false analogy. Based on a

Loss to personal estate.
Potter v. Metropolitan District Ry. Co.

Loss to the personal estate was the gist of the action in *Potter v. Metropolitan District Ry. Co.*¹ The wife was injured by the negligence of the defendant railway company; the husband commenced an action for loss of service and expense in nursing, and "loss of profit he would otherwise have made in his business," and died during the pendency of the action. The wife then entered a suggestion of his death on the record, and the action was proceeded with in her name alone: the only question of damage inquired into was what accrued to the plaintiff personally, and not what was sustained by the testator by reason of the injury to his wife. There was a verdict for the plaintiff, with £1000 damages. An action was then commenced by the plaintiff as executrix for the recovery of the damage sustained by her testator's estate. On demurrer both the Court of Exchequer and the Exchequer Chamber held the action maintainable.

Bradshaw v. Lanes. & Y. Ry. Co.

In *Bradshaw v. Lanes. & Y. Ry. Co.*,² the husband of the

application of an argument which is at best only admissible as an inconclusive presumption where real proof is unattainable. An argument from analogy is an inference that what is true in a certain case is true in a case known to be somewhat similar, but not known to be exactly parallel, that is, to be similar in all material circumstances. An object has the property B; another object is not known to have that property, but resembles the first in a property A not known to be connected with B; and the conclusion to which the analogy points is that this object has the property B also. . . . Now, an error or fallacy of analogy may occur in two ways. Sometimes it consists in employing an argument . . . with correctness indeed, but overrating its probative force. . . . There is another "mode of error in the employment of arguments of analogy" more properly deserving the name of fallacy; namely, when resemblance in one point is inferred from resemblance in another point, though there is not only no evidence to connect the two circumstances by way of causation, but the evidence tends positively to disconnect them. This is properly the Fallacy of False Analogies "Logie" (4th ed., vol. ii. book v. 358-360.) To reason from proximity in place to identity of nature is a fallacy of false analogy. If direct authority is wanted, there are the words of Lord Bramwell in *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 144: "It is a rule that, when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present, and future, certain and contingent. He cannot maintain an action for a broken arm and subsequently for a broken rib, though he did not know of it when he commenced his first action. But if he sustained two injuries from a blow, one to his person, another to his property, as, for instance, damage to a watch, there is no doubt that he could maintain two actions in respect of one blow. I may apply the text I mentioned in the argument. If he became bankrupt, the right in respect of the watch would vest in his trustee; that for damage to his person would remain in him." Lord Esher, M.R., also, in *Maedougall v. Knight*, 25 Q. B. D. 8, speaking of *Brunsdon v. Humphrey*, says: "In that case there were two separate admitted legal rights of the plaintiff which were infringed—a personal right and a right to have his property uninjured. These are distinct rights, and the jury cannot, in dealing with one case consider the damages in the other, for the two cases involve different rights and are affected by distinct rules as to assessing damages. That case does not apply to the present, and it is no authority for holding that if there be an actionable injury to the person one action may be brought for injury to one part of the body, and another action for injury to another part. That is not the rule to be derived from the case, and was never intended to be, and it has not been put forward by text writers, or treated in any subsequent case as following from the decision."

Lord Bramwell's dictum.

¹ (1874) 30 L. T. (N. S.) 765, in the Ex. Ch. 32 L. T. (N. S.) 30.

² (1875) L. R. 10 C. P. 189; followed and approved *Daly v. Dublin, Wicklow & Wexford Ry. Co.*, 30 L. R. Ir. 514. The point glanced at here had been the subject of discussion in relation to bankruptcy. In *Rogers v. Spence*, 12 Cl. & F. 720, Lord Campbell considered: "It may possibly be that the law will give an action to the bankrupt for the personal injury which has been sustained by him, and will give an action to the assignees for the injury which has been done to the property; as, for example, in the case which has been put during the arguments of the owner of a ship being on board, and the ship being run down on the high seas and going to the bottom, and the owner escaping and afterwards becoming bankrupt; it is possible that he may maintain an action for the personal injury done to him, and that the assignees may maintain an action for the injury done to the property." In *Beckman v. Drake*, 2 H. L. C. 641, the House of Lords affirmed this position; and Erle, C.J., advising the House (603), said:

plaintiff, who sued as executrix, was injured in a railway accident and subsequently died from the effects. Grove, J., puts the question: "Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's Act take away any right of action that the executrix would have had but for that Act?" He answers it thus: "It does not seem to me that the Act has that effect, either expressly or by necessary implication. The intention of the Act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the Act he sues, as trustee in respect of a different right altogether, on behalf of particular persons designated in the Act. Another argument for the defendants was that, inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and, as such, dies with the person. I do not see that there is any valid distinction between this case and that of *Potter v. Metropolitan District Ry. Co.*,¹ or why the damage to the estate, that would clearly be recoverable if the injured party lived, should be the less recoverable because of his death."

In *Leggott v. G. N. Ry. Co.*, Mellor, J., is thus reported: ² "With the single exception, so far as I am aware, of the case in the Common Pleas, *Bradshaw v. Lancs. & Y. Ry. Co.*, there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action. But as that case has been decided on the very point,³ I entirely yield to the authority of the decision, so far as to say that in this Court it cannot be questioned, and we must therefore abide by it. I must say, however, that we yield to it for the purposes of this case; and that, at all events, if it is to be questioned, it must be questioned in a court of appeal." And Quain, J., said: "With regard to the action itself, I merely say I yield to the decision

The decision doubted in *Leggott v. G. N. Ry. Co.*

"The general principle is that all rights of the bankrupt which can be exercised beneficially for the creditors do so pass, and the right to recover damages may pass, though they are unliquidated. This principle is subject to exception. The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property." See 8 M. & W. 846. Lord Campbell says (843): "It has been settled over and over again that for personal labour or anything personal respecting the bankruptcy the assignees have no claim." *In re Roberts* (1900), 1 Q. B. 122.

¹ 30 L. T. (N. S.) 765.

² (1876) 1 Q. B. D. 605.

³ The contention in *Leggott v. G. N. Ry. Co.* was that the plaintiff had recovered in respect of the injury caused by the death, and therefore was stopped from recovering for damages to the estate. *Pulling v. G. E. Ry. Co.*, 9 Q. B. D. 110, distinguishes *Leggott v. G. N. Ry. Co.* See also *London v. London Road Car Co.*, 4 Times L. R. 448, and the Scotch cases, *Eisten v. N. B. Ry. Co.*, 8 Morph. 980; *Murky v. Carfin Coal Co.* (1891), A. C. 412; *Wood v. Gray* (1892), A. C. 576; *Whitehead v. Blaik*, 20 Rettie 1045.

but not
appealed
against, and
established
by *Brunsdon*
v. Humphrey.
Effect of
receipt.
Rideal v.
G. W. Ry. Co.
Erie, C.J.'s
direction to
the jury.

in the Common Pleas without assenting to it." There was, however, no appeal; and, after the decision in *Brunsdon v. Humphrey*,¹ the law in *Bradshaw v. Lancs. & Y. Ry. Co.* may be considered established.²

In *Rideal v. G. W. Ry. Co.*,³ the plaintiff had received £20, for which he gave a receipt, as it was alleged, in full satisfaction of the grievance complained of; Erie, C.J., notwithstanding, left the case to the jury with the direction: "In terms the receipt which he signed no doubt supports that plea. Did his mind go with those terms? Was he aware of their import and effect at the time he signed? If, as he declares, he did not read the receipt and supposed it was a mere receipt, it is clear that he did not so agree. But on the other hand, if he did read it, being a man of business, he must be taken to have understood it, and it expressly included future and consequential injuries. No doubt a man might well be ready to take a certain sum in satisfaction of such injuries as he was sensible of, which would not be any equivalent for serious and permanent injuries. Still, if, in fact, a man has done so, he is bound by his bargain. No improper practice has been proved, not does it appear that the company's servants took any unfair advantage of the plaintiff. The question, therefore, simply is, did his mind go with the terms⁴ of the paper which he signed, and was he aware of its effect?" This statement of the law was quoted with approval by Mellish, L.J., in *Lee v. Lancs. & Y. Ry. Co.*⁵ as raising "the precise question the judge ought to leave to the jury. Did his mind go with this receipt, and did he understand and know at the time that he was accepting it in full satisfaction and discharge?" There the plaintiff filed a bill to restrain the defendant company from setting up the acceptance of

Mellish, L.J.,
in *Lee v.*
Lancs. &
Y. Ry. Co.

¹ 14 Q. B. D. 141.

² In giving judgment in *Chamberlain v. Williamson*, 2 M. & S. 408, an action by an administrator for a breach of promise of marriage to the intestate, Lord Ellenborough, C.J., said: "The general rule of law is *Actio personalis moritur cum persona*, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property—that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record, otherwise the Court cannot intend it. . . . Where the damage done to the personal estate can be stated on the record, that involves a different question." The converse case, of action for breach of promise against the executors of the promisor, was considered by the Court of Appeal in *Finlay v. Chirney*, 20 Q. B. D. 494. The Court held that special damage to the property may be recovered in such an action, and indicated what class of expenditure would be regarded. See 3 & 4 Will. IV. c. 42, s. 2. A Canadian case, *White v. Parker*, 16 Can. S. C. R. 699, may also be referred to. One Parker brought an action against "the conductor of a train" for injuries received in attempting to board the train, and alleged to be caused by the negligence of the conductor in not bringing the train to a standstill. On the trial plaintiff was nonsuited, but the nonsuit was set aside. Between nonsuit and judgment ordering a new trial, Parker, the plaintiff, died, and a suggestion of his death was entered on the record. It was, however, held that, under Lord Campbell's Act, an entirely new cause of action arose on Parker's death, so that the original action was entirely gone and could not be revived.

³ 1 F. & F. 700.

⁴ In *Prosser v. The Lancs. & Y. Accident Insurance Co.*, 6 Times L. R. 285, the Court of Appeal, having had *Rideal v. G. W. Ry. Co.* cited to them, held that an agreement to accept a certain sum of money which was set up in bar of an accident claim, "meant the claim which had already been made," and had no reference to any claim for future or prospective disablement, as to which plaintiff could recover.

⁵ L. R. 8 Ch. 532. *Great Pinnall Consolidated v. Sherkan* (1903), 3 C. L. R. (Australia) 176; *De Bussche v. Alt*, 8 Ch. D., per Thewiger, L.J., 314; and *N. B. Ry. Co. v. Wood*, 18 Rettie (H. L.) 27, where plaintiff, having taken £27 in settlement, was held barred from pursuing an action for £5000 damages.

£400, and a receipt for the same in discharge of the damages sustained by the plaintiff, who was injured in a railway accident, and relied on the authority of *Stewart v. G. W. Ry. Co.*,¹ where, "while a poor man was lying suffering from an accident, persons went to him on behalf of the railway company and induced him to accept a small and almost nominal sum in full of all demands, making false representations to him as to the medical opinions which had been given about his case." The Court distinguished this case on the ground of fraud; in the case of the existence of which the Court will exercise its jurisdiction to restrain the setting up of a document obtained through the same in any circumstances. Where no fraud exists, the question of the intention in the case of the receipt of money as satisfaction for an injury must be left to the jury.²

Stewart v. G. W. Ry. Co. distinguished.

The presence of the fact that the plaintiff is an infant makes a difference. No contract avails to prejudice his interests; and though he has signed a receipt in the amplest terms acknowledging full satisfaction of his claim, *Stephens v. Dudbridge Ironworks Co.*³ points out that "whenever such a contract comes before a Court of law, the question whether it was for the benefit of the infant has to be considered and the contract will not be enforced unless the Court is of opinion that it was for the benefit of the infant."

Stephens v. Dudbridge Iron Works Co.

A distinction has been drawn between the effect given to "a receipt in full discharge" and a formal agreement made with consideration acquitting a claim. Both are open to review in the way pointed out above; the agreement as a more formal document would require a greater cogency of evidence to set it aside—the presumption in its favour would be very strong, requiring fraud or duress or undue influence or invincible ignorance to be shown to invalidate it;⁴ while the receipt would be set aside on proof of the matters pointed out by Erle, J., in *Rideal v. G. W. Ry. Co.*⁵

Receipt and agreement distinguished.

In *Wright v. London General Omnibus Co.*⁶ the plaintiff had been awarded £10 by a magistrate, under 6 & 7 Vict. c. 86, s. 28, as compensation for injuries sustained by him through furious and negligent driving of two omnibus drivers, which he had accepted; and this was held by the Queen's Bench Division (Cockburn, C.J., and Mellor, J.) to disentitle him to sue the omnibus company, though the payment was utterly inadequate and made by the drivers. It was pointed out that *Lee's case* was not in point, as the present was a case of *res judicata* and not a question of accord and satisfaction.

Wright v. London General Omnibus Co. res judicata.

A question about which there has been considerable diversity of legal opinion is whether the Admiralty Court—now the Admiralty Division of the High Court—can entertain an action *in rem* for damages for loss of life under Lord Campbell's Act.

Lee's case distinguished.

Sir Robert Phillimore held in *The Sylph*⁷ that the Court of Admiralty has jurisdiction over all torts and injuries done within the ebb and flow of the tide. "The whole law" (i.e., of the ancient jurisdiction

Can Admiralty Division entertain an action *in rem* under Lord Campbell's Act? *The Sylph.*

¹ 2 Do G. J. & S. 319.

² To the same effect in *M'Donagh v. MacLellan*, 13 Rettie 1000.

³ (1904) 2 K. B. 225, 229.

⁴ Cp. *Ellen v. G. N. Ry. Co.*, 17 Times L. R. 338; *Crossan v. Caledon Shipbuilding & Engineering Co.* (1906), W. N. 104 (H. L.).

⁵ 1 F. & F. 706.

⁶ (1877) 46 L. J. Q. B. 429. Cp. *Midland Ry. Co. v. Martin & Co.* (1893), 2 Q. B.

172.

⁷ (1867) L. R. 2 A. & E. 24.

of the Court of Admiralty), he observes, "is collected in the judgment delivered by Mr. Justice Story in the case of *De Lovio v. Boit*.¹ This judgment, in truth, exhausts all the learning upon the subject." Lord Esher, M.R., points out² that learned and exhaustive as it is, it has not been acted up to even in America.

Admiralty
Court Act,
1861.

In England, statutory enactments have interfered with the jurisdiction anciently exercised in Admiralty;³ by the Admiralty Court Act, 1861, s. 7,⁴ it is, however, enacted that the "High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." Dr. Lushington said in *The Diana*⁵ that "the object of the Act, as stated in the title and preamble, is 'to extend the jurisdiction' of the Court."⁶ The 7th section, which deals with the subject of damage, does not particularise any circumstances to which the jurisdiction of the Court is to extend, but gives the Court jurisdiction in the widest and most general terms."⁷

The Guildfare.

It was next contended, in *The Guildfare*,⁸ that loss of life by collision was comprehended in the phrase "damage done by any ship." "Not without doubt and hesitation," Sir Robert Phillimore here held that it was. "It is true that Lord Campbell's Act contemplates only an action against the person; but then the 35th section of the Admiralty Court Act enacts as follow: 'The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*.' And it was admitted by the counsel for the defendant, that the argument to be derived from the language of Lord Campbell's Act, was as strong against the jurisdiction of this Court *in rem* as *in personam*."

The Beta.

The Judicial Committee of the Privy Council had the same point before them in the case of *The Beta*,⁹ and, without calling on the respondents, decided that the words of section 7 "clearly include every possible kind of damage. Personal injuries are undoubtedly within the words 'damage done by any ship.'"

Judgment in
Smith v.
Brown.

Sir Robert Phillimore adhered to his previous decision in *The Explorer*,¹⁰ where the collision took place on the high seas, and the persons killed were aliens. But in *Smith v. Brown*¹¹ Cockburn, C.J.,

¹ 2 Gallison (U. S. Circ. Ct.) 398. The subject is also exhaustively treated, 1 Kent Comm. 366-378; in the 12th ed. there is also a full note by Mr. Holmes.

² *The Queen v. Judge of City of London Court* (1802), 1 Q. B. 293; *The Zeta* (1893), A. C. 408.

³ For the antiquity and jurisdiction of the Court of Admiralty and of the Office of Lord High Admiral, see charge of the judge of the Vice-Admiralty, *Bount's case*, 15 How. St. Tr. 1231; Sheppard, Abridgment, 128; Sheppard, Epitome, 361. See Erskine's argument, that the Court of Admiralty can take no cognisance of a felony committed on land. *Codling's case*, 28 How. St. Tr. 177, 274; also *The Neptune*, 3 Knapp, P. C. 94.

⁴ 24 Vict. c. 10. Sec. 5 is considered in *The Two Ellens*, L. R. 3 A. & E. 345, L. R. 4 P. C. 161; see, 10 in *The Sara*, 14 App. Cas. 209.

⁵ Lush, 539, 540.

⁶ See per Lord Esher, M. R., *The Zeta* (1892), P. 285 at 297, dissented from in the H. of L. (1893), A. C. 468, 487, 490.

⁷ *The Malcina*, Lush. 491, decided under this section, held that the owners of a ship can be made liable for damages by a collision with a barge within the body of a county. See the collection of cases in the appellants' argument in the H. of L. *The Zeta* (1893), A. C. 470-473.

⁸ (1868) L. R. 2 A. & E. 328.

⁹ L. R. 2 P. C. 447.

¹⁰ (1870) L. R. 3 A. & E. 289.

¹¹ (1871) L. R. 6 Q. B. 729. In *The Charkick*, L. R. 8 Q. B. 197, the Queen's Bench refused to interfere where the question was as to the jurisdiction of the Admiralty to entertain a suit against a ship alleged to belong to a foreign Sovereign but engaged in commerce, on the ground that the Court of Admiralty could itself decide the point

and Hannen, J., prohibited the Court of Admiralty from entertaining a suit under Lord Campbell's Act for personal injuries occasioned by the collision of two vessels and resulting in death. They held that "neither in common parlance nor in legal phraseology is the word 'damage' used as applicable to injuries done to the person, but solely as applicable to mischief done to property." Further, that to hold that there was a transfer of the jurisdiction of the courts of common law to the Court of Admiralty would not only deprive the parties of the common law procedure and mode of trial, but would materially alter their rights and relative position; as the Court of Admiralty, in dealing with claims for damage arising from collision, acts upon principles unknown to the common law, and which, though very proper in the case of damage done by one vessel to another, are altogether inapplicable to the case of personal injury or the right to compensation given by the 9 & 10 Vict. c. 93. Blackburn, J., was also of the Court; and though his "doubts" were "not altogether removed," they were, he said, "not strong enough to make me dissent from this judgment, or even to make me require further time for consideration."¹

The question again came before the Court of Admiralty in *The Franconia*,² when Sir Robert Phillimore, while adhering to his previous decisions, took occasion to point out that, in the Merchant Shipping Act, 1854, the word damage is applied to "loss of life and personal injury." On appeal, the Court were equally divided, Bramwell and Brett, L.JJ., being of opinion that the appeal should be allowed, and, as a reason for their decision, they called special attention to "the difficulty arising from the difference between the Admiralty and common law rule as to contributory negligence." Baggallay, L.J., delivered a judgment affirming the view taken by Sir Robert Phillimore, principally on the ground of the generality of the words of the Admiralty Court Act, 1861, and the indeterminate use of the word damage; and this was concurred in by James, L.J. "I am unable," says Baggallay, L.J.,³ "to concur in the construction of the Admiralty Court Act, 1861, which has been so adopted by the Court of Queen's Bench,⁴ and apparently concurred in by the other Courts to which I have just referred;⁵ it appears to me that the view taken by the Court of Admiralty,⁶ and by the Judicial Committee of the Privy Council,⁷ is the more correct." The result was, that the judgment of the Court of Admiralty was sustained.

The same question was once again mooted in *The Vera Cruz* (No. 2),⁸ where Butt, J., held, on the authority of *The Franconia*, that

¹ L. R. 6 Q. B. 737. Per Kelly, C.B.: "The decision of *Smith v. Brown*, with which I entirely agree"; *James v. L. & S. W. Ry. Co.*, L. R. 7 Ex. 195. *Simpson v. Blues*, L. R. 7 C. P., per Brett, J., 300. As to this case, see *Cargo ex Arago*, L. R. 5 P. C. 134, followed in *The Ariva*, 5 Ex. D. 227; *The Rona*, 7 P. D. 247, 250; also Lord Esher, M.R.'s, comment in *Queen v. Judge of City of London Court* (1892), 1 Q. B. 250, cited *post*, 208, n. 3.

² 2 P. D. 163, 160. To the same effect is *Ex parte Gordon*, 104 U. S. (14 Otto) 515. See *The Queen v. Keyn*, 2 Ex. D. 63; *Harris v. Owners of The Franconia*, 2 C. P. D. 173; 41 & 42 Vict. c. 73.

³ 2 P. D. 173.

⁴ *Smith v. Brown*, L. R. 6 Q. B. 729.

⁵ See note 1, *supra*.

⁶ In *The Syph*, L. R. 2 A. & E. 24.

⁷ In *The Beltr*, L. R. 2 P. C. 447.

⁸ 9 P. D. 96, 101. No suit in Admiralty can, at common law, be maintained in the Courts of the United States for the recovery of damages for the death of a human being caused by negligence on the high seas or on waters navigable from the sea. *The Harrisbury*, 119 U. S. (12 Davis) 199. For the law in Canada see *Monaghan v. Horn*, 7 Can. S. C. R. 409.

the Court had jurisdiction to entertain an action *in rem* against a foreign ship for damages for loss of life and personal injury. The Court of Appeal, however, reversed his decision, and held that the Admiralty Division had no jurisdiction in an action *in rem* against a ship under Lord Campbell's Act. Bowen, L.J., reasoned as follows: "The only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family. The killing of the deceased *per se* gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it only can be, for the injuriously affecting the interests of the dead man's family, the injurious affecting of their interests is not done by the ship in the above sense. It arises partly from the death, which the ship causes; and partly from a combination of circumstances, pecuniary or other, with which the ship has nothing to do. The injury done to the family cannot, therefore, be said to be done by the ship."

In the House
of Lords.
Lord
Selborne's
opinion.

The House of Lords,¹ affirmed the Court of Appeal, and the Admiralty Division was held to be without jurisdiction to entertain the claim. Lord Selborne was of opinion that, if the case necessarily came within the words "any claim for damage done by any ship," according to the reasonable construction of those words in connection with the clause which authorises proceedings *in rem*, then the words, being general, would include it; but express or special inclusion was not indicated. And while the Admiralty Court Act, 1861, related expressly to claims for damage done by any ship, and section 7 related to that and nothing else, Lord Campbell's Act was concerned with "general injuries resulting in loss of life by wrongful acts." That being so, "it is not very likely that, when the legislation goes on such different lines, it should be intended indirectly to affect by the one legislation, and in a peculiar manner, a particular case which may or may not arise under the other legislation." The action under Lord Campbell's Act is, "as plainly as possible, a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the common law courts if the death had not ensued;" and the Admiralty rules, which would be applied if the action were validly brought in the Admiralty Division, are inconsistent with certain provisions of Lord Campbell's Act—as, for instance, those regulating the delivery of particulars.

Lords Blackburn and Watson assented; but Lord Blackburn, alluding to the case of *Smith v. Brown*, guarded himself from deciding more than the actual point under Lord Campbell's Act. "If," he said, "the question now raised had been whether personal damage to a man *who lived* was within the 7th section of the enactment, I should have had, as I then had [*i.e.*, in *Smith v. Brown*], some doubt about the matter, and it would have carried me so far that, if that had been the question now raised, I certainly should have wished to hear the case argued out to the end before giving an opinion upon it one way or the other."² Lord Watson also expressed no opinion on the wider question.³

¹ 10 App. Cas. 59, 66, 67, 68.

² *L.c.* 72.

³ In *The Bernina*, 11 P. D. 31, Butt, J., held that an action under Lord Campbell's Act is not within sec. 23, sub-a. 9 of the Judicature Act, 1873; and this was affirmed by the Court of Appeal, 12 P. D. 58; see, per Lord Herschell in the House of Lords, 13 App. Cas. 10. *The Circe* (1906), P. 1. *Everard v. Kendall*, L. R. 5 C. P. 428, decided that if the Admiralty Court had no jurisdiction, the County Court Acts have not given a jurisdiction to the County Courts. Yet Sir Robert Phillimore points out in *The Dowse*, L. R. 3 A. & E. 135, that in some cases where the Court of Admiralty

The law may, then, be regarded as definitely settled that the Admiralty Division has no jurisdiction to entertain suits instituted under Lord Campbell's Act by the legal personal representatives of the deceased person against the wrongdoing vessel. Conclusion

The result of the American decisions is the same. In the Supreme Court of the United States, in the case of *The Corsair*,¹ it is laid down that, in an Admiralty suit, there is no power to entertain a libel *in rem* for damage incurred by loss of life, where by the local law,² a right of action survives to the administrator or relatives of the deceased, but no lien, which is necessary to give a Court of Admiralty jurisdiction to proceed *in rem*, is allowed. American rule.

A reference to the preamble and first section of Lord Campbell's Act³ would possibly have averted the decision in *Adam v. British and Foreign Steamship Co.*⁴ The object of that Act is there stated to be not to confer a right but to impose a liability on "the wrongdoer" "in every such case," that is, within the words of the enactment. Be that as it may, the liability of the owners of a British ship to the representatives of a foreign seaman killed on a foreign ship, through a collision on the high seas, caused by the negligent navigation of the British ship, was established in *Davidsson v. Hill*, in two admirable judgments by Kennedy and Phillimore, JJ.⁵ Adverting to the ease of death occurring through negligence in a collision upon the high seas, where both parties are foreigners or where the wrongdoers were foreigners and the sufferers English, Kennedy, J., intimated an opinion that an action could be maintained in such circumstances. The law of England undoubtedly is that actions for personal wrongs may be brought in an English Court, and any special circumstances which preclude the Court from entertaining them should be shown.⁶ Apart from difficulties arising from the necessity of complying with the local law as to service of process no impediment in this case seems to exist. Liability to representatives of foreign seamen.

The Admiralty Division can in a certain event assess damages under Lord Campbell's Act. This appears from the judgment, in the Conclusion from their provisions.

has no original jurisdiction, it, notwithstanding, has appellate jurisdiction—*e.g.*, as to claims arising out of agreements for the use or hire of a ship and the carriage of goods in a ship. In *The Alina*, 5 Ex. D. 227, the Court of Appeal decided that sec. 2 of 32 & 33 Vict. c. 51, gave the County Courts jurisdiction with regard to actions for breach of charter-party, although the Admiralty Court had none. In *The Queen v. Judge of City of London Court* (1892), 1 Q. B. 290, Lord Esher, M.R., says: "I desire to speak with great respect of *The Alina*; but I think that rules of interpretation are laid down in that case which are absolutely novel. I will obey that case, because it is the decision of the Court of Appeal, until it has been reviewed by the House of Lords, and then I will obey whatever the House of Lords determines; but I will not be bound by *The Alina* one particle beyond what actually decides and determines. I do not consider that it has overruled all former cases and all rules for the interpretation of statutes." *Pugley v. Hopkins* (1892), 2 Q. B. 184. See *The Zeta* (1893), A. C. 468, 476.

¹ 145 U. S. (38 Davis) 335. The English cases are collected and considered in the judgment.

² Article 2315 of the Civil Code of Louisiana.

³ 9 & 10 Vict. c. 93.

⁴ (1898) 2 Q. B. 430.

⁵ (1901) 2 K. B. 606. *Convery v. Lanarkshire Tramway Co.*, 8 Fraser 117.

⁶ *Hart v. Gumpach*, L. R. 4 P. C. 464. Writing of Trespass Sheppard, Abridgment, 125, lays down so far back as 1675 that "An alien friend may have this or any action personal. But not an alien enemy." He cites *Calvin's case*, 7 Co. Rep. 17. Anon. Dyer, fol. 2b, 8 and 14 H. 8, 4. This last is probably a misprint for 34 Hen. 8, c. 4. See *Tirlot v. Morris*, 1 Buls. 134. See *The Ceres* (1906), P. 1, the case of death resulting from a collision between a French and a Spanish ship, where claim for damages for loss of life was held not within Admiralty rule of division of loss.

Court of Appeal, of Brett, M.R., in *The Vera Cruz* (No. 2):¹ "I will not say that in no case, for no purpose, may the Court of Admiralty not inquire into damages to a deceased person. For a great many years the Court of Chancery had jurisdiction to limit the amount of the shipowner's liability, and, if there were several claimants against the ship, to divide the amount for which the shipowner was liable among them. In such a suit the liability was admitted. That jurisdiction has been given to the Admiralty Court. At the present time, in such an action, if one of the claimants against the fund is a person who sues under Lord Campbell's Act, it being necessary to distribute the fund according to statute, it may well be that the Chancery or Admiralty Division must do something not otherwise within its direct jurisdiction—it must take cognisance of such a claim in order to fulfil its regular jurisdiction."

Lord Selborne's view of the jurisdiction of the Admiralty Division under Lord Campbell's Act.

Lord Selborne, also, in *Seward v. The Vera Cruz*, in the House of Lords,² affirms the jurisdiction of the Admiralty Division to deal with an action under Lord Campbell's Act "as in any other case (but not more in this than in any other case), if no objection were taken, and no transfer asked for or made," but that would, of course, not constitute an Admiralty action under the special Admiralty jurisdiction; this must be determined irrespective of the Judicature Act; since the sole effect of the Judicature Act is to enable the judge of the Admiralty Division, saving objections, to entertain any cause of action over which the High Court of Justice, of which the Admiralty Division forms a portion, has jurisdiction; but not to affect with special Admiralty rights or remedies anything which before the Act was not the subject of Admiralty jurisdiction.³

Child en ventre sa mère.

In the case of *The George and Richard*,⁴ a limitation of liability suit brought in the Court of Admiralty, a child *en ventre sa mère* was held entitled to be reckoned amongst the representatives amongst whom apportionment of a sum recovered would have to be made.⁵ This decision, inevitable upon principle, was supported by a sentence in the judgment of Coleridge, J., in *Blake v. Midland Ry. Co.*:⁶ "By what rule ought the jury to be guided in this apportionment? Are they to inquire into the degree of mental anguish which each member of the family has suffered from the bereavement? Then not only the child without filial piety, but a lunatic child, and a child of very tender years, and a *posthumous child on the death of the father*, may have something for pecuniary loss, but cannot come in *pari passu* with the other children, and must be cut off from the solatium."

Miscellaneous points.

It has also been decided that it is not necessary, under Lord Campbell's Act, to negative the existence of any relatives of the deceased other than those named in the declaration;⁷ that a husband cannot

¹ 9 P. D. 100.

² 10 App. Cas. 64.

³ In *The Orwell*, 13 P. D. 80, an action under Lord Campbell's Act, commenced in the Admiralty Division, it was held that upon default in pleading for the defendant, the plaintiff was entitled to enter interlocutory judgment and to have the damages assessed and apportioned by a jury. *Roche v. L. & S. W. Ry. Co.* (1899), 2 Q. B. 502.

⁴ L. R. 3 A. & E. 466. See *Walker v. G. N. Ry. Co. of Ireland*, 28 L. R. 1r. 69, discussed *ante*, 73.

⁵ See *Wms. Exors.* (10th ed.) 1238; Notes to *Viner v. Francis*, *Tud. L. C. Real Property* (3rd ed.), 798.

⁶ 18 Q. B. 110.

⁷ *Barnes v. Ward*, 9 C. B. 398. The 3rd section of the Act provides "that not more than one action shall lie for and in respect of the same subject-matter of complaint."

maintain an action;¹ that where the death occurred on board a steamer during a voyage, from a boiler explosion due to corrosion which had been going on for a period, in some portion of which the steamer had been in Ireland, no part of the cause of action arose within the jurisdiction of the Irish Courts,² and substituted service could not be allowed; that where the jury has manifestly shrunk from deciding the issue, there must be a new trial;³ that default in delivering particulars with the declaration under section 4 is ground for setting aside the service of the writ, but not for setting aside the writ itself; and the objection that the plaint does not state facts showing an obligation by the defendant to the deceased is matter for demurrer, and is not ground for setting aside the plaint as embarrassing;⁴ that money having been paid to compromise an action, but no division or apportionment of the money having taken place and there being no legal right to obtain apportionment, an action will lie, though the proper remedy is to go to a court of equity to compel the person making default to administer the trust;⁵ that money paid into court may be paid out on a consent, embodying the agreed terms of payment, being made a rule of Court;⁶ that, failing an agreement, money paid into Court may be paid out in proportions fixed by analogy to the Statute of Distributions;⁷ that an action⁸ can be sustained by a relative of the deceased though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased;⁹ and that where an action for personal injuries has been commenced in which the evidence of the injured man has been taken *de bene esse* and before trial he has died, and then an action is begun under Lord Campbell's Act, the evidence taken *de bene esse* is admissible.¹⁰

Dickinson v. N. E. Ry. Co., 2 H. & C. 735. Neither may the mother of a bastard child, *Clarke v. Carfin Coal Co.* (1891), A. C. 412. *Wood v. Gray & Sons* (1892), A. C. 576.

² *Walsh v. G. W. Ry. Co.*, 1r. R. 6 C. L. 532.

³ *Springett v. Balls*, 7 B. & S. 477.

⁴ *McCabe v. Guinness*, 1r. R. 9 C. L. 510; on the latter point Fitzgerald, B., dissented.

⁵ *Condliff v. Condliff*, 29 L. T. (N. S.) 831.

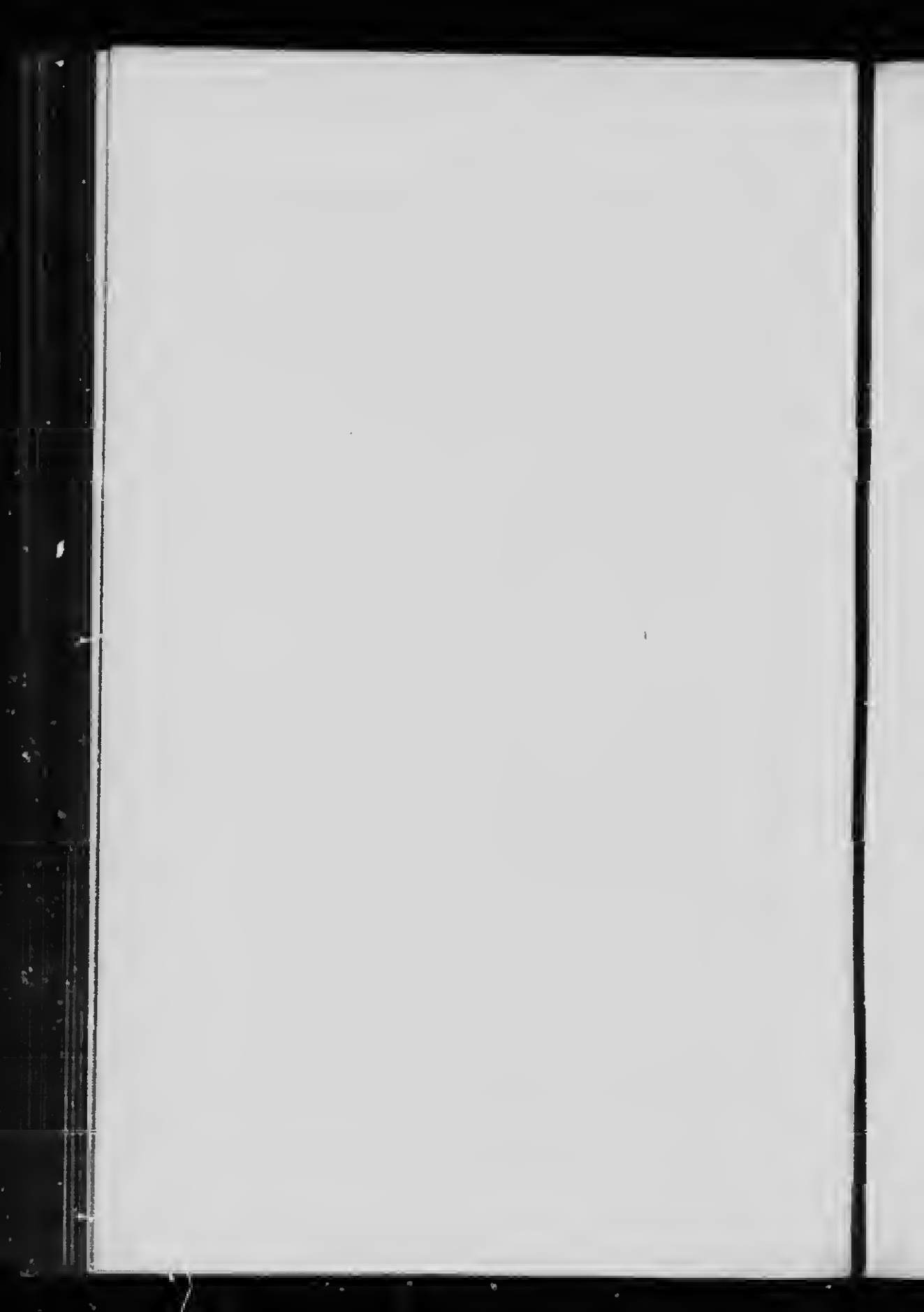
⁶ *Shallow v. Verdon*, 1r. R. 9 C. L. 150.

⁷ *Sanderson v. Sanderson*, 36 L. T. (N. S.) 847. See *The Franconia*, 2 P. D., per Bramwell, L.J., 171: "We are of opinion that under that section (9 & 10 Vict. c. 93, s. 2), it must be a jury who find and direct the division into shares." In England the payment of money on account of an infant is regulated by R. S. C. 1883, Order xxii. rr. 15, 16, and by County Court Rules, 1903, Order ix. r 24. As to right to bring successive actions where plaintiff's father and stepfather were simultaneously killed, *Johnston v. G. N. Ry. of Ireland*, 20 L. R. Ir. 691.

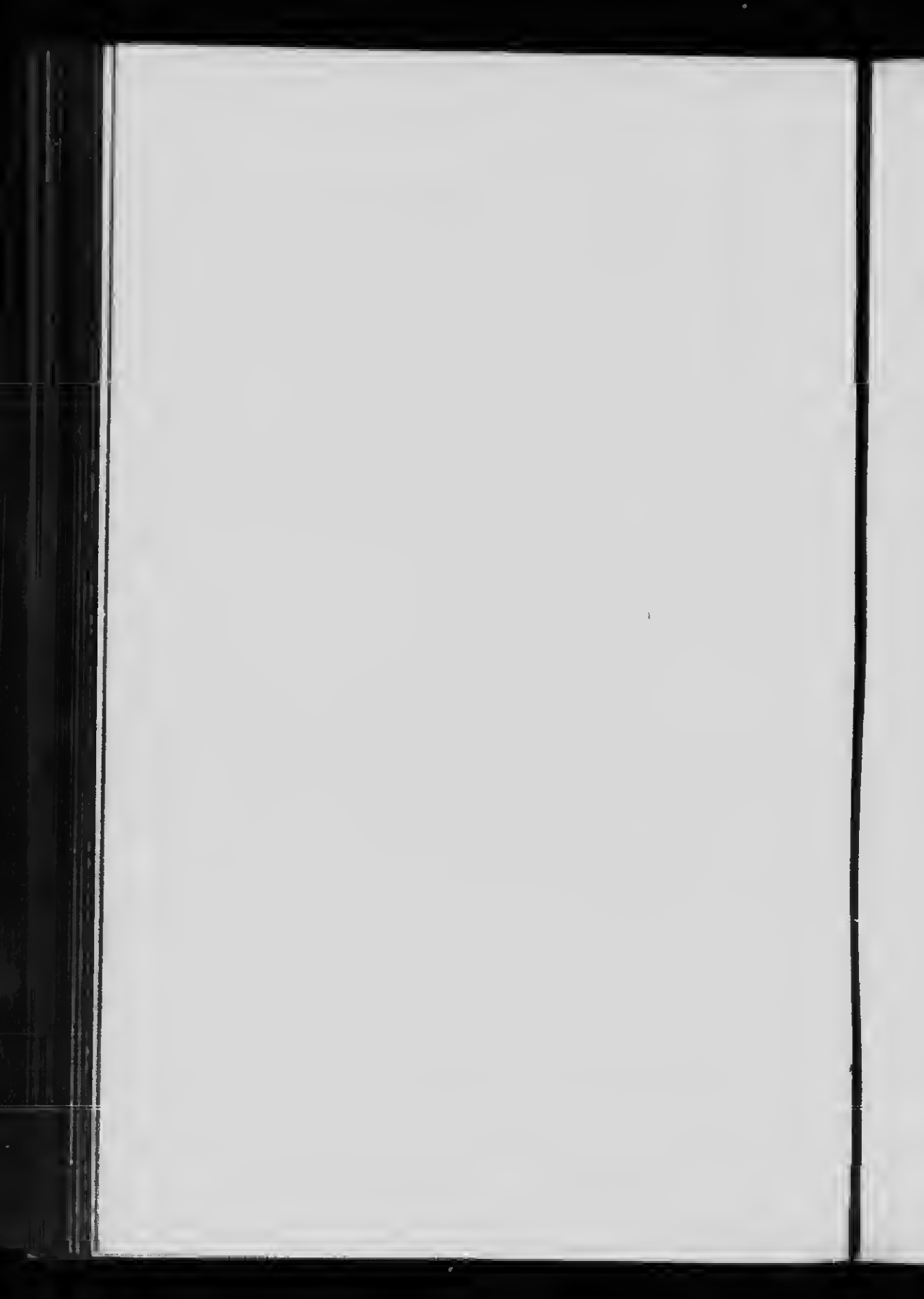
⁸ Under 27 & 28 Vict. c. 95.

⁹ *Holleran v. Bagnell*, 4 L. R. Ir. 740, followed in *Lampman v. Guinborough* (Corporation of), 17 Ont. R. 191. A wife living in adultery may not recover under Lord Campbell's Act: *Stimpson v. Hood*, 4 Times L. R. 589. *Quere*, whether evidence of the husband's willingness to take her back would entitle her to maintain the action. In *Steele v. The G. N. Ry. Co.*, 26 L. R. Ir. 96, an application made by the father and mother of the deceased that they might be at liberty to appear by counsel and solicitor at the trial of an action brought by the deceased's widow and administratrix, and tender evidence as to the amount of their shares of the money to be awarded as damages in the action, or in default might be made parties thereto, was refused, and *Johnston v. G. N. Ry. Co. of Ireland*, 20 L. R. Ir. 4, was considered, where a somewhat similar application was allowed.

¹⁰ *Corporation of Walker. n v. Erdman*, 23 Can. S. C. R. 352.



BOOK II.
OF AUTHORITIES SPECIALLY CONSTITUTED
FOR EXERCISING CONTROL.



BOOK II.
OF AUTHORITIES SPECIALLY CONSTITUTED
FOR EXERCISING CONTROL.

PRELIMINARY.

WE have now ascertained that to found liability it is necessary that the wrongful act charged must be imputable to some person as distinguished from an unreasoning force; and this person must be a responsible agent. We then proceeded to indicate the principal classes of persons who are not responsible agents. We found that, with the exception of those under the various disabilities then treated of, all natural persons are capable of becoming what Dr. Wharton¹ terms a "juridical cause"; may be responsible agents in law. The law under the designation of persons, includes, besides natural persons, various artificial arrangements for the purposes of society and government, whose functions and liabilities are not determined by the rights and duties of the aggregate of the rights and duties of individuals composing them; but, by various arbitrary rules impressed on these aggregates at the time of their constitution, and also by adaptation to their constitution of the general law of the land.²

A distinction must be kept in mind while considering these bodies between the discretionary powers with which they are clothed and the ministerial functions that they are to exercise. As clothed with discretionary powers of necessity they are independent of control; but where they have to carry out the mandates of positive law, they act under the supervision of the Courts. If their duty is to the public generally or to the Crown, their negligence is corrigible by indictment;³ if they are charged with an absolute and certain duty in the performance of which an individual has a special interest they are liable to an action; and this liability is dependent on the quality of the act and not on the rank or general functions of the officer.⁴

So far as the rules of law applied to the constitution of these bodies differ from the general rules of liability in the case of individuals, we now proceed to consider them under the headings:

I. As public officers.

II. As corporations and local administrative bodies.

¹ Negligence, § 87.

² See *Pharmaceutical Society v. London & Provincial Supply Association*, 5 App. Cas., per Lord Blackburn, 867.

³ *The King v. Bembridge*, 22 How. St. Tr. 155.

⁴ *Ferguson v. Kinnoull (Earl of)*, 9 Cl. & F. 251; *Shearman and Redfield, Negligence*, § 308.

CHAPTER I.

PUBLIC OFFICERS GENERALLY.

The King.

UNDER this head it is convenient to consider the position of the King; though constitutionally there is very slight analogy between his position and that of the large number of functionaries whom we shall here have to treat of.

The negligence of the King may be either personal negligence or negligence through his servants. As to the former, the constitutional maxim is *Rex non potest peccare*.¹ If the King personally command an injurious act, the act may be wrongful, yet the King is not accountable.² The maxim that the King can do no wrong applies to personal as well as to political wrongs, and not only to wrongs done personally by the King, but to injuries done by a subject by the authority of the King.³ This was laid down in *Viscount Canterbury v. Attorney-General*,⁴ where it was admitted that for the personal negligence of the King no proceeding could be maintained. "If," says Lord Lyndhurst, C., "the master or employer is answerable upon the principle that *Qui facit per alium, facit per se*, this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy. Cases have arisen of damages done by the negligent management of ships of war. It has been held that where the act is done by one of the crew, without the participation of the commander, the latter is not responsible.⁵ But if the principle now contended for be correct, the negligence of the seamen in the service of the Crown would raise a liability in the Crown to make good the damage, and which might be enforced by a petition of right."⁶

*Viscount
Canterbury v.
Attorney-
General.*

The case of *Viscount Canterbury v. Attorney-General* is important for another legal position that it established. The proceedings were by Petition of Right, brought by the Speaker of the House of Commons,

¹ Broom, *Legal Maxims* (7th ed.), 38. *Alii possint non peccare, ille non potest peccare*: *Le grand case in l: Court Guards*, 2 Rolle Rep. 304.

² Chitty, *Prerogativo*, 5.

³ Chitty, *Prerogativo*, 339, 340. *Feather v. The Queen*, 6 B. & S., per Cockburn, C. J., 235. See *Hampden's case*, 3 How. St. Tr., argument Sir John Banks, A. G., 1023; also opinion of Crawley, J., 1083, and *Hardy's case*, 24 How. St. Tr., per Sir John Scott, A. G., 243.

⁴ 1 Phillips, 321; 4 St. Tr. N. S. 767.

⁵ *Nicholson v. Mouncey*, 15 East 384. Cp. *Wright v. Lethbridge*, 63 L. T. 572.

for damage done to his furniture by the fire, burning down the Houses of Parliament, caused by the negligently burning of bundles of Exchequer tallies, which had been ordered to be removed. The control of the Houses of Parliament had been vested in the Commissioners of Woods and Forests, officers appointed by the Crown and removable at pleasure. The subordinate officers were appointed by the Commissioners. It was by these subordinate agents that the fire was alleged to have been caused. Assuming that they were servants of the Crown, though it was insisted they were servants only of the Commissioners, the inquiry was whether the Crown was responsible for their negligence. The Lord Chancellor discusses the matter thus: Lord Lyndhurst, C.'s, judgment.
 "Now, assuming that the fire had been caused by the personal negligence of the Commissioners, would the Crown, in such case, have been liable to make good the loss? They are indeed styled servants of the Crown; but they are, in truth, public officers appointed to perform certain duties assigned to them by the Legislature, and for any negligence in the discharge of such duty, and any injury that may be thereby sustained, they alone are, I conceive, liable. Is it supposed that the Crown is responsible for the conduct of all persons holding public offices and appointments, and bound to make good any loss or injury which may be occasioned by their negligence or delinquency? At least some authority should be cited in support of such a doctrine. But then it is said, these officers are appointed by the Crown and are removable at the pleasure of the Crown. That circumstance alone will not, I conceive, create any such liability. The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices and also to remove the persons so appointed at their pleasure. But they are not, on that account, subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the net done, had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agents whom they appoint and remove, and with the selection or control of whom the Crown has no concern."¹

¹ 4 St. Tr. N. S. 780. As to the remedies for any infringement of the subject's right, in Broom, Constitutional Law (2nd ed.), 238, occurs the following passage: "The Constitution of England, says Lord Holt (in *Ashby v. White*, 14 How. St. Tr. 784), 'has wisely distributed to several courts the determination of proper causes, but has left no subject in any case where he is injured, without his adequate remedy, if he will go to the right place for it.' If the subject has cause of complaint against the Crown, he must proceed for redress by that pathway which the constitution has laid out for him; for an illegal invasion of his liberty he should proceed by *habeas corpus*; to obtain the revocation of a grant which injuriously affects him, he should proceed by *scire facias*; for an illegal invasion of the rights of property, he should proceed by Petition of Right." By statute 46 & 47 Vict. c. 57, s. 26, *scire facias* is abolished, in so far as it relates to patents for invention. The Crown is not to be bound by a statute nor affected except by necessary implication: *Cooper v. Hawkins* (1904), 2 K. B. 164. As to the history of Petition of Right and *Monstrans de droit*, and where they lie, see Com. Dig. Prerog. D. 78; Vin. Abr. Prerog. (Q. 7)-(Q. 13); *Viscount Canterbury v. The Queen*, 1 Phill. 306, 4 St. Tr. N. S. 767; *In re the goods of George III.* 1 Add. 255, 1 St. Tr. N. S. 1274, with authorities collected in a note, 1285; and the judgment of Blackburn, J., in *Thomas v. The Queen*, L. R. 10 Q. B. 31. The present procedure is regulated by 23 & 24 Vict. c. 34; see for the practice, Clode, Petition of Right. For the proposition that the Sovereign could not be sued for a wrong, see *Tobin v. The Queen*, 16 C. B. N. S. 310, approved, *Feather v. The Queen*, 6 B. & S. 257; *Langford v. United States*, 101, U. S. (11 Otto) 341. In *Dixon v. London Small Arms Co.*, 1 App. Cas. 632, *Feather v. The Queen* is treated as a case rightly decided, but as one not to be extended. In *Windsor & Annapolis Ry. Co. v. The Queen and the Western Counties Ry. Co.*, 11 App. Cas. 607, Lord Watson cites and adopts the statement of law of

Consideration
of the liability
of servants of
the Crown.

Since, then, the King cannot personally be made liable for the negligences and torts of his servants, it remains to consider in what circumstances, and to what extent, those servants are themselves protected for acts done, or purporting to be done, in the course of their service.

1. As to
contracts.

With regard to contracts, the law has been laid down, that no cause of action exists against either servant or agent of the King who contracts as such: that is, although an agent making a contract for a private person would be personally liable, where the Crown is principal the agent will not *prima facie* be affected with any liability. An agent or servant on behalf of the Crown is not, however, incapacitated from binding himself by an express agreement; he is not liable in the absence of an express agreement; but if he enters into one, he is bound by its terms, whatever their stringency. The distinction between public and private agents rests ultimately on a question of evidence; and the existence of a different presumption from that existing in an ordinary case of private agency.

Macbeath v. Haldimand.

The course of the decisions has been uniform. The earliest is *Macbeath v. Haldimand*—an action against the Governor of Quebec, for military stores supplied to the garrison. Lord Mansfield held that "it was notorious that the defendant did not personally contract."¹

Gidley v. Lord Palmerston.

*Gidley v. Lord Palmerston*² is well known. Money had been paid to the defendant as Secretary at War, which he was authorised to pay over to plaintiff's testator. Not having done so, he was sued in *assumpsit*; but the plaintiff was held disentitled to recover, on the grounds, as stated by Dallas, C.J., that the duty was "as between him and the Crown only, and not resulting from any relation to, or employment by, the plaintiff, or under any undertaking in any way to be personally responsible to him. The money received is granted by the Crown, subject only to the disposition or control of the defendant as the agent or officer of the Crown, and responsible to the Crown for the due execution of the trust or duty so committed. There is, therefore, no duty from which the law can imply a promise to pay to the testator during his life, or to his executor after his death, nor can money be said to have been had and received to the use of the testator, which money belonged to the Crown, being received as the money of the Crown, and the party receiving it being responsible only to the Crown in his public character."

Cockburn, C.J., in *Feather v. The Queen*, "that the only cases in which the Petition of Right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or when a claim arises out of a contract, or for goods supplied to the Crown or to the public service"; *Furvell v. Bowman*, 12 App. Cas. 643; *Attorney-General of the Straits Settlements v. Wee Joo*, 13 App. Cas. 192, where, under a Colonial Act, the Crown was held liable to be sued in tort. In the Supreme Court of Canada it has also been held that where railways are taken by the State a Petition of Right does not lie against the Crown for injuries resulting from either the nonfeasance or the misfeasance of the subordinate officers or agents employed in the public service on the railway; *The Queen v. McLeod*, 8 Can. S. C. R. 1; *The Queen v. McFarlane*, 7 Can. S. C. R. 210. The nature of *Monstrans de droit* is considered in the *Case of the Bankers*, 14 How. St. R. 77.

¹ 1 T. R. 189. Cp. *Unwin v. Wolcley*, 1 T. R. 674, where the contract was "on behalf of Government." *All n v. Wall-pave*, 8 Taunt. 566. For a compendium of the American law with an examination of the English cases, see *United States v. Lee*, 100 U. S. (6 Otto) 196; the English authorities are reviewed 227-234; and *Hagood v. Southern*, 117 U. S. (10 Davis) 52. See also *Cooke v. United States*, 91 U. S. (1 Otto) 389, 398.

² 3 Brod. & B. 275, 7 Moore (C. P.) 91, 1 St. Tr. N. S. 1263.

The cases were reviewed in the Privy Council, in *Palmer v. Hutchinson*.¹ A claim was made against the Deputy Commissary-General for Natal to recover the price or hire of certain waggons and oxen for the carriage of goods. Their lordships held that the Deputy Commissary-General could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the commissariat department; since he was not a corporation, and had no property or assets in his official capacity which could be seized or attached in execution of a decree against him in that capacity; while it was clear that "no portion of the Government revenue, whether allocated to a special purpose or not, could be seized in execution under it."

*Palmer v.
Hutchinson.*

In *Kinloch v. Secretary of State for India*,² an attempt was made to obtain a legal remedy against the Secretary of State by alleging a trust to be constituted under the terms of a royal warrant, for which the Court could compel the Secretary of State to account and to distribute a fund, in which the plaintiff claimed to be entitled to share. The unanimous decision of the House of Lords, was that the terms of the royal warrant did not constitute a trust, but merely an agency for the performance of duties which the Sovereign personally could not perform; and for the performance of which the Secretary of State was answerable to the Sovereign alone.³

*Kinloch v.
Secretary of
State for
India.*

In modern times to facilitate the business of the country incorporations by statute have been made of officers or bodies who though servants of the Crown may yet be sued as principals. The Secretary of State for War, the Postmaster-General, the Commissioners of Woods and Forests, and for certain purposes the Commissioners of Works and Public Buildings are so liable to be sued. So under the Merchant Shipping Act, 1894, a public officer is appointed who may be sued for official torts. The judgment given is declaratory only.⁴ No execution can follow upon it, for there are no moneys appropriated for damages except those provided by Parliament, and any property the Commissioners have is Crown property.⁵ Whether the contract made with the Crown is discharged out of funds granted by the Imperial Parliament, or by Colonial Legislatures, or by the Indian Exchequer is immaterial so long as the obligation to the contractee is discharged from any or all of these sources.⁶

With regard to torts, the subject is more complicated. Servants of the Crown are liable for any act not justifiable by a lawful authority from the Crown. If the act is in itself wrongful, the officer doing it will in any event be liable. This appears from *Rogers v. Rajendro Dutt*⁷ where the owners of a steam tug sued the defendant for damage caused

1. As to torts.

*Rogers v.
Rajendro
Dutt.*

¹ (1881) 6 App. Cas. 619.

² (1882) 7 App. Cas. 619. *The Queen v. Secretary of State for War* (1891), 2 Q. B. 326. See also *Alexander v. Duke of Wellington*, 2 St. Tr. N. S. 704.

³ *Rice v. Chute*, 1 East 579; see note of a case, *Rice v. Evrill*, at 583, illustrating the maxim, *Cessante ratione cessat ipsa lex*.

⁴ 57 & 58 Viet. c. 60, s. 460 (4). *Dixon v. Farrer*, 18 Q. B. D. 43.

⁵ *Graham v. Public Works Commissioners* (1901), 2 K. B. 781. "Whether this decision be or be not sustainable—a matter into which I prefer not to enter—it seems to me not to have any bearing on the question here": per Palles, C.B., *Wheeler v. Commissioners of Public Works* (1903), 2 I. R. 234; the question was whether under an Irish Act the Commissioners were substituted for the Crown. The case should be consulted, since in addition to Palles, C.B.'s, dissenting judgment, there is an elaborate review of the cases. *The Queen v. McCann*, I. R. 3 Q. B. 677.

⁶ *Williams v. Howarth* (1905), A. C. 551.

⁷ 13 Moo. P. C. C. 209.

by an order issued in the defendant's official capacity forbidding the officers of the Bengal pilot service to allow the plaintiff's tug to take any ship of which they should have the charge in tow. In the particular case it was held that no action lay; but the Court said: "Neither does it seem to them to conclude the question in the action that the act complained of is to be considered as the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of malice, particular or general, against the plaintiffs. For if the act which he did was in itself wrongful, as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it was done by order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be theoretically maintained with any show of justice if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration." An act legally wrongful in itself renders even a public servant personally responsible though the act was *bonâ fide* done by him on behalf of the public.¹ Cockburn, C.J.'s, judgment in *Feather v. The Queen*,² is to the same effect: "As the Sovereign cannot authorise wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown."

*Feather v.
The Queen.*

Irresponsi-
bility of the
Crown for
misfeasance,
laches, or
unauthorised
exercise of
power by its
officers.

Military
Officers.
*Wall v.
M'Namara.*

On the other hand, no Government has ever held itself liable to individuals for the misfeasance, laches, or unauthorised exercise of power by its officers and agents; and the executive does not guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in embarrassments and difficulties and losses, which would be subversive of the public interests.³

As to military officers, in his summing-up in *Wall v. M'Namara*,⁴ Lord Mansfield said: "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright; it is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is, how the heart stood? And if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But on the other hand, if the heart is wrong, if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment or other injury complained of, they shall not cover themselves with the thin veil of

¹ *Cobbett v. Sir George Grey*, 4 Ex. 729.

² 6 B. & S. 296.

³ *Story, Agency*, § 319, cited by Miller, J., *Gibbons v. United States*, 8 Wall. (U. S.) 274.

⁴ Cited, *Johnstone v. Sutton*, 1 T. R. 536; 1 Bro. P. C. 93; 2 Gilb. Evidence, l. y. Lofft, 358.

legal forms, nor escape under the cover of a justification, the most technically regular, from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trust."

Again, in *Swinton v. Molloy*,¹ where the defendant, the captain of a Swinton v. Molloy. man-of-war, had imprisoned the plaintiff, who was the purser, for three days without inquiring into the matter, and had then released him on hearing his defence, Lord Mansfield said that "such conduct on the part of the defendant did not appear to have been a proper discharge of his duty and therefore that his justification under the discipline of the navy had failed him."

The accountability of an officer, believing himself to act in pursuance of his authority, yet doing an act which is ultimately found outside it, is dealt with in *Madraza v. Willes*.² A captain in the royal Madraza v. Willes. navy whose duty it was to arrest British ships engaged in the slave trade unlawfully took possession of the ship of the plaintiff, a Spanish merchant, engaged in the African slave trade, which was lawful by the law of Spain. A verdict and judgment were given for the plaintiff for £21,180; and though an unsuccessful attempt was made to reduce the damages, on the ground that the slave trade was by statute declared unlawful, no attempt was made to contest the captain's liability for his act.

In *Tobin v. The Queen*³ a vessel not registered as a British Tobin v. The Queen. vessel alleged to be engaged in the slave trade was seized and destroyed; but for the purpose of trying the validity of the seizure the vessel was admitted not to have been so engaged; nor liable to be condemned. The Attorney-General demurred. After giving judgment in favour of the demurrer on various statutory points, the Court said: "If it he assumed that Captain Douglas had authority from the Crown to seize all ships engaged in the slave trade, so that the seizure, if lawful, would have been made by him in the capacity of agent for the Crown, still, if he seized a ship not engaged in the slave trade, he would not act within the scope of that authority, and would not make his principal liable for that wrong. Thus, where a warrant was granted by the Secretary of State to apprehend the author of the 'North Briton,' and the defendant, upon good ground of suspicion, apprehended the plaintiff, who proved that he was not the author, the defendant was held not to have acted in obedience to that warrant, and to be responsible without a justification therefrom."⁴

In *Buron v. Denman*,⁵ again, the Crown professed to adopt and Buron v. Denman. ratify the alleged unlawful act of a captain of a Queen's ship who captured a Spanish slaver. An action against the captain was brought at bar. Parke, B., in summing up, said: "I have conferred with my learned brethren, and they are decidedly of opinion that the ratification Judgment of Parke, B. of the Crown, communicated as it has been in the present case,⁶ is

¹ Cited, *Johnstone v. Sutton*, *supra cit.*

² 3 B. & Ald. 353, 1 St. Tr. N. S. 1345. Cp. *Moatyn v. Fabrigas*, 20 How. St. Tr. 81; 1 Sm. L. C. (10th ed.) 572. As to the right of bringing in foreign vessels engaged in the slave trade, *The Le Louis*, 2 Dod. 210; 1 Kent, Com. 191, 200; *The Antelope*, 10 Wheat. (U. S.) 66. As to a contract made by a British subject for the sale of slaves, *Santos v. Illidge*, 8 C. B. N. S. 861.

³ 16 C. B. N. S. 310.

⁴ *L.c.* 349, referring to *Leach v. Money*, 10 How. St. Tr. 1001; 3 Burr. 1692, 1742; 1 Wm. Bl. 555.

⁵ 2 Ex. 167, 6 St. Tr. (N. S.) 526; *Secretary of State for India v. Kamachee Boye Sahaba*, 13 Moo. P. C. C. 86.

⁶ In documents from the Secretary of State for Foreign Affairs, the Lords of the Admiralty, and Secretary of State for the Colonial Department, on the report of the Governor of Sierra Leone and the defendant.

equivalent to a prior command. I do not say that I dissent; but I express my concurrence in their opinion with some doubt, because, on reflection, there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either. If the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by Petition of Right, or whether the injury is an act of State without remedy, except by appeal to the justice of the State which inflicts it, or by application of the individual suffering to the Government of his country, to insist upon compensation from the Government of this—in either view, the wrong is no longer actionable. I do not feel so strong upon the point as to say that I dissent from the opinion of my learned brethren; therefore, you have to take it as the direction of the Court that, if the Crown, with knowledge of what has been done, ratified the defendant's act by the Secretaries of State or the Lords of the Admiralty, this action cannot be maintained." To this ruling a bill of exceptions was tendered, but was not carried further, and the law laid down in the summing up has been since frequently cited by text-writers and acquiesced in,¹ as establishing the immunity of Crown officers for "an act of State"² purporting to be done under the authority of the Crown and, though not originally prescribed, ratified by the Crown.

Act ordered
by the
Crown.

*Hodgkinson v.
Ferne.*

If the ratification of the Crown may secure immunity for an act otherwise wrongful, because it is adopted as an act of State, much more is an officer of the Crown saved from liability for an act ordered by Government or the Crown. The rule of law was laid down by Coekburn, C.J., in *Hodgkinson v. Ferne*,³ a case where vessels chartered by the Government as transports whilst in tow of a steamer commanded by a naval officer came into collision: "Where two vessels are chartered by the Government for an expedition such as that in question, one of the terms of the contract they enter into is, that they shall pay implicit

¹ As to this doctrine of ratification by the Crown, Lord Stowell held in *The Rolla*, 6 C. Rob. Adm. 364, that the notification of blockade, which is a high act of sovereignty by a commander in foreign stations, was legal, though it was without authority from the Government at home; and the fact of the Government having had time to repudiate, and not having done so, was evidence of recognition, though the commander had no original authority; and see the judgment of Willes, J., in *Phillips v. Eyre*, L. R. 6 Q. B. 24. In *Fletcher v. Braddick*, 2 B. & P. N. R. 187, Mansfield, C.J., said: "It is doubtful whether, by obeying the orders of the officer, it was meant that the officer should see to the navigation and direct the motion of the ship." The comment on this in Abbott, *Merchant Ships*, 8th to 12th eds. (at 56 in 8th ed.), is: "This decision is not perfectly satisfactory. . . . The case was hardly ripe for judgment until that doubt had been removed." Sir J. Hannen, in *The Tasmania*, 13 P. D. 118, says: "It is unnecessary for me to express an opinion whether the law as laid down in *Fletcher v. Braddick* is modified by *Quarman v. Burnett*, 6 M. & W. 499, and the cases which have followed that decision." Ratification generally is treated in *Keightley Marstead v. Durant* (1901), A. C. 240.

² As to acts of war and of State not being within the jurisdiction of municipal Courts see the authorities referred to in *Bedre-shund v. Elphinstone*, 2 St. Tr. N. S. 449, note; to which add *Ex parte Mara's* (1902), A. C. 109; *Dobree v. Napier*, 2 Bing. N. C. 781; *Carr v. Franci Times* (1902), A. C. 170.

³ 2 C. B. N. S. 436.

obedience to the persons who command it; therefore, if one of them sustains damage from the other whilst acting in obedience to the orders of a superior officer, the owner of the vessel doing the damage cannot be held responsible in a court of law to the owner of the vessel to which the damage is done."

This necessarily follows from what was laid down in *Johnstone v. Sutton*:¹ "A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives; he must obey: nothing can excuse him but a physical impossibility."

In the event of Government orders in military or naval affairs being executed maliciously and oppressively, the general rule of law is that whenever any subject of England suffers damage for any illegal or injurious act of another short of felony, the law gives him a remedy by civil action, and without any previous conviction for the act.

Where the person thus unjustly treated is an officer in the army or the navy, no civil action is available. The wrongdoer must be brought before a court-martial on a charge of cruel and oppressive behaviour. The inability to get satisfaction in damages puts the injured person in no worse position than one injured by the acts of, e.g., a commander-in-chief or a judge or juror, against whom no action lies though malice is alleged.² In the case of a military or naval man, the injured person "has no reason to complain, for he has all which the law military, to which he engaged to submit when he entered the service, entitles him to have. The same code creates both the right and the remedy, and this Court [Queen's Bench] cannot add to the one or to the other."³

In *In re Mansergh*,⁴ Cockburn, C.J., thus marks the limits of the interference of the courts of law: "Where the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this Court [the Court of Queen's Bench] ought to interfere to protect those civil rights—e.g., where the rights of life, liberty, or property are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort, and the only matter involved was the military status of the applicant—a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign."⁵

The concluding expression might possibly be interpreted to import contract. But between the Crown and the servant seeking service there is nothing in the nature of a contract even possible; for the power is inherent in the Crown, against which no coercive process could be made available and no contract in derogation would be recognised.⁶

In delivering judgment in *Dawkins v. Lord Rokeby*,⁷ Lord Chancellor

¹ *Johnstone v. Sutton*, 1 T. R. 493, 510, 540; *Keighly v. Bell*, 4 F. & F. 703, per Willes, J., 790; *Dawkins v. Lord Rokeby*, 4 F. & F. 800.

² *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94; *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744. *Edmondson v. Rundle*, 19 Times L. R. 356. For what the term "Martial Law" signifies in Great Britain, see *Grant v. Gould*, 2 H. Bl. 99. For an account of the law as to the suppression of offences by Military Force and Martial Law, Stephen, *Hist. of Cr. Law*, vol. i. 200, 216.

³ *Dawkins v. Lord Paulet*, L. R. 5 Q. B., per Lush, J., 122. ⁴ 1 B. & S. 400, 400.

⁵ As to this, see *Trial of Gollin and others*, 12 How. St. Tr. 1289.

⁶ *Par's case*, 5 B. & Ad. 681, and the cases collected in *Grant v. Secretary of State for India*, 2 C. P. D. 445.

⁷ L. R. 7 H. L. 744, 753. See the cases there cited in argument, and the judgment

Malicious or
oppressive
execution of
orders.

Where
military law
prevails,
there is no
civil remedy.

*In re Man-
sergh.*

*Dawkins v.
Lord Rokeby.*

Cairns cited with approval the summing up of Mr. Justice Blackburn, that an "action would not lie, if the verbal and written statements were made by the defendant, being a military man, in the course of a military inquiry, in relation to the conduct of the plaintiff, being a military man, and with reference to the subject of that inquiry, even though the plaintiff should prove that the defendant had acted *malá fide*, and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him as aforesaid were false."

Where injury is really a civil matter, *Warden v. Bailey*.

A distinction was intended in *Warden v. Bailey*¹ between cases where the wrong alleged to be done was within the ambit of military authority, and those where so soon as the pretext is stated it is seen to derive no countenance from military authority. It is undoubted that if an officer commits a wrong actionable in a civil court which has no reference to his military authority even though the person wronged is a soldier under his military authority, such wrong is matter for redress in the civil courts.

Marks v. Frogley.

The point of transition from the military to the civil status was considered in *Marks v. Frogley*,² where on the breaking up of the Shorncliffe training camp for volunteers one of them accused of theft was given into military custody, and conveyed home, where he was handed over to the police. The arrest was held good under military law,³ inasmuch as the offence with which he was charged was alleged to have been committed while he was subject to military law.

Rule extends to all Crown servants.

This rule of the non-accountability of servants of the Crown extends to all servants of the Crown.

If a servant of the Crown is guilty of a wrongful act he must answer for it even though purported to be done for the Crown. He cannot escape liability by averring the order of any officer of State, or even of the Government itself. And any officer of State constraining a subordinate to a wrongful act, is equally liable to be sued for it with his subordinate. But the head of a Government department is not liable for the neglect or torts of officers in his department, unless he can show that the act complained of was substantially the act of the head himself.⁴ The power of the Government to protect its officer by declaring his act an act of State, cannot avail to increase the power of the Government as against its subjects or to limit their rights as against the Government. On an action being brought, the justification alleged must be pleaded, and although the Privy Council in *Walker v. Baird*⁵ did not "find it necessary to express an opinion," whether there does "of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war," it would be difficult to find authority for such a proposition subsequent to the time of the Stuarts.⁶

in the Ex. Ch. delivered by Kelly, C.B., L. R. 8 Q. B. 255; and *cp. Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (1892), 1 Q. B. 431.

¹ 4 Taunt. 67. See note on this case, 13 R. R. 560.

² (1898) 1 Q. B. 888.

³ Army Act, 1881 (44 & 45 Vict. c. 58), s. 176.

⁴ *Ruleigh v. Goschen* (1898), 1 Ch. 73.

⁵ (1892) A. C. 491.

⁶ I am not aware of any English case where the plea of Act of State has been held good against a subject. "Act of State can apply only to acts which affect foreigners." Stephen, *Hist. Crim. Law*, vol. ii. 61, IV. Acts of State. See *Ruling Cases*, Campbell, vol. i. 819-827, where the Indian cases on Act of State are discussed by Mr. C. P. Ilbert. *Salaman v. Secretary of State in Council of India* (1906), 1 K. B. 613; *Potter v. Broken Hill Proprietary Co.*, 3 C. L. R. (Australia) 479; Moore, Act of State.

*In re Nathan*¹ was an application under 5 & 6 Vict. c. 79, s. 23, for a mandamus to the Commissioners of Inland Revenue to pay to the applicant the amount of probate duty overpaid by him. Objection was made that the Crown cannot direct a writ of mandamus to itself, nor does a writ lie against servants of the Crown;² and was upheld on the ground that the money had been paid in contemplation of law into the hands of the Crown; as the duty had been paid to the Commissioners as *the mere servants of the Crown*; and, on the assumption that the statute did not establish a duty between the applicant and the Commissioners (in which event there would have been a right of action, and the remedy by mandamus would have been inappropriate), they were bound to obey the orders of the Crown alone. "If that be so, the meaning of the Act of Parliament, which says that these servants of the Crown are to pay back money which belongs to the Crown, and which is in the possession of the Crown and no longer in the actual possession of the Commissioners of Inland Revenue, is that it is a duty imposed upon them as servants of the Crown; and the duty imposed upon them is a statutory duty which they then owe to the Crown. The statute is also an enabling statute, because it enables them without a direct order from the Crown in each particular case, to get back from some other department of the Executive, but which is after all from the Crown, and out of the general fund into which it has been paid, the money which is to be repaid to such persons as the prosecutor if they make out their case. Therefore, the right of this prosecutor (if any) seems to me³ to be a right against the Crown in respect of moneys which are in the hands of the Crown, and belong to the Crown. If that is so, then no action will lie, because an action will not lie against servants of the Crown. I have said that I do not think the statute gives any individual an action against the Commissioners for the reasons I have stated—viz., that it raises no relation between the applicant and the servants of the Crown; therefore the claim upon which the prosecutor insists must be a claim against the Crown. If the prosecutor, therefore, has any remedy in this case, it must be by petition of right."⁴

Brett, M.R.'s
judgment.

The distinction pointed out is between—

- (a) Those cases where commissioners or others receive money either under the authority of an Act of Parliament, and without reference to the authority of the Crown, or in some capacity in which their relation to, and dependency on, the Crown is not invoked; when they are liable to ordinary process to secure its due application; and

Two classes of cases: (a) Where commissioners act under parliamentary authority.

¹ 12 Q. B. D. 461.

² *Perceval v. The Queen*, 3 H. & C. 217; *Executors of Perry v. The Queen*, L. R. 4, Ex. 27; *De Lancey v. The Queen*, L. R. 7 Ex. 140.

³ 12 Q. B. D., per Brett, M.R., 472.

⁴ In *The Queen v. Lambourn Valley Ry. Co.*, 22 Q. B. D. 463, where the prerogative writ of mandamus was sought to compel a railway company to register a transfer, Pollock, B., and Manist., J., refused the application, because "numerous authorities establish the proposition," that the writ ought not to be granted "if the applicant has another and sufficient remedy by action." It having been argued that the principle laid down had a general effect in curtailing the jurisdiction of the Queen's Bench Division, Wright, J., in *Reg. v. The Vestry of St. George, Southwark*, 67 L. T. 412, explained the decision as applying only, "where the duty sought to be enforced as well as the right to claim are in substance of a private nature, and that it does not extend to any case where the duties sought to be enforced are merely of a public nature. If it were otherwise, a great part of the jurisdiction of this Court (the Q. B. D.)

(b) Where they act as the agents of the Crown.

(b) Those cases where commissioners or others are acting directly as servants of the Crown, and are amenable to the Crown; when they are not amenable to the jurisdiction of the Courts otherwise than by petition of right.¹

The case of *The King v. Lords Commissioners of the Treasury*² seems inconsistent with this, as there the Queen's Bench ordered a mandamus to go; and in the subsequent case of *In re Hand*,³ Lord Denman, who delivered judgment in the earlier case, shows a disposition to limit the range of his decision; while, in *Baron de Bode's case*,⁴ Coleridge, J., speaks of the decision as "a much misunderstood instance," and as turning on the particular statute. In the *Queen v. Commissioners of Woods, &c.*, Lord Denman seems to incline to his earlier view;⁵ and in *The Queen v. Lords of the Treasury*,⁶ under 1 & 2 Will. IV. c. 11, the earlier decision was followed. *Ex parte Walmsley*⁷ and *The Queen v. Lords Commissioners of the Treasury*⁸ are the other way. In the latter case Cockburn, C.J., thus expresses the governing principle:⁹ "When a duty has to be performed (if I may use that expression) by the Crown, this Court (the Court of Queen's Bench) cannot claim even in appearance to have any power to command the Crown. The thing is out of the question. Over the Sovereign we can have no power. In like manner, where the parties are acting as servants of the Crown and are amenable to the Crown, whose servants they are, they are not amenable to use in the exercise of our prerogative jurisdiction."¹⁰ The law, then, may be considered settled in accordance with the view of Cockburn, C.J., and *The King v. Lords Commissioners of the Treasury*¹¹ to be overruled by *In re Nathan*¹² in the Court of Appeal.¹³

Governors of dependencies.

The next class of public officers whose position we shall consider is that of Governors of dependencies.¹⁴

in granting writs of mandamus would be taken away; but I do not think that the intention of the learned judges who decided the *Lambourn Valley case* was to lay down such a doctrine." *Smith v. Chorley District Council* (1897), 1 Q. B. 532.

¹ *The Queen v. Lords Commissioners of the Treasury*, L. R. 7 Q. B. 387, followed in *The King v. Arndel* (1906), 3 C. L. R. (Australia), 557, where *Smith v. The Queen*, 3 App. Cas. 614, is distinguished.

² 4 A. & E. 286.

³ 4 A. & E. 996.

⁴ 6 Dowl. Practice Cases, 702.

⁵ 15 Q. B. 770.

⁶ 16 Q. B. 357. See Blackburn, J., L. R. 7 Q. B. 399.

⁷ 1 B. & S. 81.

⁸ L. R. 7 Q. B. 387. See Ruling Cases, Campbell, vol. i. 802.

⁹ L. C. 394.

¹⁰ Cp. *Mitchell v. The Queen*, 7 Times L. R. 480, 579.

¹¹ 4 A. & E. 286.

¹² 12 Q. B. D. 476. *The Queen v. The Secretary of State for War* (1891), 2 Q. B. 320.

As to Lords of the Admiralty, see *Ex parte Ricketts*, 4 A. & E. 999; as to Commissioners of Woods and Forests, *Ex parte Revw.*, 5 Dowl. Pract. Cas. 668; as to Commissioners of Excise, *The Queen v. Excise Commissioners*, 6 Q. B. 975, and as to Sanitary Commissioners administering the functions of the Crown, *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400, 413. The immunity of executive officers in the United States from mandamus controlling a discretion is fully considered in *Gaines v. Thompson*, 7 Wall. (U. S.) 347. See for subsequent cases, *Carrick v. Lamar*, 116 U. S. (9 Davis) 423, and *Boynston v. Blaine*, 139 U. S. (32 Davis) 306, where the rule is said to be that the writ of mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion; when a mere ministerial duty is imposed it is otherwise.

¹³ A Petition of Right does not lie against the Crown for money received under a treaty by the Government in respect of debts owing by subjects, of a foreign power to certain of its own subjects: *Rustomjee v. The Queen*, 1 Q. B. D. 487, 2 Q. B. D. 69. The same case is authority for the proposition that the Statute of Limitations does not apply to a Petition of Right.

¹⁴ The rule of the Civil Law is, *In jus vocari non oportet neque consulem neque prefectum neque pratorum neque proconsulem, neque ceteros magistratus qui imperium habent, qui coercere aliquem possunt, et jubere in carcere duci; nec pontificem, dum sacra facit*: D. 2, 4, 2. As to Commissioners appointed in a conquered country, it is

*Mostyn v. Fabrigas*¹ is the leading case. To an action for assault and false imprisonment, the defendant pleaded—first, not guilty, and, secondly, that he was Governor of a colony, and that the plaintiff was raising sedition and mutiny; in consequence of which he imprisoned him. The plaintiff put in issue the facts of the plea. The verdict went for the plaintiff. A bill of exceptions was tendered; it was sought to argue first, that an action would not lie in England,² and secondly, that no action at all could anywhere lie against the Governor of a colony any more than against the King himself. Lord Mansfield, C.J., thus answered these contentions:³ "The first point that I shall begin with is the sacredness of the person of the Governor. Why, if that was true, and if the law was so, he must plead it. This is an action for false imprisonment; *prima facie* the Court has jurisdiction. If he was guilty of the fact, he must show a special matter that he did this by a proper authority. What is his proper authority? The King's commission to make him Governor. Why then he certainly must plead it; but, however, I will not rest the answer upon that. It has been singled out that in a colony that is beyond the seas, but part of the dominions of the Crown of England, though actions would lie for injuries committed by other persons, yet it shall not lie against the Governor. Now, I say for many reasons, if it did not lie against any other man, it shall most emphatically lie against the Governor. In every plea to the jurisdiction you must state a jurisdiction; for, if there is no other method of trial, that alone will give the King's Courts jurisdiction." "In every case to repel the jurisdiction of the King's Courts you must show a better and a more proper jurisdiction."⁴ Now,

Mostyn v. Fabrigas.

Two points raised:
I. Action would not lie in England;
II. No action would lie against the Governor of colony.

said, in arguing in *Bedreechund v. Elphinstone*, 2 St. Tr. N. S. 379, 425, 1 Knapp P. C. C. 316, 346; "A Commissioner is at most only equal to a Governor; perhaps his office is rather inferior; at any rate, he cannot pretend to a greater degree of irresponsibility." Forsyth, Cases and Opinions on Constitutional Law, 64. Oliver St. John touches on this subject in his speech in the *Proceedings against the Earl of Strafford*, 3 How. St. Tr. 1494.

¹ Cowp. 161, 20 How. St. Tr. 81, 1 Sm. L. C. (11th ed.) 591.

² *Companhia de Moçambique v. British South Africa Co.* (1892), 2 Q. B. 358, reversed (1893) A. C. 602. In *Phillips v. Eyre*, L. R. 6 Q. B. 1, it is laid down (at 28) that to found an action of tort in England, two conditions must be fulfilled: First, the wrong must be such that it would have been actionable if committed in England: *The Innes*, L. R. 2 P. C. 193. Secondly, it must not have been justifiable by the law of the place where it was done: *Blad's case* (1674), 3 Swanst. 603 App. (and see per Lord Lindley, *Carr v. Francis Times* (1902), A. C. 184); *Dobree v. Napier*, 2 Bing. N. C. 781, 3 St. Tr. N. S. 621; *Reg. v. Lesley*, Bell C. C. 220. *Phillips v. Eyre* and *The Halley* are followed and approved in *The M. Morham*, 1 P. D. 107, and discussed in *Potter v. Broken Hill Proprietary Co.* (1905), 30 V. L. R. 612; 3 C. L. R. (Australia) 479. In *Balkantine v. Golding*, Cooke's Bankruptcy Law, 487, Lord Mansfield laid down the rule that what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere, and, by parity of reasoning, where an obligation *ex delicto* to pay damages is discharged and avoided by the law of the country where it is made, the accessory right of action is in like manner discharged and avoided. To show, however, that an action is pending abroad for a wrong is no ground for staying proceedings in this country, see *Cox v. Mitchell*, 7 C. B. N. S. 55; *Mutrie v. Binney*, 35 Ch. D. 614, 623. In *Potter v. Brown*, 5 East 131, Lord Ellenborough, C.J., said: "We always import together with their persons the existing relations of foreigners, as between themselves, according to the laws of their respective countries; except, indeed, where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference." See Story, Conflict of Laws, § 326; *Cail v. Papayanni*, 1 Moo. P. C. C. N. S. 471, 483; *Scott v. Seymour*, 1 H. & C. 219; *Dennick v. Rd. Co.*, 103 U. S. (13 Otto) 11; *The Indian Chief*, 3 C. R. Adm., per Sir William Scott, 29. See also *Companhia de Moçambique v. British South Africa Company* (1892), 2 Q. B., per Fry, L.J., 414. Forsyth, Cases and Opinions on Constitutional Law, 188, 217; *Rosea v. Bhagvat Singhjee*, 19 Rettie 31.

³ 20 How. St. Tr. 228.

⁴ Case of *The Hon. Rob. Johnson*, 6 East 563; Case of *The Kinochs*, 18 How.

Dictum of Lord Mansfield: "A Governor is in the nature of a Viceroy."

Lord Mansfield's *dictum* considered by the Privy Council in *Cameron v. Kyle*.

Dictum of Lord Mansfield dissented from in *Hill v. Bigge*.

in this case no other jurisdiction¹ is shown even by way of argument; and it is most certain that if the King's Courts cannot hold plea in such a case, there is no other Court upon earth that can do it; for it is truly said that a Governor is in the nature of a Viceroy, and, of necessity, part of the privileges of the King are communicated to him during the time of his government. No criminal prosecution lies against him, and no civil action will lie against him; because what would the consequence be? Why, if a civil action lies against him, and a judgment (is) obtained for damages, he might be taken up and put in prison on a *capias*; and, therefore, locally during the time of his government the Courts in the island cannot hold plea against him." "If he is out of the government he leaves it; he comes and lives in England, and he has no effects there to be attached; then there is no remedy whatsoever, if it is not in the King's Courts.

The *dictum* of Lord Mansfield that "a Governor is in the nature of a Viceroy," in the sense that he is clothed with the plenitude of the royal prerogative, may be considered as not to be law. The question arose in *Cameron v. Kyle*,² where Parke, B., in giving the judgment of the Privy Council, said: "If a Governor had, by virtue of that appointment, the whole sovereignty of the colony delegated to him as a Viceroy, and represented the King in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself, though such act might not be in conformity with instructions which the Governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the Sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the Governor be an officer merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the colony over which he presided could not give it any legal effect. We think the office of Governor is of the latter description, for no authority or *dictum* has been cited before us to show that a Governor can be considered as having delegation of the whole royal power in any colony as between him and the subject when it is not expressly given by his commission;³ and we are not aware that any commission to colonial Governors conveys such an extensive authority."⁴

The *dictum* of Lord Mansfield was expressly dissented from in *Hill v. Bigge*,⁵ by Lord Brougham,⁶ who delivered the judgment of the

St. Tr. 395. See, however, *Companhia de Moçambique v. British South Africa Co.*, in the House of Lords, *supra*.

¹ Putler's Note Co. Litt. 391a.

² 3 Knapp P. C. C. 332, 3 St. Tr. N. S. 607.

³ *L. c.* 343, 344. See *In re Seizure of Slaves at Sierra Leone*, Br. & Lush. 148.

⁴ See Chalmers, *Opinions of Eminent Lawyers*, vol. i. 231. *The Rolls*, 6 C. Rob. Adm. 364.

⁵ 3 Moo. P. C. C. 465, 476, 478, 4 St. Tr. N. S. 723.

⁶ "With the most profound respect for the authority of that illustrious judge (Lord Mansfield), it must be observed that, as has been shown, the Governor being liable to process during his government would not of any necessity follow from his being liable to action, and that the same argument might be used to show that an action lies not against persons enjoying undoubted freedom from arrest by reason of privilege": 3 Moore P. C. C. 481. The status of Colonial Governors is exhaustively considered in *Toy v. Musgrove*, 14 Vict. L. R. 349.

Privy Council there. The action was for a private debt contracted by the defendant in England before he was Governor, but on which he was sued in the Courts of the colony, and thereupon claimed, as a personal privilege of the Governor, immunity from being called to answer there. Lord Brougham said: "If it be said that the Governor of a colony is quasi-Sovereign, the answer is that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him." "His being liable to be taken in execution is not the necessary consequence of his being liable to have a judgment against him. There were anciently more instances than happily now of persons privileged from legal process; but there still are some such exemptions, as privilege of peerage and of Parliament,¹ and of persons in attendance upon the Sovereign and upon Courts of Justice. None of these privileges protect from suits, all more or less protect from personal arrest in execution, or judgment recovered by suit. Indeed, the old, and we may now say obsolete, writ of protection which the King granted to his servants and debtors, purported to be a protection from all pleas and suits; yet the Courts held that no one should thereby be delayed in his action, but only that execution should be stayed after judgment."² "It therefore is not at all necessary that, in holding a Governor liable to be sued, we should hold his person liable to arrest while on service—that is, while resident in his government. It is not even necessary that we should meet the suggestion of his goods, in all circumstances, being liable to be taken in execution—though that is subject to a different consideration."

In *Phillips v. Eyre*,³ a colonial Act of Indemnity had been passed in respect of certain alleged wrongful acts done by the Governor. This Act of Indemnity was held an answer to an action brought in England; on the principle that, to found any right of action, it is necessary to show that the acts out of which the action arises cannot be justified by the law of the place where they are done,⁴ and that the Act of Indemnity, which the elements necessary to constitute a right of action were removed, was not necessarily and in its nature unjust.

The Privy Council had again the question of a Governor's authority before it in the case of *Musgrave v. Pulido*.⁵ An action of trespass was brought in Jamaica against the Governor for seizing and detaining a schooner, of which the plaintiff was charterer. The plea set out that the defendant was the Governor of Jamaica, and that the acts in respect of which the action was brought were done by him in that capacity. After a review of the cases, the judgment of the Privy Council proceeds as follows: "It is apparent from these authorities that the Governor of a colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it

¹ See *In re Mr. Low Well-ley*, 2 Russ. & M. 639, 3 St. Tr. N. S. 911.

² Cro. Jac. 419; 25 Edw. III. stat. 5, c. 10; *Palkington v. Stanhope* (1694), 2 Vern. 317. See Bracton (Twiss), vol. iv. 137, vol. v. 130. There is an interesting account of *essoigns* in Reeves, *Hist. Eng. Law* (2nd ed.), vol. i. 405-417; Vin. Abr. *Essoign*.

³ (1869) L. R. 4 Q. B. 225; (Ex. Ch.) 6 Q. B. 1.

⁴ *Car v. Francis Times* (1902), A. C. 176.

⁵ (1879) 5 App. Cas. 102; *Nireaha Tamaki v. Baker* (1901), A. C. 576.

be granted that, for acts of power done by a Governor under and within the limit of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise, it must necessarily be within the province of municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of State policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognisance of it."

Lord-Lieutenant of Ireland. *Tandy v. Lord Westmoreland*.

Luby v. Lord Wodehouse.

Sullivan v. Earl Spencer.

Rule of law.

The operation of the principle here indicated is shown in *Tandy v. Lord Westmoreland*,¹ an action brought against the Lord-Lieutenant of Ireland by Napper Tandy. The Irish Court of Exchequer, on motion by the Attorney-General, and acting on facts disclosed in a warrant of attorney from Napper Tandy to Dowling, his attorney, ordered the subpoena issued against the Lord-Lieutenant to be quashed, on the ground that the facts so disclosed showed that he was sued for an act done by him in his capacity of Lord-Lieutenant, and that such an action is not maintainable. This decision was followed in *Luby v. Lord Wodehouse*,² where the Attorney-General, for the defendant, moved, on affidavits filed by the plaintiff, that proceedings be stayed or the writ be taken off the file, on the ground that the facts set out in the affidavits showed that the action was brought against the defendant for acts done by Lord Wodehouse *quâ* Lord-Lieutenant, and not for a personal act done by him as a private individual; and that, therefore, he was not amenable to this or to any other Court. The Court being satisfied from the materials of the accuracy of the contention, granted the motion. In a third Irish case³ the motion was supported by an affidavit made by the Under-Secretary, which was answered by the plaintiff; here, too, the Court made the order.

It appears, then, from these and other cases,⁴ that, in actions brought against the Governors of dependencies, it is necessary, in order to prevent the ordinary Courts of law from taking cognisance of them, that—first, the facts out of which the proceedings arise should be laid before the Court, apparently in any form by which the Court can sufficiently inform itself; and, secondly, the Court, on inquiry into the nature of the acts complained of, should be satisfied that they bear the character of acts of State. On being so satisfied, it will take no further cognisance of them.⁵

¹ 27 How. St. Tr. 1247, 1264.

² 17 Ir. C. L. R. 618. See the comment on the accuracy of this case, per Lord Brougham, *Hill v. Bigge*, 4 St. Tr. N. S. 733, and what is said of this and the preceding case in *Musgrave v. Pulido*, 5 App. Cas. 111.

³ *Sullivan v. Earl Spencer*, Ir. R. 6 C. L. 173. As to the liability of a person doing a wrongful act under the King's orders, 3 Inst. 236, Chitty, Prerog. 90; Dicey, Law of the Constitution (4th ed.), 303 *et seq.*; *Proceedings on the Habeas Corpus brought by Sir Thomas Darnell and others*, 3 How. St. Tr. 1-234; Hallam, Const. Hist. vol. 1. (8th ed.), 383 *et seq.*

⁴ *Rajah of Tanjore's case*, 13 Moo. P. C. C. 22; *Forester and others v. Secretary of State for India*, L. R. Ind. App. Sup. 10; *Nabob of Carnatic v. East India Company*, 1 Ves. Jun. 370; *Ex-Rajah of Coorg v. East India Company*, 29 Beav. 300; *Rajah Salig Ram v. Secretary of State for India*, L. R. Ind. App. Sup. Vol. 119—all cited in *Musgrave v. Pulido*, 5 App. Cas. 102; *Busham v. Lumley*, 2 St. Tr. N. S. 322.

⁵ As to "Act of State" see note 2 on preceding page. As to the criminal liability

Some remarks of Blackburn, J., charging the grand jury in *Regina v. Eyre*,¹ may here be noted: "The powers of a Governor of a colony are different from and more extensive than, those of a lord-lieutenant of a county of England or a mayor of a borough in England, in which a riot or insurrection has broken out; and, consequently, both what he may be authorised to do and what he may be punishable or blamable for if he does not do, is different in his case from theirs, but the principle upon which the responsibility of each officer depends is, I think, the same. The officer is bound to exercise the powers which the law gives him in the manner which, under the circumstances, is right; and if he fails to exercise those powers, if something which he ought to do is not done by him, and mischief occurs, then, if the circumstances are such as to make it his duty to exercise them, and he does not do it, he neglects his duty; and if the neglect is such and to such an extent as amount to criminal negligence, then he is guilty of a crime for which he may be indicted."²

Charge of
Blackburn,
J., in *Regina
v. Eyre*.

It is a principle of the common law that one cannot be removed from a freehold office except for misconduct and after having an opportunity of being heard in his defence. But if the office is held at the will of the Crown, the Crown's power is unrestricted.³ The appointment of a successor vacates the prior appointment. A colonial government is on the same footing as the home government in this.⁴ Where a contract of service is made for the Crown by an agent the doctrine of *Collen v. Wright* charging the agent for an implied warranty, has no application.⁵

Judicial officers are the next class of public officers to be considered. The best description of judicial duties may be extracted from two American cases. In *Seaman v. Patten*,⁶ Livingston, J., said: "An officer acting under a commission from Government, who is enjoined by law to the performance of certain things, if in his judgment or opinion the requisites therein mentioned have been complied with; and inhibited under the like exercise of his own discretion from doing other things; who is sworn to discharge these duties to the best of his ability, and exposed also to penalties as well for negligence as for acting where he ought not, is not answerable to a party who may conceive himself aggrieved for an omission arising from a mistake or mere want of skill, if there be no had faith, corruption, malice, or some misbehaviour or abuse of power." The officer in the case was an "inspector-general of provisions," and therefore not a Court of record.

Judicial
officers.
*Seaman v.
Patten*.

In *Vanderheyden v. Young*, Spencer, J., said: "It is a general

*Vanderheyden
v. Young*.

of a Governor, see 11 & 12 Will. III. c. 12; 42 Geo. III. c. 85, sec. 6, is repealed down to "provided always that" by Public Authorities Protection Act, 1893, Sched. 1; *Rez v. Wall*, 28 How. St. Tr. 51; *Rez v. Pieton*, 30 How. St. Tr. 225; *Reg. v. Eyre*, Finlason, History of the Jamaica Case. See also *Proceedings against Col. Finnes for cowardly surrendering the City and Castle of Bristol*, 4 How. St. Tr. 186. In the United States it is assumed as a principle flowing from the sovereignty of the United States that the officers of the Government are not subject to suits for acts in the regular discharge of their official duties: Cooley, Constitutional Limitations (6th ed.), 17 n.

¹ Finlason's Report, 55.

² In *Pinney's case—the Bristol Riots*, 3 St. Tr. N. S. 11, 510—Littledale, J., says: A public officer in point of law "is bound to hit the exact line between an excess and doing what is sufficient."

³ *Willis v. Gipps*, 5 Moo. P. C., per Parke, B., 390.

⁴ *Shenton v. Smith* (1895), A. C. 229. In N. S. W. legislation has made exceptions to this principle, as in *Gould v. Stuart* (1896), A. C. 575; *Young v. Adams* (1895), A. C. 466; *Young v. Waller* (1898), A. C. 661.

⁵ *Dunn v. Macdonald* (1897), 1 Q. B. 401.

⁶ 2 Caines (N. Y.), 312, 317. A fish inspector is a judicial officer; *Fath v. Koeppe*, 7 Am. St. R. 867.

⁷ 11 Johns. (Sup. Ct. N. Y.) 150, 158.

and sound principle that whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done, and at the same time contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is, *quoad hoc*, a judge. His mandates to his legal agents on his declaring the event to have happened, will be a protection to those agents; and it is not their duty or business to investigate the facts thus referred to their superior, and to rejudge his determination."¹

Thus, a broker who undertook to give his opinions upon fruit submitted to him was held to act as a quasi-arbitrator;² so was an average adjuster, to whom the parties to a suit agreed to refer their dispute,³ and an architect, in an action by the builder against him for negligence,⁴ unless fraud and collusion supervene.⁵

Early law.

The principle of the immunity of judges for judicial acts is stated as early as the Book of Assize, 27 Edward III. 135, pl. 18. And the same protection was extended to grand jurors; for in 47 Edward III. 16, pl. 30, a writ of conspiracy⁶ was sued in the King's Bench, and the defendants pleaded that they were indictors therein; and this was held to be a good plea. In 9 Edward IV. 3, pl. 10, Littleton, J., held that an action for assault and battery would not lie against a justice of the peace for what he did as judge of record.⁷

¹ See *Barnardiston v. Soame*, 6 How. St. Tr. 1003; and 7 & 8 Will. III. c. 7. Sec. 7 is repealed by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59). The first reason of North, C.J., at 1006, is that the sheriff acts as judge in declaring the majority of votes, and therefore no action will lie, though his action is charged to be malicious. "If a justice of the peace commit any error within his jurisdiction, I know of no case where such an action will lie against him; as if he convict upon evidence which turns out not to be true, and an action of false imprisonment be brought against him, the conviction is conclusive evidence in his favour. As to the case of a revenue officer, he is a mere volunteer, and therefore he is liable for any mistakes he may make. But this is more like the case of a sheriff, who is a ministerial officer. If, for instance, a writ of *fi. fa.* be directed to him, he is bound to act; and when the property is disputed, if he return *nulla bona*, and happen to be mistaken in point of law, it is a false return": per Wilson, J., in *Drewe v. Coulton*, cited in a note to *Harman v. Tappenden*, 1 East 563. An information will not be granted against magistrates, though they mistake the law, if they do not act corruptly: *The King v. Jackson*, 1 T. R. 653; *Tozer v. Child*, 7 E. & B. 377.

² *Pappa v. Rose*, L. R. 7 C. P. 32, 525.

³ *Tharsis Sulphur and Copper Company v. Loftus*, L. R. 8 C. P. 1.

⁴ *Stevenson v. Watson*, 4 C. P. D. 148. *Tullie v. Jackson* (1802), 3 Ch. 441. If an arbitrator along with his award delivers a paper containing his reasons, the paper will be taken as part of the award; and if the reasons are wrong in law, the award will be set aside: *Kent v. Elstob*, 3 East 18, referred to by Lord Eldon, C., *Young v. Walter*, 9 Ves. 306, where he points out that "if the parties mean by the reference to say, that A's law shall be the law between them, they are competent so to agree." See Arbitration Act, 1889 (52 & 53 Vict. c. 49). An arbitrator may be called as a witness in legal proceedings to enforce his award, and may be asked questions as to what passed before him and what matters were presented for his consideration, but not as to what passed in his mind in making his award. *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 6 H. L. 418; *In re Whitley and Roberts's Arbitration* (1891), 1 Ch. 558. To the same effect are the Scotch cases; *M'Millan v. Free Church* (1802), 24 Dunlop 1282. See *East and West India Dock Co. v. Kirk*, 12 App. Cas. 738. In *Turner v. Goulden*, L. R. 9 C. P. 57, a "mere valuer" is distinguished from an arbitrator; and *cp. In re an arbitration between De Morgan, Snell & Co. and the Rio de Janeiro Mills and Granaries, Ltd.*, 8 Times L. R. 292 (C. A.). An architect's certificate was held to be given as an arbitrator in *Chambers v. Goldthorpe* (1901), 1 K. B. 624.

⁵ *Batterbury v. Vyse*, 2 H. & C. 42; *Ludbrook v. Barrett*, 46 L. J. C. P. 798.

⁶ *Fitzh. De Nat. Brev. Writ of Conspiracy*, 114.

⁷ There is a law of Alfonso V. of Aragon in 1442 saying that the *justicia* shall continue in office during life, removable only, on sufficient cause, by the king and the cortes united: Prescott, *History of Ferdinand and Isabella*, vol. i. 86, which is claimed to be "the most ancient precedent in favour of the establishment of an independent judiciary." 1 Kent, Com. 293.

Staundforde, in his "Plees del Coron," lays down that no prosecution for conspiracy lies against grand jurors; for it shall not be intended that what they did by virtue of their oaths was false and malicious; and that the same law applies to a justice of the peace, for he shall not be punished as a conspirator for what he does in open session as a justice.

In *Floyd and Barker's case*² the same subject was considered by the two Chief Justices (Popham and Coke), the Chief Baron (Fleming), the Lord Chancellor Egerton, and all the Court of Star Chamber. "It was agreed that inasmuch as the judges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a record, or of any judicial proceedings before them, or tending to the slander of the justice of the King, which will trench to the scandal of the King himself, except it be before the King himself;³ for they are only to make an account to God and the King, and not to answer to any suggestion in the Star Chamber; for this would tend to the scandal and subversion of all justice. And those who are the most sincere would not be free from continual calumniation, for which reason the orator said well, *In-vigilandum est semper, multas insidias sunt bonis*. And the reason and cause why a judge, for anything done by him as judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his justice), shall not be drawn in question before any other judge for any surmise of corruption, except before the King himself, is for this; the King himself is *de jure* to deliver justice to all his subjects; and for this that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath. And, forasmuch as this concerns the honour and conscience of the King, there is great reason that the King shall take account of it, and no other."⁴ Lord Chief Justice North, in his opinion to the House of Lords in *Barnardiston v. Soame*,⁵ puts the matter more forcibly: "No action will lie against a judge for what he does judicially, though it should be laid *falsi militiosé et scienter*; as appears in Co. 12 Rep. 24. They who are intrusted to judge, ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage."

In *Bushell's case*⁶ it was resolved by all the judges of England

¹ (1583) 173.

² 12 Rep. 23, 25. See Buller's argument, *Fabrigas v. Mostyn*, 20 How. St. Tr. 81, 204, and Lord Mansfield's judgment, 228.

³ In the time of Edward III., Thorpe, C.J., was degraded for taking bribes; 3 Co. Inst. 145; 1 Campbell, Chief Justices, 90, 91. Y. B. 14 & 15 Edw. III. Pike, Intro. xxi, liii., gives an account of the trial of many judges by Special Commission for misconduct in office. As to judges convicted of bribery, see 4 Bl. Com. 139; *Lord Bacon's case*, 2 How. St. Tr. 1087; *Lord Macclesfield's case*, 16 How. St. Tr. 707. For cases of the sale of judicial offices see 1088, and for arguments of the legality of it, 1109, 1273. See Vin. Abr. Judges.

⁴ *Aire v. Sedgewicke*, 2 Rolle Rep. 197; *Basten v. Carew*, 3 B. & C. 649.

⁵ 6 How. St. Tr. 1090.

⁶ (1670) Vaughan 135; 6 How. St. Tr. 999; see the comments on this case in the argument of the Attorney-General in *Stockdale v. Hansard*, 3 St. Tr. N. S. 768, *Bradley v. Fisher*, 13 Wall. (U. S.) 335; *Yates v. Lansing*, 5 Johns. (Sup. Ct. N. Y.) 282, 6 Johns. 337, 9 Johns. 395, may be referred in this connection for the judgment of Kent, C., considering the English authorities, and where 31 Car. II. c. 2—the Habeas Corpus Act, 1679—is said to be the first instance in the History of the English law where judges of the highest common law tribunal sitting and acting not in a ministerial

Staundforde,
"Plees del
Coron."

Floyd and
Barker's case.

Resolution in
Bushell's case.

(except Kelynge, C.J.) that a juryman cannot lawfully be punished by fine, imprisonment, or otherwise for finding against the evidence or against the direction of the judge, even though his finding is alleged to be given corruptly and knowing the evidence to be full and manifest.¹

Hammond v. Howell.

After *Bushell's case* came *Hammond v. Howell*.² The defendant was Recorder of London, and, as one of the judges of oyer and terminer, fined and imprisoned the plaintiff, because he had brought in a verdict as a juror contrary to the direction of the Court and the evidence. The act of the defendant was admitted to be illegal; yet the Court held that, in a conflict of principles, the bringing the action was a greater offence than the imprisonment of the plaintiff; that no action would lie against a judge for a wrongful commitment any more than for an erroneous judgment; that, though the defendant acted erroneously, he acted judicially; and that, if what he did was corrupt, complaint might be made to the King; if erroneous, it might be reversed.³

Groenvelt v. Burwell.

*Groenvelt v. Burwell*⁴ should be noticed; where Holt, C.J., went at large into the cases and showed that judges are not liable to an action by the party for what they do as judges; that no averment is admissible that a judge of record has acted against his duty; that, even if a justice of the peace should affirm that, upon his view, as against law which in fact is not so, he cannot be drawn in question; for his decision is a judicial act; that, in like manner, jurors are not responsible for their verdicts, because they are judges of fact; and "that it would expose the justice of the nation, and no man would execute the office of a judge upon peril of being arraigned by action or indictment for every judgment he pronounces."⁵

Kemp v. Neville.

Passing over a number of earlier cases we come to *Kemp v. Neville*,⁶ where Erle, C.J., passes in review all the learning on the subject of judicial officers' liability. His conclusions are—first, that a judicial officer cannot be sued for an adjudication, according to the best of his judgment, upon a matter within his jurisdiction; secondly, that a

but a judicial capacity are made responsible in actions by private suitors for the exercise of their discretion.

¹ The verdict of a jury might anciently be set aside by an attain; as to which see Finch, Law (1750), 484; Vin. Abr. Attain; Hawk. P. C. bk. 2, c. 22, s. 20. By statute 11 Hen. VI. c. 4, the plaintiff in an attain could recover his damages and costs against the jurors and defendants; see also 15 Hen. VI. c. 5; Forsyth, Hist. Trial by Jury, 180. Where a writ of attain lay, which was not in criminal cases (Hawkins, P. C., bk. i. c. 72, s. 5), a jury of twenty-four tried the issue whether the previous jury had sworn falsely. The verdict of the second jury concluded the matter. The writ of attain was abolished 6 Geo. IV. c. 50; sec. 61 saves the liability of those guilty of the offence of subornation; 1 Russell, Crimes (5th ed.), 360. As to juries generally, see *Bushell's case*, 6 How. St. Tr. 999, and the notes; also Historical Observations on the respective functions of the judge and the jury, Law Mag. and Rev. (1865), vol. xix. 1. For a comprehensive collection of authorities on the powers, qualifications, immunities, and responsibilities of grand juries, see *Commonwealth v. Green*, 12 Am. St. R. 804; *Commonwealth v. Brown*, 147 Mass. 585, 9 Am. St. R. 736, Bro. Abr. Jurours; Com. Dig. Enquest; Bac. Abr. Juries; Steph. Hist. Crim. Law, vol. i. 251-272, 301-307, 566-576; Reeves, Hist. of the Eng. Law (2nd ed.), vol. ii. 137, 267; Tidd, Practice (9th ed.), 775-798; 3 Bl. Comm. 354; Guicist, Hist. of the Engl. Const. *passim*.

² 1 Mod. 184; 2 Mod. 218.

³ The practice of fining juries is noticed, 2 Hale P. C. 158. There is a note on the same subject: *Penn & Mead's case*, 6 How. St. Tr. 967. See also 4 Bl. Com. 361.

⁴ 12 Mod. 386; 1 Salk. 390; 1 Ld. Raym. 454; summarized 20 How. St. Tr. 203.

⁵ See also *Muller v. Seare*, 2 Wm. Bl. 1145; *Moatyn v. Fabrigas*, 1 Cowp. 161.

⁶ (1861) 10 C. B. N. S. 523; *Hamilton v. Anderson*, 3 Macq. (Sc. App. Cas.) 363. The powers of a visitor of an eleemosynary corporation are judicial: *Philips v. Bury*, Skinner, 447, 1 Lord Raym. 5, Show. P. C. 35.

matter of fact adjudicated by him cannot be put in issue in an action brought against him for what he has so done. And it will not found jurisdiction in a civil suit to allege that what has been done has been done maliciously and corruptly,¹ though judges of inferior courts are under the supervision of the King's Bench Division, where they may be made amenable to punishment for corruption or gross misconduct.²

A distinction must be noted between judges of superior courts—that is, with power to fine and imprison, and hence of record³—and judges of inferior courts, with regard to their immunity from process for what is done by them while purporting to act in the discharge of the duties of their office. The Courts take judicial cognisance of the position and dignity of the one; but will require to be informed on the pleadings of the jurisdiction of the other.⁴

Distinction between a judge of a superior court and a judge of an inferior court.

When once the quality of the act called in question is determined, the rule applicable is clear; it is thus laid down by Parke, B., delivering the judgment of the Privy Council in *Calder v. Halket*:⁵ "English judges when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege; and the justices of the peace, whether acting as such, or in their judicial character, in cases of summary conviction, have no other than that of having notice of action, a limitation of time for bringing it, a restriction as to venue, the power of tendering amends and of pleading the general issue, with certain advantages as to costs."⁶ "An act of a judicial nature, and whether there was any irregularity or error in it or not, would be punishable by ordinary process at law; but the protection would clearly not extend to a judicial act done wholly without jurisdiction." "It is well settled⁷ that a judge of a Court of Record in England with limited jurisdiction, or a justice of the peace acting judicially with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge, or means of knowledge, of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus, in the elaborate judgment

Calder v. Halket.
Judgment by Parke, B.

¹ *Hagart's Trustees*, otherwise *Miller v. Hope* (1821), 2 Shaw (Sc. App. Cas.) 125, 143, —an action by an advocate against the Lord President of the Court of Session for words applied to him while the Lord President was acting in a judicial capacity. *Fray v. Blackburn*, 3 B. & S. 576; in a note at 578 the authorities are collected. *Thomas v. Churton*, 2 B. & S. 475; *Scott v. Stansfield*, L. R. 3 Ex. 226, adopted by Lord President Inglis, in *Harvey v. Dyce*, 4 Rettie 265. In *M'Murphy v. Campbell* (1887), 14 Rettie 728, Lord Young said: "It is not in the public interest that an action for libel should lie against a public officer for a report made in discharge of his duty to his superior officer." *Innes v. Adamson*, 17 Rettie 11; *Haggard v. Pelicier Freres* (1892), A. C. 61; *Bradley v. Fisher*, 13 Wall. (U. S.) 335.

² See, per Holt, C. J., *Groenvelt v. Burwell*, 1 Ld. Raym. 467.

³ *Ex parte Runshay*, 18 Q. B. 173; *The Queen v. Marshall*, 4 E. & B. 475; *In re Hull*, 9 Q. B. D. 689; *The Queen v. Badger*, 4 Q. B. 468. A Court of Assize is a superior court with power to commit for contempt; *Ex parte Fernandez*, 10 C. B. (N. S.) 3. See Willes, J.'s, elaborate judgment tracing the history of justices of assize, 41.

⁴ *Dutton v. Howell*, Shaw, P. C. 24, 29; *Dicas v. Lord Brougham*, 6 C. & P. 249, see Kelly's argument, 265; 3 St. Tr. N. S. 570; *Tuaffe v. Downes*, 3 Moo. P. C. C. 36, n.; *Houlden v. Smith*, 14 Q. B. 841.

⁵ 3 Moo. P. C. C. 75; 4 St. Tr. N. S. 482; *Beaurain v. Scott*, 3 Camp. 388, with note referring to *Boraine's case*, 16 Ves. 346; *Ackerley v. Parkinson*, 3 M. & S. 411; *Ferguson v. Kinnoull*, 9 Cl. & F. 251, 4 St. Tr. N. S. 785; *Garnett v. Ferrand*, 6 B. & C. 611, is an action against a coroner for turning a person out of the room where an inquiry was being held; *Willis v. MacLachlan*, 1 Ex. D. 376. For wrongful exercise of jurisdiction see *In re Medina Trepanier*, 12 Can. S. C. 111.

⁶ The details of these privileges are now regulated by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

⁷ 3 Moo. P. C. C. 77, 4 St. Tr. N. S. 494.

of Mr. Baron Powell in *Gwynn v. Poole*¹ it is laid down, that a judge of a Court of Record in a borough was not responsible, as a trespasser, unless he was cognisant that the cause of action arose out of the jurisdiction, or at least that he might have been cognisant, but for his own fault; which last proposition Mr. Baron Powell illustrates by a reference to the case of the Marshalsea Court,² which had jurisdiction only in certain cases where the King's servants were parties, who, being all enrolled, the judge ought to have had a copy of the enrolment, and so would have known the character of the parties. 'It is true,' says Mr. Baron Powell (speaking of the case of a borough court), 'that the cause of action does not arise within the jurisdiction of the Court, as it ought to do; but as the judge cannot know that, except by the plaintiff or defendant, until he knows it, the rule shall be in this case as in others, *Ignorantia facti excusat*.' Mr. Baron Powell lays down the same rule as to a party; but his opinion in that respect is disapproved by Lord Chief Justice Willes in *Moravia v. Sloper*,³ but not so far as it relates to a judge or officer. The like rule has been followed in the case of magistrates acting under the special power of Acts of Parliament, who are not liable as trespassers if they have jurisdiction to inquire into the facts stated before them, and nothing appears on one side or another to show their want of jurisdiction.⁴ It is clear, therefore, that a judge is not liable in trespass for want of jurisdiction unless he knew, or ought to have known, of the defect; and it lies on the plaintiff, in every such case, to prove that fact."

Houlden v. Smith.

The law as thus laid down is further illustrated by the case of *Houlden v. Smith*,⁵ where a County Court judge committed a debtor without jurisdiction. The debtor then brought an action for false imprisonment and obtained a verdict which was upheld by the Court.

Judgment of Pattenon, J.

"That this commitment was without jurisdiction," says Pattenon, J., "is plain; that the defendant ordered it under a mistake of the law and not of the facts is equally plain; for it is impossible that he could be ignorant that the plaintiff dwelt and carried on his business in Cambridgeshire, the service of all the processes having been proved to have been made there, and the defendant having originally specially allowed the plaint to be made in his court, within the jurisdiction of which the cause of action accrued, the defendant (the now plaintiff) residing in Cambridgeshire. This case is not, therefore, within the principle of *Lowther v. Earl of Radnor*⁶ or *Gwinne v. Poole*,⁷ where the facts of the case, although subsequently found to be false, were such as, if true, would give jurisdiction, and it was held that the question as to jurisdiction or not must depend on the state of facts as they appeared to the magistrate or judge assuming to have jurisdiction. Here the facts of the case, which were before the defendant and could not be

¹ 2 Lutw. (C. P.) 1566.

² 10 Co. B. 68 b.

³ Willes 35.

⁴ *Pike v. Carter*, 3 Bing. 78; *Lowther v. Earl of Radnor*, 8 East 113.

⁵ 14 Q. B. 841, 851. As to the authority of this case, see what is said by Kelly, C.B., in *Scott v. Stansfeld*, 37 L. J. Ex. 158. In *Watson v. Bodell*, 14 M. & W. 57, it was assumed that the want of jurisdiction was known to defendant: see, 2 Stark. Ev. (2nd ed.) 426, 811. Where an inferior court assumes a jurisdiction an action of trespass lies against the person executing process; for the whole proceeding is *coram non iudice* and a nullity. The party plaintiff in an execution in the inferior court is bound to show in his justification to an action of trespass in respect of such execution, that the cause of action arose within the jurisdiction; the officer of the court is not bound to do this, but only that the court has jurisdiction in such a matter. Bac. Abr. Trespass (D.), 661. *The case of The Marshalsea*, 10 Co. Rep. 76.

⁶ 8 East 113, 119.

⁷ 2 Lutw. (C. P.) 1560, 1566.

unknown to him, showed that he had not jurisdiction; and his mistaking the law as applied to these facts cannot give him even a *prima facie* jurisdiction or semblance of any. The only questions, therefore, are, whether the defendant is protected from liability at common law, being and acting as the judge of a court of record, in which case the plea of not guilty would be sufficient; or whether he is protected by the provisions of any statute." "Although it is clear that the judge of a court of record is not answerable at common law in an action for an erroneous judgment or for the act of any officer of the court wrongfully done, not in pursuance of, though under colour of, a judgment of the court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction."

In view of a possible ambiguity in what is here laid down, Lord Wensleydale's *dictum* in *Rorke v. Errington*¹ must be borne in mind. "There can be no doubt that a court of limited jurisdiction cannot give itself jurisdiction by finding any facts;" and thus the aspect presented by the facts to the judge or magistrate at the time of his giving his decision is the subject of evidence when the decision is questioned. Neither can such a court be prohibited on the ground that its decision is erroneous. As Lord Loughborough said, in *Grant v. Gould*:² "The foundation of it" (*i.e.*, an application for a prohibition) "must be that the inferior court is acting without jurisdiction. It cannot be a foundation for a prohibition that, in the exercise of their jurisdiction, the court has acted erroneously."

On this point then the law is clear that for an act done by a judge in his capacity of judge he cannot be made liable in an action, even though he acted maliciously and for the purpose of gratifying private spleen:³ and whether he did act in his capacity of judge or not is matter of evidence.

The same act when done by a judge of a superior court and by a justice of the peace⁴ may have very different consequences. For example, it is said, in an Irish case of some authority,⁵ "justices of the peace are not, individually, invested with a power to hear and determine any felony or other offence. Their authority is to try before

¹ 7 H. L. C. 632.

² 2 H. Bl. 101.

³ *Anderson v. Gorrie* (1895), 1 Q. B. 668.

⁴ Justices of the peace are statutory officers first appointed under 1 Edw. 3, c. 16, 2 Co. Inst. 558. At common law there were Conservators of the peace with very limited powers. See Lamhard, *Eirenarcha*, Bk. 2, cap. 3. In Lord Maclesfield's case, 16 How. St. Tr. 1270, it is said that there are some old statutes that provide that the Chancellor with the Council shall appoint justices of the peace; but the usage is that the naming of justices of peace is in fact in the Chancellor only on the recommendation of the Lord-Lieutenant. Lord Herschell, C., in 1892 created a large number of justices without the preliminary recommendation, alleging political necessity. Sir Littleton Powys, in a letter to Lord Chancellor Parker, dated 4 Aug. 1719, and printed 15 How. St. Tr. 1421, says: "There was grown a sort of general neglect all over England of the appearances of the justices of peace at the assizes"; "and that their attendance was a respect due to the king and his government upon those solemn occasions." "But if justices of the peace shall remain at home about their private affairs, or to avoid the trouble of a journey to the assizes, it ought to be looked on as a neglect of the duty of their office; for they are not called only to notify to the people that they are in commission but to answer to their names in person." The history and powers of justices of the peace are exhaustively considered in the opinions of Littleton and Bayly, J.J., and Vaughan, B., in *Harding v. Pallock*, 2 St. Tr. N. S. 342; Dalton, *Country Justice*, 1 *et seq.*; Com. Dig. *Justices of Peace*.

⁵ *Taaffe v. Downes*, 3 Moo. P. C. C. 52 n, but *quære* whether this statement ever was correct; see Dalton, *Country Justice*, 403; Vin. Abr. *Justices of Peace* (F.). As to the law now in England, see 11 & 12 Vict. c. 42, s. 1.

Dictum of Lord Wensleydale.

And of Lord Loughborough.

Distinction between acts done by a justice of the peace and a judge of a superior court.

themselves and others. No individual justice of the peace has that power," i.e., to issue a warrant to arrest one suspected of a felony, "but, as an individual, he has merely a ministerial power to bring the party accused before others as well as himself, for the purpose of trial." "The distinction is this: where process is issued, to bring the party accused before the person issuing the warrant and others, for trial, it is a ministerial¹ act—it is ministerial to the other justices, who are necessarily to sit with the justice issuing the warrant." This is not so in the case of the judge of a superior court; "for he has power and authority to sit alone and try the fact, respecting which the process issued." The act is therefore judicial, and protected.² There is also this further qualification attached to the privilege of justices of the peace, that the act complained of, though done within their jurisdiction, must have been done honestly and in good faith.³ Yet, though a justice of the peace is not protected for words used maliciously, even when he is acting as a judge, malice is not to be inferred from his words, but must be affirmatively proved.⁴ Justices of the peace are to keep the public peace. Their duty with regard to rioters is "to restrain and pursue, arrest and take them." To enable justices to do this, they have authority to call upon the king's subjects to aid them in cases of riot; and the king's subjects are bound to be assistant to them in that respect when reasonably warned. In the case of riot, when justices have done this, they have done all that is required of them.⁵

Rule as to those acting under the order of a judicial authority.

As to those who act under the order of a judicial authority, the general rule of liability is thus expressed: *Qui jussu judicis aliquod fecerit non videtur dolo malo fecisse, quia parere necesse est.*⁶ An analogous distinction exists in this connection to that which governs in the case of judges of record and of inferior magistrates. When a Court has

¹ Burn, Justice, Justice of the Peace, Actions against. 1. When an Action lies. As to what are ministerial acts, see *The Queen v. Machen*, 14 Q. B. 79; *The Queen v. Godolphin*, 13 L. J. M. C. 57; *The King v. Edwards*, 1 Wm. Bl. 637; *The Queen v. Stainforth*, 11 Q. B. 66; *The King v. Austrey*, 6 M. & S. 319, 321; *The Queen v. Anon.*, 19 L. J. M. C. 236. As to protection and power of justices, see 11 & 12 Vict. c. 42, 43, 44. Lord Knyon, in *Harper v. Carr*, 7 T. R. 275, says: "I think that the case of allowing a poor rate is the single instance in which the justices act ministerially." The case cited decides that a churchwarden taking a distress for poor's rate is entitled to the protection of 24 Geo. II. c. 44, s. 6, on the ground that granting the warrant on which he acts is a judicial and not a ministerial act of the magistrates. This was not cited in *Fourth City Mutual Building Society v. Churchwardens, &c., of East Ham* (1892), 1 Q. B. 661.

² *Taaffe v. Downes*, 3 Moo. P. C. C. 55 n. This privilege is only for acts done judicially, *Case of Mr. Justice Johnson*, 29 How. St. Tr. 81.

³ *Windham v. Clere*, Cro. Eliz. 130; *Linford v. Fitzroy*, 13 Q. B. 240. But see *Bassett v. Godschall*, 3 Wils. 121, where in an action against justices for refusing to grant a licence, malice was alleged; see, too, 11 & 12 Vict. c. 44, s. 1. In *Tozer v. Child*, 7 E. & B. 50, an action was held not to lie against a churchwarden, under the Metropolitan Management Act, 1855, 18 & 19 Vict. c. 120, presiding at the election of vestrymen, for refusing a vote or for refusing to allow as a candidate a person entitled to be a candidate, unless malice be alleged and proved.

⁴ *Allardice v. Robertson*, 4 W. & S. (Sc. App. Cas.) App. 102, 1 Dow & Cl. 495.

⁵ Per Littledale, J., *Pinney's case*, 3 St. Tr. (N. S.) 519. As to liability of justices for refusing to take an examination under a statute, *Green v. Bucklechurches*, 1 Leon. 323, approved *Ferguson v. Kinnoull*, 4 St. Tr. N. S. 806.

⁶ *Marshall's case*, 10 Co. Rep. 68 b, 76, adapted from D. 50, 17, 167, § 1. In the Reports there is this comment " (but when he has no jurisdiction *non est iudex*)." See per Lord Mansfield, in *Mitchard v. Waite*, 3 Burr. 1259. A ministerial office may be exercised by a deputy. The difference between a deputy and an assignee of office is stated in *The Earl of Shrewsbury's case*, 9 Rep. 42. As to the application of the maxim *delegatus non potest delegare*, see per Willes, J., *Burial Board of St. Margaret, Rochester v. Thompson*, L. R. 6 C. P. 457.

jurisdiction of a cause and proceeds erroneously, all acting under the authority of the Court will be protected.¹ When the Court has not jurisdiction, actions will lie against all acting under the authority wrongly assumed by it.² Where the authority exercised is special, and out of the course of the common law, and confined to a limited jurisdiction (as in case either of warrants for arrest, commitment, or distress, or of convictions or orders by local magistrates), it is requisite that the instrument to be enforced and obeyed should show on inspection all the essentials from which the duties arise.³ If, again, cause for the exercise of jurisdiction is expressed, although it may be imperfectly, the officer is not expected to judge of the sufficiency of the statement; so that, assuming the cause expressed is within the jurisdiction of the magistrate, he is entitled to protection.⁴ Where no cause whatever is expressed, the want of jurisdiction is clear.⁵

Distinction between the case of acting within or without the jurisdiction.

The law is most neatly summed up in *Peacock v. Bell*.⁶ "The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so." "Nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." But writs not appearing to be out of the scope of their jurisdiction issued by a superior court are valid and of themselves a protection to all officers and others in their aid acting under them; although they be on the face of them irregular, as a *capias* against a peeress;⁷ or void of form, as a *capias ad respondendum* not returnable the next term;⁸ for the officers ought not to examine the judicial act of the Court whose servants they are, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it.⁹

Peacock v. Bell.

Where a body of persons have imposed upon them a public duty involving the exercise of a discretion it is undoubted that they are not liable to an action merely for an erroneous exercise of their discretion without malice; even where, as in *Partridge v. General Council of Medical Education and Registration of the United Kingdom*¹⁰ they are advised to proceed and do proceed under a wrong section of an Act of Parliament, while by another section of the same Act they have conferred on them the discretionary power involved in their action.

We now come to treat of ministerial officers. Breach of a ministerial

Ministerial officers.

¹ *Munday v. Stubbs*, 10 C. B. 432; *Prentice v. Harrison*, 4 Q. B. 852; *Brown v. Jones*, 15 M. & W. 191; *Gosset v. Howard*, 10 Q. B. 411.

² *Marshalsea case*, 10 Co. Rep. 68 b; *Taylor v. Clemson*, 11 Cl. & Fin. 616: No inquisition is defective for not stating a fact which is implied necessarily from those which are stated.

³ *The Queen v. Inhabitants of Stainforth*, 11 Q. B. 75; *Gosset v. Howard*, per Parke, B., 10 Q. B. 453; *Agnew v. Jobson*, 13 Cox C. C. 625. By 24 Geo. II. c. 44, s. 6, an action is not to be brought against any constable acting in obedience to Justices' warrant till demand made of the copy of the warrant and refusal thereof. *Jones v. Vaughan*, 5 East 445, contains an explanation of the sec. For the powers incidental to a colonial legislature, justifying punitive action against a member, *Loyd v. Fulmer*, L. R. 1 P. C. 328, approved *Barton v. Taylor*, 11 App. Cas. 107.

⁴ The warrant of magistrates is an adjudication of every material point. *Brittain v. Kinnaird*, 1 B. & B. 432; *Mouid v. Williams*, 5 Q. B. 467.

⁵ Per Coleridge, J., *Howard v. Gosset*, 10 Q. B. 390.

⁶ 1 Saund. Rep. 74, cited by Parke, B., *Gosset v. Howard*, 10 Q. B. 453; see notes 1 Wms. Saund. *in loco*; *The Brewer's case*, 1 Rolle Rep. 124.

⁷ *Countess of Rutland's case*, 6 Co. Rep. 54 a.

⁸ *Parsons v. Loyd*, 3 Wils. 341.

⁹ *Turner v. Felgate*, 1 Lev. 95; *Cotes v. Michill*, 3 Lev. 20, cited Parke, B., *Gosset v. Howard*, 10 Q. B. 454.

¹⁰ 25 Q. B. D. 90.

Where there is statutory authority.

Where there is no statutory immunity.

Determination of what are ministerial and what judicial duties.

Distinction between them indicated.

duty is actionable.¹ To this rule there is an exception where the act done is enjoined by the superior appointed by the statute and is not done negligently though negligently ordered to be done.²

Where statutory immunity is wanting there is more difficulty. The argument that, because in some cases the Legislature has seen fit specially to provide for this difficulty, where it has not done so, there is no protection, is valid only so far as legislation is concerned with the creation of new relations, and not with the declaration and consolidation of old rules of law. There is, however, the authority of Fitzgerald, J.,³ for the proposition that where acts have been done under orders from a body vested with statutory authority to order; and where the party enjoined is, by statute, bound to compliance with orders thus issued; no liability attaches to the party conforming, even though the orders issued be improvident, and though there be no precise statutory immunity. On principle this is correct. The ground of accountability is negligence, and negligence is either an omission or commission. By statute, the person acting is bound to carry out the behests of the person enjoining; and by hypothesis, the negligent act is within the scope of the powers of the person enjoining; obedience to the injunction is, therefore, enjoined by statute. The act prescribed is done, and, by hypothesis, is done without negligence. If in the prescribing of the act there is negligence, that is not the concern of the actor, who, being ordered, is constrained to act, and not to sit in judgment on the act of his superior officer. Thus, when his intervention comes in, there is no negligence. The action (if any) would be against the superior for wrongly prescribing, not against the inferior for performing what it was his duty to do.

The discrimination of a ministerial from a judicial office is considerably complicated by reason of the number of offices whose duties involve an alternation of judicial and ministerial functions. It then becomes a question of fact what are the duties with regard to the performance of which the action was brought. The governing consideration is stated by Chancellor Kent:⁴ "When the law renders a public officer liable to special damages for neglect of duty, the cases are those in which the services of the officer are not uncompensated or coerced, but voluntary and attended with compensation, and where the duty to be performed is entire, absolute, and perfect."

We have already seen⁵ what are the criteria of judicial duties. The distinction, then, between judicial and ministerial duties resolves itself into this—that where one has to exercise a discretion he is protected by judicial privilege; where he has to perform an ascertained duty, he has to do so exactly. This is the rule laid down by Bayley, J., who held that the defendants, who in the case referred to,⁶ were

¹ *Pickering v. James*, L. R. 8 C. P., per Brett, J., 509. The principal cases are cited in the argument in this case. See also *In re Thornbury Election Petition*, 16 Q. B. D. 739.

² *Brennan v. Guardians of Limerick Union*, 2 L. R. Ir. 42; considered, *post*, 243.

³ *Bartlett v. Crozier*, 17 Johns. (Sup. Ct. N. Y.) 438, 450.

⁴ *Ante*, 23.

⁵ *Jones v. Bird*, 5 B. & Aid. 837, 845; *White v. Peto*, 58 L. T. 712, where Kay, J., cites with approval the passage in Addison, Torts (5th ed.), 671: "If an action be brought against contractors . . . are answerable for damage done"; *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 289, 4 St. Tr. (N. S.) 812. In *Sutton v. Clarke*, 1 Marsh. 429, 6 Taunt. 29, road trustees were held free from liability where they did all the statute required them, in the best way they could and according to the best information, though it turned out that they were mistaken. For the American decisions, see *Sherman v. Kortright*, 52 Barb. (N. Y.) 267, and *Weightman v. Washington*, 1 Black

the persons repairing a sewer and authorised by statute, were not protected because they acted *bonâ fide* and to the best of their skill and judgment. "That is not enough; they are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say, whether the defendants had done all that any skilful person could reasonably be required to do in such a case."¹

The case of Government servants is not within this rule; for they are the servants of the public, not of the person or persons who have the superintendence of the department in which they work; even if they are appointed by them. The principle may be thus stated—that when a person is acting as a public officer on behalf of the Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business.²

Government servants not within the rule.

The question was mooted so far back as the year 1699,³ when it was resolved by three judges of the King's Bench, against the opinion of Holt, C.J., that the Postmaster-General is not answerable for a packet delivered to the receiver at the Post Office and lost out of the office. The dissent of Holt, C.J., was founded on a comparison of the situation of a postmaster and a carrier or the master of a ship. As was subsequently pointed out by Lord Mansfield,⁴ the comparison does not hold good; since "the Postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the Post Office is a branch of revenue, and a branch of police created by Act of Parliament."

History of the law.

Lane v. Cotton.

Lane v. Cotton was canvassed and reconsidered in *Whitfield v. Lord Le Despencer*,⁵ where the question argued was whether the defendant, as Postmaster-General, was personally responsible for the amount of a bank-note stolen in the Post Office by one of the sorters, and while engaged in his work there. This was unanimously decided in the negative. The judgment of Lord Mansfield establishes the law. He says: "As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the

Whitfield v. Lord Le Despencer.

Judgment of Lord Mansfield.

(U. S.) 39. In this latter case the corporation was held liable for carrying out a plan that was essentially defective, and which the contractor remonstrated with them for adopting, on the ground that it was unprecedented. In *Stock v. City of Boston*, 149 Mass. 410, it was held that where a city, in constructing a sewer, negligently uncovers a water-pipe, and leaves it exposed, whereby the water in it is allowed to freeze, thus cutting off the supply of one with whom the city is under contract to furnish water so that he cannot by the use of reasonable diligence obtain a supply from that or other sources, and is thereby injured, he may maintain an action of tort against the city for damages; and the freezing of the pipe is the proximate cause of the injury.

¹ Byles, J., indicates a test in *Cooper v. Wandsworth District Board of Works*, 14 C. B. N. S. 194: "I conceive they acted judicially, because they had to determine the offence and they had to apportion the punishment as well as the remedy." Overseers in making a rate or in petitioning against a Bill in Parliament, are not ministerial officers: *The Queen v. White*, 14 Q. B. D. 358.

² *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L., per Lord Wensleydale, 124.

³ *Lane v. Cotton*, 1 Ld. Raym. 646, 12 Mod. 472.

⁴ *Whitfield v. Lord Le Despencer*, 2 Cowp. 754, 764.

⁵ (1778) 2 Cowp. 754; *Jones v. Mansell*, Ir. R. 6 C. L. 155. "The law is well settled in England and America that the postmaster-general, the deputy-postmasters and their assistants and clerks appointed and sworn as required by law, are public officers each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders"; per Gray, J., *Kennan v. Southworth*, 110 Mass. 474. *Joslyn v. King*, 20 Am. St. R. 656, is an instance of an action against a mere letter-carrier for negligence in the delivery of a registered letter. 2 Kent, Comm. (12th ed.), 610; Story, Bailm. § 463. For the duty to deliver letters gratis, *Rosening v. Goodchild*, 2 Wm. Bl. 906.

injury sustained. If the man who receives a penny¹ to carry the letters to the post-office loses any of them, he is answerable; so is the sorter in the business of his department; so is the Postmaster for any fault of his own. Here no personal neglect is imputed to the defendants, nor is the action brought on that ground; but for a constructive negligence only, by the act of their servants. In order to succeed, therefore, it must be shown that it is a loss to be supported by the Postmaster, which it certainly is not. As to the argument that has been drawn from the salary which the defendants enjoy; in a matter of revenue and police under the authority of an Act of Parliament the salary annexed to the office is for no other consideration than the trouble of executing it. The case of the Postmaster, therefore, is in no circumstance whatever similar to that of a common carrier; but he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, &c., who were never thought liable for any negligence or misconduct of the inferior officers in their several departments."²

Bainbridge v. The Postmaster-General.

An unsuccessful attempt was made in *Bainbridge v. The Postmaster-General*³ to render the Postmaster-General liable as head of the telegraph department of the Post Office by virtue of the Telegraph Act 1868,⁴ distinguishing his common law immunity from an assumed statutory liability for the wrongful acts of his subordinates in carrying on the business of the department. The Court reiterated the principle laid down in the earlier cases of the immunity of public servants for acts done by their official subordinates unless personal intervention is proved or unambiguous enactment shown.

Nicholson v. Mouncey.

In *Nicholson v. Mouncey*,⁵ the captain of a sloop of war was held not liable for damage caused by her running down the plaintiff's vessel during the watch of the lieutenant, who had the control at the time of the accident. The ground of the claim was that he was to be considered "in the ordinary character of master of the vessel by means of which the injury was done to the plaintiffs' property." "But," says Lord Ellenborough, C.J., "how was he master? He had no power of appointing the officers or crew on board; he had no power to appoint even himself to the station which he filled on board; he was no volunteer in that particular station merely by having entered originally into the naval service, but was compellable to take it when appointed to it, and had no choice whether or not he would serve with the other persons on board, but was obliged to take such as he found there and make the best of them; he had no power either of appointment or dismissal over them. The case, therefore, is not at all like that of an owner or master who . . . is answerable for those whom he employs for injuries done by them to others within the scope of their employment."

A class of cases analogous in principle to that regulation of the

¹ *Edwards v. Dickenson*, 12 Mod. 6. "In all cases deputies are answerable for their own personal misfeasance"; *Rovning v. Goodchild*, 2 Wm. Bl. 906.

² *Wright v. Lethbridge*, 63 L. T. 572; see *Robertson v. Sichel*, 127 U. S. (20 Davis) 507, where a collector of customs was sued for the tort of a subordinate in negligently keeping the trunk of an arriving passenger on a pier instead of sending it to a public store, so that it was destroyed by fire.

³ (1906) 1 K. B. 178.

⁴ 31 & 32 Vict. c. 110, ss. 2, 4.

⁵ (1812) 15 East 384; *Tobin v. The Queen*, 16 C. B. N. S. 310; *O'Byrne v. Hartington*, Ir. R. 11 C. L. 445.

relations between officers of Government departments, is found where the arrangement and control over matters of public concern is given by statute to one body, while the power of carrying them out is assigned to another. The principle is stated by Erle, C.J.: "When the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment." With this another principle is co-ordinated: that an action for negligence must be brought either against the person actually committing the wrong or against him ultimately authorising it. There is no pretence for bringing an action against a manager, and such an "action must either be brought against the hand committing the injury or against the owner for whom the act was done." The type of this class is found in the case of the jurisdiction exercised by the Local Government Board over poor law guardians.

Statutory powers given to one body with power of carrying them out assigned to another.

In *Brennan v. Limrick Union*,³ the claim alleged that a patient in a fever hospital attached to a union workhouse was so insufficiently attended to that he, while in the delirium of the disease, left his bed and fell into a yard attached to the hospital and was injured. In giving judgment, Fitzgerald, J., referred to various sections of the Irish Poor Law Act which went the length of establishing that, although the Guardians of the poor were constituted a corporation to take order for the relief of the destitute poor, they were under the control of the Poor Law Commissioners; that the law imposed on these the duty of fixing the staff of paid officers to act under the Guardians, and also gave them the power of removal; that the Commissioners might direct the increase or diminution of the staff, and might fix the duties of the respective officers; that the Guardians could not appoint paid officers unless and until the Commissioners have previously sanctioned the creation of such offices; and though the Guardians might fill up vacancies they were unable to add to the existing staff without the order of the Commissioners. The learned judge continued: "Upon a consideration of these provisions of the Poor Law Acts, we have come to the conclusion that the workhouse hospital is portion of the union workhouse in which the Guardians are to take order for the relief of the destitute and sick poor, but subject to the control of the Commissioners; that it is for the Commissioners, and not the Guardians, to determine and direct what staff should be appointed for the workhouse hospital as for any other portion of the union workhouse; and that the duty of the defendants was not 'to provide proper attendants to watch over the plaintiff's son,' but that their duty was to select and appoint such staff of paid attendants as the Commissioners should, by their order and warrant, direct. . . . I desire further to state my own impression that on other and wider grounds the action is not maintainable. The administration of the Poor Laws is in the hands of the Poor Law Commissioners, who, by express statutable provisions and their power to make and enforce general and special orders, exercise complete power over every Board of Guardians, and control and direct their action. The Guardians are but a subordinate administrative body, acting as unpaid public trustees in taking orders for

Brennan v. Limrick Union.

Statement of the law by Fitzgerald, J.

¹ *Tobin v. The Queen*, 16 C. B. N. S. 351.

² *Stone v. Cartwright*, 6 T. R. per Lord Kenyon, C.J., 412.

³ (1878) 2 L. R. Ir. 42. (*Ir. Mansfield Union (Guardians of) v. Wright*, 9 Q. B. D.

the relief of the destitute poor. I incline to the opinion that an action does not lie against them in their corporate capacity for a supposed neglect of their administrative duty in not providing adequate relief. For any such neglect of duty they are subject to the order and authority of the Poor Law Commissioners, and may be dissolved as a corporation, and paid officers appointed in their stead to carry into effect the duties they have neglected. The Guardians as a corporation may possibly be liable to indictment, or the individual members of the Board may be personally responsible in damages for negligent omission to perform their individual duties; but it would seem to be against public policy to permit actions to be maintained against them in their corporate capacity for negligent omission in carrying out their administrative duties,¹ and especially as the damages and costs should be paid, if at all, out of the rates. If the present action can be maintained, why should not an action lie against the Guardians, at suit of each pauper, for every supposed neglect of administrative duty, causing to the individual any real or fancied grievance—e.g., for supplying food insufficient in quantity or inferior in quality, or insufficient or inferior clothing or bedding, defective sanitary arrangements, or any other of the various neglects or omissions by which inmates of a workhouse may be prejudicially affected?² If the real or supposed omissions of Guardians are to be thus redressed, it would be difficult, if not impracticable, to administer the laws for the relief of the destitute poor.”

Criticism.

The remark may be interposed that if the immunity of the Guardians from liability is due to the subordination of their powers to the Local Government Board, the greater or lesser liberty allowed to them by the Board cannot affect that liability. Their action is inalienably under the supervision of the Board, with whom the responsibility must remain; in the same way as with a private employer who delegates the appointment of subordinates and the carrying out of a scheme of work to a steward or manager. The Local Government Board's responsibility is statutory and not to be divested by any arrangement between them and their agents. If, then, the Guardians act only as agents and are not guilty of actual negligence on the principle we have before noted, there is no liability.³ When the liability of the Local Government Board is inquired into they are only in the exercise of governmental functions and the principle of the Post Office cases is applicable.⁴

Unreported English case.

An unreported English case raised the same point as *Brennan's case*, with almost identical facts. Plaintiff's husband, some months previous to the accident out of which the action arose, suffered from delirium tremens, and was received into the infirmary of St. George-in-the-East, an institution administered under the Poor Laws, as in *Brennan's case*. The patient was shortly afterwards discharged as cured. Some months later he was brought in again with a certificate from the parish doctor that he was suffering from fits, and was put into

¹ See *Mill v. Hawker*, L. R. 9 Ex. 309; I. R. 10 Ex. 92; *Central Rd., &c. Co. v. Smith*, 52 Am. R. 353.

² *Toxland v. West Ham Union* (1906), 1 K. B., Darling, J., 549, criticises this passage thus: "It is to be noticed at this point that all the instances which are put by Fitzgerald, J., are strictly confined to cases of omission to perform certain statutory duties"; and is so guilty of an oversight which quite destroys the force of his criticism; for surely, supplying bad food or clothing or bedding, or defective sanitary arrangements, are very positive acts of misfeasance, not omissions only.

³ *Dalton v. Angus*, 8 App. Cas. 443, per Lord Blackburn, 446, 447.

⁴ *Whitfield v. Lord Le Despencer*, 2 Cowp. 754.

the fits wari, a reference being made at the time to his previous admission three months earlier. He showed no symptoms of violence; but after a few days, when the nurse in charge of the ward was in a part of it away from the window, he broke the window, squeezed through the bars, and threw himself into a yard below and was killed. The widow brought her action, alleging as negligence, that the Guardians having notice of the deceased's previous admission to the infirmary, and the cause of it, had not caused him to be placed in the lunatic ward, or at any rate to be more effectually guarded where he was. The case was tried before Huddleston, B., who gave judgment for the plaintiff; this was reversed in the Court of Appeal, on the ground that the facts disclosed no negligence. The Court thus escaped the necessity of an expression of opinion on the liability of Guardians acting under the Poor Law orders. Bowen, L.J., notices the subject thus: "I am not sure that it is not, perhaps, humane to the plaintiff that our decision is given against her in the Court of Appeal, because I do not hesitate to say that the other question would be so abstruse as hardly to have stopped at this Court if we decided in her favour."¹

Hickmore v. St. George-in-the-East.

Bowen, L.J.'s reference was probably to the Poor Law Act, 1835,² whereby the administration of relief of the poor is placed under the control of Commissioners who are to make rules and regulations for the management of the poor and the administration of the laws for their relief;³ and for present or future workhouses, and as "to the labour to be exacted from the persons relieved." The Commissioners may direct guardians to appoint paid officers "with such qualifications as the said Commissioners shall think necessary for superintending or assisting in the administration of the relief and employment of the poor" "and otherwise carrying the provisions of this Act into execution."⁴ The Commissioners have made orders under these powers by which the Guardians' action is controlled.

Provisions of the Poor Law Act, 1835.

The Irish Court had a very similar case before them in *Dunbar v. Guardians of Ardee Union*.⁵ A fever patient in delirium, through deficient provision of nurses (which had been brought to the attention of the Guardians hut which they were negligent in not remedying),

Dunbar v. Ardee Union.

¹ *Hickmore v. Guardians of St. George-in-the-East*, the case referred to, is not reported in any of the law reports. There are reports of it in its various stages in the *Times* for April 2, April 3, and May 21, 1884. The facts and the quotation in the text are from the shorthand notes kindly supplied me by one of the counsel in the case. *McFarland v. Stewart*, 19 N. Z. L. R. 22. In *Curran v. Boston (City of)*, 151 Mass. 505, "pecuniary profit" was received and the maintenance of "the workhouse or house of industry" was "voluntary"; notwithstanding it was held that the city was under no liability. *Maxmilian v. Mayor of New York*, 62 N. Y. 160, decided that the city corporation were not liable for the negligence of an employé of the commissioners of public charities and corrections in driving an ambulance waggon, belonging to the city. Thompson, Negligence, §§ 5818-5841; *Carson v. City of Genesee*, 108 Am. St. R. 127. An immense quantity of American decisions on the distinction between the liability of corporations for governmental work and work done for private profit are collected in the note, 136-174. *McDonald v. Massachusetts General Hospital*, 120 Mass., 432, and *Glavin v. Rhode Island General Hospital*, 34 Am. R. 675, treat of the liability of a hospital board for the misfeasance of a medical officer. A nursing association is not liable for the negligence of a nurse employed by them: *Hall v. Lees* (1904), 2 K. B. 602. The decision went on the construction of the documents making the contract of the association. Nor is a local authority liable for the negligence of its medical officer in discharging a patient from a hospital provided under statutory authority: *Evans v. Mayor, &c. of Liverpool* (1906), 1 K. B. 160. In *Delaney v. Colston*, 16 Rettie 753, see also 20 Rettie 506, directors of a home—a charitable institution—were held responsible to parents for the custody of children.

² 4 & 5 Will. IV. c. 76, s. 15.

³ *Id.*, s. 42, 43.

⁴ S. 46. S. 109 defines an "officer."

⁵ (1897) 2 I. R. 76.

escaped almost naked through the window of the infirmary where he was a patient and subsequently died. The widow sued under Lord Campbell's Act. The judge at the trial ruled against her right of action on the authority of *Brennan's case*, as did the Divisional Court; and they were affirmed by the full Court of Appeal following *Brennan's case* and holding that Guardians are officers appointed to carry out general state policy with regard to the administration of the Poor Law and thus are not liable where not personally in default.

Levingston v. Lurgan Union.

Levingston v. Guardians of the Lurgan Union,¹ an earlier case, comes under a different principle. The Guardians had made a sewer and injured the property of others in doing so. As Whiteside, C.J., says: "So far as these defences are concerned, we must take it that the defendants did the acts complained of. And the defences rely on matter of law, namely, that, although the defendants did the acts complained of, yet, as being a corporation they are, either by common law or by virtue of their act of incorporation, not responsible." The decision was that they were liable because they had done the wrong themselves; and an action for a wrong lies against a corporation, where the thing done is within the purpose of the Corporation; and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual.² But this is obviously not the principle of the preceding cases.

Toze's case v. West Ham Union.

In *Toze's case v. West Ham Union*⁴ the facts showed that defendants were carrying out an enlargement of their workhouse in connection with which the electric lighting system was being extended. A pauper, who was employed at the work under Art. 112 of the Consolidated Order, July 29, 1847, was injured through the negligence of the engineer—a permanent officer—in not providing a suitable staging on which to work. The staging gave way, the pauper fell, and was injured. The Guardians disputed their liability to pay damages, on the ground that the pauper was a servant engaged in common employment with the engineer, and also that the functions performed by them were statutory duties under the Local Government Board and, in the absence of actual negligence on their part, they were not affected by the negligence of their officers engaged in carrying out their statutory duties. A Divisional Court decided both points in favour of the plaintiff. Ridley and Darling, JJ., in holding "that the rule of law is to be ascertained from the judgment in *Levingston v. Lurgan Guardians*,"⁵ disregarded the circumstance that there the defendants had acted in a way causing injury to the plaintiff's property, so as in any circumstances to be liable; and ignored the essential inquiry whether the relation between the Guardians and the Local Government Board was analogous to the relation of a district post-office officer to the Postmaster-General, or to the ordinary relation of master and servant; or rather they assumed that the relation was the ordinary one. Neither do they appear to have apprehended that in *Levingston's case* the plaintiff was a member of the public, and in the case before them was a member of the organisation with possibly different and more limited rights. Lord Alverstone, C.J., thought the case "within the class of cases in which the Guardians having work to do as Guardians do it under circumstances in which a person to whom they owe a duty would have

¹ (1868) Ir. R. 2 C. L. 202.

² *L. C.* 213.

³ *Green v. London General Omnibus Co.*, 7 C. B. N. S. 290, 302.

⁴ (1906) 1 K. B. 538.

⁵ 1 R. 2 C. L. 202.

a right of action against them if injured through the negligence of a servant acting on their behalf." The Court of Appeal¹ affirmed the Divisional Court on the first point, which apparently was not strenuously argued;² but reversed it on the other following *Dunbar v. Guardians of Arke Union* and holding that Guardians are not liable for injuries to paupers arising from the negligence of officers or servants who have been properly employed under the statute to discharge statutory duties towards the recipients of relief. The Court failed to find any relevancy in *Levington's case*. There is a great distinction between doing something which the Guardians have no right to do, and so injuring some outside person, and doing something which it is their statutory duty to do, but in the course of doing which some of their officers are guilty of negligence.

Divisional
Court over-
ruled in the
Court of
Appeal.

In *Alamango v. City of Albany*³ an action was brought by a convict against defendants, who, by Act of the Legislature, were "authorised and directed" to establish a penitentiary for the punishment of persons convicted of crime. They acted accordingly, and appointed proper officers to manage and superintend it; these officers illegally put the plaintiff to work; while engaged in which he was injured. The Court held plaintiff could not recover: "The duty of punishing criminals is inherent in the Sovereign power. It may be committed to agencies selected for that purpose, but such agencies while engaged in that duty stand so far in the place of the State, and exercise its political authority, and do not act in any private capacity. It is so in the laying out and maintaining of highways, the building of court-houses and school-houses, as well as in the building of jails and places of detention. In the performance of all such duties it is settled, by the unanimous agreement of the Courts, that these agencies are not liable for neglect or misfeasance, unless the liability is specially imposed by statute."⁴

American
decision

In a *New South Wales case*⁵ the same doctrine was accepted. No action can be brought against the Government or its servants for an injury caused to a prisoner in gaol through the negligence of the gaol officials. This was held "on the highest grounds of policy and convenience," citing Mellor, J., in *Dawkins v. Lord Paulet*.⁶ The rule is the same as in the case already considered⁷ of an action brought by a soldier against his officer. If the act alleged is done under the authority of the prison regulations they are sufficient justification. If the act

New South
Wales
decision.

¹ 23 Times L. R. 325. The decision in the Court of Appeal is only adited as the sheets are passing through the press.

² The position of a statutory servant in relation to the doctrine of common employment may, notwithstanding, yet have to be reconsidered, and the point decided whether his employment augments the employer's liability or assimilates his position to that of his free fellow servants. Cp. *Swainson v. N. E. Ry. Co.*, 3 Ex. D., per Brett, L.J., 340; *Johnson v. Lindsay* (1891) A. C. 376.

³ (1881) 25 Hun (N. Y.) 551; see also *Brown v. People*, 75 N. Y. 437, 441, and *Ferry v. House of Refuge*, 52 Am. Rep. 495, the judgment in which case is not so wide as the terms of the head-note: "An action does not lie against a State house of refuge for an assault on an inmate by an officer thereof."

⁴ Cp. *Osborne v. Milman*, 17 Q. B. D. 514; 18 Q. B. D. 471. A convict in England sentenced to penal servitude cannot sue for any cause of action during the term, 33 & 34 Viet. c. 23, s. 8. By sec. 12 power is given to the administrator of a convict's property to sell it. This power must be exercised with discretion and care; failing which the Court will hold the administrator personally liable for loss: *Carr v. Anderson* (1903), 2 Ch. 279. The endurance of punishment for felony has the effect of a pardon under the great seal, 9 Geo. IV. c. 32, s. 3. *Leyman v. Latimer*, 3 Ex. D. 15, 352. See Com. Dig. Forfeiture (B 3).

⁵ *Gibson v. Young* (1899), 21 N. S. W. R. (Law) 1.

⁶ L. R. 5 Q. B. 114.

⁷ *Ante*, 223.

is a violation of them the proper appeal is to the body constituted by them in superintendence and not to the Courts of law. If the matter charged is criminal there is a difference. "If a prisoner by duress of the gaoler, comes to an untimely end, it is murder. It is not necessary to make it duress, that there should be actual strokes or wounds." "The reasons why the law implies malice in such cases are plain." "A prisoner is not to be punished in gaol but to be kept safely."¹ The privates wrong to the prisoner may be without redress in the Courts—not so the crime against the State.

Pauper case.

A pauper does not come under the same principle; the soldier has voluntarily contracted himself out of his civil rights; the convict has forfeited them; but parish relief is a phase of the State's economic administration which in the interest of the community is dispensed where there is no fault and sometimes no wish to receive it. The pauper, therefore, does not lose any civic rights beyond those specified by legislation. In the event of injury being inflicted on him he is in no other position than those injured by the act of employes in any other State department; the principle of the Post Office cases applies here also.

Forde v. Skinner.

*Forde v. Skinner*² illustrates this; where parish officers were held liable in heavy damages for cutting off the hair of a person in a work-house by force, Bayley, J., said: "However desirable such a regulation as that of cutting off the hair of a person in a poorhouse may be with regard to health and cleanliness, yet it is altogether unauthorised by law, and is a wrongful act if done without the consent of the party." In the case in point the act was not authorised by the officers' power, but had it been the officers were not acting in good faith, but were using their assumed power as a means of private malice and oppression.

Foreman v. Mayor of Canterbury.

In *Foreman v. Mayor of Canterbury*, Blackburn, J.,³ states a cognate point arising under the 37th section of the Public Health Act, 1848,⁴ which "requires the local board of health to appoint a surveyor and other persons named as officers and servants; and at the end of the section it is said that they may dismiss at pleasure all the officers and servants except the surveyor; and the surveyor is not to be dismissed without the approval of the General Board of Health. That being so, it would be a question to consider whether the surveyor whom they are thus required to appoint, and whom they are not allowed to dismiss at pleasure, is in the relation of servant to them in such a way as that, if the matter were being done by the surveyor, and the cause of the mischief were the negligence of the surveyor, the local board of health would be responsible for his negligence. I do not wish to express an opinion as to whether they would or would not be responsible."⁵

Crisp v. Thomas.

Foreman v. Mayor of Canterbury was cited in *Crisp v. Thomas*,⁶ where plaintiff was a scholar in a voluntary school, regulated according to the provisions of the Education Act, 1870,⁷ and the code. The defendant was the vicar of the parish, and an *ex officio* trustee of the school and the principal member of the committee of management. While in the school, a blackboard fell from an easel and struck plaintiff

¹ *The King v. Huggins*, 17 How. St. Tr. 375; *King v. Bambridge*, 17 How. St. Tr. 398; Campbell, Lives of the Chief Justices (ed. 1849), vol. ii. 204; East, P. C., c. 5, § 92.

² 4 C. & P. 239.

³ L. R. 6 Q. B. 214, 218.

⁴ 11 & 12 Vict. c. 63.

⁵ As to Criminal Liability of the surveyor under 5 & 6 W. IV. c. 50, s. 56, see *Hardcastle v. Bielby* (1892), 1 Q. B. 709.

⁶ 62 L. T. 810; (C. A.) 63 L. T. 756.

⁷ 33 & 34 Vict. c. 75. In Pennsylvania "the school district" is not liable for the

on the head. The action was to recover damages for the injuries thus inflicted. The negligence alleged was that of one of the teachers, who were appointed by the committee of management, but were not otherwise under its control. Charles, J., held that no evidence of negligence was shown, although, assuming evidence of negligence, he was of opinion the defendant was liable as a member of the committee of management. The plaintiff appealed on the point of want of evidence of negligence. The Court of Appeal affirmed the decision of Charles, J., as to this; and, on the assumption that there was evidence of negligence, differed from him on the question of liability. The judgment of the Court of Appeal on this point is most forcibly stated by Lord Esher, M.R.: "The defendant is only responsible for his agent and servant, and the schoolmistress was not his servant. He did not pay her wages; she was not bound to obey any order he might give her; he could not appoint her alone, nor of himself could he dismiss her. It is true that he could with the rest of the committee appoint and dismiss her; but even then, supposing they should dismiss her wrongfully, she could appeal to the bishop, and he could reappoint her. Neither the defendant nor the committee have power to direct the schoolmistress what to do or what not to do in the daily management of the school. Therefore she was not in any sense a servant either of the defendant or the committee, still less was the schoolmistress his servant; he could not appoint her as teacher or dismiss or interfere with her in any way at all, and therefore, even if she were negligent, he was not responsible." These considerations, thus forcibly pointed out, are the determining elements in fixing liability.

Judgment of
Lord Esher,
M.R.

The King, it may be mentioned, in the exercise of his prerogative, may, by letters patent, suspend a public officer, though his office be granted for life; after suspension the officer is entitled to receive the salary, though not to exercise the functions, of the office.¹

Suspension of
negligent
public officer.

Where an officer neglects a duty incumbent on him in a public office either by common law or statute, he is indictable for his default.² Lord Mansfield, C.J., charged the jury in *Bembridge's case*:³ "I have not a particle of doubt, that where a man has an office, created by the King's letters patent immediately or derivatively, which is of important trust and consequence to the public—that for the violation of that office, he is as much indictable as any magistrate or officer that has been alluded to; it is an office, the duty of which the public are interested in, and I have no manner of doubt, but upon principles there is no want of any precedent of the same kind as this." Hawkins⁴

Negligent
officer
indictable.

negligence of school directors or of their employes," *De Vere Ford v. Kendall Borough School District*, 121 Pa. St. 543. In England there would be no action either against the head teacher or against local managers for the negligence of assistant or pupil teachers. But I know of no case that goes to establish the doctrine of the American authorities, that "school districts are but agents of the commonwealth, and are made quasi corporations for the sole purpose of the administration of the commonwealth's system of public education," and so are under no liability. *Cormack v. School Board of Wick*, 16 Rettie 812, is a Scotch case on the liability of a School Board for defective condition of school premises causing injury to a child attending the school.

¹ Cruise, Dig. tit. 25, s. 113, citing *Slingsby's case* (1680), 3 Swanst. 178. As to acts of officers *de facto*, which are good if done of necessity, but not if not of necessity, *Harris v. Jays*, Cro. Eliz. 699. See also *Nichols v. MacLean*, 101 N. Y. 526; *Andrews v. Portland*, 79 Mo. 484, 10 Am. St. R. 280. ² *Regina v. Wyat*, 1 Salk. 390.

³ 22 How. St. Tr. 77; see also 150. *The Queen v. Hall* (1891), 1 Q. B. 747, per Charles, J., 753, citing Hawkins, Bk. 2, c. 25, § 4. All the old English cases are collected, 1 Bishop Crim. Law, §§ 459-464.

⁴ P. C. Bk. 1, c. 66. Of Offences by Officers.

is of opinion that a negligent officer "should rather be immediately displaced than the public be in danger of suffering that damage which cannot but be expected some time or other from his negligence." A distinction must be taken between offices concerning the administration of justice or of the commonwealth, to which the officer, *ex officio* or of necessity, ought to attend without any demand or request; in which cases a non-user or non-attendance in court is a forfeiture of the office; and those offices in respect of which the officer need not attend or exercise his office, until demand made on him to do so; in the case of any of these, non-user is not a cause of forfeiture, unless there has been a request and subsequent neglect.¹ Where the office held is of a private nature to be performed without request, non-user or non-attendance is not a cause of forfeiture, unless it be a cause of prejudice or damage to him whose officer the holder is, in something which concerns his charge.²

Blackburn, J.'s opinion in *Reg v. Eyre*.

"If," says Littledale, J., "a public officer is guilty of criminal neglect of duty, he is liable to a criminal information," and however honourable and honest his intentions, he is still liable to be found guilty, for the mere intention to do right will not protect him. Blackburn, J., in his charge in *Reg v. Eyre*,³ considers the case of excess beyond official duty thus: "Honesty of intention in such a case is very important; for if it be shown that the officer, under colour of exercising his office, was really moved by any other motive than an honest desire to do his duty, there is no doubt at all he would be guilty of a misdemeanour; even if there was a perfectly honest intention that would not of itself conclusively determine the question in the officer's favour, although it would be a very important element indeed. I think the officer is bound under such circumstances to bring to the exercise of his duty ordinary firmness, judgment, and discretion. I think he is bound to do that, and I think in such a case the jury have to determine upon the evidence, first, whether the circumstances were in fact such that what was done really was in excess of the duty of the officer, and secondly, whether a person placed in the position of that officer, having the information that he had, believing what he did believe, and knowing what he did know, if exercising ordinary firmness, judgment, and moderation, would have perceived it was an excess. Much allowance should be made for the difficulty of his position, but not too much, and I think it must ultimately in such a case always be a question of more or less, and therefore a question of fact;" and so for the jury.

Distinction between public officers acting for the public at large and those who act for individuals.

We have now considered the principles governing the liabilities of those public officers who act for the profit of the public at large. There is, besides, another class, who, in certain of their duties, act not for the public in general, but for such individuals of it who employ them for a certain fee paid. This class includes sheriffs, notaries, and others whose duties we shall next proceed to consider, and who all are liable for the negligence and omissions of their servants in the discharge of such of their duties as we have indicated above.

¹ *Earl of Shrewsbury's case*, 9 Co. Rep. 46b, 50a.

² *Ibid.* An office shall be lost by forfeiture as if he break the condition annexed to it by law by non-user or abuser: Com. Dig. Officer (K 2) (K 3).

³ *Pinnery's case*, *The Bristol Riots*, 3 St. Tr. N. S. 11, 506. See *Stewart's case*, 18 How. St. Tr. 863.

⁴ Finlason's Report, 58.

CHAPTER II.

MINISTERIAL OFFICERS.

I. NOTARIES PUBLIC.

A NOTARY, says Burn,¹ was anciently a scribe, that only took notes or minutes, and made short draughts of writings and other instruments, both public and private. At this day we call him a notary public who confirms and attests the truth of any deeds or writings in order to render the same authentic.² He is the officer of some known Government, and entitled as such to recognition in the commercial world.³ Notaries in England are appointed by the Court of Faculties; which is "a Court, although it holdeth no plea of controversie."⁴

To practise as a notary in London, and within ten miles, a person must have served for seven years under articles of clerkship, duly authenticated by a qualified notary in actual practice; and if within three miles of London he must also be a member of the Scriveners' Company;⁵ but to practise at a greater distance from London, a person may be admitted upon the production of a certificate of clerkship of five years to a notary or an attorney and notary.⁶

The proper number of notaries for any particular place must be determined on considerations of public convenience.⁷ For no body of men entrusted with public duties could be heard to say that their number must be kept down in order that their profits might not be diminished.⁸ Though most notaries are solicitors, there is no obligation to limit the selection of notaries to the profession of solicitor.⁷

In the *King v. Scriveners' Co.*,⁹ Lord Tenterden, C.J., in answer to a suggestion, that the whole business of a notary is the presenting of bills of exchange and drawing up protests, said: "A notary in the

Definition.

State of appointment.

Qualifications.

Duties.
Lord Tenterden, C.J., in *The King v. Scriveners' Co.*

¹ Ecol. Law (9th ed.). Notary Public, referring to Brooke's Treatise on the Office and Practice of a Notary. Pollock and Maitland, History of English Law (2nd ed.), vol. i. 218. There is an excellent article on the office and duty of a notary public in 25 Am. Jur. 343. See also Encycl. Brit. Notary; Larousse, Grand Dictionnaire Universel, Notaire.

² In England Notaries were known before the Norman Conquest: Brooke, 3. Notaries are mentioned in the Statute of Provisors, 27 Edw. III. stat. 1, c. 1, and in the Statute of Præmunire, 16 Rich. II. c. 5. The principal Acts of Parliament regulating the office and duties of notaries are: 25 Henry VIII., c. 21; 41 Geo. III. c. 79; 3 & 4 Will. IV. c. 70; 6 & 7 Vict. c. 90; 7 & 8 Vict. c. 86, s. 4; 33 & 34 Vict. c. 97, ss. 3, 63, 64 (Stamps); 52 & 53 Vict. c. 10, s. 6, amended 54 & 55 Vict. c. 50, s. 2.

³ *Musson v. Lake*, 4 How. (U. S.) 275.

⁴ 4 Co. Inst. 337. Byles, Bills (16th ed.), 218.

⁵ As to requisites of apprenticeship, see the *King v. Scriveners' Co.*, 10 B. & C. 519.

⁶ 6 & 7 Vict. c. 90; as to appointment of solicitor outside London, 3 & 4 Will. IV. c. 79.

⁷ *Bailleau v. Victorian Society of Notaries* (1904), P. 180.

⁸ *Graham v. Smart*, 9 Jur. (N. S.) 387.

⁹ 10 B. & C. 518.

City of London has many more duties. Almost all the charter parties are prepared by notaries." "The ship's broker prepares the minutes of the contract; it is afterwards put into form by a notary. There is another part of the duty of notaries, and that is, to receive the affidavits of mariners and masters of ships, and then to draw up their protests, which is a matter which requires care, attention, and diligence. Besides that, many documents pass before notaries under their notarial seal, which gives effect to them, and renders them evidence in foreign courts, though certainly not in our courts of common law.¹ There is a great deal therefore to be done by a notary, perfectly independent of and distinct from this mere matter of presenting bills and drawing up protests."²

Notary not a mere ministerial officer.

A notary is not a mere ministerial officer, in the sense that he is obliged, whether he likes it or not, to execute the duties of his office when called on to do so; he is free to decline to act if so disposed; were this not so, "they might often be innocently the cause of assisting in fraudulent or improper measures, or might be much inconvenienced by applications at improper times and places."³ "Great," says Brooke,⁴ "is the confidence attached to notaries, and very onerous are their duties, and thence the necessity of their being distinguished for extensive knowledge, probity, discretion, and zeal."⁵

A notary undertaking the duty as notary is liable in damages to any one who can show that he has suffered a special injury through the notary's neglect; and the rule of diligence is that of a specialist.⁶ The fact that one occupies the position of a notary is *primâ facie* evidence of his qualifications⁷ and that he is a fit and proper agent to protest bills.

In *Morse, on Banks and Banking*, a case is cited⁸ where the Court held it "not sufficient proof of a notary's unfitness to show that he was a man of habitually dissipated character, but that it must be shown 'that he was drunk at the time he took the note.'" The learned author prefaces his notice of this case with the remark: "The standard of fitness is not, of course, uniform and absolute; we cannot pretend to say what it may be in all the various States of the Union, but we have some knowledge of what it is in Mississippi."⁹ In England the proof of a habit of getting drunk would not be a valid objection to the execution of a specific act. To avail drunkenness must actually interfere with the exercise of the faculties in the performance itself.

Duties.

A notary should take care to distinguish, in the acts he has opportunity of performing, between those with whose forms he is familiar and those that require for their performance exceptional skill: "for although it is the business of the parties themselves to take good advice, yet it is prudent for notaries not to undertake a thing that is beyond their capacity, and at least to acquaint the parties of the difficulties which they are not able to understand."¹⁰

¹ *Chesmer v. Noyes*, 4 Camp. 129; but see *Cole v. Sherard*, 11 Ex., per Parke, B. 483; *In re Goff's Estate*, 14 L. T. N. S. 727.

² See *Anon. case No. 592*, 12 Mod. 345. *Morse*, § 228.

³ Brooke, *Office of a Notary* (3rd ed.), 17, 18.

⁴ *Office of a Notary* (3rd ed.), 19.

⁵ As to the duty and office of a notary, see *Bellemire v. Bank of United States*, 4 Wbart. (Pa.) 105.

⁶ *Shearman and Redfield, Negligence*, § 504.

⁷ *L. c.* § 585.

⁸ *Bowling v. Arthur*, 34 Miss. 41.

⁹ *Morse*, 469.

¹⁰ *Domat, Public Law*, 2, 5, 5, § 3.

He should preserve carefully and in good order all acts which are deposited with him ; and he should grant exemplifications of them, when demanded, to the parties who have a right to demand them.¹

He must keep secrecy, not only of what passes at the time of the signing of acts, but also as to the acts themselves ; and generally he is expected to observe entire fidelity.²

A notary should use a legible seal in order to give effect to certificates of protest or notice ; for where the seal is illegible the act purporting to be authenticated may be questioned.³

In the noting of bills of exchange or promissory notes he must make a "sufficient" demand upon the maker of the note or the acceptor of the bill. If no place of demand other than the city at large be appointed and the party has no residence there, the bill may be protested in the city on the day without inquiry, since that might be interminable and useless.⁴ The general principle is that due diligence must be used to find the party and make the demand. The question in each case is, has due diligence been used with reference to the circumstances of that particular case.⁵ The presumption, failing other evidence, is that the maker resides where the note is dated, and that he contemplated payment there.⁶ The demand of a foreign bill must be made by a notary public, to whom credit is given because he is a public officer.⁷

A notary is amenable, either to the jurisdiction of the Court of Faculties, or is liable to an action for negligence.

As to the jurisdiction of the Court of Faculties.

By statute on complaint made in a summary way to the Master of Faculties, and supported by affidavit or other proof, a notary who has permitted his name to be used by an unqualified person, or practised out of his allotted district, will be liable ; and it has further been decided that there is a general power to strike notaries off the roll for misconduct ; which resides in the Master of the Faculties.⁸

Notaries accountable to the Court of Faculties.

As to the liability of a notary to action.

Liability to action.

A notary, who receives a bill of exchange for the purpose of presenting it, and in case of non-acceptance or non-payment to protest it, or, indeed, to perform any of the duties of a notary, such as those enumerated by Lord Tenterden, C.J., in the extract given above, is bound to use reasonable skill and ordinary diligence in his business, and is consequently liable for injuries to his employer occasioned by want of reasonable skill, and also for ordinary diligence.⁹

Reasonable skill in a notary must be understood to indicate so much only as is ordinarily possessed and employed by persons of common capacity engaged in the same employment. By ordinary diligence is to be understood that degree of diligence which persons of common prudence are accustomed to use about their own business or affairs.¹⁰

Reasonable skill.
Ordinary diligence.

A notary is only liable to his employer, or to the person, if any, who contracts with him.

Liable on the contract.

¹ Domat, Public Law, 2, 5, 5, § 4.

² *Ibid.* ss. §§ 5, 6.

³ Story, Bills, § 277 ; 1 Parsons, Notes and Bills, 634, 635.

⁴ *Boot v. Franklin*, 3 Johns. (Sup. Ct. N. Y.) 297.

⁵ *Firth v. Thrush*, 8 B. & C. 387.

⁶ 3 Kent, Comm. 97.

⁷ Per Buller, J., *Lejtley v. Mills*, 4 T. R. 175. See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 51.

⁸ 41 Geo. III. c. 70, s. 10 ; 3 & 4 Will. IV. c. 70, s. 4. In *re Champion, ex parte the Society of Provincial Notaries Public of England and Wales* (1906), I, 86. See 6 & 7 Vict. c. 90, s. 9.

⁹ Story, Agency, § 182.

¹⁰ See *post*, Skilled Labour.

with relation to whom a duty is constituted by the employment; and is not liable to any one whom his negligence may collaterally injure.¹

Notary may not depute his duty.

A notary who has undertaken to perform a notarial act cannot depute another to do it, even though that other is himself a notary; for it is a general rule that a personal trust or power, conferred in reliance on the personal qualifications of an individual, is not to be delegated; and an authority is exclusively personal unless from the express language used, or from the fair presumptions growing out of the particular transaction, or the usage in trade, a greater liberty is conceded.²

Negligence to protest a bill for non-payment before maturity.

It has been held negligence in a notary to protest a bill for non-payment before its maturity, or to delay to demand payment until after its maturity; or to omit negligently to notify the proper parties of the dishonour of a bill whereby the holder loses his remedy against any such parties.³

A banker employing a notary not generally liable for his negligence.

A question has been mooted, whether a banker employing a notary is responsible for his negligence. This has two aspects. The notary may be employed in some matter for which the appointment of a public officer is not necessary, such as the giving of notices of non-acceptance or non-payment, which may be done equally well by an ordinary clerk. In this case it seems clear that the banker's liability will not be affected by the fact that he has chosen to conduct his business through a notary rather than through an ordinary clerk. But the negligence may be in the performance of a strictly official function, in which the banker is bound to employ a notary. The act of the officer is consequently an independent act, which the banker himself can in no circumstances do, performed by an independent public officer, in virtue of his public position, and not arising out of his agency, and for which he himself is responsible, either to the Court of Faculty or to the person injured by his act.⁴ The duty of the banker, in this case, appears to be confined to the selection of a competent and trustworthy notary.⁵ It is perfectly possible, having reference to the provisions of 3 & 4 Will. IV. c. 70, with respect to the inability of notaries to act out of their districts, that there may be no freedom of choice for the banker; when his position would appear strongly analogous to that of the employer of a compulsory pilot.⁶ The law has been thus laid down in a case of the highest authority⁷ where bills had been transmitted by a banker to a notary: "It is enough here that the notary was not in this matter the agent of the bankers. He was a public officer whose duties were prescribed by law; and when the notes were placed in his hands in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty he alone was liable; the bankers were no more liable than they would have been for the unskilfulness of a lawyer of reputed ability and learning, to whom they

If he had used proper efforts to select a competent and trustworthy one.

¹ *Simpson v. Thomson*, 3 App. Cas., per Lord Penzance, 289. Story, Agency, (9th ed.), §§ 217 b, 234.

² *Cockran v. Arlun*, 2 M. & S. 301n; *Ess v. Truscott*, 2 M. & W. 385. Broom, Legal Maxims (7th ed.), 638; Story, Agency (9th ed.), § 14.

³ See cases cited, Shearman and Redfield, Negligence, § 548.

⁴ *Whitfield v. Lord Le Despencer*, 2 Cowp. 765.

⁵ *Bellomire v. Bank of the United States*, 4 Whart. (Pa.) 105.

⁶ *Warren Bank v. Suffolk Bank*, 64 Mass. 582; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. (Miss.) 592.

⁷ *Britton v. Nicolls*, 104 U. S. (14 Otto) 706.

might have handed the notes for collection, in the conduct of a suit brought upon them." The additional fact that the notary is also an employé and agent of the banker does not appear to alter the case. There is a sharp dividing line between his duties as agent and his duties as a public officer; so that so soon as his public functions come to be discharged his private service becomes suspended and, as it were, merged.¹ Although there is a dearth of direct English authority, the law in the United States on the subject appears plain.

In another American case, *Reed v. Darlington*,² it has been held that where a notary has been guilty of negligence and is sued for it, he is placed in the position of the person who sues for his negligence would have been charged; if that person has a defence it is competent to the notary to prove it; and he must do this with all the particularity and completeness required from that person had the action been against him.³

American case, *Reed v. Darlington*.

A notary must not protest a draft for non-acceptance before due presentment for payment. If he does the publication may be a libel. It has been decided that the notary is liable in an action by the drawee, where he can show that the protest and its publication were falsely, fraudulently, and maliciously made and calculated to injure him in his credit or business;⁴ but further than this, the notary would appear to be liable for the negligence alone, apart from fraud or malice, on the principle governing in *Marzetti v. Williams*.⁵

II. THE SHERIFF.

The name sheriff is derived from two Saxon words—*scyre*, that is, a shire; and *reve*, keeper, bailiff, or guardian. The sheriff has all the authority for the administration and execution of justice which the earl or *comes* had,⁶ unless where statutory enactment has effected an alteration.⁷ The appointment of sheriff is annual,⁸ but till the appointment of a new sheriff the office is not determined.⁹ The demise of the Crown does not affect his position; for unless sooner removed or superseded he continues in office till the completion of his term.¹⁰ In the event of his death his under-sheriff continues in office in the name of the deceased until another sheriff is appointed and sworn, and is answerable in all respects as the deceased sheriff would have been had he lived.¹¹

Derivation of the name. Office and authority.

¹ *May v. Jones*, 30 Am. St. R. 154.

² 19 Iowa, 349.

³ In this it is analogous to the rule in actions on covenant of warranty: *Hamilton v. Cutts*, 4 Mass. 349; *Greenault v. Davis*, 4 Hill (N. Y.) 643.

⁴ *May v. Jones*, 30 Am. St. R. 154.

⁵ 1 B. & Ad. 415, *Shearman and Redfield*, Negligence, § 508.

⁶ Co. Litt. 168; 9 Co. Rep. 49; Dalton, *Sheriffs*, l. "Comites," says Dalton,

"*nomen accipiant a comitibus quia principem comitariunt ad bella publicaque negotia ejus lateri semper hærentes.*" Com. Dig. Viscount; Vin. Abr. Sheriff; Watson, *The Office of Sheriff*; Kemble, *The Saxons in England*, vol. ii. chap. 5. The Geréa.

⁷ 50 & 51 Vict. c. 55, ss. 8-20. Some ancient statutes as to the appointment of sheriffs are considered in the *Earl of Macclesfield's case*, 16 How. St. Tr. 1282.

⁸ 50 & 51 Vict. c. 55, s. 3, sub-s. (2). Proof that a person has acted as sheriff is *prima facie* evidence that he is sheriff without proof of his appointment: *Bunbury v. Mathews*, 1 C. & K. 380.

⁹ Atkinson, *Sheriff* (6th ed.), 19; 50 & 51 Vict. c. 55, s. 7, sub-s. (2).

¹⁰ 50 & 51 Vict. c. 55, s. 3, sub-s. (3). Originally the office was determined by the demise of the Crown, 1 Bl. Com. 342. By 1 Anne St. 1, c. 2 (c. 8 Ruffhead), the office was continued for six months after the king's demise.

¹¹ 50 & 51 Vict. c. 55, s. 25, sub-s. (1). *Gloucestershire Banking Co. v. Edwards*, 20 Q. B. D. 167.

As a judicial officer the sheriff's powers are now practically obsolete,¹ except for the purpose of executing writs of inquiry as to damages or for some special purpose, as under the Lands Clauses Consolidation Act, 1845.

Sheriff's
Deputy.

The sheriff as a ministerial officer "may make a deputy concerning his office; *scil.*, he may make his precept to another to arrest the party, or he may serve a *capias* or other process by his bailiff or servant;"² and, by 50 & 51 Vict. c. 55, s. 23, sub-a. 1, he is bound to make such appointment within one month after notification of his own appointment.

Under-Sheriff.

The under-sheriff has not any estate or interest in the office itself, neither may he do anything in his own name, but only in the name of the high sheriff, who is answerable for him;³ so that an action for a false return does not lie against the under-sheriff, for the high sheriff only is chargeable;⁴ and for every default of the under-sheriff the high sheriff shall be amerced, though he shall not be imprisoned for the act of the under-sheriff, nor indicted for any misdemeanour committed by him.⁵ The reason for the extended liability of the sheriff is, because he is supposed, and, in the first instance, bound, to execute his duty in person. The impossibility of so doing authorises him to delegate his authority to another; and for whatever the delegate does, not only when done *virtute mandati*, but *colore mandati*, the sheriff is responsible.⁶

Incidents and
tenure of his
office.

The under-sheriff is in the nature of a general bailiff, and, being in effect only the sheriff's deputy, is removable. The sheriff may not abridge any part of the under-sheriff's power during the currency of his appointment, though he may determine the appointment.⁷

High sheriff
may take
bonds from
his officers.

The high sheriff may take bonds and covenants, from the under-sheriff and from bailiffs and gaolers, indemnifying him from their neglects and defaults in the execution of the offices he trusts to them.⁸

It follows from the delegation by the sheriff to the under-sheriff, of the whole of his powers within the limits of the appointment, that the under-sheriff has power to make bailiffs and to issue precepts.⁹

Bailiffs.

Bailiffs are of three kinds:

1. Bound bailiffs.
2. Special bailiffs.
3. Bailiffs of liberties.

1. Bound
bailiffs.

1. Bound bailiffs are the ordinary officers of the sheriff, and are bound in an obligation, with sureties, for the faithful discharge of the duties which they are appointed to perform.¹⁰

¹ 50 & 51 Vict. c. 55, ss. 17, 18.

² Dalton, Sheriffs, 3. The sheriff, because "he shall answer at his peril," had the appointment, at common law, of all clerks in his county court, keepers of gaols, and subordinate officers whatsoever: *Milton's case*, 4 Co. Rep. 33b.

³ Dalton, Sheriffs, 3.

⁴ *Cameron v. Reynolds*, 1 Cowp. 403.

⁵ *Laicock's case*, Latch, 187.

⁶ *Parrot v. Mansford*, 2 Esp. (N. P.) 585; *Gregory v. Colterdell*, 5 E. & B. 571; *Smart v. Hutton*, 8 A. & E. 568, n; though not for what is done irrespective of the process, unless it is subsequently ratified: *Underhill v. Wilson*, 6 Bing. 697; nor for what is done after the termination of the bailiff's authority: *Brown v. Copley*, 7 M. & G. 558; nor yet for what is done by the authority of the execution creditor: *Crunder v. Long*, 8 B. & C. 598.

⁷ *Norton v. Simmes*, Hob. 13.

⁸ Dalton, Sheriffs, 445; Hob. 12, 13. *Milton's case*, 4 Co. Rep. 33 b.

⁹ *Parker v. Kell*, 1 Salk. 95.

¹⁰ Watson, Sheriff (2nd ed.) 39; *Taylor v. Richardson*, 8 T. R. 505. See 1 Bl. Com. 345; and the comment on the passage, 16 How. St. Tr. 50 (n). In the text

Unlike the under-sheriff, the hailiff is appointed by warrant to act on each occasion of executing process, so that he becomes the special officer of the sheriff for that occasion, and no more.¹

2. Special bailiffs are appointed by the sheriff at the instance of the plaintiff or his solicitor, who, further, must give such personal directions as to constitute them agents of the plaintiff.² Whether the special agency has been constituted is rather a question of fact than of law.³ While the special commission exists the sheriff cannot in general be ruled to return the writ,⁴ and the sheriff is freed from liability to action.⁵ After its determination he becomes liable as in an ordinary case.⁶

3. Bailiffs of liberties are officers appointed within franchises by those exercising the same to execute process therein, as the bound bailiff does within the county.⁷ In the case of a writ entrusted for execution within his liberty, the bailiff of the liberty is alone liable, and not the sheriff.

The sheriff is responsible for all acts of the bailiff done in the execution of writs⁸ directed to the sheriff in his ministerial capacity.⁹ His civil responsibility is not confined to the improper manner of executing what is commanded by his warrant, but extends to all acts, however wrongful, provided they are done under cover of the writ,¹⁰ even though they are against the express instructions of the sheriff,¹¹ and go the length of fraud.¹² The plaintiff, for whose benefit the writ is issued, is not responsible for the misconduct of officers of the sheriff unless he has so intervened in the execution of the writ that the action taken may be regarded as done under his direction.¹³ If he has done no more than set the Court in motion, it is the act of the Court, not his, from which the complaint arises.¹⁴ The same holds good with

there is a statement by Sir John Pratt, C.J., of the legal position of bailiffs and the extent of protection the law affords them when executing process.

¹ *Crowder v. Long*, 8 B. & C. 508; *Drake v. Sikes*, 7 T. R. 113; *Brown v. Copley*, 2 D. & L. 332; *Stoddart v. Goodricke*, 4 B. & Ad. 541.

² *Alderson v. Davenport*, 13 M. & W. 42; *Ford v. Locke*, 6 A. & E. 699; *Porter v. Viner*, note to *The King v. The Late Sheriff of London in a cause of Rustin against Hatfield*, 1 Chitty (K. B.) 613; *Botten v. Tomlinson*, 16 L. J. C. P. 138. A mere request that a particular officer should be employed is not enough: *Corbet v. Brown*, 6 Dowl. Practice Cases 704; *Seal v. Hudson*, 4 D. & L. 760.

³ *Alderson v. Davenport*, 13 M. & W. 42, 46; *Wright v. Child*, L. R. 1 Ex. 358.

⁴ *De Moranda v. Dunkin*, 4 T. R. 119; *Cook v. Palmer*, 6 B. & C. 739.

⁵ *Pallister v. Pallister*, 1 Chitty (K. B.) 614n.

⁶ *Taylor v. Richardson*, 8 T. R. 565.

⁷ *Dalton, Sheriffs*, 459; 50 & 51 Vict. c. 55, s. 34. See *Ritson, The Office of Bailiff of a Liberty*; also 51 & 52 Vict. c. 41, s. 59, sub-s. 2.

⁸ See *Boothman v. Earl of Surrey*, 2 T. R. 5. "For all civil purposes the act of the sheriff's hailiff is the act of the sheriff": *Ackworth v. Kemp*, 1 Doug., per Lord Mansfield, 42; *Woodgate v. Knatchbull*, 2 T. R. 148.

⁹ *Saunderson v. Baker*, 2 Wm. Bl. 832.

¹⁰ See *Tunno v. Morris*, 2 C. M. & R. 298; where the sheriff was held to have been acting under the direction of the suitors of a county court, and was therefore not liable.

¹¹ *Cook v. Palmer*, 6 B. & C. 739, where, however, it was held there was no remedy against the sheriff.

¹² *Raphael v. Goodman*, 8 A. & E. 565, cited in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, 266. As to the responsibility of sheriff for hailiff, see *Lush's Practice*, (3rd ed.), 189-190.

¹³ *Morris v. Salberg*, 22 Q. B. D. 614; *Wilson v. Tunnan*, 6 M. & G. 236; *Brook v. Hook*, L. R. 6 Ex. 89, 96; *Condy v. Blawberg*, 7 Times L. R. 424; *Walley v. McConnell*, 13 Q. B. 903; *Bullen and Leake Prec. Pleas*, (3rd ed.), 773.

¹⁴ *Abley v. Dale*, 10 C. B. 62.

regard to a solicitor, even where he perceives that the officer is going to do wrong and does not set him right.¹

Gaolers.

By the common law the sheriff had the custody of the common gaol of the county. He appointed the gaoler, and could remove him at pleasure.² Now, by the Prisons Act, 1865,³ the justices in quarter sessions assembled are constituted the prison authority, and the appointment of gaoler is given to them; and by the Prisons Act, 1877,⁴ it is provided that the sheriff shall not be liable for the escape of a prisoner. Nevertheless, the responsibilities of a gaoler, as far as it is necessary to mention them, may be conveniently noted here.⁵

Gaoler's duty.

At common law the gaoler is the sheriff's servant, whom he may discharge at pleasure.⁶ The gaoler's duty is to keep safe custody of all persons committed to his charge; formerly if he permitted a debtor to escape, the sheriff was liable to an action;⁷ now, as we have just seen, this liability is taken away. In *Stroud's case*,⁸ it was held that although a prisoner depart from prison with his keeper's license, yet doing so is an offence as well punishable in the prisoner as in the keeper. A gaoler is not responsible for detaining a man under a warrant irregularly issued, if he detain him only in pursuance of the terms of such warrant; he is responsible if he detain the wrong man, or the right man on a void warrant.⁹

Position of the gaoler with regard to his prisoners.

Since a gaoler is considered as an officer relating to the administration of justice, if a person threatens him for keeping a prisoner in safe custody, he may be indicted, and fined, and imprisoned for it.¹⁰ Again, if a criminal in his endeavour to break the gaol assault his gaoler, he may lawfully kill him in the affray.¹¹ If a prisoner gets out of gaol, and the gaoler in pursuit of him kills him, the gaoler is guilty of an escape, though he never lost sight of him,¹² and is liable in civil process to the party grieved by the escape.¹³ A head gaoler is answerable for the acts of his deputy, civilly, though not criminally.¹⁴

How far protected.

It is clear that a gaoler is protected in obeying a warrant valid on the face of it,¹⁵ but if in regard to the warrant a statutory duty is imposed, of which knowledge can be imparted to him, and which he does not observe, an action will lie. In *Moone v. Rose*,¹⁶ the plaintiff had

¹ *Sowell v. Champion*, 6 A. & E. 407; *Smith v. Keal*, 9 Q. B. D. 340.

² 14 Edw. III. stat. 1, c. 10, repealed as to England by S. L. R. Act, 1863, 26 & 27 Vict. c. 125.

³ 28 & 29 Vict. c. 126, ss. 5-10.

⁴ 40 & 41 Vict. c. 21, ss. 30, 31, 32. See now 50 & 51 Vict. c. 55, sec. 16, sub-sec. 1 & 2. Sub-sec. 1 states sheriff's liability for an escape.

⁵ As to details, see Bac. Abr. Gaol and Gaoler; Burn, Justice, Gaols; and especially Emlyn's Preface, 1 How. St. Tr. xxxvii., and *Proceedings against Huggins and others*, 17 How. St. Tr. 297.

⁶ Bac. Abr. Sheriff (H) 5.

⁷ *Brown v. Compton*, 8 T. R. 424. See *Plummer v. Whitehead*, 2 Lev. 158; Com. Dig. Officer (K 3.); Roll Abr. Escape.

⁸ 3 How. St. Tr. 291, where the difference between "breach of prison" and "escape" is stated to be "the first is against the gaoler's will; the other is with his consent, but in both the prisoner is punishable."

⁹ *Olliet v. Bessey*, Sir T. Jones, 214; *Henderson v. Preston*, 21 Q. B. D. 362.

¹⁰ Bac. Abr. Gaol. (D). 2 Roll. Abr. 76.

¹¹ Hawk, P. C., bk. 1, ch. 28, § 13; Jenk. 23, pl. 42.

¹² Hawk, P. C., bk. 2, ch. 19, § 6; Vin. Abr. Escape (Q), Escape of Felons; *Rigeway's case*, 3 Co. Rep. 52.

¹³ Bac. Abr. Gaol (D).

¹⁴ *Huggins's case*, 17 How. St. Tr. 297; 2 Id. Raym. 1574.

¹⁵ *Olliet v. Bessey*, Sir T. Jones, 214; *Henderson v. Preston*, 21 Q. B. D. 362; *Tarleton v. Fisher*, 2 Doug. 671, 677; *Ames v. Waterlow*, L. R. 5 C. P. 53.

¹⁶ L. R. 4 Q. B. 486.

been in custody for contempt of Court in not answering a bill in Chancery. By II Geo. IV. & I Will. IV. c. 36, s. 15, the duty was cast on the sheriff, gaoler, keeper, &c., in whose charge such a prisoner should be, in default of his being brought to the bar of the Court in the way specified by the statute, to "discharge him out of custody without payment by him of the costs of contempt." The gaoler had notice that the commitment was under the statute, and, as he did not discharge his prisoner, was held liable in trespass. In *Greaves v. Keene*,¹ the warrant gave no indication of the particular contempt, and *Moone v. Rose* was distinguished on the ground that the defendant, having acted under the writ, was protected by the exigency of its terms.

In *Brandling v. Kent*² an opinion is expressed by Buller, J., that a gaoler would not be liable for an irregularity in the arrest of a prisoner committed to his charge, and that the sheriff only would be answerable; since it is the duty of the gaoler to receive a person tendered to him by the sheriff, whether the arrest is legal or not. On the other hand, Lord Ellenborough, C.J., ruled at *Nisi Prius*, that a gaoler is liable to an action of trespass and false imprisonment, even though he acted *bonâ fide*, and without the means of ascertaining the identity of the person imprisoned, if, by mistake of the sheriff's officer, the warrant was executed against a wrong person.³

The gaoler is bound to have sufficient force to prevent breach of prison, as breaking the prison by mobs or rebels is no answer to an action for an escape.⁴

"When," says Lord Justice-Clerk Hope,⁵ "an officer who has not been able to lodge his prisoner in a gaol separates him from the warrant which he alone is entitled to hold, he does so at his own peril; and he is bound to make out a very extraordinary case before it can be held that his responsibility has come to an end."

The chief duties entrusted to the sheriff are: I. Conducting elections of members of Parliament; II. Summoning juries; III. Executing process. Of these in their order.

I. The sheriff's duties and liabilities in conducting the election of members of Parliament.⁶

"That the officer is only ministerial in this case, and not a judge and not acting in a judicial capacity," says Holt, C.J., in the House of Lords, "is most plain." Yet Abbott, C.J.,⁷ says: "The returning

¹ 4 Ex. D. 73.

² 1 T. R. 80. Buller, J., cites for his opinion *Badkin v. Powell*, 2 Cowp. 476, the marginal note of which is "Trespass *vi et armis* does not lie against a pound-keeper merely for receiving a distress, though the original taking be tortious. *Secus*, if he exceed his duty and assent to the trespass." *The King v. Shearncss*, 2 T. R. 47, is an instance of a prosecution of a gaoler for an escape.

³ *Aaron v. Alexander*, 3 Camp. 35; *White v. Taylor*, 4 Esp. (N. P.) 80.

⁴ *Elliott v. Duke of Norfolk*, 4 T. R. 789; *Southcot's case*, 4 Co. Rep. 83b; *Crompton v. Ward*, 1 Stra. 429; *O'Neil v. Marson*, 5 Burr. 2813.

⁵ *Ross v. M'Bean* (1845), 8 Dunlop 252.

⁶ The sheriff, in holding the election of coroner, and taking the poll of valid electors and determining which of the candidates is chosen, exercises functions of a judicial character: *The Queen v. Diplock*, L. R. 4 Q. B. 549; but now see 51 & 52 Vict. c. 41, s. 5, subs. (1).

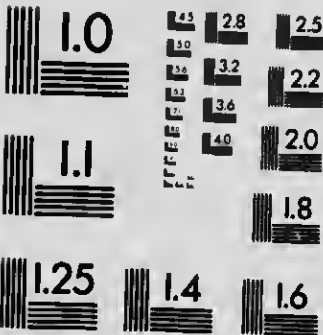
⁷ *Ashby v. White*, 14 How. St. Tr. 789. The passage continues as follows: "His business is only to execute the precept, to assemble the electors to make the election by receiving their votes, computing their numbers, declaring the election, and returning the persons elected: the sheriff or other officer of a borough is put to no difficulty in this case, but what is absolutely necessary in all cases. If an execution be against a man's goods, the sheriff must, at his peril, take notice what goods a man has." Com. Dig. Viscount (C4).

⁸ *Cullen v. Morris*, 2 Stark. (N. P.) 587.



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officer is, to a certain degree, a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer; his duties are neither entirely ministerial nor wholly judicial; they are of a mixt nature. It cannot be contended that he is to exercise no judgment, no discretion whatever in the admission or rejection of votes; "the officer could not discharge his duty without great peril and apprehension if, in consequence of a mistake, he became liable to an action."¹

Duties of
returning
officers.

Under the Ballot Act, 1872,² the returning officer's duties are to provide nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, copies of register of voters, and to appoint and pay such officers as are necessary for effectually conducting an election in the manner provided by the Act.

Wilful mis-
feasance.

By section 11 every returning officer, presiding officer, and clerk who is guilty of any wilful misfeasance, or any wilful act or omission in contravention of the Act, shall be liable to a fine of £100 in addition to any other liability which he may have incurred at common law.³ In connection with this must be taken the 7 & 8 Will. III. c. 7, by which "all false returns wilfully made" are declared against law and are prohibited.

Ashby v.
White.

In *Ashby v. White*⁴ it was ultimately resolved in the House of Lords, reversing the King's Bench, that if a man has a right to vote at an election for members of Parliament, he may maintain an action against the returning officer for refusing to admit his vote, though the person for whom he offered to vote were elected;⁵ but in *Tozer v. Child*⁶ which was an action against church wardens for maliciously rejecting the plaintiff's vote at an election for vestrymen the necessity to prove that the defendant had acted maliciously was affirmed.⁷

If the sheriff, in the discharge of his duty in the election of members to serve in Parliament, act wilfully and corruptly, he is guilty of a contempt of the House, for which the House may commit him to custody.⁸

II. Duties in
the summon-
ing of juries.

II. The sheriff's duties and liabilities in summoning juries.

By 25 & 26 Vict. c. 107, s. 4, the clerks of the peace of every county are required to issue their precepts to the churchwardens⁹ and overseers of their respective parishes, requiring them to prepare jury lists.

By 33 & 34 Vict. c. 77, s. 13, if this work is done negligently, so as to insert "the name of any person whose name ought not to have been inserted therein, or omit therefrom the name of any person whose name

¹ Per North, C. J., *Barnardiston v. Soame*, 6 How. St. Tr. 1097: "The sheriff as to declaring a majority is a judge; and . . . there is the same reason he should be free from actions as any judge in Westminster Hall or any other judge." But see per Lord Ellenborough in *Picton's case*, 30 How. St. Tr. 787, citing *Schinotti v. Bumsted*, 6 T. R. 646.

² See *Hackney Election Petition*, 2 O'M. & H. 77; *Davies v. Lord Kensington*, L. R. 9 C. P. 720; 2 Will. IV. c. 45, s. 76; *Barnardiston v. Soame*, 6 How. St. Tr. 1063, Broom. Const. Law, 800. It is the duty of a returning officer whose account has been taxed under sec. 4 of 38 & 39 Vict. c. 84, to return to each candidate out of his deposit a proportionate amount of any part of the account which has been disallowed, whether such candidate has or has not been a party to the taxation: *Martin v. Tomkinson* (1893), 2 Q. B. 121.

³ 2 Id. Raym. 938; 1 Sm. L. C. (11th ed.) 240. Cp. *Drew v. Coulton*, 1 East 563n.

⁴ *Pryce v. Belcher*, 3 C. B. 58, 4 C. B. 866.

⁵ 7 E. & B. 377; *Pickering v. James*, L. R. 8 C. P. 489.

⁶ Bac. Abr. Actions on the case (F.) 1.

⁷ *Liskeard Return*, 2 Peck. 328, 329.

⁸ The duties of the churchwardens in rural parishes with respect to jury lists are taken away by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5, subs. 2.

ought not to have been omitted," the overseer so guilty "shall, on summary conviction, be liable to a penalty for each offence not exceeding forty shillings."¹

On the principle of *Ashby v. White*,² any qualified juror would have an action against the proper officer for maliciously omitting to insert his name in the jury list.³

When the jury lists are prepared the clerk of the peace is to forward to the sheriff a book called "The Jurors' Book." This is to remain in use for one year only, beginning on January 1.⁴

Within ten days of the receipt of the book the names of all men qualified therein as special jurors must be taken out by the sheriff and put in a separate list,⁵ and an omission to do this subjects the sheriff to penalties.⁶

By the Common Law Procedure Act, 1852,⁷ the judges of assize may by precept direct the sheriff to summon jurors for the trial of all issues, civil or criminal, within certain limits therein specified. If, however, the name of any person, who is not qualified or liable to serve on juries is inserted in the jury-hook, the sheriff is indemnified for returning or impanelling him.⁸ The only remedy would be against the churchwardens⁹ and overseers.

III. The sheriff's duty in the execution of process.¹⁰

When a writ is delivered to the sheriff he is bound¹¹ strictly to execute it within his county, and there only,¹² according to the exigency of it, without inquiring into the regularity of the proceedings on which the writ is based.¹³ The party should show that he has a judgment in his favour, or is entitled to an order to arrest under the Debtors Act, 1869.¹⁴ If the sheriff executes the process of a Court not having jurisdiction in the matter in which it professes to act, he will be liable,¹⁵ but not if the Court has jurisdiction, though its order is erroneous.¹⁶ This is illustrated by Dalton:¹⁷ "If the justices of peace arraign a person of treason in their sessions who is convicted and executed, this is felony as well in the justices as in the sheriffs or officers who executed the sentence; but if he had been indicted of a trespass, found guilty

III. Duties in the execution of process.

Quotation from Dalton.

¹ See *Bray v. Somer*, 2 B. & S. 374. As to misconduct in preparing the lists, *The Queen v. Hall* (1891), 1 Q. B. 747.

² 2 Ld. Raym. 938; 1 Sm. L. C. (11th ed.) 240; *Tozer v. Child*, 7 E. & B. 377.

³ But see *The Queen v. Hall* (1891), 1 Q. B. 747, at 761, 769.

⁴ 6 Geo. IV. c. 50, s. 12.

⁵ 6 Geo. IV. c. 50, s. 46; *Williams v. Thomas*, 4 Ex. 479.

⁶ 33 & 34 Vict. c. 77, s. 15.

⁷ 15 & 16 Vict. c. 76, ss. 105, 106, 107; amended by 33 & 34 Vict. c. 77. See 6 Geo. IV. c. 50.

⁸ 6 Geo. IV. c. 50, s. 39.

⁹ See ante, 206, note 9.

¹⁰ Bac. Abr. Trespass (D) 3, (G) 1; Vin. Abr. Trespass (C. a), Imprisonment justifiable. By officers upon warrants.

¹¹ Stat. Westm. Sec. (13 Ed. 1), c. 39; Dalton, *Sheriffs*, 493; 50 & 51 Vict. c. 55, s. 30: "The sheriff ought to execute the King's writ at his peril, although resistance be made; otherwise he shall be grievously amerced; besides the party shall have his action against him if the writ be not executed"; *Horden v. Standish*, 6 C. B. 504, at 520. *Att.-Gen. v. Kinsane*, 32 L. R. Ir. 220. Shearman and Redfield, *Negligence* (4th ed.), §§ 616, 625.

¹² *Sowell v. Champion*, 6 A. & E. 407; Dalton, *Sheriffs*, 104, 106.

¹³ *The Marshalsea case*, 10 Co. Rep. 68 h, 76 a, see Thomas's note; *Thomas v. Hudson*, 14 M. & W. 353; 10 M. & W. 885.

¹⁴ 32 & 33 Vict. c. 62.

¹⁵ *Warmoll v. Young*, 5 B. & C. 690; *Imray v. Magnay*, 11 M. & W. 267.

¹⁶ *Brittain v. Kinnsaird*, 1 B. & B. 432; *Thomas v. Hudson*, 14 M. & W. 353; 10 M. & W. 885.

¹⁷ Dalton, *Sheriffs*, 107; the translation of Dalton's quotation from the Norman-French is from Watson, *Sheriff* (2nd ed.), 68, where, however, a wrong reference is given. See Y. B. 14 Hen. VIII. 16, pl. 3.

and hanged, though this had been felony in the justices, yet it would not be so in the sheriff; because a matter in which the justices had jurisdiction, and which they only were to blame in exceeding their authority."¹ A writ may therefore be at once good and bad—good as to the sheriff and those acting under him, but bad as to the persons suing it out.²

Sheriff may not set up that the writ is erroneously awarded if it shows jurisdiction on the face.

If the writ is, in fact, erroneously awarded, yet shows jurisdiction on the face, the sheriff is not allowed to set up the defect. The authority for this proposition is *Gold v. Strode*,³ where, in an action against the sheriff for an escape, it was moved in arrest of judgment that the letters of administration, on which the proceedings were based, were void, and therefore all the dependencies on it were void also. The Court, however, were of opinion that if it were so, the sheriff could not question the judgment of the Court, for it was not a void but an erroneous judgment; "and when a person is in execution upon such a judgment, and escapes, and then an action is brought against the gaoler or sheriff, and judgment and execution thereon, though the first judgment upon which the party was in execution should be afterwards reversed, yet the judgment against the gaoler being upon a collateral thing executed, shall still remain in force."⁴ If the party himself takes out an execution, that will not lie without an award of the Court, such execution will give no authority to hold the defendant, and there will be no escape if he be let go. If the Court have issued execution, though erroneously, it is good till the judgment on which it is founded is set aside.⁵ No one can be sued for exercising his legal right to issue execution on a judgment unless he act maliciously and without reasonable and probable cause.⁶

Sheriff may break open doors at the suit of the King but not of private persons.

In the execution of writs at the suit of the King the sheriff may break open the outer door of a house wherein the defendant or his goods are, but must first signify the cause of his coming, and demand admission.⁷ He may also break the door of a house in executing a *capias utlagatum*, writs of seisin, *habere facias possessionem*, and attachment.⁸ He may not break open the outer door of any man's house in the execution of process between subjects, for the maxim of law is every man's house is his castle: *Domus sua cuique est tutissimum refugium*.⁹ When once in the house he may break open inner

¹ *The Marshalsea case*, 10 Co. Rep. 68 b, 76 a.

² Parke, B., *Jones v. Williams*, 9 Dowl. Prac. Cas. 710; 8 M. & W. 357.

³ 3 Mod. 324; *Weaver v. Clifford*, Cro. Jac. 3; *Shirley v. Wright*, 2 Ld. Raym. 775; Bull. N. P. 66; in this work there is a very valuable chapter on the subject, c. vi. 64-74, "Of Case for Misbehaviour in an Office, Trust, or Duty."

⁴ In America it has often been decided that the sheriff cannot refuse to execute voidable process, since it depends on the defendant alone whether it is rendered void: *Bacon v. Cropsey*, 7 N. Y. 195; *Ames v. Webbers*, 8 Wend. (N. Y.) 545.

⁵ Gilbert, Executions, 82. A writ delivered to the sheriff to be executed, when returned is matter of record, and may be proved by an examined copy; *Ramsbottom v. Buckhurst*, 2 M. & S. 565; 2 Wms. Notes to Saund. 216.

⁶ *De Medina v. Grove*, 10 Q. B. 152; *Huffer v. Allen*, L. R. 2 Ex. 15; *Roret v. Lewis*, 5 D. & L. 371; *Bynoe v. Bank of England* (1902), 1 K. B. 467.

⁷ *Semayne's case*, 5 Co. Rep. 91 a; Cro. Eliz. 908; *Burdett v. Abbot*, 14 East 157, 162; *Launock v. Brown*, 2 B. & Ald. 594, where it is said, "Even in the execution of criminal process, you must demand admittance before you can justify breaking open the outer door, for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be?" Cp. *Katcliffe v. Burton*, 3 B. & P. 223.

⁸ *Harvey v. Harvey*, 26 Ch. D. 644.

⁹ *Semayne's case*, 5 Co. Rep. 91 a; 1 Sm. L. C. (11th ed.), 104; Broom, Legal Maxims (6th ed.), 404. In *American Concentrated Must Co. v. Hendry* (1893), 5 L. 331, s. c. 62 L. J. Q. B. 388, Bowen, L.J., disapproved of *Penton v. Browne*, 1 Sid.

doors in order to take under a *fi. fa.* goods which are within the house.¹

The sheriff is only justified in entering the house of a stranger to seize if he finds the goods of the execution debtor in the house.² If the execution debtor has no property there, the sheriff is a trespasser.³

A distinction was drawn between seizure under a *ca. sa.* now obsolete and seizure under a *fi. fa.*; for where the sheriff obtained possession of the debtor's person by the illegal act of some one else to which he was not a party, the law in favour of the liberty of the subject would not in any way let the seizure avail;⁴ but where goods only are involved and are illegally seized, when once they are in the hands of the sheriff, no order will be made for their return.⁵

Distinction between the law with regard to a seizure of goods and an arrest of the person where an illegality has occurred in some of the circumstances.

The seizure of goods by the sheriff does not vest any property in the creditor under whose writ the seizure is made. The property vested thereby in the sheriff is no more than that which results from his being the officer of the law, and is to enable him to sell the goods and raise the money. The goods are, in fact, *in custodia legis* for the benefit of those who are entitled to them, the property in the meanwhile remaining in the debtor.⁶

In the case of the execution of a writ in a liberty the sheriff should in the first instance make out his mandate to the bailiff; when this has been done, the bailiff, and not the sheriff, is answerable.⁷ Process directed to the bailiff is generally void, and the bailiff executing it is guilty of a trespass against the party whose goods are taken in execution; for he is not the officer of the Court, but of the sheriff.⁸

Execution of a writ in a liberty.

Should the writ contain what is commonly called a *non omittas* clause, the privilege of the franchise is thereby swept away, and the sheriff or his officer may enter the liberty and there execute the writ.⁹ In practice it is not unusual to issue a *non omittas* writ in the first instance without default being made by the bailiff of the liberty.¹⁰ Where there is no *non omittas* clause, the sheriff is liable to an action at the suit of the owner of the franchise for executing the writ—yet the execution is not invalidated;¹¹ so that if the sheriff arrest a man within a franchise, and afterwards let him escape, though he renders himself liable to an action by the owner for an infringement of the franchise he is also liable to an action for the escape.¹² The law is similar with regard to an arrest in a royal palace.¹³

Where there is a *non omittas* clause.

186, 1 Keb. 698, limiting the protection given to a dwelling house; but the C. A. in *Hodder v. Williams* (1895), 2 Q. B. 663, followed *Penton v. Browne* as expressing the true rule.

¹ *Hutchison v. Birch*, 4 Taunt. 619; and when the sheriff is lawfully in a house he may break down the outer door to get out: *Pugh v. Griffith*, 7 A. & E. 827.

² *Cooke v. Birt*, 5 Taunt. 765. In the previous edition the cases upon a sheriff's powers and liabilities where a *ca. sa.* was issued were considered. Since the Debtors Act, 1869 (32 & 33 Vict. c. 62), these are become obsolete, and are now omitted.

³ *Johnson v. Leigh*, 6 Taunt. 246.

⁴ *Hooper v. Lane*, 6 H. L. C. 553; *Wright v. Mitchell*, 2 Bing. N. C. 619.

⁵ *Hooper v. Lane*, 6 H. L. C. 443, 55; *Wright v. Stamp*, 9 Ex. 167.

⁶ *Giles v. Grover*, 9 Bing. 128, 1 Cl. & F. 12, 6 Bligh N. S. 277. *Ex parte Rayner*,

In re Johnson, 41 L. J. Bank 26. See 56 & 57 Vict. c. 71, s. 26.

⁷ *Boothman v. Earl of Surrey*, 2 T. R. 5.

⁸ *Grant v. Bagge*, 3 East 128.

⁹ *Adams v. Osbaldeston*, 3 B. & Ad. 489. See 56 & 51 Vict. c. 55, ss. 34, 35.

¹⁰ *Carrett v. Smallpage*, 9 East 330.

¹¹ *Sparks v. Spink*, 7 Taunt. 311; *Rex v. Mead*, 2 Stark. (N. P.) 205.

¹² *Piggott v. Wilkes*, 3 B. & Ald. 502.

¹³ See *Attorney-General v. Dakin*, L. R. 4 H. L. 338; *Winter v. Miles*, 16 East 578, 1 Camp. 475n, for the law of sheriff's levies in a royal palace, and the distinction between a royal palace and a royal residence which is also a royal residence. *Combe v.*

Sheriff must find property named in the writ.

The sheriff must, by himself or his officers, adopt the proper measures for executing the writ, and if he does not he must abide the consequences;¹ he must also receive all kinds of writs at whatever time and wherever within the county they shall be delivered to him.² He is excused where the execution fails altogether without his fault.³ In that case the creditor may have a new writ of *fi. fa.*, and the loss falls on the debtor.⁴

If a judgment creditor causes the sheriff to execute a *fi. fa.* by seizure he cannot have another writ till the first is completely executed and returned.⁵ But if the seizure has been of goods other than those of the judgment debtor, the issue of a second writ is not irregular; for neither the writ nor anything which the sheriff purports to do under it, can justify him if he has seized the goods of a stranger.⁶

Statutory provisions.

The 29 Car. II. c. 7, s. 6, prohibits the service of civil process on Sunday,⁷ and 24 & 25 Vict. c. 100, s. 36, made it a misdemeanour to arrest a clergyman on civil process while performing, or travelling to or from the performance of, divine service.

Formerly the sheriff might defer execution.

At common law the sheriff might defer execution till the return day, which was fifteen days after the *teste* of the writ. Now writs are not returnable for any certain time, the limitation being "immediately after the execution thereof."⁸ Though in strictness the sheriff always ought to have returned every writ when executed, a practice grew up of not doing so, unless he was ruled or ordered to do so by the plaintiff. This practice was designed to prevent improper conduct in the officer or to found an action against the sheriff, where by the sheriff's negligence the plaintiff's right to recover on his judgment had been defeated.⁹ There is an exception to this practice in the case of an *elegit*, where the *elegit* and inquisition must be returned and filed in order to complete the execution.¹⁰

Duty of sheriff now to execute the writ on the first opportunity.

The sheriff must execute the writ on the first opportunity he can get; if he does not he is guilty of negligence, and liable for any damage that may result.¹¹ It was contended in *Jacobs v. Humphrey*¹² that in the

De la Bere, 22 Ch. D. 316. As to mode of trial for offences in palaces, 33 Hen. VIII. c. 12, which is not repealed.

¹ *Dean, &c. of Hereford v. Macknamara*, 5 D. & R. 95.

² *Brackenbury v. Laurie*, 3 Dowl. Prac. Cas. 180, is cited for this in Atkinson, Sheriff (6th ed.), 175, but that case only goes to the neglect of a sheriff in failing to have a "sufficient deputy" under 3 & 4 Will. IV. c. 42, s. 20. The other reference is Dalton, Sheriffs, c. 20, 101. 2 Ed. III. c. 5.

³ *Giles v. Grover*, 1 Cl. & F. 95.

⁴ *L.c.* also *Foster v. Jackson*, Hob. 60.

⁵ *Müller v. Parnell*, 6 Taunt. 370.

⁶ *In re a Debtor, Smith, Ex parte*, (1802), 2 K. B. 260.

⁷ *Eggington's case*, 2 E. & B. 717; *Percival v. Stamp*, 9 Ex. 167.

⁸ "Formerly the return day was fixed in the writ itself. Now it is fixed either by the fact of its being executed, or by an order of a judge, or by lapse of four calendar months"; per Lord Denman, C.J., *Randell v. Wheble*, 10 A. & E. 729.

⁹ *Daniels v. Gompertz*, 3 Q. B. 522; *Harding v. Holden*, 2 M. & G. 914; *Bradley v. Carr*, 3 M. & G. 221; *Richardson v. Trundle*, 8 C. B. N. S. 474; and Rules of Supreme Court, 1383, Order lii. r. 11. As to time of return where the sheriff has interpleaded, *Angell v. Baddeley*, 3 Ex. D. 49.

¹⁰ *Underhill v. Devereux*, 2 Wms. Notes to Saund. 197.

¹¹ *Brown v. Jarvis*, 1 M. & W. 704; *Curie v. Parkins*, 3 Stark. (N. P.) 163; *Randell v. Wheble*, 10 A. & E. 719; *Mason v. Paynter*, 1 Q. B. 974. By 56 & 57 Vict. c. 71, s. 26, the sheriff must endorse on writs of execution against goods, the hour, day, month, and year when he received them. If he neglects he is liable to an action by s. 57 of the same Act.

¹² 2 Cr. & M. 413. The same case is authority for the proposition that declarations made by an officer whilst in possession of goods after the return of the *fi. fa.* are evidence against the sheriff. But in an action against the sheriff, admissions by the under-

case of a *fi. fa.* the reasonable time allowed to the sheriff for executing the writ was not exhausted till a writ of *venditioni exponas*¹ had been sued out against him; but Bayley, B., answered: "The sheriff ought to act without a *venditioni exponas*, and that writ is only to give him alacrity." Yet "extraordinary exertion" is not to be required from him; all he is bound to show is "due and reasonable diligence under all the circumstances."²

It is beyond question that the issue of concurrent writs is not illegal. And it does not signify how long after the first seizure the second is made: for, until the sheriff has the fact brought to his notice that the writ has been satisfied, he is entitled, and indeed bound, to proceed with the execution.³

In the case of a *fi. fa.*, an action is not maintainable against a sheriff for not levying unless actual pecuniary damage is shown.⁴ If damage is shown, the measure of it, *primâ facie*, is the value of the goods which might have been and were not taken; but the jury will have to say whether the whole loss was the result of the sheriff's neglect;⁵ and the sheriff is not estopped by his return from proving that the goods seized did not belong to the debtor.⁶

The case of *Mason v. Paynter*,⁷ which was an action against the sheriff for not executing a writ of *hab. fac. poss.* in proper time, illustrates what sort of damages can be obtained against the sheriff. The plaintiff went with the writ and warrant, and some persons to assist in putting it in force, and delivered it to the officer, desiring that it might be executed immediately. The officer refused, being told by the defendant's landlord that he should set aside the judgment; and subsequently it was set aside. The Master, in taxing costs, disallowed the expenses of the plaintiff in trying to have the writ executed, upon the very ground that the writ had not been executed; but the Court was of opinion that the sheriff was not excused in refusing to execute a writ "when he has the opportunity, is required to do it, and nothing occurs to prevent him;" and allowed the costs.⁸

sheriff are not evidence unless they accompany some official act of the latter or tend to charge himself: *Snowball v. Goodricke*, 4 B. & Ad. 541.

¹ This is a branch of a *fi. fa.*, and not an independent process. *Hughes v. Rees*, 7 Dowl. Prac. Cas. 56; *Cameron v. Reynolds*, 1 Cowp. 403. Under this it is the sheriff's duty to sell at all events for the best price that can be got: *Keightley v. Birch*, 3 Camp. 520. (Compare, however, *Leader v. Danvers*, 1 B. & P. 359). This he can do though out of office: *Doe d. Stevens v. Donston*, 1 B. & Ald. 230; but he may take a reasonable time to make inquiries: *Ayeshford v. Murray*, 23 L. T. (N. S.) 470. The sale also must take place in a reasonable time: *Carlile v. Parkins*, 3 Stark. (N. P.) 163; and before the return to the *venditioni exponas*: *Bales v. Wingfield*, 2 N. & M. 831. If through the sheriff's negligence the goods sell for an undervalue, he will be liable to both debtor and creditor: *Mullet v. Challis*, 16 Q. B. 239; *Phillips v. Bacon*, 9 East 298. The sale need not be by auction: *Phillips v. Viscount Canterbury*, 11 M. & W. 619; but the scale of fees framed under 7 Will. IV. 1 & Vict. c. 55 applied to "sales by auction" only. Since the proper mode of compelling a sale by the sheriff is by writ of *venditioni exponas*, the sheriff is not compellable to execute a bill of sale to the plaintiff's nominee, though he has promised to do so: *Cameron v. Reynolds*, 1 Cowp. 403.

² *Hodgson v. Lynch*, Ir. R. 5 C. L., per Morris, J., 356.

³ *Lee v. Dangar* (1892), 2 Q. B. 337. ⁴ *Stimson v. Farnham*, L. R. 7 Q. B. 175.

⁵ *Hobson v. Thelluson*, L. R. 2 Q. B. 642.

⁶ *Stimson v. Farnham*, L. R. 7 Q. B. 175. Where the declaration disclosed a state of facts from which the law would presume damage, under the old rules of pleading, the defendant was at liberty to plead that *in fact* no damage was sustained: *Wylie v. Birch*, 4 Q. B. 566. "No action can be maintained against him (the sheriff), without proof of damage to the execution creditor." *Dennis v. Whitham*, L. R. 9 Q. B., per Blackburn, J., 348. ⁷ 1 Q. B. 973. See also *Hobson v. Thelluson*, L. R. 2 Q. B. 642.

⁸ As to punishment of the sheriff for misconduct, 50 & 51 Vict. c. 55, s. 29. For the old law, Vin. Abr. Sheriff (L), *et seqq.*

On *fi. fa.*,
action not
maintainable
unless actual
pecuniary
damage is
shown.

Damages
obtainable
against the
sheriff.

Sheriff responsible for the execution of the writ.

Since the sheriff is responsible for the execution of the writ, he ought, if necessary, to take the power of the county—that number of persons, that is, he shall think good—to aid him effectually to do so. This is provided for by the Statute of Westminster the Second [13 Ed. 1], c. 39: "That the sheriff, as soon as his bailiffs do testifie that they found such resistance, forthwith all things set apart (taking with him the power of the shire), he shall go in proper person to do execution." This only applied to writs of execution, and therefore, in executing *mesne* process,¹ although the sheriff was permitted, yet he was not compelled to raise the *posse comitatus*,² and ought not, unless resistance was apprehended.³ There does not seem to have been any means of reimbursing the sheriff the expenses he incurred in calling out the *posse comitatus*.⁴ This procedure is practically obsolete; though the law still is that if the sheriff finds any resistance in the execution of a writ he is to take with him the power of the county and go in proper person to do execution.⁵ Modern police protection is at once efficient and available.

Sheriff's duty where there are various writs in his hands.

If the sheriff has various writs of *fi. fa.* in his hands against the same debtor, he is bound to execute them all, giving priority to each in the order in which they came into his hands; so that any one who places a writ in the hands of the sheriff is entitled to have it executed as far as possible in his interest and on his behalf. If the sheriff make default, as soon as damage arises, the creditor has a complete right of action against him.⁶

The proceeds of an execution must be applied according to the priority of the writs; if there be more than enough to satisfy the first, the surplus must go to the second, and so on.⁷ If the first be invalid by reason of the provisions of the Bankruptcy Law,⁸ or void on the ground of fraud,⁹ then the second takes its place, and the sheriff holds the goods under the later writ. The practice is the same where the execution of the earlier writ is suspended.⁹ Where the earlier writs and the landlord's rent have exhausted the proceeds, the return is *nulla bona*.¹⁰

¹ By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6, no person can be arrested on *mesne process* in any action; but where a plaintiff can show a good cause of action above £50, and that the defendant is about to quit England, a judge may order the defendant to be arrested till he gives security; or a debtor may be arrested where he is about to abscond, or to remove his goods; or if he fails to attend his examination. See also 46 & 47 Vict. c. 52, 53 & 54 Vict. c. 71, s. 7. As to terms of discharge under the Debtors Act, 1860, see s. 5.

² *Noy Maxim* 42; *Crompton v. Ward*, 1 Stra. 429; *May v. Proby*, Cro. Jac. 419.

³ 2 Co. Inst. 454; Dalton, Sheriffs, 355, 356.

⁴ Watson, Sheriff (2nd ed.), 74. "The Master is only to allow what the sheriff is entitled to under the statute 29 Eliz. c. 4, and the fees mentioned in the schedule of fees allowed by the judges under the recent statute"—i.e., 7 Will. IV. & 1 Vict. c. 55; *Slater v. Hamcs*, 7 M. & W., per Parke, B. 414; *Phillips v. Viscount Canterbury*, 11 M. & W. 619. Both enactments are superseded by 50 & 51 Vict. c. 55, ss. 20, 39.

⁵ 50 & 51 Vict. c. 55, s. 8. The sheriff in his sole discretion has the right to require the assistance of the constabulary; *Att. Gen. v. Kissane*, 32 L. R. Ir. 220; *Müller v. Knox* (H. L.) 4 Bing. N. C. 574.

⁶ *Dennis v. Whetham*, L. R. 9 Q. B. 345.

⁷ *Drewe v. Lainson*, 11 A. & E. 529.

⁸ *Aldred v. Constable*, 6 Q. B. 370; *Graham v. Witherby*, 7 Q. B. 491; 46 & 47 Vict. c. 52; 53 & 54 Vict. c. 71. *In re Pearce, Ex parte Crosshairs*, 14 Q. B. D. 966.

⁹ *Hunt v. Hooper*, 12 M. & W. 664; *Howard v. Cauty*, 2 D. & L. 115. If the sheriff be directed by plaintiff or his solicitor not to execute the writ, he is bound to obey; *Levi v. Abbott*, 4 Ex. 588. See *Lovegrove v. White*, L. R. 6 C. P. 440; *Smith v. Keal*, 9 Q. B. D. 346. Directions to the bailiff do not necessarily bind the sheriff; *Barker v. St. Quintin*, 1 D. & L. 542; *Walker v. Hunter*, 2 C. B. 324.

¹⁰ *Windle v. Freeman*, 11 A. & E. 539.

The sheriff is bound to sell, even on a writ on a fraudulent judgment, for he is not to revise the process of the court, but to execute it:¹ and where there are goods in the hands of the sheriff seized on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, the sheriff, if he have notice of the fraud, is compellable to seize and sell them under the subsequent execution, by virtue of 13 Eliz. c. 5., under pain of rendering himself liable to an action by the subsequent execution creditor. He is responsible for neglecting to seize and sell under writs in his hands, as against a person lodging a subsequent writ with him, where it is shown that the prior writs were fraudulent, even though he had no knowledge of it. "He fails in his duty by not executing at all; he is, therefore, in the position of a wrongdoer, and if it be shown that the prior writs would have been ineffectual by reason of being fraudulent as against creditors it does not lie in his mouth to say he did not know it; he has prejudiced the position of the execution creditor by not levying on goods which he might have taken in execution."²

The sheriff must seize only such a quantity of goods as is reasonably sufficient to satisfy the execution; if he sell more he is liable in trover for the excess;³ whether he has sold more than is necessary is a question of fact in each particular case. *Primâ facie* a sheriff's sale is for ready money and immediate delivery; so that the sheriff is not justified, after he has sold so much as apparently satisfies the writ, in selling more upon a speculation that actual delivery of such goods as he has already sold may be prevented by some loss or accident for which he is not answerable.⁴

It is not enough that in the careless discharge of his duty to one the sheriff's negligence may glance off and indirectly and remotely work an injury to another. Before a man can bring an action for negligence he must show a legal duty to himself. Every man who wrongfully subtracts from the substance of another man's debtor, whereby he becomes disabled to pay, does the creditor an injury; yet is there no right of action; for the law does not look beyond the proximate mischief resulting to a vested right, and redresses this only at the suit of the person immediately injured.⁵

¹ *Imray v. Magnay*, 11 M. & W. 275; *Christopherson v. Burton*, 3 Ex. 160; *Shallock v. Carden*, 6 Ex. 727. In *Remmett v. Lawrence*, 15 Q. B. 1010, however, Lord Campbell, C.J., wished to have *Imray v. Magnay* reconsidered. Where the sheriff is in under more than one writ, on relinquishing possession he can only take possession money in respect of one of them: *Glaxbrook v. David & Laur* (1905), 1 K. B. 615.

² *Dennis v. Whetham*, L. R. 9 Q. B., per Cockburn, C.J., 348.

³ *Stead v. Gascoigne*, 6 Taunt. 527; *Batchelor v. Yase*, 1 Moo. & Rob. 331, rev. 4 Moo. & Sc. 552.

⁴ *Aldred v. Constable*, 6 Q. B. 370. The party entitled to execution may levy the poundage fees and expenses of execution over and above the sum recovered. Rules of Supreme Court, 1883, Order xlii. r. 15. The sheriff is entitled where there has been no sale: *Mortimore v. Cragg*, 3 C. P. D. 216; but there must be actual seizure: *Bissicka v. Bath Colliery Co.*, 3 Ex. D. 174. See 50 & 51 Vict. c. 55, s. 20. The execution creditor must be entitled at the time of sale, and the sheriff cannot sell for his own costs: *Snary v. Abdy*, 1 Ex. D. 299, and is not entitled to poundage before sale, *Roe v. Hammond*, 2 C. P. D. 300. As to the effect of bankruptcy, *In re Craycraft*, 8 Ch. D. 596; *Ex parte Lithgow*, 10 Ch. D. 169; *Howes v. Young*, 1 Ex. D. 146; *Mostyn v. Stock*, 9 Q. B. D. 432. See 53 & 54 Vict. c. 71, ss. 11, 12.

⁵ *Bank of Rome v. Mott*, 17 Wend. (N. Y.) 554. But "intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade is actionable if done without just cause or excuse": per Bowen, L.J., *Mogul case*, 23 Q. B. D. 598; cited by Lord James, *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905), A. C. 250.

Sale must take place with reasonable expedition.

Sheriff's liability to debtor.

Duty of sheriff in conducting sale.

Effect of sheriff's sale.

The sheriff must sell with reasonable expedition,¹ and if through his negligent delay the property is lost or depreciated in value, or the debtor becomes bankrupt and his property thereby becomes divested, the sheriff is liable.² In America it has been decided that where a levy is made and property is advertised for sale, and through the negligence of the sheriff no sale takes place, the sheriff becomes a trespasser *ab initio*.³ The sheriff is also liable to an execution debtor for negligence in not properly lotting for sale goods seized under a *fi. fa.*⁴

On offering property for sale under an execution the sheriff ought to state the interest he proposes to sell, and to make known any defect of title within his knowledge; if he does not do so, and the title turns out defective,⁵ he is responsible. There is no warranty of title at a sheriff's sale; so that where certain articles had been bought at a sale under an execution for £18, and the bargain was bought for £23, while the articles were afterwards taken under a superior title, it was held that the consideration for the purchase of the bargain had not failed, since the true consideration was the assignment of the right that the defendant had acquired by his purchase at the sheriff's sale.⁶ The effect of a sheriff's sale is to take the property of the debtor and to complete the title of the creditor to the proceeds; unless the creditor has notice of an act of bankruptcy committed previous to seizure,⁷ or the goods are taken for a sum not exceeding £20 including legal incidental expenses.⁸

Where a sheriff is in possession under several writs, some for more, some for less, than £20, and sells, the writs are payable in order of priority, so long as there are funds to pay. If he receives notice of bankruptcy within fourteen days after the sale, only those writs are entitled to be paid which are for less than £20, and which would have been paid had not bankruptcy intervened.⁹ By the same enactment—the Bankruptcy Act, 1883—where goods to the above-mentioned

¹ *Jacobs v. Humphrey*, 2 Cr. & M. 413.

² *Aireton v. Davis*, 9 Bing. 740; *Bales v. Wingfield*, 4 Q. B. 580, n.; *Carlûe v. Parkins*, 3 Stark. (N. P.) 163.

³ *Bond v. Wilder*, 16 Vt. 303; *Jordan v. Gallup*, 16 Conn. 536. See *The Six Carpenter's case*, 1 Sm. L. C. (11th ed.), 132.

⁴ *Wright v. Child*, L. R. 1 Ex. 358.

⁵ *Commonwealth v. Dickinson*, 5 B. Monr. (Ky.) 506. In Massachusetts it has been decided that if the purchaser at a sale of execution lose his title through the neglect of the sheriff's officer to comply with the requirements of the law, he has an action against the sheriff: *Sexton v. Nevers*, 37 Mass. 451.

⁶ *Chapman v. Speller*, 14 Q. B. 621. As to the principle of this decision, see per Erle, C.J., *Eichholz v. Bannister*, 17 C. B. N. S. 708. In Benjamin, *Sales* (4th ed.), 634, the rule is thus expressed: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." The whole of the cases are reviewed in the above-cited treatise. See *Baguley v. Hawley*, L. R. 2 C. P. 625, where Willes, J., dissents from the judgment of the Court. The law as stated in the text must be read subject to the interpretation of sec. 12 of 56 & 57 Vict. c. 71, as affected by sec. 21 of the same Act. See *Peto v. Blades*, 5 Taunt. 657, and note 15 R. R. 611.

⁷ *Giles v. Grover*, 9 Bing. 128, 1 Cl. & F. 72, 6 Bligh N. S. 277; in which case the judges were summoned to advise the House of Lords whether, where the sheriff having taken goods on an execution issued at the suit of a subject, but before he had made any disposition of those goods, an extent issued at suit of the Crown, the Crown's extent should be preferred to the execution. The majority of the judges and the House of Lords held the affirmative; see 46 & 47 Vict. c. 52, s. 46. See also 53 & 45 Vict. c. 71, ss. 11, 12.

⁸ 46 & 47 Vict. c. 52, s. 145. As to goods taken in execution in respect of a judgment for a sum exceeding £20, see 53 & 54 Vict. c. 71, s. 11, sub-s. 2.

⁹ *In re Pearce, Ex parte Crosswhite*, 14 Q. B. D. 966.

amount are sold by the sheriff, the sale is to be by auction, unless the Court from which process issues orders otherwise.¹

So long as the sheriff is in possession of the goods of the debtor, he is bound to exercise the same degree of care in their preservation that a man of ordinary discretion and judgment may reasonably be expected to exercise in regard to his own property. He does not insure the goods, but is in the position of an ordinary bailee for the purposes of custody and sale. He is very nearly in the case of a *del credere* agent—the keeper and seller of goods with an obligation to guarantee the sale, and a lien on the proceeds to secure his compensation—and is, consequently, subject to the same rule of care and liability.² That is, he is not liable for an accidental fire, nor yet for loss by theft, robbery, or other accident, without want of ordinary care on his part.³ If the sheriff leaves the goods with the debtor on the security of some third person, the sheriff is liable if the goods are lost either through the fraud or negligence of the debtor, or through the fault of the surety.⁴ The fact that the bailee of goods holds them as a public officer has never been considered to fix more rigorous measures of liability upon him than if he held them as a private person.⁵ Story puts the liability of an officer on the same footing as that of a bailee for hire.⁶ The same liability was assumed to attach to sheriffs holding goods taken by attachment, in the American case of *Jenner v. Joliffe*.⁷ Yet on consideration it is doubtful whether this rule is precisely accurate. If the goods are taken from the possession of the sheriff by force he must answer for the taking, for he might have taken the power of the county to defend the goods or to recapture them.⁸ And in certain of the United States, Pennsylvania for example, the rule of liability for the sheriff is likened to that of a common carrier, and he is held to answer for goods unless their loss is by act of God, inevitable accident, or the public enemy.⁹ The liability to which the surety may bind himself to the sheriff has nothing to do with the right of the creditor; while it has been held that the sheriff cannot take a receipt or make any contract in relation to the property seized which will give him a remedy beyond his own liability to the creditor.¹⁰

The general proposition that the sheriff can in no case quit possession without being held to have abandoned the goods is too wide. To show that leaving possession is not an abandonment the sheriff must be able to account for his action most clearly as being caused by

Goods in the possession of the sheriff.

Effect of sheriff quitting possession.

¹ As to the effect of bankruptcy on a writ of execution, see 46 & 47 Vict. c. 52, ss. 45, 46; 53 & 54 Vict. c. 71, s. 11. *Ex parte Warren*, 15 Q. B. D. 48; *Trustee of Woolford's Estate v. Levy* (1892), 1 Q. B. 772. *In re Thomas* (1890), 1 Q. B. 460. As to the construction of 50 & 51 Vict. c. 55, s. 29, sub-sec. 2, in *Woolford's case*, see per Frv. L.J., *Lee v. Dangar* (1892), 2 Q. B. 337, 351. It is only the actual wrongdoer who is liable under the sub-section, *Byge v. Whitehead* (1892), 2 Q. B. 355; therefore, where the sheriff's bailiff in executing a writ of *fi. fa.* did not leave wearing apparel, bedding, &c., to the value of £5, the sheriff is not liable.

² *Browning v. Hanford*, 5 Hill (N. Y.), 591; *Moore v. Westervelt*, 27 N. Y. 234.

³ *Bridges v. Perry*, 14 Vt. 262. Story, *Bailm.*, §§ 124-135.

⁴ *Higgins v. Kendrick*, 14 Me. 83. Shearman and Redfield, *Negligence*, § 621.

⁵ See as to receivers, *Knight v. Lord Plimouth*, 3 Atk. 480, *Burt, Boulton & Hayward v. Hull*, (1895) 1 Q. B. 276; as to a county treasurer, *Supervisors of Albany v. Dow*, 25 Wend. (N. Y.) 440; as to revenue officers, *Burke v. Trevitt*, 1 Mason (U. S. Circ. Ct.), 90, 101.

⁶ *Bailm.*, §§ 130, 620.

⁷ 6 Johns. (Sup. Ct. N. Y.) 8. *Ante*.

⁸ *Sly v. Finch*, Cro. Jac. 514.

⁹ *Hartley v. McLan*, 44 Pa. St. 510.

¹⁰ *Browning v. Hanford*, 5 Hill. (N. Y.) 588. Street, *Foundations of Legal Liability*, vol. ii. 292.

some urgent necessity.¹ It is a question of fact whether possession has been abandoned by the sheriff.²

Ei git.

The law with regard to the execution of an *elegit* is identical with that we have already considered, and the sheriff's duty is the same. He may not, however, take securities for money under an *elegit*, they being subject to a *fi. fu.* only by the provisions of 1 & 2 Vict. c. 110, s. 12, which does not extend to an *elegit*; and he must not sell under an *elegit*.³ Now by the Bankruptcy Act, 1883,⁴ the writ of *elegit* does not extend to goods; and no *levari facias* may issue in civil proceedings. The sheriff must have the writ and execution filed in the central office. It is not sufficient to deliver such a document to the plaintiff's solicitor.⁵

Writ of possession.

In executing writs of possession⁶ (*habere facias possessionem*) the sheriff is bound to execute the writ within a reasonable time; and if after a writ is delivered to him, and he has an opportunity to execute it, and refuses or neglects to do so, he is liable to an action, even though the judgment is afterwards set aside by a judge's order in order to let in the landlord to defend.⁷ The sheriff usually has an indemnity given him and it seems he may demand it.⁸ The plaintiff for his own protection should point out the land to the sheriff.⁹ "Also," says Dalton,¹⁰ with some ambiguities "the sheriff is bound to know or to seek the land demanded; and therefore, except the demandant sheweth it to him, he may make his return accordingly." "If the demandant shall show to the sheriff a stranger's land, by force whereof the sheriff enters, yet is he no trespasser, Keil, 119, 120."¹¹ The sheriff is further bound to give actual possession of the premises, and if persons be left on them the execution is not complete,¹² for he is required to put the plaintiff into possession. It follows, from the nature of the writ, that the sheriff may break open either outer or inner doors.¹³ The sheriff executes the writ at his peril,¹⁴ and if he gives possession of land not included in the writ, he renders himself liable to an action.¹⁴

Formerly the Court would grant an *alias* if the sheriff did not execute the writ;¹⁵ and if the sheriff gave possession only of part, the plaintiff might have a new writ for the rest.¹⁶ But the form of granting

¹ *Ackland v. Paynt* r, 8 Price 95.

² *Bingham v. Ltd. v. Deacon* (1898), 2 Q. B. 173.

³ Co. Litt. 289 b. But see 27 & 28 Vict. c. 112, ss. 4-6, R. S. C. 1883, Order xliii. r. 1.

⁴ 46 & 47 Vict. c. 52, ss. 140, 160, sched. v.

⁵ *John v. Pink* (1900), 1 Ch. 290.

⁶ In this place in the previous edition the law of writs *ca. sa* and of *capias ulagatum* was treated. It is now omitted as obsolete. Outlawry by civil process was abolished by 42 & 43 Vict. c. 59, s. 3.

⁷ *Mason v. Paynt* r, 1 Q. B. 974.

⁸ *Watson, Sheriff* (2nd ed.), 318.

⁹ *Do d. Daventry v. Rhodes*, 11 M. & W. 608; *Ro d. Blair v. Street*, 2 A. & E. 320, are cited for this by *Watson, l.c.*

¹⁰ *Sheriff*, 257.

¹¹ *Dalton, Sheriffs*, 257.

¹² *Upton v. Hells*, 1 Leon. 145, *Watson, Sheriff* (2nd ed.), 318.

¹³ *Semayne's case*, 5 Co. Rep. 91 a, 1 Sm. L. C. (11th ed.), 104.

¹⁴ *Ackworth v. Kemp*, 1 Doug. 40; *Watson, Sheriff* (2nd ed.), 318.

¹⁵ *Watson, Sheriff* (2nd ed.), 320. An *alias* was a second writ issued after a former one had proved ineffectual. If the *alias* also failed, a third writ might have been sued out, which was called a *pluries*. These writs were so called from the words used in them, *Sicut alias præcipimus. Sicut pluries præcipimus*. An *alias* cannot issue after the writ is executed: *Doc dem Pale v. Roe*, 1 Taunt. 55. The whole learning on executions in civil actions can be found in Tidd, *Practice* (9th ed.), 993-1134. This must of course be checked with some modern practice book.

¹⁶ *Ibid.*

an *alias* was abolished by the Common Law Procedure Act, 1852, s. 10, and the present practice is regulated by the Rules of the Supreme Court, 1883.¹

It is not essential to the validity of an execution for the sheriff to make a return to the writ. If he do make a return, he may excuse himself on the ground that he was always ready to deliver possession to the plaintiff, and that no person on behalf of the plaintiff came to show the premises to the sheriff.² It is not a good return that the sheriff could not execute the writ; for he should have raised the *posse comitatus*.³

Interpleader.⁴—The granting of an interpleader order is purely discretionary.⁵ It is the duty of the sheriff to make inquiry, and to have good ground for supposing the goods seized to be those of the execution debtor before he applies for relief.⁶ The goods or money in dispute must be actually in his hands at the time of application to the Court in order to entitle him to it.⁷

The Court will protect the sheriff only from the original seizure, and not against subsequent misconduct,⁸ or he may be relieved in respect of conflicting claims while his liability for negligence in respect of the execution of the writ is unaffected;⁹ and it is immaterial whether an action is commenced or not so far as the protection afforded goes.¹⁰

The remedies against a sheriff are of two kinds: first, by attachment; second, by action.

First, by attachment.

Remedies against the sheriff.

Attachment is a criminal process directed to the coroner when it issues against the sheriff, or to the acting sheriff when it issues against his predecessor.¹¹

1. Attachment.

By the rules of the Supreme Court, 1883, Order lli. r. 11, "No order shall issue for the return of any writ, or to bring in the body of a person ordered to be attached or committed; but a notice from the person issuing the writ or obtaining the order for attachment or committal (if not represented by a solicitor), or by his solicitor, calling upon the sheriff to return such writ or to bring in the body within a given time, if not complied with, shall entitle such person to apply for an order for the committal of such sheriff."¹²

Provision under Rules of the Supreme Court.

Attachment may be granted for escapes,¹³ extortions,¹⁴ using

For what granted.

¹ Order xlii. r. 17. See *Lee v. Dangar* (1893), 2 Q. B. 337; *Ex parte Kent, In re Wells* (1893), 5 R. 226.

² *Watson, Sheriff* (2nd ed.), 322.

³ *Ibid.* See *Miller v. Knox* (H. L.), 4 Bing. N. C. 574; *Att. Gen. v. Kissane*, 32 L. R. 1r. 220.

⁴ By the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), the statutes relating to interpleader are repealed, and the law is now regulated by Order lvii. of the Rules of the Supreme Court, 1883. The history and growth of interpleader is traced in *Story, Eq. Jur.* §§ 800–824, and the authorities there cited.

⁵ *Wright v. Freeman*, 48 L. J. C. P. 276.

⁶ *Bishop v. Hinzman*, 3 Dowl. Prac. Cas. 166.

⁷ *Holton v. Guntrip*, 3 M. & W. 145.

⁸ *Lewis v. Jones*, 2 M. & W. 203.

⁹ *Brackenbury v. Laurie*, 3 Dowl. Prac. Cas. 180.

¹⁰ *Green v. Brown*, 3 Dowl. Prac. Cas. 337.

¹¹ *Tidd, Practice* (9th ed.), 479, 481; *Com. Dig. Attachment*.

¹² "Committal was the proper remedy for doing an act prohibited by injunction or the like, whereas attachment was the remedy for neglecting to do some act ordered to be done": *Harvey v. Harvey*, 20 Ch. D. 654; *Callow v. Young*, 50 L. T. 147.

¹³ *Arden v. Goodacre*, 11 C. B. 367, 371; *Regina v. Sheriff of Leicestershire*, 1 L. M. & P. 414. As to Escapes, *Com. Dig. Escape*; *Vin. Abr. Escape*.

¹⁴ *Com. Dig. Extor.* *on*; *Bac. Abr. Extortion*.

needless force in making arrests,¹ breaking open doors without valid excuse,² wrongfully arresting, ill-treating arrested persons, detaining them in custody unlawfully,³ or making an insufficient return to a writ,⁴ and for omitting to return writs, or to bring up the body of a prisoner in obedience to a writ of habeas corpus;⁵ and generally for all misconduct by the sheriff which falls within sec. 29 of the Sheriffs Act, 1887.⁶

For what not granted.

A sheriff is not liable to attachment for not returning a writ which has not been transferred to him by his predecessor, the provisions of 3 & 4 Will. IV. c. 99, s. 7 notwithstanding;⁷ nor where there is a disputed state of facts;⁸ nor where his action is due to some arrangement not made in the course of his duty as officer of the Court.⁹

Must be taken in a reasonable time.

Proceedings for attachment against the sheriff must be taken within a reasonable time, else by delay the sheriff may be deprived of his remedy over;¹⁰ and an attachment has been set aside, because, through delay in issuing it, the sheriff has been prevented either recovering on a judgment or proving for it in bankruptcy.¹¹

Setting aside attachment.

Where an attachment is regular it may be stayed or set aside by the indulgence of the Court, in order to permit of a trial on the merits, or for the benefit of the sheriff or of the defendant or his bail.¹² Where the Court will not set the attachment aside, the sheriff is liable to the extent of the sum really due from the defendant to the plaintiff, although it be beyond the sum sworn to, and for costs in addition.¹³

Attachment permitted to stand over.

The Courts have made a practice of letting the attachment stand over, with liberty to the plaintiff to bring an action against the sheriff, when, from any cause, proof of the injury done the suitor by the neglect of the sheriff, is not shown with sufficient particularity. One reason for this is, that proceedings on attachment being by affidavit, "a mode of adducing evidence which affords no means of extracting the truth from unwilling witnesses, and leaves every one at liberty to state as much or as little of the truth as he pleases," it is frequently necessary that a *vivâ voce* examination of witnesses should be had; while, under the old practice, either party had thus an opportunity to

¹ Com. Dig. Execution (C 12).

² Watson, Sheriff (2nd ed.), 75; Com. Dig. Forceable Entry; Hawk. P. C. bk. 2, c. 14, Where doors may be broken open in order to make an arrest.

³ Hawk. P. C. bk. 2, c. 13, Of Arrests by Public Officers; hk. 2, c. 22, Of Attachment, ss. 2, 3.

⁴ Short & Mellor, Cr. Prac. 407.

⁵ 50 & 51 Vict. c. 55, s. 29, sub-s. 4.

⁶ *Thomas v. Newnam*, 2 Dowl. N. S. 33. The Act quoted in the text is repealed by 50 & 51 Vict. c. 55, s. 39, but is preserved in substance by ss. 28, 29, sub-s. 2.

⁷ *White v. Chapple*, 4 C. B. 628, where the officer of the Palace Court seized goods under the process of that Court that had been previously seized by the sheriff, during the temporary absence of his officer, it was held that, as there was no ground for charging the officer of the Palace Court with intentional contempt of court, there was no ground for attachment. The Court will not issue an attachment unless the sheriff's conduct amounts to a contempt of court: *Collins v. Cliff*, 11 W. R. 786.

⁸ *Brown v. Gerard*, 1 C. M. & R. 595.

⁹ *Rex v. Perring*, 3 B. & P. 151; *The King v. Middlesex*, 1 Dowl. Prac. Cas. 53. *Contra*, see *The King v. Sheriff of London*, 1 Taunt. 489, where the delay was ten days and the sheriff did not show he was prejudiced by the delay; in *The King v. Sheriff of Surrey*, 9 East 467, where the delay was eighty days, and a bankruptcy intervened, the attachment was set aside. Now see 50 & 51 Vict. c. 55, s. 29, sub-s. 7.

¹⁰ Corner, Crown Practice, 36. As to setting aside an attachment, *Arden v. Goodacre*, 11 C. B. 367.

¹¹ *Stride v. Hill*, 1 M. & W. 37.

¹² *Heppel v. King*, 7 T. R. 370; *Stevenson v. Cameron*, 8 T. R. 29; *Fowlds v. Mackintosh*, 1 H. Bl. 233; but see *The King v. Sheriffs of London*, 2 B. & Ald. 192, where it is said the contempt of the sheriff is purged by placing the plaintiff in as good a situation as he could have been in had the defendant's body been brought into court. As to the history of the law, Hawkins, P. C. bk. 2, c. 22.

tender a bill of exceptions if thought desirable.¹ Under the present practice, cross-examination on affidavits may be directed either on the civil or the Crown side of the Court.²

Second, by action.

An action lies only against the high sheriff, and not against the under-sheriff or bailiff, for breach of duty in the office of sheriff, and must be brought as for an act done by him in the office of sheriff. If the breach proceeds from the default of the under-sheriff or bailiff, "that is a matter to be settled between them and the high sheriff."³

An action for negligence is maintainable against the sheriff, not because the plaintiff has sued out a writ and delivered it to the sheriff who has not executed it and thereby has broken an implied contract, but because the plaintiff has a cause of action or judgment against the defendant which gives him an interest in the writ and creates a duty by law apart from contract in the sheriff to him.⁴

Actions against the sheriff may be either by the person suing out the writ, or by the person whose goods the sheriff has taken.

I. The sheriff may be liable at the suit of the person suing out the writ.

If the sheriff make a false return he is liable to an action—that is, if actual damage occurs to the plaintiff.⁵ He is not liable to an action for not returning a writ.⁷

A false return is one in which material facts are suppressed, or material facts are stated which are untrue. A return, although true in words if false in the total impression it conveys, is a false return.⁶ That is not a false return which, while it states the facts truly, draws a wrong inference from them.

As between the parties to it, the sheriff's return is conclusive of its truth, except in an action against the sheriff for a false return; in which case the return must of necessity be called in question by the plaintiff.⁹

It is no defence, to an action for a false return of *nulla bona* on an execution, to show that the writ to be executed was delivered at a late hour on the day on which it was returnable, if the sheriff has control of the goods; ¹⁰ nor yet to show that the execution debtor was insolvent.¹¹

If the sheriff return *feri feci*, the plaintiff may proceed either on the return for debt,¹² or for money bad and received,¹³ or by rule of Court.¹⁴

¹ *Arden v. Goodacre*, 11 C. B. 367; *Regina v. Sheriff of Leicestershire*, 1 L. M. & P. 414.

² R. S. C. 1883, Order xxxviii. r. 1, extended to civil proceedings on the Crown side by Order lxviii., and to criminal proceedings by Crown Office Rules, 1906, r. 5. Short & Mellor, *Crown Practice*, 454.

³ Per Lord Mansfield, *Cameron v. Reynolds*, 1 Cowp. 406; but see 50 & 51 Vict. c. 55, s. 29, as to punishment for misconduct.

⁴ *Jones v. Pope*, 1 Wms. Saund. 34, 37, 38: an action for an escape, where the prisoner was let out with the plaintiff's consent.

⁵ Unless he is acting in his judicial capacity; *Pitcher v. King*, 9 Ad. & E. 288.

⁶ *Wylie v. Birch*, 4 Q. B. 566.

⁷ 2 Co. Inst. 452.

⁸ *The King v. Lyme Regis*, 1 Doug. 149.

⁹ *Slayton v. Chester*, 4 Masa., per Parsons, C. J., 479.

¹⁰ *Towne v. Crowder*, 2 C. & P. 355.

¹¹ *Stevens v. Beckes*, 3 Blackf. (Ind.) 88.

¹² *Perkinson v. Gifford*, Cro. Car. 539.

¹³ And without any demand of payment: *Dale v. Birch*, 3 Camp. 347; *Longdill v. Jones*, 1 Stark. (N. P.) 345.

¹⁴ *Stockdale v. Hansard*, 11 A. & E. 253.

Actions against the sheriff: either at the suit of the person suing out the writ, or at the suit of the person whose goods are taken.

I. Action by him who sued out the writ. False return.

Sheriff's return conclusive, save in action for a false return.

Where action may be maintained.

If no return is made, an action will still lie against the sheriff for the sum levied, or against his executors for non-payment of money levied on a *fi. fa.*¹ An action will also lie, if the sheriff return that he has seized certain goods and chattels of which the value is to him unknown, for he should specify.²

The plea that the sheriff is prevented from paying over money by superior force is not good,³ unless the excuse is that of war levied by the King's enemies.⁴

In an action for neglecting to seize goods under a *fi. fa.* with a return of *nulla bona*, a plea denying that there were any goods of the debtor within the sheriff's bailiwick, may be supported by proof that, though there were goods, they were not applicable to the plaintiff's writ.⁵

Sureties on a replevin bond.

If the sheriff take sureties on a replevin bond, he is bound to exercise an ordinary and reasonable discretion; though he is not to be considered to warrant the sufficiency of the sureties; so that he is justified in accepting one who appears to be a person of responsibility as surety, without making inquiries.⁶ If he has reason to suspect the solvency of a surety, or has means of satisfying himself with respect to solvency, which he neglects to use, and the surety turns out insufficient, he is liable;⁷ as if it were shown that the sureties were in debt, and though requested, had not paid, or that the sheriff had knowledge of unsatisfied executions against them.⁸ If the sheriff has no knowledge of the sureties, he must inform himself about them, and not trust implicitly to their own sworn statements.⁹ Failing to do this, he is liable; and the penalty of the bond, which is the value of the goods taken, is the limit of the damages.¹⁰

II. At suit of person whose goods are taken.

II. The sheriff may be liable at the suit of the person whose goods are taken.

Wrong name.

If the defendant is styled by a wrong name in a writ of *fi. fa.*, the sheriff is liable to an action for trespass¹¹ for executing the writ unless—

1. The name is *idem sonans*.¹²
2. The defendant is known by the name equally with some other.¹³
3. The defendant has temporarily adopted it.¹⁴

¹ *Perkinson v. Gilford*, Cro. Car. 539; *Morland v. Pellatt*, 8 B. & C. 722.

² Per Parke, B., sitting alone; *Barton v. Gill*, 12 M. & W. 315.

³ *Stockdale v. Hansard*, 11 A. & E. 253.

⁴ *Southcole's case*, 4 Co. Rep. 83b; Bul. N. P. 68.

⁵ *Heenan v. Evans*, 3 M. & G. 398.

⁶ *Hindle v. Blades*, 5 Taunt. 225; 1 Marsh. 27. The English cases are collected and considered in *Norman v. Hope*, 13 Ont. R. 556, affirmed 14 Ont. R. 287.

⁷ *Scott v. Waithman*, 3 Stark. (N. P.) 168; *Saunders v. Darling*, Bull. N. P. 60 c.

⁸ *Gwyllim v. Scholcy*, 6 Esp. (N. P.) 100.

⁹ *Jeffery v. Bastard*, 4 A. & E. 823.

¹⁰ *Yea v. Lethbridge*, 4 T. R. 433; *Evans v. Brander*, 2 H. Bl. 547.

¹¹ *Cole v. Hindson*, 6 T. R. 234; *Shudgett v. Clipson*, 8 East 328.

¹² *Ahitbol v. Benedetto*, 2 Taunt. 401; or unless the defendant has acquiesced in the use of the wrong name. If the defendant were arrested by a wrong Christian name the Court would discharge him on motion, and the sheriff would be liable to an action: *Wilks v. Lorek*, 2 Taunt. 399. What *idem sonans* means is shown in *Parchman v. State*, 28 Am. R. 435, and note 439. Where father and son had the same name and the sheriff having a writ in the name simply levied on the goods of the father where he should have taken the son's, the sheriff was held liable in trespass: *Jarmain v. Hooper*, 6 M. & G. 827.

¹³ *Scandover v. Warne*, 2 Camp. 270; *Fisher v. Magnay*, 1 D. & L. 40.

¹⁴ *Price v. Harwood*, 3 Camp. 108; *Crawford v. Sutclwell*, 2 Str. 1218; but the sheriff was not bound to keep one in custody, who he was justified in keeping, by reason of his having given a false name: *Morgans v. Bridges*, 1 B. & Ald. 647; see *Brunskill v. Robertson*, 9 A. & E. 840.

If the sheriff's officer take the goods of the wrong person, the sheriff is liable for the act of his officer¹ unless the person is himself instrumental by giving false information to the sheriff, and so makes the sheriff his mandatory to take the goods. If the sheriff then acts innocently and commits a trespass he may recover over against his principal.² But if the execution creditor merely points out goods without requiring the sheriff to act on his representation but leaves him to his own discretion to act, the execution creditor is not liable.³ After notice of the real state of facts the sheriff acts at his peril.⁴

Wrong person's goods taken.

For any abuse whatever in the execution of process an action lies against the sheriff.⁵ For example, where the officer arrests a person on a *fi. fa.*;⁶ or breaks open an outer door, save in the excepted cases;⁷ or executes a writ after a direction from the plaintiff not to do so;⁸ or remains in possession an unreasonable time,⁹ or is guilty of any other excess, even though such excess be committed by the officer contrary to the express instructions of the under-sheriff.¹⁰ The sheriff is not liable to the forfeiture of £200 provided by sec. 29 of the Sheriffs Act, 1887,¹¹ in respect of the wrongful act of the sheriff's officer; that is incurred only by way of penalty for personal misconduct or neglect.¹²

Abuse of process.

The sheriff is liable in *trover* for seizing goods under a defeasible title, which has subsequently determined;¹³ but he cannot be compelled to make restitution of goods sold under a *fi. fa.*, though the judgment on which it is based is reversed.¹⁴

Sheriff liable in *trover*.

The sheriff is liable to the landlord, under 8 Anne, c. 14, s. 1,¹⁵ for not paying over a full year's rent, if the same is due, before satisfying the execution creditor's claim out of goods seized.¹⁶ This action lies after the death of the landlord by his executor or administrator.¹⁷ To render the sheriff liable notice of the rent being due must be given

Sheriff's liability under 8 Anne, c. 14.

¹ *Ackworth v. Kempe*, 1 Doug. 40. In *Morris v. Salberg*, 22 Q. B. D. 614, the execution creditor who misled the sheriff was held liable. See *Feltham v. Terry*, 13 Geo. III. B. R., cited by Lord Mansfield, *Lindon v. Hooper*, 1 Cowp. 419.

² *Collins v. Evans*, 5 Q. B. 830.

³ *Evans v. Collins*, 5 Q. B. 804. See *Sheffield Corporation v. Barclay* (1905), A. C., per Lord Davey, 400.

⁴ *Davies v. Jenkins*, 11 M. & W. 745; *Dunston v. Paterson*, 2 C. B. N. S. 495.

⁵ Dalton, Sheriffs, 497. The Abuses practised by some Sheriffs, Under-sheriffs and Bailiffs.

⁶ *Smart v. Hutton*, 8 A. & E. 568 n.

⁷ *Lee v. Gansel*, 1 Cowp. 1.

⁸ *Barker v. St. Quintin*, 12 M. & W. 441.

⁹ *Playfair v. Musgrove*, 14 M. & W. 239.

¹⁰ *Ratcliffe v. Burton*, 3 B. & P. 223. The Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29, sub-s. (2) (b), imposes a penalty on any sheriff's officer who "takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act." *Lee v. Dangur* (1892), 1 Q. B. 231, per Denman, J., affirmed (1892) 2 Q. B. 337, and *Shopper v. Nathan* (1892), 1 Q. B. 245, per Collins, J., are decisions upon this section. As to what is a demand see *Trustee of Woolford's Estate v. Levy* (1892), 1 Q. B. 772. As to Extortion see Com. Dig. "Extortion." *Smythe's case*, Palm. 318; *Pilkington v. Cooke*, 16 M. & W. 615.

¹¹ 50 & 51 Vict. c. 55.

¹² *Bagge v. Whitehead* (1892), 2 Q. B. 355.

¹³ *Cooper v. Chitty*, 1 Burr. 20; *Whitmore v. Green*, 13 M. & W. 104.

¹⁴ *Hoe's case*, 5 Co. Rep. 89 b. The case of goods sold on a *capias utlagatum* was distinguished, for these on reversal of the outlawry were restored.

¹⁵ c. 18 Ruffhead.

¹⁶ *Riseley v. Ryle*, 11 M. & W. 16; cp. *Green v. Austin*, 3 Camp. 260: An action for money had and received cannot be maintained by a landlord to recover rent against the sheriff who had sold his tenant's goods under an execution. The action must be for removing goods from the premises under the execution before the year's rent is paid to the landlord. A sheriff is not bound to find out what rent is due to a landlord and pay it him under the Act unless the landlord gives him notice: *Smith v. Russell*, 3 Taunt. 400.

¹⁷ *Pulgrave v. Windham*, 1 Stra. 212.

him whilst the proceeds are in his hands.¹ In the action, the landlord may recover whatever is the amount of the actual damage sustained by him through the sheriff's neglect.²

Lord Esher,
M.R.

In *Thomas v. Mirehouse*³ Lord Esher, M.R., states the law under the statute: "When notice has been given by the landlord to the sheriff that rent is due, it becomes the duty of the sheriff under the statute not to sell anything upon the demised premises till the rent has been paid. Even if there are goods upon the demised premises of a value many times exceeding the amount of rent due, his duty is the same. He must refuse to sell the smallest part of the goods until the claim of the landlord is satisfied. Now, of course, the sheriff is not bound to find money with which to satisfy the claim of the landlord. He must, therefore, before he proceeds with the execution, apply to the execution creditor for the sum which is necessary. If the execution creditor provides it, the sheriff pays the landlord, and proceeds with the execution. If the execution creditor does not provide it, the sheriff cannot be called on to infringe the statute, and may return either *nulla bona* and withdraw from possession, or may himself pay the rent, looking to the execution creditor for reimbursement, and proceed to sell. This is the position of the sheriff under the Act. If he commits a breach of duty by a wrongful sale—*i.e.*, a sale which takes place before the rent is paid—the statute appears to me to state by implication that he will be liable to compensate the landlord by paying him the amount of rent which is due. This is the consequence of the enactment which makes the removal without payment of rent illegal. It is only upon payment of the rent that the sheriff is entitled to remove the goods. The cases, however, show that though the amount of the rent is *primâ facie* the measure of the damages, it is open to the sheriff after the landlord has proved his case by giving evidence of the tenancy, the amount of rent due, and notice, to show in mitigation of damages that the value of the goods removed was not sufficient to pay the rent. In such case the loss to the landlord by the removal of the goods, or, in other words, their value to him at the time of the removal, becomes the measure of damages."

Payment of
rent no
ground for
reduction of
damages in
action for
wrongful
taking of
goods.

It is no ground for reduction of damages for the sheriff to say in an action for the wrongful taking of goods, "I have paid the rent," since being a wrongdoer, he has no right to take upon himself to apply the proceeds of the sale;⁴ thus, if the plaintiff recovers, he is entitled to the full value of the goods. Where the sheriff has seized and sold goods let for hire to the execution debtor, the sheriff is only liable for the actual damage the real owner sustains.⁵

The sheriff⁶ was in no case entitled to notice of action for things

¹ "To some notice he is unquestionably entitled, but as the statute has not specified any particular form there can be no dispute about the terms": *Colyer v. Speer*, 2 B. & B. 60.

² *Foster v. Hilton*, 1 Dowl. Prac. Cas. 35; *Calvert v. Joliffe*, 2 B. & Ad. 418.

³ 19 Q. B. D. 566. Analogous to this is the case of *Vestry of St. Marylebone v. Sheriff of London* (1900), 2 Q. B. 591, where goods were held to be "taken in execution" so as to raise the duty of the sheriff to pay rates, though he had received payment of the debt and withdrawn without a sale.

⁴ *White v. Binstead*, 13 C. B. 304.

⁵ *Tancred v. Allgood*, 4 H. & N. 438.

⁶ *Atkinson v. Sheriff* (6th ed.), 302. For this he cites *Copland v. Powell*, 1 Bing. 369. The head-note of that case is: "A sheriff who levies arrears of taxes under 48 Geo. III. c. 141, No. 5, par. 2, is not entitled to notice of an action to be brought against him for anything done under the provisions of that Act." In the judgment

done by him in executing the process of the Court. Now Notice of Action has been abolished by the Public Authorities Protection Act, 1893.¹

III. HIGH BAILIFFS OF COUNTY COURTS.

By the County Courts Act,² 1888, the high bailiff of the County Court is made responsible for all the acts and defaults of himself and the bailiffs appointed to assist him, in like manner as the sheriff in any county in England is responsible for the acts and defaults of himself and his officers.

The County Courts Act, 1888, repealing 9 & 10 Vict. c. 93, s. 33.

The high bailiff of a County Court is the creation of statute. Nevertheless he is subject to a common law liability; if any one is injured by his neglect to carry out his statutory duties he is liable to an action.³ Sec. 49 of the County Courts Act, 1888,⁴ moreover, provides for payment of compensation to any person who has sustained damage by the neglect or default of any officer of a County Court by that officer on the order of the judge of the Court in which he is an officer;⁵ but this is in supplement not in substitution of the common law remedy.⁶

By s. 156 of the County Court Act, 1888, the bailiff is directed to sell goods unless the conditions of the section are complied with. A sale under this section, therefore, gives the purchaser a good title to them,⁷ but the goods seized must be the goods of the judgment debtor, otherwise the section can give no protection,⁸ and the high bailiff is liable to an action at the suit of the owner of the goods.

The high bailiff's liability is co-extensive with that of the sheriff,⁹ save where his bailiffs act under colour of some special power or authority of the County Court Acts, and not in the execution of a warrant.¹⁰

IV. PUBLIC SERVANTS, CLERKS, AND REVENUE OFFICERS.

The position of that large class of public servants, clerks, revenue officers, and the rest, who are charged with the performance of acts which bring them into relations, from time to time, with various members of the community, must shortly be noticed.

The rule stated by Lord Mansfield, C.J., in *Whitfield v. Lord Le Despencer*:¹¹ "Whoever does an act by which another person receives an injury is liable in an action for the injury sustained," is too absolutely expressed, since the idea of duty is absent. There are a multitude of

Rule stated by Lord Mansfield too broad.

Park, J., says, at 373: "The sheriff is called upon to do nothing more than is within the usual and general scope of his duty—viz., to obey the process and conform to the directions of a Supreme Court. He exercises no judgment, and no peculiar burdens are cast upon him; and it as well might be contended that he was entitled to a notice of action for an excessive levy, upon any common writ of *fi. fa.* as upon this. By the law of England, bringing an action is sufficient demand and notice; and wherever the contrary is the case, it is and must be matter of legislative enactment."

¹ 56 & 57 Vict. c. 61.

² 51 & 52 Vict. c. 43, s. 35.

³ *Watson v. White* (1896), 2 Q. B. 9.

⁴ 51 & 52 Vict. c. 43.

⁵ *The Queen v. Judge of County Court of Shropshire*, 20 Q. B. D. 242.

⁶ *Watson v. White*, *supra*.

⁷ *Goodlock v. Cousins* (1897), 1 Q. B. 348.

⁸ *Crane & Sons v. Ormerod* (1903), 2 K. B. 37; *Jelks v. Haywood* (1905), 2 K. B. 460.

⁹ *Buston v. Le Gros*, 34 L. J. Q. B. 91.

¹⁰ *Smith v. Pritchard*, 8 C. B. 565.

¹¹ 2 Cowp. 755.

Statement by
Best, C.J., in
Henly v.
Mayor of
Lyme Regis.

Robinson v.
Gell.

Jenner v.
Joliffe.

Degree of
care de-
manded from
public ser-
vants.

Duty of
public ser-
vants to the
Crown.

acts which, working injury to others, are yet absolutely without remedy. It is the notion of duty which is the determining test. Best, C.J.'s,¹ expression of the law is often quoted, and states well the general principle. "I take it to be perfectly clear that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer." A relevant instance of this principle is to be found in *Robinson v. Gell*,² where an action was brought for injury sustained by negligently preparing a notice of judgment. The Court of Common Pleas held that as the Act of Parliament, which constituted the office, the occupant of which was sued for neglect, did not contemplate his giving notices of the kind in question, there was no duty, and therefore no liability, though there was negligence. Had the Act provided for the issuing of the notice, a duty would have thereby been imposed upon the officer towards those who were in the position to receive the notice, and negligence in the discharge of the duty thus created would be actionable. Subject to this qualification being read in, the law seems to be as laid down in *Jenner v. Joliffe*.³ "In every case where an officer is entrusted by the common law or by statute, an action lies against him for a neglect of the duty of his office; so for every fraud or neglect in the execution of his office;" or, as was said in *Barry v. Arnaud*.⁴ "The defendant then is a public ministerial officer, and, being so, he is responsible for neglect of his duty to any individual who sustains damage by such neglect."

One more inquiry remains: What amount of want of care constitutes negligence in these cases? It would seem that the assumption of an office implies a representation that the holder possesses the qualifications for efficient performance of its duties. The amount of care necessary consequently varies with the greater or less complexity of the duties of the office. The officer must show that diligence which a conscientious and capable man, versed in the duties of the particular office, is expected to show in the performance of them.⁵

This statement has reference only to the remedy of one of the public injured through the officer's neglect. The liability of the negligent officer may be different, as it affects the Crown or a private individual; though it has been objected that, in all cases, for failure of duty, although amounting to a breach of trust or fraud of a pecuniary nature,

¹ *Henly v. Mayor, &c., of Lyme*, 5 Bing. 91, 107; 1 Bing. N. C. 222.

² 12 C. B. 191.

³ 9 Johns. (Sup. Ct. N. Y.) 385. The quotation in the text is little more than a reproduction of a portion of the judgment of Holt, C.J., in *Lane v. Cotton*, 1 Salk. 17. See *Pickering v. James*, L. R. 8 C. P. 489; *In re Thornbury Election Petition*, 16 Q. B. D. 739.

⁴ 10 A. & E. 640, the case of a collector of customs. See *Davis v. Black*, 1 Q. B. 900, where an action was brought against a clergyman for neglect to perform the marriage service when required. The duty of a clergyman in that matter was said to be not the same with that of a registrar under 6 & 7 Will. 4 c. 85.

⁵ Wharton, *Negligence*, §§ 297, 785; Shearman and Redfield, *Negligence*, §§ 590-593; *Jones v. Bird*, 5 B. & Ald. 837; *Jacobson v. Blake*, 6 M. & G. 919, where goods were taken possession of by Custom House officers. Story, J., in *Burke v. Trevis*, 1 Mason (U. S.) 96, discusses the duty of officers who have the custody of property seized. He maintains two positions: (1) If an officer of the revenue seize goods without probable cause he is responsible for all losses and injuries however occasioned. (2) If he seize them with probable cause he is responsible only for losses and injuries occasioned by ordinary neglect. *Estlin v. Jones*, 3 Am. St. R. 609 is an action against a clerk of court for wrongfully issuing a writ of *venditionis exponas* whereby the plaintiff was put to defend his title to land in an action. Held not legal damage.

the remedy must be for a civil injury and not by indictment. In *Bembridge's case*,¹ Lord Mansfield considers the matter, and points out the two principles that may become applicable: "The first I will venture to lay down is, that if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the king for his execution of that office; and he can only answer to the king in a criminal prosecution, for the king cannot otherwise punish his misbehaviour, in acting contrary to the duty of his office, and that this holds equally by whomsoever or howsoever he is appointed to the office, by whomsoever the office is given. There are many offices of a public nature that concern, in various ways, the whole kingdom and the king as the executive part of the Constitution, which are not given directly by the king, and not given by letters patent; many that have the grants of offices; the Lord Steward has the grant of the judge of the Marshalsea; the Lord Chancellor appoints the Masters in Chancery; and I have the appointment of a great many officers belonging to this Court;² and there is a precedent in Vidian's Entries,³ an information against the *custos brevium* for so negligently keeping the records of the Court that one of them was lost; had that been the steward of a manor who had lost one of his lord's rolls, an action would have laid; but the duty of this office concerning the public it was a matter of an information, and yet the office was appointed by the Chief Justice, not constituted by the king. There is another principle, too . . . that is this; where there is a breach of trust, a fraud, or an imposition in a subject concerning the public, which, as between subject and subject, would only be actionable by a civil action, yet, as that concerns the king and the public, . . . it is indictable."⁴

Bembridge's case, Lord Mansfield's statement of the law.

It has been held in the United States that where public officers are entrusted with public funds and give bonds for the discharge of their official duties, their duty is not limited by the considerations that would apply in bailments. Their liability is larger than this, and is fixed by their bonds; so that when money is stolen from them without their fault or negligence, they do not become released from liability thereby.⁵ In America it has also been decided, and the decision is in accord with English principle, that where a tax-collector receives a cheque for taxes and does not clear the same and the bank stops payment the tax-collector is liable for the loss to the taxpayer.⁶ Again an officer whose duty is to register deeds or make searches and who receives a statutory fee from the person requiring his assistance is liable to him

Public servants giving bonds for the discharge of their duties.

¹ 22 How. St. Tr. 155.

² The right to the appointments in Courts of Justice is considered in *Harding v. Pollock*, 2 St. Tr. N. S. 341. The right of the Chief Justice to appoint officers in his Court was required by prescription, *l.c.* 355. *Bridgman v. Holt*, Shower P. C. 111; Hargrave, Preface to Hale Jurisdiction of the Lords House, clxxxiv.

³ 213. *The Exact Pleader*: A book of Entries of Choice, Select, and Special Pleadings in the Court of King's Bench in the reign of his present Majesty King Charles II. with the method of proceeding in all manner of actions in the same Court. By Andrew Vidian, Gent. 1684.

⁴ Lord Mansfield then cites precedents showing that a public officer is indictable for misbehaviour in office, even where as against a private person he would merely be liable to an action for money had and received.

⁵ *State v. Nerin*, 3 Am. St. R. 873; the cases—American—are set out here and lengthily considered: *Board of Education v. Jewell*, 20 Am. St. R. 586; *United States v. Prescott*, 3 How. (U.S.) 573; Street, *Foundations of Legal Liability*, vol. ii. 292. In *Theodore Hook's case* there was probably legal fault and negligence, see 72 *Quarterly Review*, 71 *et seq.*, an article attributed to J. G. Lockhart.

⁶ *Chouteau v. Rowse*, 56 Mo. 65.

for negligence in his official work. Agnew, J. in *Commonwealth v. Harmer*¹ puts the duty considerably too high when he says: "The officer who makes the search stands in reference to its correctness in the attitude of an insurer, and his fee represents the premium." The learned judge's error is that of false analogy. The duty is no more than to exercise ordinary expert diligence. But in the same case the liability of an officer neglecting his duty was rightly limited to the person taking a certificate and paying the fee for it, and held not to extend to a purchaser from him or any other person injured thereby with whom there was no privity.

In Scotland there is an old decision that clerks of session are liable for the loss of writs out of their respective offices, without proof of negligence; "for the clerks who have the custody of writs ought to exoner themselves of their trust by proving the *casus fatalis*."²

¹ 6 Phila. (Pa.) 92.

² *Home v. M'Kenzie* (1735), Morison, Dictionary of Decisions, 13,123; *Alstoun v. Riddel* (1680), *ibid.* 13,957; *ibid.* Public Officer, 13,089; Reparation, sec. viii. Negligence in Office, 13,956; Clerk liable for issuing defective precept, *Henderson v. Drysdale*, 9 Shaw 536; Guthrie, Law of Damages (2nd ed.), 84-88. The principle of the liability of a public officer to any one injured directly by the performance of the duties of his office is very clearly stated by Lord Lyndhurst, C., *Ferguson v. Kinnoull*, 9 Cl. & F. 283, 4 St. Tr. N. S. 808, and *post*, 295. A volunteer undertaking to perform duties in connection with judicial process is liable for negligence in not performing his undertaking, if thereby the person for whom he undertakes suffers damage; as in *Chapman v. Morley*, 7 Times L. R. 257, where an order was made against plaintiff in a County Court committing him to prison, but was suspended so long as he paid £1 a month into Court. The defendant, the judgment creditor, wrote asking for the payment direct, promising to pass it through the Court. The plaintiff paid the defendant, but the defendant did not pass it through the Court, whereby the plaintiff was arrested on a warrant and imprisoned. Defendant was held liable for breach of duty.

CHAPTER III.

CORPORATIONS AND LOCAL ADMINISTRATIVE BODIES.

WE are now to consider any special aspects of negligence arising from the constitution and powers of those various corporations, boards and bodies of trustees which are entrusted with the administrative functions of local government.

Corporations, so far as they are owners and occupiers of land and houses, are regarded in the same light as individual owners and occupiers and dealt with accordingly. They are bound to repair bridges, highways, and churches; are liable to poor rates, and to the discharge of any other duty or obligation to which an individual owner is subject.¹ "While," says a New York decision,² "as such owners, they [the defendants, a corporation] enjoy, in respect of this property, all the rights to which private persons would be entitled, they are subject also to the same duties and obligations in respect to others owning adjacent lands, that the law imposes upon private persons owning real estate. That the premises in question are held as a public trust, and that no private gain or profit is to be derived from their possession, does not in the least diminish, or vary, the duties and obligations of the Common Council, in respect to adjacent owners, whose rights may be injuriously affected by a particular mode of using this property. The great injunction of the law, addressed to all proprietors of real estate, is: 'So use your own as not to injure another;' and a municipal corporation owning lands is as much bound to the observation of this precept as a private person. The citizen, and the municipal body, in respect to their several possessions of real estate, stand upon a footing of equality; neither is a privileged owner, and each must fulfil the same duties in respect to the other. . . . The idea of the irresponsibility of such a corporation " "can only be entertained by the Courts where the corporation is in the exercise of a purely governmental function; as when it is either declaring a law in a legislative capacity, or, in a ministerial one, executing it, without injuriously affecting the property or the rights of particular persons."³

Corporations are liable for the torts of their servants done within the scope of their employment, as any private employer.⁴ It has been

¹ 2 Co. Inst. 703; *Thursfield v. Jones*, Sir T. Jones, 187; *Rez v. Gardner*, 1 Cowp. 79; *Mayor of Lynn v. Turner*, 1 Cowp. 86; *Henly v. Mayor of Lyme*, 5 Bing. 51, 1 Bing. N. C. 222; *Cowley v. Mayor, &c., of Sunderland*, 6 H. & N. 565; *Manley v. St. Helen's Canal & Ry. Co.*, 2 H. & N. 840.

² *Brower v. Mayor, &c. of New York*, 3 Barb. (N. Y.) 257.

³ *Cp. Hackney Corporation v. Lee Conservancy Board* (1904) 2 K. B. 541.

⁴ *Yarborough v. Bank of England*, 16 East 6; *Maunt v. Monmouthshire Canal Co.*,

Corporations
as owners of
property.

Distinction taken between corporations performing public duties, and those engaged in purposes of mere private profit.

Parnaby v. Lancaster Canal Co.,
Tindal, C.J.'s judgment.

sought to draw a distinction between their liability where they perform public duties under the authority of Acts of Parliament, from which they receive neither emolument nor profit; and where they form a mere private company, using their own works, and receiving profit for the benefit of their members. The two views are set out in *Parnaby v. Lancaster Canal Co.*¹ and *Hall v. Smith*.²

In *Parnaby v. Lancaster Canal Co.*,³ which was an action against a canal company for allowing a boat sunk in their canal to remain, whereby the plaintiff was injured, Tindal, C.J., in the Exchequer Chamber, thus deals with the objection that there was no duty on them, as constituted by Act of Parliament, to remove the obstruction: "The facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company; and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap-door open without any protection, by which his customers suffer injury."

Hall v. Smith,
Best, C.J.'s judgment.

In *Hall v. Smith*,⁴ Best, C.J., after reviewing the cases, thus formulates the principle for which he contended: "From these cases I collect that the law recognises the principles which I ventured to state were founded in sound policy and justice, and that no action can be maintained against a man acting gratuitously for the public for the consequences of any act which he was authorised to do, and which, so far as he is concerned, is done with due care and attention, and that such a person is not answerable for the negligent execution of an order properly given."

Mersey Docks and Harbour Board Trustees v. Gibbs.

The question is set at rest by the decision of the House of Lords in *Mersey Docks and Harbour Board Trustees v. Gibbs*,⁵ which establishes that the fact of a profit being made or not made works no difference in principle in the liability of trustees for the public in respect of property held by them.⁶ A minute examination of the older cases is therefore unnecessary. It is sufficient to indicate that the whole learning of the

4 M. & G. 452; *Smith v. Birmingham Gas Co.*, 1 A. & E. 526. "Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that, if the agents employed conduct themselves fraudulently so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation"; per Lord Cranworth, *C. Rauger v. G. W. Ry.*, 5 H. L. C. 80. See Lindley, *Companies* (6th ed.), vol. i. 257. Pollock and Maitland, *History of English Law* (2nd ed.), vol. i. 490.

¹ 11 A. & E. 223.

² 2 Bing. 150, 163.

³ 11 A. & E. 242.

⁴ 1 L. R. 1 H. L. 33; *The Upper Humber*, (1897) A. C. 596.

⁵ Lord Wensleydale was able to arrive at this conclusion only in deference to the authority of *Mersey Docks and Harbour Board v. Cameron*, 11 H. L. C. 443. See *Glavin v. Rhode Island Hospital*, 31 Am. B. 675. *Ante*, 245.

subject is collected in the two opinions of Blackburn, J., given in *Coe v. Wise*¹ and in *Mersey Docks Trustees v. Gibbs*.²

The canon of construction is thus stated by Blackburn, J.,³ Canon of Construction.
 "In the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things." Moreover, where it is alleged that any statutory body is exempted from liability for damage done by its officers to persons outside its authority, "such a limitation ought to be clearly expressed, and any enactment that is vouched as effecting such a limitation ought to be strictly construed."⁴ In the case in which this was said, it was decided to be not enough to exonerate commissioners from paying damages that there is a proviso in their private act, "that the total amount to be expended under this Act for the above purposes, save as to interest, shall not exceed the sum of £15,000," even where the full amount they are authorised to raise has been expended. They must, in addition, raise funds to pay adequate compensation in cases where a liability for negligence is established against them.⁵

In *Foreman v. Mayor of Canterbury*,⁶ Blackburn, J., thus summarises the decision in *Mersey Docks v. Gibbs*: "It was decided that a public body, like the local board of health, are answerable for the negligence of their servants, just as if they were acting as the servants of a private person, and not for a corporation incorporated for a public purpose. Of course, the individuals composing the body are not responsible; it is the local board of health that are responsible, and they would have to pay the damages out of the funds in their hands as a local board of health."⁷ Statement of the law by Blackburn, J., in *Foreman v. Mayor of Canterbury*.

In *Duncan v. Findlater*,⁸ Lord Cottenham constructs a dilemma Dilemma stated by Lord Cottenham in *Duncan v. Findlater* which forcibly states a difficulty of frequent occurrence. "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption that the act creating the damage being within the statute must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers

¹ 5 B. & S. 458; in the Ex. Ch. 7 B. & S. 831.

² L. R. 1 H. L. 102; *The Queen v. Williams*, 9 App. Cas. 418; *The Turkistan*, 13 Rottie 342. In *Dormont v. Furness Ry. Co.*, 11 Q. B. D. 496, where a ship was wrecked in the channel of a harbour which, under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to keep clear by removing obstructions therefrom, Kay, J., held that a duty was imposed on them to remove the wreck from the channel, or to mark its position by buoys, and that the case came within the principle of *Mersey Docks v. Gibbs*. See also *The Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400, where the cause of the accident was not within the statutory authority of the Commissioners. In *Grant v. Sligo Harbour Commissioners*, 11 R. 11 C. L. 190, it was held that Harbour Commissioners cannot be sued for not cleansing, deepening, or removing obstructions from a harbour, if they have not funds to enable them to do so.

³ L. R. 1 H. L. 110.

⁴ Per Lord Esher, M.R., *Gallsworthy v. Selby Dam Drainage Commissioners* (1892), 1 Q. B. 354. The doctrine that a right of property cannot be taken away without compensation can be traced to D. 43, 8, 2. As to the burden on those who seek to establish that the Legislature intended to take away private rights, see per Lord Blackburn, *Managers of the Metropolitan Asylum District v. Hill*, 6 App. Cas. 208.

⁵ *Gallsworthy v. Selby Dam Drainage Commissioners* (1892), 1 Q. B. 348.

⁶ (1871) L. R. 6 Q. B. 218. *Gus Light and Coke Co. v. Vestry of St. Mary Abbots, Kensington*, 15 Q. B. D. 1.

⁷ See 38 & 39 Vict. c. 55, s. 265, and, as to London, 54 & 55 Vict. c. 70, s. 124.

⁸ 6 Cl. & F. 907.

conferred on him by the statute, or from the manner in which he thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct ? "

Examined.

A fallacy lurks in the phrase "not within the statute." The assumption is that works done under the authorisation of the statute are not works done within the statute if not done up to the standard of efficiency. But a power is no less exercised because it is imperfectly exercised, and a public fund is not exonerated from the consequences of the shortcomings of public functionaries because the work they have to do they do badly. Blackburn, J., in *Mersey Docks v. Gibbs*,¹ comments on this passage : "The dilemma if a good one is applicable to all cases. This is, no doubt, a very high authority, being said by the Lord Ch. . . . or in the House of Lords, though in a Scotch case, but not being the point decided by the House it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority." "If the true interpretation of the statutes is that a duty is cast upon the incorporated body, not only to make the works authorised, but also to take proper care and use reasonable skill that the works are such as the statute authorises . . . there is, with great deference to Lord Cottenham, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil the duty thus cast by the statute upon it may maintain an action against that body, and be indemnified out of the funds vested in it by the statute."

Legislative
authorisation
of a particular
act.

Although the general presumption of law is that the liability of the legally created body is, to the extent of their funds at least,² co-extensive with that imposed by the general law on individuals doing the same things, if the Legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful. Thus, where trustees of a turnpike road, or other similar official persons, are authorised to do a particular act, such as raising a road, lowering a hill, or making a drain, as in *Sutton v. Clarke*,³ and by doing so prejudice the rights or injure the property of third persons, they are not liable to an action, provided they do no more than the Act of Parliament under which they are acting authorises and requires them to do ;⁴ notwith-

¹ L. R. 1 H. L. 117.

² *Ruck v. Williams*, 3 H. & N. 308; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 107. "The want of funds affords no legal excuse to the defendants. By accepting their charter they impliedly engaged to fulfil all the duties thereby imposed. A neglect of those duties subjected them to an indictment; and their poverty as a corporation is no more a defence than the poverty of an individual is a defence to an action for breach of contract or to an indictment for a crime": *Waterford and Whitehall Turnpike Co. v. People*, 9 Barb. (N. Y.) 161, 174. ³ 6 Taunt. 29.

⁴ In cases of this sort the injured person is usually provided for by the compensation clauses of the statute. It is now well established that there can be no right to statutory compensation unless there would, apart from the statute, have been a right to bring an action for the injury complained of: *New River Co. v. Johnson*, 2 E. & E. 435. "Unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed": per Lord Campbell, C.J., *Re Penny*, 7 E. & B. 869. *City of Glasgow Union Ry. Co. v. Hunter*, L. R. 2 H. L. (Sc.) 78; *Caledonian Ry. Co. v. Walker's Trustees*, 7 App. Cas. 259. To warrant the giving of compensation, there must be an enabling power in the Act; *Hammersmith Ry. Co. v. Brand*, L. R. 4 H. L. 171, distinguished *Fletcher v. Birkenhead Corporation* (1907), 1 K. B. 205; *Metropolitan Asylums District v. Hill*, 6 App. Cas., per Lord Watson, 212. In the United States the law appears to be otherwise, on the ground that to deprive a person of compensation is unconstitutional: *Lee v. Pembroke Iron Co.*, 57 Me. 481, 2 Am. R. 50. See, too, *Mayor of Montreal v. Drummond*, 1 App. Cas. 384.

standing that a private individual doing the same thing would have been liable whether he were guilty of negligence or not. If trustees under a Turnpike Act raise a road, and thereby darken windows, no action will lie against them, provided the act done is within the scope of the duty and authority conferred upon them. Again, if injury result to a third person from the making of a drain, which would be actionable if done by a private individual, it will not be actionable if done by trustees in the performance of a duty cast upon them by an Act of Parliament. But to exempt from liability to an action, the act done by the trustees must be done carefully and without negligence. "If the act authorised to be done by the trustees is done so carelessly or improperly that the careless or improper manner in which it is done either creates or increases the damage, the trustees will be liable."

The obligations imposed by the statutory power must be strictly conformed to. James, L.J., forcibly expresses this² where an option was given by statute to a company either to construct works or to leave them alone, and, in the event of their electing to construct the works, specifying certain conditions under which they were to work. The company, professing to act in execution of their powers, varied the construction as specified in the conditions. "The words of the Act are that it should be lawful for the company to make their works according to those levels, and, of course, it was optional with them to make or not to make their works at all. But if they made them, and not to those levels, they would be in this dilemma—either from the neglect of that provision or condition the whole works were illegal, or the provision as to levels ought to be construed as imposing a distinct and separate obligation to that effect, the breach of which would not invalidate all their acts and proceedings, but would have to be remedied or punished like any other breach of statutory obligation. Of course the company would prefer their liability under the latter construction to their liability to capital punishment, which would be the consequence of the former; and we prefer that construction."

Where conditions of working are prescribed, these must be strictly conformed to.

James, L.J.'s, statement of principle.

There is a more individual duty, which is indicated by Lord Kenyon, C.J., in the *King v. Holland*.³ Objection was taken to an information against the defendant for malversations in office during the time he was a member of the Council of Madras, that the duty with breach of which the defendant was charged could only be performed by the body of which he was but a member. "In the course of the argument," said Lord Kenyon, "the Court pretty strongly intimated their opinion against this objection. They thought that each individual of the Governor and Council, who did not do what in him lay to discharge his public duty, contracted by his negligence individual guilt." This individual guilt is subsequently referred to the defendant's being "in a situation in which it was his duty to have done the acts which he neglected to do, and for the omission of which he is now accused," or to "express orders which he was bound, but neglected, to obey."⁴

Lord Kenyon C.J., in *The King v. Holland*.

¹ Per Williams, J., *Whitehouse v. Fellows*, 10 C. B. N. S. 780; *Boulton v. Crouther*, 2 B. & C. 703; *Beaver v. Mayor, &c. of Manchester*, 8 E. & B. 44; *Ferrar v. Commissioners of Sewers of London*, L. R. 4 Ex. 1; in Ex. Ch. 227. *St. Kilda Borough Council v. Smith*, 21 N. Z. L. R. 205.

² *Nitro-phosphate, &c. Co. v. London and St. Katharine's Docks Co.*, 9 Cl. D. 503, 522.

³ 5 T. R. 623.

⁴ L. C. 624. Compare with this what Lord Brougham says, *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 289: "If several are jointly bound to perform the duty, they are liable jointly and severally for the failure or refusal; and if it is a duty which the majority of the number is bound to perform, those who by their refusal prevent the

Acts done under statutory authority which, apart from the statutory authority, would constitute actionable wrongs.

Rex v. Pease.

Vaughan v. Taff Vale Ry. Co.
General principle applicable as formulated by Cockburn, C.J.

Jones v. Festiniog Ry. Co.

Hammersmith Ry. Co. v. Brand.

Lord Chelmsford's view of the law in the House of Lords.

Many acts done under statutory authority are only saved by the statutory authority from being actionable wrongs.

*Rex v. Pease*¹ is the best known instance of this class of case. The defendants were authorised by statute to construct a railway parallel and adjacent to an ancient highway, and to use the railway for the carriage of coals in waggons drawn by locomotives worked by steam. The locomotives having frightened the horses of persons using the highway, the defendants were indicted for a nuisance; judgment, however, was entered for them on the ground that the interference with the right of the public must be taken to have been contemplated and sanctioned by the Legislature, inasmuch as the statute under which they acted gave an unqualified authorisation to the use of locomotives.

*Vaughan v. Taff Vale Ry. Co.*² is to the same effect. There a wood belonging to the plaintiff was set on fire by sparks from a locomotive authorised by statute. "When," said Cockburn, C.J.,³ "the Legislature has sanctioned and authorised the use of a particular thing, and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible." In *Jones v. Festiniog Ry. Co.*,⁴ on the other hand, the common law liability was held to take effect; as, on the construction of the defendants' private Act, there was nothing to authorise the company to use locomotive engines.

The cases were much considered in *Hammersmith, &c. Ry. Co. v. Brand*,⁵ and the judges were called in to advise the House of Lords. Bramwell, B., dissented from the course of the decisions.⁶ He said: "I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question."⁷ Lord Chelmsford, who delivered the leading opinion of the House, expressed the contrary, and prevailing, opinion: "If the cases of *Rex v. Pease* and *Vaughan v. Taff Vale Ry. Co.* were rightly decided, this question has been determined. It was established by those cases that when the Legislature has sanctioned the use of a locomotive engine, there is no liability for any injury caused by using it, so long as every precaution is taken consistent with its use."⁸ "With great respect to the learned Baron,⁹ we do not expect to find words in an Act of Parliament expressly authorising an individual or a

greater number from concurring are answerable to the party injured; that is, all those who constitute a majority, such majority committing the nonfeasance, violate the duty imposed, disobey the law, occasion the injury, and are answerable for it."

¹ 4 B. & Ad. 30; *Whitehouse v. Birmingham Canal Co.*, 27 L. J. Ex. 25.

² 5 H. & N. 679. The case of *Gibson v. S. E. Ry. Co.*, 1 F. & F. 23, and the cases referred to in the note to that case were earlier decisions, and cannot now be considered good law. *Canada Central Rd. v. McLaren*, 8 Ont. App. 583; see also *Murdoch v. Glasgow & S. W. Ry. Co.*, 8 Macph. 768.

³ L. c. 645.

⁴ L. R. 3 Q. B. 733.

⁵ L. R. 4 H. L. 171; *Att.-Gen. v. Metropolitan Ry. Co.* (1894), 1 Q. B. 384; *Williams v. Portland*, 19 Can. S. C. R. 159, is a case where the grading of a street was lowered, and a person coming down a board from one of the houses abutting, slipped and was injured; cp. *Burgess v. Northwich Local Board*, 6 Q. B. D. 264; *Brierley Hill Local Board v. Peaseall*, 9 App. Cas. 602.

⁶ *Rex v. Pease*, 4 B. & Ad. 30; *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679.

⁷ Bramwell, B.'s answer to the Lords' question, L. R. 4 H. L. 185, contains a full examination of these cases.

⁸ Bramwell, B.

company to commit a nuisance, or to do damage to a neighbour. The 86th section¹ gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly (*be*) used without occasioning vibration, and consequent injury to neighbouring houses, upon the principle of law that *Cuiusque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit*, it must be taken that power is given to cause that vibration without liability to an action. The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighbourhood, actions might be brought by their owners, which would soon put a stop to the use of the railway. I therefore think, notwithstanding the respect to which every opinion of Mr. Baron Bramwell is entitled, that the cases of *Rex v. Pease* and *Vaughan v. Taff Vale Ry. Co.* were rightly decided.²

In *Powell v. Fall*,³ a case of setting fire to a stack by sparks from a traction engine constructed in conformity with the Locomotive Acts, 1861⁴ and 1865,⁵ Mellor J., gave judgment for the plaintiff, on the ground that the case was indistinguishable from *Jones v. Festiniog Ry. Co.*, and that the right to recover for damages is expressly reserved to a person sustaining injury from the use of locomotive engines authorised by the statutes. On appeal, this decision was affirmed, on the latter ground. Bramwell, L.J., however, said: "The arguments which we have heard are ingenious; but I need only say in reply to them that they have hardened my conviction that *Rex v. Pease* and *Vaughan v. Taff Ry. Co.* were wrongly decided."⁶

Subsequent cases.

Geddis v. Proprietors of Bann Reservoir,⁷ in the House of Lords, further defined the principle. The defendants, having power to make a communication between a reservoir and the River Bann, exercised the power in a manner injurious to the plaintiff, owing to their not having seen the necessity of making provision for the additional quantities of water that would be sent down by reason of their works. Lord Hatherley, C., thought the case was not "within any principle

Geddis v. Proprietors of Bann Reservoir.

Lord Hatherley, C., opinion.

¹ The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).
² L. R. 4 H. L. 202. See further *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 423; *Dunn v. Birmingham Canal Company*, L. R. 8 Q. B. 47; "Under the authority of the case (*Vaughan v. Taff Vale Ry. Co.*) to which reference has been made, if the canal company have done no more than the Legislature have authorised them to do, and damage results, and although there may be no clauses in the Act affording compensation, no action can be maintained"; *Boughton v. Midland G. W. Ry. of Ireland Co.*, Ir. R. 7 C. L. 169; also *Watkins v. Reddin*, 2 F. & F. 629, per Erle, C.J.: "Defendant has clearly no right to make a profit at the expense of the security of the public."

³ 5 Q. B. D. 597; *Evans v. Manchester, Sheffield & Lincolnshire Ry. Co.*, 36 Ch. D. 626; *Galer v. Rawson*, 6 Times L. R. 17; *The Canada Atlantic Ry. Co. v. Hazley*, 15 Can. S. C. R. 145. When the Railway Company have shown that they have used the best form of locomotive, the onus lies on the plaintiff to show negligence; *Post Glasgow and Newark Sideloth Co. v. Caledonian Ry. Co.*, 19 Rottie 608, 20 Rottie (H. L.) 35. *L.C.C. v. G. E. Ry. Co.* (1906), 2 K. B. 312, is a decision on the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 19, as to the meaning of the words "that the engine is constructed on the principle of consuming its own smoke, but that it failed to consume its own smoke, as far as practicable, at the time charged in the complaint through the default of the Company." The earlier cases are cited.

⁴ 24 & 25 Vict. c. 70. ⁵ 28 & 29 Vict. c. 83.
⁶ *Piggot v. Eastern Counties Ry. Co.*, 3 C. B. 229, decides that a company may be liable for not using the most effectual contrivances to prevent the emission of sparks, even though engines of greater power may be needed. It is also liability, where damage through fire has resulted, for allowing combustible matter to lie upon lands adjacent to a railway: *Smith v. L. & S. B. Ry. Co.*, L. R. 5 C. P. 98; L. R. 6 C. P. 14.

⁷ 3 App. Cas. 430, 149. Cp. *Colne v. Summerfield* (1853), A. C. 157; *Ratigh (Corporation of) v. Williams* (1893), A. C. 540; *Mayor, &c. of Palmerston North v. Pitt*, 20 N. Z. L. R. 396.

which could be laid down with regard to parties keeping themselves entirely within their powers, and taking care that the powers of an Act of Parliament, when exercised, shall be exercised in a manner to prevent needless injury. We are not bound, nor entitled, to suppose that they will wilfully do injury by the exercise of the legislative powers which have been given to them; but it appears to me clearly and plainly that they should use every precaution, by the exercise either of their powers created by the Act of Parliament itself, or of their common law powers, to prevent damage and injury being done to others through whose property the works or operations are to be carried on, and to avoid subjecting them to consequences which they were not bound to anticipate from the Act of Parliament, seeing that the Act also enabled the parties who had the power to do so to prevent the mischief."

Cracknell v. Corporation of Thetford.

In the Court below, *Cracknell v. Corporation of Thetford*¹ had greatly influenced the minds of the judges. The defendants, exercising powers under a private Act of Parliament to render navigable a certain river, had erected staunches in the river, the result of which, combined with the natural growth of the weeds² and the accumulation of silt against the staunches, was that the river overflowed its banks and damaged the plaintiff's land, in respect of which he sued the defendants, alleging a duty on them to cut the weeds or dredge the silt. "The injury," says Byles, J. : "is said to have arisen, first, from the erection of the staunches; that was made legal by the Act; secondly, it is said to have arisen from the defendants not removing the silt that accumulated and the weeds; but that was inevitable, because they had no power to remove them;³ they would have been liable for trespass if they had entered on the soil of the river and removed the silt and cut the weeds except for the purpose of improving the navigation. This, therefore, is a case for compensation but not for action."

Byles, J.'s judgment.

Lord Blackburn's statement.

The principle involved is thus put by Lord Blackburn :⁴ "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorised if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorised if it be done negligently. And I think that if by a reasonable exercise of the powers either given by statute to the promoters or which they have at common law the damage could be prevented, it is within this rule 'negligence' not to make such reasonable exercise of their powers."⁵

No duty to take active measures to ensure the enjoyment of what is not a legal right.

The duty to exercise statutory power so as not unreasonably to injure others was the principle on which *Geddis v. Proprietors of Bann Reservoir*⁶ was decided. The absence of any such duty was the basis of decision in *Southwark and Vauxhall Water Co. v. Wandsworth Board*

¹ L. R. 4 C. P. 629, 635.

² *Parrett Navigation Co. v. Robins*, 10 M. & W. 593.

³ As Bovill, C.J., put this point, L. R. 4 C. P. 634: "The defendants having powers only for the purpose of improving the navigation, the Act does not vest the soil in them, and the person in whom the soil is vested might complain if they did any act for any other purpose than improving the navigation."

⁴ 3 App. Cas. 455.

⁵ See *Harrison v. Southwark & Vauxhall Water Co.* (1891), 2 Ch. 409, distinguished *Knight v. Isle of Wight Electric Light and Power Co.*, 20 Times L. R. 173; *Colwell v. St. Pancras Borough Council* (1904), 1 Ch. 707, where the test proposed is whether, if the act complained of were done without statutory power, it would be a temporary nuisance only. *Bligh v. Rathangan River Drainage District Board* (1898), 2 I. R. 205.

⁶ 3 App. Cas. 430.

of Works.¹ A water company with statutory powers had laid pipes in a street. The local authority also under statutory powers proposed to lower the street without altering the pipes. The water company sought to restrain them, and the Court of Appeal held them not entitled to the protection they sought. "There is a broad distinction between exercising a right with reasonable care so as not to do avoidable damage, and taking active measures to insure the continuance of something that is not a right in the adjoining owner."² The plaintiffs had no right to any particular thickness of soil above their pipes, and as between the public authority and the water company the rights of the public authority were paramount. They may alter the level of the street without reference to the depth the water company have selected for their pipes. "The result is that though the person pulling down is bound to do no unnecessary damage, he is not fixed with any obligation to take active steps to mitigate a mischief which follows inevitably upon the reasonable exercise of his own rights."³ If, however, the authority given is permissive merely, the Legislature must be presumed to have intended that the use sanctioned is not to the prejudice of the common law rights of others.⁴

Managers of the Metropolitan Asylums District v. Hill,⁵ marks an important limitation on the exercise of statutory powers. "Where the terms of the statute," says Lord Watson,⁶ "are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose."

Metropolitan Asylums District v. Hill.
Lord Watson's dictum.

Another aspect of the principle is illustrated in *L. & B. Ry. Co. v. Truman*.⁷ A railway company were authorised by their Act to purchase by agreement any lands, not exceeding in the whole fifty acres, "in such places as shall be deemed eligible for the keeping of cattle carried by their railway. Under this power they bought land and used it as a yard or dock for their cattle traffic. The user was a nuisance to the occupiers of houses near. The House of Lords, reversing the decision of the Courts below, held that the occupiers were not entitled to an injunction. A great point was made of the decision in *Managers of the Metropolitan Asylums District v. Hill* and dicta of Lord Watson therein,⁸ but Lord Selborne thus discriminates the case then before the House from the earlier one:⁹ "In that case the establishment of a small-pox hospital within certain local limits was not specially

L. & B. Ry. Co. v. Truman.

Metropolitan Asylums District v. Hill discriminated from *L. & B. Ry. Co. v. Truman*, by Lord Selborne in the House of Lords.

¹ (1898) 2 Ch. 603.

² *L.c.* 612.

³ *L.c.* 613. *East Fremantle Corporation v. Annois*, (1902), A. C. 213; *Royal Electric Co. v. Hévet*, 32 Can. S. C. R. 462.

⁴ *Canadian Pacific Ry. v. Parke*, (1899), A. C. 535.

⁵ 6 App. Cas. 193. See *City & South London Ry. Co. v. London County Council*, (1891), 2 Q. B. 513.

⁶ *L.c.* 213.

⁷ 11 App. Cas. 45; *Biscoe v. G. E. Ry. Co.*, L. R. 16 Eq. 636; *Jones v. Stanstead, Shefford, and Chambly Rl. Co.*, L. R. 4 P. C. 98; as to the effect of this, see *Corporation of Parkdale v. West*, 12 App. Cas. 602, and *North Shore Ry. Co. v. Pion*, 14 App. Cas. 612, per Lord Selborne, 627.

⁸ 6 App. Cas. 212, 213.

⁹ 11 App. Cas. 57.

authorised, as the construction of the London and Brighton Railway, for the purpose (among other things) of the loading, carriage, and unloading of cattle and other animals, was here. If it had been, I do not think that this House would have considered the case of any adjacent land, in a situation not defined, which the Board might have been authorised to purchase by agreement for the enlargement, as they might think desirable, of the hospital premises, different from that of the site of the hospital itself. In that case no use of any land which must necessarily¹ be a nuisance at common law was authorised; it was not shown to be impossible that lands might be acquired in such a situation and of such extent as to enable a small-pox hospital (if required by the Poor Law Board) to be erected upon them without being a nuisance to the adjoining land. Here there can be no question that the Legislature has authorised acts to be done for the necessary and ordinary purposes of the railway traffic (*e.g.*, such as those complained of in *Rex v. Pease*) which would be nuisances at common law, but which, being so authorised, are not actionable. In that case there were no compulsory powers; here there are the compulsory powers usually given to railway companies; and the land in question, though not acquired under those powers, was acquired for purposes expressly authorised, being *ejusdem generis* with those for which the compulsory powers were given, and was to be used in connection with and as subsidiary to the railway and other works executed under those powers. In that case there were no provisions for any compensation for any damage or injury to any persons under any circumstances. Here there are, the line being drawn, as is usual in Railway Acts, between lands taken or injuriously affected by the construction of the works (which are subjects of compensation) and lands which or persons who may suffer some subsequent detriment or annoyance from the authorised use of the railway and works when constructed; so that, if the question had been one of compensation, the respondents would not be within the line. In all these points, as it seems to me, the present case is not similar to, but in direct contrast with, that of *Managers of the Metropolitan Asylums District v. Hill*.² In other words, in *Managers of the Metropolitan Asylums District v. Hill*, certain funds were, by Act of Parliament, made applicable to certain works. In *L. & B. Ry. Co. v. Truman*,³ by the same authority, a defined enterprise was authorised within designated limits. In the one case, mere allocation of funds to an object was determined not to legalise the carrying out of that object anywhere. In the other, the fact of a nuisance arising from the execution of Parliamentary powers was held not to limit the measure of their exercise.

The rule in *Metropolitan Asylums District v. Hill*⁴ was applied by the Privy Council in *Canadian Pacific Ry. Co. v. Parke*.⁵ The respondents were by statute authorised to irrigate their soil and to this end to divert water from its natural course. An irrigator was at liberty to determine the quantity of water he desired to appropriate

Rule applied
in *Canadian
Pacific Ry.
Co. v. Parke*.

¹ As to who is judge of necessity, see *A.-G. v. Metropolitan Ry. Co.* (1894), 1 Q. B. 390, 399.

² A small-pox hospital was declared not a noxious or offensive business within sec. 112 of the Public Health Act, 1875, in *Withington Local Board of Health v. Corporation of Manchester* (1893), 2 Ch. 19.

³ See *Rapier v. London Tramways Co.* (1893), 2 Ch. 588.

⁴ 6 App. Cas. 193.

⁵ (1899) A. C. 535.

and the means by which superfluous water was to be discharged. "When the water has been conveyed to his land he is authorised to use it for purposes of irrigation; but it is left to his discretion to determine whether, as circumstances permit, he will use in irrigation the whole, or part, or none of it. These provisions are certainly consistent with the view that no part of it was meant to be employed to the injury of neighbouring lands." Therefore the respondents were liable for any nuisance caused by them in the professed exercise of the statutory powers.

In the subsequent Canadian Appeal of *Canadian Pacific Ry. Co. v. Canadian Roy*¹ the other side of the rule came up. The question was whether a railway company authorised by statute to carry on their undertaking in the place and by the means that it was actually carried on, are responsible in damages for injury not caused by negligence, but by the ordinary and normal use of their railway. The facts showed an escape of sparks from an engine hut without negligence. The defendants were exonerated, as the plaintiff failed to show in the act from which the defendants derived their powers either provision for compensation or something done inconsistent with the powers conferred by the Act or with their proper execution. *Metropolitan Asylums District v. Hill* was also relied on in the New South Wales case of *Davidson v. Walker*; ² where an action was brought against the Government for negligence in the building of a lock-up in that the walls were not rendered impervious to the noise made by the prisoners confined there. The Court refused to hold that there was any such duty. The matter was one of public duty which overpowered considerations of private convenience. There is a jurisdiction to interfere by injunction in the case of "outrageous use of powers or subterfuge or mala fides."³

To this statement of the law must be added that in *The Queen v. Bradford Navigation Co.*; ⁴ that when statutory powers are conferred in circumstances in which they may be exercised without causing a nuisance, but new and unforeseen circumstances subsequently arise which render the exercise of them impossible without causing one, and so contravening the law of the land, the Legislature is not to be held to authorise a nuisance, and the powers conferred must be exercised, if at all, in conformity to the general law.

In *National Telephone Company v. Baker*,⁵ defendant's authority was derived from a provisional order confirmed by Act of Parliament. Kekewich, J., held that such provisional orders must be treated as "a well-known and recognised class of legislation," equally with the Railway Acts whose effect was interpreted in *L. B. & S. C. Ry. Co. v. Truman*,⁶ consequently that the conditions of exercising powers granted in either case are the same.⁷

The right of an electric lighting company to carry on their business although doing so is attended with a nuisance to neighbouring pro-

Canadian Pacific Ry. Co. v. Roy.

The Queen v. Bradford Navigation Co.

Provisional Order confirmed by Act of Parliament identical in effect with statutory enactment. *National Telephone Co. v. Baker.*

¹ (1902) A. C. 220. *Vaughan v. Webb*, 2 S. R. (N. S. W.) 293, distinguished in *Montreal Water and Power Co. v. Davie*, 35 Can. S. C. R. 255.

² 1 S. R. (N. S. W.) 196.

³ *Hawley v. Steele*, 6 Ch. D. 521.

⁴ 6 B. & S. 631. Cp. *Att.-Gen. v. Proprietors of the Bradford Canal*, L. R. 2 Eq. 71.

⁵ (1893) 2 Ch. 186.

⁶ 11 App. Cas. 53.

⁷ The subject is considered in *Hamilton v. Vicksburg, &c. Rd. Co.*, 119 U. S. (12 Davis) 280, where the facts somewhat resemble those in *Hole v. Sittingbourne & Sheerness Ry. Co.*, 6 H. & N. 488; but where the authority to construct the works was an implication from the other powers given. The governing principle is stated by *Shearman and Redfield, Negligence*, § 282.

Shelfer's case.

prietors, was asserted in *Shelfer v. City of London Electric Lighting Co.*¹ The defendants contended that as they had done all that skill and care could avail to prevent a nuisance, they were in the same position as a railway company, and were entitled to do what they had done, though it constituted a nuisance, under the authority of the Legislature. Their claim was disallowed by the Court of Appeal. The analogy of a railway company does not hold. The generating station of an electrical system may be put within wide limits; not so the works of a railway company, which have a definite line of operations, as was pointed out in *L. B. & S. C. Ry. Co. v. Truman*.² But further, the Electric Lighting Act, 1882,³ draws a distinction between liability during the construction of the works authorised and that subsequently arising through the working of them. There is nothing in the Act that relieves from liability to a common law action for a nuisance attending the carrying on of the enterprise. Sections 10, 17 and 32 refer only to construction of the works and damages then payable, and do not refer to damages caused by user.

Jordeson v. Sutton Southcoates and Drypool Gas Co.

The same considerations ruled in deciding *Jordeson v. Sutton Southcoates and Drypool Gas Co.*⁴ Under the powers of their special Act the defendants excavated land for the purpose of erecting a gas-holder. The work occasioned a nuisance. The principle applied in *L. B. & S. C. Ry. Co. v. Truman*⁵ would have been effectual but for sec. 9 of the Gas Works Clauses Act, 1871,⁶ which provided that "nothing in this or the special Act shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them;" and in the absence of anything limiting these words, damages and an injunction were awarded. In *Eastern and South African Telegraph Co. v. Cape Town Tramways Companies*⁷ escape of electrical currents on the defendants' rails caused deflections in telegraphic apparatus of the plaintiffs, but the Privy Council held this was not actionable, since the escape was a natural incident of operations legalised by the statutes under which the tramways were worked.

Escape of electric current.

Exceeding statutory powers.
Ware v. Regent's Canal Co.

As to the effects of exceeding a statutory power, the Lord Chancellor, in *Ware v. Regent's Canal Company*,⁸ said: "Where there has been an excess of the powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the Attorney-General on behalf of the public has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the Legislature. If an individual has sustained no damage, and there is no reason to apprehend that he will sustain damage, notwithstanding his being nearer to the possible cause of injury than the rest of the public, he has no peculiar position or claim to entitle him to become the redresser of a public grievance, or to complain of the disregard of the provisions of an Act of Parliament. The language of Lord Eldon in *Blakemore v. Glamorganshire Canal Co.*⁹ certainly appears to sustain the proposition of the plaintiff to its

¹ (1895) 1 Ch. 287. *Midwood v. Mayor, &c. of Manchester* (1905), 2 K. B. 597. *Stubbs v. McSweeney*, 18 N. S. W. (L. R.) 50.

² 11 App. Cas. 45.

³ 45 & 46 Vict. c. 56.

⁴ (1899) 2 Ch. 217.

⁵ *Supra*.

⁶ 34 & 35 Vict. c. 41.

⁷ (1902) A. C. 381.

⁸ (1858) 3 Dr. G. & J. 228.

⁹ 1 My. & K. 162; see per James, L.J.; *Taylor v. Corporation of St. Helena*, 6 Ch. D. 278.

full extent, but I adopt the interpretation of Lord Eldon's meaning by Alderson, B., in *Lee v. Milner*,¹ and with him I say 'that these Acts of Parliament ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed. Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own lands, and has a right also to require that no variation shall be made to his prejudice in carrying into effect the bargain between the undertakers and any one else.' The words 'to his prejudices' are emphatic, and mean not merely to his possible, but to his actual prejudice."

To return, however, to the consideration of the special position of corporations or other public bodies; there does not exist any intrinsic distinction between the liability of public bodies invested with statutory powers and that of private persons, apart from peculiarities arising from the powers conferred on such public bodies by the instrument or authority creating them. The liability of a master for the act of his servant is limited by the authority, express or implied, that the servant has from the master. The liability of public bodies is limited in addition by the instrument of their creation; and even in the event of their wishing to ratify some act that is thus *ultra vires*, they are able to do so only in the circumstances we shall subsequently have to consider.

Considerations applicable in the case of public bodies invested with statutory powers.

The general rule of liability of persons or bodies invested with statutory powers is thus expressed by Brett, L.J.:² "If people do that which, as against the public, amounts to misdemeanor, and lays them open to an indictment, and if, besides the injury to the public, they so do it as to do an injury to a private individual, that individual may maintain an action for damages for the breach of the statutory enactment which lays them open to an indictment"; and Day, J., in a later case,³ says: "The law is plain, that whosoever undertakes the performance of, or is bound to perform, duties—whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise—is liable for injuries caused by his negligent discharge of these duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether the person is guilty of negligence by himself or by his servants. If he elects to perform the duties by his servants, if, in the nature of things, he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way he is responsible for his own."

General rule stated by Brett, L.J.

By Day, J.

Where it is contended that the right to maintain an action at law is taken away by Act of Parliament the burden of proof is on those setting up the immunity; "because, if a public company or any individuals obtain an Act of Parliament which they say enables them to take away the common law rights of any person, they are bound to show that it does it with sufficient clearness."⁴

Onus on those alleging interference with common law rights.

¹ 2 Y. & C. (Ex.) 618.

² *Glossop v. Hoston and Isleworth Local Board*, 12 Ch. D. 121.

³ *Gilbert v. Corporation of the Trinity House*, 17 Q. B. D. 799.

⁴ *Clowes v. Staffordshire Potteries Waterworks Co.*, L. R. 8 Ch., per Mellish, L.J., 130; *L. & N. W. Ry. Co. v. Evans* (1893), 1 Ch., per Bowen, L.J., 28.

The liabilities of public bodies may be modified by differences of the duties cast upon them.

Public bodies,
how affected
by differences
in the mode
of their in-
corporation.

The ancient appropriate method of constituting a public body invested with privileges and affected with duties was by charter from the Crown; and from this incident of their creation an extension of their liabilities was deduced; for the grant of this charter was in the nature of a favour, which must be accepted with all its burthens or rejected with all its benefits, "otherwise a corporation might reject the obligation which was imposed and accept the benefit which was conferred upon them."¹ Hence not only are the corporation bound to the Crown to the performance of the duties in consideration of which they receive benefits, but are in addition liable in damages to private persons for their non-performance.² This is laid down in *Mayor, &c. of Lyme Regis v. Henley*,³ where Park, J., delivers the opinion of the judges: "We do not go the length of saying that a stranger can take advantage of an agreement between A and B, nor even of a charter granted by the King, where no matter of general and public concern is involved; but where that is the case, and the King, for the benefit of the public, has made a certain grant imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured by action." From this it has been sought to argue "that a contract made expressly for the benefit of a third person may be enforced by such person so long as the parties thereto have not agreed to rescind it."⁴ Assuming the existence of such a principle, it would yet seem both simpler and more accurate to consider the relation as arising from the general position of the Crown as bound to the promotion of the interests of the subjects, and as acting for them in matters where political are intermixed with private considerations, and the subjects as clothed with rights in the matter somewhat analogous to those of a *cestuis que trust*.

*Mayor, &c.
of Lyme Regis
v. Henley,
Park, J.'s
judgment.*

Eyre, B.'s,
proposition.

But the cases have been extended considerably further than this.

¹ *Rex v. Westwood*, 7 Bing, 92.

² An indictment and an information are the only remedies to which the public can resort for a redress of their grievances in this respect. If an individual has suffered a particular injury, he may recover his loss by an action on the case; *Hawk. P. C. bk. 2, ch. 25, 4*; 1 Chitty, Cr. Law, 162; 4 Bl. Com. 167, 301. The different effects of non-feasance and misfeasance are considered in *The Earl of Shrewsbury's case*, 9 Co. Rep. 50 b.

³ 2 C. & F. 331, 355. As to the American cases on this point, see *Weightman v. Corporation of Washington*, 1 Black (U. S.) 39, 53.

⁴ Such a principle was enounced in *Dutton v. Poole*, 2 Lev. 210, Vent. 318, 332, and is the basis of a series of American cases, *Lawrence v. Fox*, 20 N. Y. 268; *Van Schaick v. Third Avenue Rd. Co.*, 38 N. Y. 346, Beach, Contracts, 231; but is denied to be law by Lord Langdale, M.R., in *Colyear v. Countess of Mulgrave*, 2 Keen 98; and by the Queen's Bench, *Tweedle v. Atkinson*, 1 B. & S. 393; "where," says Bowen, L., *Gandy v. Gandy* (1885), 30 Ch. D. 69, "the true common law doctrine has been laid down"; *In re D'Angibau* (1880), 15 Ch. D. 242; *In re Flavell* (1883), 25 Ch. D. 93. It is competent, nevertheless, to show that one or both of the nominally contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract to, on the one hand, and to charge with liability on the other, the unnamed principal. *Higgins v. Senior*, 8 M. & W. 834; *Evans v. Hooper*, 1 Q. B. D. 45. A purchase in the name of another is a trust for the person who pays the consideration, except a purchase by a parent for a child, which is presumed to be an advancement, *Finch v. Finch*, 15 Ves. 43. Compare Moyle, Just. Inst., note to Inst. 3, 19, 3, also 2 Kent, Comm. 464 n (c), and Pollock, Contracts (7th ed.), 212. The whole subject is discussed at length in a note to Comyns's Digest (Hammond's edition), Action upon the Case upon Assumpsit (E a.), where *Dutton v. Poole* is suggested to rest on a special rule peculiar to agreements made by parents on behalf of their children. See also *Eley v. Positive Government Security Life Assurance Co.*, 1 Ex. D. 20, 88, and Street, Foundations of Legal Liability, vol. ii, 163.

Thus in *Sutton v. Johnstone*,¹ the plaintiff brought an action for malicious prosecution, and added a count for unreasonably delaying the calling of a court-martial; in reference to which Eyre, B., lays down the proposition that "every breach of a public duty working wrong or loss to another is an injury, and actionnble." This dictum was approved and adopted in *Ferguson v. Earl of Kinnoull*² by Lord Lyndhurst, C.; "When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained. My Lords, that was expressly laid down, if it were necessary to cito authority for the purpose, in the case of *Sutton v. Johnstone*,¹ by Mr. Baron Eyre, in delivering the judgment of the Court of Exchequer in that important case; and other authorities might be mentioned to the same effect."³ Lord Brougham's⁴ expression is: "If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages, as my noble and learned friend has stated, to those whom his refusal or failure injures." Lord Cottenham⁵ states the principle: "If there has been a wrong sustained; if that wrong has arisen from the body of which these individuals form a part having refused to do that which the law has stated they are bound to do, and damage has been sustained by an individual in consequence; and if, in such cases, the law be that the individual members of the body are all answerable in their own persons for the damage and injury so sustained, the whole case is exhausted." Lord Campbell adds:⁶ "I conceive that by the law of Scotland, as well as by the law of England, and, I believe, by the law of every civilised country, where damage is sustained by one man from the wrong of another, an action for compensation is given to the injured party against the wrongdoer."

Sutton v. Johnstone.

Ferguson v. Earl of Kinnoull.
Lord Lyndhurst, C.'s opinion.

Lord Brougham's.

Lord Cottenham's opinion.

Lord Campbell's opinion.

The law thus laid down by this highest Court must as a general expression be taken to be established. But there are not wanting indications pointing out a possible different view; and, now, certain definite limitations to it are accepted.

In America a distinction is drawn, and well established,⁷ between American law differs.

¹ 1 T. R. 493.

² 9 Cl. & F. 279, 4 St. Tr. N. S. 806.

³ *Green v. Buckle-churches*, 1 Leon. 323; *Stirling v. Turner* (no reference). *Innes v. Magistrates of Edinburgh*, Morison's Dictionary of Decisions, vol. xxxi. 13, 189.

⁴ 9 Cl. & F. 289. "In a criminal prosecution or in an action against a justice of the peace or against a clergyman for any offences by either of them committed in their respective situations, every day's practice has settled that the exercise of their offices is as against them proof that they are bound to discharge their respective functions." Per Lord Kenyon, C.J., *The King v. Holland*, 5 T. R. 623.

⁵ 9 Cl. & F. 308.

⁶ L.c. 310. Some remarks of Lord Campbell, at 324, may here be inserted with reference to the defence not infrequently heard of "conscientious disobedience" to a law. "Finally," he says, "we were much pressed with the hardship to which the appellants are exposed, by being held liable to actions for noting according to their consciences. I do not think, my Lords, that where the law is clear the hardship of being obliged to obey it is a topic that can be listened to in a Court of Justice. There can be nothing more dangerous than to allow the obligation to obey a law to depend upon the opinion entertained by individuals of its propriety, that opinion being so liable to be influenced by interest, prejudice, and passion; the love of power still more deceitful than the love of profit; and that most seductive of all delusions, that a man may recommend himself to the Almighty by exercising a stern control over the religious opinions of his fellow men."

⁷ *Huckok v. Trustees of the Village of Plattsburg*, reported as a note to *Conrad v. Trustees of the Village of Ithaca*, 16 N. Y. 161. The distinction has not gone unquestioned. In *Peck v. Village of Batavia*, 32 Barb. (N. Y.) 642, Marvin, J., is reported: "It is not for me to question the soundness of this position. Indeed, when a case arises in which it is in point, I shall of course follow it. But I may be permitted to

corporations proper, having the powers ordinarily conferred upon local administrative bodies (e.g., respecting streets within their limits), which owe to the public the duty to keep them in a safe condition for use in the usual mode by travellers and are liable in a civil action for special injury resulting from neglect to perform this duty; and quasi-corporations created by the Legislature for purposes of public policy, which, though liable to indictment for omission to perform duties enjoined, are not liable to an action for such neglect unless the action is given by some statute.¹ Clearly there, then, the principle enunciated must be taken with limitations.²

Wilson v. Mayor, &c. of Halifax.

Wilson v. Mayor, &c. of Halifax, is an English case which suggests a similar distinction. "Should a case arise," it is there said,³ "in which the question shall be whether the 68th section of the Public Health Act, 1848,⁴ imposes upon the local authority the liability to be sued in a civil action for damages, by reason of a failure to perform a duty assigned to them by the Act, we should pause before we could hold that, in addition to the well-established remedy by indictment every individual among the public would have a right of action for any and every injury resulting from such breach of duty. Upon this point, however, as it does not arise in the present case, we pronounce no opinion."

Hammond v. Vestry of St. Pancras.

On the other hand, in *Hammond v. Vestry of St. Pancras*,⁵ a case under section 72 of the Metropolis Local Management Act,⁶ 1855, where it was sought to impose a liability for an injury resulting from the disrepair of a sewer, and apart from negligence, Brett, J., said: "Now, if the 72nd section does throw upon the defendants an absolute duty or obligation to guarantee that the sewers shall be at all times cleansed, it follows that, if any injury arises to an individual from their not being so kept, the vestry are liable."⁷ The decision of the

say, with great respect for the very able and learned judge upon whose reasoning the Court proceeded (Selden, J., in *West v. Trustees of the Village of Brockport*, 16 N. Y. 161 n), that his opinion has failed to satisfy my mind of the correctness of the position." *Ehrigott v. New York*, 96 N. Y. 264; *Cohen v. New York*, 113 N. Y. 532; *McNally v. Cohoes*, 127 N. Y. 350.

¹ *Mower v. Leicester*, 9 Mass. 250. *Wilson v. Mayor of New York*, 1 Denio (N. Y.) 595. In *Barnes v. District of Columbia*, 91 U. S. (1 Otto) 552, it is said, "whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed."

² As to the historical grounds of the American doctrine, see *post*, 303, note 1.

³ L. R. 3 Ex., per Kelly, C. B., 119.

⁴ The section runs: "Be it enacted that the local board of health shall," &c., 11 & 12 Vict. c. 63, repealed 38 & 39 Vict. c. 55, s. 343.

⁵ L. R. 9 C. P. 321. *Meek v. Whitechapel Board of Works*, 2 F. & F. 144, is distinguished as involving negligence; if otherwise, is overruled, *Lampard v. City Commissioners of Sewers*, 1 Times L. R. 114. *Fleming v. Mayor and Corporation of Manchester*, 44 L. T. 517, is similar in its facts to the case in the text, but the finding of the jury was that if the sewer had been originally properly constructed, it would not have required repair, and would not have burst. Stephen, J., held the corporation liable. This decision was reversed on the ground that there was no evidence of negligence in the construction of the sewer to justify the finding of the jury; see Times Newspaper, 27th June, 1882. *Humphries v. Cousins*, 2 C. P. D. 239, is a case at common law. See also *Brown v. G. B. Ry. Co. of Canada*, 2 Ont. App., per Hagarty, C.J., 71.

⁶ 18 & 19 Vict. c. 120.

⁷ In *Glossop v. Heston and Isleworth Local Board*, 12 Ch. D. 120, Brett, L.J., said: "The defendants having done no act, it seems to me that the Court of Chancery has never, without some act done by such a body as this, granted what is called a mandatory injunction against a public body in order to force them merely to enter upon and to do their duty. There was a long list of cases cited to us the other day; I watched them carefully, and there was not one of them in which the defendant had not done an act which had caused an injury to a private individual, and which act was unjustified by any statute, and which was such an act as, if done by a private individual, would have given a cause of action at law." *Smith v. Chorley Rural Council* (1897), 1 Q. B. 678.

Court turned on the fact that no negligence was alleged, and therefore, failing a statutory duty imposed in "the clearest possible terms," there was no liability. It should be noted that the duty imposed on the vestry in this case, by the 72nd section, which the judgment of the Court determines to be a duty to exercise due and reasonable care and not an absolute duty,¹ is not enforced by any specific method; and therefore the ordinary common law means of redress are available—indictment, mandamus, or private action by any one specially injured by neglect of the duty.

In giving their opinion on the Islington Market Bill on the question of the liability of the grantee of a market, who after appropriating a particular site for the use of the public as a market place, afterwards proceeded to divert it to other purposes, the judges² summoned by the Lords state the general proposition: "We are not prepared to say that such misconduct of the grantee would not render him liable to an indictment for a misdemeanour, in like manner as the grantee of a ferry is punishable for a default in providing proper boats and ferrymen, . . . and if an indictment would lie against him for his default, an action would also lie at the suit of any private individual who should have received any special injury thereby."

Special injury a ground of private action.

It is obvious from the instances given, and, indeed, from the general language of the proposition, that this rule applies to those cases either where a nuisance has been created by the act of the defendant or maintained by his default following an act. The case of default in repairing *ratione tenura* is also well within the rule in *Henly v. Mayor, &c. of Lyne*.³ The omission complained of in *Jolliffe v. Wallasey Local Board*,⁴ which was "not placing a buoy of sufficient size and dimensions over the anchor to resist the current of the ebb and flow of the tides so as properly and efficiently to indicate the position of the anchor," is an instance in point of the second class of cases. The omission charged was a failure to complete or to maintain work that the board had undertaken—not an omission to undertake work to which they were obliged by statute, except in the sense that all shortcomings in enjoined work can be termed "omissions." *White v. Hindley Local Board*⁵ is another instance. A grid was placed

Applies to cases where nuisance has been created either by act of defendant or default in maintaining conditions he is liable for producing. *Jolliffe v. Wallasey Local Board.*

White v. Hindley Local Board.

¹ Cp. *Bateman v. Poplar District Board of Works* (No. 2), 37 Ch. D. 272.

² 3 Cl. & F. 519. See the rule stated by Pollock, C.B. *M'Kinnon v. Penon*, 8 Ex. 327.

³ 5 Bing. 91, in H. of L. 1 Bing. N. C. 222, 2 Cl. & F. 331.

⁴ L. R. 9 C. P. 62.

⁵ L. R. 10 Q. B. 219; *Blackmore v. Vestry of Mile End Old Town*, 9 Q. B. D. 451, where a water meter was fixed in an iron box in the footway, the top of which wore smooth; *Smith v. West Derby Local Board*, 3 C. P. D. 423; *Kent v. Worthing Local Board* (1882), 10 Q. B. D. 118. This last case was reflected on in *Moore v. Lambeth Waterworks Company* (1886), 17 Q. B. D. 402, where it was held that a fire-plug lawfully fixed in the highway, and in good condition, becoming dangerous through defect in the condition of the surrounding pavement, did not give a cause of action against the water company on an accident occurring. In *Thompson v. Mayor of Brighton; Oliver v. Local Board of Horsham* (1894), 1 Q. B. 332, *Kent v. Worthing Local Board*, was in terms overruled, and the law is now settled beyond dispute that where a local authority exercise two sets of powers, e.g., are gas or water or sewer authority, and at the same time highway authority—the merely allowing the road to wear away round covers placed there in execution of their powers as gas or water or sewer authority, so that a projection above the surface of the road is produced is no more than an omission to repair the highway by a highway authority for which no action lies. See *The Queen v. Mayor, &c. of Poole*, 19 Q. B. D. 602; as to the authority of this case on the preliminary point taken in it, see the curious note at 683; as to its authority on the other point, see *The Queen v. Mayor, &c. of Wakefield*, 19 Q. B. D. 810; *Strube v. Southwark and Vauxhall Ry. Co.*, 5 Times L. R. 638. In *Stockings v. Lambeth*

over the opening of a sewer to prevent the hole being dangerous to those using the road, and also to prevent stones passing into the sewer. The grid was defective through want of repair, and the horse of the plaintiff was injured. The Court held that the defendants were liable, "at all events in their capacity of owners of the sewers," even if there was an exception to their liability as surveyors of highways.¹

Exception in the case of highways and bridges.

The liability to repair in the case of highways and bridges is an exception from the general law. At common law the remedy for want of repair in highways and bridges was not by suit against the surveyor or justices, but by presentment or indictment against the county, or against some individuals thereof for and in the name of all the rest.²

Russell v. Men of Devon

In 1788 the case of *Russell v. Men of Devon*³ decided that no action will lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair. It was urged that the action ought to be maintainable by analogy to the statutes of hue and cry; and the statute of Winton⁴ was specially insisted on, as showing that an action lies against the in-

Waterworks Company, 7 Times L. R. 460 (C. A.), plaintiff recovered against a water company for negligence in placing plugholes in a footway. *Sterle v. Mayor of Essendon*, 17 Vict. L. R. 239, contains a discussion on the cases, but does not appear to be a well considered decision. The Court held that though the defendants were not bound to put up a fence, having done so they were bound to keep it. This may well be so if the accident occurred through ill-founded reliance on the fence; if, for instance, any one trusting to the fence was injured through its unsafe condition. But the accident seems rather to have been attributable to the absence of the fence. "If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard*," 1 Sm. L. C., 11th ed., 173; per Willes, J., *Skelton v. L. & N. W. Ry. Co.*, L. R. 2 C. P. 636. Cf. *Woodley v. Metropolitan District Ry. Co.*, 2 Ex. D. 384, 387, where a precaution adopted and afterwards discontinued did not suffice to raise a duty. *Wayer v. Bingham Rural Council* (1901), 1 K. B. 45, seems obnoxious to the same criticism. The judgment of Collins, L.J., assumes that having placed a fence by the road the defendants were bound to put another there when the first was removed as out of repair and possibly dangerous; and the Court generally assumed that the defendants having exercised their discretion the jury might find that the exercise of it should have been otherwise, and thus turned what was not a duty into a duty. If "the conduct complained of was an alteration in the normal condition of the road" a liability would attach to defendants, otherwise not; *Mayor, &c. of Shore-ditch v. Bull*, in H. of L. 20 Times L. R. 254, s. c. in C. A. 10 Times L. R. 64. Smith, L.J., does "not say that they [the local authority] were under any obligation to erect a fence," yet somehow they were liable for default in duty because the fence was not there. Plainly, if correct, this decision marks an exception to the rule, no liability where no duty. Cf. *The King v. Commissioners of Llandilo Roads*, 2 T. R. 2. In *Steel v. Dartford Local Board*, 60 L.J. Q. B. 256, the owner of cottages was required to connect the drains of the cottages with the sewer, and having complied with this requirement, a hole in the road, made for the purposes of the work, was filled in imperfectly, and the road subsided, causing injury to the plaintiff, who sued the board, who were held not liable.

¹ *Cox v. Vestry of Paddington*, 64 L. T. 566, where an old and rusty pipe, known to defendants' surveyor, was allowed to remain in the ground.

² 2 Co. Inst. 701; *Rez v. Men of Huntingdon, Popham*, 192; 13 Co. Rep. 33; *The case of Langforth Bridge*, Cro. Car. 365. Com. Dig. Chimin (133); *Rez v. West Riding*, 2 Wm. Bl. 685; *Rez v. Middlesex*, Andr. K. B. (1738), 101, 285.

³ 2 T. R. 667. By this statement must not be understood that any new principle of law was then enunciated, for so far back as in Charles II.'s time, Vaughan, C.J., lays down in *Thomas v. Sorrell*, Vaugh. 340: "If a man have particular damage by a foundrous way, he is generally without remedy, though the nuisance is to be punished by the King. The reason is, because a foundrous way, a decay'd bridge, or the like, are commonly to be repaired by some township, vill, hamlet, or a county who are not corporate, and therefore no action lies against them for a particular damage, but their neglects are to be presented and they punish'd by fine to the King." *Fiswell v. The Men of Devon* is the leading case in modern law, and not the first assertion of the principle established by it.

⁴ 13 Ed. f. st. 2, c. 6. Com. Dig. Hundred (C2). Cp. 29 Car. II. c. 7, s. 5.

habitants of a hundred for failing to apprehend felon committing robberies therein. This argument Lord Kenyon, C.J., retorted: "The reason of the statute of Winton was this; as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction¹ till the statute gave the remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore, when the case called for a remedy, the Legislature interposed; but they only gave the remedy in that particular case, and did not give it in any other case in which the neglect of the hundred had produced any injury to individuals."

There were, therefore, two grounds for the decision—one, the technical one that the inhabitants of a county as such cannot be sued; the other, that, since at common law there is no liability on the part of the whole of the inhabitants of a county to any individual sustaining injury through their inaction, the mere incorporation of them will not avail to give the action without the remedy being definitely conferred by statute.

Sir Barnes Peacock, accordingly, in *Borough of Bathurst v. Macpherson*,² fails to give an accurate impression of the law when he says: "The principal objection to the maintenance of the action was that the inhabitants of the county or parish, as the case might be, were not a corporation capable of being sued as such." That, indeed, was an insuperable objection. Still, as Lord Kenyon points out: "Even if we could exercise a legislative discretion in this case, there would be great reason for not giving this remedy"; for the remedy would be a very inconvenient one, and liable to great abuses.³ In the words of Ashurst, J.:⁴ "There is another general principle of law which is applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." If, then, the preliminary and technical objection were out of the way, the objection formulated by Willes, J., in *Parsons v. St. Matthew, Bethnal Green*,⁵ and pointed to by Lord Kenyon, C.J., in *Russell's case*, would hold good against giving "to every one who may meet with an accident from an imperfection in the road a right of action which be never previously possessed, and thus open a wide door to continual litigation."

¹ *Jackson v. Inhabitants of Calceworth*, 1 T. R. 71; *Witham v. Hill*, 2 Wils. (K. B.) 92.

² 4 App. Cas. 218.

³ In Scotland it is alleged to have been determined so early as 1798 that the incorporation of a royal burgh is under the liability to keep the public streets of the burgh free from dangerous obstructions; *Innes v. Magistrates of Edinburgh*, 31 Mar. Dec. Dec. vol. xxxi. 13. 180; *Dargie v. Magistrates, &c. of Forfar* (1855), 17 Dundee 730. Hay, Decisions on Liability for Accidents and Negligence; but see Lord Lyndhurst, C.'s account of *Innes v. The Magistrates of Edinburgh* in *Ferguson v. Earl of Kinnaird*, 4 St. Tr. N. S. 807, where he finds the principle asserted in the case "applicable both to the law of England and to the law of Scotland; it is a general principle." A reference to the case will establish the justice of this view. ⁴ 2 T. R. 675.

⁵ L. R. 3 C. P. 60. Cp. *Bro. Abr. Action sur le Case*, pl. 93, referring to *Y. B. 5 E. IV. 2 pl. 24*, the case of the miring of a horse through want of repair of a highway, where the substantial, and not the technical, reason is given, *in quel case nul home singular avera action de case, mes ceo est action per voy de presentment*. See the argument in *Rundle v. Hearle* (1898), 2 Q. B. 86; *Maguire v. Liverpool Corporation* (1905), 1 K. B. 776; also *H. Kinnon v. Penson*, 8 Ex., per Pollock, C.B., 327, and per Colridge, J., delivering the judgment of the Ex. Ch. & Ex. 613; *Gibson v. Mayor of Preston*, L. R. 5 Q. B., per Hannen, J., 222; *Cowley v. Newmarket Local Board* (1892), A. C., per Lord Herschell, 353.

M'Kinnon v. Penson.

*M'Kinnon v. Penson.*¹ raised the question of liability of the county surveyor for neglecting to repair a bridge under the statute 43 Geo. III. c. 59, which provided that the inhabitants of counties "shall and may sue for any damage done to bridges and other works," and "shall and may be sued in the name of such surveyor"; but the Court decided that there was no manifested intention in the statute to constitute a new liability in counties to actions to which they were not liable by common law. Had this been intended, "the obvious course would have been to recite the grievance, and provide for the remedy in express terms."

The Highway Act, 1835.

The Highway Act, 1835,² had provided that the surveyor shall repair, and keep in repair, the several highways in the parish; in default he is liable to a penalty of £5, and he shall, on the justices viewing the road, or causing it to be viewed, put it in repair to their satisfaction.

Young v. Davis.

In *Young v. Davis*³ the question was discussed whether a surveyor of highways is liable to an action simply because a road is out of repair. The Court thought the case had been substantially decided by *M'Kinnon v. Penson*, and also that the Act of Parliament appeared not to have been passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the existing duty of the parish to repair might be conveniently fulfilled.

The Metropolis Local Management Act, 1855.

The Metropolis Local Management Act, 1855, was alleged to have affected an alteration in the metropolis, in the liability to private action for want of repair to highways, by placing the exclusive right to repair them in the vestries as constituted under that Act, and thereby exonerating the parish from all concern in their repair. *Pursons v. St. Matthew, Bethnal Green*,⁴ decided that while section 96 of the Metropolis Management Act, 1855⁵ transfers to the vestries in the metropolis the duties and liabilities of the surveyor of highways, it imposes on them no greater liabilities than those to which the surveyor of highways had been previously subject.⁶

Effect of the Public Health Act, 1875.

*Gibson v. Mayor of Preston*⁷ decided the same point with reference to sec. 68 of the Public Health Act, 1848,⁸ and no different powers seem to have been conferred by the Public Health Act, 1875.⁹ The conclusion may be thus stated: By common law no action could be

¹ (1853) 8 Ex. 319; 9 Ex. 609. *Victoria Corporation v. Patterson* (1890), A. C. 615.

² 5 & 6 Will. IV. c. 50. By sec. 1, 13 Geo. III. c. 78, which collected all the former laws on highways, was repealed.

³ 7 H. & N. 760, 2 H. & C. 197.

⁴ L. R. 3 C. P. 56. See *Taylor v. Vestry of St. Mary Abbots, Kensington*, 2 Times L. R. 668.

⁵ 18 & 19 Vict. c. 120.

⁶ The case was also decided on the words of the 98th section, by which "it shall be lawful for every vestry," from which the Court held that it would appear to be intended to give them a discretion whether to repair the streets or not.

⁷ L. R. 5 Q. B. 218. "After careful attention to the arguments which have been addressed to your Lordships, I adhere to the judgment given in the case of *Gibson v. Mayor of Preston*," per Lord Hannen, *Cowley v. Newmarket Local Board* (1892), A. C. 355.

⁸ 11 & 12 Vict. c. 63, rep. 38 & 39 Vict. c. 55, but substantially re-enacted 38 & 39 Vict. c. 55, sec. 144.

⁹ 38 & 39 Vict. c. 55, s. 144. *The Queen v. Mayor, &c. of Poole*, 19 Q. B. D., per Lord Coleridge, 609. Cp. *The Queen v. Wakefield*, 20 Q. B. D. 810. "The Act of Parliament contemplates that the duty formerly belonging to the parish still remains in them, and that the surveyor acts strictly as their officer": per Pollock, C.B., *Young v. Davis*, 7 H. & N. 772. The Chief Baron adds: "In my opinion judges ought to consider the consequences of their decisions as regards a multiplicity of actions; and not decide so as to open an endless flood of litigation."

maintained for an injury arising from the non-repair of a highway by the parish, and the Legislature has not interfered by any general enactment to give a remedy by action to persons sustaining such an injury. It is therefore incumbent on a plaintiff, who seeks to establish that such a right is exceptionally given to persons sustaining an injury in a particular district, to show distinctly that the Legislature had such an intention in passing the enactment to which such an effect is attributed.¹

Borough of Bathurst v. Macpherson,² before the Judicial Committee of the Privy Council, though containing expressions capable of wider meaning,³ has been held⁴ not necessarily to involve any wider principle. The damage for which plaintiff sued was caused by an artificial work, viz., a barrel drain, without the construction of which the accident

*Borough of
Bathurst v.
Macpherson.*

¹ *Gibson v. Mayor of Preston*, L. R. 5 Q. B., per Hannen, J., 222. The judgment of Gray, C.J., in *Hill v. City of Boston*, 122 Mass. 344-381, contains an exhaustive examination of the English cases from the Year-books down to *Winch v. Conservators of the Thames*, L. R. 9 C. P. 378. Gray, C.J., thus expresses himself (at 369): "The result of the English authorities is, that when a duty is imposed upon a municipal corporation for the benefit of the public, without any consideration or emolument received by the corporation, it is only where the duty is a new one, and is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect of its performance is to be presumed." This is, of course, only a conclusion as to the drift of the English cases up to 1874. Subsequent decisions have, we have seen, denied this. The reference to trading corporations is to cases like *Scott v. Mayor, &c. of Manchester*, 1 H. & N. 59, 2 H. & N. 204; *Cowley v. Mayor, &c. of Sunderland*, 6 H. & N. 565. The doctrine of the Massachusetts Courts is thus stated (at 380): "However it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the Commonwealth, and a breach of which, in the case of a town, would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby." *Tindley v. City of Salem*, 137 Mass. 171. There has been a great conflict of opinion in the United States as to the true doctrine. The view upheld in Massachusetts is based on the authority of *Russell v. Men of Devon*, 2 T. R. 607. The deduction from what is said in that case being, that at common law there is no action against a municipal corporation for failure to repair a highway. All the case actually says, however, is that no action can be brought against the public; and the subsequent English cases merely affirm that the statutes dealing with the liabilities with respect to highways, have no more than transferred the liabilities of the county to the boards created by those statutes, and have not imposed any more onerous obligation on them. The state courts, which have adopted the view taken in Massachusetts, have followed the English construction of statutes dealing with the common law liability, in respect of highways, or, rather, have arrived at the special conclusion of the English cases by the aid of a more general principle; viz., that a duty imposed on public bodies "as the representative and agent of the public" is a duty not enforced by action. On the other hand, the Supreme Court of the United States, and many of the foremost states, as New York and Pennsylvania, adopt the rule that an act of negligence can always be brought against a chartered municipality for neglect to keep streets, over which it has control, in a reasonably fit condition for use: *District of Columbia v. Woodbury*, 136 U. S. (29 Davis) 450. The ground of this is, that a duty arises to the public, from the nature of powers granted to the municipal corporations on their incorporation, to keep the highways, in their jurisdiction, in a reasonably safe condition for ordinary uses, and a corresponding liability rests on them to respond in damages to those injured by a neglect to perform those duties which are held "municipal or ministerial and not governmental."

² 4 App. Cas. 256.

³ *E.g.* Their Lordships are of opinion, *l.c.* 267, that the appellants "were liable to an indictment." "This being so, their Lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty"; and again, "in their Lordship's opinion, there is no principle upon which a distinction in this respect between nonfeasance and misfeasance can be supported."

⁴ *Municipal Council of Sydney v. Bourke* (1895), A. C. 443.

Judgment.

would not have occurred, nor yet if it had been kept in repair. The question was whether the defendants were bound to keep it in repair. The judgment states: ¹ "Their Lordships are therefore of opinion that the appellants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance in the highway, for which they were liable to an indictment. This being so, their Lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty." But the default of the defendants was not keeping the drain they had made in repair. They had made a hole, and neglected to prevent its becoming dangerous, and the point of the decision is thus expressed: "The duty was cast upon them of keeping the artificial work, which they had created, in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed."² There was an omission supervening on an act, not a mere omission to act.

Municipality of Pictou v. Geldert.

In the subsequent case of *Municipality of Pictou v. Geldert*³ in the Privy Council, *Borough of Bathurst v. Macpherson* was shown to be the basis of a series of Colonial decisions proceeding on a theory that the decision in *Russell v. The Men of Devon*⁴ was due merely to the technical difficulty of suing a county; and that when this difficulty was removed by the constitution of some quasi corporation or some public officer who might be sued, the old immunity for acts of nonfeasance ceased, and a liability was imposed. Their Lordships emphatically repudiated such a construction: "Whatever general views are stated in that case, must, as in all cases, be taken with reference to the facts. And it is clear to their Lordships that the governing fact in the *Bathurst case* is that the conduct complained of was not in the view of the Committee nonfeasance but misfeasance. In delivering the judgment of the Committee, Sir Barnes Peacock expressly says that they do not decide whether the Legislature threw upon the municipality the obligation of keeping in good repair the works it took over. The ground of the decision was that the municipality having, under the powers conferred upon them, constructed a drain which, unless kept in proper condition, would cause a nuisance to the highway, were bound to keep this artificial work in such a condition that no nuisance should be caused, and that, if, owing to their failure to do this, the highway subsided and a nuisance was created, they were as much liable for a misfeasance as if they had by their direct act made the hole in the road which constituted a nuisance to the highway."

Sanitary Commissioners of Gibraltar v. Orfila.

Previously to *Borough of Bathurst v. Macpherson*,⁵ the Privy Council, in *Sanitary Commissioners of Gibraltar v. Orfila*,⁶ had laid down that "in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can show that the statute or ordinance under which they act imposed upon the Commissioners a duty towards himself which they negligently failed to perform," and this statement was adopted as rightly

¹ 4 App. Cas. 267.

² (1893) A. C. 529, 530.

³ 4 App. Cas. 256.

⁴ 15 App. Cas. 411.

⁵ L. C. 265.

⁶ 2 T. R. 667.

expressed in *Municipality of Pictou v. Geldert*.¹ The question of principle was discussed in the House of Lords in *Cowley v. Newmarket Local Board*² where the plaintiff sustained injury from a fall owing to the existence of a drop of eighteen inches in the level of a footway vested in the defendants, which was caused by the owner of stables adjoining the footway having constructed a (for him) more convenient access to his stables from the highway. The House of Lords reaffirmed the principles already cited, in *McKinnon v. Penson*³ and in *Gibson v. Mayor of Preston*,⁴ that a transfer to a public corporation of the obligation to repair a highway does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shown that the Legislature has used language indicating that this liability shall be imposed. And there is the authority of the Privy Council that this is "settled law."⁵

These cases were held to conclude the Court in *Thompson v. Mayor, &c. of Brighton*.⁶ There a properly made man-hole whose cover was in the highway became the cause of an accident through the wearing away of the material of the road round it. The contention that was fruitlessly urged, was that "there was no such thing as a highway authority as distinct from a sewer authority"; the defendants were acting as an urban authority, and were bound to prevent what was put in the road from being a nuisance. So long as the covers were in themselves in proper condition there was no right of action, although they were made dangerous by the want of repair of the roadway.

*Municipal Council of Sydney v. Bourke*⁷ raised the same point, but on the interpretation of a Colonial statute (43 Vict. No. 3); the test suggested is to see whether "a power only is conferred and no obligation imposed"; in that case there is no liability for nonfeasance. The facts of *Borough of Bathurst v. Macpherson*⁸ were substantially reproduced in *Lambert v. Lowestoft Corporation*.⁹ In the earlier case the hole in the road was caused "by the brickwork of the drain having broken away, and not having been repaired, the rain tore away the soil, and caused the earth to work away."¹⁰ In the latter "the accident was caused by rats having worked away the mortar at the point where one of these drains formed the sewer, and a cavity having been formed under the roadway." In both cases, a hole was made in the roadway, which caused the accident. Notwithstanding that all the explanatory passages from judgments professing to uphold the earlier cases were pressed upon Lord Alverstone, C.J., he refused to act upon them, and held the defendants not liable apart from negligence; which he found had not been established. In the *Bathurst case* negligence was alleged to have been established, but the main ground of the decision seems to be that it was covered by the authority of *Hartnall v. Ryde Commissioners*, "a decision which has been recognised as sound law in several later cases."¹¹ *Hartnall v. Ryde Commissioners*,¹²

¹ (1893) A. C. 527.

² (1892) A. C. 345. The statute applicable was The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 144, 149.

³ 8 Ex. 319; 9 Ex. 609.

⁴ L. R. 5 Q. B. 218.

⁵ *Municipality of Pictou v. Geldert* (1893), A. C. 527.

⁶ (1894) 1 Q. B. 332, 340.

⁷ (1895) A. C. 433.

⁸ 4 App. Cas. 256.

⁹ (1901) 1 Q. B. 590.

¹⁰ 4 App. Cas. 263.

¹¹ L. C. 209.

¹² 4 B. & S. 361. See Brett, L. J.'s, explanation of this case, *Glossop v. Heston Local Board*, 12 Ch. D. 121, based on the act complained of being a misdemeanour at common law.

Hartnall v. Ryde Commissioners overruled by *Maguire v. Liverpool Corporation*.

which was constantly cited in the course of these decisions, and as constantly distinguished and departed from,¹ was finally overruled in *Maguire v. Liverpool Corporation*² by the Court of Appeal. The principle on which that case was alleged to be decided—that the creation of a body of Commissioners with a power “as any surveyor of highways are invested with” to do repairs involved a liability to action at the suit of individuals for damages caused by not repairing—is obviously inconsistent with the test given in *Municipal Council of Sydney v. Bourke*³ that distinguishes between a power and an obligation. The power, which, indeed, so far as the public is concerned, is also an obligation, may be enforced by public remedies, by mandamus or indictment; but failing the creation of an obligation to private persons no private liability for nonfeasance can be inferred.

Sanders v. Holborn District Board of Works.

The principle of these cases was summarised in *Saunders v. Holborn District Board of Works*:⁴ an action under sec. 29 of the Public Health (London) Act, 1891,⁵ which imposes on the sanitary authorities the duty of removing snow from the streets. In order to establish the liability of a public body charged with a general public duty to an action by an individual “it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the Legislature is clearly disclosed no action will lie.” *Guardians of Holborn Union v. Vestry of St. Leonard, Shoreditch*⁶ as inconsistent with this principle may now be regarded as overruled.

Non-liability for neglect to repair in criminal proceedings.

The principle of non-liability for mere neglect to repair was also applied to criminal proceedings in the case of *Reg. v. Pocock*;⁷ where trustees under a local Act were charged with manslaughter on a coroner’s inquisition, which set out that they did “feloniously” neglect to repair, or contract for the reparation of, a certain road, whereby it became ruinous, and a man driving along the road was killed. The inquisition was removed by *certiorari* into the Queen’s Bench, and quashed, Lord Campbell saying: “No doubt the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the party guilty of it liable to an indictment for manslaughter; and the cases which have been cited in the course of the argument, and which establish that doctrine are good law.” “But how can the principle I have stated apply to the present case? It cannot be said that the trustees are guilty of felony in neglecting to contract. Not only must the neglect, to make the party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect. According to the argument here, it might be said that where the inhabitants generally are bound to repair, and a death is caused, as in the present case, all the inhabitants are indictable for manslaughter.”

The American reports are rich in cases illustrative of the principle we have been discussing. The carrying out of general governmental

¹ *E.g.*, *Parsons v. Vestry of Bethnal Green*, L. R. 3 C. P. 56; *Cowley v. Newmarket Local Board* (1892), A. C. 345; *Municipality of Picton v. Gridert* (1893), A. C. 524; *Thompson v. Mayor, &c., of Brighton* (1894), 1 Q. B. 332; *Saunders v. Holborn District Board of Works* (1895), 1 Q. B. 64. ² (1905) 1 K. B. 767.

³ (1895) A. C. 439.

⁴ (1895) 1 Q. B. 64.

⁵ 54 & 55 Vict. c. 76.

⁶ 2 Q. B. D. 145. Sec. 125 of 18 & 19 Vict. c. 120, is repealed by 54 & 55 Vict. c. 76, sched. 4.

⁷ 17 Q. B. 34.

powers is not a matter that can form the subject of claims by individuals. The policeman whose neglect on his patrol gives occasion for my house to be broken into and for me to be robbed is not liable to me in an action. He may be dismissed or censured by his superior, whose officer he is, but he is not mine. If engaged on special duty for me the case may be otherwise, but even then, on a well-known principle, the action would be personal only, and not against the officer who has appointed him to the duty. Neither, where hydrophobia is raging, and the authorities know of it, but do not see that dogs affected are dealt with, although they have the power, and I am bitten, are the authorities liable.¹ Nor where, through lack of governmental supervision, a person is gored by a cow running at large is liability imposed on the civic authorities.²

The proposition of Eyre, B.,³ that "every breach of a public duty working wrong or loss to another is an injury and actionable" is therefore to be limited to the cases of breach of a duty at common law and of breach of a statutory duty where there is no penalty or procedure enjoined by the statute creating the duty. Eyre, B.'s proposition, how limited.

The case of breach of a statutory duty, where there is a penalty or procedure enjoined by the statute creating the duty, remains to be considered.⁴

In *Couch v. Steel*,⁵ Lord Campbell said: "The general rule is that 'where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages' (Com. Dig. Action on the Case, A). The Statute of Westminster 2 [1 stat. 13 Edw. 1], c. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. See 2 Inst. 486. And in Com. Dig., Action upon Statute (F), it is laid down that 'in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law.'"⁶ The law thus laid down does not conclude the question of whether there is a right to sue for a mere omission to exercise a statutory duty to the State when the omission works a special injury to the person seeking to sue; since the general rule laid down is no more than that when one is injured by the act of another from whom a duty is owing—otherwise there is no wrong—he has a right of action. And the interpretation in Comyns of the Statute of Westminster 2 [13 Edw. 1], c. 50, contains the saving clause that the statute must enact or prohibit a thing "for the benefit of a person." Judgment of Lord Campbell in *Couch v. Steel*.

The benefit must be directly for the benefit of the person, not incidentally merely as the outcome of public policy. The decision of the Queen's Bench in *Couch v. Steel* was that by common law a right exists to maintain an action on the case for special damage sustained by the breach of a public duty; and that this right "is not taken away by reason of the statute which creates the duty imposing a penalty" Comment.

¹ *Smith v. Selinger*, 199 Pa. St. 615.

² *Rivers v. Augusta*, 38 Am. Rep. 787.

³ *Ante*, 295. *Sutton v. Joinstone*, 1 T. R. 493; *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 251; 4 St. Tr. N. S. 785.

⁴ Where a special remedy is pointed out, which it is impossible to resort to, then the right given may be enforced by ordinary action, *Bentley v. Manchester, Sheffield, and Lincolnshire Ry. Co.* (1891), 3 Ch. 222.

⁵ 3 E. & B. 402.

⁶ *L.c.* 411.

recoverable by a common informer for neglect to perform it, though no actual damage be sustained by anyone."¹

Lord Cairns's doubts.

In the Court of Appeal in *Atkinson v. Newcastle Waterworks Co.*,² Lord Cairns, C., expressed "grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been" laid down by him in *Couch v. Steel*, and these were concurred in by Cockburn, C.J., and Brett, L.J. In *Cowley v. Neumarket Local Board*³ Lord Herschell (who was counsel in *Atkinson's case*) also entertained "very grave doubts whether the proposition thus broadly stated can be maintained," and quoted with approbation Lord Cairns's words in *Atkinson's case* that much must "depend on the purview of the Legislature in the particular statute and the language which they have there employed." The inconveniences pointed out by James, L.J., in *Glossop v. Heston & Isleworth Local Board*⁴ were in Lord Herschell's opinion of great weight as against Lord Campbell's view: "It would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon whom duties are cast for the benefit of the locality"; for (the case was one of defective sewage system) every owner would have his action on an allegation that had something different been done he would be better off.

Lord Herschell's.

Couch v. Steel cited as overruled.

Lord Herschell again referred to Lord Cairns's view of *Couch v. Steel*, with approbation in *Municipality of Picot v. Geldert*,⁵ and Charles, J., in *Saunders v. Holborn District Board of Works*⁶ treats it as having been overruled by the cases cited.

Wills, J.'s, statement of principle.

Wills, J., in *Clegg, Parkinson & Co. v. Earley Gas Co.*⁷ formulates, as he says, a "principle deeper" than that on which *Atkinson's case* was decided; it is "that where there is an obligation created by statute to do something for the benefit of the public generally, or of such a large body of persons that they can only be dealt with practically *en masse*, as it were, and where the failure to comply with the statutory obligation is liable to affect all such persons in the like manner, though not necessarily in the same degree; there is no separate right of action to every person injured, by breach of the obligation, in no other manner than the rest of the public."⁸ Wright, J., is content to affirm the proposition that "the general rule of law is that where a general obligation is created by statute and a specific remedy is provided, that statutory remedy is the only remedy."⁹

Groves v. Wimborne.

The Court of Appeal in *Groves v. Wimborne*⁹ accepted Lord Cairns's test to "look at the general scope of the Act and the nature of the statutory duty" preliminary to deciding whether in addition to the statutory

¹ 3 E. & B., per Lord Campbell, 415.

² (1892) A. C. 352.

³ (1893) A. C. 525.

⁴ (1896) 1 Q. B. 504.

⁵ (1898) 2 Q. B. 87.

⁶ (1895) 1 Q. B. 70.

⁷ (1891) 1 Q. B. 747.

⁸ (1898) 2 Q. B. 402.

⁹ (1904) 8 Ont. L. R. 588.

² 2 Ex. D. 448.

⁴ 12 Ch. D. 109.

⁶ (1895) 1 Q. B. 70.

⁷ (1896) 1 Q. B. 504. *Harbinson v. Armagh County Council*, (1902) 2 I. R. 538: The Acts constituting County Councils the local road authority has made no difference in the character of their liability.

⁸ A principle deeper still—if being more extensive is meant by the phrase—was before the Court in *Rundle v. Hearle* (1898), 2 Q. B. 87: that an action for non-repair of a highway could not be brought on account of the multiplicity of actions the existence of such an action would admit. Lord Russell, C.J., desired "to hear further argument" before determining the point. As to this principle see *Ashby v. White*, 1 Sm. L. C. (11th ed.), per Holt, C.J., 262.

⁹ (1898) 2 Q. B. 402. In the *Queen v. Hall* (1891), 1 Q. B. 747, the cases upon the remedy available where a statutory offence has been created, and a statutory penalty attached thereto, are lengthily considered and classified. *Deyo v. Kingston & Pembroke Ry. Co.* (1904), 8 Ont. L. R. 588.

penalty provided there is a private action for injury. It was also said¹ that "in addition one must look at the nature of the injuries likely to arise from a breach of that duty, the amount of the penalty imposed for the breach of it, and the kind of person upon whom it is imposed before one can come to a proper conclusion as to whether the Legislature intended the statutory remedy to be the only remedy for breach of the statutory duty"; though no authority was cited for this extended inquiry, whose vagueness would leave the matter at the practically absolute "discretion" of the judge. So aided the Court arrived at the conclusion that by the provisions in the Factory Acts² for fencing dangerous machinery, in addition to the statutory penalty, there was conferred a right of action which might be pursued against the employer by the injured person or his representatives. But it nowhere appears from the facts why the case could not have been sustained on the ground of a special duty to a boy not to expose him to unnecessary dangers; or failing that, why the principle of *Smith v. Baker*³ was not applicable, and their neglect of a statutory duty is evidence of negligence.⁴ If, then, the plaintiff had a right of action independently of the statute, the first of Willes, J.'s, rules applies,⁵ and the benevolent (if inconclusive) general propositions of the Court are as unnecessary to the decision as they are difficult to reconcile with the cases.

In *Johnston and the Toronto Type Foundry Co. v. Consumers Gas Co.*⁶ the opposite conclusion was arrived at; where by a private Act, extending the powers of the respondent Gas Company, obligations were imposed on it for the benefit of its consumers, with a view to the reduction of the price of gas contingent on a surplus profit being shown, but no pecuniary penalty was imposed for default, and no right of action was given to persons aggrieved; while provision was made for its accounts being audited by direction of the Mayor of the Corporation, and surplus profits being entered in a "Special Surplus Account." The ground of decision was:⁷ "It is difficult to suppose that the gas company would wittingly have consented to place themselves at the mercy of every customer who might fancy he was paying more than the company was entitled to charge." "The gas company was originally established with the assent of the corporation. The corporation were large customers, if not the largest customers of the company. The ratepayers, therefore, were interested in keeping down the price of gas. On behalf of their constituents, and on behalf of the public, the corporation came forward to oppose the bill of 1887. They procured the insertion of clauses designed to cheapen the supply of gas. They obtained authority to check the company's accounts. They were given the fullest power of investigation. If they should find the company wilfully disobeying the Act of Parliament they certainly would have no difficulty in compelling obedience by process

New doctrine advanced there.

Johnston, &c. v. Consumers Gas Co. of Toronto.

¹ L. c. 416.

² 41 & 42 Vict. c. 16, s. 5, repealed Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), sched. 7. See now ss. 10, 144, 145, 146, 147. In *Kelly v. Glebe Sugar Refining Co.*, 20 Rettie 833, Lord Adam could not "adopt the view that "liability is limited to the penalty imposed by the statute [the Factory Acts] for the neglect of its provisions."

³ The neglect of the statutory provisions creates a *prima facie* case of fault against the factory owners which will render them liable in damages to their employees."

⁴ (1891) A. C. 325.

⁵ *Blamires v. Lancs. & Y. Ry. Co.*, L. R. 8 Ex. 283. *Wolverhampton New Water Works Co. v. Hawksford* (1859), 6 C. B. N. S. 336.

⁶ Post. 309.

⁷ L. c. 455.

⁸ (1898) A. C. 447.

of law. To them, and not to every individual customer who may fancy himself aggrieved Parliament has confided the duty of seeing that the Act is obeyed."

Ride discussed.

The actual decision in *Atkinson v. Newcastle and Gateshead Waterworks* is no more than that there may be circumstances (as where a penalty is prescribed that may in some instances go to the person suffering special damage from the breach of a statutory duty) where the breach of a public statutory duty does not vest a right of action in a person suffering special damage against the person guilty of the breach. The circumstances are generalised in the words of Lord Tenterden in *Doe dem. the Bishop of Rochester v. Bridges*:¹ "Where an act creates an obligation, and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."

Lord Campbell's error in *Couch v. Steel* was in assuming that where there is a penalty for breach of the statutory duty there must also be a right of private action in the person injured. He says:² "No provision for compensation to a person sustaining special damage by reason of a breach of duty prescribed by the Act" has been made; "nor are there any words taking away the right which the injured party would have at common law to maintain an action for special damage arising from the breach of a public duty." Lord Cairns in *Atkinson's case* noted the false assumption, and subsequent cases have done no more than follow the principle enunciated by Lord Tenterden in the case cited above.³ Lord Tenterden was merely reiterating Lord Mansfield, C.J., in *Rex v. Robinson*:⁴ "The rule is certain, 'that where a statute creates a new offence, by prohibiting and making unlawful anything which was lawful before; and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and particular method of proceeding that particular method of proceeding must be pursued and no other.' And this is the resolution in *Castle's case*."⁵

Two canons.

Hence there are two canons—the first, stated by Blackburn, J., delivering the opinion of the judges consulted in the *Mersey Docks Trustees v. Gibbs*:⁶ "In the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things." The second: When a statute creates an obligation and enforces the performance in a specific manner, not only is the public remedy by indictment excluded, but also any rights of private persons apart from the statute creating the right.⁷

¹ 1 B. & Ad. 859; cited and approved, *Stevens v. Jeacocke*, 11 Q. B. 742, which Lord Campbell distinguished from *Couch v. Steel* on the ground that no duty was there imposed upon the defendant, he was only prohibited from exercising his common law rights of fishing.

² 3 E. & B. 414.

³ *Doe dem. the Bishop of Rochester v. Bridges*, 1 B. & Ad. 859. *Pebbles v. Oswaldtwistle Urban District* (1897), 1 Q. B., per Lopes, L.J., 623; (1898), A. C., per Lord Halsbury, C., 394.

⁴ 2 Burr. 803.

⁵ Cro. Jac. 643.

⁶ L. R. 1 H. L. 110; *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 412.

⁷ 3 E. & B., per Lord Campbell, 412. Where a penalty is given by statute, one moiety to the King, the other to a common informer, the King may sue for the whole,

and the obligation, if unperformed, can only be enforced by the penalty¹ or by those for whose benefit the right is conferred in the way indicated in the statute.²

It may be convenient here to set out the excellent generalisations of Willes, J., in *Wolverhampton New Waterworks Co. v. Hawkesford*,³ where liability may be established founded on a statute. He divides the cases into three classes: "One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy." "The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and peculiar remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue."⁴

Willes, J.'s, division into three classes of statutory liability.

Where a statute prohibits an act but does not prescribe a remedy, the effect is formulated by Bowen, L.J., in the *Queen v. Tyler and International Commercial Co.*:⁵ "Where a duty is imposed upon a

Bowen, L.J. in the *Queen v. Tyler*.

unless a *qui tam* action has been previously commenced: *The King v. Hymen*, 7 T. R. 536.

¹ Cp. *Gorris v. Scott*, (1874) L. R. 9 Ex. 125; *Buxton v. N. E. Ry. Co.*, (1868) L. R. 3 Q. B. 549. A penalty may sometimes not import a prohibition but be in the nature of a tax on the adoption of a certain line of conduct; see *The Crede*, 2 Wall. Jan. (U. S. Circ. Ct.) 485. *Munro v. Chun Tsang Toy*, (1891) A. C. 272.

² *Johnston & the Toronto Type Foundry Co. Ltd. v. Consumers Gas Co. of Toronto* (1898), A. C. 447. *Finlay v. Miscampbell*, 20 Ont. R., per Ferguson, J., 39. *Regina v. Wegg*, 2 Salk. 460.

³ (1859) 6 C. B. (N. S.) 336, 356. *A. G. v. Ashbourne Recreation Ground Co.* (1903), 1 Ch. 101.

⁴ Where a statute confers a right and also gives a remedy, *prima facie* that remedy is the only one: *Festoy of St. Pancras v. Batterbury*, 2 C. B. (N. S.) 477.

⁵ (1891) 2 Q. B. 592, following *Reg. v. Birmingham and Gloucester Ry. Co.*, 3 Q. B. 223, and *Reg. v. Great North of England Ry. Co.*, 9 Q. B. 315. *The Queen v. Mayor and Justices of Bodmin* (1892), 2 Q. B. 21, follows *Ex parte Thompson*, 6 Q. B. 721, in holding that where one rule for a mandamus has been refused, the Court will not grant a subsequent application on the same matter, though with supplementary materials. The rule in criminal cases is stated in *The Queen v. Miles*, 24 Q. B. D. 431; 52 & 53 Vict. c. 63, s. 33. This does not affect the right of civil action. The law that determines whether proceedings for a wrong are to be by indictment is thus stated by Holt, *remedy for a wrong is by action or by indictment*. *Test whether* C.J., *Ashby v. White*, 1 Sm. L. C. (11th ed.), 262: "If men will multiply injuries actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a public nuisance every man shall have his action, as is agreed in *Williams's case*, 5 Co. Rep. 73 a; and *Westbury & Powell, Co. Lit.* 56 a. Indeed, where many men are offended by one particular act, there they must proceed by way of indictment, and not of action: for in that case the law will not multiply actions. But it is otherwise when one man only is offended by that act, he shall have his action; as if a man dig a pit in a common, every commoner shall have an action on the case *per quod communium suum in tam amplo modo habere non potuit*; for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway; every passenger shall not bring his action, but the party shall be punished by indictment, because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man each man shall have his action."

company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of indictment."

Action
against de-
faulting con-
tractor for
breach of
contract to
perform
statutory
duty by a
stranger.

In an American case,¹ an endeavour was made to carry the liability to a person specially injured by breach of a statutory duty one stage further than in the English cases we have just been considering; and where a city corporation had made a contract for the supply of water for extinguishing fires which was not performed by the contractor, whereby a person sustained damage, a claim based on the contract with the city was brought by the person damaged, not against the city but against the contractor; in respect of his breach of duty. The answer of the Court appears conclusive: "The present case is not based upon the breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for the want of the requisite privity between the parties before the Court." "There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the Government." "We are unable to see how a contractor with the city to supply water to extinguish fires, commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law."

Somewhat similar considerations were at the base of the decision in *Gorris v. Scott*.² An Act of Parliament was passed to prevent the introduction of cattle and sheep diseases into Great Britain, and also the "spreading" of such diseases. Privy Council orders were made under the Act directed to the prevention of disease, but with no relation to the danger of loss at sea. By neglect to observe precautions prescribed by the orders, sheep were washed overboard. But it was held that the owner could not sue on the negligence, for the damage was not that contemplated by the statute, which was not intended to confer benefit on the owners. Still if there is a continuing statutory duty, but the statutory remedy has ceased to apply, the law will not assume that the Legislature would stultify itself by leaving a duty in continued existence with no means of compelling its performance, but will infer that an action at law will arise on the cesser of the statutory remedy.³

Breach of
statutory
duty to pro-
vide school-
house.

Here also may be noted the Scotch case of *Birrell v. Anstruther*,⁴ which was an action by the representatives of a schoolmaster, in which it was averred that defenders were under statutory obligation to provide a suitable house for the deceased, but culpably failed to do so; and the house provided by them under their statutory obligation was left in a state unfit for human habitation for several years previous to the death of the deceased, which was caused thereby.

¹ *Fowler v. Athens City Waterworks Co.*, 20 Am. St. R. 313.

² L. R. 9 Ex. 125. *Ross v. Rudge Price*, 1 Ex. D. 260.

³ *Pulsford v. Devenish* (1903), 2 Ch., per Farwell, J., 633. Cp. *Castle's case*, Cro. Jac. 643.

⁴ 5 Macph. 20.

The Court, however, held that no cause of action was disclosed; for it was averred that the schoolmaster had continued to live in the house after it had become uninhabitable, and also there was no relevant averment of culpable homicide. His remedy, says the Lord Justice-Clerk, "was to refuse to live in such a house, and to go and live elsewhere, and bring an action of damages against the heritors for the expense and annoyance thereby caused to him. In that way he would have saved his life, and filled his pockets."¹

Continued residence with knowledge of the breach of duty dis-entitles from recovery.

It is plain, then, that in the circumstances we have been considering a public duty imposed by statute and sanctioned by a penalty, does not ordinarily carry with it a right of action at the suit of a person injured by the neglect of it. But when public bodies have property vested in them for public purposes a distinction must be taken as to the liabilities they come under. This distinction is very clearly pointed out by James, L.J., in *Glossop v. Heston & Isleworth Local Board*,² where an injunction was sought against the defendants, a sanitary authority under the Public Health Act, 1875,³ and in whom all sewers in their district were vested by the Act, for "permitting sewage or water polluted by sewage or other offensive matter to pass through the drains under their control" into a stream passing near the plaintiff's residence so as to cause a nuisance to him. James, L.J., points out⁴ that under their Act the sanitary authority "are under the same liabilities, and have the same defence in respect of any alleged liability as any private owner of a sewer would have. If the sewer, being in the state in which it was transferred to them, would, independently of the Act of Parliament, give to any landowner, or any riparian proprietor, a right to an injunction to restrain the use of that sewer, or the abuse of that sewer, it appears to me they would be in the same position as any other owner of a sewer would be." But when the case alleged is not based on a common law nuisance, but on alleged neglect to comply with the Act of Parliament, other conditions come into being. "If the neglect to perform a public duty for the whole of the district is to enable anybody and everybody to bring a distinct action or to file a distinct claim because he has not had the advantages he otherwise would be entitled to have if the Act had been properly put into execution, it appears to me the country would be buying its immunity from nuisances at a very dear rate indeed by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening such a door to litigious persons, or to persons who might be anxious to make profit and costs out of this Act of Parliament. It appears to me the only remedy would be by an application for a mandamus."⁵ But the Court of Chancery, whose jurisdiction was invoked, "never granted a mandamus to a public body to compel it to do things for the benefit of private persons" where they have done no wrongful act, but have only not acted. The sole remedy, it was then pointed out, was by an application to the Local Government Board under s. 299 of the Public Health Act, 1875.⁶

Neglect to perform a duty vested for the benefit of the public.

James, L.J.'s statement of the rule of law.

Remedy for mere non-feasance.

¹ L.c. 23. Subordinate managers are regarded as independent public officers, and not as agents of the School Board; *Domovan v. Board of Education*, 85 N. Y. 117.

² 12 Ch. D. 192. *R. Binion v. Workington Corporation* (1897), 1 Q. B. 619.

³ 38 & 39 Vict. c. 55.

⁴ L.c. 110.

⁵ L.c. 115. *Passmore v. Oswaldtwistle Urban Council* (1898), A. C., per Lord Macnaghten, 398.

⁶ 38 & 39 Vict. c. 55.

*A.G. v.
Dorking
Union.*

*Attorney-General v. Guardians of Poor of Union of Dorking*¹ was decided on the authority of *Glossop's case*. The action was by an owner of property on a stream below the outfall of a sewer into which not only persons with a prescriptive right drained, but others also. The local body had done nothing; but it was contended that they ought at least to have brought their action to prevent the intruders increasing the existing nuisance. To this Jessel, M.R., replied:² "It is impossible to suppose that any such action could be maintained. It comes to this, if you could maintain it you would get an injunction against a man for not bringing an injunction action against his neighbour." "No such action has ever been heard of at common law, and I am sure no such action has ever been heard of in equity, where a person cannot physically put an end to the nuisance," or "if at all, by bringing an action for an injunction, and I am satisfied no action at common law lies." Under the statute the only right was "to prevent the local authority from committing a nuisance." Their answer to this would be conclusive: "We found the sewers in this state and left them there." Jessel, M.R., also pointed out that in exercising so "very delicate jurisdiction the Court always looks to the balance of convenience."³ This was one of the grounds on which Fry, J., in *Attorney-*

*A.G. v.
Acton Local
Board.*

General v. Acton Local Board,⁴ while granting an injunction restraining an adjacent sanitary authority from authorising or directing sewage from their district to flow into the sewers of the plaintiffs, refused to grant a mandatory injunction to stop up existing drains. He added:⁵

"I am by no means clear that the defendants have power to stop up a drain the construction of which they have once authorised or directed. I observe that the Master of the Rolls expressed that view in *Attorney-General v. Guardians of the Poor of the Union of Dorking*."⁶ Acting on these expressions Romer, J., held in *Attorney-General v. Clerkenwell Vestry*,⁷ that a sanitary authority having granted permission to make communications between their pipes emptying into a stream and houses could not afterwards cut off or stop up these communications. *Charles v. Finchley Local Board*⁸ was urged as an authority contrary to this view, but was distinguished on the ground that there what was authorised was to pass pure water down a pipe into a channel; that what was done was to send down sewage as well;⁹ and the principle was approved that "if a man has a right to send clean water through my drain, and chooses to send dirty water, every particle of the water may be stopped, because it is dirty." If a man cannot exercise his legal right without incurring a wrongful element he loses 'hat which was lawful, and acquires no supplementary incidents whatever. But *Charles's case* was dissented from by Cozens Hardy, J., in *Brown v. Dunstable Corporation*,¹⁰ who followed Stirling, J., in *Ainley v. Kirkheaton Local Board*.¹¹

*A.G. v.
Clerkenwell
Vestry.*

*Charles v.
Finchley
Local Board.*

*Brown v.
Dunstable
Corporation.*

¹ 20 Ch. D. 595. An action for damages was held to lie in *Foster v. Warblington Urban Council* (1900), 1 K. B. 648.

² L.c. 605.

³ L.c. 607. "The public have an interest in the matter. As a general rule, it would only be right to grant an injunction where the company was acting in a high-handed and oppressive manner, or guilty of some other misconduct"; *Corporation of Parkdale v. West*, 12 App. Cas. 616. *Islington Vestry v. Hornsey Urban Council* (1900), 1 Ch. 695, is a particularly good instance of the strength of this principle.

⁴ 22 Ch. D. 221. *Brown v. Dunstable Corporation* (1899), 2 Ch. 378.

⁵ L.c. 232.

⁶ 20 Ch. D. 606.

⁷ (1901), 3 Ch. 527.

⁸ 23 Ch. D. 767.

⁹ *Durrant v. Brankome Urban District Council* (1897), 2 Ch. 291.

¹⁰ (1899), 2 Ch. 378.

¹¹ 60 L. J. Ch. 734, affd. (1892), 2 Q. B. 274.

*Stretton's Derby Brewery Co. v. Mayor, &c. of Derby*¹ is the case of a sewer overflow into private premises. Through the large increase of premises drained into the sewer, when there was a heavy rainfall the sewer was inadequate to carry off the surface water in addition to the ordinary sewage. The plaintiffs' brewery was built after the construction of the sewer, and drained into it by statutory right. The plaintiffs claimed that the sewer belonged to the defendants, who were liable for any nuisance caused by it, and put their case (1) that apart from any statutory duty and treating the defendants as private owners of a sewer, they were liable; or (2) that they were liable under sec. 19 of the Public Health, 1875,² in that they had not caused their sewer to be constructed and kept so as not to be a nuisance. Romer, J., held³ that the plaintiffs were not entitled to put their case on the footing that the defendants were to be treated as private owners; for "when under and by virtue of statutory duties and powers, works are made and maintained by a public body for the benefit of the public, or of a section of the public, and a member of the public in exercise of the statutory rights given to him, uses those works, and thus suffers damage, the rights of that member, and the liability of the public body in respect of such damage, are to be ascertained, not by considering how matters would stand if the parties could be regarded as strangers, but by reference only to the statutes under which the works are made, maintained and enjoyed. And to make the public body liable under the circumstances you must find that liability cast upon the public body by the statutes in question, either by express provision or reasonable intendment." The obligation under the Public Health Act, 1875,⁴ "though in form not limited, is in fact limited to cases where the public authority has been guilty of negligence, or, as it is sometimes expressed, of want of reasonable care and diligence."⁵ The difference is great between the obligation to construct a new system of drainage and the obligation to use sewers that are vested in a proper manner. In the latter case if the sewer is left to itself and uncleansed and becomes a nuisance, the sanitary authority is liable under sec. 19 of the Public Health Act, 1875.⁶ Yet not so as to include the case of a sewer so used that a filthy discharge in excess of the purifying influences of the volume of water into which the sewer flows causes pollution at a spot lower down, say, five miles or so.⁷

*Stretton
Derby
Brewery Co.
v. Mayor, &c.
of Derby.*

Analogy of
rights of
private
owner in-
applicable.

Public
authority's
duty
measured by
negligence.

We are thus led to the consideration of another principle—that of the absolute obligation, or the discretion, involved in the performance of statutory works. We have seen that it is not the law that a local board is liable to private persons for mere failure to carry out powers conferred by statute, unless there is an absolute obligation on them to do so.

Absolute
obligation or
discretionary
power.

Now, "If a matter is left to the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal

¹ (1894) 1 Ch. 431.

² 38 & 39 Viet. c. 55.

³ (1894) 1 Ch. 442.

⁴ 38 & 39 Viet. c. 55, s. 19.

⁵ *Hammond v. Vestry of St. Pancras*, L. R. 9 C. P. 316; *Bateman v. Poplar District Board of Works*, 37 Ch. D. 272; *Brown v. Sargent*, 1 F. & F. 112.

⁶ *Buron v. Portlade Urban Council*, (1900) 2 Q. B. 588.

⁷ *Harrington (Earl of) v. Derby Corporation* (1905), 1 Ch. 205, 223.

is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not."¹ Or, as Cockburn, C.J., expressed the principle in a case where the question was whether a mandamus should issue to a vestry to make sewers under the Metropolis Management Act, 1855, "In order to constitute a sufficient writ there ought to appear upon the face of it a present duty to be performed and a non-performance of such duty. This writ only states a general duty in the vestry to make the works in question, and does not show that in the particular instance it is a present duty to make them."²

What is a
discretion?
Sir Edward
Coke.

Lord
Halsbury, C.

"Discretion," as described by Sir Edward Coke,³ "is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talīs discretio discretionem confundit*." This expression is modernised by Lord Halsbury, L.C., "discretion means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular; and it must be exercised within the limit to which an honest man, competent to the discharge of his office ought to confine himself."⁴

Where the
duty is
discretionary.

The considerations applicable where the duty is of a discretionary nature are well pointed out in some American cases. In *Johnston v. District of Columbia*,⁵ evidence was tendered that the plan on which a sewer had been constructed by municipal authorities had not been judiciously determined on, but was held inadmissible to support an action against the municipality by the owner of land injured by the overflow

¹ *Rez v. Mayor, &c. of London*, 3 B. & Ad., per Lord Tenterden, C.J., 271. See also *Rez v. Archbishop of Canterbury*, 15 East 117; *Reg. v. Visitors of Middlesex Asylum*, 2 Q. B. 433; *Rez v. Bishop of Gloucester*, 2 B. & Ad. 158; *Wright v. Fawcett*, 4 Burr. 2041.

² *The Queen v. Vestry of St. Luke, Chelsea*, 1 B. & S. 912; *The Queen v. Tottenham Local Board*, 9 Times L. R. 414 (C. A.). There is a case of the negation of judicial discretion in *Carter v. McLaren*, L. R. 2 H. L. (Sc.) 120. In *Reg. v. Guardians of Epsom Union*, 11 W. R. 593, a case on what is a good return to a mandamus, the limits of the liability of a local board are discussed, and also the principles by which the court will be guided in considering their duties and liabilities. *Meador v. West Cowes Local Board* (1892), 3 Ch. 18.

³ *Rooke's case*, 5 Co. Rep. 100 a. Callis, Reading on the Statute of Sewers, 112-115, discusses "What Commissioners of Sewers may do by discretion," which he terms a "herb of grace" and subdivides into three degrees, *discretio generalis*, *discretio legalis*, *discretio specialis*. "*Legalis discretio* is that which Sir Edward Coke meaneth and setteth forth in *Rooke's* and *Keighley's cases*, *hoc est scire per legem quod sit justum*; and this is merely to administer justice according to the prescribed rules of the law; and herein is this discretion limited, that it go not beyond or besides those laws which are to be executed; and this discretion is to be governed by the laws, for Cicero saith, *Sapientis est iudicis cogitare tantum sibi esse permittum quantum sit commissum aut creditum*." As to the distinction between a wide and general discretion and a narrow one, see *Allcroft v. Bishop of London* (1891), A. C. 666, where *Rez v. Mills*, 2 B. & Ad. 578, is cited. See the note on "discretion," 8 How. St. Tr. 55. Lord Mansfield said, in *Rez v. Wilkes*, 19 How. St. Tr. 1039: "Discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful; but legal and regular." Also see per Willes, J., *Lee v. Bude and Torrington Junction Ry. Co.*, L. R. 6 C. P. 589; and per Jessel, M.R., *In re Taylor*, 4 Ch. D. 159.

⁴ *Sharp v. Wakefield* (1891), A. C. 179. See *Reg. v. Boleter*, 33 L. J. M. C. 101, a case cited by the Lord Chancellor, in *Sharp v. Wakefield*.

⁵ 118 U. S. (11 Davis), per Gray, J., 20. The leading authorities are referred to in the judgment, *Hutchins v. Frostburg*, 68 Md. 100, 6 Am. St. R. 422.

of water from the sewer: "The duties of the municipal authorities in adopting a general plan of drainage and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a Court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers according to the general plan so adopted are simply ministerial duties; and for any negligence in so constructing a sewer or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured." Again, in a New York case¹ Denio, C.J., says: "It is not the law that a municipal corporation is responsible in a private action for not providing sufficient sewerage for every, or for any, part of the city or village. The duty of draining the streets and avenues of a city or village is one requiring the exercise of deliberation, judgment, and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not, in a technical sense, a judicial one, for it does not concern the administration of justice between citizens; but it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means, and the determination of the order of time, in which improvements shall be made. It involves, also, a variety of prudential considerations relating to the burdens, which may be discreetly imposed at a given time, and the preference which one locality may claim over another. If the owner of property may prosecute the corporation on the ground that sufficient sewerage has not been provided for his premises, all these questions must be determined by a jury, and thus the judgment, which the law has committed to the city council or to an administrative board, will have to be exercised by the judicial tribunals. The Court and jury would have to act upon a partial view of the question, for it would be impossible that all the varied considerations which might bear upon it could be brought to their attention in the course of a single trial. Such a system of law would be as vexatious in practice as it is unwarranted in law."²

Rule of discretion for a public authority.

Judgment of Denio, C.J., in *Mills v. City of Brooklyn*.

¹ *Mills v. City of Brooklyn*, 32 N. Y. 495.

² Cp. *Forbes v. Lee Conservancy Board*, 4 Ex. D. 116—a judgment of Pollock, B., considering the law as to discretionary powers of commissioners. In *York and North Midland Ry. Co. v. The Queen*, 1 E. & B. 858, it was unanimously decided in the Exchequer Chamber, before Jervis, C.J., Pollock, C.B., Creswell, Williams, and Talfourd, JJ., and Parke, Alderson, Platt, and Martin, BB., overruling the Queen's Bench (Lord Campbell, C.J., and Crompton, J., Erle, J., dissenting), and also the Queen's Bench cases, *The Queen v. Lancs. & Y. Ry. Co.*, 1 E. & B. 228, *The Queen v. G. W. Ry. Co.*, 1 E. & B. 253; at 864: that "to say that there is no difference between words of requirement and words of authority, when found in such [railway] Acts is simply to affirm that the Legislature does not know the meaning of the commonest expressions"; at 865: "It seems to us, therefore, that these statutes [i.e., the special Acts of the company] do not cast upon the plaintiffs in error this duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the Legislature, which are permissive only; and that there is no reason in policy or otherwise, why we should endeavour to pervert them from their natural meaning"; at 870: "We are of opinion that the mandamus cannot be supported, upon the ground that the railway company, having exercised some of their powers

*Child v. City
of Boston.*

Yet if works, to undertake or to leave in the discretion of the corporation, are undertaken, and negligence is shown in the construction, the corporation is liable.¹ Thus in *Child v. City of Boston*,² damages, occasioned by reason of the flooding of the basement of the plaintiff's house with drain water, caused through permitting a waste weir to be closed, were held recoverable; because the damage arose from a failure properly to work the sewer appliances and to keep them free from obstruction; and this was purely a ministerial duty, "and the defendants were liable for negligence in its exercise to any person to whom their negligence occasioned an injury."³ On the other hand, in *Hill v. City of Boston*,⁴ the case of a child injured through falling over a staircase, dangerous through original construction⁵ in a schoolhouse provided by the city under a statutory obligation, an action was held not maintainable against the city for the injury, as it is "well settled in this Commonwealth that no private action, unless authorised by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage."⁶ With these cases may be compared the Scotch case of *Wisely v. Aberdeen Harbour Commissioners*,⁷ where the substitution of a new and safer method of laying rails for an existing method involving more risk, was held a matter within the discretion of the defendants with which the Court would not interfere.

*Wisely v.
Aberdeen
Harbour Com-
missioners.*

Distinction
between the
duty to under-
take work
and the duty
after having
undertaken
it, to do it
efficiently.

These decisions point to twofold functions on the part of public bodies. They have, first, to exercise their discretionary administrative powers as to the advisability of undertaking proposed works, and as to the general manner in which the work they determine to undertake is to be performed. Thus a corporation are unfettered by legal constraint, so far as a private action against them is concerned, in deciding whether they will have a system of drainage and sewerage, and as to the proportions of the system and the sum to be appropriated to its cost. Having decided this a new liability arises. If injurious consequences to an individual flow from the carrying out of the plan actually determined on, an action is maintainable for the loss caused;

and made part of their line, are bound to make the whole railway authorised by their statute. It is unnecessary, here to determine the abstract proposition that a work which before it is begun is permissive, is, after it is begun, obligatory. We desire to be understood as assenting to the proposition of my brother Erle (1 E. & B. 206) 'that many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by mandamus.' "The right of mandamus lies" "where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed to its exercise. It does not lie to correct alleged errors in the exercise of its judicial discretion": *In re Hollon Parker*, 131 U. S. (24 Davis), per Field, J., 226. *The Queen v. Adamson*, 1 Q. B. D., per Cockburn, C. J., 205; with the comment in *Ex parte Lewis*, 21 Q. B. D. 195.

¹ See *Ashley v. City of Port Huron*, 24 Am. R. 552, and note 556; *Leader v. Moxon*, 2 Wm. Bl. 924; *Jones v. Bird*, 5 B. & Ald. 837. In *Brine v. G. W. Ry. Co.*, 2 B. & S. Crompton, J., 411, says: "The distinction is clearly established between damage from works authorised by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the work being negligently done, as to which the owner's remedy by action remains"; and this statement is adopted by the judges in *The Mersey Docks and Harbour Board v. Gibbs*, L. R. 1 H. L. 93, 112. *Clothier v. Webster*, 12 C. B. N. S. 790, was an action for negligent laying of a sewer, and was held maintainable. See *Cox v. Paddington Vestry*, 64 L. T. 566.

³ 80 Mass. 53.

² 86 Mass. 41.

⁴ 122 Mass. 344, 23 Am. R. 332.

⁵ *Cormack v. School Board of Wick*, 16 Rettie 812, is a case of deteriorated condition, not of originally unsafe construction.

⁶ 122 Mass. 345.

⁷ (1887) 14 Rettie 445.

for instance, if the effect of the plan of drainage is to collect water and to cast it on the land of any one, where of its own accord it would not have flowed, the corporation so acting are liable; because they have no more right to deprive a private citizen of the enjoyment of his property than any other private citizen has.

If it is sought to escape responsibility by showing that the work is efficiently done in accordance with a predetermined plan,¹ and that the injury is caused by the defect of the plan itself, and it is contended that for mere defect of plan there is no liability on the corporation, since the determination in regard to that is discretionary or judicial, the answer is that so long as the plan is merely passively ineffectual, so long as it does not afford to all the whole benefit they may have reasonably looked to derive from an efficient plan, the contention that no action lies in respect of the defect is a sound one;² but where the plan in its execution involves an actual invasion of another's property, there is no protection; or, to state the matter somewhat differently, against the mere incompleteness or inadequacy of the plan as a solution of a given problem, there is no redress; but such incompleteness or inadequacy is of no avail as a defence to an action for trespass or interference with the property or rights of others.³ The principle is neatly stated by Lush, J., in *Hall v. The Mayor, &c. of Batley*.⁴ "If damage ensues as the consequence of work properly done, it must be sought for by a claim for compensation; but if, as the result of negligence in the doing of it, it is properly the subject of an action."⁵

Work involving an invasion of property actionable.

Principle stated by Lush, J., in *Hall v. Mayor, &c. of Batley*.

The subject has been discussed twice in the Privy Council—in *President, &c. and Ratepayers of Colac v. Summerfield*,⁵ and in *Corporation of Raleigh v. Williams*.⁶ In the latter case it was argued, on the one hand, that if work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of some inefficiency or some defect which a competent engineer ought to have foreseen and guarded against, or if the result of a drainage work, for example, is to damage a person's land by throwing water on it, there is actionable negligence on the part of the municipality. On the other hand, the contention was that when an engineer is employed by a municipality to do work, the municipality thereupon becomes a helpless instrument in the hands of the engineer they employ. The Privy Council negatived both these contentions, but without formulating any definite principle in substitution. The limits of liability they marked out seem, however, to accord with the cases we have been considering. The municipality, says Lord Macnaghten, "cannot indeed modify the engineer's plan themselves. That is no part of their business. But they may return the plan for amendment if they think that it is not desirable in the shape submitted to them. If, however, acting in good faith, they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute."

Colac v. Summerfield and Raleigh v. Williams.

Yet where the work done has become insufficient and cannot be

¹ *Ashley v. Port Huron*, 24 Am. R. 552, and the cases there cited.
² Cp. *Stretton's Derby Brewery Co. v. Mayor, &c. of Derby* (1894), 1 Ch. 431.
³ *Ruck v. Williams*, 3 H. & N. 308.
⁴ 47 L. J. Q. B. 148, 151.
⁵ (1893) A. C. 540, 550.
⁶ (1893) A. C. 187.

Hawthorn Corporation v. Kannuluik.

used without infringing rights of property, the continuation of its user was held negligent in *Hawthorn Corporation v. Kannuluik*.¹ A watercourse was taken over by a local authority and made into a public drain which became insufficient and in time flooded the lands of an adjoining proprietor. The Privy Council found it "difficult to imagine a more conspicuous example of negligence than is shown by repeatedly pouring offensive stuff into a receptacle or channel proved over and over again to be insufficient to hold it and pass it on. The municipal authorities might just as well pour this stuff directly on the plaintiff's land." The case of *Stretton's Derby Brewery Co. v. Mayor of Derby*² at once occurs as presenting similar facts having a dissimilar conclusion. The distinction is manifest. There the plaintiffs, by connecting with the insufficient sewer, brought the overflow on their premises.

Distinction . . .
guished from
the *Raleigh Corporation case.*

It is more difficult to reconcile Lord Macnaghten with himself in the *Raleigh Corporation case*.³ "It was argued . . . that if the result of a drainage work is to damage a person's land by throwing water upon it which would not otherwise have come there—that is actionable negligence on the part of the municipality. This argument in their Lordship's opinion is wholly untenable." The distinction probably lies in the finding in the *Hawthorn Corporation case* that "a number of subsidiary channels have since been made by the municipal authorities of Hawthorn, or with their permission for the purpose of running off the storm water and sewage into the main drain;" and that "several ineffectual complaints" were made of their doing so. If the damage were only the result of the ineffective but not negligent exercise of statutory powers we have seen⁴ that no action would lie. The case does not seem within the principle of *Corporation of Parkdale v. West*,⁵ followed in *North Shore Ry. Co. v. Pion*,⁶ that it is a condition precedent to exercising statutory powers affecting other interests than those of the body exercising them that the prescribed means of ascertaining the compensation due should be taken and the amount of compensation he paid, tendered, or deposited. If this is not done the execution of the work is illegal, and an action by the party aggrieved is the proper means to seek redress.

Condition precedent to the exercise of statutory powers that the compensation should be provided for. American rule as to negligent exercise of powers.

The American rule, which is identical with the English, has been well stated; where a municipal corporation in making a public improvement, diverts the flow of surface-water so as to cast it upon the land of a private owner, and such result is the direct and necessary consequence of the improvement when the work is performed carefully and skilfully, there can be no recovery, the damage being considered consequential. But where such diversion of the water is unnecessary, and results from negligence in the execution of the improvement, then the rule is different, and a landowner whose land is injured thereby may recover damages from the municipality.⁷

Classes of negligence in the management of sewers for which corporations are liable.

In a Canadian case,⁸ where an owner had without the authority of the corporation connected his drain with a sewer belonging to the defendant corporation, which, becoming choked, caused an overflow of the drain, for which the owner brought an action against the cor-

¹ (1906) A. C. 105.

² (1893) A. C. 550.

³ 12 App. Cas. 602.

⁴ *Saunby v. Water Commissioners of London (Ontario)*, (1906), A. C. 160.

⁵ 14 App. Cas. 612.

⁶ 14 App. Cas. 612.

⁷ *Welsh v. Corporation of St. Catherine's*, 13 Ont. R. 369.

⁸ (1894) 1 Ch. 431.

⁹ *Ante*, 317.

¹⁰ 12 App. Cas. 602. *Saunby v. Water Commissioners of London (Ontario)*, (1906), A. C. 160.

¹¹ 14 App. Cas. 612. ¹² Thompson, *Negligence*, § 5906.

¹³ *Welsh v. Corporation of St. Catherine's*, 13 Ont. R. 369.

poration, some valuable remarks were made by Cameron, C.J.,¹ on the liability of a corporation for damage caused by the overflow of drains. First, "it must be shown affirmatively that the corporation required the property owners to use the public drain by connecting the private drains therewith. Secondly, that the drain or sewer has been improperly and negligently constructed, and injury results in consequence of such negligent and improper construction, or that the same has become obstructed and the corporation has negligently omitted to remove the obstruction within a reasonable time after knowledge or notice of the obstruction, and injury results to the plaintiff after such reasonable time for removal after such knowledge or notice has been had by the corporation; or third, the corporation brings to the plaintiff's land, by means of the drain or sewer, more water than would otherwise come to the same, and pours it wilfully upon the said land, or after bringing the water to the land negligently allows it to escape and flow over the land." In the case before the Court no action lay, for the connecting with the corporation drain was the plaintiff's own and uninvited act; but, disregarding this consideration, there must be some positive act of negligence to import chargeability.²

Liability of corporation for damage caused by overflow of drains.

Vis major is a valid excuse for the non-performance of a statutory duty.³

Vis major excuses.

In the case of powers *primâ facie* discretionary, a further distinction must be drawn between, first, those where the object, for which the power is conferred, is for the purpose of enforcing a right; in which case there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. When there is such a duty it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. Secondly, those where the discretion is absolute.

Distinction between powers conferred with a duty to exercise them, and powers conferred with an absolute discretion.

The rule for the distinction of these two classes of cases—those where there are discretionary words coupled with a duty and those where the discretion is unfettered by a duty—is expressed by Lord Cairns, C., in *Julius v. Bishop of Oxford*,⁴ discussing the effect of the words "it shall be lawful," he thus discriminates: "The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right and authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the

Rule laid down by Lord Cairns, C., in *Julius v. Bishop of Oxford*.

¹ 13 Ont. R. 379.

² In *Stainton v. Woolrych*, 23 L. J. Ch. 300, the execution of drainage works incidentally interfered with the flow of water from a spring, but the Court refused an injunction because the works were authorised by Act of Parliament, but if the injury had been caused by the improper or unskilful execution of them, then the Court would have granted relief.

³ *River Wear Commissioners v. Adamson*, 2 App. Cas. 743; *In re Richmond Gas Co. v. Mayor, &c. of Richmond* (1893), 1 Q. B. 56.

⁴ 5 App. Cas. 222.

Court of Queen's Bench to decide on an application for a mandamus. And the words 'it shall be lawful' being, according to their natural meaning, permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power to show, in the circumstances of the case, something which, according to the principle I have mentioned, creates this obligation."¹

Unreasonable exercise of a discretion not lawful.

That a local body has discretionary power does not avail to protect them in an unreasonable exercise of the power or in its exercise for an oblique motive. An authority conferred for some definite purpose must not be abused to secure some other end. If this is shown to be attempted, the Courts will enjoin the local body. The discretion must be used in good faith and reasonably, though—to use a familiar phrase—"the Courts will not be astute" to fix an unfavourable sense on ambiguous acts. The discretion allowed is a real discretion, not one so illusory that the Courts will strive either to direct or to supervise.

Distinction between a corporation and a natural person with reference to the power of incurring liabilities.

A distinction of some importance still remains to be treated—that between a corporation and a natural person with reference to the power of incurring liabilities. A natural person is presumed capable of acquiring all classes of rights and becoming subject to all classes of liabilities within the range marked out by the legal system of the State of which he is a member. But a corporation has a definite scope and limit, outside which it may not presume to act without risking its very existence. If, on the true construction of the instrument creating a corporation, it appears—whether expressly or by implication is of no moment²—that the corporation is precluded from acting in any particular way, a contract to act in that particular way entered into on behalf of the corporation is wholly void, and cannot be ratified.³

A more difficult question is whether a corporation is liable for a tort distinctly authorised by it, yet outside the limits of the corporate powers.

Acts of agent how far binding on corporations.
I. When authority to act implied.

There are a large number of railway cases where the point is whether acts admittedly wrongful, done by the officers of companies in assumed advancement of the companies' interests, are within the scope of the duty of those officers sufficiently to render the companies liable for their misfeasance; or whether, in any way, an implied authority to do them could be inferred so as to charge the companies for the fault of their officers. The conclusion from them is that an agent has no implied authority to commit a tort *ultra vires*, and cannot on that ground merely bind his corporation.⁴

II. When expressly given in a matter *ultra vires*.

The question now to be considered differs from these in that an express and definite instruction exists to do an act which when done is wrongful and outside the objects of the company's constitution. To what extent, then, is the corporate property bound to compensate the wrong done by the direction of the corporation while professing to act, and believing themselves to act, as a corporation, though in a manner not authorised by their powers?

¹ See *Dormont v. Furness Ry. Co.*, 11 Q. B. D. 502.

² *The Mayor, &c. of Westminster v. L. & N. W. Ry.* (1905) A. C. 426.

³ *Rex v. Mayor, &c. of London*, 1 Show. (K. B.) 280; 8 How. St. Tr. 1030.

⁴ *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 673. *Baroness Wenlock v. River Dee Co.*, 10 App. Cas. 354. Whenever a duty is imposed on a public body, costs incidentally and necessarily incurred in protecting the interests and duties of such body may be paid by means of any rate the body has power to make: *The Queen v. White*, 14 Q. B. D. 358; *A. G. v. Vestry of Lambeth*, 4 Times L. R. 257; *A. G. v. Mayor of Brecon*, 10 Ch. D. 204; *Leith Council v. Leith Harbour & Docks Commissioners* (1899), A. C. 508.

⁵ *Poulton v. L. & S. W. Ry.*, L. R. 2 Q. B. 534.

The point is glanced at by Blackburn, J., in *Poulton v. L. & S. W. Ry. Co.*,¹ where he says: "In the present case an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorised him to do, and a thing which could never be right on the part of the company to do. *Having no power themselves they cannot give the station-master any power to do the act.* Therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station-master personally, but not against the railway company."² This was in accordance with the view that had long been accepted.

In *Harman v. Tappenden*³ an action was brought against members of a corporation in their private characters for acts done in their corporate capacity. It was questioned by Lord Kenyon, notwithstanding two early cases,⁴ whether the defendants were liable. He referred to a case he had argued before Lord Mansfield against Wadham College, where "the Master had great objection with respect to the facts agreed upon by a majority to be returned; conceiving that he would thereby make himself individually liable to the consequence; but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character." The case itself does not seem to throw any light on the point now being considered, as the act for which the defendants were sued was of a judicial nature, and the defendants acted to the best of their judgment.

In *Maund v. Monmouthshire Canal Co.*⁵ the question was whether trespass would lie against a corporation for the acts of its officers done within its authority; *Yarborough v. Bank of England*,⁶ was held to conclude the matter in the affirmative. The case was argued on motion in arrest of judgment, and a valid mandate from the Bank to do the wrongful act was presumed.

As against the application of these decisions to the present question, it may be contended that the acts done were committed about a matter necessarily incident to the corporation business, and that had the corporation not been held liable, an immunity from liability for torts would have been the necessary result.

In *Ferguson v. Kinnoull*,⁷ Lord Brougham, commenting on *Harman v. Tappenden*, notes that though Lord Kenyon and Lawrence, J., express doubts how far individual corporators can be sued, yet notwithstanding this, Lawrence, J., appeared to hold "that the action lay, if the defendants had in their corporate capacity tortiously

¹ L. R. 2 Q. B. 540.

² See note to *Maund v. Monmouthshire Canal Co.*, 4 M. & G. 452, citing, at 453 note (c), *inter alia*, Bro. Abr. Corporation, 43, where Lib. Assis. 22 Edw. 111. 100, pl. 67, is referred to, for the statement that a corporation cannot be sued in tres. ass.

³ (1801) 1 East 555, 560. Cp. the same judge, *The King v. Hollod*, 5 T. R. 607, 623.

⁴ *Rick v. Pilkington* (1690), Carthew 171, an action against the Lord Mayor of London in his private capacity for an act done with others in his public character, to which there was a plea in abatement; but see per Lord Lyndhurst in *Ferguson v. Kinnoull*, 9 Cl. & F. 251, 4 St. Tr. N. S. 785; and *Rex v. Rippon*, 1 Ld. Raym 564, a case of mandamus to the Corporation of Ripon, citing *Enfield v. Hills* (1679), Sir T. Jones 116. The report concludes thus: "The Court perceiving that the cause raised great heats between the parties, and faction in the City (of Canterbury), they were exhorted to peace and amity. Whereupon the parties agreed amongst themselves (as I think), for no judgment was given."

⁵ (1842) 4 M. & G. 452.

⁶ (1812) 16 East 6, where the learning on the cases is collected in the judgment of Lord Ellenborough, C. J.

⁷ 9 Cl. & F. 303, 4 St. Tr. N. S. 822.

Comment.

procured the acts complained of to be done by the corporate body ; and both he and Lord Kenyon agree that, for injurious acts wilfully and maliciously done, the corporators were liable in their individual character, though not for mere error of judgment." But the case in which this remark occurs is a Scotch case, in which the same learned lord had previously remarked : " There is a great laxity in the Scotch law as regards corporations. Almost any set of persons authorised in any way to act together, or continuing to act together for a length of time, seems to be regarded as a corporation."¹ Lord Brougham's opinion seems moulded with strict reference to the local facts before the House ; for he avoids enunciating any definite proposition on English law, and distinguishes a Scotch corporation from an English one on the ground that " new corporations with us"—*i.e.*, in England—" can only be created by statute or by grant from the Crown ;" while in Scotland " many private persons have the power of granting what is termed ' Seal of Cause,' which creates a corporation."² Notwithstanding that the head note to this case, as reported in the State trials,³ states the proposition without limitation : " Where the refusal"—to perform a public duty—" is the act of the majority of a corporation or other body, the members of the majority are individually liable," a proposition so broad as this does not appear anywhere in the speeches of the learned law lords. The nearest approach to it is in the speech of the Lord Chancellor,⁴ where the ground taken is the same as that taken in *Rich v. Pilkington*.⁵ The wrongful act was not a corporate act, but the act of a collection of individuals. Where this is so, individual liability follows ; and the test of whether any act, though wrongful, is a corporate act, or the act of a collection of individuals, is indicated in the argument of the Solicitor-General⁶ to be whether in doing a thing they have a right to do as a corporation, they are guilty of a mere error of judgment, or whether in doing a thing they have no right to do as a corporation they act perversely.

Mill v. Hawker.

The question of the individual liability of a member of a corporation did arise in *Mill v. Hawker*,⁷ where an action was brought against the surveyor and members of a highway board in their private character for acts committed by the surveyor under the order of the Board. From the course taken at the trial, the fact that the act done was wholly outside the powers of the Board was taken for granted. The element of perversity was, however, absent. The majority of the Court held that in respect of corporate acts the individual members of the corporation could not be sued. " It is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting *ultra vires*, then the mere fact of giving a corporate form to the act does not

¹ 9 Cl. & F. 301.

² The Scotch law is considered in *Gray v. Forbes*, 5 Cl. & F. 356.

³ 4 St. Tr. N. S. 785. In 9 Cl. & F. 251, the head note on this point is : " If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable, jointly and severally, for the failure and refusal."

⁴ *L.c.* 808.

⁵ Carthew 171.

⁶ Sir W. Follett, *arguendo*, 4 St. Tr. N. S. 801.

⁷ L. R. 9 Ex. 309, L. R. 10 Ex. 92.

prevent it from being the act of those who cause it to be done."¹ The Lord Chief Baron (Kelly) dissented. In a judgment in which all the authorities are collected and considered, he thought it "settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is *ultra vires*, and is not, and cannot be, in contemplation of law a corporate act at all."² "An individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character and not against an individual member."³ The Exchequer Chamber declined to decide the point, Blackburn, J., saying:⁴ "It is one of considerable importance and great difficulty. If it were necessary to decide that question, we should require time for consideration, and possibly when we had considered it our decision would not be unanimous. . . . We think it better, therefore, to leave the decision of the Court of Exchequer upon that point as it is. We leave it with the authority it had before—no better and no worse."⁵

Kelly, C.B.,
dissents.

On appeal to
Exchequer
Chamber,
point not
decided.

The remark of Kelly, C.B., obviously refers only to the former of the classes noted above, where corporations acting with reasonable latitude err in their judgments and so infringe others' rights. Strangely enough, *Ferguson v. Kinnoull* does not seem to have been cited in the argument, and is not noticed in the judgments, either in the Exchequer or in the Exchequer Chamber; yet Kelly, C.B.'s, language might well be used as based on the distinction indicated by the Solicitor-General in his argument in *Ferguson v. Kinnoull*, and certainly cannot be used as an authority against individual liability where the wrongful act is perversely done under the shadow of a corporate name.

Kelly, C.B.'s,
language
carefully
limited.

This point is touched on by Lord Bramwell in giving an illustration in *Abrath v. N. E. Ry. Co.*⁶ "If the directors even, by resolution at their board, or by order under the common seal of the company," "were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires*; they would have no authority to do it." The case, it may be noted, would be within the exception stated by Kelly, C.B., where "the corporate name be (is) used as a mere colour for the malicious act." Under the doctrine of *Ferguson v. Kinnoull* the peccant directors would be individually liable for their torts.

Lord Bram-
well in
Abrath v.
N. E. Ry. Co.

In the United States the question is settled. There the rule laid down is, that a corporation is liable to the same extent and in the same circumstances as a natural person for the consequences of their wrongful acts, and will be held responsible in a civil action, at the suit of an

Point settled
in America.

¹ L. R. 9 Ex. 317.

² L.C. 321. See remarks on the same point by Crompton, J., *Reg v. Train*, 9 Cox. C. C. 184.

³ L. R. 9 Ex. 322.

⁴ L. R. 10 Ex. 94.

⁵ This matter is now usually settled by statutory provisions in the case of corporations entrusted with administrative functions of local government; see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 265; Public Health (London) Act, 1891, (54 & 55 Vict. c. 76), s. 124. This leaves the question of good faith open. If it exists the Act though wrong and *ultra vires* is protected. If it does not and in the last resort the Court and jury have to decide, an action lies against the individuals.

⁶ 11 App. Cas. 251.

Swayne, J.,
in *National
Bank v.
Graham*.

Campbell, J.,
in *Philad-
phia, &c.
Rd. Co. v.
Quigley*.

Gray, J., in
*Lake Shore,
&c. Rd. Co.
v. Prentice*.

*Salt Lake
City v.
Hollister*.

injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which they commit, however foreign to their nature or beyond their general powers the wrongful transaction or act may be;¹ or, to quote the words of Swayne, J. :² "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application." "An action may be maintained against a corporation for its malicious or negligent torts however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel. In certain cases it may be indicted for misfeasance or non-feasance touching duties imposed upon it in which the public are interested. Its offences may be such as will forfeit its existence." The liability was expressed by Campbell, J., at an early stage of the series of cases in which the point is mooted, in the leading case of *Philadelphia, &c. Rd. Co. v. Quigley*.³ "The result of the cases is," said he, "that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found in the judicial annals of both countries, of suits for torts arising from the acts of their agents of nearly every variety."⁴

In *Lake Shore, &c. Rd. Co. v. Prentice*,⁵ Gray, J., and in the same Court, says: "This Court has often" "affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances." "A corporation is doubtless liable like an individual to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal." "A corporation may even be held liable for a libel, or a malicious prosecution by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation."

The course of the United States decisions seems uniformly to have run in the channel pointed out in this decision, and the doctrine of *ultra vires* does not appear to have been recognised as applicable to the case of torts, for which corporations are held responsible irrespective of the limits to their power of lawfully doing the acts out of which they arise. The distinction between the case of contracts and torts in this respect is pointed out in *Salt Lake City v. Hollister*.⁶ "The question,"

¹ *Reed v. Home Savings Bank*, 130 Mass. 443; *v. York and New Hampshire Rd. Co. v. Schuyler*, 34 N. Y. 30; *Merchants Bank State Bank*, 10 Wall. (U.S.) 604; *Central Rd. and Banking Co. v. Smith*, 52 Am. R. 353; *Denver, &c. Ry. Co. v. Harris*, 122 U. S. (15 Davis) 597; 2 Kent, Com. 284, and Mr. Holmes, note to 12th ed. On the liability of corporations for the torts or negligences of their directors, servants, and agents. Cp. *South Helton Coal Co. v. North Eastern News Association*, (1894), 1 Q. B. 133 (C. A.), as to the circumstances in which a corporation may sue in respect of libel.

² *National Bank v. Graham*, 100 U. S. (10 Otto) 702.

³ 21 How. (U. S.) 210.

⁴ The learned judge then cites authorities for his proposition, *inter alia*, *National Exchange Company of Glasgow v. Drew*, 2 Macq. (H. L. Sc.) 103.

⁵ 147 U. S. (40 Davis) 109.

⁶ 118 U. S. (11 Davis) 256; *Central Transportation Co. v. Pullman's Car Co.*, (1890), 139 U. S. (32 Davis), 24, 46; criticised in *Dillon Municipal Corporation*, § 1192, n. 1.

it is there said, "of the liability of corporations on contracts which the law does not authorise them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is practised on him. The powers of these corporations are matters of public law open to his examination, and he may and must gauge for himself as to the power of the corporation to bind itself by the proposed agreement."

The United States rule seems an intelligible one; and, reasoning from the analogy of the now recognised liability of corporations at English law for fraud,¹ for malicious prosecution,² for libel,³ and for intentional misfeasance,⁴ will probably be applied by the English Courts whenever the point calls for decision, adopting the line of reasoning indicated by Kelly, C.B., in his dissentient judgment in *Mill v. Hawker*, and emphasised by what was said in the Common Pleas by Erle, C.J.:⁵ "We think it extremely important that these companies should be held responsible where they admit they have intentionally done a wrongful act, and that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants, who may be wholly unable to answer the compensation which the jury may award to the injured party."

The point that has been noted before still remains. Would the directors of a company, inspired individually with private animosity and who act collectively to avoid individual responsibility, be able to evade the law by this ruse? The presence of fraud will invalidate anything done by its means, and there is little doubt that on the finding of a jury that the corporate name was used as a pretext and a blind, the individual liability of the wrongdoers would be established.

Further, it seems clear that a chartered corporation may forfeit its charter by nonfeasance. In the *City of London case*⁶ it was conceded in argument that a corporation might be dissolved for refusal to act. In the subsequent case of the *City of London v. Vanacre*,⁷

as too wide; see also Pollock, Contracts (7th ed.), Appendix D, Limits of Corporate Powers. In *Sulmon v. Hambrough Co.* (1871), 1 Cases in Chancery, 204, the House of Lords directed contributions to be levied on the members of a company to pay the plaintiff's debt, the assets of the company being insufficient for the purpose. There are articles on the Liability of Corporators in the American Law Magazine, vol. i. 96, vol. iv. 92, 362.

¹ *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Ranger v. G. W. Ry. Co.*, 5 H. L. C., per Lord Cranworth, 87; *Royal British Bank, Ex parte Nicol*, 28 L. J. Ch. 257, per Lord Chelmsford, C. 265. The Chancery cases are not quite consistent on this subject. Brice, *Ultra Vires* (3rd ed.), 426.

² *Bank of New South Wales v. Owenston*, 4 App. Cas. 270; *Edwards v. Midland Ry. Co.*, 6 Q. B. D. 287. See, however, Lord Bramwell in *Abrath v. N. E. Ry. Co.*, 11 App. Cas. 250; but note also the remarks of Earl of Selborne, at 256, as to malice in a corporation. *The King v. Mayor, &c. of London*, 1 Show. 275 (K. B.); 8 How. St. Tr. 1039. In the *Queen v. Great North of England Ry. Co.*, 9 Q. B. 315, an indictment was held to lie against a corporation for misfeasance. It seems to have been taken to be indisputable that a corporation is indictable for a wrongful omission of duty. See *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. per Lord Blackburn, 869; The Interpretation Act 1889 (52 & 53 Vict. c. 63), ss. 2, 19; Short and Mellor, *Crown Practice* 98; C. O. R. 1906, r. 35. Lord Lindley in *Citizen's Life Assurance Co. v. Brown* (1904), A. C. 423, had the satisfaction of deciding judicially what he had long maintained as a text writer, that a corporation may be guilty of malice, and that a libel published by a servant in the course of an employment that is authorised will affect the corporation with liability. *Cornford v. Carlton Bank, Ltd.* (1900), 1 Q. B. 22.

³ *Whitfield v. S. E. Ry. Co.*, E. B. & E. 115.

⁴ *Green v. London General Omnibus Co.*, 7 C. B. N. S. 290.

⁵ L. C. 303; in this case the corporation was a trading one created by statute.

⁶ 8 How. St. Tr. 1039.

⁷ 12 Mod. 271.

Tendency of opinion.

Effect of nonfeasance on the position of a corporation.

Holt, C.J., laid down that "All franchises are granted on condition that they shall be duly executed according to the grant; and if they [the grantees] neglect to perform the terms the patents may be repealed by *scire facius*." Blackstone¹ also includes amongst the causes for which a charter of a corporation may be forfeited, "negligence or abuse of its franchises;" and Ashhurst, J., in *The King v. Amery*,² says: "All franchises may be lost by non-user or neglect; and the strongest case of non-user or neglect is that which appears on the record when the parties are called upon in a Court of Justice to state their right and they neglect or refuse to do it."³

This rule of law was of great constitutional importance before the Revolution of 1688;⁴ of late years the subject does not seem to have been discussed in England; there is, however, a wealth of American authority that completely exhausts the learning of the subject.⁵

Liability of corporations for the negligence of officers carrying out duties of general public concern, as distinguished from duties of local administrative concern. Distinction between servants of the corporation and statutory officers.

The liability of municipal corporations for the negligence of officers charged with carrying out duties of general public concern—such as policemen—has been largely considered in America; and municipal corporations have been held not responsible, on the ground that they are public officers engaged in the discharge of general public duties. "The powers and duties with which police officers and constables are intrusted are derived from the law and not from the city or town under which they hold their appointment."⁶ "If," says an interesting New York case,⁷ "the corporation appoints or elects them, and can control them in the discharge of their duties, and continue or remove them, can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation and its local and special interest, they may justly be regarded as its servants or agents, and the maxim of *Respondent superior* applies. But if, on the other hand, they are elected or appointed by the corporation in obedience to the statute, to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the Legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or State

¹ 1 Com. 485. See *Corporation of Colchester v. Seaber*, 3 Burr. 1866; *Mayor of Colchester v. Brooke*, 7 Q. B. 382.

² 2 T. R. 597. In this case the subject of the forfeiture of corporate franchises by non-user or mis-user was fully discussed. The judgment of the King's Bench was reversed by the House of Lords, 2 Bro. Parl. Cas. 336, on the ground that two corporations for the same purposes of government cannot, by law, exist within one and the same place and at one and the same time.

³ In proceedings against corporations in the nature of *quo warranto*, the King must be a party to the prosecution. *Rex v. Staverton*, Yelv., 190; *The King v. Ogden*, 10 B. & C. 230.

⁴ Hallam, Const. Hist. vol. ii. (8th ed.), 450.

⁵ *The People v. Kingston, &c. Turnpike Road*, 23 Wend. (N. Y.) 193; *The People v. Bristol, &c. Turnpike Road*, 23 Wend. (N. Y.) 222; *The People v. Hillside Turnpike Road*, 23 Wend. (N. Y.) 254; *Thompson v. The People*, 23 Wend. (N. Y.) 537; also the note to *State v. Atchison, &c. Railroad Co.*, 8 Am. St. R. 179; Angell and Ames on Private Corporations, cc. 19, 20, 21.

⁶ Per Bigelow, C. J. *Buttrick v. Lowell*, 83 Mass. 174.

⁷ *McKay v. City of Buffalo*, 9 Hun (N. Y.) 401, at 403, affd. 74 N. Y. 619, where a policeman, in pursuance of the city regulations, shooting at a dog supposed to be mad, in the public streets, so negligently handled his pistol as to shoot the plaintiff, who sued the city; but was held not entitled to recover. To the same effect is *Whitfield v. City of Paris*, 31 Am. St. R. 69.

officers, with such powers and duties as the statute confers upon them, and the doctrine of *Respondent superior* is not applicable."¹

Further, where the police are under the control of commissioners, not only are the city authorities not liable, but neither are the police commissioners, for the negligence of any member of the force.² This freedom from liability may be placed on either of two grounds. First, the commissioners are appointed "to perform a public service not peculiarly local or corporate," within the meaning of the principle just stated. Secondly, because there is no more relation of master and servant in the case under consideration than between an officer and the men of his regiment; or than, at common law, there is between the managing director of a railway and the platelayers or pointsmen engaged on it.

Control of police. Neither municipal corporation nor police commissioners liable for negligence of members of the force.

The English case of *Stanbury v. Exeter Corporation*³ turned on a somewhat minute examination of the not plain sections of a long and complicated Act of Parliament. The distinction, however, aimed at is clear between officers appointed to carry out duties by the local authority and in subordination to them, and officers appointed (it is immaterial by whom) to carry out duties in conjunction with the local authority. For the acts of the former in the scope of their employment the local authority is liable, in the latter it is not. Wills, J.,⁴ approves the principle of the American cases: "If the duties to be performed by the officers appointed are of a public nature and have no peculiar local characteristics, then they are really a branch of the public administration for purposes of general utility and security which affect the whole kingdom; and if that be the nature of the duties to be performed it does not seem unreasonable that the corporation who appoint the officer shall not be responsible for acts of negligence or misfeasance on his part." Yet up to this no such principle has been accepted in English cases.

Stanbury v. Exeter Corporation.

Wills, J.'s, ratio decidendi.

The test in America may be all right; in England it is merely an evasion of the issue, which surely is whether the officers (whatever the duties they perform) are made accountable to the local authority. The test in this class of cases is the same as in ordinary cases where the matter in dispute is whether the relation is that of employer and employed who "has put the agent in his place to do that class of acts?"⁵ To arrive at the answer to this four questions are to be answered:

Criticised.

- (1) Between whom is the employment for service made?
- (2) By whom is payment of wages made?
- (3) Who has the power to discharge?
- (4) And most important of all, whose orders is the employed bound to obey?"⁶

In the United States cases so much stress is laid on the distinction between "public duties" and "private or corporate powers" that definitions of these terms as enunciated in a recognised United States authority may here be noted. "Public duties," it is said,⁷ "are, in

"Public duties" and "private or corporate powers" distinguished.

¹ Cf. *Bultrick v. City of Lowell* 83 Mass. 172, followed *McCleave v. City of Moncton*, 32 Can. S. C. R. 106.

² *Altwater v. Mayor, &c. of Baltimore*, 31 Md. 462.

³ (1905) 2 K. B. 838. At 4 Local Gov. R. 65, there is a note that should be looked at. *Enceer v. The King* (1906), 3 C. L. R. (Australia) 969. *Winterbottom v. London Police Commissioners* (1901), 1 Ont. L. R. 549, distinguishing *Hesketh v. City of Toronto*, 25 Ont. A. R. 449. *Ante*, 241.

⁴ *L.c.* 843.

⁵ *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. per Willes, J., 296.

⁶ *Swinson v. N. E. Ry. Co.*, 47 L. J. Q. B. 372.

⁷ *Hart v. City of Bridgeport*, 13 Blatchf. (U. S. Cir. Ct.) 293. The general principle is investigated by Marshall, C.J., *Foule v. Common Council of Alexandria*, 3 Peters (U. S.) 409.

general, those which are exercised by the State as a part of its sovereignty for the benefit of the whole public, and the discharge of which is delegated or imposed by the State upon the municipal corporation." "Private or corporate powers are those which the city is authorised to execute for its own emolument and from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognised duties which are undertaken by the government for the universal benefit." Duties of the former kind are duties of preserving the peace and protecting property; of the latter the right to make sewers, to provide gas and water, to establish parks, or to build markets.

Position of
the Metro-
politan police
force.

In the Metropolitan Police District there is plainly no more than a personal liability attaching to any member of the Metropolitan police force for negligence in his office; since the force is under the direction of the Secretary of State for the Home Department,¹ and the superior officers are not employers; while the Crown, which is the employer, cannot be sued in tort.²

Position of
the county
police force.

In the counties the control of the police is mainly regulated by the County Police Acts, of which the principal are 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88.³ By sec. 6 of the earlier of these Acts the chief constable has the power of appointment and dismissal of petty constables; so that an action against the county justices as the superintending power is excluded by their want of power of control, even if, on other grounds, a liability might be established. Between the chief constable and the petty constable the relation is, as we have seen, no more than that between a manager with full powers and the staff he supervises.

Position of
the borough
police.

The Municipal Corporation Act, 1882,⁴ Part ix. Police, provides for the appointment of constables in boroughs by a watch committee, appointed by the council. Sec. 191 requires that any constable shall obey "all such lawful commands as he receives from any justice having jurisdiction in the borough, or in any county in which the constable is called to act."⁵ Thus neither in the corporation, nor in the watch committee, nor in the justices, nor yet in the chief constable, do those qualities inhere which are necessary to be found for the purpose of establishing a relation raising a legal liability.⁶

¹ 10 Geo. IV. c. 44; 2 & 3 Vict. cc. 47, 71; 19 & 20 Vict. c. 2.

² *Whitfield v. Lord Le Despencer*, 2 Cowp. 754; *Tobin v. The Queen*, 16 C. B. N. S. 310. *Ante*, 219.

³ There are numerous amending and extending Acts which are to be found in the official Index of Statutes, and see Sched. 5 of the Police Act, 1890 (53 & 54 Vict. c. 45).

⁴ 45 & 46 Vict. c. 50.

⁵ Sec. 192 refers to a supervision by the Secretary of State. Neglect or violation of duty by a constable is punishable on conviction by two justices with a penalty not exceeding £10: Sec. 16, Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89).

⁶ The rule of *Respondet superior* is based upon the right which the employer has to select his servants, to discharge them if not competent or skilful or well-behaved, and to direct and control them while in his employ. This rule has no application to a case in which the powers do not coexist: *Maximilian v. Mayor, &c., of New York*, 62 N. Y. 160. Officers of the fire department of a municipality have been held to be in the same category as the police, *Burrill v. City of Augusta*, 78 Me. 118. For other officers in the same position, e.g., overseers of the poor, assessors and collectors of taxes, see the cases cited by Allen, C.J., *Tindley v. City of Salem*, 137 Mass. 174. A medical officer of health was held not a servant of a corporation in *Forsyth v. Canniff*, 20 Ont. R. 478. *Evans v. Liverpool Corporation* (1906), 1 K. B. 160. The treasurer of a borough is not a servant of the Council; he owes a duty to and stands in a fiduciary

The point has not arisen in any English reported case, but in America it is clearly established that no action lies against a policeman at the suit of any private person for injury sustained by his negligence, because the duty of the policeman is not to individual members of the community but to his superiors only. Cooley, J., instances the case of the policeman who "goes to sleep on his beat, and a robbery is committed which would not have been committed had he kept awake and attended to his duty. Yet, although the municipality whose officer he is may punish him for this neglect of duty by a deprivation of his office or otherwise as provided by law, he is not answerable for the damages suffered by the person robbed. There is no privity between them; he is the officer of the city, and not of the citizen."¹

No action against a policeman by any private person for nonfeasance.

When an action is brought against a corporation for the negligent exercise of their powers, a question often arises as to what state of the facts is sufficient to raise the presumption of negligence against the defendant corporation. Where the matter is one of which *res ipsa loquitur*, there is no difficulty. But it may happen that the mere existence of the thing complained of is not actionable without proof of some default on the part of the corporation. If, for example, a duty were imposed on a corporation to clear away street refuse within a reasonable time after it is deposited on a street; and the evidence merely points to the existence of refusal at a definite point of time, without any indication whether it had been long on the street or only just placed there, the *onus* of the plaintiff would not be discharged, since the facts are equally consistent with liability or non-liability. In this case, in America, the rule adopted is that it is necessary to bring home to some of the officers of the corporation actual notice of the circumstances relied on to establish default prior to the happening of the accident; or to affect them with implied knowledge by showing the circumstances to have been sufficiently notorious for it to be reasonable to fix the corporation with notice of them; in this latter case the jury will be warranted in concluding that the circumstances can only be explained by attributing them to negligence. This rule has been adopted in the Canadian Courts,² but the point does not appear to have come up directly for decision in any English reported case.

Onus of proof in case of corporation charged with negligence.

Previously to the passing of the Public Authorities Protection Act, 1893,³ the cases as to the notice of action required under various general public Acts were numerous, important, and conflicting. By that Act the sections, requiring notice of action to be given or proceeding to be begun in any particular place or within any particular time, or making special provisions as to costs or authorising a pleading of the general issue, contained in more than one hundred Acts,⁴ including the Highway Act, 1835, the Metropolis Management Acts, 1855 & 1862, and the Public Health Act, 1875, are repealed, and an uniform mode of procedure is substituted.

Public Authorities Protection Act, 1893.

relation to the burgesses as a body: *A.-G. v. De Winton* (1906), 2 Ch. 106, 116. As to county treasurer: *Reg v. Saunders*, 24 L. J. (M. C.) 45, 48.

¹ *Thompson, Negligence*, § 6302.

² *Town of Portland v. Griffiths*, 11 Can. S. C. R., per Gwynne, J., 344; *Castor v. Uttridge*, 39 U. C. Q. B. 113, 127. The law on the subject of valid by-laws is summarised in 1 Woodd, *Lec.* 495-500. "A by-law," says Sir George Treby in his argument in the *King v. The City of London*, quoting Hobart, C.J., to a corporation "is a mind as reason is to a man, but it hath no moral mind," 8 How. St. Tr. 1134.

³ 56 & 57 Vict. c. 61.

⁴ See the schedule to the Act.

Public
Authorities
Protection
Act, 1893.

1. No action,¹ prosecution, or proceeding² will lie against any person for any act done in intended execution³ of any public statutory duty, or for any alleged neglect thereunder,⁴ unless commenced within six months after the occurrence of the event from which it takes its rise; or in the case of a continuing damage⁵ within six months after its cessation.⁶

2. Where the defendant succeeds he is entitled to costs to be taxed as between solicitor and client.⁷

3. Where the action is for damages the defendant may plead tender of amends⁸ before action, or may make a payment into court. If no more is recovered⁹ than is tendered or paid the plaintiff is not to recover any costs incurred subsequent to the tender or payment; but the defendant is to have his costs subsequent thereto as between solicitor and client.¹⁰ This provision does not affect the costs of an injunction.

¹ This includes actions where an injunction is asked for, see s. 1 sub-s. (c.) (and thus supercedes the law laid down in *Flower v. Low Leyton Local Board*, 5 Ch. D. 347; *Chapman v. Auckland Union*, 23 Q. B. D. 204; and all actions in the Chancery Division, *Harrop v. Mayor of Osselt* (1898), 1 Ch. 525, or elsewhere, so long as the action is brought against any one for an act done in pursuance or execution or intended execution of any Act of Parliament: *The Ydon* (1899), P. 230; and extends even to the working by a municipality of a tram system under statutory powers, *Parker v. London County Council* (1904), 2 K. B. 591; but not to the case of a contractor doing work for his own profit which a public authority has been authorised to do: *Kent County Council v. Folkestone Corporation* (1905), 1 K. B. 620. It covers an ordinary action for personal negligence; *Lyles v. Southend-on-Sea Corporation* (1905), 2 K. B. 1, but not the breach of a private contract entered into in contemplation of a public duty; *Sharpington v. Fulham Guardians* (1904), 2 Ch. 449; *Clarke v. Lewisham District Council*, 19 Times L. R. 62; nor yet a breach of duty by any company performing duties of public authority, but also earning profit for its proprietors, e.g., a railway company: *A.-G. v. Margate Pier and Harbour Co.* (1900), 1 Ch. 749. In libel, statements in a resolution dismissing a schoolmaster upon which he founded an action against the School Board, were held within the Act; *Reid v. Blisland School Board*, 17 Times L. R. 626. Officers of a local board acting under orders to vindicate a right of highway are held protected in an action for trespass brought against them; *Greenwell v. Howell* (1900), 1 Q. B. 535. An action *in rem* is not within the Act; *The Burns* (1907) P. 137; applying *The Lowford*, 14 P. D. 34; nor is one for goods sold and delivered and for work and labour, *Miford Docks v. District Council*, 65 J.P. 483.

² I.e., applications under 11 & 12 Vict. c. 44, for *mandamus*, prohibition, or *certiorari*, not made by a department of the Government. The time for moving these writs is limited by the Act to six months; and the law as stated in the *Queen v. Mayor, &c. of Sheffield*, L. R. 6 Q. B. 652, is now altered, except in the case of a *certiorari* to justices.

³ *Clothier v. Webster*, 12 C. B. N. S. 700. The intention is no defence on the merits, *Selmes v. Judge*, L. R. 6 Q. B. 724.

⁴ *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62.

⁵ The calculation of the six months runs from the time of the legal injury; *Offin v. Rochford Rural District Council* (1906), 1 Ch. 342. The prolonged effect of an injury is not a continuance of the act causing damage; *Carey v. Metropolitan Borough of Bermondsey*, 20 Times L. R. 2; *Markey v. Tolworth Joint Isolation Hospital District Board* (1900), 2 Q. B. 454; *Williams v. Mersey Docks & Harbour Board* (1905), 1 K. B. 804; *Spittal v. Glasgow (Corporation of)*, 6 Fraser 828; *Polley v. Fordham* (1904), 2 K. B. 345; *Turley v. Daw*, 22 Times L. R. 231.

⁶ *Crumbie v. Wallasey Local Board* (1891), 1 Q. B. 503.

⁷ *Avery v. Wood* (1891), 3 Ch. 115; *Andrews v. Barnes*, 39 Ch. D. 133. The general law applies to the plaintiff's costs, 53 & 54 Vict. c. 44, s. 5; R. S. C. 1883, Order lxx. r. 1. *Reeve v. Gibson* (1891), 1 Q. B. 652; *Hasker v. Wood*, 54 L. J. (Q. B.) 419.

⁸ *Pavys v. Richardson*, 21 Q. B. D. 202.

⁹ "Recover" in clause (c) of sec. 1, means recover by judgment, or by consent order; *Smith v. Northcote Rural Council* (1902), 1 Ch. 197.

¹⁰ The discretionary power under Order lxx. r. i. to deprive the defendant of his costs is not taken away by this provision; *Bostock v. Ramsey Urban District Council* (1900), 2 Q. B. 616; and the Act does not apply to appeals; *Fielden v. Morley Corporation* (1900), A. C. 133. No special direction is needed for the defendant to take advantage of the Act; *North Metropolitan Tramways Co. v. London County Council* (1898), 2 Ch. 145. A consent order dismissing an action with costs is equivalent to a judgment; *Shaw v. Herefordshire County Council* (1899), 2 Q. B. 282; but see *Aird v. School Board*, 9 Fraser 22.

Pearson v.
Dublin
Corporation,
(1907) 2 I. R.
27.

Certiorari.

4. Where the defendant is in the opinion of the court not afforded "sufficient opportunity of tendering amends" before the commencement of proceedings, the court may award costs against the plaintiff as between solicitor and client.

The provision of 5 & 6 Vict. c. 97, sec. 4, that where notice of action is required, such notice shall be given one calendar month, at least, before any action shall be commenced, remains unrepealed and operative so far as local and personal acts are concerned.

Before leaving the subject of corporations the peculiarity of their position as to estoppel should be noticed. A private person may always preclude himself from asserting his legal rights by conduct on which others have acted based on the assumption that he has not such rights or has abandoned them. A body exercising public rights or statutory powers cannot forgo them either implicitly or explicitly. The rights with which it is clothed are not for its own benefit; and it cannot be permitted in any way to act adversely to the purposes of its creation. This has been established law since *Fairtitle v. Gilbert*.¹ Turnpike trustees by their Act had power to erect toll-houses and to mortgage the tolls. They mortgaged the houses. The mortgagees brought ejection. The trustees objected that their act was *ultra vires*. The plaintiff then said they were estopped from taking the point, having concurred in the conveyance. The King's Bench decided against him. "In general the party granting is estopped by his deed to say he had no interest; but that general principle does not apply in this case, where the trustees are not acting for their own benefit, but for the benefit of the public." "Besides there is a still further reason why the trustees should not be estopped; for this is a public Act of Parliament, and the Court are bound to take notice that the trustees under this Act had no power to mortgage the toll-houses."

The law thus laid down was accepted in *In re Companies Acts, Ex parte Watson*.² While in *Great North Western Central Ry. Co. v. Charlebois*³ the Privy Council gave their sanction to the *a fortiori* position: "a company cannot do what is beyond its legal power by simply going into Court and consenting to a decree which orders that the thing shall be done." And in *Islington Vestry v. Hornsey Urban Council*⁴ the Court of Appeal affirmed the proposition that a public body, with public duties, and with rights and powers conferred upon them to enable them to discharge those duties, are not estopped from enforcing a right to put an end to what they have permitted, and even encouraged and agreed to allow.

¹ 2 T. R. 169.
² (1899) A. C. 114, 124.

³ 21 Q. B. D. 301.
⁴ (1900) 1 Ch. 695, 705.

5 & 6 Vict.
 c. 97, s. 4,
 unrepealed in
 the case of
 local and
 personal acts
 not
 scheduled.
 Estoppel.

*Fairtitle v.
 Gilbert.*

*Great North
 Western
 Central Ry.
 Co. v.
 Charlebois.*

*Islington
 Vestry v.
 Hornsey
 Urban
 Council.*

CHAPTER IV.

HIGHWAYS, TURNPIKES, CANALS, ETC.

I. HIGHWAYS.

Definition.

A HIGHWAY in English law¹ is the largest expression to designate a public way, and includes all roads, bridges (not being county bridges), carriage-ways, cartways, horseways, bridle-ways, foot-ways, causeways, churchways, and pavements, and is a way open to all the King's subjects, and not to a limited number only.²

Various kinds of highways.

¹ 5 & 6 Will. IV. c. 50, s. 5. Probably the earliest record of the construction of straight highways is of those made by King Archelaus of Macedonia, and noted by Thucydides, bk. ii. 100, *ὁδοὺς ἐπίπλεας ἔθηκε, κ.τ.λ.* This Archelaus is the patron of Euripides and the tyrant whose crimes are recounted by Plato in the Gorgias, § 59. The law of highways in the Civil Law is to be found in D. 43, tt. 7-13.

² *The King v. Richards*, 8 T. R. 634. In law, public rivers are highways: *Mayor of Colchester v. Brooke*, 7 Q. B. 339, 373. "The right of navigation," says Lord Hatherley, C., in *Orr Ewing v. Colquhoun*, 2 App. Cas. 240, "is simply a right of way." "The bed of all navigable rivers where the tide flows and reflows, and at all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm." "The grant by the Crown of any part of the bed or soil of this estuary [at Whitstable] below low-water mark, whether for a fishery or not, must by the common law have been subject to the public right of navigation, of which the right to anchor is an essential part, that no property can be claimed in the soil except subject to this over-riding right": per Lord Westbury, C., *Gann v. Free Fishers of Whitstable*, 11 H. L. C. 207, 209. As to placing a permanent obstruction, *Eastern Counties Ry. Co. v. Dorling*, 5 C. B. N. S. 821; *Rex v. Lord Grosvenor*, 2 Stark. (N. P.), 511. A railway is a public highway to be used in a particular mode. A footway can be used only for foot passengers and not by others, yet it is certainly a public highway: per Holroyd, J., *The King v. Severn and Wye Ry. Co.*, 2 B. & Ald. 648. In Gibbon, Law of Dilapidations (2nd ed.), 298, it is said: "A way merely leading to a church, a village, or a private house, and therefore not useful to the public generally, is not a highway." For this proposition *Katherine Austin's case*, 1 Vent. 189, is cited: "An indictment was found against her that she *vi et armis* a certain part of the King's highway leading from Shoreditch Church to Stoke Newington, through Hogsdon, *postibus et repagulis inclusit, &c.*" The true bearings of the proposition, however, appear clearly in *Thrower's case*, 1 Vent. 208: "He was indicted at the sessions of the peace at Ipswich for stopping *communem viam pedestrem ad ecclesiam de Whilby*." Hale, C.J.'s, judgment is reported as follows: "If this were alleged to be *communis via pedestris ad ecclesiam pro parochianis*, the indictment would not be good, for then the nuisance would extend no further than the parishioners, for which they have their particular suits; but for aught appears this is a common footway, and the church is only the terminus *ad quem*, and it may lead further; the church being expressed only to ascertain it, and it is said *ad commune nocumentum*"; but see the definition in 5 & 6 Will. IV. c. 50, s. 5, set out in the text. In *Young v. Cuthbertson*, 1 Macq. (H. L. Sc.) 455, 458, Lord Cranworth, C., said: "If, indeed, Starleyburn had been a mere private house to which the public had been in the habit of going from Burnt-island, and returning back again, I believe the case would not have properly come within the description of a public right of way: for the owner might destroy the house and shut up the way, and then there would be an end of it. But here the right of way extended further." In *Bourke v. Davis*, 44 Ch. D. 122, Kay, J., says: "It is argued

What constitutes dedication.

Primâ facie a road that leads from one public place to another is a highway.¹ It may not be repairable by the local authority;² nevertheless the public may be entitled to the use of it although not bound to repair it.³

Each parish ought of common right to repair the highways within its boundaries.⁴ Before 1836 any road dedicated to, and used by the public, became a highway repairable by the inhabitants at large.⁵ The Highway Act, 1835,⁶ added a condition that the parish should not be compellable to repair a road so dedicated, "unless a variety of things were done, one of which is that it shall be made in a substantial manner, and to the satisfaction of the surveyor."⁷ Notwithstanding this, a road may still be a highway, though it is not repairable by the inhabitants at large.⁸

Liability of parish to repair.

By an Act in the time of Queen Mary⁹ the care of highways was entrusted to two surveyors for each parish. This Act was made perpetual¹⁰ and continued in force till 1767.¹¹ The Act at present in force by which the powers and duties of surveyors of highways are defined and regulated is that just alluded to, the Highway Act, 1835.¹²

Various statutory enactments.

That a *cul de sac* may be a highway. That is so in a street, in a town, into which houses open, and which is repaired, sewered, and lighted by the public authority at the expense of the public. Lord Cranworth instances Connaught Place which opens into the Edgware Road, *Young v. Cuthbertson*, 1 Macq. (H. L. Sc.) 456, and see *Rugby Charity v. Merryweather*, 11 East 375 n. But I am not aware that this law has ever been applied to a lone tract of land in the country on which public money has never been expended." *Rugby Charity v. Merryweather* is discussed, 3 Kent, Comm. 450. The true principle is said to be that, if there be no other evidence of a grant or dedication than the presumption arising from the fact of acquiescence on the part of the owner, the period of twenty years applicable to incorporeal rights would be required as the period of limitation. Other evidence of intention may shorten the period, or explicit and unequivocal acts of dedication may do so. As Hale, C.J., says, in the case cited above, *Katherine Austin's case*, "Tis a matter of fact, and much depends upon common reputation. If it be a public way of common right, the parish is to repair it, unless a particular person be obliged by prescription or custom." Though it is law that a *cul de sac* may be a highway, a dedication will not be presumed from the mere transit of passengers to see a view at the end, or some object of interest there. The main consideration is, has public money been expended in maintenance. An owner who has allowed the expenditure of public money on a road on his estate cannot afterwards be permitted to claim it as a private road; *A.-G. v. Antrobus* (1905), 2 Ch. 188, 207. For the difference between English and Scotch law in constituting a public right of way, see per Lord Blackburn, *Mann v. Brodie*, 10 App. Cas. 385. As to what is a "street," and how it differs from a highway under the Public Health Act (1875), see per Jessel, M.R., *Taylor v. Oldham Corporation*, 4 Ch. D. 408; *Maude v. Baildon Local Board*, 10 Q. B. D. 394; *Robinson v. Barton Eccles Local Board*, 8 App. Cas. 798; *Mayor of Portsmouth v. Smith*, 10 App. Cas. 364. For "way of necessity" see Mr. Holmes's note, 3 Kent, Comm. (12th ed.), 424; *Richards v. Kensington*, 57 L. J. M. C. 48; *Hill v. Wallasey Local Board* (1894), 1 Ch. 133; a private road is a street within ss. 16 and 54 of the Public Health Act, 1875.

¹ Per Lord Cranworth, *Campbell v. Lang*, 1 Macq. (H. L. Sc.) 451; *Young v. Cuthbertson*, 1 Macq. (H. L. Sc.) 455, 457.

² 5 & 6 Will. IV. c. 50, s. 23.

³ *Roberts v. Hunt*, 15 Q. B. 17.

⁴ *Rex v. Ragley*, 12 Mod. 409; *The Queen v. Inhabitants of Ashby Folville*, 1 L. R. 1 Q. B. 213, where it is doubted whether in point of law a parish could be bound by prescription to repair highways in another parish. As to repair of highways by the inhabitants of a particular district within a parish, *The King v. Inhabitants of Ecclesfield*, 1 B. & Ald. 348; *The Queen v. Rollett*, L. R. 10 Q. B. 469.

⁵ *Reg v. Tithing of Westmark*, 2 Moo. & Roh. 305; *Rex v. Hudson*, 2 Str. 909.

⁶ 5 & 6 Will. IV. c. 50, s. 23.

⁷ *The Queen v. Inhabitants of Dukinfield*, 4 B. & S., per Blackburn, J., 172.

⁸ *Roberts v. Hunt*, 15 Q. B. 17.

⁹ 2 & 3 Ph. & M. c. 8.

¹⁰ 29 Eliz. c. 5, s. 2, repealed 42 & 43 Vict. c. 59.

¹¹ 7 Geo. III. c. 42, s. 57, repealed 13 Geo. III. c. 78, s. 83, repealed 5 & 6 Will. IV. c. 50, s. 1.

¹² 5 & 6 Will. IV. c. 50, s. 6 of which provides for surveyors being elected by the

In the Metropolis, the district boards and vestries have the powers of surveyors conferred on them by the Metropolis Management Act, 1855.¹ By the Public Health Act, 1875,² every urban authority is to be the surveyor of highways in its district. By the Highway Act, 1862,³ in highway districts the powers of surveyor of highways were vested in the highway boards. Now by the Local Government Act, 1894,⁴ highway boards are abolished, and the district council for any rural district has transferred to it the powers, duties, and liabilities of any highway authority within its district; and the rural district council is constituted surveyor of highways.⁵ In all the above cases, where the powers of the surveyor vest in local authorities, the surveyor appointed by the local authority is the officer to perform the duties that attach to the surveyor under the Highway Act, 1835.⁶

Action for non-repair will not lie.

We have already seen⁷ that an action does not lie for an injury arising merely from non-repair of a highway; because the liability was in the parish, and at common law no action could be maintained against it.⁸ An indictment might be preferred against the inhabitants of a parish or township for non-repair of a highway, or against the inhabitants of a county for the non-repair of a bridge;⁹ though it does not lie against their officers.¹⁰ This liability to repair continues notwithstanding any agreement with the owners of houses alongside a highway to do the repairs.¹¹ As between the parish and the owners there is the liability on the contract.¹²

By the Tramways Act, 1870,¹³ the Tramway Company are made in the first instance the persons taking the care and guardianship of the highway within the limits of their undertaking, but their authority is subordinate to that of the road authority, conformity to whose directions discharges their obligation.¹⁴

Presentment of highways out of repair abolished.

Formerly justices of assize and of the peace might have presented highways which were out of repair; now, by 5 & 6 Will. IV. c. 50, s. 99, it is not lawful to take any legal proceedings by presentment against the inhabitants of any parish or other person on account of any highway being out of repair.

Section 94 of that Act substitutes a method, by which, on the oath of a credible witness before a justice of the peace, a summons may be issued requiring the surveyor or other person chargeable with the repairs to appear before the justices at special highway sessions. The

inhabitants; and s. 11 for their appointment by justices in certain events. As to the attendants with which this power in justices must be exercised, see *Regina v. Best* and others, 5 D. & L. 40.

¹ 18 & 19 Vict. c. 120, s. 96.

² 38 & 39 Vict. c. 55, s. 144.

³ 25 & 26 Vict. c. 61.

⁴ 56 & 57 Vict. c. 73, s. 25.

⁵ 38 & 39 Vict. c. 55, s. 144, incorporated in 56 & 57 Vict. c. 73, s. 25, sub-s. 1.

⁶ 38 & 39 Vict. c. 55, s. 144.

⁷ *Supra*, 298.

⁸ *Russell v. Men of Devon*, 2 T. R., per Lord Kenyon, 672.

⁹ Hawk. P. C. bk. 1, c. 71, s. 3; *The Queen v. Birmingham and Gloucester Ry. Co.*, 3 Q. B. 223.

¹⁰ *The King v. Dixon*, 12 Mod. 108.

¹¹ *The King v. The Mayor, &c. of Liverpool*, 3 East 86.

¹² *The Queen v. Ashby Folville*, L. R. 1 Q. B. 213; *Runde v. Hearle* (1898), 2 Q. B. 83.

¹³ 33 & 34 Vict. c. 78, ss. 28, 29, 55; *Aldred v. West Metropolitan Tramways Co.* (1891), 2 Q. B. 396, followed in *Barnett v. Poplar Corporation* (1961), 2 K. B. 319. Beyond the right to lay down and maintain their grooved rails on the public streets, and to use them for their trams, the right of a tramways company is not exclusive, and it may not use its lines so as to make a nuisance: *Ogston v. Aberdeen District Tramways Co.* (1897), A.C. 111, 118; distinguished in *City of Montreal v. Montreal Street Ry.* (1903), A.C. 482.

¹⁴ *Dublin United Tramways Co. v. Fitzgerald* (1903), A. C. 99.

justices may then either themselves inspect the highway, or appoint some competent person to do so; and may¹ on the hearing of the summons convict the surveyor or person chargeable in any penalty not exceeding £5, and such further sum as would defray the estimated expenses of putting the highway in repair; to which purpose it is to be applied.

By the following section, if the obligation to repair is disputed, a indictment. bill of indictment may be preferred.

There is also the mode of proceeding by information. This is in the information. discretion of the Queen's Bench Division; which will never give leave to file an information, for not repairing a highway, unless it appear that the grand jury have been guilty of gross misbehaviour in not finding a bill. A reason why this method should be resorted to but rarely is that the fine set on conviction upon an information cannot be expended in the repair of the highway, whereas on an indictment it is always so expended.²

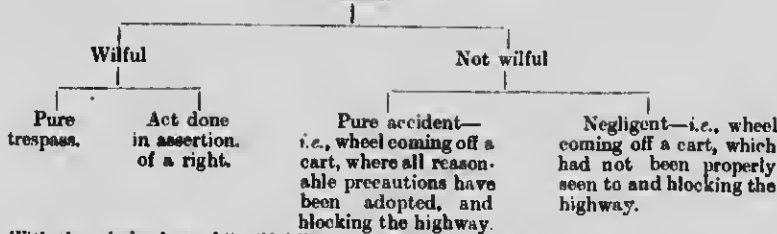
The condition of a highway must constitute a nuisance at law before the remedy by indictment is available.

A nuisance has been defined to be an offence against the public, Definition of nuisance. either by doing a thing which tends to the annoyance of all the King's subjects, or the neglecting to do a thing which the common good requires.³ Kindersley, V.C., in *Soltau v. De Held*,⁴ is more lengthily to Kindersley, V.C. in *Soltau v. De Held*. the thing must be such as, in its nature or in its consequences, is a nuisance—an injury or a damage, to all persons who come within the sphere of its operation, although it may be so in a greater degree to some than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke, or

¹ The justices may, notwithstanding the report, exercise a discretion whether to convict or not: *Regina v. Lord Radnor*, 4 Jur. 460, s. c. *sub nom. Regina v. Justices of Wilts*, 8 Dowl. Prac. Cas. 717.

² *Rez v. Steyning*, 92; Bac. Abr. Highways (G). Mandamus will not lie: *The Queen v. Trustees of Oxford and Witney Turnpike Roads*, 12 A. & E. 327.

³ Hawk. P. C. bk. 1, c. 75, s. 1. Nuisances may be thus divided:—



With the whole class of "wilful" nuisances we have nothing to do; and of the "not wilful" our concern with the species "pure accident" is merely incidental. Our inquiry is with those acts which are "negligent" in the proper meaning of the term—where, that is, there is absence of some care that ought to have been taken. Obstructions, it is manifest, may be common to all these four; though the proper scope of a treatise on Negligence is to consider any act done without the amount of care required in the class of acts of which it is a case, or any act omitted to be done in a class where an obligation to act is imposed. The first statute on public nuisances is 12 Ric. II c. 13 (repealed 19 & 20 Vict. c. 64); Reeves, *Hist. of English Law* (2nd ed.), vol. iii. 212.

⁴ 2 Sim. (N. S.) 142; *Rogers v. Elliott*, 146 Mass. 349, 4 Am. St. R. 316, is like *Soltau v. De Held* in its facts, with the exception that Rogers brought an action for injuries caused by the defendant's ringing the church bell for the usual services. The ground was that he was suffering from sunstroke, and the annoyance of the bell was intolerable. *Martin v. Nutkin*, 2 P. Wms. 266, injunction enforcing an agreement not to ring "the five o'clock bell."

of poisonous effluvia are emitted. To all persons who are at all within the reach of those operations it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that, to those who are nearer to it, it may be a greater nuisance, a greater inconvenience, than it is to those who are more remote from it; but, still, to all who are at all within the reach of it, is more or less a nuisance or an inconvenience."

Pollock, C.B.,
in *Bamford*
v. *Turnley*.

Pollock, C.B., in *Bamford v. Turnley*,¹ did not think that "nuisance," for which an action will lie, is capable of any general legal definition. What is a nuisance must at all times be a question of fact with reference to all the circumstances of the case. "Most certainly in my judgment it cannot be laid down as a legal proposition or doctrine, that anything which, under any circumstances, lessens the comfort or endangers the health or safety of a neighbour, must necessarily be an actionable nuisance. That may be a nuisance in Grosvenor Square which would be none in Smithfield Market, that may be a nuisance at midday which would not be so at midnight, that may be a nuisance which is permanent and continual which would be no nuisance if temporary or occasional only."

Knight Bruce,
V.C., in
Walter v.
Selge.

Knight Bruce, V.C., in *Walter v. Selge*,² defined a "nuisance" as "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people."³

Examples.

It is a nuisance to suffer ditches along a highway to be foul,⁴ to suffer boughs of trees growing near the highway to overhang it so as to incommode the passage,⁵ to dig a ditch or make a hedge across a highway, or to do any act whatever that renders it less commodious to the public.⁶ Every contracting or narrowing of a highway⁷ is a nuisance; and generally any act or omission whereby the convenience of the way becomes lessened.⁸

Statutory
modification
of common
law non-
liability.

The care of a highway is the business of the surveyor of highways for the district in which the highway is situated. The functions of surveyor of highways, which were originally exercised by an individual have by various Acts of Parliament come to be vested in the local administrative bodies, who appoint officers by whom the actual

¹ 3 H. & S. 79.

² 4 De G. & S. 322.

³ This was approved in *Tod Heatley v. Benham*, 40 Ch. D. 80, per Cotton, L.J., 94, per Bowen, L.J., 98. Under the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), s. 8, it was decided that a nuisance must be something injurious to health. *G. W. Ry. Co. v. Bishop*, L. R. 7 Q. B. 550. See now the enumeration of nuisances in Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2. This provision does not apply to public sewers: *Fulham Vestry v. London County Council* (1897), 2 Q. B. 76. In *Multon Local Board v. Multon Farmers Trading Co.*, 4 Ex. D. 302, Stephen, J., held that under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 114, nuisance was not confined to matters injurious to health. This was followed in *Banbury Urban Sanitary Authority v. Page*, 8 Q. B. D. 97, with reference to s. 47; and in *Bishop Auckland Sanitary Authority v. Bishop Auckland Iron Co.*, 10 Q. B. D. 138, with reference to s. 91. Nuisance under 29 & 30 Vict. c. 90, s. 19, includes an overcrowded house though occupied by one family only: *The Guardians of the Rye Union v. Payne*, 44 L. J. M. C. 148. See *Norris v. Barnes*, L. R. 7 Q. B. 537, and the two succeeding cases; also the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 sub-s. 3 (c.).

⁴ Hawk. P. C. bk. 1. c. 76, s. 149.

⁵ *Ibid.* See 5 & 6 Will. IV. c. 50, s. 72; *Walker v. Horner*, 1 Q. B. D. 4; suffering the branches of trees to grow over a highway is not a wilful obstruction within the sec. The cases on "wilful obstruction" under s. 72 are collected in *Oully v. Smith*, 12 Q. B. D. 121.

⁷ 1 Russell, Crimes (5th ed.), 474; but see 27 & 28 Vict. c. 101, s. 51, for the summary remedy.

⁸ Wellbeloved, Highways, 440.

duties of the office are performed, acting as servants of the local authority.¹

The common law rule by which, whenever it pleased the owner of Highway re-
land to dedicate land as a highway to the public, it became the duty pairable by
of the parish to maintain it, has been altered by statute;² so that now the parish
no road shall be deemed a highway repairable by the parish unless three cannot be
months' notice be given to the surveyor of the intention to dedicate; constituted
and unless such proposed road be substantially made to his satisfaction without com-
and that of two justices, who are to view and certify, and whose cer- plying with
tificate is to be enrolled at the next sessions. The surveyor, on receipt statutory
of the notice, is to call the district Council,³ and, if they deem the new formalities.
road not of sufficient utility, the question is to be determined by the
next special sessions for the highways.⁴ Save in this way no liability
can be imposed on a parish contrary to its wishes, though the road
may be used by the public, and rights over it acquired adversely to the
owner,⁵ apart from any sanctions whatever.

"A positive obstruction or nuisance on a road, whether caused Liability of
by a surveyor of highways or any other person, would no doubt render surveyor of
responsible the person who caused the obstruction or nuisance; but, highways
looking at the statute [5 & 6 Will. IV. c. 50] and the course of legisla- under 5 & 6
tion," Pollock, C.B., was "clearly of opinion that the Legislature never Will. IV.
intended to make a surveyor of highways personally responsible at c. 50.
the hazard of a jury finding him guilty or not guilty of negligence in
not repairing the road."⁶

The local authority exercising the office of surveyor of highways, or the surveyor of highways himself, where the provisions of the Highway Acts are not modified by the later legislation, are liable for their own acts or the acts of their servants in the execution of the duties which belong to the office of surveyor of highways, subject to

¹ 2 & 3 Ph. & M. c. 8, and 22 Car. 2, c. 12, made provision for choosing two surveyors for a year to amend the highways leading to market towns. By 3 & 4 W. & M. c. 12, the justices were to appoint one, two, or more surveyors out of a list of inhabitants of each district furnished by the inhabitants, of those who have £10 per annum in their own or their wife's right, or £100 personal estate, or farm £30 per annum, "or if no such," "of the most sufficient." By 13 Geo. III. c. 78, this last enactment was varied by providing that the constables and householders assessed to public rates shall name ten inhabitants qualified as above, from whom the justices are to choose if they think them qualified; if not, from other substantial inhabitants or occupiers of lands living within three miles of the place in the country. Then came the Highway Act, 1835 (5 & 6 Will. IV. c. 50), which at present regulates the office of surveyor of highways, subject to the vesting of the office in local bodies by 18 & 19 Vict. c. 120, s. 96, 38 & 39 Vict. c. 55, s. 144, and 56 & 57 Vict. c. 73, s. 25.

² 5 & 6 Will. IV. c. 50, s. 23.

³ 56 & 57 Vict. c. 73, s. 25.

⁴ *The Queen v. Justices of Derbyshire*, E. B. & F. 69; *The Queen v. Bagge and Another*, 44 L. J. M. C. 45.

⁵ *The King v. Inhabitants of Leake*, 5 B. & Ad. 469, approved in *The Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273 (where the public had the use of a towing-path as a footpath), on the ground that to permit such an user was not inconsistent with its statutory use by the company as a towing-path.

⁶ *Young v. Davis* (1862), 7 H. & N. 771, Ex. Ch. 2 H. & C. 197. Under the Highway Act, 1835 (5 & 6 Will. IV. c. 50), ss. 51-54, the surveyor may take materials for the repair of the highways in his district in the manner therein specified. By s. 55, if he makes holes in getting materials he shall cause them to be filled in or fenced. In case of neglect after specified notices, he may be fined a sum not exceeding £10, and every surveyor within twenty-one days of his appointment is required to fill up or secure existing holes under penalty of 10s. for every default. By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 265, the local authority and their officers are protected from personal liability. There is a similar section in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 124.

the general rules of law that are to be observed in questions arising between master and servant.¹

The distinction between a surveyor appointed by an urban sanitary authority under section 189 of the Public Health Act, 1875, and the surveyor of highways appointed under the Highway Act, 1835, must be borne in mind; since it is only in respect of ministerial acts that the former officer can act as surveyor of highways. The real surveyor of highways is the urban sanitary authority which appoints him.

Foreman v. Mayor of Canterbury. Blackburn, J., distinguishes between the surveyor of highways under the Highways Act and the surveyor to the local authorities under the Public Health Act.

Blackburn, J., in his judgment in *Foreman v. Mayor of Canterbury*,² thus distinguishes between them: The local Board of Health "would not be liable simply because they were surveyors of highways; but there is nothing in the Act which would relieve them merely because they were surveyors from liability which they would otherwise incur. In an ordinary case, where the surveyor of highways is acting for a township or parish, he would be clearly liable for any act of his own personal negligence. There is nothing to relieve him from that. If he had left the stones in the road in such a way as has been described³ he would be personally liable for the negligence. If he was himself the master of the servants, he would be equally responsible for their negligence. But in fact, and in practice, the surveyor never is the master of the persons who are employed on the roads. There is no matter of law that would prevent him being so. If, by any arrangement he made with the parish, he took upon himself to do the work by his servants, he would be responsible for those servants, though he was surveyor of the highways. But, that being an unusual and uncommon state of things, it would require distinct proof to show that the persons who left the stones in that position were his servants, they generally being the servants of the parish, and the parish being a body

¹ *Alston v. Seales* (1832), 9 Bing. 3, under 13 Geo. III. c. 78. By 5 & 6 Will. IV. c. 50, s. 99, a surveyor who removes an obstruction without a conviction by justices acts at his peril; *Keane v. Reynolds*, 2 E. & B. 748. Cp. *White v. Feast*, L. R. 7 Q. B. 353; *Denny v. Thwaites*, 2 Ex. D. 21.

² L. R. 6 Q. B. 216, under the Public Health Act, 1848 (11 & 12 Viet. c. 63). See *Adams v. Lakeman*, E. B. & E. 615, as to non-liability of an assistant surveyor, under 5 & 6 Will. IV. c. 50, s. 44, to a penalty on the ground that such liability attaches only to the statutory surveyor of highways; *Tucker v. Axbridge Highway Board*, 5 Times L. R. 26. It is clear that "any individual who is specially injured by the obstruction has by common law a right to remove that which unlawfully causes a special injury to him. But a private individual has no right to remove an obstruction which causes no special injury to him, but which is simply an obstruction to the road as regards the public in general as distinguished from the individual": per Jessel, M.B., *Bagshaw v. Burton Local Board*, 1 Ch. D. 224. This case was considered in *Denny v. Thwaites*, 2 Ex. D. 21, where a surveyor of highways took up and removed a drain and brickwork belonging to the respondent which formed a nuisance and obstruction to the highway. For this the surveyor was convicted by justices acting under The Malicious Damage Act, 1861 (24 & 25 Viet. c. 97), s. 52, for committing "damage, injury and spoil" upon the respondent's property. He appealed, and the Exchequer Division held that the conviction was wrong, on the ground that he was not a private individual "but the surveyor of highways having a control over and an interest in the drains laid for carrying off the water, and that in dealing *bond fide* with the drains he was not guilty of wilful or malicious damage." As to the respondent's rights it was added that "the owner of the adjoining land only had a qualified property in the drains, &c., subject to the exercise by the surveyor of his control over them." As to damage done "by reason of the exercise of any of the powers" of the Public Health Act, 1875 (38 & 39 Viet. c. 55), see s. 308. *Nutter v. The Accrington Local Board of Health*, 4 Q. B. 375, affirmed in H. L. 43 L. T. 710, is a decision under the corresponding sec. in the Public Health Act, 1848. The extent to which a surveyor of highways is entitled to interfere with the soil is considered in *Coverdale v. Charlton*, 4 Q. B. D. 104, explained in *Holla v. Vestry of St. George's, Southwark*, 14 Ch. D. 785; *Finchley Electric Light Co. v. Finchley Urban Council* (1903), 1 Ch. 437, and *post*, 356.

³ By the side of a road without light.

which cannot be sued. But when it is a local board who are acting as surveyors,¹ the state of things is in general the other way. The persons who are employed as labourers to mend the highway are in general servants of the local board; although the local board of health are a body who might very well contract with a contractor, yet they are a body who generally do the work themselves, that is, by their servants, and pay those servants. Therefore, generally speaking, as a matter of fact, those who actually do the work, when it is done by a local board of health as surveyors, are servants of the local board of health. . . . The 37th section of the Public Health Act, 1848, requires the local board of health to appoint a surveyor and other persons named as officers and servants; and at the end of the section it is said that they may dismiss at pleasure all the officers and servants except the surveyor, and the surveyor is not to be dismissed without the approval of the General Board of Health.² That being so, it would be a question to consider whether the surveyor whom they are thus required to appoint, and whom they are not allowed to dismiss at pleasure, is in relation of servant to them in such a way as that, if the matter were being done by the surveyor, and the cause of the mischief were the negligence of the surveyor, the local board of health would be responsible for his negligence.³ The distinction pointed out is of considerable importance in determining liability in these cases.

*Pendlebury v. Greenhalgh*⁴ and *Taylor v. Greenhalgh*,⁵ arising out of the same accident and on identical facts, with decisions pointing in different ways, are yet reconcilable and consistent with *Foreman v. Mayor of Canterbury* and with each other.

An assistant surveyor appointed under the Highway Act, 1835,⁶ neglected to fence and to light a road, during the alteration of the level of the highway; and an accident happening he was held liable by the Court of Appeal in *Pendlebury v. Greenhalgh*; the case was discriminated from *Taylor v. Greenhalgh*⁵ in the Court of Queen's Bench on the fact of "personal interference." Lord Cairns says: "Although the conclusion at which this Court has arrived does not agree with that of the Court of Queen's Bench, the difference is not so much a difference on any point of law as a difference between the view taken by the Court of Queen's Bench of the facts, and the view which this Court takes of the facts as stated in the case." *Taylor v. Greenhalgh* in the Queen's Bench, was decided on the authority of *Foreman v. Mayor of Canterbury*,⁷ and on a finding of the jury, that "the defendant did not personally interfere in doing the work, or in directing the road to be left in such a condition as it was left."

The principle underlying these cases is the distinction between the liability of a surveyor appointed to carry out the ministerial duties

¹ I.e., under the Public Health Acts or under the Metropolis Management Acts.

² Now by 38 & 39 Vict. c. 55, s. 189, where no portion of the salary is paid out of moneys voted by Parliament, such officers are removable at pleasure.

³ See *District of Columbia v. McElligott*, 117 U. S. (10 Davis) 621. *Hardcastle v. Bielby* (1892), 1 Q. B. 709, decides that a surveyor under 5 & 6 Will. IV. c. 50, s. 56, could not be convicted for having "caused the stones to be laid on the highway," or "allowed them to remain at night upon the highway," so as to cause danger, who gave general directions as to the repairing the road to a person who gave orders to the carter who placed them there.

⁴ (1875) 1 Q. B. D. 36.

⁵ L. R. 9 Q. B. 487, reversed 24 W. R. 311, as indistinguishable from *Pendlebury v. Greenhalgh*. The effect of this reversal was that, in the opinion of the Court of Appeal, the distinguishing inference of fact could not in fact be drawn, not that the decision was wrong if the inference could be drawn.

⁶ 5 & 6 Will. IV. c. 50.

⁷ L. R. 6 Q. B. 214.

of the surveyor of highways, and the highway authority itself. The one is, *primâ facie*, liable only for his personal acts or defaults; the other, for all acts done in the exercise of its powers by those to whom it has entrusted them under the ordinary limitations existing in the law of master and servant or contractor and contractee. The surveyor acting under the orders of a highway board, who does an act which is unlawful, cannot justify it because it was done by the orders of the highway board; but he is personally liable for his act;¹ on the other hand, he is absolutely protected when conforming to any orders of the Board within the scope of their duties.²

Reid v. Darlington Highway Board.

*Reid v. Darlington Highway Board*³ points the other aspect of the matter to that which was most prominent in *Pendlebury v. Greenhalgh*. A highway board instructed their surveyor to employ a certain contractor to do work, which work was accordingly undertaken by the contractor, and carried on without further intervention of the surveyor. On an accident happening, through leaving material unlighted on the road at night, it was held that there was no evidence to fix either the surveyor or the board with liability.⁴ Had the surveyor been the statutory officer under the Highway Act, or had the action been brought against the urban authority under the Public Health Act, 1875, s. 144, the mere fact of non-intervention, otherwise than to set in motion some other agency, would not have been sufficient to rebut the presumption of responsibility. It would then have been necessary, for the exoneration of the defendant, that the work should have been let out to a contractor, and that there should have been no duty on the defendants to see that reasonable care and skill were used in the execution of the work, or that, there being such duty on them, it was performed.⁵ "By whom," said Lord Cairns in *Pendlebury v. Greenhalgh*,⁶ "was the fencing and lighting to be supplied? The defendant, no doubt, might have stipulated that the man supplying the labour should supply the light or fencing. The contract, we are informed, was not in writing, and we must take it that the labour alone was contracted for. If the defendant did not contract for the fencing or lighting, then the duty of fencing and lighting remained in the defendant, for which he remained responsible."⁷

Hyams v. Webster.

Akin to this portion of the subject are the cases of *Hyams v. Webster*⁸ and *Smith v. West Derby Local Board*.⁹ In the former an action was brought against a contractor for that, having under his contract opened a highway for the purpose of constructing a sewer, he had so negligently done the work that the plaintiff's horse stumbled in a hole, and thereby the plaintiff sustained injury. The jury found that the hole was a natural subsidence, thus negating negligence in the filling in. The Court of Queen's Bench⁹ held that, as between the defendant and the public, the defendant's obligation ceased as soon as he had properly reinstated the road; and that it then became the duty of the surveyor of highways to look after its subsequent repairs, whether

¹ *Mill v. Hawker*, L. R. 9 Ex. 309; L. R. 10 Ex. 65.

² 25 & 26 Vict. c. 61, s. 16.

³ 41 J. P. 581.

⁴ An action under very similar circumstances brought against the contractor is *Blake v. Thirst*, 2 H. & C. 20.

⁵ *Hughes v. Percival*, 8 App. Cas. 443.

⁶ 1 Q. B. D. 36, 41.

⁷ L. R. 2 Q. B. 264, in Ex. Ch. L. R. 4 Q. B. 138.

⁸ 3 C. P. D. 423.

⁹ Considerable stress was laid in the course of the case upon 18 & 19 Vict. c. 120, ss. 110, 111, 135, and on 25 and 26 Vict. c. 102, s. 33.

its defective condition arose from subsidence or from ordinary wear and tear. This was upheld in the Exchequer Chamber, on the ground that all responsibility to the public, in excess of that of properly reinstating the road at the completion of the work, is on the parish.

In *Smith v. West Derby Local Board*,¹ the action, on similar facts, was brought against the local board. To the objection that "how the subsidence was caused is not known," it was answered: "We cannot go into the *quantum* of evidence; but I think there were facts from which negligence might and ought to have been inferred. The trench was so improperly filled in that a subsidence of from 12 to 15 inches took place—a thing not likely to occur by fair wear and tear if the earth had been properly consolidated."

The mode of expressing the reasons for this decision is certainly logical. The question to be solved is whether the admitted existence of a certain condition of things can more probably be referred to an artificial antecedent, from which negligence is the inference, or, on the other hand, to the mere operations of Nature, from which an inference of negligence is not to be drawn. The solution is:—because the condition arises from the artificial antecedent—"the trench," says the learned judge, "was so improperly filled"—therefore, "there was evidence that the work of filling in the trench had been negligently and improperly done." That is, by assuming an effect to be due to negligence, negligence in the cause is made inevitable. The whole difficulty of the case arose from the absence of material to make this induction of negligence from. Nevertheless, the decision seems unexceptionable, and in accordance with other authorities.² The law being that a statutory duty is imposed on the highway authority to see to the maintenance of the highway, the highway authority is liable for any falling short in the discharge of this statutory duty, through acts of their own or acts authorised by them. Where, then, a trench is made in a roadway and filled in, but subsequently a subsidence shows itself in the very place where the excavation had been made, and not accounted for by any other theory, a state of things has arisen from which an inference that the cause was the interference with the highway is more consistent with probability than the assumption of a mere unaccountable operation of Nature; and the jury, or, in the case in point, the county court judge, must say whether the inference will be drawn.³ If the jury or the judge will draw the inference, then a state of facts is presented that points to misfeasance, an imperfect execution of a work that must be perfectly carried out, and not mere nonfeasance, the gradual and natural decay of a highway whose want of repair is merely the effect of user and of the operations of the forces of Nature.⁴

It has been noted⁵ that for certain purposes a railway is a highway—

¹ 3 C. P. D. 423; *Meeling v. Vestry of St. Mary, Newington*, 10 Times L. R. 54

² E.g., *Gray v. Pullen*, 5 B. & S. 970.

³ Cp. Blackburn, J.'s, charge to the jury in *Hall v. Bristol (Mayor of)*, L. R. 2 C. P. 322, with *Trower v. Chadwick*, 3 Bing. N. C. 334, 6 Bing. N. C. 1, which are reconciled by Lord Coleridge, C.J., in *Fairbrother v. Bury Rural Sanitary Authority*, 37 W. B. 544, on the ground that in the earlier case negligence was alleged, while in the latter it was not.

⁴ *Burrows v. Commissioners of Sewers of the City of London*, 4 Times L. R. 262; *Bull v. Mayor of Shoreditch*, 19 Times L. R. 65. *Whyler v. Bingham Local Board* (1901), 1 K. B. 45 has been noticed, ante.

⁵ Ante, 332.

⁶ 140 U. S. (33 Davis) 442, where *Virginia Central Rd. Co. v. Sanger*, 15 Crattan (Va.) 230, 237, is cited as establishing that "as accidents as frequently arise from obstruc-

Smith v. West Derby Local Board.

subsid.

Railway highway. Duty considered in that point of view. *Gleeson v. Virginia Midland Ry. Co.*

Highways
constructed
with impend-
ing banks.

the duty of keeping the side banks secure was considered; and Lamar, J., after citing *Tarry v. Ashton*¹ and *Kearney v. L. & B. Ry. Co.*,² is reported as saying: "If such be the law as to persons who, for their own purposes, cause projections to overhang the highway not constructed by them, a fortiori must it be the law as to those who, for their own purposes of profit, undertake to construct the highway itself and to keep it serviceable and safe, yet who allow it to be practically overhung from considerations of economy or through negligence." This liability must, moreover, be taken subject to the considerations pointed out in *Sanitary Commissioners of Gibraltar v. Orfila*,³ referring to Blackburn, J.'s, canon of construction in the *Mersey Docks v. Gibbs*⁴ "in the absence of something to show a contrary intention, the Legislature intends that the body the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same thing;" that where the duty of maintaining works remains in reality in some superior body, and those sued are merely those through whom the administration may be conveniently carried on, they are subject to no liability in respect thereof.

Amount of
repair may
vary.

The amount of repair required to be done to a highway may vary. The earliest case on the point is *Regina v. Inhabitants of Cluworth*.⁵ As reported in Salkeld, the proposition is laid down that the inhabitants of a parish are not bound to put the road in a better condition than it has been kept in time out of mind; but they are bound to put it in such condition as it has usually been in when at its best. In Modern Reports and in Holt the proposition is limited to the case of one bound to repair by prescription. In that case it is evident that the liability arising from custom must be limited by custom. This may be inferred from *Rez v. Inhabitants of Henley*,⁶ where Patteson, J., ruled that it is not enough that a road is as good as ever it was or as it usually had been, but, if the necessities of the public require it, the parish are bound to convert it from a green road to a hard road. This direction was afterwards upheld by the Queen's Bench,⁷ where, however, in an incidental allusion to *Regina v. Inhabitants of Cluworth*,⁸ Bowen, L.J., appears to approve the decision that "at common law the obligation of the parish does not extend beyond the reparation of the existing road." If this be so, in progressive districts under the common law, the roads must have been a serious drag on the enterprise of the community. So far as the reason of the thing goes *Rez v. Henley* appears the better opinion. But there is further authority.

Manley v. St. Helen's Canal and Ry. Co.
Martin, B.'s
judgment.

The case of *Manley v. St. Helen's Canal and Ry. Co.*⁹ is inconsistent with the narrower view. Martin, B., said: "I agree with the Lord Chief Baron that, if we were now discussing what kind of bridge it

tions on the track, as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions," i.e. as are created by rocks from the side sliding down on the track.

¹ 1 Q. B. D. 314.

² 15 App. Cas. 412.

³ 1 Salk. 359, 6 Mod. 163, Holt (K. B.) 339.

⁴ 10 L. T. (O. S.) 110.

⁵ *Leck Improvement Commissioners v. Justices of Stafford*, 20 Q. B. D. 797.

⁶ 1 Salk. 359.

⁷ 2 H. & N. 840.

⁸ L. R. 6 Q. B. 759.

⁹ L. R. 1 H. L. 110.

ought to be, I should say a bridge suitable to the present state of society. I have no doubt that, when this bridge was built, the place near it was a small village; now it has thousands of inhabitants; and to hold that the same bridge which would suffice formerly will do so now, when the place has become a great manufacturing town, would be utterly contrary to reason and good sense. Courts of law must look at these matters with reason and common-sense, and these tell us that undertakings of this sort must be conducted so as to meet the exigencies of society. Is it fitting then that, in the town of St. Helen's, there should be a bridge which, when opened, as it may be, at any hour of the day or night, shall leave a gulf in the highway entirely without protection? That is a question for the jury, and all persons would concur that the only verdict they could have found was that which they have found. Had they found the contrary, I should have dissented from their verdict, and thought it a fit one to set aside." These remarks were made where the liability of a commercial company was being considered. But it will not readily be supposed that the state of repair, which the authorised highway authorities are to maintain throughout their districts, would be fixed on a laxer principle than that which governs with commercial companies in progressive neighbourhoods.

*The King v. Inhabitants of Devon*¹ is only apparently in opposition to this decision. The indictment there alleged that a bridge was so narrow that the King's subjects could not pass without danger. The distinction between this and the former case was pointed out by Ahcott, C.J.,² to be that to hold the defendants liable for the narrowness of the bridge would be "adding to the bridge something which did not exist before," and not merely charging them for a shortcoming in maintaining it in efficient condition. "And," he goes on to say, "if we should lay down the law to be that the inhabitants of a county may be compelled to widen a bridge, I am utterly unable to see why we should not be called upon to say that the inhabitants of a parish are bound to widen a public high road; and the inconvenience arising from such a rule is obvious. The inhabitants of a parish, as such, have no power, except by Act of Parliament, to purchase at their own expense land for the purpose of widening a road; and, if they could be compelled to buy land for such a purpose, I do not see why they should also be compelled to buy houses."

The King v. Inhabitants of Devon.

"I always direct juries," says Wills, J.,³ "on the basis that the standard of a road authority's duty must vary from time to time as the traffic becomes greater and more burdensome."⁴

Standard of road authority's duty variable. *Rez v. Inhabitants of Landulph.*

Neither is *Manley v. St. Helen's Canal and Ry. Co.* inconsistent with *Rez v. Inhabitants of Landulph*,⁵ where Patteson, J., directed the jury

¹ (1825) 4 B. & C. 670. This case seems to have come before the Court by reason of a dictum of Lord Kenyon, in *Rez v. Inhabitants of Cumberland*, 6 T. R. 194, that, if a bridge had become of insufficient width, the burden of widening it must be borne by those bound to repair it. *Regina v. Inhabitants of Stretford*, 2 Ld. Raym. 1169, where Holt, C. J., cited *Duncomb's case*, Cro. Car. 306, holding that enclosing the land adjoining to the highway would draw upon the owner of the land the charge of repairing the highway; *Need v. Hendon Urban District Council*, 81 L. T. 405, 406.

² 4 B. & C. 677.

³ *Mayor, etc. of Chichester v. Foster* (1906), 1 K. B. 176.

⁴ *A.-G. v. Scott* (1905), 2 K. B. 168, where the cases are cited.

⁵ 1 Moo. & Roh. 393; in the note to this report several cases on the law are collected. As to this case, but on another point, see per Mellor, J., *Bridgewater Trustees v. Boddlecum-Linacre*, L. R. 2 Q. B. 4; and per Lord Campbell, C.J., *McCannon v. Sinclair*, 2 E. & E. 50.

that, if they thought it proved by the evidence that the want of repair arose from the nature of the spot over which the alleged road passed, it would be absurd to require the parish to do repairs which from the nature of things must always be ineffectual.

Highway
out of repair ;
when neigh-
bouring land
may be used.

If a highway be overflowed or out of repair passengers may justify going on the adjoining land ;¹ that is if the way is public, but not if it is a private way. In the latter case there is no right to go on the adjoining land. This is because the owner of a private way may himself be bound to repair, and the impassable state of the way may be the result of his own neglect. Where the road is public the general good is paramount to private convenience. If, however, the grantor of a private way obstruct it, the grantee may go *extra viam* over the grantor's land, and there is no obligation on him to enter upon litigation ; since he is entitled to take the simplest remedy in his power.²

Rights of
public officer
suing.

A public officer, it was said in a Privy Council Appeal from lower Canada, suing on behalf of the public may sustain an action by proof that the nuisance in respect of which he sues has been erected on land over which the public have rights of passage which are interfered with by the erection complained of. He need not prove actual damage to the public ; proof of the infringement of a right is sufficient. Although the public officer may interfere if he chooses, he is not in all cases bound to do so. If then in any case he refuses to interfere, an individual suffering damage is not prejudiced in his private rights by the refusal of the public officer. Neither, on the other hand, does a refusal by the public officer to act supersede the necessity of proof, by the plaintiff in a private action, that he has sustained injury special to himself, and beyond that which he suffers as a member of the public. The right on behalf of the public and the right of action of the individual are entirely separate and have no mutual dependence whatsoever.³

Negligence in
the user of a
highway.

Any member of the public can be negligent in respect of the user of a highway, as well as the authority charged with the maintenance of it ; and we proceed to consider those heads of negligence which refer specially to the user of highways, and which occur independently of the statutory duties of surveyors of highways.

No action for
hindering a
person pass-
ing along a
highway.

It was very early determined that no *action* will lie for merely hindering a private person passing along a highway. The reason is that the effect would be indefinitely to multiply suits. In lieu of action, the remedy is by indictment.⁴ To entitle a private plaintiff to maintain an action he must show a particular damage suffered by himself over and above that suffered by the other subjects of the realm.⁵

¹ *Taylor v. Whithead*, 2 Doug. 745. Com. Dig. Chimin. (A) Highway (A 1). By the eighth table of the *leges Duodecim Tabularum* roads were required to be eight feet wide and double at corners ; while travellers were allowed to drive over the adjoining land if the road was bad.

² *Selby v. Nettlefold*, L. R. 9 Ch. 111.

³ *Brown v. Gugg*, 2 Moore P. C. C. (N. S.) 341, cited and approved *Bell v. Corporation of Quebec*, 5 App. Cas. 95. In England the only public officer to take action is the Attorney-General, and his presence is required where a decree in the case would bind public rights, *Sampson v. Smith*, 8 Sim. 272 ; but his concurrence is not necessary where the plaintiff is suing upon an alleged private right, or upon a public right where he sustains special damage : *Boyce v. Puddington Borough Council* (1903). 1 Ch., per Buckley, J., 114, affirmed (1906) A. C. 1.

⁴ *Pain v. Patrick*, 3 Mod. 289 ; s.c. *sub nom. Paine v. Patrick*, Carthew, 191 ; s.c. *sub nom. Payne v. Partridge*, 1 Shower (K. B.) 255, 1 Salk. 12 ; Vin. Abr. Chimin Common (D) 2, where the early authorities on " particular damage " are collected ; per Vaughan, C. J., *Thomas v. Sorrell*, Vaugh. 330, 335, 341.

⁵ *Caledonia Ry. Co. v. Walker's Trustees*, 7 App. Cas. 259. As to consequential damage, see *Bigg v. Corporation of London*, L. R. 15 Eq. 376. The owner of a ferry

For the necessity to prove special damage where a private suit is brought, an early and leading authority is *Iveson v. Moore*.¹ The plaintiff, the owner of a colliery, was obliged to take carts and waggons along a highway almost daily, but by reason of the highway being obstructed he was hindered in his business. The King's Bench were divided, Holt, C.J., and Rokeby, J., considered that no action would lie in respect of the obstruction, because the plaintiff sustained no more particular damage than any other of the King's subjects, who all had the same right to pass this way; Gould, J., was of opinion that the action would lie, "though he agreed that an action would not lie for a public nuisance without special damage, for avoiding multiplication of suits, and therefore, in this case, if the plaintiff had concluded only *per quod* his carts or carriages could not pass, it would not have lain nor have been maintainable, yet he was of opinion that some special damage appears to be done to the plaintiff by this stoppage of the way, which is not common to the rest of the King's subjects; and this appears in the *per quod*, the business of which is to close the action and show the cause of it."² Turton, J., thought that the application being to arrest judgment, the defect, if any, was cured by verdict. No decision was pronounced, though on the case being subsequently argued before the justices of the Common Pleas and the barons of the Exchequer,³ they were all of opinion that the action lay.

Iveson v. Moore.

No action for public nuisance without special damage.

The operative consideration probably was that the plaintiff was not merely casually impeded in his going along the highway, but an additional element of expense was imported into his business by the delay occasioned by the impediment. The language of the judges in the Exchequer Chamber is that "the plaintiff did necessarily suffer an especial damage *more than* the rest of the King's subjects."⁴

In *Winterbottom v. Lord Derby*⁵ the subject of obstructing the passage of the highway was carefully considered. The true principle governing is said to be "that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say that they could would really in effect be to say that any of the Queen's subjects could."

Winterbottom v. Lord Derby.

To this statement of the law may be added—that a person injured by an obstruction may remove it, so far as is necessary to enjoy his rights, but only if its continuance does him a special injury; and he must remove it in the manner by which the least mischief is caused. After a judicial decision has been given that an obstruction exists,

cannot maintain an action for loss of traffic caused by a new highway, by bridge or ferry made to provide for a new traffic: *Hopkins v. G. N. Ry. Co.*, 2 Q. B. D. 224; followed in *Dibden v. Skirrow*, (1907) 1 Ch. 437; *Cowes Urban Council v. Southampton, &c. Steam Packet Co.*, (1905) 2 K. B. 287.

¹ 1 Id. Raym. 486. *Maynill v. Saltmarsh*, 1 Keb. 847, was cited, where it was held sufficient special damage to show that, by reason of the defendant's obstruction of a way, the plaintiff was prevented carrying his corn, whereby it was injured by rain. See, too, *Blaygrave v. Bristol Waterworks Co.*, 1 H. & N. 360; Reeves, Hist. of Eng. Law (2nd ed.), vol. iv. 384. Y. B. 27 H. VIII. 27, pl. 10. Cp. Lib. Ass. 27 E. III. 133, pl. 6.

² 1 Id. Raym. 489. ³ 1 Id. Raym. 489. ⁴ 1 Id. Raym. 495, 12 Mod. 267, under name of *Jervison v. Moore*. Cp. *Greasley v. Codling*, 2 Bing. 263.

⁵ Lord Penzance says in *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 263; "In *Ashby v. White*, 1 Sm. L. C. (4th ed.), 185, 212 (?), the language was 'still if any person have sustained a particular damage beyond that of his fellow citizens.' &c. The judges do not say a damage of a different kind or description from that suffered by other subjects, but 'more than' or 'beyond' their fellow citizens."

⁶ L. R. 2 Ex., per Kelly, C.B., 322.

the right to remove it attaches to that body or person who is entitled to represent the public, although no special statutory power may be given for the purpose.¹

What interferences with a highway the law regards.

The next inquiry is to ascertain the various interferences with a highway which in law are held to create obstructions.² To this end it is necessary to notice the chief cases decided with reference to obstructing highways; not, however, neglecting the caution given by Brett, J.,³ that "To maintain an *action* for damage caused by that which is a public nuisance, the damage must be particular, direct, and substantial."

Right of a frontager to access.

The right of a frontager to access to his property from the highway is a different right, and, as far as it is a right of a man to step on his own land, a higher right than that of a mere passenger to pass to and fro on a highway.⁴ An obstruction of access to premises is in itself

¹ *Bagshaw v. Buxton Local Board*, 1 Ch. D. 220. See *Denny v. Thwaites*, 2 Ex. D. 21.

² What constitutes an obstruction was discussed in *A. G. v. Terry*, L. R. 9 Ch. 423; *Gully v. Smith*, 12 Q. B. D. 121; *Fearnley v. Ormsby*, 4 C. P. D. 136; *Halker v. Horner*, 1 Q. B. D. 4; *Wood v. Esson*, 9 Can. S. C. R. 239. The question of what is a defect in a highway was treated at length in *Pratt v. Inhabitants of Weymouth*, 147 Mass. 245, 9 Am. St. R. 691. In *Roberts v. Rose*, 35 L. J. Ex. 63, in the Ex. Ch., Blackburn, J., said: "When a person seeks to justify his having interfered with the property of another for the purpose of abating a nuisance, he may be justified, if the other be a wrongdoer, but only in so far as his interference was necessary for the purpose. And we agree with the Court below that in abating a nuisance, if there be two ways of doing it, that way must be chosen by which the lesser mischief will be done. We are also agreed that where, in the alternative way of abating a nuisance, there may be some wrong done to the property of an innocent person or to the public, that mode cannot be adopted." See *Dimes v. Peley*, 15 Q. B. 276; *Arnold v. Holbrook*, L. R. 8 Q. B. 96, where the cases on the right to deviate when the use of footway becomes fondrons, are collected. There is a broad distinction between removing an obstruction, which has been wrongfully placed in the highway, and making good by a permanent structure the result of mere nonfeasance on the part of those charged with the duty of repairing. Where there is no right to repair there can be no duty to repair: *Campbell Davys v. Lloyd* (1901), 2 Ch. 518. In *Y. B. 22, E. IV. 8, pl. 24*, the defendant justified in trespass, by reason of a custom, that they which plough may turn their plough upon the land of another, and that for necessity; and it was held good. In *Mitten v. Faudrye*, Poph. 161, the case is put of a man driving cattle through a town, one of which strays into a house, and the owner of the stray goes in after it. The owner does not thereby commit a trespass. (Cf. *Tillett v. Ward*, 10 Q. B. D. 17.

³ *Benjamin v. Storr*, L. R. 9 C. P. 407.

⁴ *The Queen v. Pratt*, 4 E. & B. 860; *Lude v. Shepherd*, — c. 1004; *Blundell v. Catterall*, 5 B. & Ald. 268—right of going over land to *Laone* in the sea. The celebrity of the decision in *Blundell v. Catterall*, and the discussion it has undergone, may perhaps warrant a note on the subject. The plaintiff was the lord of a manor bounded on one side by the River Mersey, who by grant from the Crown held the shore to low-water mark. The defendant was a servant at an hotel fronting the shore, the proprietor of which kept bathing machines. The plaintiff sued for trespass in driving one of these machines across the foreshore with a visitor at the hotel for the purpose of bathing. The defendant's case was that there was a common law right for all the King's subjects to bathe on the seashore, and to pass over it for that purpose on foot, and with horses and carriages. Abbott, C.J., Holroyd and Bayley, J.J., held that the plaintiff could recover; Best, J., dissented. His dissent was based on three separate lines of argument. First, an authority. Bracton, 1 l. c. 12, s. 6, was cited for the proposition—*Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis*. The majority of the Court denied this authority, on the ground that Bracton had not quoted merely, but interpolated his doctrine from the civil law. Secondly, that as the sea is the highway of the world, free access to it is of great importance. To this the answer was, admitting the fact, it is irrelevant, since the question at issue is not the importance of getting to the highway of the sea, but the right of traversing the plaintiff's land without his permission. Thirdly—and on this point the very words of Best, J., at 278, must be given: "By bathing, those who live near the sea are taught their first duty—namely, to assist mariners in distress. They acquire, by bathing, confidence amidst the ways, and learn how to seize the proper moment for giving their assistance." This argument "of public convenience" the majority of the Court met with the rejoinder that the greatest public convenience is that the rights of private

Right of crossing land to bathe in the sea

denied by the King's Bench. Best, J.'s, dissent.

actionable, as being the infringement of a right in property; and it is therefore not necessary to show special damage, which, we have seen, is required to be proved where the action is for the obstruction only of a public highway.¹ The owners of a "roadside property," to adopt the term used by Wood, V.C., in *Attorney-General v. Thames Conservators*,² have "the public right of passing and repassing along the highway," possessed by all subjects of the realm who have occasion to use the highway; and in addition, a right to enter their houses

property should be assured; though it is obvious that the proposition laid down by the learned dissentient judge is somewhat wide and vague as applied to the case of an hotel visitor bathing from a machine. In Hall's Essay on the Rights of the Crown in the Seashores of the Realm (Stuart Moore's, 3rd ed.), 833, a vigorous rally is made to support the judgment of Best, J., and to question the decision. The argument may be summarised: First, the books are silent. When that happens it may be from the clearness of the right which has never been disputed. The case of bathing is one of these cases. Secondly, the right was a customary right. Thirdly, the authority of Bracton, joined with the known habits of men to bath and swim long prior to written codes, should have been held to establish the right. Fourthly, though Roman and English law do differ on some points, there is no evidence that this is one; and, as fishing and bathing are analogous, and they agree in that, there is an inference that they agree in the common right of bathing. To this it may be answered: First, that the case of bathing is not

Hall, Essay on the Rights of the Crown in the Seashores of the Realm, supports Best, J.'s, dissent.

one of the cases from the silence of the books as to which the right may be presumed; and that, if a reason were needed, the existence of such a right would presume a limitation to private ownership (*Fitch v. Rawling*, 2 H. Bl. 393). Secondly, that a general custom cannot exist; a local custom was shown not to exist; and a common law right, without positive evidence of its existence, is not to be presumed. Thirdly, that "the known habits of men to bathe and swim long prior to written codes" is not proved, and it is doubtful if it could be proved; but, could it be proved, it would be irrelevant, even with the authority of Bracton; which is confessedly drawn from the civil law, while the laud laws of England are based on the feudal law—an antagonistic system. Fourthly, there is no more similarity between a right to bathe and a right to fish than between a right to kill wild animals not game and a right to exercise oneself on a man's close. A right of fishing in the sea, or a right of taking shell-fish, does not necessarily involve a right to cross a man's land, while a right to go across it to bathe does; and the only authority adduced, "that fishers who fish in the sea may justify their going upon the land adjoining to the sea, because such fishing is for the commonwealth and for the sustenance of all the kingdom" (*Fitzh. Abr. Barre*, 93; *Y. B. 8 E. IV.* 18, pl. 30, per Danby, C.J. 19), makes it clear that there is a difference between the right to bathe and the right to fish, by the reason it gives for the goodness of the right of fishery, that it is for the commonwealth and for the sustenance of all the kingdom—a reason not applicable according to the ordinary use of language to a claim of a right to bathe. Further, this passage was interpreted by Holroyd, J., to refer to a particular custom; and in Bro. Abr. *Customes*, 46, it appears that the doctrine laid down was on a question which arose upon a custom of drying nets. But, apart altogether from the reasoning, the decision in *Blundell v. Catterall* exists, has been acted on, and is generally regarded as settling the law; which, did not the decision settle it, would probably have to be settled, as it is, on reasoning similar to that of the majority of the Court. *Ilundudno Urban Council v. Woods* (1899), 2 Ch. 705; *Brinckman v. Matley* (1904), 2 Ch. 313. In *Rex v. Crunden*, 2 Comp. 89, it was held to be an indictable offence for a man to undress on the beach and to bathe in the sea near inhabited houses from which he might be distinctly seen. This was followed in *The Queen v. Wellard*, 14 Q. B. D. 63. The Roman law is thus stated: *Littorum quoque usus publicus juris gentium est, sicut ipsius maris; et ob id quibuslibet liberum est casam ibi imponere, in qua se recipiant, sicut reliis circum et ex mare deducere. Proprietas autem eorum potest intellegi nullius esse, sed ejusdem juris esse, cujus et mare et quæ subjacent mari, terra vel harena: Inst.* 2, 1, 5. The Crown's right to the foreshore is traced to D. 43, 8, 3: *Littora in quæ populus Romanus imperium habet populi Romani, sicut arbitror* (Celsus).

Reasons alleged considered.

Customes.

¹ It is well established law that, where there is a public highway, the owners of land adjoining thereto have a right to go upon the highway from any spot on their own land": *Marshall v. Ulleswater Steam Navigation Co.*, L. R. 7 Q. B., per Blackburn, J., 172; *Rose v. Groves*, 5 M. & G. 613; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662, reversing the Court of Appeal, L. R. 10 Ch. 679; *Bourke v. Davis*, 44 Ch. D. 110. In the United States the right of access of a riparian owner does not differ from that of the public at large, and the Legislature may shut it off without making compensation: *Thayer v. New Bedford Rd. Co.*, 125 Mass. 253.

² 1 H. & M. 31.

The King v. Russell.

from the highway,¹ and "a reasonable right of access, they have a reasonable right of stopping, as well as of going and returning in the use of the highway."² But, as was laid down by the King's Bench in *The King v. Russell*,³ "the primary object of the street was for the free passage of the public, and anything that impeded that free passage without necessity was a nuisance. That, if the nature of the defendant's business [in the case before the Court, that of a waggoner] were such as to require the loading and unloading of so many more of his waggons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot."

Lindley, M.R., paraphrases this passage thus:⁴ "It comes, in substance, to this—that in a case of doubt or difficulty, the private reasonable right of a householder to carry on his business must yield to the public right of user of the street. If the public right of user is, in fact, so obstructed that it cannot be used to the extent which the law requires, then the private right must give way, and it is no answer to say that the defendants can go on using this street in a way which is reasonable looking to their interests alone." The assumption made is that the defendant has no more rights than any other person in the street. If he happen to be the dedicator of the street and dedicated it subject to an obstruction, the law is otherwise; whatever the public inconvenience they have to submit to it, since the dedicator has granted to them a portion of his property which they have chosen to take, while the rest remains his.⁵

Rez v. Cross.

In *Rez v. Cross*,⁶ where defendant was indicted for causing coaches to remain an unreasonable time in the public highway near Charing

¹ *Lyon v. Fishmongers' Co.*, 1 App. Cas. 675; *North Shore Ry. Co. v. Pion*, 14 App. Cas. 619; *The Queen v. Metropolitan Board of Works*, L. R. 4 Q. B. 358, explained by Lord Chelmsford in *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 258; *W. H. Chapin, Ltd. v. Mayor of Westminster* (1901), 2 Ch. 329; *Rose v. Groves*, 5 M. & G. 613. As to the distinction between the right of access from a river to a riparian frontage and the right of navigation, see *Bell v. Corporation of Quebec*, 5 App. Cas. 84. There is no common law right to tow on the banks of ancient navigable rivers; *Ball v. Herbert*, 3 T. R. 253. Bracton, Lib. 1, c. 12, s. 6, says the law of England is identical with the Civil Law: *Riparum etiam usus publicus est de jure gentium sicut ipsius fluminis. Itaque navis ad eas applicare, funes arboribus ibi natis religere, onus aliquid in his reponere cuius liberum est, sicuti per ipsum fluvium navigare; sed proprietarius earum est illorum quorum praeiis adhaerent.* Cp. Inst. 2, 1, 2-4. *Ripa ea putatur esse quae plenissimum flumen continet*, D. 43, 12, 3, §. 1. The ruling of Holt, C.J., at *Nisi Prius*, to the same effect in *Young v. —*, 1 Ld. Raym. 725, is rejected by Lord Kenyon, C.J., in *Ball v. Herbert*, where, also, the incongruity of Sir Matthew Hale's opinion in his *De Jure Maris*, Harg. Law Tracts, 85-87, that individuals had a right to a tow-path for towing vessels up and down rivers on making a reasonable compensation to the owner of the land for the damage, is exposed. Callis, Sewers, 74, says: "I cannot more aptly compare a bank of the sea, or of a navigable river, than to a highway, for that the property thereof is to him whose ground is next adjoining and the use thereof is common to all men, and the power thereof the king hath by his laws, *proprietus domino, usus populo, potestas regi.*" *Hornor v. Whitechapel Board of Works*, 55 L. J. Ch. 289, is the case of interference with access to a market.

² *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 721; *Ramuz v. Southend Local Board*, 67 L. T. 169.

³ (1805) 6 East, 430. *Regina v. Chittenden*, 15 Cox C. C. 725, the case of a traction engine. See *Brown v. Eastern and Midlands Ry. Co.*, 22 Q. B. D. 391, where a heap of rubbish was placed on defendants' land, the Court of Appeal held evidence admissible that many other horses than the plaintiffs' had shied at it, with a view of showing that it was a nuisance.

⁴ *A. G. v. Brighton, & Supply Association* (1900), 1 Ch. 281.

⁵ *Fisher v. Prowse*, 2 B. & S. 770. Cp. *Robertson v. Bristol Corporation* (1900), 2 Q. B. 198.

⁶ 3 Camp. 227.

Cross, "every unauthorised obstruction of a highway," says Lord Ellenborough, "to the annoyance of the King's subjects, is an indictable offence. Upon the evidence given, I think the defendant ought clearly to be found guilty. The King's highway is not to be used as a stable-yard. It is immaterial how long the practice may have prevailed for no length of time will legitimate a nuisance." And on the following day, in a subsequent case, he said: ¹ "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house;—the public must submit to the inconvenience occasioned necessarily in repairing the house; ² but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon the subject is much neglected, and great advantages would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business." *Rex v. Jones.*

The *King v. Moore*³ was to the same effect. The obstruction was caused by a crowd collecting on the highway to watch pigeon-shooting on the defendant's enclosed grounds. "If a person," says Lord Tenterden, C.J., "collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable;" and in reply to the argument that the defendant was not liable for the collection of people whom it was not his intention to assemble, Littleton, J., points out that though not the defendant's object to assemble a crowd, "if it be the probable consequence of his act, he is answerable as if it were his actual object."⁴ *The King v. Moore.*

"There is no doubt," says Park, J., summing up in a well-known case,⁵ "that a tradesman may expose his wares for sale; but he must do it in such a way as not by so doing to cause obstruction in the public streets." The obstruction need not be physical; to cause people to assemble so as to be a nuisance is enough. There are, however, police *Rex v. Carlile.*

¹ *Rex v. Jones*, 3 Camp. 231; *Harris v. Mobbs*, 3 Ex. D. 268; *Wilkins v. Day*, 1 Q. B. D. 110.

² *Herring v. Metropolitan Board of Works*, 19 C. B. N. S. 510. There is a custom in the City of London authorising the Lord Mayor to license the erection of hoardings during rebuilding for a reasonable time: *Bradlee v. Christ's Hospital*, 4 M. & G. 714; *Davey v. Warren*, 14 M. & W. 199—a ladder placed against a house for whitewashing is not a hoard. See The General Paving (Metropolis) Act, 1817 (57 Geo. III. c. xxix.), s. 75; and The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 121-123; The Metropolis Management, &c. Amendment Act, 1882 (45 Vict. c. 14), s. 13; also Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 79, 80; *Woodall v. Nuttall*, 8 Times L. R. 68, where the contention was that there was negligence in placing a hoarding close to a tram line and not stopping the traffic; *Regina v. Commissioners of Sewers, Ex parte Brass*, 22 L. T. (N. S.) 582; *Howe v. Kearsley*, 1 Times L. R. 426, where Lord Coleridge, C.J., said: "The defendant in shoring up the house in question had done what had been a perfectly lawful act, as it had been sanctioned by the proper authorities, so that to be liable at the present action he must be shown to have been clearly guilty of negligence," and see per Lord Denman, C.J., *Rex v. Ward*, 4 A. & E. 404; and per Crompton, J., *Regina v. Justices of Richmond*, 2 L. T. (N. S.) 373.

³ 3 B. & Ad. 188.

⁴ *Bellamy v. Wells*, 60 L. J. Ch. 156. "I am not prepared to say that it was necessary to show that they were disorderly persons": Park, J., *Rex v. Carlile*, 6 C. & P. 649.

⁵ *Rex v. Carlile*, 6 C. & P. 648.

powers for dealing with such cases,¹ and at common law, when the assembling to look at things displayed in shop windows becomes a nuisance it may be dealt with; yet the widest tolerance in matters of this kind must be observed in the interests of all dwellers in commercial places, where the rule observed would be that applicable to a market, not to the quiet surroundings of a residence.

Benjamin v. Storr.

In *Benjamin v. Storr*² access to plaintiff's premises was obstructed for an unreasonable time and in an unreasonable manner by the defendants loading and unloading goods into and from vans at their premises: so that the plaintiff's customers were prevented from coming to his shop, and he suffered a material diminution of trade. An action was there held maintainable on the ground that the plaintiff had sustained a particular damage, beyond the general damage to the public, and which was direct and substantial. The case was treated as a public nuisance and private injury resulting therefrom, and coming under the principle of *Iveson v. Moore*³ and *Winterbottom v. Lord Derby*;⁴ but it could no less securely have been put on the principle approved by Lord Cairns, C., in *Lyon v. Fishmongers' Company*⁵—that interference with a private right is in itself a ground of action, even though it does not amount to a public nuisance accompanied by particular damage.

Judgment of Jessel, M.R.

The action of the defendants must be reasonable; and this question of what is reasonable depends upon the circumstances; with regard to them the observations of Jessel, M.R., in *Original Collieries Co. v. Gibb*,⁶ are entirely in point; as, indeed, they also are with regard to the rights inherent in private property entitling to its reasonable enjoyment: "You cannot lay down *a priori* what is reasonable. You must know all the circumstances. It would be clearly reasonable, for instance, if a wheel came off an omnibus in the middle of a highway, for a blacksmith to be sent for to put the wheel on the omnibus if that were the easiest mode of moving it out of the way, and the omnibus might lawfully stop there until the wheel was put on, in order to take it out of the way, if that were the best mode of taking it out of the way, and a reasonable and usual mode. Nobody would deny that if the blacksmith chose to carry on his trade of repairing omnibuses immediately opposite his own house, and for that purpose, not keeping any one omnibus more than a reasonable time for his work, he kept omnibuses opposite his house or shop, or smithy door for that purpose, that would be an obstruction of the highway, and would be a nuisance. You must look at the circumstances. So, again, it is perfectly reasonable that A shall put his carriage before his house door, even although it may overlap his neighbour's door. For instance, take the houses which have been divided—houses in Portland Place—that is a familiar instance to me, and I dare say to most of us—where two doors immediately adjoin. It is impossible to draw up a carriage to the one without overlapping the other. There is no doubt that it is quite a reasonable thing to stop a carriage there for the purpose of taking up

Repairing vehicle on highway.

Carriage overlapping neighbour's door.

¹ Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 52, 54, subs. 9; Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 21.

² (1874) L. R. 9 C. P. 400. In *Mott v. Shoolbred*, L. R. 20 Eq. 22, where a public street was improperly used as a stable-yard, it was held by Jessel, M.R., that the nuisance to the neighbouring houses was not so permanent as to entitle a reversioner to an injunction.

³ 1 Ld. Raym. 486.

⁴ 1 App. Cas. 662, 674.

⁵ L. R. 2 Ex. 316.

⁶ 5 Ch. D. 721.

and setting down, or even for the purpose of waiting there a reasonable time. But suppose the neighbour's carriage comes up and wants either to take up or to set down, it would be monstrous to hold that the coachman of the first carriage should not move out of the way. It would then become unreasonable. When he sees the neighbour's carriage coming up, he is bound to get out of the way, and he *commits a private nuisance to his neighbour, in the nature of a public nuisance, by stopping before his door and preventing his coming up, he not requiring to stop there.* In that case, therefore, if he persisted in doing this day after day, I have no doubt that his neighbours might bring an action against him, and get, no doubt, nominal damages; but nominal damages would establish the right and carry the costs." "In the same way it is not unreasonable that your neighbour should give an evening party occasionally, and that there should be a file of carriages running across your door or opposite your door. But it would be very unreasonable if anybody did not break the file to allow your carriage to come to your own door, and still more unreasonable, if, instead of giving parties occasionally, as people do, your neighbour were to turn his house into an assembly room, or for some private purpose, in consequence of which a file of carriages came every day and obstructed the carriage-way to your house. I only give these as illustrations. The law is quite clear. The question of reasonableness has been said to be a question for a jury. It must be reasonable user and nothing else."¹

Rule of give and take.

Disturbance caused by evening party.

The case of *Fritz v. Hobson*² was decided in strict accordance with these principles, although *Original Hartlepool Collieries Co. v. Gibb*,³ was not referred to there. Defendant was engaged in building operations to get to which there were three accesses—one down a narrow court, which was the most convenient, and which the defendant largely engrossed for the conveyance of building material, thus causing damage and loss to the plaintiff, who had a shop in the court. The defendant asserted "an unqualified and absolute right to approach the area of building operations which he was carrying on by the nearest road, to any extent, for any materials, for any time, and without regard to the plaintiff's convenience or inconvenience."⁴ Fry, J., disallowed this claim, on the ground, first, that the private right of the owner of a house adjoining a highway to access from his house to the highway must not be interfered with by an unreasonable use of the highway; and, secondly, on the ground of the decision in *Benjamin v. Storr*,⁵ that there was a public nuisance, with particular, direct, and substantial damage to a private individual.

Fritz v. Hobson.

In *Regina v. Mathias*,⁶ the head note is that "the use of a public footway includes that of a perambulator as a usual accompaniment of a large class of foot-passengers, if of a size and weight not to inconvenience other passengers, and not to injure the soil," but the report of Byles, J.'s, direction to the jury does not go nearly so far. "There might be many things on a footway which ought not to be there, but not being nuisances, interfering with the convenient use of the way

Regina v. Mathias.

¹ See per Lord Cranworth, C., in *A. G. v. Sheffield Gas Consumers' Co.*, 3 D. G. M. & C., 330, where the law is laid down in the same manner, and with almost identical illustrations.

² 14 Ch. D. 542.

³ 5 Ch. D. 713. See *Bell v. Corporation of Quebec*, 5 App. Cas. 84.

⁴ 14 Ch. D. 552.

⁵ L. R. 9 C. P. 406.

⁶ 2 P. & F. 570.

Perambulator
on footpath.

by passengers, one of the public would have no right to remove. If you should think that this perambulator ought not to have been there, but that it did not amount to a nuisance to the way, the defendant, as one of the public, had no right to remove it." "My direction to you is, that the owner of the soil may remove anything that encumbers his close, except such things as are usual accompaniments of a large class of foot-passengers, being so small and light as neither to be a nuisance to other passengers nor injurious to the soil." "If you are of opinion that this perambulator comes within the description of the things as to which I have just directed to you, you will find for the prosecution; if not, for the defendant." The jury could not agree and were discharged.

Walker v. Brewster.
Fireworks;
land.

Wood, V.C., in *Walker v. Brewster*,¹ laid down that the collecting a crowd is fully established to be a nuisance in law; and "in the neighbourhood of a populous town the letting off fireworks and performance of powerful bands will collect together crowds as a necessary and not merely a probable consequence," and so *a fortiori* are nuisances.

Inchbald v. Robinson.

Walker v. Brewster was distinguished in *Inchbald v. Robinson*²—the case of a performance at a circus causing inconvenience to neighbouring householders—on the ground that there the nuisance was an outdoor performance and that people assembled outside the ground;³ while in *Inchbald v. Barrington* the inconvenience arose from the performance itself. "The plaintiff," said Selwyn, L.J., "cannot complain of the temporary crowding occasioned by people going to the circus or leaving it; and no such continuous crowding is shown as to justify the interference of the Court." In *Barber v. Penley*,⁴ North, J., gave judgment on the ground that "it is not here a coming to and going from that is complained of; it is the nuisance caused by those who intend ultimately to get into the theatre collecting in the street outside the theatre and remaining there, which is quite a different thing from coming to or going from it."⁵ With regard to the distinction between outdoor and indoor performances, the learned judge added: "If a defendant does within his premises what causes a nuisance outside, it does not matter whether the nuisance is caused by what goes on inside being actually visible outside and so causing the crowd to collect, or whether, by reason of what is going on or what is about to go on inside, he causes the crowd to collect. It seems to me the principle of both is the same, though the application is somewhat different."

Barber v. Penley.

Analogy to
resorting to a
fashionable
church.

It is obvious from what Selwyn and Giffard, L.JJ., say in *Inchbald v. Robinson*, that a crowd going to or leaving a circus may collect and continue in such circumstances and numbers as to create a nuisance. But the evidence necessary to prove such would have to be greater than where the crowd collected for some less justifiable purpose.

If the purpose in assembling is laudable according to ordinary standards of judgment there would be more reluctance to find a nuisance than where the sense of the majority of ordinary people condemned it. The crowd thronging to church to hear a fashionable week-night preacher might in fact be a nuisance to the tradesmen in the road leading to the church, but it is hard to imagine "such

¹ L. R. 5 Eq. 34.

² L. R. 4 Ch. 388.

³ L. C. 396.

⁴ (1893) 2 Ch. 457, *Wagstaff v. The Edison-Bell Phonograph Corporation*, 10 Times L. R. 80.

⁵ Cp. *Jenkins v. Jackson*, 40 Ch. D. 71, where the head note confuses A & B. See as to subsequent stage of this case (1891) 1 Ch. 89.

continuous crowding" "as to justify the interference of the Court," while a similar assemblage in honour of a "two-headed nightingale" might not escape condemnation.

The user by costermongers and stallkeepers of the sides of highways for the carrying on of their business at common law is an infringement of the public rights. Any costermonger placing goods on the highway for a period longer than necessary to load and unload, may be indicted for a nuisance for his offence against the public, or be made defendant to an action by any private person whom he specially injures. The highway is for the passage to and fro of all his Majesty's subjects. No one has a right to engross any portion of it. Every passenger has a right to the whole width of it, subject only to the equal right of every other passenger. The common law has, however, been infringed upon by various special Acts in some cases, for the more readily vindicating public rights, and, in the case of costermongers, so it has been decided, to confer exceptional privileges.

Michael Angelo Taylor's Act¹ the Metropolitan Police Act,² the

¹ The General Paving (Metropolis) Act, 1817 (57 Geo. III. c. xxix), ss. 64, 65, 66, *Summers v. Holborn District Board of Works* (1893), 1 Q. B. 612, decides that while costermongers carry on their business in accordance with regulations made under 31 Vict. c. 5 (The Metropolitan Streets Act Amendment Act, 1867), s. 1, they are exempt from the provisions of 57 Geo. III. c. xxix, s. 65, relating to street obstructions. Lord Coleridge goes even further, and seems to regard The Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), as "inconsistent" with the provisions of sec. 65 of the earlier Act. This opinion is apparently based on the principle of interpretation adopted in *Fortescue v. Vestry of St. Matthew, Bethnal Green* (1891), 2 Q. B. 170. It, however, overlooks the considerations that, in that case, the same authority was entrusted with carrying out the provisions of both Acts, whereof the latter excluded the rights allowed under the former. In *Summers's case*, on the contrary, different authorities carry out each Act; while the absence of contradiction between the provisions of the two is shown by the fact that for ten years previous to the decision in *Summers's case*, the police acted under a Police Order of 17th April, 1882, by which "obstructions or inconvenience to the passage of the public by the habitual practice of depositing on the footways, or other part of the street, things for sale," is left to be dealt with by the local authority under the powers conferred by 57 Geo. III. c. xxix.; while the like *contemporanea expositio* limits the scope of police intervention to dealing with casual or actual obstruction, in short, with traffic regulation. Local needs were dealt with by the local authority—the vestry, while general regulative duties were discharged by the police. The scope of sec. 65 of 57 Geo. III. c. xxix., is indicated by *Wyatt v. Gems* (1893), 2 Q. B. 225. *Gooding v. Green* (1893), 1 Q. B. 109, has a distinct bearing on Lord Coleridge's views on "inconsistency."

What constitutes "inconsistency" so as to work the repeal of one of two apparently coexisting provisions, is a matter of such importance in this and other connections, as to excuse a note. "Repeal by implication is never to be favoured": *Dobbs v. Grand Junction Waterworks Co.*, 9 Q. B. D. per Field, J., 158. The repugnancy between the new provision and a former statute must not only be plain, but also unavoidable: *Foster's case*, 11 Co. Rep. 56 b, 63 a, 1 Roll. Rep. 91; *Thornby d. The Duchess of Hamilton v. Fleetwood*, 10 Mod. 118 *arguendo*; Bacon, Abr. Statute D. Where two sections in conflict are found in one Act, the rule is "the general enactment must be taken to affect only the other parts of the statute to which it may properly apply"; *Pretty v. Solly*, 26 Beav., per Romilly, M.R., 910, and per the same judge, *De Winton v. Brecon*, 28 L. J. Ch. 604; see also, per Best, C.J., *Churchill v. Crease*, 5 Bing. 160. The rule, where two Acts are to be read together, is the same as when various provisions occur in the same Act, "unless there is some manifest discrepancy making it necessary to hold that the later Act has to some extent modified something found in the earlier Act": *Canada Southern Rd. Co. v. International Bridge Co.*, 8 App. Cas., per Lord Selborne, 727. "The test of whether there has been a repeal by implication by subsequent legislation," says Smith, J., *Churchwardens, &c. of West Ham v. Four City Mutual Building Society* (1892), 1 Q. B. 658, "is this: Are the provisions of a later Act so inconsistent with or repugnant to the provisions of an earlier Act that the two cannot stand together?" This inconsistency then is not to be determined by the expression of preference, moral or political, but is to be arrived at by the application of

² 2 & 3 Vict. c. 47, s. 54, sub-s. 6. Under sec. 72 of The Highway Act, 1835 (5 & 6 Will. IV. c. 50), the police can prosecute for obstructing a highway within the Metropolitan area. *Back v. Holmes*, 57 L. J. M. C. 37.



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Metropolitan Streets Act,¹ and the Town Police Clauses Act, 1847,² give summary means for enforcing a very vigorous control over highways in urban districts.

By the Metropolitan Streets Act (Amendment) Act, 1867,³ however, costermongers and stallkeepers in the London district are, by a beneficent interpretation of the special legislation applicable, exempted from all interference, so long as they conform to the police regulations made under the Act. So soon as the regulations are transgressed the general law is once more applicable to them.

rules of law. For example, the maxim *generalis specialibus non derogat* is to be regarded. "Now, if anything," says Lord Selborne, C., *Seward v. Vera Cruz* (1884), 10 App. Cas. 68, "he certain it is this, that where there are general words in a later Act capable of reasonable and sensible application, without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation, indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." In the earlier case of *Garnett v. Bradley* (1878), 3 App. Cas. 950, Lord Hatherley had thus stated the rule: "An Act directed towards a special object, or special class of objects, will not be repealed by a subsequent general Act, embracing in its generality those particular objects, unless some reference be made directly or by necessary inference to the preceding Act." For instances of the working of this principle, see *Rez v. Poor Law Commissioners*, 6 A. & E. 1; *London & Blackwall Ry. Co. v. Limehouse*, 3 K. & J. 123; *Thorpe v. Adams*, L. R. 6 C. P. 125; *Taylor v. Corporation of Oldham*, 4 Ch. D. 410. Lord Hatherley had previously, in *Green v. The Queen*, 1 App. Cas. 546, said: "A well-known passage from Lord Coke has been cited by Mr. Justice Quain, namely, that you are not to do away with existing special rights by general affirmative words. But if the affirmative words are clear, plain, and precise, and the two things will not coexist, or stand together, then I apprehend you are compelled to come to a construction, which is a sensible construction in itself, and also a natural and ordinary construction. Finding that the two things will not stand together, you are compelled to adopt that construction which the plain sense of the words requires." "If," says Kay, L.J., in *Millington v. Harwood* (1892), 2 Q. B. 172, "a subsequent Act does not in terms repeal a previous Act, and does not expressly refer to that Act, we must find such an inconsistency as that the two Acts cannot be read together." This principle of law was firmly established so far back as 1577; as may be seen from a report to Sir Walter Mildmay by Mr. Justice Mauwood of the opinion of the judges on the construction of certain of the Popery Acts, printed as a note in Froude, *History of England*, vol. xi., 88. It is nowhere more aptly stated than by Pratt, C. J., *Chapman v. Pickersgill*, 2 Wils. (K. B.) 146: "It is an universal rule that an affirmative statute is hardly ever repealed by a subsequent affirmative statute; for if it is possible to reconcile two statutes they shall both stand together." The conflicting principle is illustrated by *Parry v. Croydon Commercial Gas and Coke Co.*, 11 C. B. N. S. 579, 15 C. B. N. S. 568. Reference should be made by all inquiring into this subject, to Lord Blackburn's full discussion of it, in *Garnet v. Bradley*, 3 App. Cas. 965-969. His expression is (at 967): "Where there is some particular law standing, and a subsequent enactment has general words which would repeal that particular law or particular custom, if they were taken in all their generality, yet, nevertheless, the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together; the first, the particular law standing as an exceptional proviso upon the general law." The now obsolete case (see 56 & 57 Vict. c. 61, s. 2) of *Graham v. Mayor, &c. of Newcastle-on-Tyne* (1893), 1 Q. B. 643, is an excellent example of the observance of the principles we have been discussing; *Summers v. Holborn District Board of Works* (1893), 1 Q. B. 612, of their violation. In *Keep v. Vestry of St. Mary, Newington*, in the Court of Appeal (1894), 2 Q. B. 524, Lindley and Smith, L.JJ., Kay, L.J., dissenting, held that the Metropolitan Streets Act Amendment Act, 1867 (31 Vict. c. 5), is a statutory permission by the Legislature to costermongers, street hawkers, or itinerant traders to carry on their business in the way in which they invariably do carry it on, provided only that they comply with the police regulations. Both parties to this appeal were probably agreed that the Act referred to gave a statutory permission to the costermongers. The only question in dispute was against whom? The police certainly. The L.JJ. assume that the protection is against the parish authorities as well. It is curious to note in Hansard, under 3rd December 1867, that the responsible minister introducing the Bill in the House of Lords speaks of it as intended merely to restore the law to what it was before the passing of the Act earlier in the year. It is also curious to note that the very disparate functions of the police and the local authorities seem not to have been present to the minds of the Lords Justices.

¹ 30 & 31 Vict. c. 134, s. 6.

² 19 & 20 Vict. s. 89, s. 28.

³ 31 Vict. c. 5, s. 1.

In some of the costermongers' cases it has been contended that the obstruction caused is not by the harrow of the person proceeded against, but by reason of other costermongers, each conforming to the police regulations, congregating round him; and that in these circumstances there is no liability. This contention is disposed of by James, L.J., in *Thorpe v. Brumfit*.¹ "It was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant."

Obstruction
an individual
as well as a
joint act.

James, L.J.,
in *Thorpe v.*
Brumfit.

In the United States the law negating any power of the local authorities to grant dispensations from the operation of the general law has been unambiguously and beneficially laid down. In *Cohen v. Mayor, &c., of New York*² the "permits" sometimes "granted by common councils of cities, or by other bodies," are declared to confer "no right upon the party who obtains" them, and in the case in question were held to impose a serious liability on the grantors. There the City of New York was sued for damages caused to the plaintiff's intestate by the falling on him whilst walking through the streets of that city, of a pair of thills attached to a grocer's waggon, which was stationed in the street under a permit granted by defendants, and for which they were paid. The fall was caused through the wheel of another waggon catching that of the grocer's waggon (the street being narrow). The Court of Appeals, reversing the Court below, held the city liable; for that "it must be regarded as itself maintaining a nuisance so long as the obstruction is continued, by reason of, and under such licence, and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the placing of such obstruction in the highway." The city authorities are co-operating in creating a nuisance. "We think," the Court said, "that in a case like this, where no obstruction would have existed but for the wrongful conduct of the defendant, it (the city) must be held responsible for the damage which is caused by reason of the obstruction, even though it might not have happened, if the licensee had been careful in regard to the manner in which he exercised the assumed right granted him by the licensee."³ Gray, J., dissented, considering that the licence given by the city to do an illegal act, was not enough to charge them for the damage that had resulted. The answer to this view is that the giving the licence in the circumstances constituted an integral part of the wrongful act. The illegality was not in the way the licensed act was done but in the act itself.

Licence to
obstruct.

*Cohen v. The
City of New
York*.

¹ L. R. 8 Ch. 656. *Sadler v. G. W. Ry. Co.* (1896), A. C. 450, which is discussed *Bullock v. London General Omnibus Co.*, 76 L. J. K. B. 127.

² 113 N. Y. 532; 10 Am. St. R. 506; see *Speir v. Brooklyn*, 130 N. Y. 6. As to a licence given by local authorities to do a thing which is done negligently, *Ward v. Caledon*, 19 Ont. App. 69.

³ L. C. 538.

Licence and non-interference distinguished.

No English authority has, probably, gone so far as to let out standing places in the streets. Yet many refuse to interfere with harrows or stalls placed there. This allowance does not affect the original illegality of placing stalls in a highway; nevertheless the local authorities are not thereby rendered liable to an action;¹ they are merely quiescent, and some have even assigned to costermongers streets where they may ply their business free from any action by the local authorities.² The New York authorities had co-operated in an illegal act; the English position is one of mere non-interference. Active participation in an illegal obstruction with damage resulting therefrom, would, in England and in America alike, render the local authority a joint tortfeasor with the immediate author of the obstruction.

Harris v. Mobbs and Wilkins v. Day.

Obstruction outside the *via trita* of the highway.

Two cases, *Harris v. Mobbs*³ and *Wilkins v. Day*,⁴ remain to be considered. In each of these an obstruction was left on the roadside, but not (except to the extent of a few inches in one case) on the metalled part; and in each the person authorising the obstruction was held liable to one sustaining particular damage, on the ground that "in the case of an ordinary highway, although it may be of a varying and unequal width, running between fences one on each side, the right of passage or way *prima facie*, unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not confined to the part which may be metalled or kept in repair for the more convenient use of carriages and foot-passengers."⁵

¹ *Glossop v. Heston and Isleworth Local Board*, 12 Ch. D. 102. In the *King v. Smith*, 4 Esp. (N. P.) 109, Lord Ellenborough directed an acquittal on an indictment for a nuisance in obstructing a highway, where it appeared there had been a twenty-five years' user of it as a market. The Chief Justice "could not hold a man to be criminal who came there under the belief that it was such a fair or market legally instituted. If the fair or market was not a legal one, the party might be proceeded against for usurping the franchise." The user, however, must be without interruption.

² Probably without regard to such a decision as *Hawkins v. Robinson*, 37 J. P. 682, or the law on which it is founded.

³ (1878) 3 Ex. D. 268.

⁴ (1883) 12 Q. B. D. 110.

⁵ Per Martin, B., in *Regina v. The United Kingdom Electric Telegraph Co.*, 9 Cox C. C. 144, and adopted by Crompton, J., 176, where the cases are collected; *Regina v. Train*, 9 Cox C. C. 180. *Coverdale v. Charlton*, 4 Q. B. D. 104, explained by James, L.J., in *Rolls v. Vestry of St. George, Southwark*, 14 Ch. D. 796, to mean "that the Board had only the surface, and with the surface such right below the surface as was essential to the maintenance and occupation and exclusive possession of the street, and the making and maintaining of the street for the use of the public," was followed in *Wandsworth District Board of Works v. United Telephone Co.*, 13 Q. B. D. 904. In *Baird v. The Mayor, &c. of Tunbridge Wells* (1894), 2 Q. B. 867, affirmed in H. L. (1896), A. C. 434, it was resolved that what vested was "the surface use of the street and nothing more." The Public Health (London) Act, 1891, (54 & 55 Vict. c. 76.) s. 44, gives a power to the sanitary authority in London to provide public conveniences, and *Mayor of Westminster v. L. & N. W. Ry. Co.* (1905), A. C. 426, decided that "the provision of the statute itself contemplates that such conveniences should be made beneath public roads, and if beneath public roads some access underneath the road level must be provided." In *Finchley Electric Light Co. v. Finchley Urban Council* (1903), 1 Ch. 437, an electric light company carried two wires across a road in the defendant's district at a height of thirty-four feet, which the defendants cut. An injunction was granted by the C. A. on the ground that the local authority had no such right, even though the defendants had taken over the road from turnpike trustees. Where the local body has statutory powers, although no property passes, they have a right under their statutory powers, e.g., to erect poles for electrical purposes, though sunk to a depth of six feet: *Escott v. Mayor, &c. of Newport* (1904), 2 K. B. 369. In *National Telephone Co. v. Constables of St. Peter Port* (1900), A. C. 317, the wires were not alleged to be outside the limits of the street. *A.-G. v. Conduit Colliery Co.* (1895), 1 Q. B. 301, is a case of subsidence of a highway where no actual damage was done, yet held the parish was entitled to nominal damages; and the *Mayor, &c.* of

Lord Russell of Killowen, C.J., in *Neeld v. Hendon Urban Council*¹ seemed to throw doubt on this, following the criticisms of Channell, J., He says: "It seems to me very difficult to give assent to such a general proposition as this, that, under all conditions where you find a metalled road bordered by unmetalled margins and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is highway;" and Cozens Hardy, J., in *Countess of Belmore v. Kent County Council*² cites this passage in giving judgment. Joyce, J., however, in *Harvey v. Truro Rural Council*³ points out that in both cases the facts rebutted the presumption, and that there was no need of any modified proposition of law to justify them. A reference to the report of *Neeld's case*⁴ shows that in the opinion of the majority of the Court this was so. Smith, L.J., accepts the statement of Crompton, J., in the *United Kingdom Electric Telegraph Co.'s case* as correct, and points out that in the case before him there was "abundant evidence" "to destroy the *primâ facie* presumption;" while Williams, L.J., says: "The presumption is that *primâ facie*, if there is nothing to the contrary, the public right of way extends over the whole space of ground between the fences on either side of the road; that is to say, that the fences may *primâ facie* be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated. But in the case of the waste of a manor there is another obvious reason for which fences may be put up, namely, to separate the adjoining closes from the waste."

Neeld v. Hendon Urban Council.

The right of one having house or land abutting on a highway to pass from his property to the highway is, on the authorities,⁵ beyond question. If he is also the owner of the soil of the highway, any statutory interference with his rights, he is entitled to prevent alteration being made in the level of the highway.⁶ If he is not the owner of the soil of the highway, his right of passage becomes merely a consequence of the dedication of the highway to the public. If, then, the dedication of the highway is at a certain level, the house- or land-owner abutting on the highway has a right of access at that level, so long as it is preserved, equally with the rest of the public. In the case of the subsidence of the highway, since he has no right to the maintenance of any particular level, he has no right to have the road maintained at the sunk level, and consequently no right of his is infringed if the road is raised to the height it was previously to the subsidence.⁷

Rights of owner of house or land which abuts on a highway.

Wednesbury v. Lodge Holes Colliery Co. (1905), 2 K. B. 823, fixed these damages at the cost of making the highway as commodious as before to the public, and not at the cost of restoring the original level, but was reversed in C. A., (1907) 1 K. B. 78.

¹ 81 L. T. 405, 409. "The right of the public," says James, V.C., *Turner v. Ringwood Highway Board*, L. R. 9 Eq. 422, "is to have the whole width of the road preserved free from obstructions, and is not confined to that part which was used as the *via trita*."

² (1901), 1 Ch. 873.

⁴ 81 L. T. 409, 410.

⁵ *Lyon v. Fishmongers Company*, 1 App. Cas. 676. *Coppinger v. Sheehan* (1906) 1 I. R. 519: a right of way to the sea for the purchase of navigation avails at any state of the tide, and includes the right to cross the foreshore.

⁶ *Goodson v. Richardson*, L. R. 9 Ch. 221. As to compensation for an interference with the level of a street, see *The Queen v. The Wallasey Local Board of Health*, L. R. 4 Q. B. 351; the point as to the ownership of the soil does not appear to have arisen. See *Sellers v. Matlock Bath Local Board*, 14 Q. B. D. 423; *Milward v. Redditch Local Board*, 21 W. R. 429.

⁷ *Burgess v. Northwich Local Board*, 6 Q. B. D. 264.

³ (1903) 2 Ch. 638, 643.

Bramwell, L.J.'s, statement of the law.

"Supposing," says Bramwell, L.J.,¹ "that the owner of property adjoining a highway is not the owner of the soil in the highway, I do not think that he has any right by the law of the land, to have the road continued at a particular level. It may be a great inconvenience to him no doubt to have the road altered, if he has built with refereneo to the level of the road; but it may be an inconvenience to the public not to have the level altered, and I do not know that he has any vested right in the road remaining at that level to the inconvenience of all mankind."

How the *primâ facie* right to the width of the whole road may be limited. *Fisher v. Prowse*.

The right to the enjoyment of the whole width of a highway, we have just seen, is not absolute, but *primâ facie* only. It remains to consider in what respect this *primâ facie* right may be limited. The general rule of law applicable is laid down by Blackburn, J., in the leading cases of *Fisher v. Prowse* and *Cooper v. Walker*,² "which explained and overruled several out of which vague notions of liability have sprung up:" "The law is clear that if, after a highway exists, anything he newly made so near to it as to be dangerous to those using the highway—such, for instance, as an excavation, *Barnes v. Ward*³—this will be unlawful and a nuisance; as it also is if an ancient erection, as a house, is suffered to become ruinous, so as to be dangerous, *Regina v. Watts*,⁴ and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as much as if the nuisance arose from an obstruction in the highway itself; but the question still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public, and accepted by them subject to the inconvenience or risk arising from the existing state of things. We think the latter is the correct view of the law. It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions, and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention."

Robbins v. Jones.

The greater part of this passage was incorporated in the judgment in *Robbins v. Jones*⁵—"The *Waterloo Bridge case*." By reason of the construction of the bridge, a high causeway was made as an approach, raising the level of the roadway considerably above the old road. A row of houses stood on the original level of the ground, running parallel

¹ *Nutter v. Accrington Local Board*, 4 Q. B. D. 375, 388.

² 2 B. & S. 779; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Rundle v. Hearle* (1898), 2 Q. B., per Lord Russell of Killowen, C.J., 89. *Arnold v. Blaker*, in Ex. Ch. L. R. 6 Q. B. 433, states the law of a limited dedication. *Arnold v. Holbrook*, L. R. 8 Q. B. 96.

³ 9 C. B. 392.

⁴ 1 Salk. 357.

⁵ (1863) 15 C. B. N. S. 221.

to the causeway and road leading to the bridge, but leaving a space of more than seven feet between the houses and the retaining wall of the causeway. In consequence of the construction of the causeway, the houses were divided into two distinct dwellings; having one door opening upon the causeway, and connected with it by flagstones resting at one end upon the walls of the houses, and on the other upon the retaining wall of the causeway, and having at intervals gratings fastened into the flags; the whole formed one continuous footway, which had become dedicated to the public, and was used as part of the highway for foot-passengers. The door of the lower portion opened on the old road. A crowd having collected on the flagstones and grating, a portion gave way, and about thirty persons were thrown down to the lower level. The plaintiff's husband was killed, and she brought an action against the owner, who had under-let. The judgment, though delivered by Erle, C.J., was prepared by Willes, J.¹ (who presided at the trial), and establishes nine propositions, as follows:

"The Waterloo Bridge case."

Propositions of Willes, J.

1. If the flagstones and grating are considered a private way to the houses, the reversioner is not liable, but the occupier.²
2. If the flagstones and grating constitute a public way, then the gap between the houses and the retaining wall of the causeway was not made by the defendant, but was coeval with and a consequence of the construction of the way.³
3. If the flagstones and grating constitute a public way, the public has to repair, since the liability is attached to the public user, not to the *quantum* of benefit attaching to the frontage. The benefit was retained by the proprietor, not conferred on him.
4. The flagging and grating in the case before the Court were not used by the occupier of the house otherwise than as one of the public, and were therefore not repairable by him.
5. The more or less artificial character of the flagging or grating did not make it more or less a way to be repaired by the parish.⁴ "Whether it be stone, iron, wood, or composition, as it is a public way, the public are to keep it in repair, and not the person who dedicated it."

¹ 15 C. B. N. S. 223.

² "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any. In this case there was none, not that that circumstance makes any difference in our opinion": 15 C. B. N. S. 240. *Coupland v. Hardingham*, 3 Camp. 398, first, was the case of a hole adjoining a highway; secondly, was a nuisance; and therefore it was the duty of the occupier to fence it. "If the landlord at the time of the demise knows of the defect, and does nothing to cause it to be remedied, he may be liable too. But I doubt very much whether, if the burthen of repair is cast upon the tenant, the duty of the landlord does not altogether cease": per Brett, J., *Guinnell v. Eamer*, L. R. 10 C. P. 641.

³ In *Barnes v. Ward*, 9 C. B. 392, the hole was made by defendant. The law in the United States on this point differs from the English law. There a duty exists on the part of the highway authority to erect guards or barriers along the margin of the travelled portion of the highway, or even along the external portion of the highway, and if a person using the highway is injured through the absence of such protection he may recover against the authority, even though the injury was received outside the limits of the highway; *Hudson v. Marlborough*, 154 Mass. 218. In one case the excavation which caused the accident was eleven feet from the highway; *Ivory v. Decypark*, 116 N. Y. 476.

⁴ "The exceptions to the liability of the parish have been known. They are custom, prescription, tenure, and inclosure while it lasts. Have we authority to add flagging and grating?" 15 C. B. N. S. 241.

6. A cellar flap differs because it is worn out for the benefit of the occupier of the cellar to which it is the door, and it "may be considered as a trap in its nature and essence, unless it be kept shut."¹

7. A ruinous building adjoining a highway differs, because what is insufficient here is part of the highway itself.

8. A concealed danger differs, because—

- (a) The existence of the gap must have been known to all passers;
- (b) It would not have been a danger had the parish maintained and repaired the flagging and grating;
- (c) The defendant did not erect, and, as it was a highway, could not have removed, the structure; and
- (d) In the absence of fraud a highway may be dedicated with a dangerous obstruction on it; e.g., in *Fisher v. Prowse*.

9. The grant of a way casts on the grantee, and not on the grantor, the duty to maintain and repair, with a right to enter on the grantor's land to do all acts necessary for the maintenance and repair of it.²

Obligation to keep area fenced is absolute.

The obligation of one maintaining an excavation, an area, for example, adjacent to a highway, is independent of negligence; it is an absolute obligation. The excavation unprotected is unlawful, a nuisance and indictable. The occupier has to maintain a fence or other protection for those using the highway. His duty is "to prevent its becoming defective," and he is subject "to all risks of injury that may be done to it by strangers or trespassers."

Subject to the right of passage, the ownership of a highway remains unaffected.

The *primâ facie* right of the public to use the whole width of a highway is further limited to the right of passage over it, and the owner continues in the possession of all other rights of ownership not inconsistent therewith.³ This is clearly shown by *Vestry of St. Mary*,

¹ *Hamilton v. Vestry of St. George, Hanover Square*, L. R. 9 Q. B. 42; the judgment in which is identical with the case put in *Robbins v. Jones*, 15 C. B. N. S. 242: "We may refer, by way of illustration only, to the case of one of the squares, where the footway at one side consists of large flags reaching from the outer wall of the area to the outer wall of the cellar. There the upper part of the flag forms the way, and the lower part of the same flags forms, as we are told, the ceiling of the cellar. Who is to maintain and repair the flagged way? We apprehend the public, who walk upon it and wear it out, without which it might last an indefinite time." *Lawrence v. Jenkins*, L. R. 8 Q. B. 274. This case is one of a prescriptive obligation to maintain a fence, but the right of the public to the free enjoyment of the highway cannot be stated lower than the right of one landowner as against his neighbour who owes him the duty to maintain a fence; *Braithwaite v. Watson*, 5 Times L. R. 331. Cellar arches were held not to be part of the road in *Thompson v. Sunderland Gas Co.*, 2 Ex. D. 429. In *Warner v. Wandsworth District Board of Works*, 53 J. P. 471, plaintiff, while driving along a road, passed under a bridge whose entrance was higher than its exit, and his head coming into contact with the bridge he sustained injury, but he was held disentitled to recover on proof that the bridge was in the same condition when it was dedicated.

² The authorities are collected Gale, Law of Easements (Gibbon's, 5th ed.), 528 *et seqq.*, citing, *inter alia*, *Poultret v. Rycroft*, 1 Wms. Saund. 322 a; 1 Notes to Saunders, 566; "by common law, he who has the use of a thing ought to repair it," *Taylor v. Whitehead*, 2 Doug., per Lord Mansfield, 749; *Bell v. Twentynman*, 1 Q. B. 766; *Lord Egremond v. Pulman*, M. & M. 404. See also *Colebeck v. Girdler's Company*, 1 Q. B. 234; and *Corporation of London v. Riggs*, 13 Ch. D. 798, where the limitation to a way of necessity was stated to be that it was to be only such a way as will enable the owner of the close to enjoy it in its then state at the time of the grant of the enclosing land, and not as a right of way for all purposes. As to "way of necessity," 3 Kent, Comm. (13th ed.) 424 *cum notis*.

³ In the *King v. Russell*, 6 B. & C. 566, the judge at the trial charged the jury that if they thought an erection on a highway—in this case the River Tyne—was for a public purpose and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, they should acquit the defendants. On motion for a new trial, Holroyd, J., was of opinion the direction was good, and Bayley, J., who tried the case, adhered to the opinion he

Newington v. Jacobs.¹ The respondent was the owner of premises in Newington Causeway, to whom the vestry had refused permission to had expressed to the jury at the trial; but Lord Tenterden, C.J., dissented. In *The King v. Ward*, 4 A. & E. 384, the King's Bench unanimously, and with the concurrence of Littledale, J., who had refrained from the previous decision, dissented from *The King v. Russell*, which had been previously reflected on in *The King v. Pease*, 4 B. & Ad. 30. See *A. G. v. Terry*, L. R. 9 Ch. 423, 426, n. In *Wick v. Wilson*, 101 N. Y. 234, 54 Am. R. 698, defendant, for the purpose of removing merchandise from his store in the city of New York, laid skids from a truck across the sidewalk to the steps. Plaintiff attempted to pass round them, but fell and was injured. Judgment having been given for defendant, was affirmed on appeal, Earl, J., saying: "The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the cases of merchandise. Every one doing business along a street, in a populous city, must have such a right, to be exercised in a reasonable manner so as not to unnecessarily encumber and obstruct the sidewalk. When the plaintiff found this obstruction in her pathway, she had the option either to wait a couple of minutes, or to cross the street and pass upon the other sidewalk, or to pass round the truck in the street, or to take the way she selected. The defendant was under no obligation to furnish her a safe passage way around the obstruction." This case was quoted in the later case of *Jochem v. Robinson*, 57 Am. R. 208, where the leading English cases were also cited and approved. In the judgment, which was on facts not dissimilar from those in the case just cited, it was said: "The primary object of a public street in a city is for public travel. The same is true of a public sidewalk. Neither may be always wholly restricted to such use. Business men and their employees must have access to and from their places of business, and so must their customers. Dealers, and especially wholesale dealers, in the crowded portion of a great city, as here, must moreover have an opportunity for receiving and shipping goods more or less bulky and ponderous, and often in the original packages. Such reception and shipment of goods must necessarily at times more or less hinder or obstruct travel upon public sidewalks and even upon public streets. The right to so hinder or obstruct is by no means absolute or continuous. It is at most temporary. It depends upon the necessity, and the necessity may depend upon the size and weight of the packages handled, the duration of the obstruction, and perhaps other circumstances. 'This necessity need not be absolute; it is enough if it be reasonable.' If the law required an absolute necessity, but few could escape liability." "It follows from what has been said that whenever such dealer so hinders or obstructs public travel upon such sidewalk or street, he thereby takes upon himself the burden of showing the obstruction to have been reasonably necessary and temporary. Failing to do so, he is responsible for any injury therefrom to a traveller upon such street or sidewalk in the exercise of ordinary care." The authorities cited in the above judgment have been omitted from the quotation. See also as to the right to load and unload, *Callanan v. Gilman*, 107 N. Y. 360, where the cases are collected. Lord Coleridge, C.J., in *Watson v. Ellis*, 1 Times L. R. 317, does not seem fully to have apprehended that there is a right to use the footpath for loading and unloading. There he appears to have thought that the putting a carpet on the highway was at the peril of the householder; but *quære* had he not a right to put it there, subject to the duty of taking it up after it had been used by his visitor, and putting it down on the arrival of the next; so that there should be no needless interference with the right of passage; if not in Smithfield Market, yet in Grosvenor Square; see per Pollock, C.B., *Bamford v. Turnley*, 3 B. & S. 79; *vestry of St. Mary, Newington v. Jacobs*, L. R. 7 Q. B. 47, cited in the text; and per Jessel, M.R., *Original Harthepool Collieries Co. v. Gibb*, 5 Ch. D. 721. In the subsequent and similar case of *De Teyron v. Waring*, 1 Times L. R. 414, Lord Coleridge, C.J., reiterated his statement of the law, in *Watson v. Ellis*, with additional emphasis, "the laying down the matting [on the pavement] was unlawful, as it was an obstruction to the highway, and, if it caused any injury to a passenger it was actionable; a man while walking along the street 'might if he pleased look up at the stars as he walked, and his doing so was not contributory negligence, which should preclude him from recovering.'" Lord Coleridge probably had in his mind the lines:

*Os homini sublime dedit; et cunctum videre
Jussit, et erectos ad sidera tollere vultus.*

Metamorph. lib. i. 85.

It would be rash to generalise even from this that star gazing can, in all circumstances, be pursued at the risk of those having stumbling blocks along the way. The author was in a Court (a Divisional Court) when a learned Queen's counsel absolutely refused even to argue that a tradesman has any rights, as against an injured person, to load or unload goods from his premises, across the highway, on any other terms than such as identify his position with that of an obstructor. The Court apparently approved the course taken. Every consideration, however, of law, authority, common-sense, and convenience seems distinctly the other way.

¹ L. R. 7 Q. B. 47.

*Vestry of
St. Mary,
Newington v.
Jacobs.*

Right to load
and unload
merchandise
across the
footpath.

Right of
householder
to put down
carpet across
the pavement.

take up the flags and take a proper paved carriage-way across the side pavement to his premises, where he stored heavy machinery. The respondent was accustomed to convey the machinery across the flagged footway by means of rollers and levers; but this method was objected to as an obstruction of the thoroughfare; thereupon he conveyed his machinery to and from his premises in trolleys or waggons; the result was to break the flags through the extraordinary weight of the machinery. He was summoned, under The Highway Act, 1835,¹ s. 72, for causing injury or damage to be done to the highway. The magistrate held that the injury or damage was not wilfully done to the highway; that the freehold property in question could not be reasonably enjoyed without access across the footway; and that the rights of ownership and of the public might be jointly exercised there quite consistently with the general welfare; and dismissed the summons. On appeal there was judgment for the respondent, since "the owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith; and the appropriation made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights as owner of the land, which are not inconsistent with the right of passage by the public."²

Decision in accordance with the old law.

Goodtitle v. Alker: judgment of Lord Mansfield, C.J.

Cattle v. Stockton Waterworks Co.

Law as to opening up new districts.

This is merely a statement of what has, with one doubtful exception,³ always been regarded as the law. Thus, as early as Rolle's Abridgment⁴ (circa 1660) it is laid down that the King has nothing but the passage of a highway for himself and his people, but the freehold and all profits belong to the owner of the soil. And Lord Mansfield in *Goodtitle v. Alker and Elmes*,⁵ where the question was whether ejectionment would lie by the owner of the soil for land which is subject to passage over it as the King's highway, says: "It [i.e., the highway] is like the property in a market or fair. There is no reason why he [the owner] should not have a right to all remedies for the freehold, subject still, indeed, to the servitude or easement. An assize would lie if he should be disseised of it; an action of trespass would lie for an injury done to it." Again, in *Cattle v. Stockton Waterworks Co.*, Blackburn, J., speaking of the right of the owner of the soil to deal with a highway, says:⁶ "This, as owner of the soil, he had a perfect right to do, provided he did not interfere with the road above him,⁷ or the defendants' right acquired under their act to keep their pipes there."

The liabilities incurred by opening up a new country were considered in the High Court of Australia, where the principles governing were thus enunciated by Griffith, C.J. "If the government voluntarily undertakes the care and management of a road, it is bound to use

¹ 5 & 6 Will. IV. c. 50.

² The point does not appear to have been taken in *Lee v. Nixey*, 63 L. T. 285.

³ *Welladvised v. Foss*, in 8 Geo. II., cited in *Goodtitle v. Alker*, 1 Burr. 140, but denied by Lord Mansfield, at 143, to be an authority.

⁴ *Chimin Private (B)*, *A que le soile, et les choses sur ceo appartient. En un hault chimin le roy sad auler foisque le passage pur lui et ses peuple*. Cp. Y. B. 8 E. IV. 9, pl. 7; Y. B. 2 E. IV. 9, pl. 21.

⁵ 1 Burr. 143; *Harrison v. Duke of Rutland* (1893), 1 Q. B., per Kay, L.J., 155. 1 Roll. Abr. 392. B. r. 1. 2.

⁶ L. R. 10 Q. B. 455. Cp. Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54.

⁷ *Goodson v. Richardson*, L. R. 9 Ch. 221.

reasonable care, just as any person who renders voluntary services is bound to use such care as is reasonable under the circumstances. The rule that governs the application of this general principle to such cases as the present may be thus stated. The government of a new country forming for the first time a practicable road upon land which has been technically dedicated as a highway, but impassable for wheeled traffic, is not bound by the rules which govern persons (other than the highway authority) who interfere with the surface of an ancient highway as that term is understood in England. If the government improve the so-called highway and render it more useful to the public than it previously was, they are not guilty of a misfeasance merely on the ground that they have interfered with a highway. The analogy is rather to the case of a private owner who invites the public to pass through his land by a track which he has there constructed, and which is reasonably safe for persons using ordinary care. If such an owner, after granting the permission, puts or allows to be put upon the track which he so offers, a new obstacle or danger by which persons using reasonable care would be liable to be injured, he is liable for the consequences.¹ But in the absence of such acts of commission, he is not liable merely by reason of the imperfections of the road which he offers. So the Government of a newly settled country, which undertakes the first formation of a road, whether the soil has or has not been formally dedicated as a highway, is bound to use such care as to avoid danger to persons using it as is reasonable under all the circumstances."² The law is the same where a road is laid out on a building estate.

No new danger may be created.

Another limitation of a highway authority's user of a highway, is by the statutory powers of laying pipes conferred on some other body, most often a gas or water company. Highway authorities contended that their statutory duty of keeping their highways in repair could be carried out regardless of the injury to pipes placed in the subsoil. This pretension was negatived by the Court of Appeal in *Gas Light and Coke Co. v. Vestry of St. Mary Abbott's, Kensington*,³ where the principles governing were expressed by Lindley, L.J., in two propositions:

Statutory limitation of highway authority's user.

Gas Light and Coke Co. v. Vestry of St. Mary Abbott's, Kensington, Propositions by Lindley, L.J.

1. The right of gas and water companies to lay their pipes and have them uninjured is subordinate to the right of the public to use the streets and to have them kept in repair.

2. The statutory right of gas and water companies to lay their pipes under a highway imposes on the highway authority a duty to repair their highways only in such a manner as shall not injure the pipes authorised by statute so caused to be placed.

In *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*,⁴ it was pointed out that gas and water companies pay nothing for the privilege of putting their pipes down in a public road, and they have to take the risk of the road authority altering the level. The only duty on them is to take reasonable care that their operations shall work no unnecessary damage; and they are under no obligation to do anything to mitigate a mischief which normally follows from the reasonable exercise of their powers.⁵ To use a legal right in order to

Gas and water companies take the risk of alteration of levels.

¹ *Corby v. Hill*, 4 C. B. N. S. 556.

² *Miller v. McKeon*, 3 C. L. R. (Australia), 50, 59.

³ 15 Q. B. D. 1.

⁴ (1898) 2 Ch. 603.

⁵ *East Freemantle Corporation v. Annis* (1902), A. C. 213; *Royal Electric Co. v. Hiee*, 32 Can. S. C. R. 462; *Ash v. G. N. & Co. (City Co.)*, 19 Times L. R. 639; *Mayor, &c. of Chichester v. Foster* (1906), 1 K. B. 167.

effect thereby a wrongful action does not justify the wrongful act but obliterates altogether the pretended justification.

Duty to prevent property adjoining the highway from being jeopardised by the use of the highway.

Binks v. S. Y. Ry. Co.

A duty, which will be discussed more in detail presently, lies on those whose property abuts on a highway to see that persons lawfully using the highway are not jeopardised by the condition of the adjoining property.

The test to determine what property abuts on a highway within the meaning of this rule, which is proposed by Blackburn, J., in *Binks v. S. Y. Ry. Co. and River Dun Co.*,¹ and approved by Willes, J., in *Hadley v. Taylor*,² is to ascertain whether a person may be injured through an accident happening to him on the highway, or whether he must wander from the highway before he is in danger. Subject to this consideration there is no general duty on an owner of land adjoining a highway to fence it from the highway.³

Proper users of the highway.

There is some vagueness in settling what is a proper user of a highway. In the United States children injured while using a highway as a playground, and not for mere purpose of going to and fro, by defect⁴ in a highway rendering it unsafe for travellers, have been held disentitled to maintain an action, on the ground that their user of it is an improper one.⁵ It has also been said that a town is not liable to one who, while stopping in the highway for the purposes of conversation, leans against a defective railing and is injured by reason of its insufficiency.⁶ Bigelow, C.J., in this latter case draws a distinction between the case of a person who, without fault or negligence on his own part, is forced against railings, or takes hold of them to aid him in his passage, or falls against them by accident, or has occasion to use them in the furtherance of his rights as a traveller; and the case of persons leaning against railings for "a place of rest while they stop in the highway to lounge, or to recover from fatigue, or to engage in conversation. If a person uses them for such purposes he does it as his own risk."

English law otherwise.

These cases do not represent the effect of the English law, which is certainly not so strict in limiting the user of the highway. For instance, the head-note to *Gwinnett v. Eamer*⁷ runs: "At the time of the accident [i.e., the accident which constituted the cause of action in the case] A was not passing along the way, but was standing on the grating to talk with a person at the window above it:—Held, that A was not making an improper use of the grating;" there is, however, no reference to this ground of decision in the report.

Jewson v. Gatti.

In *Jewson v. Gatti*⁸ the question of what rights are comprehended under the user of a highway in an ordinary and usual manner was the subject of discussion. An open cellar abutting on a footway was protected by a bar, which was insecurely fastened. The plaintiff, a child of ten, went up to the bar and leant upon it, when it gave way, and the plaintiff fell into the cellar. At the trial, Day, J., nonsuited, substantially on the ground taken by Bigelow, C.J., in the American

View of Day, J.

¹ 3 B. & S. 244.

² L. R. 1 C. P. 53, 55.

³ *Cornwell v. Metropolitan Commissioners of Sewers*, 10 Ex. 771. The law on this point is, we have seen, different in the United States. *Ante*, 359 n. 3.

⁴ An insufficient railing.

⁵ *Stinson v. City of Gardiner*, 42 Me. 248.

⁶ *Stickney v. City of Salem*, 85 Mass. 374.

⁷ L. R. 10 C. P. 658.

⁸ 1 Times L. R. 635, (Day, J.'s language as here reported is not very lucid) and 2 Times L. R. 381, 441 (C. A.); *Stiefsohn v. Brooke*, 5 Times L. R. 684, per Fry, L.J.

case. "Persons who are not using a thoroughfare in an ordinary and usual manner," said he, "that is, not using it for what it was intended, choose to wander about it and to lean against any erection that might be lawfully erected upon some one's premises abutting on to such street, could not, if they came to harm while so doing, make that person liable for any such mishap. Had the child been jostled, or had she slipped up while passing along the pavement in an ordinary way and had so fallen against the bar, which, from being insecurely fastened, had given way, and so caused the accident, her position would have been different, and she would have had a right of action." This view was overruled both in the Divisional Court and in the Court of Appeal, and a new trial ordered, Lord Esher, M.R., saying: "This was a case of premises on the highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected, without any due regard to the safety of the public, and that of itself might be sufficient to sustain a case for the plaintiff. But there was more than that. For there was painting going on in the cellar, and it must have been known that this would attract children; and then a bar was put up, ostensibly for the purpose of protection, against which children would naturally lean while looking down into the cellar where the painting was going on."

Overruled in the Divisional Court and in the Court of Appeal. Judgment of Lord Esher, M.R.

There seems a disposition in the judgment of the Master the Rolls to put the case on the ground of a special duty owing to children, though this is not distinctly stated.¹ The broader and more substantial ground seems to be that there was a dangerous hole next the highway which there was an obligation on the defendant to guard, and if they chose to guard it by a bar that bar must be sufficient, not merely to resist the casual and inevitable pushings of people travelling along the highway, but such acts as ordinary experience shows might be reasonably expected from people using the highway. Ordinary people may stop, may talk, may rest, may look about them, may act with great latitude without losing their rights as passengers on a highway; they must, however, not take advantage of their presence on the highway for promoting objects inconsistent with its lawful user.²

Considered.

What is the lawful user of a highway arose for determination unincumbered by any special feature in *Harrison v. Duke of Rutland*.³ The plaintiff was using the highway, the soil of which was in the defendant, solely for the purpose of interfering with the rights of the owner over another portion of his land. The Court of Appeal held that as the plaintiff was not on the highway for the purpose of using it in any of the ordinary and usual modes in which people use a highway, he was a trespasser. "Cases," says Lord Esher,⁴ M.R., "might arise in which it would be a question whether what a person was doing was a reasonable and usual use of a highway. In such cases there might be a question for a jury as to whether such person was using the highway as a highway for passing, in accordance with the reasonable and ordinary user of it for that purpose;" but these were not the case before the Court.

Harrison v. Duke of Rutland.

The rotten state of a fence adjoining a highway was the cause

¹ See *ante*, 161.

² *Homewood v. City of Hamilton* (1901), 1 Ont. L. R. 260.

³ (1893) 1 Q. B. 142; for the case law as to trespasses on a highway, see Kay, L.J., 155. *Reg. v. Pratt*, 4 E. & B. 860. *Fielden v. Cox*, 22 Times L. R. 411, is instructive as to the perils amidst which we move, when on a holiday.

⁴ (1893) 1 Q. B. 147.

Harrold v. Watney.

of the injury to the plaintiff, a child of four, playing there, in *Harrold v. Watney*.¹ The child put one foot on the fence and was about to put another when it came down and injured him. The Court of Appeal held that he could recover. In doing so they imply that the fact of the child playing on the highway did not point to a wrongful user of the highway. There must be latitude in determining the class of act permissible on a highway. "If I were on the highway and wanted to tie up my hoot or got tired and leaned against the fence, should I not have been lawfully using the highway?"² The same judge in a later case³ gives additional examples: "If a man while using a highway for passage sat down for a time to rest himself by the side of the road to call that a trespass would be unreasonable. Similarly," "if a man took a sketch from the highway, I should say that no reasonable person would treat that as an act of trespass." But acts done "not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout" "by watching the trials of race-horses on the plaintiff's land" are not "an ordinary and reasonable use of the highway."

Tying up boot: leaning against fence:

sketching on highway.

Racing tout.

Highway used only in the ordinary and accustomed way.

Highways and Locomotives (Amendment) Act, 1878.

A highway, then, must be used only in the ordinary and accustomed way, but that way must not be enviously and narrowly circumscribed. Any user by which the highway is injured will be a nuisance, and indictable;⁴ and if special damage is caused to an individual actionable.

There are further special legislative provisions against excessive or engrossing user. By the Highways and Locomotives (Amendment) Act, 1878,⁵ s. 23, the local authority may recover in a summary manner from any person causing damage to the highway "by excessive weight passing along the same or extraordinary traffic thereon."⁶ The operation of this section has been considerably extended by the substitution of the words "by or in consequence of whose order,"⁷ for the words "by whose order," as they originally stood, "such weight or traffic has been conducted." This was a result of the decision in *Kent County Council v. Lord Gerard*.⁸

¹ (1898) 2 Q. B. 320.

² *L.c.* per Smith, L.J., 322.

³ *Hickman v. Maisey* (1900), 1 Q. B. 752, 756. *Cp. A.G. v. Antrobus* (1905), 2 Ch. 188.

⁴ *Egerley's case*, 3 Salk. 183—"information setting forth, that no waggon ought to carry more than 2000 weight, and that the defendant used a waggon with four wheels, *et cum inusitato numero equorum*, in which he carried 3000 or 4000 weight at one time, by which he spoiled the highway." The information was held good, despite various objections, "because it was the excessive weight which he carried that made the nuisance." *Com. Dig. Chimin* (A 3.)

⁵ 41 & 42 Vict. c. 77. The sec. 23 is amended by the Locomotives Act, 1898 (61 & 62 Vict. c. 29), ss. 1, 12; and sec. 10 is amended by the Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63), s. 4.

⁶ *Williams v. Davies*, 44 J. P. 347; *Northumberland Whinstone Co. v. Alwick Highway Board*, 44 J. P. 360; *Barnett v. Hoo Highway Board*, 46 J. P. 805. The proceedings under the 23rd sec. are in the nature of an action for a personal tort, and cannot be taken against the executor of a person offending against it, *Story v. Sheard* (1892), 2 Q. B. 515. *Commonwealth v. Allen*, 148 Pa. St. 358, 33 Am. St. R. 830, is an American authority on the "reasonable use of a highway" deciding that running a traction engine upon a single occasion is not a nuisance.

⁷ Sec. 12 (1) (c.), 61 & 62 Vict. c. 29. See an article on this Act, 106 *Law Times Newspaper* 52. As to costs *Chesterfield Rural District Council v. Newton* (1904), 1 K. B. 62.

⁸ (1897) A. C. 633. *Epsom Urban Council v. London County Council* (1900), 2 Q. B., per Bigham, J., 756. *Egham Rural District Council v. Gordon* (1902), 2 K. B. 120, so far as it decides any point of law, seems inconsistent with *Kent County Council v. Folkestone Corporation* (1905), 1 K. B. 620. *Kent County Council v. Vidler* (1895), 1 Q. B. 448, is a decision previous to *Lord Gerard's case* on the words "by whose order."

On the definition of "extraordinary traffic" there has been some fluctuation in judicial opinion. In *Pickering Lythe East Highway Board v. Barry*,¹ Grove and Lopes, JJ., held that a person carrying materials for building a house over a highway is not liable for damage to the highway; and Lopes, J., said: "I think the Legislature intended something unusual in weight or extraordinary in the kind of traffic, either as compared with what is usually carried over roads of the same nature in the neighbourhood or as compared with that which the road in its ordinary and fair use may be reasonably subject to. It would not be sufficient to compare the weight and traffic complained of with traffic usually carried on in the particular road." But Bowen, J., in the later case of *The Queen v. Ellis*, doubted:² "I have had occasion to consider this passage in the judgment of my brother Lopes, and I cannot adopt it to its full extent;" while Field, J., giving the judgment of himself and Bowen, J., said: "If the question whether it is extraordinary traffic is an inference of law from the facts, we must consider the point, the authorities having already decided³ that the word 'ordinary' must be interpreted with reference to the road in question;" and, after having discussed the facts of the case with reference to the user of traction engines as an ordinary incident of agricultural industry, he concludes: "Having regard to the character of this road and to the mode in which it was generally used, it is impossible to hold that the use of such engines was an ordinary incident of the traffic upon it."

Extraordinary traffic. *Pickering Lythe East Highway Board v. Barry.*

The Queen v. Ellis.

This decision seems more in accord with the law previously to the Act than the earlier one. The parish is not bound to repair all its roads in the same way, or judged by the same standard, but with reference to the ordinary uses respectively made of the roads.⁴ If this be so, what is the ordinary user of one road in a district may be extraordinary in another; and the test is what the user of the particular road is, and not what the circumstances of the neighbourhood are; nor yet what the user by one particular person may be if contrasted with the ordinary use of the road by the public.⁵ Traffic, however, resulting from the carrying on the ordinary and recognised trade of a district is not within the enactment,⁶ even though it is greater than the other traffic on the road, and is not continuous.⁷

Considered.

User of particular road is the test.

The various decisions on "extraordinary traffic" were passed in review by Bowen, L.J., in *Hill v. Thomas*,⁸ where *Pickering Lythe East Highway Board v. Barry* was overruled, and the definition adopted that "extraordinary traffic," as distinct from "excessive weight," will include "all such continuous or repeated user of the road by a

Hill v. Thomas.

¹ 8 Q. B. D. 59, per Lopes, J., 62.

² 8 Q. B. D. 469.

³ "It appears to me that those words ['excessive weight,' 'extraordinary traffic'] must mean excessive and extraordinary with reference to the ordinary use and traffic upon and over the road." "It is the ordinary nature of the traffic over the road which is to be the standard": per Lindley, J., *Lord Avland v. Lucas*, 5 C. P. D. 223 (C. A.), 351; and not traffic arising out of the recognised industries of the district even though not continuous, *Wallington v. Hoskins*, 6 Q. B. D. 206; *Savin v. Oswestry Highway Board*, 44 J. P. 766; *Tunbridge Highway Board v. Sevenoaks Highway Board*, 33 W. R. 306; *Reg. v. East and West India Dock Co.*, 60 L. T. 232.

⁴ *Ante*, 342.

⁵ *Whitebread v. Sevenoaks Highway Board* (1892), 1 Q. B. 8.

⁶ *Wallington v. Hoskins*, 6 Q. B. D. 206.

⁷ *Raglan Highway Board v. Monmouth Steam Co.*, 46 J. P. 598. The six months within which proceedings must be taken under this section runs from the surveyor's certificate, and not from demand of payment: *Pool and Forden Highway Board v. Gunning*, 51 L. J. M. C. 49; see, however, *White v. Colson*, 46 J. P. 565. As to who may be summoned as surveyor, *Low-aster v. Harlech Highway Board*, 52 J. P. 805.

⁸ (1893) 2 Q. B. 333, 340. A string of carts drawn in the same track was held "extraordinary traffic," in *Mayor, &c. of Wolverhampton v. Salop*, 11 Times L. R. 386.

person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair." Singularity of the product carried or singularity of the purpose for which it is applied, though a test, is not the sole test of the user. But "extraordinary traffic is really a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common."

*Etherley
Grange Coal
Co. v.
Auckland
District High-
way Board.*

In the *Etherley Grange Coal Company v. Auckland District Highway Board*¹ it was sought to qualify *Hill v. Thomas* by the proposition that traffic which is of such an extent and nature as to be extraordinary in comparison with the ordinary traffic on the road in question is, nevertheless, not "extraordinary traffic" within the meaning of the statute, if it can be shown that it is traffic of such a nature as is ordinarily conducted on other roads in the district. Lord Esher, M.R., was, however, of opinion that this contention "is directly in the teeth of the judgment in *Hill v. Thomas*, which appears to me distinctly to hold that the ordinary traffic on the particular road in question must be looked to, in order to see whether the traffic is extraordinary, and that it is none the less extraordinary with regard to that road because it would be ordinary traffic on another road;" and in this opinion Lopes and Kay, L.JJ., concurred.

*A.-G. v.
Scott.*

In *Attorney-General v. Scott*² the objection was taken that the user of a road by a traction engine would not have done injury if the highway authority had properly repaired it, and reliance was put on the legislation regulating the use of locomotives on highways. The Court of Appeal held that this legislation was subject to sec. 13 of the Locomotives Act, 1861:³ nothing in this Act contained shall authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action as the case may be, where, but for the passing of this Act, such indictment or action could be maintained. As to the objection that the highway authority had not done their duty, this was to say "if some one else had done his duty the nuisance would not have arisen"—and was no answer.⁴

II. TURNPIKES.

Definition.

A turnpike road is a public highway established by public authority, and is to be regarded as a public easement. The only difference between this and a common highway is that, instead of being made at the public expense in the first instance, it is authorised and laid out, by public authority, with funds raised in some other way than by taxation, and the cost of construction and maintenance is reimbursed by a toll levied on passengers, or on some classes of passengers, by public authority, for the purposes of reimbursement.⁵ Every

¹ (1894) 1 Q. B. 37.

² (1904), 1 K. B. 404.

³ 24 & 25 Vict. c. 70.

⁴ The defendants succeeded at the trial; *A.-G. v. Scott*, (1905) 2 K. B. 161.

⁵ Somewhat altered from what is said by Shaw, C.J., *Commonwealth v. Wilkinson*, 33 Mass. 175.

traveller has the same right to use it, paying the toll established by law, as he would have to use any other highway.

The case of turnpike roads was governed either by general Acts or by the particular Acts constituting the trust.¹ So far as the liability was not regulated by statute it differed nothing from that in the case of an ordinary highway; though the trustees were liable, so was the parish.²

Turnpikes regulated by statutory enactments constituting trusts;

It is not now necessary to deal at any length with the subject; inasmuch as with very few, if any exceptions, the turnpike trusts in England have expired,³ or have been superseded by legislation turning turnpike roads into ordinary highways.⁴

which have expired.

III. CANALS.

We next proceed to consider any special relations raised by the existence or user of canals.

A canal has been defined: an artificial highway by water constructed for the benefit of the public by adventurers authorised by the Legislature to take tolls for its use as a compensation for their risk and labour in the undertaking.⁵ This as a definition is obviously very unsatisfactory. A canal need not be a highway; for it may possibly be private property for private purposes. It need not be constructed for the benefit of the public, but for that of a private person merely. It need not be authorised by the Legislature; for there is no law to prevent a man making a canal on his own land. There need be no tolls; for there is nothing in morals or in law to prevent a man being a disinterested benefactor of his kind. Lastly, there is nothing in the nature of things—whatever may be the probabilities against the adoption of such a course—to prevent the Legislature authorising the construction of a canal out of public funds, or in a manner in which neither risk nor recompense should be entailed. As a summary of certain prominent facts most frequently connoted by the notion of a canal this collocation of incidents may pass muster. Excluding the sense in which canal is used to indicate a mere conduit, a canal is an artificially constructed waterway which admits of being used for purposes of passage; and, when made by public authority, usually becomes a highway with a right of tolls attached.⁶

Definition.

Webster's definition criticised.

Suggested definition.

If a canal were constructed on private property, and by agreement amongst the proprietors (putting aside questions of abstracting water from streams or rivers), the liabilities incurred would not differ from those incurred by the owners of a reservoir.⁷

¹ *E.g.*, 48 & 49 Vict. c. 37; 37 & 38 Vict. c. 95; 36 & 37 Vict. c. 90; 4 Geo. IV. c. 95; 3 Geo. IV. c. 126; and many more. The principal recent cases with reference to turnpikes are *West Riding Justices v. The Queen*, 8 App. Cas. 781; *Justices of Lancashire v. Rochdale*, 8 App. Cas. 494; *Justices of the Peace for County of Lancaster v. Improvement Commissioners of Newton in Makerfield*, 11 App. Cas. 416.

² *The Queen v. Kitchener*, L. R. 2 C. C. R., per Blackburn, J., 93.

³ Such as survive are treated as local and personal Acts; see *The Statute Law Revision Act, 1890* (53 & 54 Vict. c. 51), s. 3; also *Local Government Act, 1888* (51 & 52 Vict. c. 41), ss. 12, 13.

⁴ See *Official Index to Statutes, 1905*, Tit. Highway, General Provisions (a), (c), (f); 2. Highway Authorities (3).

⁵ Webster, *Law of Canals*, 1.

⁶ *The King v. Inhabitants of Kent*, 13 East 220; *The King v. Inhabitants of the Parts of Lindsey*, 14 East 317; *The King v. Inhabitants of St. Mary, Leicester*, 6 M. & S. 400; *The King v. Chelsea Waterworks Co.*, 5 B. & Ad. 156; *The King v. Inhabitants of Woking*, 4 A. & E. 40.

⁷ *Rylands v. Fletcher*, L. R. 3 H. L. 330.

Canals constructed under statutory powers.

In so far as canals are constructed under the sanction of Parliament, the rights and liabilities affecting them are regulated, in each case, by the Act to which they owe their construction;¹ though of course the proprietors are bound, irrespectively of statute, to keep their banks in such repair that the water cannot escape; and, where they have failed in this duty, they have even been held disentitled to recover, when clay-pits were dug in the neighbourhood of the canal into which the water of the canal escaped; on the ground that, if they had performed their obligation and kept proper banks, it was a question for the jury whether the water would have escaped.²

Mersey Docks Board v. Penhallow.

Even before the decision in *Mersey Docks Trustees v. Gibbs*,³ companies working a canal were held liable for negligence as commercial adventurers undertaking an enterprise for a profit. So long as they induce the public to use their canal they are liable for damage for neglect to keep it in repair; yet it would be unreasonable to require of them perpetually to sound and drag the length of their canal to learn instantly what obstructions might lie at the bottom, or to keep guards going along the banks to prevent the injuries inflicted by idlers. The rule to be applied in such a case is adopted in *Mersey Docks Board v. Penhallow*⁴ from Tindal, C.J.'s, judgment in *Parnaby's case*,⁵ "The common law" "imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives and property."

Statutory authority.

When created by statute, canal companies must take care strictly to observe the obligations imposed on them; for where a special authority is delegated by Act of Parliament to particular persons affecting the rights of others, "it must be strictly pursued";⁶ and where the words of the Act are ambiguous, every presumption is made against the company.⁷ A good illustration of this is found in the *Queen v. Bradford Navigation Proprietors*.⁸

Undertakers under Parliamentary powers.

The position under Parliamentary powers of undertakers of the construction of a canal is most distinctly stated by Lord Ellenborough in the *King v. Kerrison*.⁹ "Can we," he says, "put any other construction upon the Act but this, that the Legislature intended that, so far as regarded the making the river navigable, and the cutting new channels for that purpose, neither public nor private rights should stand in their way, but still they should make good to the public in another shape the means of passage over such ways as they were empowered to cut through?" This principle was acted on in the case of the disturbance of the level caused by a railway being run across a highway, in *Oliver v. N. E. Ry. Co.*¹⁰ the head note of which is, "where a railway, under the powers of an Act of Parliament, crosses a highway on the level, it is the duty of the company to keep the part of the way used by the public in a state of repair suitable for the ordinary and regular traffic."

¹ E.g., *Evans v. Manchester, &c. Ry. Co.*, 36 Ch. D. 626, 638.

² *Staffordshire and Worcestershire Canal Co. v. Hallen*, 6 B. & C. 317.

³ L. R. 1 H. L. 93.

⁴ 7 H. & N. 339.

⁵ 11 A. & E. 243.

⁶ Per Lord Mansfield, *Rex v. Croke*, 1 Cowp. 29. Com. Dig. Grant (G 12.); *Mayor, &c. of Birkenhead v. L. & N. W. Ry. Co.*, 15 Q. B. D., per Bowen, L.J., 579.

⁷ *Scales v. Pickering*, 4 Bing. 452.

⁸ 6 B. & S. 631. ⁹ 3 M. & S. 531.

¹⁰ 43 L. J. Q. B. 198.

The existence of a canal raises many points of difficulty in the relations which it constitutes towards the neighbouring proprietors—more especially in the mining districts. In nearly all cases these have to be decided with reference to the terms of the Acts under which the companies are constituted, and not under the terms of the common law. The opposite limits of these decisions are marked respectively by *Dudley Canal Navigation Co. v. Grazebrook*¹ (approved by the Exchequer Chamber in *Stourbridge Canal Co. v. Earl of Dudley*,² and by the House of Lords in *G. W. Ry. Co. v. Bennett*³) and by *Knowles v. Lancs. & Y. Ry. Co.*⁴

Relations of canal companies with neighbouring proprietors.

The former class of cases decides that where a clause in an Act of Parliament points to a restriction on the right of getting minerals within any specified distance of a canal company's cutting, yet gives to the mine-owner no power to compel payment of compensation where his operations cannot be carried on without damage to the canal, but only a power to go on with his mining operations unless he is compensated, the canal company cannot maintain an action against the owner of the minerals for an injury arising from his working the minerals in the usual way if they do not choose to pay compensation as they are empowered by their Act.

Dudley Canal Navigation Co. v. Grazebrook.

The cases, on the other hand, under the class of *Knowles v. Lancs. & Y. Ry. Co.*⁵ determine that where the Act under which the canal is constituted contains a provision to compel payment of compensation, and not merely a right on the part of the owner of the soil to go on with the working, unless he is compensated, if in any case the mineowner works his mine, he must do so without injuring the canal; and if he does injure it he will have to pay for the injury; since his appropriate and only remedy is under the compensation sections of the Act by which either the company or the mine-owner may take proceedings for the assessment of compensation.

Lancs. & Y. Ry. Co. v. Knowles.

*Dunn v. Birmingham Canal Co.*⁶ illustrates the former class. The canal company did not exercise their powers of purchase, and the mine-owner proceeded to work the minerals under their canal, with the result that his mine was flooded; for the damage caused he brought his action. Both the Exchequer Chamber, and the Queen's Bench, decided that he was entitled to work his mine and the Canal Company

Dunn v. Birmingham Canal Co.

¹ 1 B. & Ad. 59. *Midland Ry. Co. v. Checkley*, L. R. 4 Eq. 19.

² 30 L. J. Q. B. 108.

³ L. R. 2 H. L. 27; discussed in *Midland Ry. Co. v. Robinson*, 15 App. Cas. 19; *Ruabon Brick and Terra Cotta Co. v. G. W. Ry. Co.* (1893), 1 Ch. 427. See *Fletcher v. G. W. Ry. Co.*, in the Ex. Ch., 5 H. & N. 689; *London & N. W. Ry. Co. v. Evans* (1892), 2 Ch. 432.— judgment of Kekewich, J., reversed (1893) 1 Ch. 16.

⁴ 14 A. C. 248; *Cromford Canal Co. v. Cutts*, 5 Ry. Cas. 442, distinguished in *Chamber Colliery Co. v. Rochdale Canal Co.* (1895), A. C. 564; *New Moss Colliery Co. v. Manchester, &c. Ry. Co.* (1897), 1 Ch. 725.

⁵ 14 App. Cas. 253, 257.

⁶ L. R. 3 Q. B. 42. Cp. *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418; *Green v. Chelsea Waterworks Co.*, 10 Times L. R. 259 (C. A.); *Langstaff v. McRae*, 22 Ont. R. 78. It is now settled law that, where minerals are separated from the surface, the mineral owner is not entitled to let down the surface, unless, by the deed, instrument, or Act of Parliament, by which the minerals are severed from the surface, it appears that the surface owner has parted with the right of support, *Bell v. Love*, 10 Q. B. D., per Baggallay, L.J., 558, 3 C. 9 App. Cas. 286; and *Davis v. Treharne*, 6 App. Cas., per Lord Blackburn, 466; *Conssett Waterworks Co. v. Ritson*, 22 Q. B. D. 318, 321 (C. A.) 702; *L. & N. W. Ry. Co. v. Evans* (1893), 1 Ch., per Bowen, L.J., 27; *Bishop Auckland, &c. Society v. Butterknowle Colliery Co.* (1904), 2 Ch. 419; and *New Sharlston Collieries Co. v. Earl of Westmorland*, in House of Lords, reported in a note, l.c. 443. Where the surface is compulsorily parted with, and the owner thinks it beneficial to work his mines and proceeds to do so, he is in no worse position than if he had never parted with the surface at all: *G. W. Ry. Co. v. Bennett*, L. R. 2 H. L. 40.

had no remedy for any damage that might ensue to their canal from his doing so. On the other hand, the defendants were entitled to bring the water into the canal, as they had an absolute power to construct the canal and keep it filled with water under their Act; therefore in the absence of negligence, which was expressly negatived by the case, they were not liable for the escape of the water by action at law. The only remedy of the plaintiff was by compensation under the provisions of the Company's Act.

Ordinary remedy in Courts of the country only taken away so far as a particular jurisdiction is appointed.

Often some particular jurisdiction is appointed under canal Acts to determine all questions that may arise respecting things to be done in pursuance or in execution of the Act. Then, if the canal proprietors do anything not in strict accordance with the terms of their Act, there is not a pursuance and execution of the Act in the sense in which action is protected, and the ordinary remedy in the courts of the country is not taken away.¹ It follows that this right is reciprocal; so that, if any infringement is made on the statutory rights of companies, they are entitled to the ordinary remedies at law; in the words of Erle, J.,² "such a company [i.e., a canal company] has all the rights and remedies which an individual owner of private property has, unless the statute contains some provision to take them away;" and this is manifest on principle, since such companies are grafts on the common law, and not governed by independent laws, to any greater extent than is indicated.

Duty of canal companies as to water in or coming to their canals.

The duty of canal companies, with regard to the water in or coming into their canals, is made plain by three cases—*Harrison v. G. N. Ry. Co.*,³ *Boughton v. Midland G. W. Ry. of Ireland Co.*,⁴ in the Irish Exchequer Chamber, and *Nield v. L. & N. W. Ry. Co.*⁵

In the first of these the defendants undertook the maintenance of a cut or delf for carrying off water, but the banks were insufficient to resist what water they could contain, though sufficient for what they ordinarily did contain. By the wrongful conduct of third parties, more water was forced into the cutting than otherwise would have gone there, and, the banks being insufficient, damage was caused to the plaintiff. The defendants were held liable, since the proximate cause of the damage was their defective bank.⁶

Boughton v. G. W. Ry. of Ireland Co.

In the second case the defendant company, acting under statutory power, constructed an open cut parallel with their canal to carry off water from the overfalls of the canal in time of flood. This was properly constructed and amply sufficient. Owing to an obstruction in a sewer under the control of the Corporation of Dublin, water from the drain was stopped and flooded the premises of the plaintiff, who had opened a communication between his house drain and the canal drain. The Court held⁷ that the plaintiff could not recover, for "the discharge of the surplus waters of the canal by this drain of the Company was lawful by statute, and therefore, in the language of Chief Justice Cockburn in *Dunn v. Birmingham Canal Co.*, 'it is impossible to say that what is thus expressly legalised can be made the ground

¹ *Shand v. Henderson*, 2 Dow (H. L.) 519.

² *Rochdale Canal Co. v. King*, 14 Q. B. 135.

³ (1864), 3 H. & C. 231. *Countess of Rothes v. Kirkealdy, &c. Waterwork Commissioners* (1879), 6 Rottie 974, 7 App. Cas. 694.

⁴ (1873) Ir. R. 7 C. L. 169.

⁵ (1874) L. R. 10 Ex. 4.

⁶ In *Barber v. Nottingham, &c. Canal Co.*, 15 C. B. N. S. 726, the remedy was by compensation for water flowing "over or through the banks." Under the special Act this was apparently not so in *Cockburn v. Erewash Canal Co.*, 11 W. R. 34.

⁷ Ir. R. 7 C. L. 178.

of an action of tort.' " The case was mainly decided on the analogy afforded by *Dunn v. Birmingham Canal Co.*¹

In the third case² the owners of a canal, being threatened with flood from a neighbouring river, erected a harricade across the canal so as to prevent more water than the canal would securely hold from coming into it and flooding warehouses they had on the banks of the canal. In consequence of the harricade the water flowed on and injured the plaintiff's premises, doing more damage than it would have done had it not been hacked up by the hoards. The plaintiffs were held not entitled to recover; for, except in defending themselves against the water, the defendants had nothing to do with bringing the water to the place where it did the injury complained of. The only right they had against the defendants was "not to be injured by the defendants bringing water there without giving it a sufficient means of escape."³

Nield v. L. & N. W. Ry. Co.

These three cases have this in common, that damage is done to third persons by an overflow of water from causes over which the companies have no control. In the last case, the company were merely using means to protect themselves against a sudden and extraordinary casualty; and there the Court decided that a property owner has by common law what Branwell, B., described as "a kind of reasonable selfishness in such matters." "The law," he continued, "says, 'let every one look out for himself, and protect his own interest;' and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it, 'Why did not you do the same?'"

Cases compared and considered.

In the second case the defendants did no more than they were authorised by statute to do; and the intervention of an independent agency could not alter the legal quality of an act, which, apart from that intervention, was lawful.

The first case differs from the other two in the presence of negligence. The company not merely constructed works of the capacity they needed, but of a greater capacity, and, considering that greater capacity—but in that respect only—of insufficient strength. Had it not been for this negligent act in constructing a receptacle for water greater than the receptacle could safely contain, the injury would not have happened; hence they were held liable, not because they did not make the provision required by their parliamentary powers, but because having made

¹ L. R. 7 Q. B., 244, per Cockburn, C.J., 261; L. R. 8 Q. B. 42. See *Regina v. Delamere*, 13 W. R. 757; trustees had altered the bed of a river, and damage resulted to the claimant, who was held entitled to compensation.

² L. R. 10 Ex. 4. In the subsequent case of *Thomas v. Birmingham Canal Co.*, 49 L. J. Q. B. 851, the act done, the opening of sluices, was for the protection of the neighbourhood, and also for the protection of the banks of the canal. The defendant were not called on, and *Nield v. L. & N. W. Ry. Co.* does not appear to have been cited. The decision was that, if nothing had been done, the case would have been within *Nichols v. Marland*, 2 Ex. D. 1. But as the case found that the damage to the plaintiffs was not increased, it was *injuria absque damno*, and not a ground of action.

³ See *Menzies v. Breadalbane*, 3 Bligh (N. S.), per Lord Eldon, C., 420, citing D. 39, 3, 1, §§ 1, 2. These passages "have reference to accidental and extraordinary casualties, from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours, for the sake of self-preservation guard themselves against the consequences; perhaps in this way the different passages in the Digest may be reconciled." *The King v. Trafford*, 1 B. & Ad. 874, in Ex. Ch. 8 Bing. 204. *Vinnicombe v. MacGregor*, 29 V. L. R. 32. In Y. B. 12 H. VIII. 3. Brudnal says: that if a man's ground be surrounded with waters he may make a trench in his own grounds to let the water run downwards and to descend upon his neighbour's ground; for water is an element descendible (*jure naturæ*), and then the neighbour may do the same, so that the water runs at last into a river or ditch.

greater, they did not do their work efficiently. Had the defendants in *Harrison v. G. N. Ry. Co.*¹ constructed their delph of the same strength, and with no more than the accommodation they needed in the event of a flood, they would not have been any more liable than the defendants in *Nield v. L. & N. W. Ry. Co.*² were. Instead of this they constructed what was in effect a reservoir inadequate to contain the volume of water they collected there.³

Whalley v. Lancs. & Y. Ry. Co.

With these cases *Whalley v. Lancs. & Y. Ry. Co.*⁴ must be compared. The defendants were the owners of a railway upon a slight embankment, which they were authorised to construct by Act of Parliament. An extraordinary storm of rain flooded the neighbouring land, and the water, being stopped by the embankment, caused an amount of pressure dangerous to its stability. The defendants, to relieve the pressure, cut trenches in the embankment, through which the water passed to the plaintiff's land in a way different from what it would otherwise have done, and thereby caused injury. In its more important aspect this case is considered in another connection.⁵ Here it is important only to distinguish the principle under which it was decided from that governing in *Nield's case*. In *Nield's case* the works were erected to prevent the aggression of a common enemy, and the decision was that the natural right of a landowner to act for his own protection was not taken away because he had constructed an artificial watercourse on his land. The case of *Whalley v. Lancs. & Y. Ry. Co.* differs in that "an extraordinary misfortune happened. It fell upon the defendants, and, if they had allowed things to remain as they were, they would have been the sufferers; but, in order to get rid of the misfortune which had happened to them, and which, *rebus sic stantibus*, would not have injured the plaintiff, they did something which brought an injury upon the plaintiff."⁶ There is all the difference between the mere averting of a threatened mischief, irrespective of where it may else fall, and the commission of a new and positive wrong. To take an illustration from the squib case:⁷ there is the difference between hurling it away in its course to prevent suffering mischief, and taking it from the ground when it was at rest and starting it on a fresh flight.

Principle distinguished from *Nield v. L. & N. W. Ry. Co.*

Duty to the public in connection with highways.

Duties also arise to the public generally where the course of a canal intersects public highways or places over which people have a right to pass. Thus, in *Manley v. St. Helen's Canal and Ry. Co.*,⁸ a canal company were held liable for not taking reasonable precautions to render a bridge, which they had made over their canal, safe for persons passing along the road after dark. The bridge provided was a swivel bridge, which opened when the canal was being used, and was not

¹ 3 H. & C. 231. As to damages from flood increased by wrongful erection of works, see *Workman v. G. N. Ry. Co.*, 32 L. J. Q. B. 279.

² L. R. 10 Ex. 4.

³ In the Digest, D. 39, 3, 1, § 1, *De Aqua et Aquæ pluvie arcendæ* is the following: *Hæc autem actio locum habet in damno nondum facto; opere tamen jam facto hoc est, de eo opere, ex quo damnum timetur. Totiensque locum habet, quotiens manu facto opere aqua nocitura est; id est cum quis manu fecerit, quo aliter fluere quam natura auleret; si forte immittendo eam aut majorem fecerit, aut citatorem aut vehementiorem; aut si comprimendo redundare cesserit. Quod si natura aqua noceret, ea actione non continetur.*

⁴ 13 Q. B. D. 131.

⁵ Post.

⁶ L. c. Brett, M.R., 138.

⁷ *Scott v. Shepherd*, 1 Sm. L. C. (11th ed.), 454.

⁸ 2 H. & N. 810; *Witherley v. Regent's Canal Co.*, 12 C. B. N. S. 2; *Griffiths v. East and West India Docks*, 5 Times L. R. 43; *Steinhoff v. Corporation of Kent*, 14 Ont. App. 12.

lighted at night. Martin, B., said :¹ " If I were asked what kind of bridge they ought to provide, I should say an ordinary stone bridge, such as is found on all canals ; but these persons for their own profit will not incur the expense of making one." And a life was lost through their default.

A canal company are not bound to fence their premises, even when they are alongside a public footway, unless, indeed, they be " substantially adjoining ;" and this " is not a question for the jury, but for the judge."² The towing-path by a canal is to be used only by horses employed in towing vessels, yet it is a common highway for that purpose " consequently the canal companies do not owe any duty to persons other than those using the towing-path as a highway for the purposes of navigation to keep it in repair, " except, possibly, where they have appropriated a part of the public highway for their use as such."³

No duty
ordinarily
to fence.

IV. BRIDGES.

A bridge has been defined⁴: " a building constructed over a river, creek, or other stream, or over a ditch or other place, in order to facilitate the passage over the same."⁵

Definition.

" Pons," says Sir Edward Coke,⁶ " *signifi. ut omne quod super aquas*

¹ 2 H. & N. 840, 851.

² *Binks v. South Yorkshire Ry., &c. Co.* 3 B. & S. 244, 253; *Gautrel v. Egerton*, L. R. 2 C. P. 371.

³ *The King v. Severn and Wye Ry. Co.*, 2 B. & Ald., per Bayley, J., 648.

⁴ Shearman and Redfield, Negligence, § 403. " Where persons pay one toll for the use of one entire towing-path, parts of which are artificial and parts not, there can be no distinction made as to the duty of those who maintain the path to take reasonable care of the artificial and the natural parts, or at least to warn those who use them of defects in them. The defendants can in future, if they think fit, announce to those who pay the tolls that they must take the paths as they find them. If this is done, there could be no liability for a defective state of repair, even though wilful. Whether if they gave such notice, and left the banks unrepaired, they could be compelled to repair them, is a question that could then be directly raised and decided": per Bramwell, B., *Winch v. Conservators of the Thames*, L. R. 9 C. P. 389. See *Navigation Conservators v. Bolton*, 6 App. Cas. 685. In America it has been laid down that where land is acquired for a public purpose, as for a canal, railway, or the like, direct benefits to the owner from its construction are deemed part of the considerations paid by the corporation acquiring the right to construct the public work; and that if embankments and abutments essential to the construction and maintenance of a canal protect the owner's land from overflow, they are to that extent a benefit, and the presumption is that this benefit was taken into consideration in authorising the construction; for the ordinary rule is that a contract for a right of way for a canal or a condemnation for that purpose and assessment of damages includes all direct benefits and damages: *Burk v. Simonson*, 54 Am. R. 304. Cp. *Nield v. L. & N. W. Ry.*, L. R. 10 Ex. 4.

⁵ 1 Bouvier Law Dict. (6th ed.) *sub voce*. This definition is too wide, as it includes both viaducts and causeways.

⁶ In America a bridge across a street for private use has been determined to be an indictable nuisance, even though it is so high above the surface as not to impede the passage of ordinary vehicles: *Bybee v. State*, 48 Am. R. 175. In England by the common law it would be not unlawful, if so high above the street as not to interfere with the user of the street; while the soil of the street was in those responsible for the bridge, and also provided there be not local enactments prohibiting it. The authority charged with repairing bridges is bound to rebuild if a bridge becomes destroyed; *State ex rel. Roundtree v. Board of Commissioners*, 41 Am. R. 821, where the English cases to the same effect are examined.

⁷ 2 Co. Inst. 700. Comment on the Statute of Bridges, 22 Hen. VIII. c. 5, where all the old learning is collected. After the definition in the text Coke cites the verses:

Nil Tadcaster habet musis aut carmine dignum,

Præter magnifice structum sine flumine pontem.

And adds: *Vidit et scripsit poeta in ætate.* He also gives, at 701, the following derivation: *Pons à pendendo quasi tanquam in aëre pendet.* *The King v. West Riding of Yorkshire*, 7 East 588. Callis, Sewers, 86, has a curious discussion whether c. 15 of Magna Charta as given in 2nd Inst. (9 Hen. III.) is repealed or refers only to bridges existing at the date of it. The words are: *Nulla villa nec liber homo distringatur*

Must cross a watercourse.

transimus unde ponticulus." He seems to regard it as indispensable to the character of bridges, under 22 Hen. Vlll, c. 5, that they should cross a stream or watercourse; and this view was adopted by the Court in *The King v. Inhabitants of Oxfordshire*,¹ where Lord Tenterden, C.J., said this incident of crossing a stream, &c., "must be considered as virtually included in the true import of the word 'bridge.'"

County bridge.

The county at large is *prima facie* liable to the repair of all public bridges² within its limits, in the same manner as parishes are bound to repair all public ways within their district.³ The parish or hundred is responsible for "bridges over small streams."⁴ The showing an obligation in another does not relieve the county, parish, or hundred in the last resort.⁵

Liability to repair.

If a man build a bridge and dedicate it to the public, he is not bound to repair it at common law;⁶ for no particular man is bound to reparation of bridges by the common law, except *ratione tenuræ* or *prescriptionis*; and if no one is bound by tenure or prescription it should be repaired by the whole county;⁷ "for of common right the whole county must repair it, because it is for the common good and ease of the whole county." This liability of the county to repair does not arise so soon as it appears that a bridge built by an individual for his private purposes is of public utility, as evidenced by public use, but is dependent on dedication and adoption in a certain sense; there must be public user supplemented by public utility. The question is then one of evidence for the jury.⁸ The remedy at common law

facere pontes nisi qui ab antiquo et de jure facere consueverant tempore Henrici Ari nostri. He concludes in the affirmative. See per Blackstone, J., 5 Burr. 2508.

¹ 1 B. & Ad. 301. In *The Queen v. Inhabitants of Derbyshire*, 2 Q. B. 745, it is laid down that it is not necessary to constitute a bridge that water should flow under it at all seasons of the year and all the year.

² A public bridge is one "all his Majesty's subjects had used freely and without interruption as of right"; *The King v. Inhabitants of Bucks*, 12 East 192, 204.

³ *The Queen v. Inhabitants of Ely*, 15 Q. B. 827.

⁴ Per Blackburn, J., *The Queen v. Kitchener*, L. R. 2 C. C. R. 93.

⁵ 2 Co. Inst. 700. *The Queen v. Kitchener*, L. R. 2 C. C. R. 88.

⁶ 2 Co. Inst. 701; *The Case of Langforth Bridge*, Cro. Car. 305. If a miller make a new bridge over a new cut of water for his own profit the county shall not be bound to repair it, though it be used by the public, since it is not made for the common benefit, 1 Roll. Abr. 368. See also 13 Co. Rep. 33. *The King v. West Riding of Yorkshire*, 2 East, 342. "A bridge built by an individual over a public highway that is useful to the public, and generally used by them, or if in the course of time it has become useful, and is used by the public, must be kept in repair by the public; as should a patriotic person build a bridge at his own expense over a public fordway it would be more than unjust to compel him also to keep it in repair"; per Nelson, J., *Heacock v. Sherman*, 14 Wend. (N. Y.) 58; *Mayor of Albany v. Cudliff*, 2 N. Y. 103.

⁷ 2 Co. Inst. 701. But the freehold of bridges, as of the highway, is in him that has the freehold of the soil; the free passage is for all the King's subjects. And though the bridge is not specifically dedicated, if it becomes "useful to the county in general" the county is bound to repair it: *The Queen v. Wills*, 6 Mod. 307, 1 Salk. 350; *The King v. West Riding of Yorkshire*, 2 Win. Bl. 685, 5 Burr. 2594; *The King v. West Riding of Yorkshire*, 2 East 342; *The King v. Bucks*, 12 East 192. It makes no difference that the bridge is built by turnpike trustees in the line of their road; for as Lawrence, J., said in *The King v. West Riding of Yorkshire*, 2 East 352, "It might as well be contended, that if a parish were to build a new bridge on a road within their limits, they would be bound to keep it in repair afterwards, and that the county would not be liable, as that the trustees are in this case because the bridge is built in the turnpike road. In truth, the trustees are merely substituted in lieu of the parish." And Lord Ellenborough, C.J., said: "If the trustees under similar acts throw this burthen generally on the counties, it may be necessary to make special legislative provision in future; but this cannot vary the common law rule." See *The Glusburne Bridge case*, R. v. West Riding of Yorkshire, 5 Burr. 2594; also 43 Geo. III. c. 53, s. 5.

⁸ *The Queen v. Inhabitants of Southampton*, 17 Q. B. D. 424; s. c. 19 Q. B. D. per Lord Coleridge, C.J., 600.

for non-repair was by presentment, at the suit of the King for avoiding multiplicity of suits, either before the justices of the King's Bench, or before justices in eyre or commissioners of oyer and terminer, or before the sheriff by commission or writ in the nature of a commission.¹ This last remedy is taken away by 28 Edw. III. c. 9.²

The common law liability is traced through 22 Hen. VIII. c. 5,³ "concerning the repairing of decayed Bridges in Highwaies and by whom;" which provides that justices of the peace shall have power to inquire of all nuisances arising from bridges broken in the highways to the damage of the King's liege people in every shire, franchise city, or borough, and to charge the inhabitants of each county in which they might find any decayed bridges not otherwise repairable; the 1 Anne, c. 12,⁴ which was passed because the fines for not repairing levied under the earlier Act were paid into the Exchequer instead of being handed over to the county treasurers to be applied in the repair of the bridges as was by the Act directed; the County Bridges Act, 1803,⁵ the County Rates and Bridges Act, 1812,⁶ the County Bridges Act, 1815,⁷ the County Bridges Act, 1841,⁸ the Highways and Bridges Act, 1891,⁹ besides numerous other subordinate or partial enactments, in supplement of or substitution for them.

By the Locomotives Act, 1861,¹⁰ s. 7, if a bridge or a turnpike or other road be damaged by a locomotive passing over it, the owner or person in charge is required to make good the damage. In the *Queen v. Kitchener*¹¹ this was held to be limited to the case of a "body of persons liable to repair in ease of the general public," and not to apply to county bridges.

The limit of the liability as declared by 22 Hen. VIII. c. 5,¹² is not confined to the structure of the bridge itself, but extends a distance of 300 feet from each of the ends of the bridge.¹³ By the Highway Act, 1835,¹⁴ where a county bridge has been built since 1825, the highway over it is to be repaired by those who were, at law, before the building of the bridge, bound to repair the highway.

¹ 2 Co. Inst. 701.

² 2 Co. Inst. 701. The statute is repealed 50 & 51 Vict. c. 55, s. 30.

³ 2 Co. Inst. 697. By 51 & 52 Vict. c. 41, s. 3, the powers of justices are transferred to County Councils, and by ss. 6, 11 (1) powers are given to County Councils to take over bridges, not county bridges, and to erect new and to maintain them. By 54 & 55 Vict. c. 63, s. 3, County Councils may enter into agreements with highway authorities for the improvement of bridges.

⁴ 1 Anne Stat. 1, c. 18, Rutledge. Sec. 13 is repealed by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59.)

⁵ 43 Geo. III. c. 59, "Lord Ellenborough's Act," the year following the decision in the *King v. West Riding of Yorkshire*, 2 East 342. One effect of this Act is an anticipation of the Highway Act, 1835, section 5, providing that the common law liability to repair should not attach to any new bridge unless it had been erected in a substantial manner under the direction or to the satisfaction of the county surveyor. It is extended by 54 Geo. III. c. 60, but see Stat. Law Rev. Act, 1890 (53 & 54 Vict. c. 33).

⁶ 52 Geo. III. c. 110. Secs. 3 & 4 repealed by the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35, No. 1).

⁷ 55 Geo. III. c. 143. See Stat. Law Rev. Act, 1890 (53 & 54 Vict. c. 33).

⁸ 4 & 5 Vict. c. 40, repealed 53 & 54 Vict. c. 51.

⁹ 54 & 55 Vict. c. 63.

¹⁰ 24 & 25 Vict. c. 70.

¹¹ L. R. 2 C. C. R. 88.

¹² Section 9.

¹³ *Hertfordshire County Council v. New River Co.* (1904), 2 Ch. 513, discusses the liability, under the statute of persons liable to repair a bridge, to repair the highway for a distance of 300 ft.

¹⁴ 5 & 6 Will. IV. c. 50, s. 21; but see *The Queen v. Inhabitants of Southampton*, 17 Q. B. D. 424, 19 Q. B. D. 590.

By section 46 of the Railways Clauses Consolidation Act, 1845,¹ a railway company which crosses a road must make a "bridge," and must metal and repair the "bridge" and road and approaches.²

The Metropolis Management Act, 1855,³ and the Public Health Act, 1875,⁴ enact the word "street" shall apply to and include any "bridge" which shall vest in the authorities under those two Acts respectively. The effect of these enactments on the sections of the Railways Clauses Consolidation Act, 1845,⁵ is stated by Lord Watson⁶ to be this: "The whole bridge, from its foundation upwards, is part and parcel of the appellants' land, with the exception of those portions of it consisting of the carriageway and footpaths, and the materials of which they are made, which have been vested in the local authority by force of statute. The bridge, with that exception, appears to me to be as much the appellants' property as an embankment would be constructed upon land acquired for that purpose in order to carry the approaches to the bridge." A "bridge" in this sense was apparently not known to the common law.

The expenses of the repairs of bridges under the Inclosure Act, 1833,⁷ are recoverable by means of rates made by the commissioners in the manner provided by that Act.

When the person or public body liable to repair a bridge is ascertained, the same rules apply as to determining the extent and method of repairing as are applicable in the case of a highway, and the general law of negligence supplies the test of what constitutes negligence.

The question of fencing remains. This is usually provided for by the statute under which the bridge is erected, as, for example, the Railways Clauses Consolidation Act, 1845,⁸ and by the provision of Lord Ellenborough's Act,⁹ to which we have already referred, by which, before a bridge can be dedicated to the public, the approval of the surveyor is required. By common law, no such requirement is made; and there seems no reason why the dedication of a bridge should, apart from statutory enactment, be subject to any other liability than that of a highway at common law.¹⁰

Further, from a consideration of *Manley v. St. Helen's Canal and Ry. Co.*¹¹ where there is a statutory obligation to maintain a bridge across a canal, the common law liability does not admit of being put higher than that a jury will be warranted in finding a bridge to be insufficient if, with reference to the state of circumstances, it is unfenced, so as to be dangerous. This liability differs nothing from the rule applicable to highways generally,¹² and would be the subject of indictment, not of private action.

A question is propounded by the Lord Chancellor (Halsbury) delivering the judgment of the Privy Council in *Victoria Corporation*

¹ 8 & 9 Vict. c. 20.

² *North Staffordshire Ry. Co. v. Dale*, 8 E. & B. 336, followed *Mayor, &c. of Bury v. Lanes. & Y. Ry. Co.*, 20 Q. B. D. 485, and approved 14 App. Cas. 417.

³ 18 & 19 Vict. c. 120, s. 250.

⁴ 38 & 39 Vict. c. 55, s. 4. As to what is meant by "vest in the authorities," see the cases cited *ante*, 356.

⁵ 8 & 9 Vict. c. 20.

⁶ *G. E. Ry. Co. v. Hackney Board of Works*, 8 App. Cas. 687, 692; *Lightbound v. Higher Bebington Local Board*, 14 Q. B. D. 849, *affd.* 10 Q. B. D. 577, is a decision on the meaning of the words "fronting, adjoining, or abutting" in s. 150 of the Public Health Act, 1875. *The North of England Ry. Co. v. Langbaugh*, 24 L. T. (N. S.) 544.

⁷ 3 & 4 Will. IV. c. 35.

⁸ 8 & 9 Vict. c. 20, ss. 49 *et seqq.*

⁹ 43 Geo. III. c. 59, s. 5.

¹⁰ *Ante*, 332.

¹¹ 2 H. & N. 840.

¹² *Hardesty v. South Yorkshire Ry. Co.*, 4 H. & N. 67.

Lord Watson
in *G. E. Ry.
Co. v.
Hackney
Board of
Works.*

Liability
similar with
that in regard
to highways.

Fencing.

Liability
where
dangerous if
unfenced.

*v. Patterson*¹ of considerable interest; whether if the original construction of a bridge were such, and the pressure placed upon it by the tramway company who had statutory power to use the bridge was so great that under any circumstances, independently of any decay, or misuse of it, the weight upon it would have caused the destruction of the bridge the tramway company who used the bridge in a way for which it was not constructed would be liable? Failing some limitation of their liability they clearly would; for a grant of user is only of the user of the thing as it exists, not of some different thing. In the case in question the thing granted to be used was not kept in the state it should have been kept in: the beam which broke had been bored and weakened: there was negligence; and the corporation were liable.

User such as is destructive of the thing need imports liability.

V. SEA-WALLS, OR SEWERS.²

The law of the liability of sea frontagers to repair sea-walls, and of the extent of the duty in cases of liability, after long being the subject of misconception, has recently been placed on a satisfactory footing by a series of important and interesting cases. These we are now to consider.

The law of liability of frontagers arises either by prescription and custom, or by the common law.³

Though prescription and custom are often identified, there is a distinction between them that should be noticed. Prescription is always alleged in the name of a person and his ancestors, and those whose estate he has; a custom is always alleged in the land or place; and it serves for those who cannot prescribe in their own name nor in the name of any person certain, as the inhabitants of a town. The allegation of a custom for all classes of person is bad in law.⁴

Liability.
Prescription and custom distinguished.

¹ (1869) A. C. 615, 618.

² The *locus classicus* for the learning on this branch of law is Callis's Reading upon the Statute of Sewers. The word sewer in this connection means the "walls, ditches, banks, gutters, sewers, gales, canals, bridges, streams, and other defences by the course of the sea and marsh ground," "by rage of the sea flowing and re-flowing, and by means of the trenches of fresh waters descending and having course by divers ways to the sea," subject to be broken or become in disrepair: see 23 Hen. VIII. c. 5, s. 2. See also *Form. Dig. Sewers*; *Vin. Abr. Sewers*; and The Sewers Act (1833), 3 & 4 Will. IV. c. 22; as to partial repeal of which, see The Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19); as to s. 47, *Stracey v. Nelson*, 12 M. & W. 535; and as to 44, S. L. R. Act, 1874.

³ Per Lord Coleridge, C. J., *Hudson v. Tabor*, 2 Q. B. D. 292, citing *Keightley's case*, 10 Co. Rep. 139 a; *The King v. Commissioners of Sewers for Essex*, 1 R. & C. 477, which establishes the proposition that where one buys land below the level of high water, and which would be daily covered with water but for a sea-wall the purchaser has *ipso facto*, notice that he is liable to contribute to repair the sea-wall. *Morland v. Cook*, L. R. 6 Eq. 252. *Pycr v. Carter*, 1 H. & N. 916, which was cited by the M. R. in *Morland v. Cook*, but was spoken of by Lord Westbury, C., in *Suffield v. Brown*, 4 De G. J. & S. 186, as a case of little or no authority (and his opinion was adopted by Lord Chelmsford, C., in *Crosley v. Lightowler*, L. R. 2 Ch. 478), was definitely overruled in *Wheeldon v. Burrows*, 12 Ch. D. 31, notwithstanding the dicta of Mellish and James, L.J., in *Watts v. Nelson*, L. R. 6 Ch. 170. James, L.J., was one of the Court in *Wheeldon v. Burrows*.

⁴ "The difference between custom and prescription" is "only that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation, but the rules affecting the subject matter are in each case the same"; per Farwell, J., *Mercer v. Denne* (1904), 2 Ch. 556, affd. (1905), 2 Ch. 538. *Gutward's case*, 6 Co. Rep. 59 b; Co. Lit. § 170, 113 b; *Fitch v. Rawling*, 2 H. Bl. 393; *Calis*, 110; *Selby v. Robinson*, 2 T. R. 758, where a custom, "for poor and indigent householders living in A," was held too vague; *Earl of Coventry v. Willer*, 9 L. T. (N. S.) 384; *Hall v. Nottingham*, 1 Ex. D. 1; *Allgood v. Gibson*, 34 L. T. (N. S.) 883, where a custom to have common of fishery over the lord's waters on the waste of the manor, and to take and carry away fish as a profit à prendre, was held un-

We are now to consider what is the liability by common law.

Crown bound
by the
common law
to protect the
kingdom from
inundation.

The Crown is by the common law bound to protect the kingdom from inundation of water.¹ This is laid down in the *Case of the Isle of Ely*;² "It is to be known that, by the common law before the statute of 6 H. VI. c. 5, the King ought of right to save and defend his realm, as well against the sea, as against the enemies that it should not be drowned or wasted, and also to provide, that his subjects have their passage through the realm by bridges and highways in safety; and therefore, if the sea-walls be broken, or the sewers or gutters are not scoured, that the fresh waters cannot have their direct course, the King ought to grant a commission to inquire and to hear and determine these defaults."³

Statutory
supplement.

The statutes⁴ superimposed on the common law relating to sea-walls and sewers are hut confirmatory and extending to it, and by no means import a different liability. The general terms of the commissions issued in conformity with the statutes obliged every one, within the jurisdiction of the Commissioners,⁵ to contribute who received benefit, even if not immediate.⁶ Notwithstanding the terms of the commissions, an impression seems to have been general that the fact of being a frontager imposed the liability to safeguard against the sea; and this proposition is adopted by Callis in his Reading on the statute of Sewers,⁷ founding himself on a case from the *Liber Assisarum* in the 37 Edward III. 218, pl. 10. But the passage cited is shown by Cockburn, C.J.,⁸ not to bear the meaning sought to be put upon it; and after examination of the authorities that learned judge concludes that "the fact that the owner of land fronting the sea might be liable under a commission issued by virtue of the King's authority by no means tends to show that, independently of a royal commission, such liability existed at common law;" he adds, "We see nothing to warrant our holding it to exist." His view was adopted by the Court of Appeal,⁹ where Lord Coleridge, C.J., discussing the probable origin of a sea-wall, as to which there is no authentic account, said:¹⁰ "In all likelihood it was first erected either by the King at the

Cockburn,
C.J.'s, criti-
cism on
Callis.

reasonable; *Bourke v. Davis*, 44 Ch. D. 110; *Goodman v. Mayor of Saltash*, 7 App. Cas. 633, distinguished *Tilbury v. Silva*, 45 Ch. D. 98. *Edwards v. Jenkins* (1896), 1 Ch. 308, where a custom for the inhabitants of adjoining parishes to exercise a right of recreation over land in one of them was held bad; *Brocklebank v. Thompson* (1903), 2 Ch. 344, right to a churchway *prima facie* a parochial custom.

¹ *Nos pro eo quod ratione dignitatis nostre regie ad providendum saluationi regni nostri Anglie circumquaque sumus districti* are the words of the old writ in the Register. The 23 Hen. VIII. c. 5, s. 3 says: "We, therefore, for that, by reason of our dignity and prerogative royal, we be bounden to provide for the safety and preservation of our realm of England, willing that speedy remedy be had in the premises, &c.," see Fitzherbert, *De Natura Brevium*, 113 a.

² 10 Co. Rep. 141 a; *Le Case del Boyall Piscarie de le Bunne*, Sir John Davys, 55; "Commission of Sewers to defend the kingdom against the sea is very ancient, and even by special prescription in some cases; but sewers for melioration of land are by Act of Parliament": per Holt, C.J., 12 Mod. 331; see also the precedent quoted in the *Case of the Isle of Ely*, 10 Rep. 141 b; *Hendly v. Mayor, &c. of Lyme*, 5 Bing., per Best, C. J., 109.

³ Cf. Fitzherbert, *De Natura Brevium*, 113; see also 225 E.

⁴ 6 Hen. VI. c. 5; 18 Hen. VI. c. 10; 4 Hen. VII. c. 1; 6 Hen. VIII. c. 10; 23 Hen. VIII. c. 5. See 4 Co. Inst. 275.

⁵ *Mayor, &c. of New Romney v. Commissioners of Sewers for New Romney*, (1892) 1 Q. B. 840.

⁶ *Soady v. Wilson*, 3 A. & E. 248; *Heddy v. Bates*, 13 Ch. D. 498.

⁷ P. 115.

⁸ *Hudson v. Tabor*, 1 Q. B. D. 232. *Nitro-phosphate and Odun's Chemical Manure Co. v. London & St. Katherine Docks Co.*, 9 Ch. D. 503.

⁹ 2 Q. B. D. 290.

¹⁰ *L.c.* 295.

expense of those to be benefited by it, assessed upon them respectively in proportion to the benefit they did or would respectively receive, or by some great land-owner, for his own benefit, whose land, if it came into the hands of separate owners, would be liable to no other burdens than those which the law imposes upon all other land within the realm. But, as we have said, we can see no reason for holding that the burden sought to be imposed upon the defendant in this case in respect of his frontage land is one of such burdens." There is then no common law duty on the frontager, merely as frontager, to erect or maintain a sea-wall for the protection of his neighbour.

Origin of sea walls.

No common law duty on frontager to maintain.

Attorney-General v. Tomline.

In *Attorney-General v. Tomline*,¹ the position was advanced that the owner of foreshore in the natural user of his property is entitled to take away the shingle and sell it, even though his doing so diminishes the natural barrier against the sea, and may expose his neighbours to be flooded. The case differs from *Hudson v. Tabor* in this, that *Hudson v. Tabor* sought to establish a liability to maintain a barrier against the sea, while in *Attorney-General v. Tomline* a right to destroy a natural barrier was advanced. From the absence of a duty to keep up a sea-wall, which was admitted in *Hudson v. Tabor*, it was sought to reason, through the equally admitted right of a man to the natural enjoyment of his property, to the establishment of a right to remove an existing protection. Fry, J.,² was inclined to hold, on the analogy of *Baird v. Williamson*³ and *Fletcher v. Smith*,⁴ that to remove shingle from the foreshore was a natural user of land, and similar in its nature to the digging of coal; yet he did not decide the case on this ground, to which, in the Court of Appeal, Brett and Cotton, L.JJ.,⁵ abstain from giving their assent. The ground of the decision is that there is in the Crown a duty to guard the shores and land adjoining the sea from being overflowed by the sea; consequently there is an obligation on every person possessed of a sea bank to do nothing inconsistent with the protection of the land from the inroads of the sea. As James, L.J.,⁶ points out, the existence of such a duty on the part of the Crown is inconsistent with the right claimed; for the exercise of the right would be a wrongful act, in the nature of a nuisance, indictable by the Crown, and "the person who suffered the particular damage occasioned by the nuisance would have a right to call upon the Court to interfere for his protection." This duty does not extend to give protection to artificial structures, but only to natural protecting banks against the sea and the waters of tidal rivers.⁷

Duty of the Crown to guard the coasts.

The case of damage caused by an extraordinary storm and high tide came before the Courts in *The Queen v. Commissioners of Sewers for Essex*,⁸ where the prescriptive liability of the frontager to repair the sea-wall in ordinary cases was admitted; but where it was, in addition, sought to impose a liability to keep in repair against the act of God. The case had been mooted and decided so long ago as 1609 by the Common Pleas,⁹ that "if one who is bound by prescription to

Damage caused by extraordinary storm where there exists a prescriptive liability in ordinary cases. *The Queen v. Commissioners of Sewers for Essex*.

¹ 12 Ch. D. 214, 14 Ch. D. 58, followed in *Musselburgh Real Estate Co. v. Provost, &c. of Musselburgh* (1905), A. C. 491.

² 12 Ch. D. 228.

³ 15 C. B. N. S. 376.

⁴ 2 App. Cas. 781, *sub nom. Smith v. Yussgrave*, 47 L. J. Q. B. 4.

⁵ Brett, L.J., 14 Ch. D. 67; Cotton, L.J., *l.c.* 69. ⁶ *l.c.* 62.

⁷ *West Norfolk Farmers Manure Co. v. Archdale*, 16 Q. B. D. 754, 758, 760.

⁸ 14 Q. B. D. 561; in House of Lords, under the name *Commissioners of Sewers for Fobbing v. The Queen*, 11 App. Cas. 449.

⁹ *Keighley's case*, 10 Co. Rep. 139 a; *Soady v. Wilson*, 3 A. & E. 248. Callis, 122, cites 37 Ass. 10, and 38 Ass. 15, as declaring the law to be "that he which is bound

repair a wall *contra fluxum maris*, and he keeps the wall in good repair and of such height and as sufficient as it was accustomed; and by the sudden and unusual increase of water, salt or fresh, the walls are broken or the water overflows the walls; that in this case the Commissioners of Sewers ought to tax all such persons who hold any lands or tenements, or common of pasture, or profit of fishing, or bave, or may have, any loss, damage, or disadvantage by any manner of means in the same places, according to the quantity of their lands, &c., for no fault in this case was in him who ought to repair it." On *Keighley's case* being cited in *The King v. Commissioners of Sewers for West Somerset*, Lord Kenyon, C.J., said:¹ "To be sure the law is so." Again, in *The King v. Commissioners of Sewers for Essex*, Ahhott, C.J., said:² "Even where an individual is bound by prescription or otherwise to repair, still if there be no default on his part, and damage is sustained by an extraordinary flood or tempest, the whole level must bear the loss and be contributory to the repairs."

Where there is negligence there is liability, though damage has arisen from an extraordinary storm.

Liability to repair may be against violent tempests,

but this must be established by evidence.

Where the obligation to repair has been neglected, even though the flood complained of has been caused by an extraordinary storm or high tide, the negligent frontager will be liable, where it is impossible to apportion what is due to his neglect and what would have happened in any event.³ Yet if it were shown that the damage came from the storm and was not the consequence of the disrepair, no liability would be attached; and if it were shown that some of the damage arose from the storm and not from neglect the damage would be apportioned.⁴

In *The Queen v. Leigh*⁵ the Court made a rule absolute for a new trial because the judge had not put to the jury the contingency of a greater liability than to provide walls in a condition to resist ordinary weather and tides, and had rejected evidence showing that the defendants and their predecessors in the lands had, in fact, repaired against the effects of the more violent tempests. In *Commissioners of Sewers for Fobbing v. The Queen*,⁶ however, after passing in review the earlier law, the House of Lords adopted the proposition that a frontager is not liable to repair the damage caused by an extraordinary storm, unless the evidence establishes as against him something more than the ordinary liability of a frontager bound to repair; and, further, following *The King v. Commissioners of Sewers for West Somerset*,⁷ that the fact of repairs, appearing to have been done by the frontagers, as far back as records extend, and of there being no evidence of repairs by the level, although in all probability extraordinary storms had occurred during the period covered by the records, was not evidence from which liability for extraordinary events should be inferred.⁸

by prescription to repair is bound peremptorily alone to do the work, and not by any other; and if no such person can be found, then the parties whose grounds do adjoin and those which have free fishing in the river, and free passage thereon, be all of them to do and perform the same jointly, and no one of them is a discharge for the other, because they shall be *in consimili casu*." But see *ante*, 380.

¹ 8 T. R. 312, 313.

² 1 B. & C. 484.

³ See *Staffordshire Canal Co. v. Hallen*, 6 B. & C. 317; *Harrison v. G. N. Ry.*, 3 H. & C. 231; *Collins v. Middle Level Commissioners*, L. R. 4 C. P. 279.

⁴ *N. F. phosphate, &c. Co. v. London & St. Katharine's Docks Co.*, 9 Ch. D. 503.

⁵ (1839) 10 A. & E. 398.

⁶ 11 App. Cas. 449.

⁷ 8 T. R. 312.

⁸ See per Lord Herschell, C., 11 App. Cas. 455. In this connection the law as to accretion may be noticed. See Vin. Abr. Soil (A.) 2, 3. Accretion may be (1) by additions to land formed so slowly that its progress cannot be perceived. In this case the accretion belongs to the adjoining landowner: *Rex v. Lord Yarborough*,

The subjects of the jurisdiction of commissioners of sewers are exempted from the operations of the Public Health Act, 1875,¹ by sections 13 and 327.

Exempted from Public Health Act, 1875.

We have hitherto considered the subject of sewers in the meaning which the term more especially bears in connection with the statute of Henry VIII., and which has become familiar from the title of Callis's treatise. It remains to consider the liability for negligence arising out of the construction, maintenance, and responsibility for sewers in their usual and modern signification.

Sewer in its modern signification.

"The word sewer," says Kindersley, V.C., in *Sutton v. Mayor, &c. of Norwich*,² "comes from the word 'to sew'—that is, to 'drain.' . . . In the common sense of the term it means a large and generally, though not always, underground passage for fluid and feculent matter from a house or houses to some other locality; but it does not comprise a cesspool for the purpose of retaining the sewage, whether as a simple deposit, or to be converted into manure or other useful purpose."

Sutton v. Mayor, &c. of Norwich.

By the Metropolitan Management Act, 1855,³ the main sewers enumerated in schedule (A) to the Act, including the main sewers of the city of London, are vested in the County Council;⁴ but all other sewers within the limits marked by schedules (A) and (B) are in the local bodies there enumerated.

The Metropolitan Management Act, 1855.

By the Public Health Act, 1875⁵, all sewers are vested in the local authorities; and the authorities in whom existing sewers are vested are the authorities charged with the construction of new ones when such are required.⁶

The Public Health Act, 1875.

3 B. & C. 91, 2 Bligh (N. S.) 147, 1 Dow (N. S.) 178; *sub nom. Gifford v. Lord Yarborough*, 5 Bing. 163. See also *In re Hull and Selby Ry. Co.*, 5 M. & W. 327; *Scrutton v. Brown*, 4 B. & C. 485; *Foster v. Wright*, 4 C. P. D. 438; *Hindson v. Ashby* (1896), 1 Ch. 78; *Jefferis v. East Omaha Land Co.*, 134 U. S. (27 Davis) 178. (2) By a sudden charge, as by a flood. Then the landowner is not entitled to a gain; *St. Louis v. Rutz*, 138 U. S. (31 Davis) 226. There is an exhaustive judgment in *Nebraska v. Iowa*, 143 U. S. (36 Davis) 359. When submerged land can be identified there is no accretion. *Hale, De Jure Maris*, 15. Land washed away and afterwards re-formed on the old ascertained site is not land gained by increment: *Lopez v. Muddun Mohun Thakoor*, 13 Moo. I. A. 467. A non-tidal river changing its course does not work a change of ownership: *Thakurain Ritraj Koer v. Thakurain Sarfaraz Koer*, 21 Times L. R. 637; *L. R. 32 Ind. Ap. 165. Si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum pertinet. Nam et commodum ejus esse debet cuius periculum est: Inst. iii. 23, 3.*

¹ 38 & 39 Vict. c. 55.

² 27 L. J. Ch. 742. See on the meaning of sewer in 18 & 19 Vict. c. 120, s. 204, wherein it is provided that no buildings are to be made over sewers without consent, *The Poplar District Board of Works v. Knight*, 28 L. J. M. C. 37. As to the distinction between sewers and drains, see *Acton Local Board v. Batten*, 28 Ch. D. 283. *Sykes v. Sowerby Urban Council* (1900), 1 Q. B. 584. A cesspool is not part of a sewer; *Meador v. West Cowes Local Board* (1892), 3 Ch. 18; *Croft v. Rickmansworth Highway Board*, 39 Ch. D. 272; *Pinnock v. Waterworth*, 3 Times L. R. 563; *Wincanton Rural Council v. Parsons* (1905), 2 K. B. 34. As to the metropolis, *Bateman v. Poplar District Board of Works*, 33 Ch. D. 360, 37 Ch. D. 272, and *Heaver v. Fulham Borough Council* (1904), 2 K. B. 383, where the earlier cases are collected. A drain is a sewer as soon as more than one house is connected with it. As a sewer might be "of any convenient material," an iron pipe to discharge affluent water was held a sewer in *Tottenham Board v. Bolton*, 2 Times L. R. 828. For the duty of a Local Board, *Thompson v. Eccles Corporation*, *Haedicke v. Friern Barnet Urban Council* (1905), 1 K. B. 110; *Bonella v. Twickenham Local Board of Health*, 20 Q. B. D. 63; *Hornsey Local Board v. Davis* (1893), 1 Q. B. 756.

³ 18 & 19 Vict. c. 120, ss. 68, 135. The powers conferred by these sections are very similar to, and should be compared with, sec. 96, vesting highways in the local authority.

⁴ 51 & 52 Vict. c. 41, s. 48, sub s. 8. As to the vesting of sewers see *Taylor v. Corporation of Oldham*, 4 Ch. D. 395, 411; *Ogilvie v. Blything Union Sanitary Authority*, 65 L. T. 338, 67 L. T. 18; *Reg. v. Staines Local Board*, 60 L. T. 261.

⁵ 38 & 39 Vict. c. 55, s. 13.

⁶ *Meador v. West Cowes Local Board* (1892), 3 Ch. 18; *Ferrand v. Hallas Land*

To appreciate these enactments it is needful to consider the extent of the rights conferred on local boards by the vesting sewers in them, and what are the liabilities involved, as far at least as they arise out of negligence.

Attorney-General v. Guardians of Poor of Union of Dorking.

As to the first point, Jessel, M.R., in giving judgment in *Attorney-General v. Guardians of Poor of Union of Dorking*¹—under the Public Health Act, 1875—said :² “ We must remember that the vesting of the sewers in the local authority gives them a very limited right of ownership. I am not prepared to say that they are in the same position as a land-owner through whose land a sewer, an artificial work, runs. It by no means follows that they have the same right as he has. He can stop it up without asking anybody, but, as I read this Act of Parliament, I am by no means prepared to say that this local sanitary board can stop the sewer up, and thereby cause a most frightful nuisance to the inhabitants of the district whose drainage it is their business to protect and perfect. That is the first difficulty in the way, that the vesting is not an absolute right of ownership, but a modified and limited right of ownership, and it does not, in my opinion, give them a right to stop up the sewer.”

Mayor, &c. of Birkenhead v. L. & N. W. Ry. Co.

With this must be taken what was said in *Mayor, &c. of Birkenhead v. L. & N. W. Ry. Co.*,³ where defendants constructed an embankment over a sewer vested in the plaintiffs under the terms of a special Act, which did not prevent access for the purpose of repairs, though it increased the difficulty of doing them ; in respect of which increased difficulty of access the plaintiffs claimed compensation under section 68 of the Lands Clauses Consolidation Act, 1845.⁴ The plaintiffs were held not entitled ; both in the Divisional Court,—as the vesting of the sewer “ would not vest in the plaintiffs any title to the land, or any right other than the right in equity to obtain protection from disturbance by enforcement of legal right ; ” and in the Court of Appeal, where Brett, M.R., said : “ Whether, the sewer being vested in them, they have an interest in land, it is not necessary to decide, though I am inclined to think that the sewer does give them an interest in land.” Bowen, L.J.’s, view was : “ The true canon of construction applicable to an enactment like this, which interferes with private property, is to read into it by implication only so much as is reasonably necessary to make the Act of Parliament work. Therefore one ought only to imply that the statute gave the commissioners such powers as were reasonably necessary for the efficient working of the sewer system.”

Right to support involved in the powers conferred on local bodies with regard to sewers.

The right to support involved in the powers conferred on the local bodies with regard to sewers was formerly a matter of importance. As this has now become the subject of statutory enactment, it may be shortly disposed of. In *Metropolitan Board of Works v. Metropolitan Ry. Co.*⁵ it was decided that local bodies do not acquire a right to lateral support for their sewers against the owners of adjoining lands ; but in *re Corporation of Dudley*⁶ the Court of Appeal further held that

cf. Building Co. (1893), 2 Q. B. 135 ; *Travis v. Utley (1894)*, 1 Q. B. 233 ; *Winkinson v. Llandaff, &c. Rural District Council (1903)*, 2 Ch. 605.

¹ 29 Ch. D. 505. *Ante*, 312.

² 20 Ch. D. 604.

³ 15 Q. B. D. 572.

⁴ 8 & 9 Viet. c. 18.

⁵ L. R. 3 C. P. 612 ; L. R. 4 C. P. 192 ; but see Jessel, M.R., *Roderick v. Aston Local Board*, 5 Ch. D. 328 ; and Bowen, L.J., in *L. & N. W. Ry. Co. v. Evans (1893)*, 1 Ch. 27, which was approved in *Clippens Oil Co. v. Edinburgh, &c. Water Trustees (1904)*, A. C. 64.

⁶ 8 Q. B. D. 86 ; *L. & N. W. Ry. Co. v. Evans (1892)*, 2 Ch. 432.

a right to lateral support "accrues the very moment that the sewer is constructed."¹

Now by the Public Health (Support of Sewers) Act, 1883,² passed in consequence of the decision last referred to, a local authority cannot acquire any right of support, whether vertical or lateral. A saving clause preserves all rights actually acquired before the passing of the Act. When the owner of mines or other property is desirous of working his lands, the right to be paid for abstention arises.

In accordance with the principle laid down in *Geddis v. Proprietors of Bann Reservoir*,³ Stephen, J., in *Fleming v. Mayor and Corporation of Manchester*,⁴ held the defendants liable for the consequence of a sewer hursting into a cellar during a violent thunderstorm, where the jury found that the injury was caused by defects in the original construction of the sewer, and by the omission of the defendants to take reasonable means to discover such defects.

In *Dixon v. Metropolitan Board of Works*⁵ Lord Coleridge, C.J., held the defendants not liable for injuries arising where they had constructed a sewer, acting under the powers of the Metropolitan Local Management Act, 1855,⁶ with its outfall a little above the plaintiff's coal wharf, and having water-gates, which it was the duty of a person employed by them to open when the water within became eight feet deep. This having been done after an unusually heavy rainfall, the rush of water carried away a portion of the plaintiff's wharf. The Lord Chief Justice found that the injury was caused by the opening of the water-gates, and not by the act of God, yet he held the defendants not liable since what they had done was what they were authorised by Parliament to do, and was done without negligence.⁷ In the earlier case of *Hall v. Mayor, &c. of Balley*,⁸ Lush, J., held the defendants liable for constructing a drain, by agreement with the plaintiff, but in so negligent a manner, that the front of plaintiff's mill was caused to sink. In answer to the objection that the undertaking such work on the part of a local body was *ultra vires*, the learned Judge pointed out that "it is not like the case put, of the urban authority entering into a contract to build a house, or a wall, or to do any other work unconnected with their function as a sanitary body."

In the first of these cases the liability had negligence been proved, would have been for not doing what they should have known ought to have been done; in the third, for doing carelessly or imperfectly what, if they did at all, they should have done with care and precaution; in the second they were held not liable, though their act occasioned damage to a third party, because what they did was, first, within the limits of their statutory powers; and, secondly, through causing damage, not negligent.

¹ *Normanton Gas Co. v. Pope*, 52 L. J. Q. B. 629. *South Staffordshire Waterworks Co. v. Mason*, 56 L. J. Q. B. 255, is distinguished by virtue of specific enactments in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17).

² 46 & 47 Vict. c. 37. By sec. 3(3) it is obligatory upon local authorities to make a map of all their sanitary works.

³ 3 App. Cas. 450, 455.

⁴ 44 L. T. 517. This decision was reversed on appeal, but on the ground that there was no evidence of negligence. See the *Times* newspaper, 27th June, 1882.

⁵ 7 Q. B. D. 418. Cp. *Derinzy v. Corporation of Ottawa*, 15 Ont. App. 712.

⁶ 18 & 19 Vict. c. 120, ss. 135, 136.

⁷ In *Brown v. Sargent*, 1 F. & F. 112, Erle, J., held that the question was for the jury what is an "ordinary" or "extraordinary" amount of drainage. See *Meek v. Whitechapel Board of Works*, 2 F. & F. 144 (?); *Hammond v. St. Pancras*, L. R. 9 C. P. 316, 323.

⁸ 47 L. J. Q. B. 148.

Ruck v. Williams.

In *Ruck v. Williams*,¹ Improvement Commissioners were held liable for negligence under an Act requiring them to "make all proper sewers and drains to communicate with the intended main sewer," for having constructed a sewer or drain communicating with the plaintiff's premises without a flap (the absence of which caused the plaintiff's premises to be flooded), in substitution for an old drain with a flap, the continuance of which would have protected the plaintiff's premises. "We think," said Martin, B., "that when the commissioners thought proper to make a new sewer communicating with the plaintiff's premises from the old drain, and omitted to give him that protection which he had before, whereby there was a damage immediate and consequent upon it, that was such a damage from negligence as entitled him to maintain this action."²

Statutory provisions as to sanitary condition of sewers.

By section 19 of the Public Health Act, 1875,³ and by section 72 of the Metropolis Management Act, 1855,⁴ the local bodies shall cause⁵ the sewers belonging to them to be constructed, covered, ventilated,⁶ and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied.

Under the Metropolis Management Act, 1855,⁴ the only remedy was to proceed at law or in equity, but by section 299 of the Public Health Act, 1875,³ a representation may be made to the Local Government Board, who may direct an inquiry under sections 293 and 296; upon this an order may be obtained; which, however, Bacon, V.C., has held is not a defence to an action for nuisance.⁷

Negligence may in some cases be treated as nuisance.

In this connection the law of negligence is brought into intimate association with the law of nuisance. So far as nuisance is caused by imperfect action, or omission to act, where perfect (that is, not negligent) action—the action of a prudent man according to the circumstances—is demanded, it may be proceeded against indifferently as a negligent act or as a nuisance. To constitute a nuisance, however, more widely reaching nonfeasance or misfeasance would usually be requisite to obtain an injunction or a conviction than is, at law, required to constitute actionable negligence. As, however, the cases of pollution of a stream most frequently involve infringements of public rights,⁸ the more usual course of proceedings for their abatement has been against the nuisance rather than by action for negligence.

¹ 3 H. & N. 308.

² *Southampton and Itchin Floating Bridge v. Local Board of Health for Southampton*, 8 E. & B. 801, decided, on demurrer, that an action for negligence, and not a proceeding for compensation, is the proper remedy for want of due and proper care in the construction, management, and direction of a sewer. Other cases on the liability for negligence with regard to sewers are *Lloyd v. Wigney*, 6 Bing. 489; *Ward v. Lee*, 7 E. & B. 426; *Hyams v. Webster*, L. R. 2 Q. B. 264; affirmed L. R. 4 Q. B. 138. In *Bales v. Inhabitants of Westborough*, 151 Mass. 174, Mr. Justice Holmes exhaustively considers the duty of a municipality in respect of the construction and maintenance of its sewers. ³ 38 & 39 Vict. c. 55. ⁴ 18 & 19 Vict. c. 120.

⁵ The Vestry or District Board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and skill they can be kept cleansed": per Brett, J., *Hammond v. Vestry of St. Pancras*, L. R. 9 C. P. 322; *Balsam v. Poplar District Board*, 37 Ch. D. 272. Neglect will render the local authority liable to any person specially injured thereby. *Ante*, 296. ⁶ This word is only in the Public Health Act, 1875.

⁷ *Whitefield v. Newquay Local Board*, Law Times newspaper, March 18, 1882, 349.

⁸ *Blackburne v. Somers*, 5 L. R. Ir. 1; *Cowan v. Duke of Buccleuch*, 2 App. Cas. 344. See Rivers Pollution Prevention Acts 1876 (39 & 40 Vict. c. 75) & 1893 (56 & 57 Vict. c. 31). *Kirkheaton District Local Board v. Ainley* (1892), 2 Q. B. 274; *Yorkshire West Riding Council v. Holmfirth Urban Sanitary Authority* (1894), 2 Q. B. 842; *Derby Corporation v. Derbyshire County Council* (1897), A. C. 550; *Eastwood v. Horley Urban District Council* (1901), 1 Ch. 645. *Ante*, 312, 335.

CHAPTER V.

GAS AND WATER COMPANIES.

WE are now to consider the position of gas and water companies. Subject distributed. Throughout the country these are very frequently departments of the local authority, although in the metropolitan district they constitute vast independent corporations clothed with extensive Parliamentary powers. It therefore becomes necessary for us to consider—

- (1) Their relations to the local authorities of their districts where they are not a portion of that authority;
- (2) Their relations to the public at large; and
- (3) Their relations to their own customers.

I. The relations of gas and water companies to the district authorities in which they carry on their operations may be considered from the point of view, first, of the common law unmodified by statute; and, secondly, of statute as modifying the common law.

First, then, with regard to the position of gas and water companies at common law.

This law is laid down in *The Queen v. Longton Gas Co.*¹ The defendants were charged with obstructing a highway by opening trenches and laying down pipes, for the purpose of conveying gas to private houses. They had power by Act of Parliament to do such acts in respect of laying down pipes and mains for public purposes, but not for private purposes: "General convenience," said Cockburn, C.J., "is greatly against the allowing private persons or companies, without parliamentary powers, to interfere from time to time with the public streets. The making such openings from time to time for water, gas, sewage, and other purposes, and the opening of the streets for repairs and alterations, are a serious inconvenience, even when done under the restrictions which an Act of Parliament puts upon the persons clothed with parliamentary authority so to act; and it would be difficult to see how far the annoyance might extend, if unauthorised dealings of this nature with the highways were allowed." In the subsequent case of *The Queen v. Train*,² where the right to lay tram lines in a highway without parliamentary sanction was discussed, Crompton, J., said: This case "also falls within *Regina v. The Longton Gas Co., Ltd.*, with which we took a good deal of pains. . . . If persons

I. Position of gas and water companies at common law.

Regina v. Longton Gas Co.

Judgment of Cockburn, C.J.

The Queen v. Train.

¹ 2 E. & E. 651, 668; *Ellis v. Sheffield Gas Consumers' Co.*, 2 E. & B. 767—an action for negligence caused by the negligence of defendants' contractor.

² 2 B. & S. 640, 648; at *Nisi Prius*, 3 F. & F. 22.

wish for power to act as the defendants acted here, they must take the usual regular and constitutional course of getting the protection of the Legislature."

Attorney-General v. Sheffield Gas Consumers' Co., and Attorney-General v. Cambridge Gas Consumers' Co.

The limits of these cases have sometimes been supposed not to coincide¹ entirely with cases like *Attorney-General v. Sheffield Gas Consumers' Co.*,² and *Attorney-General v. Cambridge Consumers' Gas Co.*³ But this, however, arises from misapprehension. They were proceedings in form by a public officer, but in substance by an antagonistic and competing company—in form to obtain an injunction restraining a public nuisance; in substance to prevent trade competition affecting their private interests; and in each case the Court was of opinion that "the suit has been instituted more from regard to private than to public good. If the public interest clearly required the immediate interposition of the Court, that might not be material."⁴ And, again, "that not one single inhabitant is brought forward to say, though five miles of work has been completed, that there has been any inconvenience to himself; no single passenger along the Queen's highway says that he has been impeded."⁵ The decision of the Court, moreover, was, in each case, based on the fact that what was required was an injunction, and there was a legal remedy.

Court interferes if injury is irreparable, or continuous.

In *Attorney-General v. Cambridge Consumers' Gas Co.*, Page Wood, L.J., said:⁶ "Where the Court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two grounds which are of a totally distinct character; one is that the injury is irreparable, as in the case of cutting down trees; the other, that the injury is continuous, and so continuous that the Court . . . restrains the repeated acts, which could only result in incessant actions, the continuous character of the wrong making it grievous and intolerable."

Cases considered.

These cases, then, decide no more than that the Courts will not interfere by injunction to restrain a nuisance which is not continuous so as to be grievous and intolerable. Now, in the same judgment of Page Wood, L.J., referring to *The Queen v. Longton Gas Co.*,⁷ the Lord Justice said: "It was held, upon grounds in which I entirely acquiesce, that to say that any private individual or company may break up the pavements for the purpose of laying down gas-pipes or water-pipes, or of making communications with the gas-pipes or water-pipes of another company, without subjecting themselves to an indictment, would be to create confusion and discomfort to the inhabitants of a town." The grounds of decision were, therefore, altogether different, and cover distinct provinces—the one being referable to the equitable and discretionary jurisdiction of the Court of Chancery, the other relating to an absolute and public legal right. This is the more manifest from a note to the report in *Attorney-General v. Sheffield Gas Consumers' Co.*,⁸ which states that, subsequently to the decision of the Lord Chancellor and the Lords Justices, an indictment was tried and a verdict given for the Crown, which the Queen's Bench refused to

¹ See *A. G. v. Cambridge Consumers' Gas Co.*, L. R. 6 Eq., per Malins, V.C., 296; L. R. 4 Ch. 71.

² 3 De G. M. & G. 304.

³ L. R. 4 Ch. 71

⁴ *I. e.*, that they were instituted from private, and not from public, regards; per Knight Bruce, L.J., 3 De G. M. & G. 312.

⁵ Per Page Wood, L.J., L. R. 4 Ch. 84.

⁶ L. R. 4 Ch. 80.

⁷ 2 E. & E. 651.

⁸ 3 De G. M. & G. 338.

disturb, as they were of opinion that the obstruction amounted to a nuisance—or rather, probably, that there was evidence from which the jury might find the existence of a nuisance. Thus, although the Court of Chancery refused to intervene, after its refusal the legal remedy was nevertheless available through the verdict of a jury. The two Chancery cases, accordingly, illustrate the discretionary nature of the equitable jurisdiction in matters of injunction, and not any conflict with the principle of the common law, which will not allow interference with the highways.

Cases illustrate discretion of the Equity Courts.

The right of the public to the enjoyment of their highways unimpeded is absolute, and cannot be alienated even by the authorities in whom the highways are made to vest for the purposes of maintenance; but by statute only. Thus, in *Hawkins v. Robinson*,¹ where a local board affected to give permission to a gas company, without an Act of Parliament, to lay their pipes in the streets the Court of Queen's Bench held that the licence of the local board was no answer to an indictment. The subsequent case of *Edgeware Highway Board v. Harrow Gas Co.*² does not affect this decision; for that turned upon the terms of an agreement made between the plaintiffs, as surveyor of the highways, and the defendant gas company, by which the plaintiffs gave permission to the defendants to break the surface of the highway to lay down gas-pipes in consideration that the company should make good the surface of the road and should pay a specific sum per yard for the highway opened. The company laid their pipes, but did not make good the highway, and refused to pay the price. The plaintiffs were held by the Queen's Bench entitled to recover, since the agreement was not necessarily a licence to create an indictable offence; and thus, as against the defaulting company, it must be held good. A doubt was expressed by Lush, J., whether even assuming such a contract to be illegal, the defendants would be entitled to set it up. This case, it is manifest, turns on other considerations than that of a right in the local board to give permission to dig up the highway; yet, had the case turned on the validity of such a pretension, the judgment would merely authorise it to the extent that it was not a nuisance.³ Now, it is only to the extent that an obstruction is a nuisance that it can be indicted; and what is a nuisance is for the jury; so that no conflict can arise between this decision and the rule of the common law.

Local boards cannot give permission to companies to disturb the highway unless empowered by statute.
Hawkins v. Robinson.
Edgeware Highway Board v. Harrow Gas Co.

Two cases remain for consideration—*Pudsey Coal Gas Co. v. Corporation of Bradford*,⁴ and *Mayor, &c. of Preston v. Fullwood Local Board*.⁵

In the former the Corporation of Bradford, having parliamentary powers within the limits of their borough, commenced supplying gas in an adjoining township in which they had not parliamentary powers, but in which there was a gas company. The gas company filed a bill against the corporation to restrain them from continuing to supply gas within their district. Malins, V.C., decided, in accordance with the principle laid down by Lord Westbury in *Stockport District Water-*

Pudsey Coal Gas Co. v. Corporation of Bradford.
Mayor, &c. of Preston v. Fullwood Local Board.

¹ 37 J. P. 662.

² L. R. 10 Q. B. 92.

³ See *Windhill Local Board v. Vint*, 45 Ch. D. 351, as to illegality of agreements compromising an indictment for nuisance.

⁴ L. R. 15 Eq. 167.

⁵ 53 L. T. 718. Cp. *Normanton Gas Co. v. Pope and Pearson*, 52 L. J. Q. B. 629, where pipes were laid down without parliamentary powers, but parliamentary powers were obtained subsequently; the powers thus obtained were held to cover the case of the pipes previously laid down.

works Co. v. Mayor, &c. of Manchester,¹ that though the corporation had no right to do what the bill alleged them to have done (since an incorporated body had only those powers which were conferred upon it), still there was no private right shown which entitled the plaintiffs to maintain the suit; and further, there was nothing to prevent them supplying gas as they liked—that is, as against the plaintiffs, and in the circumstances before the Court—if they kept clear of committing a nuisance.

*Mayor, &c. of
Preston v.
Fullwood
Local Board.*

In *Mayor, &c. of Preston v. Fullwood Local Board*² the Corporation of Preston, who had no parliamentary powers for the purpose, supplied water to an adjoining urban district, and claimed the right to enter and break up the streets, whenever occasion should require, for the purpose of repairing their water-pipes. North, J., held this a claim to commit a nuisance, which could neither be authorised by the surveyor of highways, nor obtained by acquiescence. *Edgware Highway Board v. Harrow Gas Co.*³ was much pressed in argument, but was distinguished on the ground that it “turned on its special facts, and the grounds of the decision have no application to a case where it is not a question of committing a particular act on a particular highway at a certain time, but a question as to the right to enter on the highway and do the acts.”⁴ Perhaps a more obvious and equally satisfactory ground would be that the Court will not be astute to detect in validities in a contract when the defendant has obtained the benefit and seeks to avoid the onus of it.

*Edgware
Highway
Board v.
Harrow Gas
Co. dis-
tinguished by
North, J.*

Suggested
ground.

One exception—though an exception not substantially interfering with the rule that pipes may not be laid in a highway without an Act of Parliament authorising the act—must be mentioned. “The owner [of the soil] may carry water-pipes under a highway;”⁵ but the right is, as pointed out by Blackburn, J., in *Cattle v. Stockton Water-works Co.*,⁶ only “provided he does not interfere with the road above him.” Thus, not even the owner himself may disturb the highway, and he is only in a better position than other persons as by his ownership of the adjoining land he may tunnel under the highway without interfering with the surface, while his ownership of the highway obviates what would else be a trespass.

Owner of soil
may carry
pipes under a
highway.

User of the
soil by other
than the
owner and
without his
consent.

The case of use of the soil beneath the highway, with the consent of the highway authorities, by some one not the owner of the soil, and without his assent, did arise in *Goodson v. Richardson*.⁷ The defendant, having obtained the consent of the highway board of the district, commenced to lay water-pipes in the highway, which was the soil of the plaintiff. Sir George Jessel, M.R., granted a perpetual injunction, which, on appeal, was affirmed by the Lord Chancellor and the Lords Justices, Lord Selborne, C., saying: “The plaintiff is the owner of the soil through which these pipes have been laid, and no one has a right to take that soil for such a purpose, except under contract with the owner, or with his consent. At the same time the plaintiff has not the right of an unlimited owner in respect of that soil, because the upper surface is dedicated to the public for the purpose of a public highway,

¹ 9 Jur. (N. S.) 266.

² 53 L. T. 718. *Gas Light and Coke Co. v. South Metropolitan Gas Co.*, 4 Times L. R. 3; (C. A.) 351, turned on the construction of a clause of the Metropolitan Gas Act 1860.

³ L. R. 10 Q. B. 92.

⁴ 53 L. T. 722.

⁵ *Goodtitle v. Alker and Elmes*, 1 Burr., per Lord Mansfield, 143.

⁶ L. R. 10 Q. B. 455.

⁷ L. R. 9 Ch. 221.

which is under the management of local authorities; and the plaintiff cannot use the soil or deal with it by breaking it open, or in any other manner so as to interfere with the use of it by the public for the purposes of a highway."

The absence of powers at common law authorising the supply of gas and water has from time to time been supplied by various Acts of Parliament,¹ both general and special; now, by the Gas and Water Facilities Act, 1870,² for the purpose of enabling a local authority to supply gas, power is given to construct, maintain, and continue gas works or waterworks, to raise additional capital, or to amalgamate any gas or water enterprises upon obtaining a provisional order thereto authorising from the Local Government Board³ and without resort to Parliament. This Act does not apply to the Metropolitan area, where the supply and regulation of gas is regulated by the Metropolis Gas Act, 1860,⁴ and its amending Acts, and that of water by the Metropolis Water Acts, 1852⁵ and 1871,⁶ with their amending Acts. By these Acts, and by the Metropolis Management Act, 1855, powers are given to break up and restore highways,⁷ to apportion districts,⁸ to light streets,⁹ and to do all acts which are necessary to carry out the purposes of their constitution—namely, the supply of gas and water to ascertained districts.¹⁰

II. As to the relations of gas and water companies, acting within the general powers of their Acts, to the public at large.

As we have seen,¹¹ where the execution of works is authorised by statute, it is necessary to show negligence in the execution in order to recover for injury received in consequence thereof; otherwise the work is protected by the statutory powers; and compensation for any injurious consequences resulting from carrying out the works authorised by statute can be obtained, if at all, only under the provisions of the Act giving the powers, and not by action.

Thus, in *Blyth v. Birmingham Waterworks Co.*,¹² an Act of Parliament

II. Relation of gas and water companies acting under their statutory powers to the public at large.

Blyth v. Birmingham Waterworks Co.

¹ As to gas:—10 & 11 Vict. c. 15 (Gasworks Clauses); 22 & 23 Vict. c. 66 (Measures for Sale of Gas); 23 & 24 Vict. c. 125 (Metropolis Gas Act, 1860); 23 & 24 Vict. c. 146 (Measures for Sale of Gas); 24 & 25 Vict. c. 79 (Metropolis Gas Act, 1861); 34 & 35 Vict. c. 41 (Gasworks Clauses); 36 & 37 Vict. c. 89 (Gas and Water Works facilities); 38 & 39 Vict. c. 55, ss. 68, 161-163 (Public Health); 41 & 42 Vict. c. 49, ss. 33, 66 (Weights and Measures); 41 & 42 Vict. c. 52, ss. 77, 80, 81 (Public Health, Ireland). As to water:—10 & 11 Vict. c. 17 (Waterworks Clauses); 26 & 27 Vict. c. 93 (Waterworks Clauses); 36 & 37 Vict. c. 89 (Gas and Waterworks Facilities); 38 & 39 Vict. c. 86, s. 4 (Breach of Contract); 40 & 41 Vict. c. 31 (Reservoirs); 48 & 49 Vict. c. 34 (Rates, Metropolis); besides an infinity of special Acts.

² 33 & 34 Vict. c. 70, incorporated with the Public Health Act, 1875, by s. 161.

³ 36 & 37 Vict. c. 89. Sections 2 to 11 and the schedule of this Act are repealed by 46 & 47 Vict. c. 39.

⁴ 23 & 24 Vict. c. 125. The Gas Clauses Act Amendment Act, 1871, 34 & 35 Vict. c. 41. As to a "reasonable time" under this Act for reconnecting gas with premises, *South Metropolitan Gas Co. v. Noakes*, 5 Times L. R. 448. As to negligence in cutting off supply from meter, *Pulerson v. Mayor, &c. of Blackburn*, 9 Times L. R. 55. Each of the gas companies of the Metropolis—the Gas Light and Coke, the South Metropolitan, and the Commercial—is further regulated by special Acts.

⁵ 15 & 16 Vict. c. 84.

⁶ 34 & 35 Vict. c. 113.

⁷ 18 & 19 Vict. c. 120, s. 110. By 23 & 24 Vict. c. 125, s. 54, if the local authority refuses or delays consent, the Secretary of State may authorise gas mains or pipes to be laid. See 10 & 11 Vict. c. 15, s. 6; 10 & 11 Vict. c. 17, s. 28.

⁸ 23 & 24 Vict. c. 125, s. 6.

⁹ *Ibid.*, s. 22.

¹⁰ The Waterworks Clauses Act, 1871 (10 & 11 Vict. c. 17), was much considered in *Miles v. Mayor, &c. of Huddersfield*, 11 App. Cas. 511; and in *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441.

¹¹ *Ante*, 284.

¹² 11 Ex. 781.

Judgment of
Alderson, B.

directed the defendants to lay down pipes with plugs in them as safety-valves, to prevent the bursting of the pipes. The plugs were properly made and of proper material; but there was an accumulation of ice about one of them that prevented it from acting properly. The defendants were not bound to keep the plugs clear. By reason of the accumulation of ice, water escaping from the neck of the main, forced its way into the house of the plaintiff, and caused injury; nevertheless the plaintiff was held not entitled to recover, as the Court was of opinion that the facts as proved did not warrant the conclusion of negligence. "The defendants," said Alderson, B., "might have been liable for negligence if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men acting prudently to provide against; and they are not guilty of negligence because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the Polar regions. Such a state of circumstances constitutes a contingency against which no reasonable man can provide."¹

Had the company not been authorised by statute to lay down pipes with plugs in them, they would have been liable for the consequences, as they would then have acted at their own risk; but the statute authorised the act they did in the way they did it; hence no liability could result.

Hipkins v.
Birmingham
and Stafford-
shire Gas
Light Co.

With *Blyth's case* should be compared *Hipkins v. Birmingham and Staffordshire Gas Light Co.*² By the terms of the defendants' special Act they were to be liable if they "at any time cause or suffer to be conveyed or to flow, into any stream, reservoir, aqueduct, pond, or place for water within the limits of the said Act, or into any drain, sewer, or ditch communicating therewith, any washing, substance, or thing which shall be produced in making or supplying gas." They erected a gas-tank on solid sandstone, and with proper material, about forty-five yards from the plaintiff's well. By reason of the working of mines, by persons unconnected either with the plaintiff or defendant, the floor of the tank cracked, and washings flowed into and contaminated the well. The plaintiff brought his action in respect of the contamination, and was held entitled to recover, on the ground that it had not been shown that the manufacture of gas might not be so conducted as to prevent the washings from flowing into the neighbouring wells, and that there was neither hardship nor improbability in considering that the Legislature by using the word "suffer" meant to enact that the company should carry on their works upon the terms of preventing at all events the offensive fluids which they created

¹ 11 Ex. 784. But, though the company would not be liable for the unforeseen results of an extraordinary frost, if they do not take reasonable care against the effects of an ordinary frost, and an extraordinary one does the mischief that would have happened through their insufficient precautions against an ordinary one, they are of course not discharged from liability: *Steggles v. New River Co.*, 11 W. R. 234; in Ex. Ch. 13 W. R. 413. *Ante*, 81. Cp. *In re Richmond Gas Co. v. Richmond Corporation* (1893), 1 Q. B., per Mathew, J., 60.

² (1860), 5 H. & N. 74, in Ex. Ch. 6 H. & N. 250. See *Millington v. Griffiths*, 30 L. T. N. S. 65.

from being a nuisance to the neighbourhood. Cockburn, C.J., lays stress on negligence in the defendants. He says: "The injury having proceeded immediately from their works, the onus was on them to get rid of the 'presumption of negligence; and not having done so, they may be properly said to have 'suffered' this evil to take place." This does not seem to have been the view of the other judges; for Wightman, J.,² assumes that what happened was "without any neglect or default," and considers the company to be liable as "insurers at all events against any contamination of the water in the neighbourhood;" and the judgment of the Exchequer Chamber goes on the same ground. Williams, J., however, appears to prefer the ground that the Act, while not constituting the defendants insurers, yet exacts an extraordinary degree of care from them; and their failure to comply with this requisition is probably the "negligence" alluded to by Cockburn, C.J.; since negligence in the ordinary sense is precluded by the statement in the special case, that "the tank was constructed in the usual and proper manner, with proper materials, and with due care." Negligence there was in a lack of that care which was required in the circumstances—that is, of the provisions of the special Act; though no negligence could be averred in the sense of the definition of Alderson, B., in *Blyth's case*—"the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a reasonable and prudent man would not do." By this test the company would have immunity; but by their special Act a higher degree of care was needed, so that if not absolutely bound to insure, they were at least bound not to use a nuisance.

Cockburn, C.J.'s, view of the ground of liability.

Wightman, J.'s, view.

Williams, J.'s, view.

The liability of gas and water companies has also been discussed in three *Nisi Prius* cases—*Blenkiron v. Great Central Gas Consumers' Co.*,³ *Mose v. Hastings and St. Leonards Gas Co.*,⁴ and *Snook v. Grand Junction Waterworks Co.*⁵

In the first a gas company were held liable for negligence in laying on gas whereby there was an escape into premises where lights were burning, followed by an explosion which injured the plaintiff's premises. Cockburn, C.J., directed the jury⁶ "that to allow a quantity of gas to escape into premises where lights are burning was necessarily attended with danger of ignition, and must have been known to be so; and those who carry on operations dangerous to the public are bound to use all reasonable precautions—all the precautions which ordinary reason and experience might suggest to prevent the danger. It is not enough that they do what is usual if the course ordinarily pursued is imprudent and careless; for no one can claim to be excused for want of care because others are as careless as himself; on the other hand, in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business."

Blenkiron v. Great Central Gas Consumers' Co.

Carelessness or want of precaution not justified by being usual.

In the second case, *Mose v. Hastings and St. Leonards Gas Co.*,⁷ an explosion took place between the discovery of the locality of an escape of gas and the arrival of the means to remedy it, though discovery

Mose v. Hastings and St. Leonards Gas Co.

¹ 6 H. & N. 255.

² 2 F. & F. 437, 3 L. T. (N. S.) 317.

³ 2 Times L. R. 308.

⁴ 4 F. & F. 324.

⁵ *L.c.*, 256.

⁶ 4 F. & F. 324.

⁷ 2 F. & F. 440.

of the escape might have been made earlier. Pollock, C.B., said, "it was the duty of all gas companies to use due and reasonable care to prevent mischief from the escape and explosion of gas;" and "it was for the jury to say whether the not sending any one for several days, during which, according to the evidence, the escape of gas and the danger of an explosion was discoverable, was such reasonable care as the companies were bound to keep up."

Snook v. Grand Junction Waterworks Co.

The third case was a water company case,¹ where the plaintiff's premises were flooded with water, which was ultimately discovered to have escaped from a fracture in the defendant's water-main. The mere fact of the fracture was relied on as *prima facie* evidence of negligence, and as indicating that there was no system of inspecting and testing the pipes by the company. On the part of the defendants a theory was set up, and supported by evidence, that the fracture was occasioned by the sudden contraction of the pipe, due to the difference in temperature between the incoming water and the iron of the receiving pipe. Huddleston, B., directed the jury that, "if they accepted that evidence, it was clear that the accident was inevitable, and the defendants, therefore, were not liable for it." There was a verdict for the defendants.²

Consideration of the cases.

Between this last-mentioned case and *Blyth v. Birmingham Waterworks Co.* there are points of distinction. In *Blyth's case* the duty was to act "with reference to the average circumstance of the temperature in ordinary years;" and the cause of the damage was "the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the Polar regions"—in short, an extraordinary natural event, the occurrence of which was not to be inferred;³ while in *Snook's case* the injurious agency arose from the ordinary workings of forces of Nature which could be anticipated, but not guarded against without an incommensurably greater expense and inconvenience than the damage that want of safeguarding against them might cause. The duty was to take ordinary reasonable care. "They were not bound to ransack science in the hope of discovering some scientific specific against possible accident; they were only bound to use well-known scientific means."⁴ In the one case, the cause of damage being extraordinary, precautions against it were not required, from the fact that the occurrence was without the range of events in legal contemplation. In the other, reasonable care was to be used to prevent damage from an occurrence which scientific investigations could forecast as not unlikely. To constitute negligence, defect in the exercise of the normal amount of care had to be found.⁵ In *Blyth's case* no care was needed, because the extraordinary force that caused the damage was without the range of those that by law are

No duty to take extraordinary precautions.

Negligence is defect in the exercise of normal care.

¹ *Snook v. Grand Junction Waterworks Co.*, 2 Times L. R. 308. Cp. *Green v. Chelsea Waterworks Co.*, 10 Times L. R. 259 (C. A.).

² With these cases compare *Holly v. Boston Gas Light Co.*, 74 Mass. 123, where several positions are advanced which would not at all hold in English Law, and where several more are advanced that would only hold in a qualified degree.

³ Per Mellish, L.J., *Nichols v. Mansland*, 2 Ex. D. 5. Cp. *In re Richmond Gas Co. and Richmond Corporation* (1893), 1 Q. B. 59.

⁴ 2 Times L. R. 310.

⁵ Mr. Fraser, the defendants' engineer, was recalled at the request of the jury, and stated that the pipes were cast iron, and not wrought; the latter would be improper, and rapidly decay. In reply to his lordship, "he stated that all the other water companies used the same material for their pipes as the defendants. Mr. Baron Huddleston: That answers your question; it is clearly not negligent of the defendants. They are only bound to use what are in general use": 2 Times L. R. 310. But this is too broadly stated.

to be guarded against; while in the other case care was needed, but not more than reasonable care.

The proposition of Huddleston, B., that water companies are only bound to use a similar kind of pipe to those in general use is, perhaps, not exactly accurate, though it sums up what is the practical effect of the duty imposed on water companies. It is clearly not sufficient if all water companies, by design or unconscious coincidence, use water-pipes in fact inefficient for the ordinary purposes of water-pipes or set their faces against recognised improvements. On the other hand, the invariable use of a given description of pipe by all companies raises an almost irresistible presumption that the pipe so used is ordinarily and reasonably fit and proper, and in the absence of any special and exceptional degree of diligence being exacted, the provision by the company of the description of pipe in general use is a sufficient discharge of their duty to the public.

Huddleston, B.'s, statement criticised.

The duty cast on the defendants in *Mose v. Hastings and St. Leonards Gas Co.* differs from that on the defendants in *Snook v. Grand Junction Waterworks*, or rather the manifestation of it does, though the duty is the same. In *Snook's case* the defendants were held discharged because they used ordinary and reasonable care in the providing of instruments. In *Mose's case* the defendants were held liable because they had not in addition guarded against deterioration. Indeed, that case can be readily brought under the principle on which *Tarry v. Ashton*,¹ or *Murphy v. Phillips*,² was decided—the company are bound to know that things like their pipes will ultimately get out of order, and there is consequently a duty cast upon them to prevent the consequences of natural decay or deterioration. *Blenkiron v. Great Central Gas Co.*³ is a case of positive negligence. In *Mose's case* the state of the pipes was allowed to become dangerous; in *Blenkiron's* there was an actual user of dangerous agencies in a dangerous way—that is, in too close proximity to lights. Those using the lights were entitled to the uninterrupted enjoyment of their own property. It therefore behoved the gas company to safeguard their operations from the dangers incident from the lawful user of the neighbouring property. This they failed to do; hence the accident. As is pointed out by Cockburn, C.J., the duty on them was no higher than the duty of the company in *Snook's case*; indeed, it is precisely the same—they were to use those precautions which ordinarily prudent and careful people appreciating the danger would use in a similar business. A point not prominent in Huddleston, B.'s, remarks, is brought out by the Lord Chief Justice when he says,⁴ “It is not enough that they do what is usual if the course ordinarily pursued is imprudent and careless.” But he goes on to show that, “in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business.” Use, that is, is not the standard by which negligence or diligence is to be tested; still prudent use raises an almost irresistible presumption in any individual case.

(a) Duty to use ordinary and reasonable care in providing instruments.

(β) To guard against deterioration.

(γ) To guard against contact with danger.

The usual not sufficient if imprudent.

*Paterson v. The Mayor, &c. of Blackburn*⁵ is an interesting case. A gas authority disconnected their mains from a meter. In cutting off

A *Paterson v. The Mayor, &c. of Blackburn.*

¹ 1 Q. B. D. 314.

² 35 L. T. (N. S.) 477.

³ 2 F. & F. 437.

⁴ 2 F. & F. 440. *Rayner v. Australian Widows' Fund Life Assurance*, 24 V. L. R. 208.

⁵ 9 Times L. R. 55. *Cp. Stock v. Boston (City of)*, 149 Mass. 410.

the supply of gas, the workmen left a long piece of pipe projecting into a cellar. The pipe, though itself effectually stopped up, remained connected with the gas main. The owner of the meter sold it; and the buyer and another while trying to get the meter away, broke the projecting pipe. Finding a rush of gas into the cellar, they blew out their light, desisted from the work, and gave immediate notice of the occurrence to the gas authority. Before anything could be done, an explosion took place, a house was wrecked thereby, and seven people were killed. The plaintiff was representative of one of these and sued under Lord Campbell's Act. The negligence alleged consisted in the gas authorities' workmen having only disconnected the pipe from the main to the meter by plugging their own pipe, and "in having given Ormerod notice that his meter had been disconnected when they knew he was going to have it removed." The jury found negligence and a new trial was moved for. This was refused, Lord Esher, M.R., saying: "The defendants were bound to have anticipated that if they allowed an escape of gas into a house, the probability was that it would explode and injure people in the house and in the street. It was clear that the gas supply to Ormerod's meter was intended to be permanently cut off, and the question therefore was, whether, in cutting off the supply, the servants of the defendant had failed to use precautions which in reason they ought to have taken. There was a precaution—in cutting off the supply at a perfectly safe point—which would have been both easy and effective, and the jury were justified in the view of the negligence in this respect of the defendants which they had taken. Gas was so dangerous a thing, that it required the greatest precautions whether the supply was intended to be cut off permanently or even only temporarily." As reported, the plugging of the gas pipe seems to have been effectual, if the pipe were not meddled with. If, in trying to get the meter away, the buyer and his assistant needlessly and negligently broke it, it would seem hard to make the gas company liable. In the view then of the jury and of the Court of Appeal, the breaking the pipe was a natural and probable consequence of attempting to remove the meter, and though this is nowhere mentioned in the report, it was most likely the real ground of the decision.¹

Lord Esher,
M.R.'s, judgment.

Criticised.

Leakage.

It has been contended² that the principle illustrated by *Fletcher v. Rylands*³ applies to leakages from water or gas pipes; that is, the companies are bound to keep the water or the gas, as the case may be, in their pipes, and negligence need not be proved against them when it is shown they have not done so. Touching on this point in *Cattle v. Stockton Waterworks Co.*, Blackburn, J., said:⁴ "If it were necessary to decide these questions, we should require further time to consider, as we are not as yet quite agreed on the principle of law applicable to such a case." The distinction may be pointed out that in *Fletcher v. Rylands* the bringing of the water on land was a conscious and voluntary act of the defendant; while in *Humphries v. Cousins*,⁵ for example, "the plaintiff was bound to receive sewage from the defendant's land through the old drain, but not otherwise." "Further, as the plaintiff was the occupier of a servient tenement, he was clearly not bound to repair the drain on any of the dominant tenements."

Blackburn,
J., in *Cattle v.*
Stockton
Waterworks
Co.

¹ See *ante*, 78.

² *Cattle v. Stockton Waterworks Co.*, L. R. 10 Q. B. 453.

³ L. R. 1 Ex. 265; L. R. 3 H. L. 330.

⁴ 2 C. P. D. 244.

⁵ L. R. 10 Q. B. 457.

Lord Russell of Killowen, C.J., in *Price v. South Metropolitan Gas Co.*¹ held it to be clear that where a gas company with statutory power to lay pipes, does so in the exercise of its statutory powers the "wild beast" theory is inapplicable. In the same case he also held that the fact that a leakage of gas was not reported at the head office did not exonerate the defendants. The contention of the defendants as to this was that sec. 24 of the Gasworks Clauses Act, 1847,² imposed a daily penalty for the escape of gas after notice and that this was the only liability on the defendants.³

Price v. South Metropolitan Gas Co. "Wild beast" theory inapplicable.

Farwell, J., further decided in *Batcheller v. Tunbridge Wells Gas Co.*⁴ following the principle in *Jordeson v. Sutton, &c. Gas Co.*,⁵ that under sec. 9 of the Gasworks Clauses Act, 1847, a gas company has no statutory authorisation to commit a nuisance; so that to an action for an injunction against them for an escape of their gas which contaminated water in neighbouring pipes, it is no answer to say that some escape of gas was inevitable and that the water pipe was inefficient; since the plaintiff owned no duty to the defendants to make his water pipe impervious to gas.

Batcheller v. Tunbridge Wells Gas Co.

No immunity for nuisance.

A gas company has no right to any particular thickness of soil above their pipes;⁶ and they are subordinate in their user of the road to the road authority;⁷ yet if the local authority in repairing a road in which are gas pipes improvidently use a steam roller of unusual weight so that the pipes are cracked, a verdict of negligence against them may be maintained.⁸

Gas. co. no right to any particular thickness of soil above their pipes.

In *East London Waterworks v. St. Matthew, Bethnal Green*,⁹ the Court of Appeal decided that a water company had power to place a guard over a stop-cock in the street; and in *Chapman v. Fylde Waterworks Co.*¹⁰ that the Waterworks Clauses Act, 1847, conferred no power on the owner or occupier of a house to repair a service pipe or to break up the surface of the street; consequently the water company are responsible where the flap or lid placed over the stop-cock or the service pipe gets out of repair if the facts show negligence in the matter.

Company to repair flap or lid over stop-cock or service pipe.

The case of gas and water pipes, not merely authorised, but often required, to be placed by statute, comes rather under the principle, which we have before considered in several connections—that where the Legislature authorises the construction of a work or the use of a particular thing for a particular purpose, the permission carries with it impliedly an exemption from responsibility for any damage arising from the construction and the contemplated use without negligence.¹¹ And negligence has been defined "absence of care according to the circumstances."¹² The point does not appear to have been raised in *Snook's case*; it is, however, the ground of the decision in *Green v. Chelsea Waterworks Co.*, where Lindley, L.J., with the concurrence

Statutory authorisation.

¹ 65 L. J. Q. B. 126.

² 10 Vict. c. 15.

³ *Ante*, 284 *et seq.*

⁴ 17 Times L. R. 577.

⁵ (1899) 2 Ch. 217.

⁶ *Southwark & Vauxhall Water Co. v. Wandsworth District Board of Works*, (1898) 2 Ch. 603.

⁷ *Gas Light & Coke Co. v. Vestry of St. Mary Abbots, Kensington*, 15 Q. B. D. 1.

⁸ *Driscoll v. Poplar Board of Works*, 14 Times L. R. 99.

⁹ 17 Q. B. D. 475.

¹⁰ (1894) 2 Q. B. 599.

¹¹ *Ante*, 286. The liability of gas companies for leakage from their pipes is also treated in the American case of *Mississinewa Mining Co. v. Patton*, 28 Am. St. R. 203.

¹² Per Willes, J., *Vaughan v. Taff Vale Ry. Co.*, in Ex. Ch., 5 H. & N. 679, 688.

of the rest of the Court, held that "the doctrine of *Fletcher v. Rylands* was inapplicable to a company which was doing what it was authorised to do by Act of Parliament."¹

*Cattle v.
Stockton
Waterworks
Co.*

The point actually decided in the case just alluded to, *Cattle v. Stockton Waterworks Co.*,² is of interest as it puts a limit to what would otherwise have been a most indefinite and onerous liability. The owner of land on both sides of a road contracted with the plaintiff to make a tunnel under the road for an agreed sum. When the plaintiff went to work, he found that there was a leak in the defendant's main in the road, by which the plaintiff's expense in executing the contractual work was increased. The Court declined to decide whether the mere escape of water from a main would import liability—that is, whether the landowner could have recovered in an action—but decided that the plaintiff would have no action because his contract was rendered less profitable than it would otherwise have been, had the existing state of things been different from what it actually was. It was assumed throughout that the existing state would have been different but for the defendant's water escaping. If the Court had given effect to this contention, "we should," said Blackburn, J., "establish an authority for saying that in such a case as that of *Fletcher v. Rylands*³ the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine who, in consequence of its stoppage, made less wages than he would otherwise have done." "It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge, J., in *Lumley v. Gye*,⁴ Courts of justice should not 'allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness, as I conceive, of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.' In this we quite agree."⁵

*Blackburn,
J.'s, judg-
ment.*

*Liability for
acts of
servants.*

The liability of gas and water directors for the acts of their servants is, of course, only an instance of the general law of master and servant. *Rex v. Medley*,⁶ as a gas case, may be cited. The chairman and directors of a gas company were indicted for a nuisance in so polluting a river as to kill the fish therein. The evidence showed that the directors did not know of what had been done till the discovery was made which was the ground for action. The contention was that the directors were, therefore, not criminally liable. Lord Denman, C.J., however, summed up: "It is said that the directors were ignorant of what had been done. In my judgment, that makes no difference; provided you think that they gave authority to Leadheter to conduct the works, they will be answerable. It seems to me both common sense and law that if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants."

¹ 10 Times L. R. 259 (C. A.).

² L. R. 1 Ex. 265; L. R. 3 H. L. 330.

³ L. R. 10 Q. B. 453.

⁴ 2 F. & B. 252.

⁵ *Bayley v. Wolverhampton Waterworks Co.*, 6 H. & N. 241, turns on the liability of the company to repair fireplugs under a local Act as against the local board.

⁶ 6 C. & P. 292.

The liability of any person¹ engaged in the manufacture of gas who causes or suffers any stream of water to be fouled with gas refuse is regulated by The Public Health Act, 1875, s. 68,² by which a penalty of £200 a day is imposed on any one thus offending; while a further penalty of £20 a day is imposed for continuing the act whereby the water is fouled after expiration of twenty-four hours' notice from the local authority or the person to whom the water belongs.³ By common law pollution of a river with gas refuse is a nuisance and indictable.⁴

III. The relations of gas and water companies with their customers.

As gas and water companies are regulated by Act of Parliament, the price they may charge their customers for their commodities, the means by which they may supply them, the liabilities they are subject to, and the remedies they have at their disposal, are to be found in the various gas and water Acts, and do not belong to our subject.

The case of *Holden v. Liverpool New Gas and Coke Co.*,⁵ however, illustrates a curious point of contributory negligence. The defendant company supplied gas to a house belonging to the plaintiff. The last tenant on quitting, gave notice to the company that he would not require a further supply, and one of their workmen removed a chandelier from one of the rooms, leaving the end of the pipe secured. Whilst the house remained untenanted, the gas, by some unexplained means, escaped, and an explosion took place, by which the house was damaged. The only means of shutting the gas off was a stop-cock within the house, which was the property of the plaintiff. The plaintiff brought an action, but was nonsuited, on the ground that he "must be responsible for not taking care that the stop-cock inside the house was properly turned." On the argument of a rule for a new trial this decision was sustained, the Court being of opinion that the plaintiff was himself wanting in the ordinary care of seeing that the stop-cock in the inside was closed, which would have effectually prevented the gas from escaping.

This case was cited in *Burrows v. March Gas and Coke Co.*,⁶ as authority for the proposition that the default of the defendants in that case was too remote to subject them to liability. The action was brought on a contract that the defendants should supply the plaintiff with a gas-pipe from the main to a meter under the plaintiff's staircase. The mischief arose thus: The pipe, having been laid down, required testing, and, to test it, gas was laid on and the pipe filled, without notice to the gasfitter. No one was sent from the gas company to test the pipe; but, an escape of gas being perceived, the servant of the gasfitter went with a lighted candle to examine the work, not to test the pipe, when an explosion occurred, doing the damage for which the plaintiff sued the gas company. The damage was caused by the concurrence of the two causes—the inefficient pipe and the negligent introduction of the lighted candle. The defendants put their case in the form of a dilemma—either the action was for contract, then the damage was too remote; or for tort, and then there was contributory

¹ By the definition (sec. 4) of the Public Health Act, 1875, this word includes any body of persons corporate or incorporate. Cp. Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19.

² The Gasworks Clauses Act, 1874 (10 & 11 Vict. c. 15), s. 21, contains similar provisions. See also The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 62.

³ *Hipkins v. Birmingham and Staffordshire Gas Co.*, 6 H. & N. 250; *Millington v. Griffiths*, 30 L. J. (N. S.) 65.

⁴ *Rex v. Medley*, 6 C. & P. 292.

⁵ L. R. 5 Ex. 67, in Ex. Ch. L. R. 7 Ex. 96.

⁶ 3 C. B. 1.

Fouling water with gas refuse.

III. Relation of gas and water companies acting under their statutory powers to their customers. *Holden v. Liverpool New Gas and Coke Co.*

Duty to turn off stop-cock.

Burrows v. March Gas and Coke Co.

negligence. On the latter supposition, however, *Holden's case* is very distinguishable, since the control of the regulating agency—the stop-cock—was exclusively in the plaintiff's possession; while, in the present case, the plaintiff merely employed an independent contractor whose servant was negligent, and to whose negligence the plaintiff could not be considered contributory. On the former, the contract was "to supply a pipe reasonably sufficient for the purpose for which it was used." Having failed in this, "the consequence—the natural and necessary consequence—was that the gas escaped; and, having so escaped, a further natural consequence was that an accident might be expected to result."¹

Grounds of judgment noted.

Cockburn, C.J., who delivered the judgment of the Exchequer Chamber, put the liability also on another ground. Besides supplying a defective pipe, the defendants were in default "in sending gas through it in quantities calculated to produce the catastrophe which occurred." A remark of Martin, B.'s, in the Court of Exchequer, requires notice in order to guard against a possible misconception:² "Even if Sharratt had been a servant of the plaintiff, his negligence would not have exonerated the defendants from substantial liability for their breach of contract." This must be taken in connection with the learned Baron's previous holding that there was "a clear breach of contract on the part of the defendants, for which, I think, they are liable." On the ground of tort, on a similar assumption that "Sharratt had been a servant of the plaintiff," the result must have been otherwise.³

Lannen v. Albany Gas Light Co.

The converse case is treated in the New York case of *Lannen v. Albany Gas Light Co.*⁴ An escape of gas having occurred in plaintiff's father's house, the defendant company sent a man to see about it, who struck a light and caused an explosion; hence the action. "The casualty," says the judgment of the Supreme Court, "was the direct and immediate consequence of the explosion, and this was caused by the negligent act of the defendant's agent in lighting a match in the midst of a large quantity of inflammable and explosive gas." It was urged that the defective pipe belonged to the plaintiff, and not to the gas company, and to allow gas to escape from it was an act of contributory negligence which disentitled the plaintiff to maintain the action. This argument the Court treats as follows:⁵ Whether, if there was negligence in this respect, it was of that direct and proximate character which may be said to have contributed to the catastrophe, is not, to my mind, entirely clear. Assuming that the house belonged to, and was in the possession of, the plaintiff and her father, perhaps they would have a right, as incident to that property and that possession, to have gas in their cellar, if it were not dangerous to other persons. Perhaps we ought not to presume that fire or light would be permitted to come in contact with it, especially by persons aware of the presence of the gas and the danger of its contact with fire. Many an article of an inflammable or explosive character is permitted to be kept in inhabited dwellings by law. The danger arises from some other material being brought in proximity to or contact with them. It is hence a question of some difficulty whether the act of permitting the gas to escape, which in itself was not the cause of the explosion, can

Reasoning of the Court.

¹ L. R. 7 Ex. 97.

² L. R. 5 Ex. 72.

³ See *Burton v. Boston Gas Light Co.*, 117 Mass. 533.

⁴ 46 Bart. (N. Y.) 264.

⁵ L. C. 266.

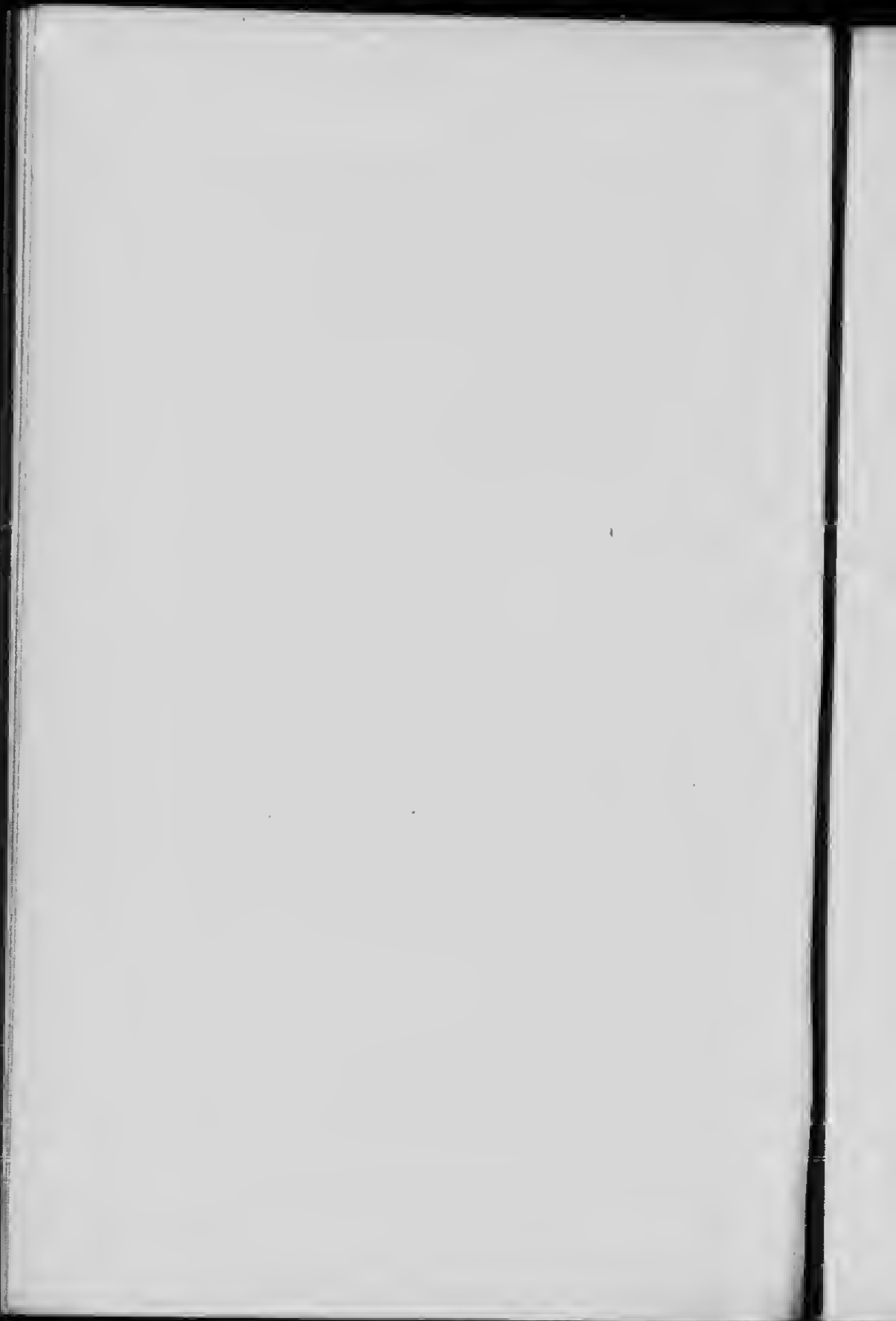
be said to have contributed to it in any such direct or proximate manner as to justify the imputation of such negligence as should defeat a recovery for damages consequent upon the explosion."

The decision appears conformable to principle in a case where Criticised.
 damage is caused by the negligence of another man's servant on the plaintiff's property; where, however, the negligence of the plaintiff's servant is the cause which sets in motion the antecedent negligence, since the employer "has put the agent in his place to do that class of acts," "he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."¹ Had the master himself done the act, he would most clearly have been guilty of contributory negligence; and he is not less so because his servant does it in his stead.

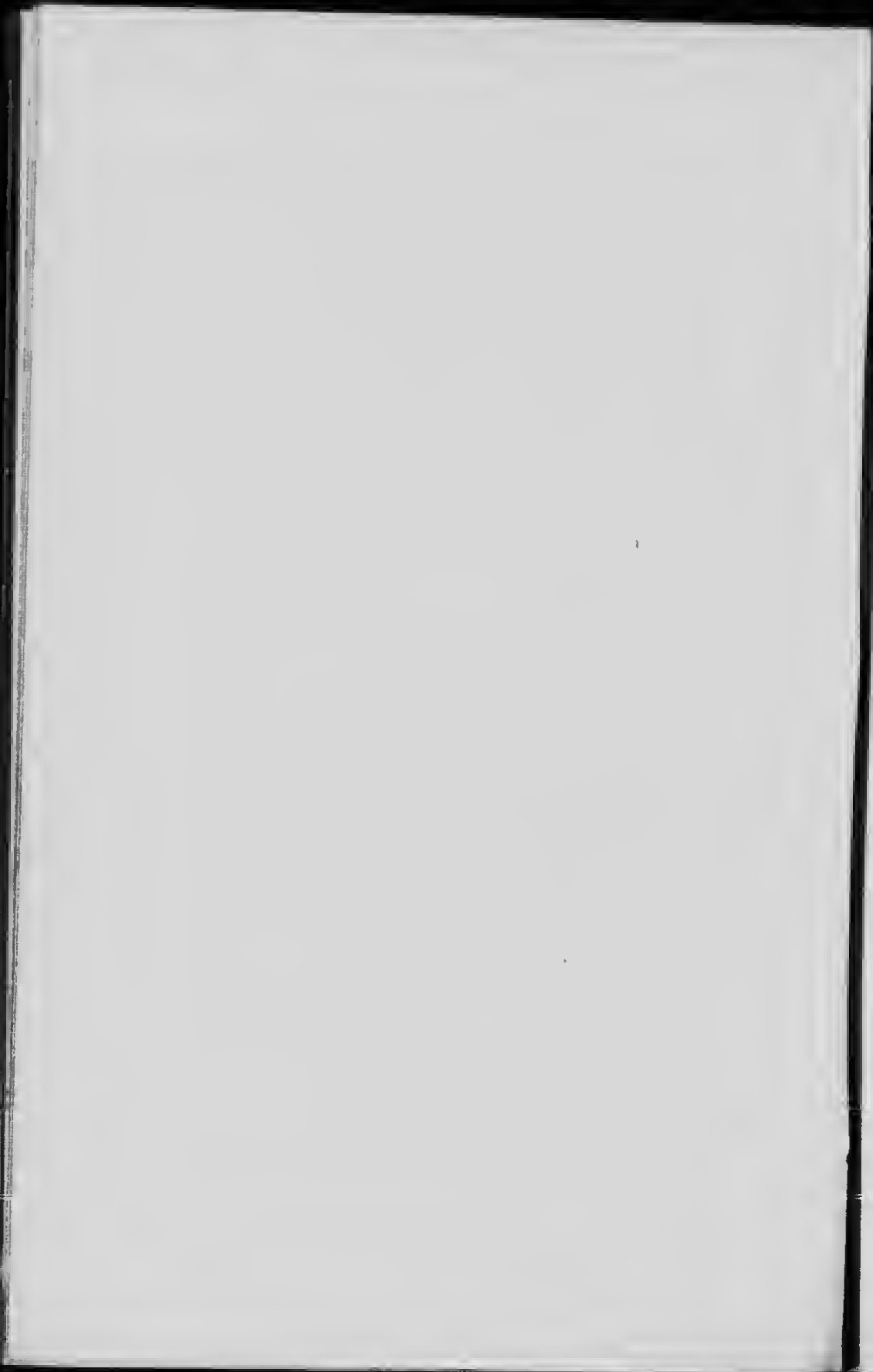
Where the liability does not attach, the explanation is due to the Combined negligence.
 force of the principle thus stated in *Brown v. Illius*.² "In those cases where the negligence of the complainant is a complete legal excuse for that of the defendant, we always find that the injury is the product, to some extent, of the co-operation of causes set in motion by both parties, and is due in some measure to the combined negligence of both."

¹ Per Willea, J., *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 266.

² 27 Conn. 92, ante, 76.



BOOK III.
DUTY TO EXERCISE CONTROL OVER
PROPERTY.



BOOK III.

DUTY TO EXERCISE CONTROL OVER PROPERTY.

CHAPTER I.

DUTY ARISING FROM THE OCCUPATION OF PROPERTY.

I. RELATION TO THE PUBLIC GENERALLY.

THE duty on every occupier of land, as laid down in *Fletcher v. Rylands*,² is—*sic utere tuo ut alienum non lædas*.³ This must be understood in connection with the distinction pointed out by the Lord Chancellor (Chelmsford) in the *St. Helen's Smelting Co. v. Tipping*⁴ between a nuisance producing material injury to property, and one where a personal discomfort only is involved. The legal consequences of the latter are dependent "on the circumstance where the thing complained of actually occurs." In the former, "the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

*Aldred's case*⁵ is an early example of that damage to property *Aldred's case*

¹ Throughout these inquiries the ambiguity of the word "owner" must be borne in mind; sometimes it is used as distinguished from occupier; sometimes it includes occupier; most generally it signifies one possessing a higher title to property as against one with a subordinate title or with no title at all; in this sense "owner" and "occupier" are correlative with "landlord" and "tenant," and are thus used. In *Chandler v. Robinson*, 4 Ex., 170, Parke, B., says: "The term 'owner' as well as 'proprietor' is ambiguous. It may mean that the defendant has the whole legal interest in the house, so that no one else had an estate in possession or reversion, or that he had the subsisting legal interest at the time of the wrong complained of, or that he was owner of the whole or some interest as distinguished from that of the tenant in possession." "Owner," besides being an ambiguous, is also a statutory word with very various connotations (see a valuable note in Pollock and Maitland, *Hist. of English Law* (2nd ed.), vol. ii. 153), and the particular colour that it takes must be sought for in the statute to which it is in any particular case to be referred. Stroud, *Judicial Dictionary*, *sub voce*.

² L. R. 1 Ex. 279.

³ Erle, J., referring to this maxim says it "is *inere verbiage*. A party may damage the property of another where the law permits; and he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained; and when it is, the maxim is superfluous." *Bonomi v. Backhouse*, El. B. & E. 643. Very true, but it is still highly convenient as a short expression of certain mental conclusions.

⁴ 35 L. J. Q. B. 66; 11 H. L. C. 642.

⁵ 9 Co. Rep. (1609) 57 b. The early cases are collected in *Roll. Abr. Action Sur Case (N) Nusans*.

Action for keeping pigs too near a dwelling-house.

which a man may not commit even in the user of his own. The action was in case against a certain Thomas Benton alleging *predictum Thomas ulterius machinans et malitiose intendens ipsum Willielmum (Aldred) multipliciter pręgravare, &c., quoddam ædificium pro suis et porcis suis in horto suo predicto tam prope aulam et conclave ipsius Willielmi predicti crexit, ac sues et porcos suos in ædificio in horto illo posuit, et illos ibidem per magnum tempus custodivit ita quod per fetidos et insalubres odores sordidorum predictorum suum et porcorum predicti Thomę in aulam et conclave predictum ac alias partes predicti messuagii ipsius Willielmi penetrantes et influentes idem Willielmus et famuli sui ac alie personę in messuagio suo predicto conversantes et existentes, absque periculo infectionis in aula et conclavi predicti ac aliis locis messuagii predicti continuare seu remanere non potuerunt.* The defendant having been found guilty, it was moved in arrest of judgment that the building of the house for hogs was necessary for the sustenance of man; and "one ought not to have so delicate a nose that he cannot bear the smell of hogs, for *lex non favet delicatarum votis*; but it was resolved that the action for it is (as this case is) well maintainable; for in a house four things are desired—*habitatio hominis, delectatio inhabitantis, necessitas luminis, et salubritas æris*, and for nuisance done to three of them an action lies." "A lime kiln," it is said, "is good and profitable; but if it be built so near a house that when it burns the smoke thereof enters into the house so that none can dwell therein an action lies for it."

Lime kiln.

Tenant v. Goldwin.

In *Tenant v. Goldwin*¹ filth from the defendant's "privy house of office" flowed into the plaintiff's cellar. The defendant was held liable for the injury done, "because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour; and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's . . . he himself must repair the wall of his house of office; for he whose dirt it is must keep it that it may not trespass."

Crowhurst v. Amersham Burial Board.

These principles were applied to the decision of *Crowhurst v. Amersham Burial Board*.² A burial board planted a yew-tree on their own land and four feet from the boundary. The tree grew to project over the adjoining land where the plaintiff had a right to pasture his cattle. His horse ate of the yew-tree and was poisoned by it. Plaintiff brought his action and recovered, and the judgment was sustained in the Exchequer Division. The finding of facts precluded "the supposition of mere accident" and established "that the trees must be taken so as to have been planted and grown with the knowledge of the defendants, as to make them responsible for whatever might be the direct consequence of the original planting"; also that the plaintiff was not aware of the existence of the yew-tree and was not negligent. Defendants' knowledge of the poisonous quality of yew-tree leaves was held immaterial; "whether they knew it or not, they must be held responsible for the natural consequences of their own act," and having brought on the land something with a tendency to do mischief, there was a duty to prevent its escaping.

Yew-tree planted by defendant.

¹ 1 Salk. 21, 360, 2 Ld. Raym. 1080, 6 Mod. 311. See *Fletcher v. Rylands*, L. R. 1 Ex., per Blackburn, J., 282-5.

² (1878) 4 Ex. D. 5.

An attempt to carry the principle of this case much further was made in *Giles v. Walker*.¹ Forest land being brought into cultivation by the occupier, became immediately covered with thistles, which had never grown there before; and thistle seeds, blown by the wind, fell in large quantities on the plaintiff's land, where they took root and did damage. Plaintiff recovered damages in the County Court, and the defendant appealed. His counsel, however, was stopped by the Court, and the plaintiff's counsel called on, who urged that *Crowhurst v. Amersham Burial Board* was in point. The judgment of the Court was very curt, Lord Coleridge, C.J., saying: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles which are the natural growth of the soil. The appeal must be allowed." Lord Esher, M.R., merely added, "I am of the same opinion." The distinction between the cases is most obvious: in the one something deliberately introduced produces injury through projecting over a neighbour's land; in the other the injury arises from the spontaneous product of the soil.²

Giles v. Walker.
Land covered with thistles.

Had the learned judges in *Smith v. Giddy*³ considered the case of *Giles v. Walker*⁴ they probably would not have affirmed the proposition that an action lies against an adjoining landowner for allowing his trees to overhang the boundary of his estate to the damage of his neighbour's crops. At least they would have had opportunity to "differentiate the present case in principle from *Crowhurst v. Amersham Burial Board*;"⁵ from which it is plainly distinguishable. The finding on which that judgment was based was that "the trees must be taken so to have been planted and grown with the knowledge of the defendants as to make them responsible for whatever might be the direct consequence of the original planting."⁶ "Elm and ash trees growing on the defendant's premises overhanging the plaintiff's premises and interfering with the growth of his fruit trees" must *prima facie* be of such an age that they were not to be presumed planted by the occupier of the premises even if they were. The planting was clearly lawful: "to plant a tree on one's own land infringes no right." If after it is planted in the ordinary course of nature it grows over the boundary and does damage, it may well be that the person responsible for planting it is in some cases liable; but it must be shown that he has done a wrong, in the same way as in *Farrer v. Nelson*⁷ with regard to rabbits. If, however, the occupier sued is not the person who plants, a difficulty at once arises. A quotation from Pallett, C.B.'s, judgment in *Brady v. Warren*,⁸ where the alleged cause of action was bringing new rabbits on land to improve the breed, will best bring out the point: "It is not proved that the defendant himself brought rabbits to the land." "If, therefore, the bringing of them is to render him liable, he can be so only as a *subsequent occupier of land*, which continued to be affected by a wrongful act."⁹ "I cannot, however, see that the act" "can in law impose upon the land a *quasi servitude* rendering its occupier liable in respect of wild rabbits." As to these *Boulston's case*¹⁰

Smith v. Giddy. Trees overhanging neighbour's land.

Decision criticised.

Pallett, C.B.'s, judgment in *Brady v. Warren.*

¹ 24 Q. B. D. 656. Damage done by not keeping thistles cut has been the subject of legislation in Victoria; *Sanderson v. Nicholson*, (1900) V. L. R. 371.

² Under the Roman Law the fate of the case would not have differed. *Sunt casus quibus cessat Aquilia actio . . . nam qui agrum non proscindit, qui vites non subscribit, item aquarum ductus corrumpi patitur, lege Aquilia non tenetur.* D. 7, 1, 13, § 2.

³ (1904) 2 K. B. 448.

⁴ 24 Q. B. D. 656.

⁷ (1904) 2 K. B. 448.

⁵ 4 Ex. D. 5.

⁶ *L.C. D.*

⁸ (1900) 2 I. R. 602.

⁹ 15 Q. B. D. 258.

¹⁰ *Cp. Hall v. Duke of Norfolk* (1900), 2 Ch. 493. ¹¹ 5 Co. Rep. 104 b.; Cro. Eliz. 547.

held that stocking land with rabbits is not actionable, for "it was lawful for any man to kill them upon his own ground."¹ The ordinary growth of a tree (properly planted) does not seem to differ from the ordinary flow of water from gravitation, and in a case of this sort, as Brett, L.J.'s opinion. Brett, L.J., has pointed out in *West Cumberland Iron and Steel Co. v. Kenyon*,² it is "necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land."³

Analogous case. Keeping sun from fruit trees.

A curious case within the writer's own knowledge would possibly have exercised the learned judges who decided *Smith v. Giddy*. A man to the wall of his house with a south-east aspect built a vinery, and for years grew abundant crops of grapes. A religious body on the opposite side of a wide road built a church with a particularly massive and lofty tower; but which intercepted the sun's rays to the vinery and the grapes would not ripen. Bramwell, L.J., solves the legal problem in *Bryant v. Lefever*⁴ thus: "A hedge, a wall, a fruit tree, would each affect the land next to which it was planted or built. They would keep off some light, some air, some heat, some rain, when coming from one direction, and prevent the escape of air, of heat, of wind, of rain, when coming from the other. But nobody could doubt that in such a case no action would lie; nor will it in the case of a house being built and having such consequences. That is an ordinary and lawful use of property, as much as the building of a wall, or planting of a fence or an orchard."

Author of a nuisance responsible for its continuance as well as his tenant.

In *Brent v. Haddon*,⁵ which was an action for a nuisance, it was alleged that the request to abate it was made to the lessee, whereas it ought to have been to the lessor; "for the lessee hath not any authority to abate it, being done in the time of his lessor, and it should he waste in him; nor was it any nuisance erected by him." The judgment, however, was that "the continuance is a nuisance by him, against whom the action well lies." In *Rosewell v. Prior*⁶ the converse was decided, that he who erects a nuisance is answerable for its continuance, though he has parted with the land; because he transfers the land with the wrong, and is answerable for the natural consequences of his act. A tenant for years erected a nuisance and then underlet the property with the nuisance subsisting. After recovery against him for the original nuisance he was held liable, on the above-stated ground, for continuing the nuisance during the underlease. In *The King v. Peddy*,⁷ the duty of the landlord was held to be to exact from his tenants an obligation to cleanse, with a right of entry for himself in case of their default, where particular care is required to prevent a place becoming a nuisance—in the case in question, "two buildings called necessary houses." This decision appears to have followed *The King v. Moore*,⁸ where the defendant used his land for pigeon-shooting, and

The King v. Peddy.

"Necessary houses." Land used for pigeon-shooting.

¹ *Earl of Northumberland's case*, Poph. 141. Cp. *O'Gorman v. O'Gorman* (1903), 2 I. R. 573. ² 11 Ch. D. 787.

³ In some of the discussions on this topic there has been a disposition to reason from the fact that the failure to cut trees or bushes overhanging a highway is a nuisance. But this is dependent on the statute law dated from the Statute of Winchester, 13 Edw. I. c. 5 (1285), and including, *inter alia*, 7 Geo. II. c. 9, 13 Geo. III. c. 78, ss. 6 and 7, and 5 & 6 Will. IV. c. 50, ss. 65, 66, 72. *Walker v. Horner*, 1 Q. B. D. 4. The Civil Law is to be found D. 43, 27, *De Arboribus Cordendis*. Post, 507.

⁴ 4 C. P. D. 178.

⁵ Case 6, 2 Salk. 460.

⁶ 3 B. & Ad. 184.

⁷ Cro. Jac. 555.

⁸ (1834) 1 A. & E. 822.

collected a crowd of people outside so as to be a nuisance; for which he was indicted and convicted, though the crowd was outside his premises, on the ground that the assembly was the natural and probable consequence of his act.

There was no act charged against the defendant in *Russell v. Shenton*,¹ either of making or continuing the nuisance sued on—omitting to cleanse and repair drains and sewers. Yet he was sought to be made liable as “owner and proprietor;” but the Queen’s Bench, following *Cheetham v. Hampson*,² held that no liability was shown, since the cleansing of drains and sewers is *prima facie* the duty of the occupier.

Russell v. Shenton.
Cleansing of drains, &c., *prima facie* occupier’s duty.

Rich v. Basterfield,³ according to the head note in the Law Journal Report, may be cited for three propositions:

Rich v. Basterfield.

1. The owner of real property is not responsible for a nuisance committed and continued thereon by the tenant in possession.

2. If the owner of land demise it with an existing nuisance thereon, he is responsible for the continuance of that nuisance during the term; and also, if he is a party to the creation of a nuisance, after the demise; but he is not responsible for a nuisance created after the demise, if he is not a party to it, though such nuisance is a probable consequence of the user of the land as demised.

3. An omission on the part of the owner of land to determine the tenancy, after the creation by the tenant of a continuing nuisance thereon is not equivalent to a fresh demise of the premises so as to make him responsible for such nuisance.

The facts of the case were: A building originally used as a green-house in which there was a stove wont to burn coke, was converted by the defendant, when he became owner, into a shop with a fireplace and chimney, and afterwards, before any fire had been lighted, was let by the defendant to a tenant, who, week to week, lighted coal fires, that proved a nuisance to the plaintiff, smoke being driven into his drawing-room; in respect of which he sued the defendant. The Court of Common Pleas decided that the defendant was not liable; because, it being quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them so as not to annoy the plaintiff, “the utmost that can be imputed to the defendant is that he enabled the tenant to make fires if he pleased.”

Facts.

In the later case of *Harris v. James, Blackburn, J.*,⁴ describes the actual decision in *Rich v. Basterfield* as a “desperate refinement.”

Criticised by Blackburn, J.

In *Harris v. James*, land was let for the very purpose of being worked as a lime quarry and for erecting lime-kilns and burning lime. Injury arose “from the natural and necessary consequence of carrying out this object;” so that the nuisance became the landlord’s. “As to the injury caused by working the quarry in a negligent and improper

Harris v. James.

¹ 3 Q. B. 440.

² 4 T. R. 318. It is the occupier, not the owner, of lands who is liable to repair a highway *ratione tenuræ* under s. 25, sub-s. 2, of the Local Government Act, 1894 (56 & 57 Vict. c. 73); *Rural District Council of Daventry v. Parker* (1900), 1 Q. B. 1.

³ (1847) 16 L. J. C. P. 273, 4 C. B. 783.

⁴ (1876) 45 L. J. Q. B. 546. If the lighting fires was not a nuisance by reason of the place being an improper one, the principle of *Bryant v. Lefever*, 4 C. P. D. 172, would apply. In *White v. Jameson*, L. R. 18 Eq. 303, it was held that where a landlord licenses a person to come on his land, and allows him when there to commit a nuisance, the landlord is liable to be sued in equity as well as at law. Cp. *Saxby v. Manchester & Sheffield Ry. Co.*, L. R. 4 C. P. 198, where the owner was held not liable.

manner, the landlord is not liable for that, but if the demise to the tenant was on the terms that he should work the quarry by means of blasting, then he is liable."

Notice of defect must be given where other party has no knowledge.

The general rule of law seems to be that where there is knowledge in this one party and not in the other, there notice is necessary.¹ In *Broggi v. Robins*² two rooms had been let on a weekly tenancy and defendants had agreed to do the repairs. The plaintiff, a child of five, was sitting in front of the fire when a plank of the floor gave way and she was thrown into the fire, upset a saucepan of soup and was scalded. The Court of Appeal held, reversing Day, J.,³ that failing knowledge of the defect on the landlord's part the plaintiff could not recover. "No notice had been given to the landlords of any need of repairs." *Tredway v. Machin*,⁴ also in the Court of Appeal, is similar. Plaintiff stepped on to a balcony which defendant was under an obligation to repair. The balcony gave way and plaintiff fell. No one had a notion of the existence of any serious defect in the balcony. As no notice of the defective state of the balcony had been given to the defendant, judgment was entered for him.

How an owner may be affected with notice of nuisance. *Gandy v. Jubber*.

This question of what is sufficient to affect an owner with notice of a nuisance was raised in *Gandy v. Jubber*.⁵ Premises, to which an area was attached, were let, to a tenant from year to year, by the owner, who died, having devised the property to the defendant. At the time of the testator's death there was an iron grating over the area improperly constructed, and so far out of repair as to amount to a nuisance. The defendant, having no notice of the nuisance, suffered the tenant to remain in occupation of the premises upon the same terms as before and took the rent. Plaintiff's wife having sustained damage through the dangerous condition of the grating, the Court of Queen's Bench held that the defendant as reversioner, was liable for it, and that a tenancy from year to year is not, for the purposes of such an action, to be treated as a continuous tenancy, but as one recommencing every year. Error was brought, and after argument the Court of Exchequer recommended the plaintiff to settle the matter. This was done and no judgment was given.⁶

Judgment prepared by the Exchequer Chamber.

The judgment prepared by the Court of Exchequer Chamber, though not formally pronounced, was communicated to the reporter, and points out⁷ that "the true nature of such a tenancy is that it is a lease for two years certain, and that every year after it is a springing interest, arising upon the first contract and parcel of it, so that if the lessee occupies for a number of years, these years, by computation from the time past, make an entire lease for so many years, and that

¹ *L. & S. W. Ry. Co. v. Flower*, 1 C. P. D., per Brett, J., 85. Parke, B., in *Vyse v. Wakefield*, 6 M. & W. 453, exhaustively considers the law in the case of contract; *Makin v. Watkinson*, L. R. 6 Ex. 25.

² 15 Times L. R. 224.

³ 14 Times L. R. 439.

⁴ 20 Times L. R. 726.

⁵ (1864) 5 B. & S. 78, 9 B. & S. 15. *Bartlett v. Baker*, 3 H. & C. 153. As to notice being served on owner of premises to abate a nuisance under Public Health (London) Act, 1891 (54 & 55 Vict. c. 78), s. 4, sub-s. 3: *Gebhardt v. Saunders* (1892), 2 Q. B. 452; *The Queen v. Mead* (1894), 2 Q. B. 124; *Andrew v. St. Olave's Board of Works* (1898), 1 Q. B. 775, distinguished *Proctor v. Mayor, &c. of Islington*, 18 Times L. R. 505, and in *Harris v. Hickman* (1904), 1 K. B. 13, on the ground that the notice in each of these cases was only "an intimation notice." *Haedicke v. Friern Barnet Urban Council* (1904), 2 K. B. 807; (1905) 1 K. B. 110.

⁶ 5 B. & S. 494. The cases are gone into at great length in *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. R. 778; where the decision is that a trustee demising property in such a condition as to be a nuisance, continues liable notwithstanding the demise.

⁷ 9 B. & S. 15.

after the commencement of each new year, it becomes an entire lease certain for the years past, and also for the year so entered on, and that it is not a re-letting at the commencement of the third and subsequent years."¹ The conclusion is that the judgment of the Queen's Bench was wrong, and it has ever since been so regarded.

The decision in *Sandford v. Clarke*² need not detain us. Subsequently, Wills, J., who delivered the leading opinion there, in *Bowen v. Anderson*,³ thought "we were mistaken in holding that a weekly tenancy came to an end at the end of each week." "The attention of the Court was not called to the case of *Jones v. Mills*,⁴ and that decision was overlooked in giving judgment." Yet the actual decision may rest on sound principle, if the practice in the case of a weekly tenancy for the landlord to do the repairs is established enough to have judicial recognition. The ordinary presumption would then be rebutted, and a rebuttable presumption would be substituted that the repairs are done by the owner and that the occupier is exonerated.

Irrespective of questions of length of tenancy, it is clear law that when it appears that a landlord has let the premises to a tenant who is bound to maintain and repair them, *prima facie* the person liable to any one injured through want of repair is the tenant.⁵ This *prima facie* liability is rebutted where the premises are shown to have been ruinous and in danger of falling when the letting occurred; so that the landlord is guilty of the non-repair which leads to the damage. Where then, after the demise the fall appears to have arisen from no fault of the lessee but by the laws of nature, the landlord will be liable.⁶

The strength of the presumption that the obligation to do the repairs is on the occupier, to the exoneration of the owner, is well illustrated by *Gwinnett v. Eamer*.⁷ At the time of the demise of premises by the defendant to a tenant a grating, part of the demised premises, placed in the foot pavement in front of the premises, was so far out of order as to be a nuisance; but the owner had no knowledge of the fact, and no means of knowing it, and was guilty of no negligence in being ignorant of it. By the terms of the demise the tenant bound himself to repair and keep in repair all except the roofs, main walls and main timbers of the house. The plaintiff being injured through the defect in the grating sued the defendant, the landlord. The Court of Common Pleas held that he was not liable. "I doubt very much," says Brett, J., "whether if the burthen of repair is cast upon the tenant, the duty of the landlord does not altogether cease. Here the accident occurred after the demise. If, therefore, the plaintiff has any remedy at all, it must be against the tenant and not against the landlord;" otherwise, as is pointed out by Heath, J.,⁸ there would be a very undesirable circuitry of action.

¹ The nature of this tenancy is discussed in 4 Bac. Abr. Leases and Terms for Years (7th ed.), 838, 839. This title is said to have been written by Chief Justice Gilbert.

² 21 Q. B. D. 308. *Sandford v. Clarke* was "distinguished" in *Hett v. Janzen*, 22 Ont. R. 414; see *Norris v. Calmur*, 1 C. & E. 576.

³ (1894) 1 Q. B. 167.

⁴ 10 C. B. (N. S.) 788.

⁵ (1873) *Pretty v. Bickmore*, L. R. 8 C. P. 401.

⁶ (1861) *Todd v. Flight*, 9 C. B. N. S. 377; *Hall v. Duke of Norfolk* (1900), 2 Ch. 493; *Ferrier v. Trépannier*, 24 Can. S. C. R. 86.

⁷ (1875) L. R. 10 C. P. 658; *Mayor of Scarborough v. Rural Sanitary Authority*, *Scarborough*, 1 Ex. D. 344; see *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. R. 391, and note at 398, and *Leonard v. Storer*, 15 Am. R. 76, and note at 78.

⁸ *Payne v. Rogers*, 2 H. Bl. 350.

Landlord undertaking to repair.

It may be noted that where a landlord undertakes the work of repairing and repairs so negligently and unskilfully that the lessee is injured, he thereby, under a familiar principle, renders himself liable though he need not have undertaken the work at all.¹

No duty on landlord not to let a house out of repair.

But there is no duty imposed on a landlord, by his relation to his tenant, not to let a house in a dilapidated condition, because the condition of the house is the subject of contract between them.² In the case cited it was sought to render the landlord liable for an injury received by a man moving the tenant's furniture. In *Cavalier v. Pope*³ there was a contract to repair by the landlord with the tenant, plaintiff's husband. Phillimore, J., held "that the wife could not recover as for a breach of contract," but could in respect of "damages sustained by her through the defective condition of the floor," which being worn gave way and caused her injury. The Court of Appeal reversed this holding that the landlord's default was "nothing but remissness in carrying out a contract." As to a liability in tort, the case could not be put "higher than that of an invitor, and inasmuch as the condition of the floor at the time of the accident was probably better known to the plaintiff than to the lessor, including his agent, the 'trap' element is quite out of the case."⁴ Yet even to assume this liability against the landlord is to put the case too high; for "a landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term."

Cavalier v. Pope.

Mathew, L.J., tries to support a right of action on a representation without fraud.

Mathew, L.J., dissented, holding that the wife "was induced to occupy the premises with her husband by a representation which proved to be untrue—namely, that the defendant had resolved that the premises should be properly repaired within a reasonable time;" and that she thus had a right of action. Thirteen years previously to this utterance, Bowen, L.J., in the Court of Appeal,⁵ had said: *Derry v. Peek*⁶ decided that "a plaintiff cannot succeed in an action of deceit or fraud without proving that the defendant was fraudulent. That any doubt should ever have been cast upon that proposition seems to me strange, for it has certainly been an accepted proposition ever since I have, and, I believe, ever since my Lord has been in the profession." The dissent of Mathew, L.J., nevertheless, induced the plaintiff to take the case (*in forma pauperis*) to the House of Lords, where the decision of the Court of Appeal was affirmed.⁷

Landlord no action for temporary nuisance.

The lessee who erects a building without the consent of his lessor, does not commit actionable waste by doing so, and the lessor, apart from covenant, cannot restrain him,⁸ unless the building is shown to be an injury to the inheritance. A nuisance that is only temporary, and may cease the moment the landlord comes into possession, gives the landlord no right of action. Any action brought in respect of a temporary nuisance must be by the tenant.⁹

Building repairs to houses.

A point has been taken as to the rights arising out of the execution of building repairs. The principle is thus stated by the Lord Chancellor

¹ *Greggs v. Cady*, 82 Me. 131, 17 Am. St. R. 466. ² *Lone v. Cox* (1897), 1 Q. B. 415.
³ (1905) 2 K. B. 787. ⁴ *Cp. Robbins v. Jones*, 15 C. B. (N. S.), per Willes, J., 242.
⁵ *Le Lievre v. Gould* (1893), 1 Q. B. 499. ⁶ 14 App. Cas. 337.
⁷ (1906) A. C. 428. *M'Manus v. Armour*, 38 Sc. L. R. 791; *Malone v. Laskey*, 23 Times L. R. 399.
⁸ Co. Lit. 53 a. *Jones v. Chappell*, L. R. 20 Eq. 539; *West Ham Central Charity Board v. East London Waterworks Co.* (1900), 1 Ch. 624. As to the equitable doctrine of ameliorating waste see *Doherty v. Allman*, 3 App. Cas. 723, 733.
⁹ *Simpson v. Savage*, 1 C. B. N. S. 347; *Jones v. Chappell*, L. R. 20 Eq. 539; *Meux's Brewery Co. v. City of London Electric Lighting Co.* (1895), 1 Ch. 287, 317.

in *St. Helen's Smelting Co., Ltd. v. Tipping*.¹ "If a man lives in a town, of necessity he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce; also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large." In *Herring v. The Metropolitan Board of Works*²—the case of a shopkeeper injured by a hoarding erected during the progress of certain works—Byles, J., said: "Houses must be repaired, and they cannot be otherwise repaired so properly and safely to the public as they can by having a board or hoarding to shield passengers from danger. But if these obstructions can be lawfully made by private persons, *a fortiori* may they be made by public bodies."

Herring v. The Metropolitan Board of Works.

A Scotch case³ contains a full exposition of the law by the Lord President (Inglist). "There may," he says, "be damage—and very serious damage—arising from the operations of one's neighbour on his own premises, which yet gives rise to no claim for reparation to the person damaged. Indeed it is difficult to conceive any operation in the way of alteration of the construction of a building which will not be attended by dangerous consequences to the neighbours on either side. The generation of dust alone is an annoyance of a very serious kind, and in the case of shops of particular kinds must be almost destructive of the goods which they contain and exhibit for sale. The obstruction of access caused by building operations next door is also a very great risk, particularly to shopkeepers or tavern-keepers, or any class of tradesmen whose customers necessarily resort to their premises and cannot transact with them, or give them their custom elsewhere. But no one ever thought of claiming reparation for damage so produced. To countenance such a claim would be to put an end to the improvement or repair of houses within burgh, and to restrain the use of property in a manner and to an extent inconsistent with the very existence of property and the title of ownership. An operation carried on by a proprietor within burgh, which is either in its own nature unlawful, or which, though lawful in itself, is executed in a reckless, unskilful, or negligent manner, whereby injury is done to his neighbour, is a wrong in law for which reparation is due. Nay, where the work is of a delicate or difficult description, and likely to imperil the neighbour's tenement, the proprietor who undertakes it is bound in more exact diligence, and will be answerable for any want of due care and attention to the rights and interests of his neighbour which has been productive of damage, and the amount of care and attention required in the particular case, and the extent to which it has been neglected will always be a question for the jury on the evidence. But the principle is clear. There must be fault, or, in other words, delinquency or wrong, on the part of the defender of the action of reparation to render him liable to the pursuer in damages."

Laurent v. The Lord Advocate. Judgment of Lord President Inglist.

In building operations there must be fault to render builder chargeable. Distinction sought to be made.

In the case under consideration the existence of the relation of landlord and tenant was sought to distinguish it from cases where this

¹ 35 L. J. Q. B. 72.

² 34 L. J. M. C. 227; see per Lord Ellenborough, C.J., in *Rez v. Jones*, 3 Camp. 230, quoted *ante*.

³ *Laurent v. The Lord Advocate* (1869), 7 Macph. 610; see *M'Intosh v. Scott*, 21 Dunlop 363; *Campbell v. Kennedy*, 3 Macph. 121, commenting on *Cleghorn v. Taylor*, 18 Dunlop 664. *Cameron v. Fraser*, 9 Rettie 26, decided that in fact unavoidable injury was caused.

Landlord by letting not deprived of rights in other property.

Liability at common law in respect of real property.

Where a house is let in a dangerous state.

relation did not exist, and Lord Deas based his dissent from the judgment of the Lord President on this ground. If a contract between landlord and tenant disabled the landlord from doing the ordinary repairs to his adjoining property, the matter would plainly stand on its own facts and not be the foundation of a rule of law. If, on the other hand, the ownership of the adjoining house by the landlord should be said to limit his rights in respect of it to a greater extent than if it were in the hands of any other person, no sufficient reason for such a limitation is advanced, and there is authority the other way.¹

By common law, then, the occupier and not the owner is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and the occupier is therefore *prima facie* liable to third persons for damages arising from any defect, and until the owner has done something that is equivalent to taking possession.²

The occupier is always, the owner may under peculiar circumstances be, liable for an injury sustained by a third person arising from negligence.³ If there is an express agreement between landlord and tenant that the former shall keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord.⁴ If, on the other hand, the owners are at once out of possession and not as between themselves and their lessees bound to repair, nor entitled to enter for the purpose of doing repairs, they are not liable for injuries received in consequence of the neglect to repair.⁵

A landlord, as we have seen, who lets a house in a dangerous state is not liable to the tenant for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy, if any, is on the contract.⁶

¹ Cp. *Davis v. Town Properties Investment Corporation* (1903), 1 Ch. 797; *Williams v. Gabriel* (1906), 1 K. B. 155; *Bamford v. Turnley*, 3 B. & S. 62. In *Earris v. James*, 45 L. J. Q. B. 545, "the injury complained of arose from the natural and necessary consequences of" granting the lease. In *Tucker v. Newman*, 3 P. & D. 14, the erecting, on defendant's house, eaves and a pipe, overhanging and conducting water on land in the occupation of a tenant was held a "permanent injury," giving a cause of action to the reversioner.

² *Regina v. Watts*, 1 Salk. 357, as *R. v. Watson*, 2 Ld. Raym. 856, 3 Ld. Raym. 18; *Cheetham v. Hampson*, 4 T. R. 318. *Bishop v. Trustees of Bedford Charity*, 1 E. & E. 697, an interesting case in Ex. Ch.; *Copp v. Aldridge*, 11 Times L. R. 411. *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. R. 279, was an attempt to charge a landlord for injuries to a passer-by from the fall of snow from the roof of a house which the landlord reserved the right to enter upon to repair. Where smoke issued from a chimney on premises occupied by certain persons they are liable under the Nuisances Removal Acts (18 & 19 Vict. c. 121 s. 12, 23 & 24 Vict. c. 77, s. 13, 29 & 30 Vict. 90, s. 14), though the persons actually causing the smoke to issue were their servants; *Barnes v. Ackroyd*, L. R. 7 Q. B. 474.

³ *Coupland v. Hardingham*, 3 Camp. 398.

⁴ *Payne v. Rogers*, 2 H. Bl. 350. In old times, when the lessor covenanted to repair and did not, the lessee could not avail himself of the landlord's neglect as an answer to an action for the rent, Y. B. 14 H. IV. 27, pl. 35; now a counterclaim would be available. In *Pindar v. Ainsley*, cited in *Balfour v. Weston*, 1 T. R. 310, 312, Lord Mansfield said: "The consequence of the house being burned down is that the landlord is not obliged to rebuild, but the tenant is obliged to pay the rent during the whole term"; *Arden v. Pullen*, 10 M. & W. 321; *Hart v. Windsor*, 12 M. & W. 68; *Duff v. Fleming* (1870), 8 Macph. 769. Under a general covenant to repair the tenant is bound to rebuild if the house is accidentally destroyed by fire; 3 Kent, Comm. 465; *Bullock v. Dommitt*, 6 T. R. 650.

⁵ *Payne v. Rogers*, 2 H. Bl. 350; *Chauntler v. Robinson*, 4 Ex. 163.

⁶ *Hart v. Windsor*, *supra*; *Keates v. Cadogan*, 10 C. B. 591. *De Boos v. Collard*, 8 Times L. R. 338, is a cellar flap case, where defendants had demised a cellar to sub-

It has furthermore been particularly laid down¹ that there are only two ways in which a landlord can be made liable where injury arises from the defective repair of premises let to tenants—first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; and, secondly, in the case of a misfeasance by the landlord. In either of these two classes of cases an action will lie against the owner.²

Two ways in which a landlord can be made liable for defective repair of premises.

There is no warranty implied on the lease of a house or land that it is or shall be reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property.³ On the other hand, one who lets a house ready furnished does so under the implied condition or obligation that the house is in a fit state to be inhabited forthwith;⁴ but in *Manchester Bonded Warehouse Co. v. Carr*,⁵ the Common Pleas Division were "not prepared to extend these decisions to ordinary leases of lands, houses or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty." Certain floors in a warehouse were demised by the plaintiffs to the defendants, who covenanted to maintain the inside of the premises in good and tenantable repair and condition. The plaintiff covenanted to keep the walls, roof and main timbers in good and substantial repair and condition. Sub-lessees of the defendant overloaded a floor with flour, in consequence of which the whole building fell. On these facts it was held that there was no implied warranty by the plaintiffs that the building was fit for the purpose for which it was demised.

No warranty in lease of house or land that it is fit for occupation unless house is let ready furnished.

To this freedom from warranty of fitness there is one limitation.

tenants, the flap of which was alleged likely to be dangerous to persons passing by if no warning was given since it opened upwards. Judgment was entered for defendants.

Housing of the Working Classes Act, 1890.

¹ *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311; *Ponsford v. Abbott*, 1 C. & E. 225.

² Cp. *Barham v. Ipswich Dock Commissioners*, 54 L. T. 23. For the cases about water penetrating demised premises through a portion not demised, see *post*, 482. By the common law as now developed, a lease for years is a transfer of the property, which remains at the risk of the lessee; but at the time of the introduction of leases, at the end of the twelfth century, the termor had no real right, but only the benefit of a covenant (*conventio*); his right was in *personam* against the lessor and his heirs; and his action was an action of covenant (*quod tenent et conventionem factam*). Pollock and Maitland, *Hist. of English Law*, vol. ii., 106 *seq.* The civil law regards a lease, for years as a mere transfer of the use and enjoyment of the property, and holds the landlord bound without any express covenant to keep it in repair and otherwise fit for use and enjoyment for the purpose for which it is leased, even when the need of repair or the unfitness is caused by an inevitable accident, and if he does not do so, the tenant may have the lease annulled or the rent abated. The Roman Civil Law authorities are reviewed, *Viterbo v. Friellander*, 120 U. S. (13 Davis) 713.

³ *Hart v. Windsor*, 12 M. & W. 68; see *Law Mag. N. S.* (1844), vol. i. 203. The English cases are reviewed in *Bowe v. Hunking*, 135 Mass. 380, 46 Am. R. 471, where it was held that a tenant cannot maintain an action against his landlord for an injury caused by falling upon a stair in the tenement, the tread of which had been sawed out and left unsupported by a previous tenant, there having been full opportunity to examine the stair at the time of hiring, and no warranty of the fitness of the tenement having been given by the landlord, the only evidence of knowledge on the part of the landlord being that he knew the stair had been sawed out, that he tried it and it bore his weight, and he thought it would bear anybody's weight. This was approved in *Doyle v. Union Pacific Railroad Co.*, 147 U. S. (40 Davis) 413, where it was said that in the absence of fraud, misrepresentation, or deceit, a landlord is not responsible for injuries happening to the tenant by reason of a snowslide or avalanche. In the civil law *si saltum pascuum locasti, in quo herba mala nascebatur; hic enim si pecora vel demortua sunt, vel etiam deteriora facta, quod interest prestabitur, si scisti; si ignorasti pecunia non pocius*: D. 13, 2, 18, § 1.

⁴ *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Finch-Hatton*, 2 Ex. D. 336. These cases are discussed in *Murray v. Albertson*, 50 N. J. (Law) 167, 7 Am. St. R. 787.

⁵ 5 C. P. D. 511; *Saner v. Bilton*, 7 Ch. D. 815.

By the Housing of the Working Classes Act, 1890,¹ in any contract made after August 14, 1885, for letting for habitation by persons of the working class a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for habitation.

The owner of property is liable notwithstanding the employment of another.

The occupier of property cannot escape liability by the mere employment of another :

(a) Where the work he imposes upon another is illegal.

(s) Where injury arises from doing the very thing which he has delegated.

(γ) Where the thing to be done arises out of a statutory duty or a public authority.

(δ) Where the thing to be done is necessarily dangerous.

(a). Where the work to be done is illegal. *Ellis v. Sheffield Gas Co.*

Where a legal work is done illegally: *Hole v. Sittingbourne and Sheerness Ry. Co.*

In *Ellis v. Sheffield Gas Co.*,² the work to be done was illegal; and shifting the actual work to other shoulders does not discharge the liability incurred by promoting its execution and receiving the benefit of it. With this may be contrasted *Hole v. Sittingbourne and Sheerness Ry. Co.*,³ where the work to be done—the building a bridge⁴—was authorised by Act of Parliament; but in the course of carrying out the contract an obstruction was occasioned which violated the Act of Parliament. The defendants having sought to evade responsibility by showing that they had delegated their statutory duty to a contractor, it was pointed out by the Court that the company's statutory duty was absolute. They were to construct a bridge and to avoid obstructing the navigation. In the course of construction, and without negligence, an impediment was caused to the navigation; for this, the defendants would be liable, since it was directly caused by non-observance of their statutory duty, and was a positive act done in carrying out the plan fixed upon for the work, and not a merely negligent act collateral to the contract, the responsibility for which would turn on a question whether the relation of master and servant existed. Parliament had imposed a duty on the defendants which could not be discharged by making a contract with third parties, though as between contractor and owner the way of carrying out the work might no doubt give rise to a claim for damages.

(β). Where injury arises from doing the very thing contracted to be done.

The next case—*Pickard v. Smith*⁵—raised the question whether the mere situation and circumstances of property, apart from any question of illegality or of statutory obligation, imports a similar duty

¹ 53 & 54 Vict. c. 70, s. 75. To bring a house within the section the rateable value, if the hereditament is situated within the metropolis, must not exceed £20, if in Liverpool, £13, if in a parish wholly or partially in Manchester or Birmingham, £10, if elsewhere in England, £8, 32 & 33 Vict. c. 41, s. 3; and if in Scotland or Ireland, by 53 & 54 Vict. c. 70, s. 75, £4. By the Housing of the Working Classes Act, 1903 (3 Edw. VII., c. 39), s. 12, the condition implied by s. 75 of the principal Act is made obligatory, and any agreement to exclude it is declared void. As to right of tenant to sue his landlord under this provision, see *Walker v. Hobbs*, 23 Q. B. D. 458. In *Gott v. Gandy*, 2 E. & B. 845, a count in a declaration against the landlord by tenant from year to year of a house for neglecting to do substantial repairs to the premises after notice that they were in a dangerous state; *per quod* the premises during the tenancy fell and injured plaintiff's goods, was held bad, no obligation to do substantial repairs on notice being implied by law from the relation of landlord and tenant.

² 2 E. & B. 767. See also *Paterson v. Lindsay*, 13 Rettie 261, where Lord Young expresses the view that any operations in the vicinity of private grounds which cannot be conducted without danger to persons in those grounds are illegal.

³ 6 H. & N. 438.

⁴ As to duty in constructing a bridge see *McCleneghan v. Omaha, &c. Rd. Co.*, 13 Am. St. R. 506.

⁵ (1861) 10 C. B. N. S. 470; *Threlkeld v. White*, 8 N. Z. L. R. 513.

paramount to contract. Defendant was the lessee of refreshment-rooms at a railway station; the entrance to the coal cellar was by a trap-door on the platform. While a coal merchant by defendant's orders was shooting coals into the cellar, the trap-door was negligently left open and unguarded. Plaintiff, who was leaving the station in the usual way, fell into the hole and was injured. Defendant urged that the liability was either that of the railway company or of the coal merchant.¹ The Court held that it was defendant's obvious duty, if he used the hole in a way necessarily to create such danger, to take reasonable precautions not to injure persons lawfully using the platform; he was not absolved from this duty by employing the coal merchant. The act the coal merchant was employed to do was to open the trap and the defendant must have trusted him to guard against accidents in doing the very thing the contract was about. The defendant was bound to take reasonable means to avert evil consequences in doing it. "The performance of this duty he omitted; and the fact of his having entrusted it to a person who also neglected it furnishes no excuse, either in good sense or law."

The facts proved showed a hole in such a position that special precautions may well have been needed to prevent its being dangerous. Yet this was not the ground on which the case was decided; for in the course of the argument,² Williams, J., is reported to have said: "The fact of the trap-door being on the platform of the railway makes no difference. Suppose the hole were in the foot pavement of a public way; would not the housekeeper who employs the coal merchant to open it, and who trusts him to guard and to close it, be responsible?" And the answer is: "No doubt he would." The case of *Pickard v. Smith* has been so repeatedly recognised that any discussion of the point decided there is now no more than academic. Nevertheless, it may be pointed out that the distinction has been contended for as being between a work ordinarily and necessarily hazardous,³ and one that would be performed in the ordinary course of things, and—unless those actually engaged on the work are negligent—without peril. If the former were the correct distinction, the moving of a coal-plate in the pavement for the shooting of coal and during the progress of the work, according to the ordinary usage of words, cannot appropriately be described as dangerous. In properly doing the act there is no risk. The danger arises from default of a responsible agent, who, by the use of the simplest precaution would obviate the possibility of danger.⁴ Antecedently the principle applicable would seem to be that stated by Lord Westbury.⁵ "The ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature,"

Pickard v. Smith considered.

Principle enunciated by Lord Westbury in *Daniel v. Metropolitan Ry. Co*

¹ Williams, J., expressed an opinion that the coal merchant would not be liable. But on an action being brought against a coal merchant for the negligence of his carman in removing an iron plate in the footway, the Queen's Bench Division held that it was the common case of negligence by a servant in the scope of his employment, for which the master was responsible; *Whiteley v. Pepper*, 2 Q. B. D. 276. As to a coal-cellar plate in a pavement insecurely fastened, *Braithwaite v. Watson*, 5 Times L. R. 331.

² 10 C. B. N. S. 472.

³ E.g., *Hughes v. Percival*, 8 App. Cas. 451; *Dalton v. Angus*, 6 App. Cas. 829.

⁴ Per Lord Fitzgerald, *Hughes v. Percival*, 8 App. Cas. 452; and the opinions cited in the judgment of Holker, L.J., 9 Q. B. D. 448; and especially the rule of liability stated by Lord Blackburn in *Dalton v. Angus*, 6 App. Cas. 829.

⁵ *Daniel v. Metropolitan Ry. Co.*, L. R. 5 H. L. 45, 61.

and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work. My Lords, undoubtedly, it would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected with all prudence proper persons to perform the work, but that he is still under an obligation to do that which, to him, in many cases, would be impossible—namely, to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons."

Wider principle necessary than that enunciated in *Pickard v. Smith*.

The duty on the occupier to watch a coal-hole while coalmen are shooting coals down it—a duty now firmly established by law—must, therefore, be referred to another principle than that of guarding against the consequences of acts ordinarily or necessarily hazardous; and must be held to come under a principle of this sort—that where injury has arisen from the doing of a delegated act (whether in itself dangerous or otherwise, is immaterial) if the act is one whereby in fact danger is caused, the liability attaches just as if there were no delegation. Nevertheless the class of acts which may be performed without danger, if the simplest and most ordinary means are used, would seem susceptible, apart from authority, of quite other regards than those in their nature dangerous, or calling for the exercise of exceptional care.

(γ). Where the duty on the owner is a statutory one. *Gray v. Pullen*.

In *Gray v. Pullen*¹ the obligation was a statutory one. By the Metropolis Local Management Acts, 1855² and 1862³ the defendant was empowered to make a drain from his premises to a sewer, and was "to cause the pavement to be reinstated and the surface to be made good in a proper and substantial manner." He employed a contractor to do the work, who personally supervised its execution. A day or two before the accident there were heavy rains which caused the ground to sink and made a hole, into which the female plaintiff fell. Blackburn, J., ruled that as the work was done by a contractor, and as there was no evidence to go to the jury that the work had been done by a servant of the defendant, and as defendant had authority to cause the drain to be made under the statute, there was no case to go to the jury. This ruling was upheld on the ground that there was nothing to take the case out of the common doctrine that if a person, in the exercise of a right, either as a private individual or conferred by statute, employs a contractor to do work, and the contractor is guilty of negligence in doing it, from which damage results, he and not the employer is liable. The negligence alleged was plainly that of the contractor in the way he did the work; and not a danger arising from the doing of the work.

Hole v. Sittingbourne and Sheerness Ry. Co.

*Hole v. Sittingbourne and Sheerness Ry. Co.*⁴ gave the Court some difficulty to distinguish. Cockburn, C.J., sought to do this by saying a statutory duty was imposed which was not discharged and mischief resulted, when it was no answer to say that the mischief arose by reason of the manner in which the duty was discharged by the contractor; while in the case before the Court (*Gray v. Pullen*) all that was

¹ (1864) 5 B. & S. 970. That the work was done under statutory powers was the ground of the decision in *Burham v. Ipswich Dock Commissioners*, 54 L. T. 23. Cf. *City of Halifax v. Lordly*, 20 Can. S. C. R. 505.

² 18 & 19 Vict. c. 120.

³ 25 & 26 Vict. c. 102.

⁴ (1861) 0 H. & N. 488.

meant was "that where persons in the exercise of the statutory power interfere with a public highway, they shall, as quickly as possible, fill up any opening they create in the surface, and make good what they had temporarily interfered with." Crompton, J., makes the suggestion that the real decision in *Hole v. Sittingbourne and Sheerness Ry. Co.* was that "where anything connected with the real property of a party is done in such a manner as to cause a nuisance, the person who does it is liable;" and Mellor, J., points out that "in *Hole v. Sittingbourne and Sheerness Ry. Co.* there was a perpetual obligation on the defendants. In the present case I agree there is no warranty from the defendant Pullen." Blackburn, J., did not give any reason discriminating the cases. The judgment of the Queen's Bench was, however, unanimously overruled by the Exchequer Chamber, who confirmed *Hole v. Sittingbourne Ry. Co.*, and *Pikard v. Smith*, which they treated as indistinguishable, and held that the statutory duty was created absolutely.

In the case of a lamp hanging from the front of a house over the public way,¹ Lush, J., says: "Is it his [the defendant's] duty to maintain it in a safe state of repair, or only to employ a proper person to put it in repair? Surely the mere statement is enough to show that the duty must be in the first proposition." Blackburn, J., puts the case: "If there were a latent defect in the premises, or something done to them without the knowledge of the owner or occupier by a wrongdoer, such as digging out the coals underneath, and so leaving a house near a highway in a dangerous condition." He answers, or evades answering, his problem thus: "I doubt—at all events I do not say—whether or not the owner would be liable."²

In *Butler v. Hunter*³ the plaintiff's and defendant's houses adjoined. In consequence of a fire the defendant had to repair his house. He employed an architect, who found it necessary to pull down and to rebuild the front. A contract was entered into with a builder to do the work. In doing it, the workmen removed a hressummer that was inserted in the party-wall of the two houses in consequence of which removal the plaintiff's house fell. The work might have been done with safety if the plaintiff's house had been shored up. To shore up the house would have been the usual method of doing the work. It did not appear that the defendant knew anything about the work or the contract.

In *Bower v. Peate*⁴ again, the plaintiff's and defendant's houses adjoined. Defendant, having determined to pull down his house, proposed to carry the foundations of a new one to a lower depth than his neighbour's. To do this it became necessary to underpin his neighbour's wall. A contract was entered into for the work at the risk of the contractor. Owing to defective underpinning or supporting the accident happened.

In *Butler v. Hunter* the proposition advanced was, that where a person employs a tradesman to do that which may be dangerous to another, he is bound to show that he directed all care to be taken, and specifically pointed out in what way the danger was to be guarded

¹ *Tarry v. Ashton*, 1 Q. B. D. 320; *Silverton v. Marriott*, 59 L. T. 61.

² See *Hughes v. Percival*, 3 App. Cas., per Lord Fitzgerald, 455: "He is not in the actual position of being responsible for injury, no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even although it may be *culpa levisima*."

³ (1862) 7 H. & N. 826.

⁴ (1876) 1 Q. B. D. 321.

Interference with a highway.

(d). Where what is done is necessarily dangerous or may become so if precaution is not taken.

Tarry v. Ashton.

Butler v. Hunter.

Bower v. Peate.

Butler v. Hunter.

Judgment of
Wilde, B.

against; or, at all events, to show that he did enough to exempt himself from responsibility. But the Court held that as the accident had arisen, not from the act itself contracted to be done, but from "the improper mode in which it was done," the owner was not liable. Wilde, B., said: ¹ "It seems to me that the absence of a shoring is like the absence of a proper hoarding, or any one of the ordinary precautions which belong to the careful taking down of a wall. Then it is said that the defendant ought to have given orders to do the work in a tradesmanlike way, or ought to have pointed out what was requisite. But it seems to me that it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done. I think that as a matter of fact if a man gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesmanlike way."

Judgment of
Cockburn,
C.J., in
Bower v.
Peate.

In *Bower v. Peate* the judgment was delivered by Cockburn, C.J., who affirms the proposition that "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful." ² The dividing line of the cases is indicated by the Chief Justice to be determined by the test whether the work is such that if it be done carefully, no injurious consequences can arise; or whether it is such that injurious consequences will arise unless precautionary measures are adopted. It is strange that *Butler v. Hunter* does not appear from the report to have been cited in the argument. The two cases have subsequently been treated as not consisting well together.

Lord Black-
burn in
Dalton v.
Angus;

In *Dalton v. Angus*, Lord Blackburn, reviewing the cases, says: ³ "Ever since *Quarman v. Burnett* ⁴ it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole v. Sittingbourne Ry. Co.*, ⁵ *Pickard v. Smith*, ⁶ *Tarry v. Ashton*. ⁷

¹ 7 H. & N. 833. In the course of the argument he had asked, at 829: "Suppose a person employed a contractor to pull down a house, and be omitted to put up a hoarding so as to prevent bricks falling on persons passing, who would be liable?"

² 1 Q. B. D. 326. See *Blake v. Ferris*, 5 N. Y. 48, 61. Per Thesiger, L.J., *Angus v. Dalton*, 4 Q. B. D. 184: "It is properly admitted by the defendants' counsel that the case of *Bower v. Peate* is undistinguishable from the present, and I am of opinion that the law there laid down by the Lord Chief Justice, in delivering the considered judgment of the Court, is correctly stated and placed upon proper principles." Per Cotton, L.J., 188: "I agree with the decision in *Bower v. Peate*." Per Lord Selborne, C., in *Dalton v. Angus*, 6 App. Cas. 791: "It follows from that decision [*Bower v. Peate*], as to the correctness of which I agree with both the Courts below."

³ 6 App. Cas. 829.

⁴ 6 M. & W. 499.

⁵ 6 H. & N. 488.

⁶ 10 C. B., N. S., 470.

⁷ 1 Q. B. D. 314.

I do not think either side disputed these principles, nor that, in *Bower v. Peate*,¹ the Queen's Bench Division thought that the case of a man employing a contractor to excavate near the foundation of a house which had a right of support, fell within the second class of cases; nor that, if correctly decided, that case was decisive. But *Bulter v. Hunter* was relied on, which case the Court of Exchequer held fell within the first class of cases. I am not quite sure that I understand from the report what the state of the evidence was. But, assuming that the defendants are right in saying that it was such as to make the case not distinguishable from *Bower v. Peate*, I think that the reasoning in *Bower v. Peate* is the more satisfactory of the two." Again, in *Hughes v. Percival*, Lord Blackburn,² having read the principle already quoted from the judgment of Cockburn, C.J., adds: *Hughes v. Percival*. "I doubt whether this is not too broadly stated. If taken in the full sense of the words, it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant, but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention, and, indeed, not being a Court of error, had no power, to alter the law as laid down in *Quarman v. Burnett*. . . . It is not necessary now to inquire how far this general language should be qualified. I do not think the case of *Bulter v. Hunter* is consistent with my view of the law. I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer, I am obliged to differ from them."

The later cases have tended to accentuate the liability on the ultimate employer. In *Hardaker v. Idle District Council*,³ the work undertaken was to construct a sewer. The default was breaking a gas main, through insecurely packing the soil round it while excavating. The statutory duty of the District Council was "not performed by constructing a proper sewer. Their duty was not only to do that, but also to take care not to break any gas-pipes which they cut under: this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the District Council's duty for them, but did so carelessly; the case is one in which the duty of the District Council, so far as the gas-pipes were concerned, was not performed at all."⁴ The Court of Appeal, in *Penny v. Wimbledon Urban Council*,⁵

¹ 1 Q. B. D. 321.

² 8 App. Cas. 447; *Black v. Christ Church Finance Co.* (1894), A. C. 48. *Byrnes v. Western*, 17 N. S. W. (L. R.) 80, where the Court were divided on the effect of the sale of a house as old building materials which the purchaser was to cart away—whether he was owner or contractor. Cp. *Lavery v. Purcell*, 39 Ch. D. 598. In *Lemaître v. Davis*, 19 Ch. D. 281, both employer and contractor were held liable for damage done to the vault of a neighbour's house. See *Upton v. Townsend*, 17 C. B. 30; also *Tone v. Preston*, 24 Ch. D. 739. The Prescription Act, 1832 (2 & 3 Will. IV., c. 71) was considered in *Lemaître v. Davis*, *supra*.

³ (1890) 1 Q. B. 335. See *Grows v. Wimborne (Lord)* (1898), 2 Q. B., per Rigny, L.J., 412.

⁴ L.c., per Lindley, L.J., 342.

⁵ (1899) 2 Q. B. 72. The authorities are grouped and very fully discussed by Pallen, C.B., *Clements v. County Council of Tyrone* (1905), 2 I. R. 415.

Penny v. Wimbledon District Council. Where employer has a duty he cannot free himself from its performance by employing a contractor.

adopted the statement of the law by Bruce, J.¹ "The principle of the decision, I think, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." Smith, L.J., adds:² "I agree with this entirely, but would add as an exception the case of more casual or collateral acts of negligence, such as that given as an illustration during the argument—a workman employed on the work negligently leaving a pickaxe, or such like, in the road." The facts of the case showed that a contractor employed to make up a highway negligently left on the road a heap of soil, unlighted and unprotected, over which a person after dark fell and was injured. "I cannot hold," says Smith, L.J., "that leaving heaps of soil in the road, which would by the very nature of the contract have to be dug up and dealt with, is an act either casual or collateral with reference to the contract." The same Lord Justice delivered the judgment of the Court in *The Snark*.³ The facts showed that a barge of the defendant's had sunk in the fairway of the Thames without negligence. The defendants employed "an under-waterman—that is, a man who goes down under water to get up sunken vessels—and they entered into a contract with him to get up this barge." He was negligent, and plaintiff's steamer ran on the wreck and was injured. The Court of Appeal accepted the proposition: "When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." *Pickard v. Smith*⁴ is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do."

The Snark.

Holliday v. National Telephone Co.

This doctrine concerning work done on a public highway had been previously formulated in *Holliday v. National Telephone Co.*⁵ The telephone company were laying wires in a public street. A plumber who worked under the supervision of the telephone company's foreman did so under a contract to solder the tubes containing the wires to the satisfaction of the foreman. To get a flare which was necessary in order to do the work a benzoline lamp was used to dip into the caldron of molten metal. If the lamp was in order there was no danger. But the lamp, as the plumber should have known, was out of order, an explosion resulted and the plaintiff was injured, and he brought his action against the Telephone Company. Their defence was that the plumber was a contractor and responsible, and they were not. Lord Halsbury, C., after pointing out that facts showed a co-operation in work, where both parties are liable, said:⁶ "There is a further ground

¹ (1898) 2 Q. B. 217. *Hill v. Tottenham Urban District Council*, 15 Times L. R. 53; *Bull v. Mayor, &c. of Shoreditch*, 18 Times L. R. 171.

² (1899) 2 Q. B. 76.

³ (1900) P. 105.

⁴ 10 C. B. (N. S.) 470.

⁵ (1899) 2 Q. B. 302.

⁶ L. C. 398.

for holding that the plaintiff is "entitled to succeed. There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorised by the proper authority. The telephone authority so authorised to interfere with a public highway are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works."¹

Principle stated by Lord Halsbury, C.

II. WITH REGARD TO PERSONS RESORTING TO PREMISES.

Besides the duties already enumerated, there are others which fall upon occupiers of fixed property. Subject distributed.

I. As to trespasses upon property.

II. As to the use of premises by bare licensees or volunteers.

III. As to the use of premises by those resorting to them upon business which concerns the occupier, and upon his invitation, express or implied.

But before taking these divisions in order there are certain ancient principles yet touching familiar things that must be noted.

"It will be a trespass," says Comyns,² citing Fitzherbert,³ "if a man wrongfully enters the house, lands, or tenements of another without his consent; and therefore trespass lies *de domo sua fracta*."⁴ The universality of this rule there are exceptions. In 37 H. VI. 37, pl. 26, it is said if a man who is assaulted and in danger of his life, run through the close of another without keeping in a footpath, trespass does not lie; for the doing this being necessary for the preservation of life is lawful; or, if one enter on another's land to succour the owner's beast, the life of which is jeopardised, trespass does not lie, because the owner's loss is irremediable if the beast died. But trespass lies if the loss is not irremediable, as for entering to prevent the beast being stolen or the owner's corn from being trampled or eaten.⁵ A man may enter the land of another to recover his beast that has been stolen, though not to recapture one that has been removed to the land of another, not feloniously;⁶ unless the beast has been driven there by the owner of the land;⁷ but he may not enter to look for a beast he has lost.⁸ Again, if a tree belonging to one person is blown down on the land of another, the owner may enter to take it away; also fruit falling from the tree of one man on the land of another may be gathered by the owner with impunity, so far as, and because, the falling there could not be prevented;⁹ yet if the loppings of a tree fall on the land of another, an action lies if their falling could be prevented by proper care.¹⁰ "So where my beasts are doing damage in another man's land, I may not enter to drive them out; and yet it would be a good deed to drive them out so that they do no more damage; but it is otherwise if another man drive my horse into a stranger's land, where they do damage; there I may justify entry to drive them out, because the wrongdoing took its beginning in a stranger's wrong.

Trespass, when excused.
(1) To preserve one's life.
(2) To rescue cattle.
(3) To recover a beast that has been stolen.
(4) To remove a tree blown down; or fruit fallen,
(5) or to recover horses driven by a stranger on a neighbour's land.

¹ See *Maxwell v. British Thomson Houston Co.*, 18 Times L. R. 275.
² Dig. Trespass (A 2).
³ 2 Roll. Abr. 565.
⁴ *Higgins v. Andrewes*, 2 Roll. Rep. 55.
⁵ 2 Roll. Abr. 565, pl. 9. Cp. Y. B. 9 E. IV. 35, pl. 10, per Littleton, J.
⁶ *Toplade v. Stayle*, Style 165.
⁷ Y. B. 6 E. IV. 7 pl. 18. See post, Book IV., chapter i.: Duty to answer for one's own acts.
⁸ De Natura Brevium, 87 D.
⁹ Y. B. 21 H. VII., 27, pl. 5.
¹⁰ *Millen v. Fawdry*, Latch 119, 120.

But here, because the party might have his remedy if the corn were anywise destroyed, the taking was not lawful. And it is not like the case where things are in danger of being lost by water, fire, or such like, for there the destruction is without remedy against any man.¹ The same distinction is pointed in Y.B. 38 E. III. 10 b., where it is said that if a man flies his hawk at a pheasant on his own ground, and the hawk pursues the pheasant into another's warren, the owner of the hawk cannot justify entering the warren and taking the pheasant. There is a somewhat subtle distinction between this and what was agreed by the whole Court in *Sutton v. Moody*,² that if a man pursues deer, hare, or conies out of his land or the land of another into mine, and there takes them, they are the hunter's and not mine. There is no right to enter the land in either case. If the trespass is already complete the game may be carried away. Yet where the hawk has killed the pheasant, the owner of the hawk not being by, it is a trespass to enter the land to claim the pheasant.

We are now prepared to consider :

I. As to trespasses upon property.

Trespasses
upon
property.
Townsend v.
Wathen.

The first case to note is *Townsend v. Wathen*.³ Defendant placed traps baited with flesh so near the plaintiff's courtyard, where his dogs were kept, that they could scent the bait without going upon the defendant's premises. Several of the plaintiff's dogs having been thus enticed into the traps, and thereby injured, the plaintiff brought his action. The Court of King's Bench held that he might recover. The defendant's purpose being to catch dogs, he must be held to have malice against those special dogs which came into his traps. "What difference," says Lord Ellenborough, C.J.,⁴ "is there in reason between drawing the animal into the trap by means of his instinct, which he cannot resist, and putting him there by manual force?"

Deane v.
Clayton.

The earlier authorities were cited and elaborately examined in the somewhat unsatisfactory case of *Deane v. Clayton*.⁵ The facts were found by a special verdict: A large tract of woodland belonging to the defendant adjoined upon a piece of woodland belonging to a gentleman named Townsend. A low bank or mound of earth and a shallow ditch marked the boundaries of the respective estates, but was not a sufficient fence to prevent dogs passing from one woodland to the other. Through the defendant's woodland there were public paths not fenced from the rest of the land. The defendant had caused several iron spikes, called dog-pears, to be screwed and fastened into several of the trees in the woodland, and had them purposely

¹ Per Rode, J., Y. B. 21 H. VII., 27 pl. 5, 28.

² 1 Ld. Raym. 250, where all the old authorities are collected. Holt, C.J., follows Y. B. 12 H. VIII., 9 pl. 2.

³ (1808) 9 East 277. An attempt was made, on the authority of this case, in *Stansfeld v. Bolling*, 22 L. T. (N. S.) 799, to render a confectioner liable for the death of a dog of a customer which got behind the counter and ate some poison put for rats and mice. The Court, however, negatived the right of action. *Townsend v. Wathen* was distinguished in argument on the ground that there the enticement was made to operate beyond the defendant's property, but there was no decision against an allurement not calculated to act beyond the limit of the premises. In *Janson v. Brown*, 1 Camp. 41, defendant justified shooting a dog because the dog was worrying his fowl and could not otherwise be prevented; it was held, however, that he must prove that the dog was in the act of worrying the fowl at the moment he was shot. See note 1 Camp. 41; also *Vere v. Lord Cavendish*, 11 East 508, where Lord Ellenborough held a gamekeeper had no right to shoot a dog following a hare; Com. Dig. Pleader (3 M 33.).

⁴ 5 East 251.

⁵ (1817) 7 Taunt. 489, 2 Marsh. 577, where the arguments of counsel are given which the learned reporter in 7 Taunt. regrets he is unable to give; see also 1 Moore (C. P.) 203.

placed at such a height as to allow a hare to pass under them without injury, but to wound and kill a dog that might happen to come against one of the sharp ends. None of the spikes was at a less distance than fifty yards from the public footpath. There were also notices painted on hoards outside the woods—"Take notice, that steel-traps and spring-guns and dog-spikes are set in these woods and premises." The plaintiff, by the consent of Townsend, went into Townsend's woodland, accompanied by a pointer dog, for the purpose of sporting. A hare rose in Townsend's grounds, and was seen and pursued by the plaintiff's dog. The hare ran and was pursued by the dog over the mound into the defendant's woodland, where the dog ran against one of the sharp ends of the spikes, and was killed. The plaintiff tried to hut could not stop the dog going into the defendant's wood.

On these facts Burrough and Park, JJ., were of opinion the plaintiff could recover the value of the dog; while Dallas, J., and Gibbs, C.J., held an action was not maintainable. Division of opinion.

The weight of argument appears to be on the defendant's side, but no judgment was given, and the plaintiff did not think fit to avail himself of the suggestion of Burrough, J., who offered to withdraw his judgment to enable him to appeal.

In *Hott v. Wilkes*,¹ tried before Garrow, B., the learned judge, considering that the same question was involved as was under the consideration of the Court of Common Pleas in *Deane v. Clayton*, directed the jury to find a verdict for the plaintiff, and reserved to the defendant liberty to move to enter a nonsuit. The jury found, in addition, that the plaintiff had knowledge that there were spring-guns in a wood, and entered the wood, and in the exercise of a right, hut to gather nuts, and where there was no pathway. The King's Bench thereupon declined to consider the general question as to the liability incurred by placing such engines as spring-guns where no notice is brought home to the party injured, and decided the case merely on the ground that the plaintiff had notice of their being on the ground, and had no business to go there.² *Hott v. Wilkes.*

By the 7 & 8 Geo. IV. c. 18,³ the use of spring-guns calculated to destroy human life or to inflict grievous bodily harm, with the intent to injure trespassers, was prohibited, unless for the protection of a dwelling-house in the night-time. This Act rendered the decision of what were the common law rights of property owners with regard to the setting of spring-guns, &c., only of importance in cases that had occurred previously to its passing.

Bird v. Holbrook,⁴ however, was such a case. The question there *Bird v. Holbrook.*

¹ (1836) 3 B. and Ald. 304. See the article in 35 Edin. Rev. 123. "Spring Guns and Man Traps," also "Man Traps and Spring Guns," reprinted in Sydney Smith's works, and probably the motive force of the enactment, 7 & 8 Geo. IV. c. 18, superseded now by 24 & 25 Vict. c. 100, s. 31.

² Some discussion must have taken place on the question of humanity, for Best, J., says, 3 B. & Ald. 319, "Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity." Abbott, C.J., answers him, at 300, by anticipation thus: "Nor are we called on to pronounce any opinion as to the inhumanity of the practice, which in his case has been the cause of the injury sustained by the plaintiff. That practice has prevailed extensively and for a long period of time, and although undoubtedly I have formed an opinion as to its inhumanity, yet at the same time I cannot but admit that repeated and increasing acts of aggression to property may perhaps reasonably call for increased means of defence and protection." Best, J., was apparently proud of his sentiment, for he recites to and repeats it in *Bird v. Holbrook*, 4 Bing. 641.

³ See now 24 & 25 Vict. c. 100, s. 31.

⁴ (1828) 4 Bing. 628.

Best, C.J.'s,
judgment.

was whether it was incumbent on a person, who had set a spring-gun in a walled garden, at a distance from his house, to give notice of what he had done. The Court included Best, C.J., counsel for the plaintiff in *Deane v. Clayton*, and Burrough and Park, JJ., who had given judgments in favour of the plaintiff in that case; and they took the opportunity of reiterating the contention they had there advanced. The ground of the decision is thus put by the Chief Justice: "We want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity and the sanctions of religion."¹ Another ground is that on which Gaselee, J., exclusively based his judgment that it was impossible, after *Hott v. Wilkes*, to hold otherwise than that notice was necessary. But *Hott v. Wilkes* was the case where, assuming notice to have been given, it was contended that, in spite of the notice, the defendant was liable. The present case was not, therefore, necessarily concluded by the decision: for a decision, that where notice had been given of the placing of a spring-gun the defendant is not responsible, does not decide the case whether, where no notice of the placing of a spring-gun has been given, the defendant was responsible. Abbott, C.J., says definitely:² "Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained." Bayley, J., says: "The declaration" "assumes the law to be, not that the mere act of placing these guns in a man's own ground is illegal and punishable by indictment, but that a party doing that act may be liable to an action provided he does not take due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce."³ Holroyd, J., says:⁴ "Without giving any decided opinion upon that point" (i.e., whether placing spring-guns on property from which injurious consequences result to a trespasser without notice is a lawful act), "but assuming, for the present, that that would be so, it seems to me that a party having express notice that the spring-guns were placed in a particular ground, and entering upon that place as a trespasser, stands in a very different situation." We may hence conclude that the majority of the Court did not even express an opinion upon what Abbott, C.J., calls the "general question," and that the argument from authority used in *Bird v. Holbrook* was a straining of the expression in the earlier case.

Abbott, C.J.,
in *Hott v.*
Wilkes.

Bayley, J.

Holroyd, J.

Jordan v.
Crump.

*Jordan v. Crump*⁵ raised again the question in *Deane v. Clayton*. The plaintiff was walking with his dog along a public footway through

¹ 4 Bing. 643. At this time of day it may be worth while to recall, though it is needless to comment on, another of the general principles by which the Chief Justice buttressed his judgment: "It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids that the law will not reach; if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England." As to this last proposition see the argument of Sir Samuel Romilly, *A.-G. v. Pearson*, 3 Meriv. 379, and the note, in which the history of the theory is set out and the cases collected; also *Shore v. Wilson*, 9 Cl. & F. 355; *In re Masters, &c. of Bedford Charity*, 2 Swans 470; and a very able pamphlet by the late Lindsey Middleton Aspland, Q.C., entitled "The Law of Blasphemy," 1884. Lord Eldon, it may be noted, does not seem to have held the view of Best, C.J. *Twiss, Life of Lord Eldon*, vol. iii. 447.

² 3 B. & Ald. 310.

⁴ *L.c.* 314.

³ *L.c.* 312.

⁵ (1841) 8 M. & W. 782.

a coppice of the defendant's in which, to the knowledge of the plaintiff, there were dog-spears. The dog broke from plaintiff's control, and, while chasing a rabbit into the coppice, was injured by running against a dog-spear. The Court held that the plaintiff could not recover; "and we shall merely content ourselves with saying that we take the same view of the law on this subject as is there taken [in *Deane v. Clayton*] by Gibbs, C.J. But the present case is much stronger than that; for here the plaintiff had express notice that dog-spears were set in the wood; though, were this even otherwise, our decision would still be in favour of the defendant, on the short ground that the setting of them was a lawful act, and that the accident occasioned by them was the act of the dog, not of the defendant, and that the plaintiff was bound to keep his dog on the footpath." As to *Bird v. Holbrook*, the Court said: "The reason of this decision was that setting spring-guns without a notice was, even independently of the statute, an unlawful act. The correctness of that position may perhaps be questioned; but, if it be sound, the decision in that case was right."¹

The subsequent case of *Wootton v. Dawkins*,² which in its leading features closely resembles *Bird v. Holbrook*, is an additional authority for the view taken in *Jordin v. Crump*. The declaration alleged that plaintiff entered the defendant's garden at night, and without permission, to search for a stray fowl, and whilst looking into some hushes he came in contact with a wire, which caused something to explode with a loud noise, and to knock him down, and to injure his face and eyes. A rule was, in the first instance, moved for in the Court of Queen's Bench, but was refused, on the ground that under the statute³ it was not enough that the instrument was one calculated to create alarm, but must be calculated to destroy human life, or to inflict grievous bodily harm; of which there was no evidence; while at common law there was no cause of action at all. The Court of Common Pleas was subsequently moved, on the ground that the rule had been moved in the Queen's Bench by mistake; but they declined to grant a rule, holding that the conclusion of the Court of Queen's Bench was correct. Thus, the three Courts of Queen's Bench, Common Pleas, and Exchequer, have successively declined to follow the doctrines laid down in *Bird v. Holbrook*, which must therefore be considered as overruled.

We may conclude then—

(1) That at common law the placing of instruments in the nature of spring-guns, dog-spears, &c., on a man's land is not unlawful, provided only that they were not placed so as to be a peril to the enjoyment of the rights of other persons,⁴ or in the nature of a trap.⁵

(2) That by statute⁶ the use of spring-guns is unlawful in so far as their use is calculated to destroy human life or inflict grievous bodily harm on trespassers; except in a dwelling-house and in the nighttime for the protection of it.⁷

(3) That the setting up on a man's own land of dog-spears and such instruments, not contained in the statutory exception against instruments, capable of causing deadly injuries to human life, is a lawful

¹ The judgment was given by Alderson, B.

² (1857) 2 C. B. N. S. 412.

³ 7 & 8 Geo. IV. c. 18, s. 1.

⁴ *Barnes v. Ward*, 9 C. B. 392.

⁵ *Townsend v. Wathen*, 9 East 277.

⁶ 24 & 25 Vict. c. 100, s. 31.

⁷ "If a man commits a trespass to land, the occupier is not justified in shooting him, and probably if the occupier were sporting or firing at a mark on his land, and saw a trespasser and fired carelessly and hurt him, an action would lie": per Bramwell, B., *Degg v. Midland Ry. Co.*, 1 H. & N. 780.

user of land, even where injury will be a probable result from setting them.¹

The owner of property is not allowed to protect his property in every conceivable mode. He must proportion his means to his end. If danger is involved notice must be given of it. He must also, in certain cases, take positive measures for the protection, not merely of those who are induced to enter upon his lands by his invitation or acquiescence, but even of those who are upon his land without invitation and even to his detriment.

Duty where lands are adjacent to a public way.

This duty arises principally where lands are adjacent to a public way. In *Jordin v. Crump*,² Alderson, B., had said: "The case is similar to that of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field by the owner of it. In such a case the party digging the pit would be responsible for the injury if the pit were dug across the road; but if it were only in an adjacent field the case would be very different, for the falling into it would then be the act of the injured party himself."

Barnes v. Ward.

In reliance on this *dictum*, the proposition was maintained in *Barnes v. Ward*³ that there is no common law duty upon an owner of land adjoining a highway to guard or to fence a ditch or area upon his own land. After consideration and reargument, the Court held that where a newly made excavation adjoining the highway renders the way unsafe to those who use it with ordinary care, a duty to fence it arises. The cases were classified into, first, those where the existence of a hole adjoining a road is not dangerous to the persons and cattle of those passing along;⁴ secondly, those where the hole may interfere with the rights of those passing along.⁵

Test.

The test is not whether the plaintiff is a trespasser or not,⁶ but is the excavation so near the highway as to interfere with the ordinary user of the same by the public. Thus, in *Hardcastle v. S. Y. Ry. Co.*, Pollock, C.B., said:⁷ "When an excavation is made adjoining a public way so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown

Pollock, C.B., in *Hardcastle v. S. Y. Ry. Co.*

¹ Bac. Abr. Trespass (F). For what injuries to Real Property an Action of Trespass lies, contains a large collection of the early cases on the point.

² 8 M. & W. 782, 787.

³ (1850) 9 C. B. 392; *Orr Ewing v. Colquhoun*, 2 App. Cas. 864. *Sarch v. Blackburn*, 4 C. & P. 297, was a dog case; there Tindal, C.J., said, 300: "Undoubtedly a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it."

⁴ *Blüthe v. Topham*, 1 Roll. Abr. 88; "Si A, seise d'un wast adjacent al un hault chemin fode un pit en le wast deins 36 pees del dit chemin et le mare de B, escape en le dit wast, et decade en le pit et la morust, uncore B, n'avera aucun action vers A., pur ceo que le fesans del pit en le wast et nemy en le hault chemin ne fuit aucun tort al B. mes ceo fuit le defaut de B. mesme que son mare escape en le wast": Cro. Jac. 158.

⁵ *Coupland v. Hardingham*, 3 Camp. 398; *Jarvis v. Dean*, 3 Bing. 447, where it was assumed as a matter beyond dispute that the action was well founded, supposing the road was shown to be a public one; per Pollock, C.B., *Firmstone v. Wheeley*, 2 D. & L. 208; *Wright v. Midland Ry. Co.*, 51 L. T. 530.

⁶ "A trespasser is liable to an action for an injury which he does; but he does not forfeit his right of action for an injury sustained": *Barnes v. Ward*, 9 C. B. 420; *Silverton v. Marriott*, 50 L. T. 61.

⁷ (1859) 4 H. & N. 74; *Stone v. Jackson*, 16 C. B. 199; *Pearson v. Cox*, 2 C. P. D. 369. Plaintiff's servant, while driving plaintiff's horses along a road not dedicated to the public, drove into a trench dug for the purpose of making drains, and unlighted. Held, there was no duty on the owner to protect any one using the road without licence: *Murley v. Grov*, 46 J. P. 360.

into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different." "A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury no one could tell whether he was liable for the consequences of the act upon his own land or not. We think that the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be dangerous if it were otherwise—if in every case it was to be left as a fact to the jury, whether the excavation were sufficiently near to the highway to be dangerous."¹ *Hounsell v. Smyth*,² the case of an excavation on a waste between two roads, and *Binks v. S. Y. Ry. and River Dun Co.*,³ the case of a canal twenty-four feet from a pathway, which twenty-four feet had been trampled down and made indistinguishable from the pathway, were decided on the authority of the earlier cases.

Does the excavation substantially adjoin the highway?

Hounsell v. Smyth.
Binks v. S. Y. Ry. and River Dun Co.

There is a Scotch case⁴ erroneous itself but which bears looking at to bring into prominence principles which it ignores. A proprietor let the right of digging fire-clay on his lands to a brick manufacturer, with leave to him to erect works and houses, and to make roads there. The tenant erected his works and built houses for his workmen near an unfenced quarry on the lands, remote from any public way, but which was being worked in the ordinary manner. The road or path used by the workmen in going to the works from the houses passed within twelve feet of the quarry. The pursuer, one of the brick manufacturer's workmen, resided in one of the cottages in full view of the quarry; as Lord Gifford expressed it, "seeing it every day and almost every hour of his life. After living there some time—it does not appear how long, on the morning in question, and after having slept in another cottage, not his own, he stumbles into the open quarry in question—an open quarry which had always been there and which had never been enclosed." The pursuer brought his action against the landlord, alleging a neglect of duty to fence. The Second Division of the Court of Session, Lord Gifford doubting, affirming the sheriff and sheriff-substitute, held the pursuer entitled to recover. The doctrines propounded by the Lord Justice-Clerk (Moncreiff) are here used as a foil only to illustrate the principle of the English authorities. Where, says he, the landlord "uses his land so as to bring a concourse of people to it, then he must remove any existing danger. Suppose a church or a school had been built on this piece of ground, would the proprietor have been entitled in such case to have this quarry unfenced? No proprietor is entitled to give liberty which exposes the persons taking advantage of it to danger." "But there are points in

M'Feat v. Rankin's Trustees.

Views of the Lord Justice-Clerk (Moncreiff).

¹ The principle that if the excavation is substantially adjoining the highway, the landowner is liable, was declared to be the Scotch rule in *Prentices v. Assels Co.*, 17 Rettie 484. The dictum in *Holop v. Durham*, 4 Dunlop 1168, importing a duty to fence a disused quarry, is dissented from in *Prentices v. Assels Co.*, the Lord President (Inglis) saying: "I entertain strong doubts whether the words were ever spoken by his Lordship (Lord President Boyle). It would be surprising if such a startling proposition of law had been accepted," &c.

² (1860) 7 C. B. N. S. 731.

³ 3 B. & S. 244; *Hadley v. Taylor*, L. R. 1 C. P. 53, was the case of a "hoist-hole" within fourteen inches of the public way, and unfenced. Willes, J., referred with approval to the rule laid down in *Binks v. S. Y. Ry. Co.*

⁴ *M'Feat v. Rankin's Trustees*, 6 Rettie 1043.

this case which take it out of that category altogether. A right to make roads is expressly given in the lease—rent is paid on that footing. *The landlord, therefore, who was a party to that lease, was bound to fence this dangerous quarry.* "Again, the increase of the danger is of great importance. The quarry did not remain in the state it was in when the cottages were built. It had been enlarged, and that in the direction of the cottages. In the third place, *this is not the first accident of a similar nature which has occurred here. The defenders thus had warning that this was a dangerous place.*" Whether as an exercise in law or logic, this decision seems equally noteworthy.

Lord Justice-Clerk Moncreiff's views examined.

As to the Lord Justice-Clerk's first point, Williams, J., in *Hounsell v. Smyth*,¹ answered it by anticipation: "Suppose a person gives another leave to walk on the edge of a cliff, surely it would be unjust to say that such permission throws on the proprietor of the land the burthen of fencing the cliff. Nor can it make any difference that there is a high road open to hut at some distance from the cliff." And the cases presently to be considered—under the heading of what the duty of an occupier of property is to licensees on his property²—show clearly that there is no shadow of authority for it in English law; while Fry, L.J., subsequently uses like facts to point an illustration of an incontrovertible principle:³ "If I invite a man who has no knowledge of the locality to walk along a dangerous cliff which is my property, I owe him a duty different to that which I owe to a man who has all his life hirdnested on my rocks."

The second point appears to involve a major proposition that where by lease for valuable consideration a right to make roads over land is given, the person granting the lease is bound to fence all places on his property possibly dangerous, in case the lessee should make one of the roads he is empowered to construct under the lease near to any of such places. Assuming any obligation of this sort under a lease, it is going a long way to give the benefit of the implied covenant to one not a party to it or taking any interest under it or with reference to it. However, the proposition itself is wholly contradictory to English authority.⁴

The third point again involves an illicit assumption—viz., that knowledge of a danger is correlative with a legal duty to take precautions against it.

Lord Gifford's remark is very good sense, and, in England at any rate, very good law: "Dunnachie, the clay tenant, had power to build by his lease, and he chose to build his workmen's cottages upon the clayfield, and in dangerous proximity to the open stone quarry. Now, if Dunnachie chose to do this I think he was bound to fence his own cottages and the roads to them, so as to make them safe for his own workmen, and I have a difficulty in seeing how and when the defenders became liable to make safe roads to cottages which they did not build, which they were not bound to maintain, and which, I suppose, Dunnachie might remove at his own pleasure."

Innes v. Fife Coal Co.

Innes v. Fife Coal Co. is a case where similar notions of legal duty were adopted.⁵ An engine-driver who was given a house by his em-

¹ 29 L. J. C. P. 207.

² *Post*, 442. Per Cockburn, C.J., *Gallagher v. Humphrey*, 6 L. T. (N. S.) 684.

³ *Thomas v. Quartermaine*, 18 Q. B. D. 685, 701.

⁴ *Erskine v. Adeane*, L. R. 8 Ch. 756; *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 M. & W. 68; *Keates v. Earl Cadogan*, 10 C. B. 591. *Culpa caret, qui scilicet sed prohibere non potest*: D. 50, 17. 50.

⁵ 3 Fraser 335.

ployers adjacent to his work, ran over his own child who was playing in an unfenced siding fronting the house. There does not seem to have been any statutory duty to fence. Lord President Balfour held that providing the houses for the occupation of their workmen implied a duty to safeguard the workmen's children from the perils of the situation. The assumption was made that if the child had been the child of a stranger (e.g., the child of a fellow workman) there would be a cause of action; and it was concluded that the fact of paternity did not affect the rights to recover.

The fact that a man's property abuts on the highway is not a reason why he should be restricted in the natural and beneficial use of it. In accordance with this principle, both the owner and occupier of a building and elevator were held not liable to one who was injured by being pushed into and falling down an elevator well, where the opening of it was in a wall of the building and outside the limits of a street, and while the elevator was actually in use, in the absence of proof of negligence in the owner or occupier or that the opening was not so constructed as to be closed by doors or by a proper barrier when the elevator was not being used.¹

Abutting on highway does not restrict the natural and beneficial use of property.

The duty of the owner of land near a highway to fence the land for the protection of people using the highway where there is a dangerous place, either on the highway or so near thereto as to be substantially the same thing, is at the root of the obligation to take effectual care that ordinary passengers should not stray at the point of diversion, asserted in *Hurst v. Taylor*,² as incumbent on those who, in the exercise of statutory power, divert a highway. This duty arises probably from the accustomed user of the old way being likely to mislead persons; so that, though there would be no obligation to fence the place if the road were an old way, yet the likelihood of travellers being misled must be the measure by which the question, whether a duty to fence in the changed circumstances is imposed, must be determined. The rule has accordingly been formulated that there is a duty cast upon those who exercise a statutory right to divert a public footpath to take reasonable care to protect passengers who use the new footpath from straying therefrom. Whether in any particular case such care has been used is a question for a jury. This rule is undoubtedly humane and reasonable in itself, but a difficulty arises in the application of it. The power exercised in diverting the footpath is by hypothesis statutory. In the case in question the work authorised was completed before the accident. If, then, the steps taken follow the statutory power, in the absence of actual negligence, what jurisdiction has a Court to prescribe other precautions than those indicated, or to affect with liability those exercising statutory rights?

Duty where highway is diverted.

Hurst v. Taylor

Difficulty of the decision.

If premises beside a highway are so dangerous that those using the highway are imperilled, on an accident arising in consequence of the

¹ *M'Intire v. Roberts*, 149 Mass. 450, 14 Am. St. R. 432; cp. *Patterson v. Hemenway*, 148 Mass. 94, 12 Am. St. R. 523.

² 14 Q. B. D. 918; *Mayor, etc. of Rotherham v. Fullerton*, 50 L. T. 364, turns on powers given by a local Act to compel owners of land abutting on streets to fence them. The case of *Evans v. Rhymney Local Board*, 4 Times L. R. 72, follows *Hurst v. Taylor*, but is so implicated with its particular facts as not to furnish any authority on a question of principle. One statement as reported—"The decision in *Hurst v. Taylor* clearly shows that there is a duty on the defendants to furnish protection for people using an extremely dangerous place on a dark night"—is either an inaccurate view of *Hurst v. Taylor*, or shows that *Hurst v. Taylor* is inaccurate. See *Hounsell v. Smyth*, 7 C. B. N. S. 731, per Williams, J., 743.

dangerous condition the occupier of the premises is in the first instance liable. But if a highway is diverted so as to pass by a danger that has antecedently existed and remains in itself unaltered, the proximity of the highway casts no new duty on the occupier of the property; and, as we shall see more in detail later, an occupier of property may dedicate a way over or through it subject to any obstruction existing antecedently to his dedication.

Canadian case. Fall of snow from roof of house.

In a Canadian case the action was for injuries sustained by the plaintiff through ice and snow falling from the roof of the defendant's house and injuring the plaintiff while walking on the highway. The evidence was that before the accident happened the defendant, though warned of the dangerous state of the roof, took no measures to remedy it. There was, further, a by-law proved requiring people to keep their roofs clear of snow and ice. A nonsuit granted at the trial was set aside and a new trial directed, on the ground that the facts disclosed evidence for a jury.¹

Attempt to extend the liability of an owner of property adjoining a highway in Scotland.

In Scotland it was sought, on the authority of a passage in Addison on Torts² and the Scotch case of *Beveridge v. Kinneir*,³ to assert a general obligation on owners of property abutting on a street to keep their property, not merely in such a condition that injury should not result from its natural condition, but also that it should not become dangerous through the intervention of trespassers.⁴ A trespasser on a building yard wishing to open a sliding gate of ordinary construction, the groove of which was somewhat clogged, forced it so that the gate fell into the street and upon a passenger, who sued the owner of the gate for the injury. The Court was of opinion he could not recover; and, though there is some uncertainty in some of the expressions as reported, the general scope of the judgment appears to discriminate between an unsafe condition which is made injurious by a mischievous or thoughtless act, and a condition which is safe as against all usual and ordinary acts, but which may be made unsafe and injurious by wilful trespassers.

M' Dowell v. G. W. Ry. Co.

The law of England is the same, though Kennedy, J., appears to have thought otherwise,⁵ but was corrected by the Court of Appeal.⁶ The position taken by him is that knowledge of danger arising from the possible acts of wrongdoers creates a duty to guard against it. It may, or it may not—"according to the circumstances." Another position taken by the learned judge is also untenable. A course of conduct undertaken for one's own purposes does not raise a duty to

¹ *Landreville v. Gouin*, 6 Ont. R. 455, distinguishing *Lazarus v. Toronto*, 19 Upp. Can. Q. B. 9, where there was no notice. See further on this point, *Smethurst v. Proprietors of Independent Church in Barton Square*, 148 Mass. 261, 12 Am. St. R. 550; also *Hannen v. Penco*, 12 Am. St. R. 717; *City of Montreal v. Montreal Street Ry.* (1903), A. C. 482. In *Toronto Ry. Co. v. City of Toronto*, 24 Can. S. C. R. 589, an accumulation of snow was caused by the acts of the tram company; *City of Kingston v. Drennan*, 27 Can. S. C. R. 46, turned on a statutory obligation to clear away snow. In the Metropolitan area the duty of clearing away snow from the streets is imposed on the sanitary authorities by The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 31, snow being included under the words street-refuse by sec. 141. *Saunders v. Holborn District Board of Works* (1895), 1 Q. B. 64. The law for the rest of the country, exclusive of London and exclusive of local Acts, is to be found in The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 43, 44. *Graham v. Mayor, &c. of Newcastle* (1893), 1 Q. B., per Lord Esher, M. R., 646, referring to 5 & 6 Will. IV. c. 50, s. 29.

² (5th ed.) 456. ³ 11 Rettie 387.

⁴ *Murphy v. Smith*, 23 Sc. L. R. 709. See *Hilop v. Durham*, 4 Dunlop 1169; and *Black v. Cadell*, Morison, Dict. of Decisions, 13,905.

⁵ *M' Dowell v. G. W. Ry.* (1902) 1 K. B. 618.

⁶ (1903) 2 K. B. 331.

continue in it for the benefit of third persons; else if my servant omits to ring my dinner bell, my neighbour may have his action against me.

*In re Williams v. Groucott*¹ raises a somewhat different point. It is whether, when a mine has been severed from the ownership of the surface soil with licence to the owner of the mine to sink a shaft through the surface, it is incumbent on him to protect the owner of the surface against injury to his cattle by reason of the shaft, or whether it rests with the owner of the surface to protect them against it himself. The Court held that this was the duty of the owner of the mine, and that, "when a party alters things from their normal condition so as to render them dangerous to already acquired rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights."²

Duty where ownership of the surface is separated from ownership of the minerals.

Willes, J., further held at *Nisi Prius*³ that where an excavation is so near a highway as to create or to increase danger to the public, and an accident happens thereby, the person making the excavation is liable, even though a statutory obligation to fence the highway is imposed on other persons who have neglected to do so. But this is scarcely so absolutely. If the duty to fence is imposed for the benefit of the adjacent owner neglect of it will probably not be held to curtail his rights, unless perchance his right to excavate be conditional on the performance of the duty to fence. If the excavation without the fence would be dangerous and the duty to fence is imposed for another purpose than the benefit of the adjoining owner, the neglect of the duty could not be called in aid to exonerate him from liability for his wrongful excavation.

Willes, J.'s, summing up in *Wettor v. Dunk*.

In *In re Williams v. Groucott*⁴ the law was laid down with reference to an interference with the natural condition of property; the converse case had previously been decided in a group of cases, of which *Fisher v. Prowse* and *Cooper v. Walker*⁵ are the chief. The law is clear that after a highway is dedicated, anything subsequently placed so near it as to be a nuisance, or to impair the safe enjoyment of it, is as unlawful as an actual obstruction.⁶ No decision had determined whether an erection or excavation already existing, and not otherwise unlawful, became unlawful when the land on which it existed, or to which it was immediately contiguous, was dedicated to the public as a way, supposing the erection or excavation prevented the way from being as safe and commodious as it otherwise would have been; or whether the dedica-

Fisher v. Prowse, and *Cooper v. Walker*.

¹ 4 B. & S. 149; distinguished in *Great Laxey Mining Co. v. Clague*, 4 App. Cas. 115.
² Per Blackburn, J., 4 B. & S. 157. *Sybray v. White*, 1 M. & W. 435, is the only similar case reported. There the law as stated in the text "was taken for granted in the declaration and also by the parties at the trial, as well as afterwards by the counsel in the argument and the Court in giving judgment. It is perfectly true that the point may have passed without consideration, but still the case is so far an authority; and very eminent judges sat in the Exchequer at that time": per Blackburn, J., 158.

³ *Wettor v. Dunk* (1864), 4 F. & F. 298; *Hawken v. Shearer*, 56 L. J. Q. B. 284. The Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), does not extend to Scotland and Ireland.

⁴ (1862) 2 B. & S. 770; *M'Fee v. Police Commissioners of Broughty Ferry*, 17 Rettle 764, which holds that there is a duty on police commissioners to take effective measures to prevent the public using a street not safe, would indicate that the law of Scotland differs from the law of England on this point, were it not as inconsistent with *Mackenzie v. Bankes* (1866), 6 Macph. 936, as it is with *Fisher v. Prowse*.

⁵ Thus in *Daniels v. Potter*, 4 C. & F. 262, it was held that the duty of one placing a cellar flap upright against a wall in the public highway during the time the cellar was being lawfully used, was so to secure it that it would not in ordinary circumstances fall on persons using the highway.

tion must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. The latter proposition was decided to be the law in *Cooper v. Walker*,¹ a case where stone steps projected into a street to an extent rendering them dangerous to passengers by night. Following the decision of the Exchequer in *Cornwell v. Metropolitan Commissioners of Sewers*,² the Queen's Bench held that the user of the way was taken subject to the risk. In the Exchequer case Alderson, B., said: "Suppose there is an inclosed yard with several dangerous holes in it, and the owner allows the public to go through the yard, does that cast on him any obligation to fill up the holes? Under such circumstances caveat viator." And Parke, B., adds: "This is not the case of a new sewer, and therefore we may dispense with the consideration of what the Commissioners are bound to do when they make a sewer. This is an ancient sewer, which has existed with the highway time out of mind, and therefore the public have only a right to the highway subject to the sewer."

Cornwell v. Metropolitan Commissioners of Sewers.

This decision involved overruling the decision of Lord Ellenborough in *Coupland v. Hardingham*,³ which, "being only a holding at *Nisi Prius*, though by a very great judge," "must yield in point of authority to a judgment *in banc*."⁴ Martin, B., conjectured that, "in the case of *Coupland v. Hardingham*, in all probability the road had been used long before the house was built."⁵

Overruling *Coupland v. Hardingham.*

A case of *Jarvis v. Dean*,⁶ not cited in *Cornwell v. Metropolitan Commissioners of Sewers*, was distinguished on the ground that "the report leaves it uncertain whether the area in that case existed before the dedication of the way or not. As it is stated to have belonged to an unfinished house, it probably had not been long in existence, and, as Best, C.J., states in his judgment⁷ that the way had been a public thoroughfare for many years, it seems that the way must have been more ancient than the area, and that the present point could not therefore have been raised. It certainly does not appear to have been raised, and no opinion is given on it."⁸

Jarvis v. Dean.

The case of *Firth v. Bowling Iron Company*,⁹ so far as it is not determined on its own peculiar facts—the death of an animal caused by swallowing fragments of rusted iron dropping from a fence which the defendants were bound to maintain—seems to point to a principle that, where an obligation exists to fence for the benefit of a neighbour, the fencing must be so done as not to cause injury to the neighbour, not only while the fencing is efficient, but from the natural effects of decay. The principle is undoubtedly a sound one; it may be otherwise put: that there is a duty to prevent ill effects from decay.

Firth v. Bowling Iron Company.

A practice having grown up of fencing fields adjoining highways with barbed wire, the legality of the practice was questioned in several cases;¹⁰ and the Barbed Wire Act, 1893,¹¹ was passed, giving the local

The Barbed Wire Act, 1893.

¹ 2 B. & S. 770.

² 10 Ex. 771.

³ 3 Camp. 398.

⁴ 2 R. & S., per Blackburn, J., 782.

⁵ 10 Ex. 775.

⁶ 3 Bing 447.

⁷ L.c. 448.

⁸ 2 B. & S. 782. In *Morant v. Chamberlain*, 6 H. & N. 541, the point is touched on at 564, and the opinion of the Court there is that a highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of adjoining land for the purpose of depositing goods thereon.

⁹ 3 C. P. D. 254.

¹⁰ E.g., *Stewart v. Wright*, 9 Times L. R. 480; *Elgin County Roads Trustees v. Jones*, 14 Rettie 48.

¹¹ 56 & 57 Vict. c. 32.

authority power to serve notice in writing on the occupier of any land adjoining a highway within its district fenced with barbed wire, or in which barbed wire is placed, so as to be a nuisance to such highway, requiring him "to abate such nuisance" within a time to be stated in the notice; and on the expiration of the time stated (which is not to be less than one month and not more than six months), if the occupier has not done so, empowering the local authority to apply to a court of summary jurisdiction, which may direct the occupier to abate such nuisance; and on the occupier failing to comply with an order to do so, may themselves "do whatever may be necessary in execution of the order, and recover in a summary manner the expenses incurred in connection therewith."

Barbed wire adjoining a highway.

Apart altogether from legislation, if, by any act of an owner of property adjoining the highway, the user of the highway is made less commodious to the public, such owner is liable to indictment. If, too, any private person is injured by a barbed fence which lawfully using a highway, from "making a false step or being affected with sudden giddiness,"¹ or through the wind blowing his cloak against the barbed wire and tearing it, or through any accident of a similar sort causing him particular damage, he will have his action. No new right is given by the Barbed Wire Act, 1893, but merely a summary and efficient way of vindicating rights as old as the law. A barbed wire fence adjoining a highway is not made a nuisance by the Act. So soon as it becomes a nuisance to the highway it may be dealt with under the Act. But if, through the placing of barbed wire along or against the highway, the person or property of any one lawfully using the highway is injured in a way special to himself and not common to all using the highway, then, though no nuisance was before experienced, a right of action will arise for interfering with that full and absolute user of the highway that is the right of every one lawfully using the highway. A barbed wire fence adjoining a highway is in the same position legally as an excavation there. So soon as any one in the right user of the highway by false step, or swerving, or slipping, or fainting, or even by being run against or pushed, is injured by the barbed wire, a right of action arises against the person who is responsible for its being there. In all these cases the question for the jury will be whether the barbed wire was placed so close to the highway as to be dangerous to those rightly using the highway in the ordinary and accustomed manner.

Barbed wire fence, in what circumstances a nuisance.

In this connection may be noted the case of *Simkin v. L. & N. W. Ry. Co.*² The plaintiffs' horse, drawing a waggonette in which plaintiffs were seated, was frightened by seeing or hearing (which is not clear) an engine of the defendants' blowing off steam at a station, where the roadway leading to the station was not fenced or screened from

Simkin v. L. & N. W. Ry. Co.

¹ Per Pollock, C.B., *Hardcastle v. South Yorkshire Ry. Co.*, 4 H. & N. 74.
² 21 Q. B. D. 453. In *Manchester South Junction, &c. Ry. Co. v. Fullerton*, 14 C. B. N. S. 54, plaintiff's carriage, with others, was waiting at a crossing for a train to pass from the station. The engineer, at starting, quite unnecessarily blew off the mudcocks and frightened plaintiff's horse whereby injury was occasioned, for which plaintiff was held entitled to recover. In *Glaney v. Glasgow & S. W. Ry. Co.*, 25 Rottie 581, the cause of action alleged was that the defendant "culpably caused the engine to emit a prolonged and piercing whistle, which continued without intermission for about five minutes." This was held insufficient, for there is a duty to whistle and no standard to determine what is "prolonged." *Jones v. Grand Trunk Rd. Co.*, 16 Ont. App. 37. *Robinson v. Toronto Ry. Co.* (1901), 2 Ont. L. R. 18.

the station. The horse bolted, and the plaintiffs were thrown out of the waggonette and injured. The breach of duty alleged was, "the defendants' line of railway at the station was not properly and sufficiently screened from the roadway forming the approach to the railway." The case manifestly has nothing to do with such a case as *Indermaur v. Dames*,¹ as the condition of things was perfectly obvious, and has to be considered as the case of property abutting on the highway. If, then, a duty to screen existed, it was a common law duty; since no statutory provision imposing the duty on the defendants was even averred. That being so, the assertion of the existence of such a duty would have had very widespreading consequences. For example, practising military signalling would have to be carried on under rigidly restrictive conditions lest the waving of flags should startle horses on the highway. So, too, the working of windmills, and, except in extreme loneliness, games of football and cricket. The Court, however, held there was no such duty; the only duty was "to provide a reasonably safe mode of leaving their station having regard to the business they carried on at their station."

Fry, L.J.'s,
doubts.

Fry, L.J., in assenting reluctantly to the decision, states the question as being "whether this danger would have been lessened by placing a screen as suggested," and thus gives an apparent sanction to a mode of estimating liability greatly wider than has usually been accepted. The work of the railway being carried on under statutory authorisation, the company were entitled to carry on their business under conditions that would otherwise be a nuisance, if necessary to the adequate conduct of their enterprise.² Neither were they bound to adopt every possible means of obviating danger or inconvenience that ingenuity could suggest or boundless resources supply.³ There must be a proportion between means and ends. If that be so, the question is not as proposed by Fry, L.J., but rather, whether the placing of a screen could be regarded as a reasonable precaution for a railway company to take, having reference as well to the outlay necessary, the benefit likely to be derived, the means of the company, and the existing public sentiment on the matter.

Considered.

In the case before the Court there was some indistinctness in the evidence as to whether it was the sight or the sound that frightened the horse. In the latter event a duty to shut out the sounds of railway operations would impose such an excessively onerous, if not impossible, obligation on a railway company as to come within the principle—that, operations carried on in accordance with statutory authorisation are exonerated from liability for what would be otherwise actionable. It is doubtless possible, by a considerable outlay, to shut out the sight of railway engines from the highway. The question then becomes one of general law: Is there an obligation so to use premises that animals traversing the highway shall not be frightened or offended? Is a hosier to abstain from the display of vermilion-coloured hosiery, a cook-shop proprietor from the emission of steam, a hairdresser from the display of possibly disquieting figures, a lamp vendor from the show of brilliantly revolving lamps? These and other cases may be put which do not seem at all to differ in principle from what was sought to

¹ L. R. 2 C. P. 311.

² *L. & B. Ry. Co. v. Truman*, 11 App. Cas. 45.

³ *Hanson v. Lancs. & Y. Ry. Co.*, 20 W. R. 297; *Ford v. L. & S. W. Ry. Co.*, 2 F. & F. 730.

be established in this case. Fry, L.J., states the case as being that of an "engine which was blowing off steam, and which also presented a hideous and terrifying aspect." This appalling vision must be tempered by circumstances of time and place. An Indian in full war-paint, plumed, scalp-decked, and equipped with lethal weapons, would doubtless be a disquieting apparition in the streets of an English country town. Some years ago, at any rate, such a vision in a remote Western settlement would not necessarily have had much observation. So, too, with a steam-engine and its incidents. To the contemporaries of Oliver Cromwell it would have brought suggestions of the nether world. To the ordinary sane Englishman of to-day it is too familiar to excite more than the most cursory regard. With the change of habits and modes of life comes a change of legal liabilities—especially in such a branch of the law as negligence; what would have been appalling a hundred and fifty years ago, is to-day an ordinary incident of life.

If such is the operation of civilisation on the relations of human beings, is an exception to be made with regard to the susceptibilities of animals? Setting aside the uncertainty of their dispositions, a plain ground of policy forbids subordinating improvements in the mode of living to the wayward dispositions of animals, whose presence amongst us is regulated by their utility to us. To say that a human being could reasonably be expected to be terrified by the blowing off of steam from a railway engine is absurd; to require a railway company to encounter the large expense of averting the chance glance of a horse from their operations seems scarcely less so, when a comparison is made between the existing risk and the probable benefit resulting from a change. As property adjoining a spot on which the public have a right to carry on traffic is subject to the ordinary exigencies of that traffic,¹ so traffic carried along a spot where the rights of private property are exercised must accommodate itself to the exercise of those rights—where, that is, that exercise does not exceed what is ordinary and accustomed.

*Simkin v. L. & N. W. Ry. Co.*² was the case of people—a railway company—carrying on their business with reasonable care and caution. Moreover, the decision involved no more than the assertion of common law rights; for the business the defendants were carrying on, being authorised by the Legislature, could be treated as if in the same situation, and subject, therefore, to the same obligations as any business at common law; for example, that of a smith or a miller. The case of a railway company, however, may be put even higher than this. In *L. & B. Ry. Co. v. Truman*³ the Court of Appeal, on the authority of *Managers of the Metropolitan Asylums District v. Hill*,⁴ had, indeed, held that the Legislature cannot be taken to sanction that which is a nuisance at common law, except in the case where it has authorised a certain use of a specific something in a specified position, which cannot be so used without occasioning nuisance; or in the case where it has imperatively directed that something shall be done within a certain area, from the doing of which a nuisance must result. But this decision was reversed in the House of Lords;⁵ and Lord Blackburn stated the correct principle as follows: "I think the

Should an exception to the general rule be made in the case of animals?

Special rights of railway companies.

¹ *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, per Lord Blackburn, 767.

² 21 Q. B. D. 453.

³ 29 Ch. D. 89.

⁴ 11 App. Cas. 193.

⁵ 11 App. Cas. 60.

construction of ordinary Railway Acts is now fixed. And whether they should have originally been construed so or not, I agree with what is said by North, J. :¹ ' Now it is clearly settled that the power to take defined lands compulsorily, and to make a line of railway thereon, and to use locomotives upon that line, entitles a company to run locomotives thereon, notwithstanding that in so doing they cause what, in the absence of such power, would be an actionable nuisance, provided always that they are not guilty of negligence. See *Rez v. Pease*,² *Hammersmith Ry. Co. v. Brand*.'³ Thus a railway company can justify under statutory powers.

Locomotive engines on highways.

It has been sought to bring the class of cases, of which *Powell v. Fall*⁴ is a prominent example, within the same principle. But, apart from the very material consideration that the decided cases are decided on the Railway Acts and not on the Locomotive Acts, in the latter there is distinct legislative authority that the rule applied in railway cases shall not apply.⁵ An additional element of difference is that a railway engine is used on the company's own land, a locomotive engine on the highway. Admitting, then, that the same law as to nuisance should apply to both, the facts necessary to constitute a nuisance on a highway might be very much slighter than those required to point a nuisance in the user of a man's own property. The emission of steam, the shrieking of whistles, and the noise caused by the moving of trains may very probably appear by no means abnormal in a big manufacturing town when issuing from premises in private ownership, but would considerably alter their complexion if perpetrated on the public highway in a rural or residential district. That being so, the attention of the jury would have to be called to the distinction in obligation on the respective defendants, though the question of nuisance or not nuisance in both cases would be for them.

Erle, C.J.'s, summing up in *Watkins v. Reddin*.

The law as to locomotive engines on highways is most succinctly laid down by Erle, C.J.,⁶ as follows: "The plaintiff is entitled to your verdict, if the engine was calculated by its noise and appearance to frighten horses, so as to make the use of the highway dangerous to persons riding or driving horses. For the defendant has clearly no right to make a profit at the expense of the security of the public." In *Powell v. Fall*,⁷ where *Watkins v. Reddin* does not appear to have been cited, Bramwell, L.J., states the reason of the law in language very similar: "It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner ought to pay compensation for the damage." The inapplicability of reasoning from the railway cases to cases of this class is noted by Lindley, L.J., in *Galer v. Rawson*,⁸ where it was "clear to him that there was a great difference between locomotive engines on railways and traction engines on highways. The result of the sections was

Bramwell, L.J., in *Powell v. Fall*.

Lindley, L.J., in *Galer v. Rawson*.

¹ 25 Ch. D. 431.

² 4 B. & Ad. 30.

³ 1. R. 4 H. L. 171. Cp. per Kekewich, J., *Evans v. Manchester, Sheffield, and Lincolnshire Ry. Co.*, 36 Ch. D. 626, 634.

⁴ 5 Q. B. D. 597.

⁵ 24 & 25 Vict. c. 70, s. 13.

⁶ *Watkins v. Reddin*, 2 F. & F. 629, 634.

⁷ 5 Q. B. D. 601.

⁸ 6 Times L. R. 17 (C. A.). *Ballock v. Jopp*, 23 N. Z. L. R. 819.

that any traction engine which was a nuisance and caused damage would give rise to a cause of action even though all the statutory requirements were complied with."

This was said on the appeal of a case tried before Stephen, J., where the issue was whether the engine which caused the accident sued on was lawfully on the road and properly managed. The jury found this in the affirmative. It was then sought, in the Court of Appeal, to obtain a decision that an engine was in itself a dangerous thing, and any one using it did so at his own risk. The Court refused to rule this as matter of law; and since the point had not been taken at the trial, but the parties had been content to fight on the issue of negligence, they refused to disturb the verdict. The decision comes to no more than the affirmance of the proposition that, where an engine on a road has fulfilled all the statutory requirements, the *onus* is on the persons damaged by injuries caused by it to show it is a nuisance, and not on the owners of it to prove it is not; or, to state the point somewhat differently, unless evidence is given to show such an engine is a nuisance, the presumption, in an action against the owner, is that it is not. Apart from cases altogether, the statute seems clear beyond dispute on the point.¹

Engine on a highway not intrinsically a nuisance.

On whom the *onus* lies of proving nuisance.

The recent impulse given to electric power as applied to motion and the repeal of s. 29 of the Highways and Locomotives (Amendment) Act, 1878² (which itself had modified s. 3 of the Locomotive Act, 1865³) requiring a man with a red flag to precede any locomotive propelled by steam or by other than animal power has produced a revolution in the kind of vehicles used on highways and necessitates a consequent modification in the law. By the Locomotives on Highways Act, 1896,⁴ light locomotives, that is any vehicles propelled by mechanical power under three tons in weight unladen, not used to draw more than one vehicle, and so constructed that no smoke or visible vapour is emitted except from a temporary or accidental cause, are exempted from the earlier legislation restricting the use of locomotives on highways.⁵ The council of any borough may, by bylaws, prevent or restrict their use on bridges in their area.⁶ A light locomotive must, between one hour after sunset and an hour before sunrise, carry a lamp,⁷ and a warning bell or other instrument,⁸ and at no time go at a greater pace than fourteen miles an hour.⁹ The Local Government Board may make bylaws for the construction, conditions of user and use of light locomotives on highways¹⁰ and otherwise have very extensive powers, which are further extended by ss. 7 & 8 of the Act we are now to consider.

Motor vehicles.

The Locomotives on Highways Act, 1896, was amended by the Motor-Car Act, 1903.¹¹ The expression "motor-car" is to have the same meaning as "light locomotive" in the earlier Act.¹² Any person who recklessly or negligently drives a motor-car on a public highway (and this expression includes any roadway to which the public are granted access¹³) commits an offence under the Act¹⁴ punishable by a fine not exceeding £20, and on a second conviction by a fine not exceeding £50 or by imprisonment for not more than three months.¹⁵ To drive

Motor-Car Act, 1903.

¹ See 24 & 25 Vict. c. 70, s. 13; and 26 & 27 Vict. c. 83, s. 12.

² 41 & 42 Vict. c. 77, by sec. 18 of 61 & 62 Vict. c. 29. ³ 28 & 29 Vict. c. 83.

⁴ 59 & 60 Vict. c. 36. ⁵ S. 1 (1). ⁶ S. 1 (1) a. ⁷ S. 2.

⁸ S. 3. ⁹ S. 4. ¹⁰ S. 6.

¹¹ 3 Edw. VII. c. 36. ¹² S. 20 (1). ¹³ S. 20 (1).

¹⁴ S. 1 (1). *Elwes v. Hopkins* (1906), 2 K. B. 1; *Todrick v. Denndar*, 7 Fraser (Court of Justiciary) 8. ¹⁵ S. 11 (1). *Ex parte Novis* (1905), 2 K. B. 466.

"at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway, and to the amount of traffic which actually is at the time, or which may reasonably be expected to be, on the highway," is also an offence.¹ Motor-cars are to be registered² and drivers licensed.³ A duty to stop in case of accident is also imposed and sanctioned by a penalty. The rate of speed in the earlier Act mentioned is increased, but is not to exceed twenty miles per hour; while within limits, that may be prescribed in the Local Government Board's regulations, it is not to exceed ten miles per hour. This, too, is sanctioned by a penalty.⁴

Purview of the Acts. Common law rights and liabilities unaffected.

These alterations in the law, while they permit the use of motor-cars and regulate their user, are directed to the public and police aspects of the case, and do not affect individual rights or remedies. The statutes referred to come within Willes, J.,⁵ first-class; they leave the common law remedy, but they give other remedies directed to other ends. The statutes, except in imposing a penalty for failure to stop in case of accidents, bring nothing under the purview of the law that was not so before. Reckless or negligent driving or to the common danger, is not permitted, and when injury results to a passenger on the highway was and is actionable, whether the offending vehicle is motor-car or the meanest form of conveyance. The duty on the driver of a motor-car is greater the more powerful and complicated the engine he drives is; for the duty to use care increases in proportion to the danger involved in dealing with the instruments which for a man's own purposes he brings into relations of proximity to his neighbours.⁶ On the other hand, the change in ways and customs of using the highway must act on the standard of care of passengers. A person crossing the road in front of an oncoming motor with a clear course, must take that into account and not leave a margin that would only be sufficient to admit of crossing in front of a lame donkey drawing a costermonger's harrow.

Duty of driver of motor-car.

Skidding.

An error has become prevalent, through the ill-considered decisions of certain County Court judges, that where an accident happens through the skidding of a motor vehicle, the fact of the accident fixes liability on the owner, on a principle that in one of the cases was, with some infelicity, referred to as the principle in *Fletcher v. Rylands*. The law is plain that there is no liability in the case of traffic on a highway unless negligence is affirmatively shown, or the user of the machine, the motor, is dangerous. *Powell v. Fall*⁷ has been cited as in point. The locomotive in that case had been constructed in conformity with the Locomotive Acts, but had a habit of emitting sparks. The protection of the statutes did not protect from the consequences of sparks causing fire on a highway or elsewhere; and to emit sparks which cause fire is a wrong at common law. The skidding of a motor is averred to be due to a concurrence of causes; the efficient one—the condition of a road lacking grip—is outside the motor altogether. Again, the skidding should not be a merely abnormal occurrence; if it is, as is pointed out

¹ S. 1 (1). *Troughton v. Manning*, 21 Times L. R. 408; *Hartreaves v. Baldwin*, 21 Times L. R. 715; *The King v. Hankey* (1905), 2 K. B. 687.

² S. 2.

³ S. 3.

⁴ S. 9.

⁵ *Wolverhampton New Waterworks Co. v. Hawkesford* (1859), 6 C. B. N. S. 356.

⁶ Cf. *Le Lievre v. Gould* (1893), 1 Q. B. 491.

⁷ 5 Q. B. D. 597.

in *Hautayne v. Bourne*,¹ there is no liability. The same rule must be applicable to bicycles. Where liability is held to attach to a motor for skidding, proof of the impact and damage is not sufficient. The motor is a licensed vehicle, the skidding carries no presumption of negligence or nuisance. There should also be evidence that in normal circumstances there exists a reasonable probability of skidding or other abnormality; the *res ipsa loquitur* doctrine is not applicable. The ground that a motor that skids is a nuisance² has also been taken. But this is a mere *petitio principii*. If the skidding itself does not make the nuisance, it still leaves the tendency in normal circumstances to be proved before it can be treated as one. If the thing itself is shown to have this tendency, well and good. If it is only shown to have it in abnormal conditions, or where there is default outside itself, if legal analogies hold good, there is no liability. Supposing the proof to be that on ordinary macadamised roads skidding did not ordinarily occur, the fact of an unprecedented skidding does not affect with liability. Suppose, again, a stretch of road prepared in some special way by which "skidding" is rendered likely, but the fact of this special dealing with the road is unknown to the motorist he is not liable for what is a pure accident. If he has knowledge of the danger, he must use greater precautions. If the roadway is asphalted but there is a rule of the road authorities to sprinkle sand or gravel so that the exceptional danger from the slipperiness of the road is obviated, the motorist is entitled to rely on this being done. It is plainly incompetent for any judge without evidence to rule that a motor is either dangerous or a nuisance.³

Bicycles.

Assumption of nuisance not allowable.

Lord Blackburn has on several occasions summed up the law relating to this subject,⁴ and on the rights of persons using the highway, and nowhere more clearly than in *River Wear Commissioners v. Adamson*,⁵ thus: "The common law is, I think, as follows: Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault and liable to make it good. And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner." The reason of this, the same learned judge had previously explained, in *Fletcher v. Rylands*,⁶ to be because traffic on a highway—whether by land or sea—"cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident."

Lord Blackburn in *River Wear Commissioners v. Adamson*.

Reason of this rule.

¹ 7 M. & W. 598.

² *Bamford v. Turnley*, 3 B. & S., per Pollock, C.R., 79.

³ The principles enunciated by the C. of A. in *The Merchant Prince* (1892), P. 179, are applicable. *Galer v. Dawson*, 6 Times L. R. 17 (C. A.).

⁴ E.g., in *Fletcher v. Rylands*, L. R. 1 Ex. 286; *The Khedive*, 5 App. Cas. 890; *Cyzer v. Carron Co.*, 9 App. Cas. 882.

⁵ 2 App. Cas. 767.

⁶ L. R. 1 Ex. 286.

Duty to meet
licensees.

Corby v. Hill.

II. We are now to ascertain what is the duty of an occupier of property to persons using his property as bare licensees or volunteers.

The first case under this head is *Corby v Hill*,¹ where slates were stacked on a private road, without notice, against which the plaintiff's horse was driven and injured. The defendant pleaded licence by the owners of the soil. The Court² was of opinion that, "having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they had held it out as a way along which they might safely go." Neither could a third person "acquire the right to do so under their licence or permission."

Bolch v.
Smith.
Statement of
the law by
Wilde, B.

In the succeeding case of *Bolch v. Smith*,³ Wilde, B., thus expressed his view of the law; "If A gives B permission to cross his yard, in which there are several ways, and there is a pit in the yard which is usually covered, but on a particular night, it being uncovered, B falls into it, I can understand that A would be liable.⁴ But if the hole has always been uncovered, and B in broad day walks into it, would A be liable?" The facts proved, showed that men were employed under condition that they were not to leave their work for the day, and water-closets were built for their use, to reach which they had permission to use certain paths which crossed the dockyard. The defendant had been permitted to build a mortar-mill on the side of one of the paths. The plaintiff had gone along this path to one of the water-closets, and on returning had stumbled, and, in endeavouring to save himself, his left arm had been caught by the shaft, and so injured as to require amputation. There were two other paths to the water-closet, the one the plaintiff used being the most convenient. The Court held that he could not recover; and distinguished *Corby v. Hill* on the ground that there the injured man had a right to use the road, while in the present case plaintiff had only permission, which, said Martin, B., "involves leave and licence, but it gives no right." "I will add," says Wilde, B.,⁵ "that I do not mean to say that if the defendant had made a hole in the yard and had covered it in a way that was insufficient, but which appeared to be sufficient, he would not have been liable.

Corby v. Hill
distinguished.

¹ 4 C. B. N. S. 556.

² *L.c.* per Cockburn, C.J., 563.

³ 7 H. & N. 712. In *Griffiths v. L. & N. W. Ry. Co.*, 14 L. T. (N.S.) 797, where a "mere licensee" got under a crane from which a package fell and injured him, it was said that a railway company must be allowed to carry on their business on their own premises in such a way as they think fit. "When the company used this crane it was never thought that any one would go under it; it was merely used in carrying out their own mode of doing their own business; how can it be said that there was any negligence?" "The defendants had a right to use the most defective slings they liked as far as the conduct of their own business was concerned, merely compensating the owners of goods for any injury done thereby to such goods." *Harrison v. N. E. Ry. Co.*, 20 L. T. (N.S.) 844, holds that there is no duty on a railway company which allows people to cross their line, but in no definite track, to use care to protect them. In *Cawte v. Olyett*, 5 Times L. R. 56 (C. A.), where the hatch of a disused barge was open and plaintiff fell down while crossing the barge to moor his own barge to the same buoy, yet, as the evidence showed, that the hatch had been properly fastened, and that the bar had been removed without defendant's knowledge, it was held there was no duty on the defendant to afford further protection. *Moore v. City of Toronto*, 26 Ont. R. 59 n., the case of a park lake having been deepened into which a child fell is obviously not to be decided on the principle of *Bolch v. Smith*.

⁴ *Cp. Harin v. Arrol*, 16 Rettie 509; *Pritchard v. Long*, 5 Times L. R. 630.

⁵ 7 H. & N. 746.

But here there was nothing of the character. The danger was open and visible; there was nothing which could be called a trap."

It is questionable whether the distinction drawn between a *right* and a *permission* explains the cases. In *Corby v. Hill* the slates were on the road unknown to the licensee, while in *Bolch v. Smith*, the engine was there before the licence to use the path had been granted. In the one case, the plaintiff took subject to the right to have the engine there; in the other, the obstruction was an infringement on his right, or at least the placing of a dangerous substance in a place that he was allowed to use without giving him warning of the alteration in the state of things, whereby he might be injuriously affected. In both cases, as long as the tacit permission existed, there was, as against any one except the owner, a *right* to use the paths. In neither case, had the owner taken proper steps to forbid or to limit the user, was there any right as against him. It seems, then, that the ground of the decision in the two cases is that in one a danger had been added without means being taken to communicate the alteration to the plaintiff; in the other, the condition of the way was, or might have been, well known to the plaintiff, and no alteration had been made in it.¹

Cockburn, C.J., points out the distinction between these cases in *Gallagher v. Humphrey*,² where a passage over defendant's premises was used to the knowledge of the defendant by numbers of people, and, amongst them, by the plaintiff. The accident from which the action originated was caused by negligently lowering goods from the warehouse abutting on the way. Cockburn, C.J., says: "A person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger; but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger."

There is a *nisi prius* ruling of Watson, B., in *Barrett v. Midland Ry. Co.*,³ that appears to go beyond this. The plaintiff lived in one of a row of cottages facing the defendants' railway lines, and the occupants of the cottages were in the habit of using a defined way across the line

¹ The judgment of Bigelow, C.J., in *Sweeney v. Old Colony and Newport Rd. Co.*, 22 Mass. 368, well deserves study as a comprehensive statement of the principle of the law on this subject. "The true distinction," the Chief Justice says, 374, "is this: a mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." This distinction, the Chief Justice adds, is the "pivot" on which the cases turn. *Castle v. Parker*, 15 L. T. (N. S.) 367, compared with *Watkins v. G. F. Ry. Co.*, 40 L. J. C. P. 817.

² 6 L. T. (N. S.) 684. *Malone v. Laskey*, 23 Times L. R. 399.

³ (1858) 1 F. & F. 361.

Distinction considered.

Cockburn, C.J.'s judgment in *Gallagher v. Humphrey*.

Watson, B., in *Barrett v. Midland Ry. Co.*

with the knowledge of the defendants, but not as a right. Plaintiff sued in respect of injuries received while crossing. Watson, B., directed the jury that "though there was no right of way, still the circumstance of people being in the habit of passing threw upon the company the responsibility of using reasonable care before moving over that portion of their line. If you think there was negligence in the person having the conduct of the engine, or that warning in some way should be given to those crossing the line under circumstances of danger, of which they may not be in a condition to be fully conscious, the defendants will be liable." It is doubtful if this amounts to more than a direction that the defendants are not allowed to increase the risks of crossing. Because the crossers are here licensees, the defendants are not entitled to conduct themselves negligently with regard to them. The question of how this "responsibility of using reasonable care" is to be measured, is untouched by the direction. The answer to it is given by Willes, J., in *Gautret v. Egerton*.¹

*Gautret v.
Egerton.*

Judgment of
Willes, J.

In *Gautret v. Egerton* the declaration alleged a general duty of the defendants to keep their land in safe condition for the benefit of any persons that might go on it, without alleging any benefits that might accrue to the defendants, or that they had been guilty of any wrongful act of commission, or anything that amounted to the laying a trap. Willes, J., in giving judgment, having examined the declaration and shown that it only alleged a permission to use a way, thus dealt with the alleged legal duty: "A permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declaration in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shown. No action will lie against a spiteful man, who, seeing another man running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence. Every man is bound not wilfully to deceive others, or to do any act which may place them in danger."

Summary of
the law by
Pigot, C.B.,
in *Sullivan v.
Waters*.

The law is succinctly summed up by Pigot, C.B., in *Sullivan v. Waters*: "A mere licence given by the owner to enter and use premises, which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, creates no obligation" in the owner to guard the licensee against danger.

¹ (1866) L. R. 2 C. P. 371; *Keeble v. East and West India Docks*, 5 Times L. R. 312 (C. A.).

² L. R. 2 C. P. 375.

³ 14 Ir. C. L. R. 475. It had previously been laid down in *Metcalf v. Hetherington*, 11 Ex. 257, that the words "negligently and improperly" and "contrary to their duty" will not dispense with the necessity of setting forth facts that show the duty. See, too, *General Steam Navigation Co. v. Morrison*, 13 C. B. 581; *Dutton v. Pooley*, 2 B. & S. 191; *Seymour v. Maddox*, 10 Q. B. 326; *Robertson v. Adamson*, 24 Dunlop, 1231.

*Burchell v. Hickisson*¹ is very like *Gallagher v. Humphrey*. A boy of four years accompanied his sister, who was going on business to the defendant's house. A flight of steps, with railings, led up to the front door. A broken rail left a gap, across which a rope had been placed, but which had worn out. The sister went up the steps, telling the child to remain below. He disobeyed, fell through the gap and was injured. Lindley, J., rested the judgment of the Court on the alternative—"The defendant never invited such a person as the plaintiff to come unless he was taken care of by being placed in charge of others, and if he was in charge of others, there was no concealed danger."² Had there been an invitation on business—had, for example the sister fallen through the hole—the obligation on the defendant would have been different, to maintain the steps in the ordinary condition in which steps for the purpose of approaching a house are ordinarily kept.³ In that case, in the words of Byles, J. :⁴ "The knocker says 'Come and knock me,' the bell says 'Come and ring me,' and he who on proper occasion responds to this invitation, does so with a right to protection."

Burchell v. Hickisson.

No invitation no liability.

The distinction between the two classes of cases is further illustrated in *Ivay v. Hedges*.⁵ Defendant, the landlord of a tenement house, allowed each tenant the privilege of using the roof to dry linen on. The roof was flat, with an iron rail round the edge. This rail was, to the knowledge of the landlord, out of repair. The plaintiff, when going to the roof for the purpose of removing linen, slipped and caught at the rail, which gave way, so that the plaintiff fell into the courtyard below. The county court judge gave judgment for the defendant, holding that those using the roof used it as licensees and not under their contract. In the Divisional Court it was sought unsuccessfully to obtain a new trial on the authority of a Scotch case, *M'Martin v. Hannay*,⁶ where a child was killed by falling through the railing of a common stair, where one of the banisters was wanting. The Scotch case was distinguishable in that there the staircase, through defect in which the accident happened, was a necessary part of the holding, which all the tenants were entitled to the use of, and which had to be kept in repair; while in the present case, the roof was not a part of the holding, and the tenants were merely at liberty to use it as it was, and without obligation on the landlord. The plaintiff in this case and the child in *Burchell v. Hickisson* had precisely similar rights; while the legal rights of the child in *M'Martin v. Hannay* were similar to those of the sister in *Burchell v. Hickisson* had the accident happened to her.

Ivay v. Hedges.
Difference between letting and license.

Falling through railing of a common stair.

The same absence of a legal duty to take care is the ground of the decision in *Batchelor v. Fortescue*.⁷ The defendant, a contractor, was carrying on his business on his own ground when the deceased husband

Batchelor v. Fortescue.

¹ (1880) 50 L. J. Q. B. 101. In *Murley v. Grove*, 46 J. P. 380, Cave, J., says as to the dictum in *Gallagher v. Humphrey*: "I think, too, that it is doubtful whether even the fact that the injured person was present unlawfully would excuse negligence." "I cannot think that Compton, J., can have been correctly reported." Cp. *Bedman v. Tottenham Local Board of Health*, 4 Times L. R. 22. Very like *Burchell v. Hickisson* is *Cusick v. Adams*, 115 N. Y. 55, 12 Am. St. R. 772. As to allurements to children and the special degree of responsibility attaching, see ante, 165.

² Cp. *Waite v. N. E. Ry. Co.*, El. B. & E. 719.
³ *Holmes v. N. E. Ry. Co.*, L. R. 4 Ex. 254, affirmed, "for the reasons given by the Court of Exchequer," L. R. 6 Ex. 123.
⁴ *Smith v. London and St. Katharine Docks Co.*, L. R. 3 C. P. 331.
⁵ 9 Q. B. D. 80. Cp. *Willoughby v. Horridge*, 12 C. B. 742.
⁶ 10 Maoph. 411; cp. *Webster v. Brown*, 19 Rettie 765.
⁷ 11 Q. B. D. 474. *Smith v. Highland Ry. Co.*, 16 Rettie 57, where a child was

Wide expressions used in the judgments.

Commented on.

Lord Esher, M.R., in *Le Lievre v. Gould*.

Tolhausen v. Davis.

of the plaintiff (the action was brought under Lord Campbell's Act), who was the watchman of neighbouring property to that where defendant's men were working, came to look on at the progress of the work, and, an accident happening, was killed while there. Doubts were expressed whether the case of the deceased could be put as high even as that of a licensee; even if they could, the deceased must still be taken to have stood where he did, subject to all the risks of his being there. Some of the expressions used in *Batchelor v. Fortescue*, if taken literally, seem to go a very great way—further perhaps than in any other case of the kind; for example, Smith, J., is reported¹ as saying: "There was no duty cast upon the defendant to take due and reasonable care of him"—the deceased; and Brett, M.R.,² says: "There was no contract between the defendant and the deceased; the defendant did not undertake with the deceased that his servants should not be guilty of negligence; no duty was cast upon the defendant to take care that the deceased should not go to a dangerous place." These expressions might suggest that towards a trespasser there is no duty; but this is not so either in law or in reason.³ Where the safety of life or limb is involved, more serious responsibility intervenes than in other cases.⁴ The existence or non-existence of a contract cannot be an wholly adequate measure of the responsibility of one man with reference to the safety of another;⁵ and though "no duty was cast upon the defendants to take care that the deceased should not go to a dangerous place," yet if, in full sight of defendants' servants, he were there, they were in a different position with regard to the continuance of operations known to them to be dangerous than if he were not. As Lord Esher, M.R., says in *Le Lievre v. Gould*:⁶ "If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage." The same is true if a man is driving in his own park and he sees a trespasser in front of him. He may not in law, any more than in morals, drive over him. An inquiry of Bowen, L.J.'s, in the course of the argument—"what evidence is there that the defendant had reason to suppose that the deceased would be at the spot where he met his death"—very probably affords the key to the decision. Not only, as stated by Brett, M.R., in the judgment, was there no "reason to expect the deceased to be at the spot where he met with his death;" but there was no evidence to show he was there such a time as to enable the defendant's servants to warn him of his danger, or to cause the duty to do so to arise.

*Tolhausen v. Davis*⁷ illustrates the same principle as *Batchelor v.*

killed on a private line of railway leading to a harbour, illustrates the same principles. *Castle v. Parker*, 18 L. T. (N. S.) 367; cp. *Thatcher v. The G. W. Ry. Co.*, 10 Times L. R. 13 (C. A.).

¹ 11 Q. B. D. 477.

² 11 Q. B. D. 479.

³ *Bird v. Holbrook*, 4 Bing. 628. *Petrie v. Owners of SS. Rostrevor*, (1898) 2 I. R. 556. *Ante*, 428, n. v.

⁴ *Ante*, 159. *Collett v. L. & N. W. Ry. Co.*, 16 Q. B. 984; *Indianapolis, & Rd. Co. v. Horst*, U.S. 93 (3 Otto) 291.

⁵ *Foulkes v. Metropolitan District Ry. Co.*, 5 C. P. D. 157.

⁶ (1893) 1 Q. B. 497.

⁷ 58 L. J. Q. R. 98; *Crawford v. Upper*, 16 Ont. App. 440. The American cases are collected in a note to *Donaldson v. Wilson*, 1 Am. St. R. 489. *Walker v. Midland Ry. Co.*, 2 Times L. R. 450 (H. L.), was a case where a man mistook the door of a

Fortescue—that, because the defendant was not shown to have had any reason to suppose the injured person would be where she was when injured, there was no duty to take precautions against her being injured.

The doctrine prevalent in the United States, and at any rate favourably looked on in Canada,¹ that discriminates between "public duties" and "private or corporate powers," is not of validity in England to exonerate corporations in respect of their ownership of parks and buildings from liability for injuries sustained by people using them from their want of repair. In England, a person using a park for recreation, or a building provided for shelter, would not be held a "mere licensee," but an "invitee" at least. The purpose for which municipal corporations hold parks is for the recreation of the townsmen, whose rights cannot be thus whittled down. The case of a royal park may be different. As appeared in the discussion on the case of Hyde Park railings in 1867, an opinion was given by Sir R. Bethell, Sir A. Cockburn, and Mr. Willes in 1855 on the *Sunday Riots case*, that the Crown has a right to shut the gates of a royal park and to exclude the people. But many eminent lawyers were then of a different opinion, based probably on the consideration that the park was maintained by public funds and for the public benefit; certainly now no such claim of exclusion would be advanced. In a park like Windsor Great Park, or the private park of a nobleman, the view taken of popular rights by the Canadian case is probably a just one.

Rights of the people in public parks and buildings.

A royal park possibly differs.

In two United States cases² the duty to use ordinary care to a trespasser is asserted; and this duty is described by the Supreme Court of the United States as one that "cannot be doubted."³

United States cases.

Travellers on a street have not only the right to pass, but to stop and rest on necessary and reasonable occasions, that is, provided they do not obstruct the street or doorways, or wantonly injure them. In

Rights of travellers.

service-room for that of a water-closet, and, entering, fell down the well of a lift and was killed. It was held in the House of Lords that there was no duty on the defendants, "for the service-room was a place in which no guest of the hotel had any right or legitimate occasion to be, and into which no guest was expressly or impliedly invited to go." Lord Selborne thought it "impossible to hold that the general duty of an innkeeper to take proper care for the safety of his guests extends to every room in his house, at all hours of night or day, irrespective of the question whether any such guests may have a right or some reasonable cause to be there. The duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go in the belief, reasonably entertained, that they are entitled or invited to do so." *Headford v. McClary Manufacturing Co.*, 24 Can. S. C. R. 291, is the case of falling into the well of a lift. *Howley v. Wright*, 32 Can. S. C. R. 40, is a lift accident case where the victim was entirely in fault, endeavouring to get out of the lift. In *Mountney v. Smith*, 3 S. R. (N.S.W.) 608, plaintiff asked the barmaid of a public-house the way to "the lavatory," was misdirected and was injured. The New South Wales Court held that it was outside the scope of a barmaid's authority to direct men to the "places of convenience." They were over-ruled by the High Court of Australia, 1 C. L. R. (Australia) 146, which held that the barmaid had this authority. See *The Apollo* (1891), A. C. 409; *Maekie v. Macmillan*, 36 Sc. L. R. 137; *Fleming v. Eadie*, 25 Rettie 500. As to "due diligence," see per North, J., *Colley v. Hart*, 44 Ch. D. 184. In *The Queen v. Commissioners for Special Purposes of the Income Tax*, 20 Q. B. D. 549, 21 Q. B. D. 313, it is held that under 5 & 6 Vict. c. 35, s. 133, over-assessment of income-tax must be found and proved as soon after the end of the year for which it is assessed as the applicant can ascertain it, "by using all reasonable and proper exertions." This may serve as a species of translation of "due diligence."

¹ *Schmidt v. Town of Berlin*, 26 Ont. R. 54.

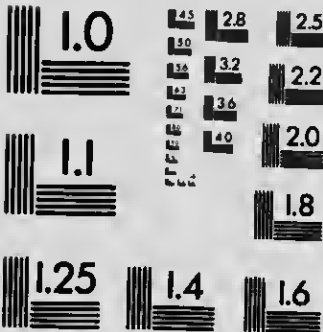
² *Bain v. Rd. Co.*, 42 Vt. 380; *Rounds v. Delaware, &c. Co.*, 64 N. Y. 129.

³ *Grand Trunk Rd. Co. v. Richardson*, 91 U. S. (1 Otto), .71. *Sievert v. Brookfield*, 35 Can. S. C. R. 404.



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a Maryland case¹ a foot passenger on a city street, sat for a moment on the door sill of a house fronting on the street to tie his shoe, and while there was injured by a brick falling from the dilapidated wall of the house upon his head, which was within the street line. The Court held the owner of the house liable, adding: "A ruined and dilapidated wall is as much a nuisance if it imperils the safety of passengers or travellers on a public highway as a ditch or pitfall does by its side."

Distinction between permitting a licensee the use, and affording him facilities to use.

In *Harris v. Perry*,² an invitee was injured while being taken a gratuitous ride on the defendant's premises, where the dangers to which he was exposed (known to the defendant's servants) were greater than they appeared to the invitee, who was injured and brought an action. The distinction was taken³ between the measure of duty towards a bare licensee "where the licensor accepts the duty of carrying him, from what it is where he merely permits him to pass through his premises." This appears well founded. There is the difference between permitting to use or not troubling to forbid the use, and suggesting or inviting the use. This latter carries with it the implication that nothing is known of particular perils.⁴

Special features of tenement houses.

The circumstances of tenement houses suggest the consideration of the duty to maintain the common staircases and passages. The ordinary relation between landlord and tenant does not satisfy the requirements of this case; for there the tenant has full control, here only user with others. The possession and control is in the landlord, who prefers "to make one passage way for all rather than one for each." He holds out an inducement to all who need such accommodation to come and pass over this passage, which is a way provided in the same sense as a man provides a way for his customers to his place of business. This being so, "the same implied covenant to keep in safe and convenient repair must exist as much in one case as in the other," and the use of the hall and staircase, for the purpose of enjoying visits, is by necessary implication within the reasonable intent of the demise of the rooms.⁵

Miller v. Hancock.

This was held good law in England by the Court of Appeal in *Miller v. Hancock*,⁶ where the landlord's liability to repair was denied on the ground that the owner of the dominant tenement (so the tenant was called) must do such repairs as may be necessary for the enjoyment of his easement.⁷ Bowen, L.J., met this by citing Lord Mansfield's dictum in *Taylor v. Whitehead*,⁸ that "by the common law he who has the use of a thing, ought to repair it. The grantor may bind

¹ *Murray v. M'Shane*, 52 Md. 217, 36 Am. R. 367.

² (1903) 2 K. R. 219; *Powell v. M'Glynn* (1902), 2 I. R. 154.

³ *L.c.* 225.

⁴ Cp. *Thatcher v. G. W. Ry. Co.*, 10 Times L. R. 13, per Lord Esher, M.R.; *Laz v. Corporation of Darlington*, 5 Ex. D. 28, 32; and a New South Wales case where a man was crushed on the top of a lift, *McFerran v. Randle*, 3 S. R. (N.S.W.) 445, where the decision might very well have been otherwise. *Mountney v. Smith*, 1 C. L. R. (Australia) 146, reversing 3 S. R. (N.S.W.) 668. *Harris v. Perry* is distinguished *Nightingale v. Union Colliery Co.*, 35 Can. S. C. R. 65.

⁵ *Sawyer v. McGillicuddy*, 10 Am. St. R. 260. In *Martin v. Hannay*, 10 Macph. 411, where a child was killed by falling through the railing of a common stair where one of the banisters was wanting, the proprietor was held liable on the ground that notice of the defect was brought home to his factor. *Driscoll v. Partick Burgh Commissioners*, 37 Sc. L. R. 274.

⁶ (1893) 2 Q. R. 177. *Marshall v. Industrial Exhibition, &c. of Toronto*, (1901) 1 Ont. L. R. 319, where the plaintiff was licensee of premises under an agreement.

⁷ *Pomfret v. Riecroft*, 1 Wms. Ssund. 321. *R. N. Buckley & Sons v. N. Buckley & Sons* (1898), 2 Q. B. 608.

⁸ 2 Doug. 745, 749.

himself." The Court were of opinion that in the case of tenement houses, there is by necessary implication an agreement by the landlord with his tenants binding him to keep the staircase in repair, since he knows that persons who have business with the tenement will be coming up and down the stairs in ordinary course; and that on the analogy of *Smith v. London and St. Katharine Docks Co.*¹ a duty arises on the landlord's part towards persons using the staircase on business with the tenants. Kay, L.J., adds: "It may be that in order to preserve such an easement (*i.e.*, the right to use the staircase), as between himself and the landlord, the tenant might have a right to repair the staircase;" but this has since been decided adversely to the Lord Justice's view.² In *Hargroves, Aronson & Co. v. Hartopp*,³ the landlord was held liable after notice of disrepair and default not only to the tenant's visitors, but to the tenant himself.

Common staircases in Scotland have been for long time past an usual means of construction. So far back as 1814 in a Scotch case in the House of Lords,⁴ Lord Eldon "thought a common staircase might be considered as a highway to the effect of supporting an action" of negligence for injuries caused by its bad condition.

III. As to the use of premises by those resorting to them upon business which concerns the occupier, and upon his invitation, express or implied.

III. Persons going upon premises by invitation express or implied.

In *Southcote v. Stanley*⁵ the position of a visitor to premises was considered. Defendant was an hotel-keeper, and was visited by the plaintiff, who, in leaving, opened a glass door, from which a piece of glass fell and cut him; in respect of which injury he brought his action. Defendant demurred; and following *Priestley v. Fowler*,⁶ his demurrer was allowed; for not only do the servants in a domestic establishment undertake to run all the ordinary risks of the service, but all the members of the establishment, and a visitor is in this category, are included.

Southcote v. Stanley.

Had the declaration stated that the plaintiff was a guest and not a mere visitor, there would have been a difference, as is pointed out by Erle, J., in *Chapman v. Rothwell*:⁷ "The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purpose of business carried on by the defendant." Had the plaintiff been a guest using the hotel, the defendant's obligation would have been greater. He would have been bound to know that things like the window will ultimately get out of order, and that there is a duty from time to time cast upon him to turn his attention to them. If he could show that he did investigate, and there was some latent defect which he could not discover, he would discharge the duty on him; if he did not discover what he ought on investigation to have discovered, then he would be liable for the consequences.⁸

Erle, J.'s comment in *Chapman v. Rothwell.*

¹ L. R. 3 C. P. 326.

² *Campbell Davys v. Lloyd* (1901), 2 Ch. 518, 527.

³ (1905) 1 K. B. 472.

⁴ *Milne v. Smith*, 2 Dow 390, 396.

⁵ (1856) 1 H. & N. 247.

In *Collis v. Selden*, L. R. 3 C. P. 495, the declaration stated that the defendant negligently hung a chandelier in a public-house, which fell on the plaintiff. This was held not to disclose a duty, "for it is not shown in what capacity the plaintiff was there; it is merely alleged he was lawfully there." *Converse v. Walker*, 30 Hun (N.Y.) 596, is said in the judgment, at 602, where the law is carefully considered, to be "not unlike *Southcote v. Stanley*"—people during a storm crowded in such numbers upon the piazza of an hotel, strong enough for ordinary purposes, that it broke down. Cp. *King v. G. W. Ry. Co.*, 24 L. T. (N.S.) 583. ⁶ 3 M. & W. 1. ⁷ El. B. & E. 168, 170. ⁸ *Tarry v. Ashton*, 1 Q. B. D. 314.

Azford v. Prior: the case of "a guest" and not of "a visitor."

There is at first sight some difficulty in reconciling *Azford v. Prior*¹ with *Southcote v. Stanley*² and *Collis v. Selden*.³ Plaintiff entered defendant's inn without speaking to any one, and not for the purpose of ordering refreshments, but to wait for a friend who had not arrived. Part of the floor of the parlour of the house had been taken up, leaving a hole about four feet square, and the carpenter was still at work upon it. The plaintiff walked into the parlour, and fell into the hole, which he swore he did not see. At the trial, the plaintiff got a verdict, with £30 damages. The Court refused a rule, saying there was no ground for a non-suit, and that, as the judge, who tried the case, was not dissatisfied with the verdict, they would not be justified in interfering with it. The declaration, however, averred that the plaintiff was "lawfully in the said inn as a guest," and the decision of the Court was probably no more than that it was matter for the jury to say in what capacity the plaintiff was on the defendant's premises, and that they could not disturb the verdict of the jury when the declaration alleged a cause of action, and the judge at the trial was not dissatisfied with the finding of the jury. In *Southcote v. Stanley* the declaration alleged that defendant "invited the plaintiff to come as a visitor," thus showing no cause of action on the face of it; while in *Collis v. Selden* there was no averment beyond the general allegation that the plaintiff was on the premises at the time of the accident.

Resorting to premises on business purposes.

Parnaby v. Lancaster Canal Co.

The judgment in *Southcote v. Stanley* goes no further, then, than its direct decision as to the position of a visitor.⁴ Before that decision—indeed, as early as the year 1839, in the well-known case of *Parnaby v. Lancaster Canal Co.*⁵—the liabilities attaching to carrying on business, and the consequent invitation to the public to resort to the premises where business was carried on, were considered in the Queen's Bench, and on appeal in the Exchequer Chamber. The company had a canal, and took tolls on it. A boat having sunk in the canal, the difficulties of avoiding it were very great. By the company's Act it was lawful for the company, in the case of a boat sinking in the canal, to weigh it up, and retain it for expenses, but the company did not act upon their powers; by reason of leaving the sunk boat in the canal Parnaby's boat navigating the canal ran foul of it, and was injured. Both Courts held that though the exercise of the statutory power conferred on the canal company was permissive, yet the company were liable on a common law principle that the owners of a canal taking tolls for the navigation are bound to use reasonable care in making the navigation secure.⁶

Chapman v. Rothwell and Wilkinson v. Fairrie compared.

The comparison of *Chapman v. Rothwell*⁷ with *Wilkinson v. Fairrie*,⁸ will enable us to distinguish the risks against which it is imperative

¹ 14 W. R. 611.

² 1 H. & N. 247.

³ L. R. 3 C. P. 495.

⁴ This is manifest from *Sandys v. Florencc*, 47 L. J. C. P. 598, where the claim was against an hotel-keeper for injuries caused by the fall of a ceiling in a room of the hotel while plaintiff "was using the said hotel as a guest for reward to the defendant."

⁵ 11 A. & E. 223.

⁶ In *Monaghan v. Buchanan*, 23 Sc. L. R. 580, the how rope, by which a steamer was secured to a pier, was let go before the gangway for passengers to pass on the boat was removed, and plaintiff was thrown off and injured. Held, that "the safe practice is to see the gangway withdrawn before the how rope is thrown off, and the tide forces the boat's head away from the pier," and this should have been adopted. The plaintiff recovered. Cp. *John v. Bacon*, L. R. 5 C. P. 437; *Timbrell v. Waterhouse*, 6 N. S. W. R. (Law) 77.

⁷ (1858) EL. B. & E. 168; *Hudson v. Wood*, 22 Ont. R. 66.

⁸ (1862) 1 H. & C. 633.

for the occupier to take heed, from those which the invitee must guard against. In the former case, a trap-door in the floor of a passage, along which the wife of the plaintiff was passing as a customer, was left open, not properly guarded and lighted, whereby she fell down and was killed. In the latter, the plaintiff, going along a dark passage, on business, fell down a staircase. In the one case, the plaintiff was held entitled, in the other disentitled, to recover. The ground of the distinction is reasonable and obvious; since ordinary accidents, such as falling down stairs, are to be imputed to the carelessness or misfortune of the sufferer, while accidents from unusual covert danger, such as that of falling into a pit, are rather referable to the neglect to give adequate warning of their existence.¹

Falling into hole in a passage, and falling down stairs, have different legal effects.

The leading case, however, on this branch of the law is *Indermaur v. Dames*.² Defendant was a sugar refiner, at whose place of business there was a shaft, necessary, usual, and proper for the purposes of the defendant's business. When it was in use it was sometimes necessary, for purposes of ventilation, that it should be open. It was not necessary that it should be unfenced when not in use; and it might, then, without injury to the business, have been fenced. The plaintiff was on the premises testing a gas regulator supplied by his employer to the defendant and, without negligence on his part, fell down the shaft.

Indermaur v. Dames.

"The common case," says Willes, J.,³ "is that of a customer in a shop; but it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted." . . . "The class to which the customer belongs includes persons who go, not as mere volunteers or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, expressed or implied. And, with respect to such a

Willes, J.'s, judgment.

¹ *Wilkinson v. Fairrie* was distinguished in *Paddock v. N. E. Ry. Co.*, 18 L. T. (N. S.) 60, on the ground that the plaintiff chose to go wandering about in the dark looking for what he wanted, and was to all intents a volunteer. *Driscoll v. Commissioners of the Burgh of Partick*, 2 Fraser 368—case of unlighted common staircase; *Fleming v. Eadie*, 25 Rettie 500—sanitary inspector goes about strange house without waiting to be shown. In *Nicholson v. Lancs. & Y. Ry. Co.* 34 L. J. Ex. 84, a passenger fell over a hamper taken out of a train and placed at the side of the line some distance from the platform, but where there was an usage for passengers to pass in going out of the station; it was held there was some evidence of a duty on the part of the company. Cp. *Holmes v. N. E. Ry. Co.*, L. R. 4 Ex. 254, in Ex. Ch. L. R. 6 Ex. 123. See *Cornman v. Eastern Counties Ry. Co.*, 4 H. & N. 781; *Sturges v. G. W. Ry. Co.*, 8 Times L. R. 231 (C. A.); *Jones v. Grand Trunk Rd. Co.*, 16 Ont. App. 37.

² (1866) L. R. 1 C. P. 274, in the Ex. Ch. L. R. 2 C. P. 311. In *Rutts v. Goddard*, 4 Times L. R. 193, plaintiff recovered . . . calling upon auctioneers and estate agents, she entered by a door, which was . . . usual entrance, and, having reached a folding door, which she pushed open, fell . . . on a flight of steps leading to a cellar. In *Mason v. Langford*, 4 Times L. R. 46, plaintiff was held disentitled where she went to defendant's shop when the iron shutters were down, but the door was ajar, which she pushed open and stepped in down a steep flight of steps, the trap-door of which was raised. *Steer v. St. James's Residential Chambers Co.*, 3 Times L. R. 500; *O'Neil v. Everest*, 61 L. J. Q. B. 453. The law in the United States is identical with our own: *Bennett v. Rd. Co.*, 102 U.S. (12 Otto) 577, 581, where the English cases are reviewed. *Hudson v. Victorian Rys. Commissioner*, 26 V. L. R. 269; *Harrington v. Wellington Harbour Board*, 14 N. Z. L. R. 347.

³ L. R. 1 C. P. 287.

visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."¹

Precautions that should be adopted.

Crafter v. Metropolitan Ry. Co.

Duty independent of privity.

Smith v. London and St. Katharine Docks Co.

In determining what precautions ought to be adopted in individual cases practical difficulties will often arise; the discriminating line, however, is indicated in *Crafter v. Metropolitan Ry. Co.*,² "between suggestions of possible precautions and evidence of actual negligence such as ought reasonably and properly to be left to a jury."

In *Smith v. London & St. Katharine Docks Co.*,³ the duty of the occupier is held to exist independent of privity. The company there were the owners of docks, who provided access by means of gangways to the vessels there. The plaintiff, going on a vessel for business, saw the gangway, and, proceeding upon it, fell into the water. The defendants were held liable; "for the gangway being placed there as the means of access to all persons having business on board the ship, it amounts to an invitation to persons having business on board the ship to go upon it." The rule, then, may be thus stated, that persons inviting others not only on their own premises, but upon any premises, are answerable for anything in the nature of a trap existing in the means they afford for going upon such premises,⁴ or while they are there.⁵

Test to distinguish between licensees.

The test of an act done for the common interest of the parties was subsequently, in *Holmes v. N. E. Ry. Co.*,⁶ used to discriminate the position of a licensee from that of a person on premises to whom a duty to take care is owing. "As soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes."⁷

Laz v. Corporation of Darlington.

View of Bramwell, L.J., as to duty.

In *Laz v. Corporation of Darlington*,⁸ Bramwell, L.J., thus expressed

¹ *Dolan v. Burnet*, 23 Rettie 550 (defective condition of shop floor), distinguished, *Paterson v. Kidd's Trustees*, 24 Rettie 99 (latent defect in floor of granary); *Watson v. M'Leish*, 25 Rettie 1028 (workman using rotten planks lying on premises instead of bringing his own).

² L. R. 1 C. P., per Montagu Smith, J., 304; *Langmore v. G. W. Ry. Co.*, 19 C. B. N. S. 183; *G. W. Ry. Co. v. Davies*, 39 L. T. (N.S.) 475; *Wood v. Canadian Pacific Ry. Co.*, 30 Can. S. C. R. 110.

³ L. R. 3 C. P., per Bovill, C.J., 332.
⁴ In *Watkins v. G. W. Ry. Co.*, 46 L. J. C. P. 817, Deaman, J., held that a passenger's friend is not in the position of a person barely licensed, but when seeing his friend off is "on lawful business in which the passenger and the company have both an interest"; and in *Thatcher v. The G. W. Ry. Co.*, 10 Times L. R. 13, Lord Esher, M.R., said: "If a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former." In *York v. Canada Atlantic S.S. Co.*, 22 Can. S. C. R. 167, a woman fell off a wharf on her way to meet a passenger expected by steamer; *Sparkes v. North Coast Steam Navigation Co.*, 20 N. S. W. L. R. 371.

⁵ *Harris v. Perry* (1903), 2 K. B. 219.
⁶ L. R. 4 Ex. 254, in Ex. Ch. L. R. 6 Ex. 123. In the Court of Exchequer, Channell, B., says, 258: "In one sense the plaintiff was a licensee, but he was not a mere licensee, and the word mere has a very qualifying operation." Romer, L.J., in *Frank Warr and Co. v. London County Council* (1904), 1 K. B. 721, quotes Vaughan, C.J., in *Thomas v. Sorrell*, Vaugh 351, where, speaking of the general effect of a licence, he says that "a dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful." A licence to do something in its nature permanent, as to erect a building, when acted on is irrevocable, *Liggins v. Inge*, 7 Bing 682, was followed in *Plimmer v. Mayor, &c. of Wellington*, 9 App. Cas. 699.

⁷ L. R. 4 Ex. 254, per Cleasby, B., 259.

⁸ 5 Ex. D. 28. 34.

the duty owing in the second class above mentioned: "If the place was not safe, if there was a danger that was not obvious to any person coming there, that person ought to have been warned against it, and it should have been said: 'If you come, you must come and take the place as you find it, for the situation of things is such that there is danger there.' The defendants did not warn the plaintiffs, and the jury have found that the place was dangerous, and, therefore, there is, in my opinion, a *prima facie* case against them; not upon any ground of negligence or misfeasance but simply upon this ground that they have not done their duty to their customer in apprising him that there was danger in his accepting their invitation and allowing him to come on their ground for a profit to themselves." The case raised the question of the liability of the lord of a market for the death of a cow injured by jumping a dangerous railing in a market place. Brett, L.J., was of opinion "that the defendants were under the liability—*prima facie* at all events—of affording a reasonably safe place for the standing of cattle. The finding of the jury is that they did not do so; therefore, in my opinion, the defendants are liable."¹

Warning must be given of unusual danger.

*White v. France*² raised for decision, not what the duty to a person invited on premises is—for that was made clear by the earlier cases—but what circumstances outside express invitation will confer upon a person the rights of a licensee. A licensed waterman out of employment saw that defendant's barge was in charge of one man only, and not of two, as required by the rules of the Thames Conservancy Board. Accordingly, he went on the defendant's premises to point out the omission, and to get employment. He was referred to the foreman, who, he was told, would be on the premises the next day. Returning the next day he was injured by the fall of a bale of goods from a warehouse trap-door. The Court held that he was on the premises "on lawful business in which both the plaintiff and the defendant had an interest," and so could recover. A similar decision was given in a Scotch case, *Brady v. Parker*,³ where a dealer in firewood visited premises on a dark evening to buy tar-barrels for firewood, and was referred by one of the workmen to a clerk, who told him that they did not sell them; on his way off the premises he fell down an open hatchway and was killed.³

White v. France.

Scotch case: *Brady v. Parker*.

Nicolson v. Macandrew,⁴ another Scotch case, is governed by different considerations. Pursuer, a mason, had lent a shovel to a fellow-workman, and, wishing to reclaim it, climbed a ladder and passed along a scaffold erected, not for masons, but for joiners. It was not alleged that other workmen than the joiners were in the habit of using the scaffolding with the permission of the defenders, or that they had occasion to use it. Through the defect of the scaffold the pursuer was injured. "I do not see," said the Lord President (Englis), "that there can be any common law liability, the scaffolding not having been erected for the use of the masons." If this view of the facts is right,

Nicolson v. Macandrew.

¹ L. C. 33. Cp. *Clayards v. Dethick*, 12 Q. B. 439; also *Pittsburgh Southern Ry. Co. v. Taylor*, 104 Pa. St. 306, where the Supreme Court of Pennsylvania, Paxson, J., delivering the judgment, took a view similar to that of Bramwell, L.J. The Court of Maine decided the same way, in *Merrill v. Inhabitants of North Yarmouth*, 78 Me. 200, where a man unnecessarily drove his waggon across a flooded highway. The other side of the question is considered in *City of Altoona v. Lotz*, 114 Pa. St. 238; *Keith v. Ottawa, &c. Ry. Co.*, (1902) 5 Ont. L. R. 116.

² 2 C. P. D. 308.

³ *Brady v. Parker*, 14 Rettie 783, cited in *Mountney v. Smith*, 1 C. L. R. (Australia) 146.

⁴ (1898) 15 Rettie 854.

the difference between the two cases is that between a licensee and a trespasser. In the former case the dealer visited the premises on a purpose common to himself and the owner of them. In the latter, the mason's user was without reference to the owner of the premises, and purely for his own convenience.

O'Neill v. Everest.

In *O'Neill v. Everest*¹ the decision was in favour of the defendant on special facts. Defendant, a master lighterman, contracted to convey goods to a ship, and supplied a barge for the purpose. He contracted with another person to take his barge to the ship and return it when unloaded. Plaintiff was employed by a stevedore to unload the barge. In the course of unloading and after dark he fell through the hatchway of the cabin, for which the defendant had not supplied a cover, and was injured. It was held that the defendant was not liable, as it was no part of his duty to supply a cover for the hatchway.

Mansfield v. Baddley.

The case of *Mansfield v. Baddley*² is one very close to the line. Plaintiff was employed by the defendant as a dressmaker. It was no part of her duty to go down into the kitchen, but on one occasion she went there, at the request of the defendant, to fetch something up. As she was leaving the kitchen, a savage dog, which was generally tied up, rushed from under the table and bit her leg. Plaintiff was aware that a dog of this kind was kept on the premises. The county court judge nonsuited, on the ground that the plaintiff was a servant and knew the disposition of the dog. The Court held the non-suit wrong, as the risk "was not incidental to the service."

Considered.

If the plaintiff sustained the injury as a servant, it was undisputed that she knew of all the surroundings; there was no concealed danger, and no circumstances known, or that ought to have been known, to the defendant of which the plaintiff was ignorant; while, if she did not sustain the injury as a servant, the question of whether the risk was incidental or not could not arise.³ The duty of the occupier of the premises is, then, to protect the invitee from all unusual risks;⁴ yet, from the undisputed facts, it is evident that the plaintiff knew of the existence of the dog and the savageness of its disposition. The possibility of the dog's being loose could not be called an unusual risk, for it was distinctly alleged that the plaintiff had knowledge of what the practice with regard to it was, viz., that it was generally tied up. The law applicable is thus stated by Bowen, L.J., in *Thomas v. Quartermaine*:⁵ "Where the danger is one incident to a perfectly lawful use of his own premises neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all." In *Smillie v. Boyd*,⁶ the dog was habitually shut up while the pursuer was on the premises, whither she went by the permission and on the invitation of

Bowen, L.J.,
in *Thomas v. Quartermaine.*

Smillie v. Boyd distin-
guishable.

¹ 61 L. J. Q. B. 453. See *ante*, 64. ² 34 L. T. (N. S.) 696.

³ But *quaere*, must not the plaintiff be held to take not merely the risks incidental to the service "but all the known risks" on the defendant's premises: *Brooks v. Courtney*, 20 L. T. (N. S.) 440.

⁴ *Chapman v. Rothwell*, El. B. & E. 168; *Wilkinson v. Fairrie*, 1 H. & C. 633; *Smith v. London and St. Katharine Docks Co.*, L. R. 3 C. P. 326.

⁵ 18 Q. B. D. 697.

⁶ 24 Sc. L. R. 148. The business which will ordinarily justify an entry on premises in the absence of an express invitation or an engagement for services must be the ordinary business of the occupant, not that of the plaintiff (for exceptions to this see *Bac. Abr. Trespass, F*): *Bigelow, L.C.*, on Torts, 705.

the defender's wife. On the day of the accident the dog was let out before the pursuer had left the premises, and bit her. The only point was whether the pursuer's licence had terminated before she was bitten or the dog had been released while her licence was yet unexpired. The latter having been found as a question of fact, the liability of the defender followed.

A great diversity of opinion was caused by the case of *Woodley v. Metropolitan District Ry. Co.*,¹ on the following facts: The plaintiff was a workman in the employ of a contractor engaged by the defendants to execute certain work on a side wall on their line of railway in a dark tunnel. Trains were passing the spot every ten minutes, and the line, being there on a curve, the workmen would not be aware of the approach of a train till it was within twenty or thirty yards of them. The space between the rail and the wall, on which the workmen had to stand while at work, was just sufficient to enable them to keep clear of a train. The place was wholly without light. No one was stationed to give notice of an approaching train. The speed of the trains was not slackened when arriving near where the men were at work, nor was any signal given. The service was one of extreme danger, and, while the plaintiff was reaching across the rail to find a tool he had laid down, a train came upon him suddenly, and struck and seriously injured him. On a previous occasion, when similar work was being done, a look-out man had been stationed to give warning of approaching trains, but this precaution had been discontinued.²

In the Exchequer Division, Kelly, C.B., and Amphlett, B., gave judgment³ for the plaintiff, on the ground that a look-out man had formerly been employed to warn the workmen of their danger, and that after the accident a look-out man was again employed, so that the jury might hence reasonably infer negligence. On appeal, the judgment of the Court of Exchequer was reversed by Cockburn, C.J., Mellor and Grove, JJ., Mellish and Baggallay, L.JJ., dissenting.

The point raised was whether, on the facts as stated, there was evidence of negligence. Cockburn, C.J., considered that the plaintiff was working either as a servant of the company; or was on their premises, not only on lawful business, but by their invitation. If the former, he must be taken to have been aware of the nature and character of the work and its attendant risks when he entered upon it. If the latter, he had full notice of the risks, and yet chose to remain. Mellor and Grove, JJ., considered that there was no implied obligation on the part of the company to provide a look-out man, as suggested by the Lord Chief Baron; that, as there was nothing done or omitted by the company in the working of the line that varied from the ordinary way, if the plaintiff thought there was danger of an unusual character in the nature of the work, he was free to have stipulated for precautions or to have left the work altogether; and that, as neither mismanage-

¹ (1887) 2 Ex. D. 384. *Woodley's case* was approved in *Leury v. Boston, &c. Rd. Co.*, 139 Mass. 580. Cp. *Robertson v. Adamson*, 24 Dunlop 1231, an accident arising from a man, who had been employed on works twenty years, falling from a bridge within the works, which was unprotected by any kind of parapet, and was accustomed to be unlighted, although there was a lamp; also *Clark's Administrator v. Richmond and Danville Rl. Co.*, 49 Am. R. 394, where a railway brakeman was killed by collision with a low bridge while standing on the top of a car at night. Cp. *Casey v. Sinclair*, 23 So. L. R. 305; also *Huff v. Austin*, 15 Am. St. R. 613.

² From the judgment of Cockburn, C.J., 2 Ex. D. 388, it appeared that the plaintiff had been working for a fortnight before the accident happened.

³ 2 Ex. D. 385 n.

ment nor misconduct ensued, but the business was conducted in the usual way, with equal means of knowledge on all sides, the plaintiff could not recover.

Dissent of
Beggally and
Mellish, L.J.

Beggally, L.J., dissented on the ground that the plaintiff was the servant of the contractor, and that the case could not be distinguished from *Indermaur v. Dames*; also that "the real question is whether the company's train was run in such manner and with such precautions that the plaintiff was not exposed to any undue risk; and this was essentially a question for the jury." The learned judge seems to have overlooked the preliminary, that there must be evidence of negligence before any question can be left to the jury. Mellish, L.J., also dissented, as he considered that railway companies are bound to take reasonable care that the servants of contractors are not injured by passing trains, and that the fact of the plaintiff having worked in the tunnel for a fortnight without making any objection, and without abandoning his service, was not sufficient to raise a necessary inference in point of law that he consented to their running their trains as usual. This, too, assumes that a contract to work in the normal conditions of working the line is not good.¹

Not a
volunteer.

"I think," Mellish, L.J., adds, assuming that he did understand what the risk was which he was running, "he is entitled to say 'I know I was running great risk, and did not like it at all, but I could not afford to give up my good place, from which I get my livelihood, and I supposed that if I was injured by their carelessness I should have an action against the company, and that if I was killed my wife and children would have their action also.'"

Later cases² have conclusively shown that a workman is entitled to say this in the case of an alteration in the conditions of his employment. The present case is different; for to allow a workman to accept work in circumstances of risk and when he has entered on it to say: "I know I am running great risk, but I cannot afford to give up my good place, and I suppose if I am injured I shall have an action against the company," would be to permit him without communicating with his employer to vary his contract and to diminish the risks by reference to which his remuneration is fixed, or at any rate the competition for his employment; though another class of cases denies to the employer the right of increasing the risks without the most unequivocal making of a new contract.

Thrusell v.
Handyside.

In *Thrusell v. Handyside*,³ Hawkins, J., distinguished *Woodley v. Metropolitan District Ry. Co.*⁴ A workman was directed by his employer to work in a particular place. The defendants were contractors working above the place where the plaintiff was engaged at his work. For some time the defendants' work was carried on in a manner that obviated danger of injury, but subsequently the plaintiff's employers required the safeguard which protected the plaintiff to be removed so that they might more speedily accomplish their own work on which the plaintiff was engaged. No other safeguards were substituted.

¹ In *MacCarthy v. Young*, 6 H. & N. 329, it was decided that a servant had no greater right than his master, where the master was the gratuitous bailee of a defective scaffolding, of whose defects the hailer was ignorant.

² E.g., *Thomas v. Quartermaine*, 18 Q. B. D., per Fry, L.J., 701, expressing concurrence with the view of Cockburn, C.J.; *Smith v. Baker* (1891), A. C. 325. Cp. *Members v. G. W. Ry. Co.*, 14 App. Cas., per Lord Halsbury, C., 184, and per Lord Herschell, 192.

³ (1888) 20 Q. B. D. 359. Cp. *Casey v. Sinclair*, 23 Sc. L. R. 305.

⁴ 2 Ex. D. 384.

Plaintiff complained to the defendants' foreman of the danger from their operations to which he was exposed, but without result, though it was proved that satisfactory precautions could have been easily taken if desired. Plaintiff was injured by the falling of an iron bolt from the work carried on by the defendants above where he was placed, and brought his action. An appeal by the defendants from the county court was brought on the ground of the identity of the case with *Woodley v. Metropolitan District Ry. Co.*¹ Hawkins, J., however, pointed out that in *Woodley's case* the plaintiff was injured through a regularly recurrent danger, which the exercise of foresight would have obviated; while in *Thrusell's case* the danger was intermittent, and not to be avoided consistently with a continuance of the employment. In addition to this, it may be noted that, in *Woodley's case*, the running of the trains was in the ordinary course of business and without negligence, and the duty sought to be imposed upon the railway company was that of taking extra precautions to secure the safety of the workman; while in *Thrusell's case* an ordinary means of doing the work in safety—"in order to do this work and to hoist the plates a large stage had been erected which was called a gantry"—had been abandoned for other means not safe. The removal of the workman in *Woodley's case* is not paralleled by the alteration in the mode of doing the work, since the cessation of extra precautions differs widely from the abandonment of ordinary ones.² Neither does the fact that the abandonment of the first mode of working was at the request of the plaintiff's employers affect the nature of his claim, which appears almost identical with *Smith v. Baker*.³ That a workman's employer has for his own purposes made arrangements with third persons without reference to his workman cannot, in the absence of special circumstances, alter the conditions of the workman's employment. It remains that a dangerous method of working was deliberately undertaken, with the effect of injuring some one who had not contracted to encounter the risk, and who, therefore, became entitled to recover in respect of his injury. In this view *Woodley's case* has little, if any, bearing on the present.

Distinguished from *Woodley v. Metropolitan District Ry. Co.*

Some American cases may be shortly noticed, as they raise questions on which there are no reported English decisions.⁴ "It is a very ancient rule of the common law," says Gray, C.J.,⁵ "that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire or any like danger is not a trespass." "As individuals may thus enter upon the land of another, firemen may do so for the protection of property, officers of the law for similar purposes, and under proper circumstances for the arrest of offenders or the execution of criminal process. The right to do this may be in limitation of the more general right of property which the owner has, but it is for his protection and that of the public." A later case improves on this and holds that if a police officer enters the premises of a private owner, at the request of a tenant for the purpose of arresting a person there engaged in disturbing the peace, he may maintain an action against the owner of the premises, for injuries received while leaving with

American cases not covered by English authority.

¹ 2 Ex. D. 384.

² 20 Q. B. D. 361.

³ Altogether apart from the fact that in *Woodley's case* the look-out man had not been employed in the same work, but per Kelly, C.B., 2 Ex. D. 386, "on some former occasion, or on some other part of the railway."

⁴ (1891) A. C. 325.

⁵ So far as the writer's researches go.

⁶ *Proctor v. Adams*, 113 Mass. 376.

the offender in custody, from their defective condition, in a respect not attributable to the tenant.¹ Such is the head note. The facts do not bear it out. The defective condition was in the entry to the premises; the duty to repair was found to be on the defendant; and the officer was on the premises in pursuance of his public duty.

In Maine it has been held that a Customs officer searching for smugglers on a wharf without a lantern and who fell into the water through an opening negligently left unguarded and unlighted could maintain an action, and that contributory negligence could not successfully be alleged, since his duty in searching for smugglers rendered it necessary for him to keep himself concealed.²

Letter carriers and water inspectors apparently in America enjoy immunities of their own. In England their position is that of any other person coming on premises on business with the occupier.³

¹ *Leahey v. Godfrey*, 138 Mass. 315. The judgment is by Holmes, J.

² *Low v. Grand Trunk P. Co.*, 72 Me. 313. The English rule may be gathered from *Scott v. London & St. Katherine Dock Co.*, 3 H. & C. 580.

³ *Ante*, 440.

CHAPTER II.

WATER AND WATERCOURSES.

THE collection, distribution, and user of water on a man's estate raise questions of difficulty with reference to the exercise of control over property that must be dealt with here.

There is no property in running water.¹ That there should be a property fixed in running water, says Callis :² " I cannot be drawn to that opinion, for the Civil Law says farther, *quod aqua profluens non manet in certo loco, sed procul fuit extra ditionem ejus cujus flumen est ut ad mare tandem perveniat* ; for in my opinion it would be strange that the law of property should be fixed upon such uncertainties, as to be altered into *meum, tuum, suum* before these words can be spoken, and to be changed in every twinkling of an eye." " I am of opinion, that taking this word *aqua* for the bare running water there can be no property therein, but as the same is incident to the soil, taking them two for one, it is drawn with the property thereof. And this difference is apparent by 12 H. VII. aforesaid ;³ and Mr. Linwood put a difference *inter fluvium et flumen*, for, saith he, *est perennis decursus aquarum sed flumen est propria ipsa aqua.*"⁴

No property in running water.

The moment the water of a spring runs into a definite channel, it constitutes a watercourse.⁵ " A watercourse differs from a way or common ; that it doth not begin by prescription nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally and cannot be averted."⁶ A declaration stating merely the possession of the place through which the water used to run is the proper mode of laying claim to a watercourse.⁷

Watercourse.

We have therefore to consider the relations raised :

I. By water flowing upon land by the operation of natural causes merely.

I. Relations raised by water naturally flowing upon land.

II. By water brought upon land by the intervention of an artificial agency.

II. Relations raised by water brought on land.

¹ *Higgins v. Inge*, 7 Bing, per Tindal, C.J., 692.

² Reading on the Statute of Sewers, 78.

³ In 12 H. VII. 4, a *precipe quod reddat* is brought *de una acra terra cu' aqua cooperta*.

⁴ Cp. D. 43, 22, 4. *De fonte. Cisterna non habet perpetuum causam, nec vivam aquam. Ex quo apparet in his omnibus exigentium, ut viva aqua sit. Cisternæ autem in imbribus concipiuntur. Denique constat interdictum cessare, si lacus, piscina, puteus vivam aquam non habeat.*

⁵ *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627 ; *Briscoe v. Drought*, 11 Ir. C. L. R. 250 : where the question is of the existence of a watercourse, the judge ought to define the term to the jury.

⁶ Per Whitlock, J., *Shury v. Piggot*, 3 Buls. 339.

⁷ *Brown v. Best*, 1 Wils. (K. B.) 174.

Under the first class we shall consider, first, water running in defined channels, whether natural or artificial, as it is surface water or subsoil water; and, secondly, water not running in any channels; and this also under the two heads of surface water and subsoil water.

Under the second class a distinction must be noted between (a) water brought on land with reference to the right of the landowner bringing it there alone, and (b) water brought on land where a contractual relationship has been constituted between the landowner and others liable to be affected by the bringing of water there.

I. WATER NATURALLY FLOWING UPON LAND.

Two heads:

I. Water in a defined channel.

II. Water not in defined channels.

I. Water in a defined channel.

Definition of a water-course.

Water-course (a) natural; (b) artificial. (a) Natural water-courses.

This we proceed to consider under the headings of—

I. The position of the owners of land by or through which water runs in a defined channel; and

II. The position of the owners of land by or through which water runs not in any defined channel.

The rule of the civil law is: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.*¹

This is followed by the Code Civil,² which, with its comments, is declared by the Privy Council, in *Miner v. Gilmour*, not to differ materially from the law of England.³

I. The position of the owners of land by or through which water runs in a defined channel.

To be a watercourse, by force of the term, water must flow in a defined stream. It need not always flow; but there must be a stream usually flowing in a particular direction. Sometimes it may even be dry; still usually it must flow in a definite channel, having a bed, sides or banks, and most frequently discharging itself into some other stream or body of water. A mere surface-drainage over the entire face of a tract of land made up of unusual freshets or other extraordinary causes, is not a watercourse; neither is water flowing in the hollows or ravines in land, which is the mere surface-water from rain or melting snow, and is discharged through hollows or ravines, at other times destitute of water, from a higher to a lower level.⁴

Water running in a defined stream within the foregoing description may be either natural or artificial.

(a) A natural stream is one which takes its rise from causes produced by the operations of nature, and has the force to flow in a channel either marked out by the configuration of the soil or directed by the force of the stream itself. An artificial stream is one that arises by the agency of man, or, though arising from natural causes, flows in a channel made by man.⁵

¹ D. 39, 3, 1, § 4; and see judgment of Lord Denman, C.J., *Mason v. Hill*, 5 B. & Ad. 1, where the Roman law is much considered, at 23-24. ² Arts. 640-644.

³ *Miner v. Gilmour*, 12 Moo. P. C. C. 131, 156; *Commissioners of French Hoek v. Hugo*, 10 App. Cas. 336, 344; *Wood v. Waud*, 3 Ex., per Pollock, C. B., 781; 3 Kent, Comm. 439, 440; *Embrey v. Owen*, 6 Ex., per Parke, B., 369; also *Tyler v. Wilkinson*, 4 Mason (U.S.) 307, and *North Shore Ry. Co. v. Pion*, 14 App. Cas. 612. Unreasonable use of water is considered in *Ellis v. Clemens*, 21 Ont. R. 227, affd. 22 Ont. R. 216.

⁴ Cp. *McNab v. Robertson* (1897), A. C. 129. *Rivus est locus per longitudinem depressus, quo aqua decurrat, cui nomen est ἀρὸ τοῦ πεῖρ, id est, à fluendo: D. 43, 21, 1, § 2.*

⁵ As to a natural watercourse, see *Gregory v. Bush*, 3 Am. St. R. 797; Rankine, *Land-Ownership in Scotland*, (3rd. ed.) 462; a work that may with advantage be referred to on the whole of this subject.

*Holker v. Porritt*¹ shows the considerations determining what is a natural stream. A stream upon a man's land was in some way or other divided, one portion flowing in a defined current, while another passed into a farmyard, where it supplied a trough; the overflow from the trough was diffused over the ground. The owner of the farmyard collected the overflow into a reservoir, and used it for the purposes of a mill. A riparian proprietor higher up obstructed the flow on the ground that the water so collected was an artificial stream, whereupon the owner of the farmyard sued. The Court of Exchequer held that he was entitled to maintain his action on the ground that the stream was a natural stream, and remained a natural stream, though it had been turned into an artificial channel. In the Exchequer Chamber² the judgment went on a somewhat broader principle—that as the water came to the plaintiff's land it became his to do what he liked with; and he had a right to complain of any one diminishing the flow which came to him as a natural stream; that, no doubt, the consequences to a wrongdoer were more serious by reason of the more profitable use the water was put to; but the authorities established that so soon as the owner of land on a stream has appropriated the water to a beneficial use, he may sue in respect of damage done to him with reference to it.³

In the Court of Exchequer, Martin, B., said: "Now, that state of things [*i.e.*, as shown in the case] was exactly as if a stream lost itself in a marsh or swamp, a haunt for snipe and wild-fowl, but not turned to any agricultural purpose. And I am of opinion that, if a proprietor in such a case expends his labour in cutting a course for the water, he acquires a right analogous to that which he would have if that course had been a natural stream, and that no distinction can be made between a natural stream and a watercourse made to drain land and to carry down the water to its natural destination."

The test, then, to determine between a natural and an artificial stream is, not the construction of the channel along which it flows, but the circumstances of its course—does it flow naturally at all, not is its volume in all circumstances the same. A stream arising from natural causes, and flowing in its natural course, continues a natural stream, though it flows in a channel altogether transformed by the hand of man.

The relevant questions, then, are—In what condition is the water received on a man's land, and, if he bound to part with it, in what condition does it leave his land? While upon his land he may divert it into channels or make what use of it he pleases without in any way being accountable for such use; provided only it leaves his land in the same condition as that in which he received it, and in undiminished volume, save so far as is consistent with his right to a reasonable user of it for domestic or similar purposes.⁴ If the stream originated by the agency of man, then an inquiry must be instituted whether rights have been acquired to the use of the stream, which, though originally artificial, may have become affected with the rights and

¹ L. R. 8 Ex. 107, L. R. 10 Ex. 59. The case is called *Holker v. Porritt* in L. R. 8 Ex. and *Holker v. Porritt* in the Ex. Ch.

² L. R. 10 Ex. 59.

³ *Mason v. Hill*, 5 B. & Ad. 1.

⁴ *Roberts v. Richards*, 50 L. J. Ch. 297 (*Sutcliffe v. Booth*, 32 L. J. Q. B. 136, considered and approved), but in the Court of Appeal the order was discharged on an undertaking being given by the defendant not to divert any water from the watercourse, 51 L. J. Ch. 944. *A. G. v. G. E. Ry. Co.*, L. R. 6 Ch. 572. *Baily & Co. v. Clark, Son & Morland* (1902), 1 Ch. 649.

Holker v. Porritt.

Martin, B.'s judgment in the Court of Exchequer.

Test to determine between a natural and an artificial stream.

User of water while on land.

duties attaching to natural streams;¹ and the proper inference may be, that which was drawn in *Bailey & Co. v. Clark, Son & Morland*,² that the watercourse was constructed under the conditions that the water might be withdrawn for manufacturing purposes equally by all the riparian proprietors, provided that the abstraction of water was of reasonable amount.³

Natural stream either (a) navigable; or (b) not navigable.

A natural stream is either navigable or not navigable.

A navigable stream is one over which the public has a right of navigation,³ which is identical with a right of way over a land highway.⁴

In navigable rivers that are tidal the soil, as high as the sea flows or reflows, is presumed⁵ to belong to the King, and the King is presumed to have the same property therein as in the foreshore of the sea.⁶ In navigable rivers beyond the flow of the tide the proprietors on either side are presumed to be possessed of the soil of it to a supposed line in the middle; though the law secures to the community the right of navigation upon the surface of the water as a public highway, which individuals are forbidden to obstruct, and precludes the riparian proprietors from preventing the progress of the fish through the river or dealing with the water to the injury of their neighbours.⁷ The right of navigation does not draw with it any right of property, but is confined to the right of passage to and fro, as in a land highway;⁸ so that, in addition to the right connected with the navigation to which he is entitled as one of the public, the riparian owner on a navigable river retains his rights as an ordinary riparian owner, subject only to the public right of navigation.⁹

No common law right to tow.

The contention that where navigation is difficult the public are entitled at common law to tow on the banks of ancient navigable rivers cannot be supported¹⁰ In *Winch v. Conservators of the Thames*.¹¹ It was said that there is no objection to a dedication of a way to the public for such a limited purpose. "Perhaps," says Lord Kenyon, in an earlier case,¹² "small evidence of usage before a jury would establish

¹ *Ivimey v. Stocker*, L. R. 1 Ch. 396. As to what constitutes navigability, *Earl of Hechester v. Raishleigh*, 61 L. T. 479.

² (1902) 1 Ch. 649.

³ *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713; *Anon.*, 1 Camp. 517, n.; *The King v. Montague*, 4 B. & C. 508; *Earl of Hechester v. Raishleigh*, 61 L. T. 477; even against the Crown, *Colchester, Mayor, &c. of, v. Brooke*, 7 Q. B. 339; *Williams v. Wilcox*, 8 A. & E. 314.

⁴ *Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

⁵ *A. G. v. Emerson* (1891), A. C. 649.

⁶ *Com. Dig. Navigation (A)*; *Bulstrode v. Hall*, 1 Sid. 148.

⁷ Per O'Hagan, J., in *Murphy v. Ryan*, Ir. R. 2 C. L. 148, citing Hale, *De Jure Maris*, i.; *Bristow v. Cormican*, 3 App. Cas. 641; followed in *Hardin v. Jordan*, 140 U. S. (33 Davis) 371, where the whole subject is elaborately treated, and where, speaking of *Bristow v. Cormican*, the Court says, 392: "Of course this decision has not the controlling authority which it would have had if it had been made before our revolution. But it is the judicial decision of the highest authority in the British Empire, and is entitled to the greatest consideration on a question like this of pure common law." *Kaukana Co. v. Green Bay, &c. Canal Co.*, 142 U. S. (35 Davis) 254; *Lembeck v. Nye*, 21 Am. St. R. 828; *Shively v. Bowlby*, 152 U. S. (45 Davis) 1. There can be no public right of fishing in non-tidal waters, even where they are to some extent navigable rivers; *Pearce v. Scotcher*, 9 Q. B. D. 162.

⁸ *Orr Ewing v. Colquhoun*, 2 App. Cas. 839. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it; *Smith v. Andrews* (1891), 2 Ch. 678, 696.

⁹ *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *North Shore Ry. Co. v. Pion*, 14 App. Cas. 612.

¹⁰ *Ball v. Herbert*, 3 T. R. 253.

¹¹ L. R. 7 C. P. 458, 471.

¹² *Ball v. Herbert*, 3 T. R. 262.

a right by custom on the ground of public convenience"; and from the tone of the latter case this seems to be so.

With these limitations, the position of an owner of land by which a navigable stream flows is the same as that of an owner by whose land a not navigable stream flows. If the stream form the boundary of the property of landowners, each proprietor has an equal right to the use of the water, and no proprietor has a right to the water to the prejudice of other proprietors unless he has a right to divert it or a title to some exclusive enjoyment.¹

Position of owners of land by which a navigable stream flows.

The owners of lands adjoining a stream from its source to the sea have a natural right to the use of the water of it. A river begins at its source so soon as it comes to the surface, but the owner of the land of which it rises cannot monopolise all the water at the source any more than a proprietor lower down.² When it is said that the proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filium*, it does not follow that their property is capable of being used in the ordinary way in which so much land uncovered by water might be used. The bed of the stream must only be used in such a way as not to affect the interest of riparian proprietors in the stream. Neither is allowed to use it in such a manner as to interfere with the natural flow. The bank may be fenced, though any erection in the *alveus* is unlawful; and the *onus* of proving that such an erection is not an encroachment falls on the person putting it in the stream. Neither need damage be proved³—that is, damage need not be proved if the Court be of opinion that injury may reasonably be expected to result from an encroachment. If injury does not result at the time of action, and there is no probability of it resulting at some future time, then no action lies.⁴

Rights of owners adjoining a natural stream.

Further, each riparian proprietor is presumed to be entitled to the adjoining half of the bed of the stream. This presumption is, however, rebuttable; but not by proof that the conveyance is of land bounded by the river, nor of subsequent inconvenience arising to the grantor from the grant, nor that the grantor was owner of both banks.⁵

If the stream is wholly in the property of one landowner, then the rights of those higher up and lower down the course of the stream are the same as those of opposite proprietors, with the exception that any use may be made of the stream within the limits of property, provided that its volume and quality are unaffected at the points of adit and exit.⁶

¹ *Wright v. Howard*, 1 Sim. & St. 190; 3 Kent. Comm. 439. D. 43, 13, *ne quid in flumine publico ripave ejus fiat quo aliter aqua fluat, quam priore estate fluxit.*

² *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627, followed in *Bunting v. Hicks*, 70 L. T. 455; *Mostyn v. Atherton* (1890). 2 Ch. 360.

³ *Bickett v. Morris*, L. R. 1 H. L. (Sc.) 47. This case, as explained by *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, is discussed, *Belfast Rope Works Co. v. Boyd*, 21 L. R. Ir. 560, the case of the erection of a weir to establish control over water, and in an excellent judgment by Madden, C.J., *Nagle v. Miller*, 29 V. L. R. 765. See *Earl of Norbury v. Kitchin*, before Wood, V.C., 15 L. T. (N. S.) 501; *Ross v. Powrie and Picaithley*, 19 Rettie 314; *Crossley v. Lightowler*, L. R. 2 Ch. 478. A riparian owner may moor to his bank a floating wharf and boat-house if the same is not an obstruction to the navigation, *Booth v. Ratcliff*, 15 App. Cas. 188.

⁴ *Kensit v. G. E. Ry. Co.*, 27 Ch. D., per Cotton, L.J., 131; *Swindon Waterworks Co. v. Wilts & Berks Canal Navigation Co.*, L. R. 7 H. L. 697.

⁵ *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133; *Jameson v. Police Commissioners of Dundee*, 12 Rettie 360; *Duke of Devonshire v. Pattinson*, 20 Q. B. D. 263.

⁶ *West Cumberland Iron and Steel Co. v. Kenyon*, 11 Ch. D. 782; *Canfield v. Andrews*, 41 Am. R. 828.

Embrey v. Owen.

The law is stated in *Embrey v. Owen*¹ to be that flowing water is *publici juris* in this sense only—that all may use it reasonably who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession; and that during the time of his possession only. The right to have a stream of water flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; this is not an absolute and exclusive right to the flow of *all* the water; it is subject to the right of other riparian proprietors to a reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorised use of this common benefit that any action will lie.²

Lord Cairns, C., in *Swindon Waterworks Co. v. Wilts & Berks Canal Navigation Co.*

The general type of these uses is specified by Lord Cairns, C., in *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.*:³

“Undoubtedly the lower riparian proprietor is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But, farther, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purposes of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water.”

The Irish Court of Appeal who had permitted a railway company whose line crossed a stream to take water from it and carry the water along their line to a tank for the use of their locomotive engines along the whole of their railway, was reversed by the House of Lords in *McCartney v. Londonderry & Lough Swilly Ry. Co.*⁴ Lord Macnaghten said⁵ the case was entirely covered by the *Swindon case*. “There Lord Cairns, C., gave a judgment as to the rights of riparian owners so complete and exhaustive that I venture to say no case has since come before the Courts, not excepting the case of *Kensit v. G. E. Ry. Co.*, which might not have been disposed of by the application of one or two

¹ 6 Ex. 353; *Withers v. Purchase*, 60 L. T. 819.

² *Sampson v. Hoddinott*, 1 C. B. N. S. 590. As to diverting a watercourse, see *Gilson v. Delaware and Hudson Canal Co.*, 36 Am. St. R. 802, and the exhaustive note on “Proximate and Remote Cause,” 807-861.

³ L. R. 7 H. L. 704; *Bonner v. G. W. Ry. Co.*, 24 Ch. D. 1.

⁴ (1904) A. C. 301. ⁵ L. C. 308.

sentences taken from it, and that perhaps without any great loss to the general stock of legal knowledge."

In this connection may be noted an often-cited passage from the judgment of Lord Kingsdown in *Miner v. Gilmour*.¹ "By the general law applicable to running streams every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

Lord Kingsdown in *Miner v. Gilmour*.

A distinction is here drawn between—

- (1) Ordinary user to which water may be applied irrespective of any question of subtracting from lower proprietors;² and
- (2) Extraordinary user to which water may be applied subject to its not being subtracted from the lower proprietors; and this is settled law.

Distinction between ordinary and extraordinary user.

In *Stockport Waterworks Co. v. Potter*,³ the water of the River Mersey was alleged to be abstracted for the use of the inhabitants of Stockport for domestic purposes, and the complaint was that the defendants had fouled it. The Court decided that a riparian proprietor could not grant his water rights apart from his estate. This was distinguished in *Nuttall v. Bracewell*⁴ where two adjoining riparian proprietors agreed to divert a stream so that it should run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before. "What is done by the two proprietors may be supposed to be a more convenient way of making use of the flow of water while it in no way diminishes or affects the rights of the other proprietors."⁵

Stockdale Waterworks Co. v. Potter

Nuttall v. Bracewell

Holker v. Porritt,⁶ was also distinguished from *Stockport Waterworks v. Potter*⁷ because that was a diversion of water made from a stream by a person who had no power to make it; not a taking by a riparian proprietor out of a stream for his own purposes, but the making of a new stream, and carrying away the water in immense quantities for consumption elsewhere. *Ormerod & Todmorden Mill Co.*⁸ is indis-

Holker v. Porritt

Ormerod v. Todmorden Mill Co.

¹ 12 Moo. P. C. C. 156; *Baily & Co. v. Clark, Son & Morland* (1902), 1 Ch. 649, 663; *Duke of Buccleuch v. Cowan*, 5 Macph. 214; *Commissioners of French Hoek v. Hugo*, 10 App. Cas. 336; *North Shore Ry. Co. v. Pion*, 14 App. Cas. 612.

² See *Pennington v. Brinsop Hall Co.*, 5 Ch. D., per Fry, J., 772: "The pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage." Increased fouling of a stream already made foul is not permitted. *M'Gavin v. M'Intyre*, 17 Rettie 818; or, in the words of Lord Watson in the same case in the House of Lords, (1893) A. C. 277: "A proprietor who has prescribed a right to pollute cannot in my opinion use even his common law rights in such a way as to add to pollution."

³ 3 H. & C. 300.

⁴ L. R. 2 Ex. 1.

⁵ L. R. 2 Ex. 14.

⁶ L. R. 8 Ex. 107.

⁷ 3 H. & C. 300.

⁸ 11 Q. B. D. 155. See *Kenait v. G. E. Ry. Co.*, 27 Ch. D. 122, where a lower proprietor was held not entitled to recover against the licensee of a higher proprietor not doing injury. Cp. D. 43, 21, *De Rivis*.

tinguishable. There the Court of Appeal adopted the view taken by Pollock, C.B., and Channell, B., and approved by Wilde, B., that the grant of a right to flowing water by a riparian owner is valid only against himself, and cannot confer rights against others.

In the passage just cited¹ from *Miner v. Gilmour*² Lord Kingsdown draws a distinction between—

- (1) Ordinary user to which water may be applied irrespective of any question of subtracting from lower proprietors ; and,
- (2) Extraordinary user to which water may be applied subject to its not being subtracted from lower proprietors.

Ordinary and extraordinary uses of water.

The inquiry what are ordinary and what extraordinary uses of water in streams depends upon custom and local circumstances ; and the law does not lay down any fixed rule. Reasonable use is not a question of law, but of fact, to be determined by the jury or Court from all the circumstances of the case ; yet, like any other finding of fact, it is subject to review, and will be set aside if against the evidence, or not supported by it.

Remarks by Redfield, C.J., on the considerations applicable.

Some remarks of Redfield, C.J.,³ are valuable, as giving an indication of the considerations most generally applicable : " In regard to many uses of the water in streams, it has been so long settled by common consent, or is so obvious in itself, that it is determinable as matter of law. Such are the uses for irrigation, for propelling machinery, and for watering cattle, and some others. And in regard to some *débris* or waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and, in some instances, the indispensable necessity would seem sufficiently to decide such cases. Among these may be named the infusion of soap-dyes and other materials used in manufacturing, into the streams by which the machinery is propelled. The deposit of sawdust to some extent is nearly indispensable in the running of saw-mills,⁴ and most other machinery used in the manufacture of wood and propelled by water-power. The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below." If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit which might be of no account in some streams might seriously affect the usefulness of others. So, too, a kind of deposit which would affect one stream seriously would be of little importance in another."⁵

Subterranean streams flowing in defined channels.

The cases we have hitherto considered have had reference to natural streams on the surface flowing in defined channels. It is manifest that besides these there may be subterranean streams running in defined channels. Indeed, they were a very frequent feature in

¹ *Ante*, 465.

² 12 Moo. P. C. C. 156.

³ *Snow v. Parsons*, 28 Vt. 461, cited Gould, *Law of Waters*, § 220, where the United States authorities on this and the kindred subjects are exhaustively considered ; *Cansfield v. Andrews*, 41 Am. R. 828.

⁴ As to this, see a most valuable judgment, *Red River Roller Mills v. Wright*, 44 Am. R. 194.

⁵ In *Blair v. Deakin*, 57 L. T. 522, Kay, J., held that a lower proprietor is entitled to pure water ; therefore, if one higher proprietor discharges a harmful chemical into the stream, and another does the same, and the conjunction produces contamination, he is entitled to an injunction against both. Cp. *Thorpe v. Brumby*, L. R. 8 Ch., per James, L.J., 656, and refer to *Sadler v. G. W. Ry. Co.* (1896), A. C. 450.

ancient Greece.¹ The law with regard to them is laid down by Pollock, C.B., in *Dickinson v. Grand Junction Canal Co.*:² "If the course of a subterranean stream were well known, as is the case with many which sink under ground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." This statement is approved in the House of Lords in *Chasemore v. Richards*,³ where also Lord Wensleydale says:⁴ "The right to a natural stream flowing in a definite channel is not confined to streams on the surface, but the right to an underground stream flowing in a known and definite channel is equally a right *ex natura*, and an incident to the land itself as a beneficial adjunct to it, as was determined in the case of *Wood v. Waud*."⁵

To the same effect is *Collins v. Chartiers Valley Gas Co.*:⁶ "The distinction between rights in surface and in subterranean streams is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location, and course."

This follows an earlier case⁷ in the same Court laying down that a man may not divert to the hurt of a lower proprietor "defined water-courses" which are distinguished from the hidden streams, of which the owner of the soil through which they pass can have no knowledge, until they have been discovered by excavations. Farwell, J., interpreted the authorities in the same way in *Bradford Corporation v. Ferrand*⁸ adopting the view of the Irish Court of Appeal in *Ewart v. Belfast Poor Law Guardians*⁹ that it would be against natural justice to punish him in unlimited damages for digging in his land, if perhaps his excavation came upon some hidden and unknown stream and simultaneously the water supply of some lower proprietor were diminished.¹⁰

(b) The rights with regard to artificial streams differ considerably from those which belong to natural streams. In the latter case, each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course. In the former, any right to the flow of water must rest on some grant, either proved or presumed,

¹ Grote, History of Greece (2nd ed.), vol. ii. 292, and note; Abbott, History of Greece, vol. i. ch. 1; *Dudden v. Guardians of Clutton Union*, 1 H. & N., per Pollock, C.B., 630: "If the channel or course under ground is known, as in the case of the River Mole, it cannot be interfered with." This is distinguished by Farwell, J., in *Bradford Corporation v. Ferrand* (1902), 2 Ch. 665: "In cases like that of the River Mole, where a river disappears into the ground, and what is apparently the same river reappears on a lower ground. In such cases there is a terminus *a quo* and a terminus *ad quem*, and the owners of land between the two and their riparian neighbours can fairly be presumed to know of the existence and course of the stream"; and then only is there a right to a stream of subterranean water.

² 7 Ex. 300, 301; *Cross v. Kitts*, 58 Am. R. 558.

³ 7 H. L. C., per Lord Chelmsford, 374.

⁴ L.c. 384.

⁵ 3 Ex. 748.

⁶ 131 Pa. St. 143, 17 Am. St. R. 791. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, has a note referring to cases *contra*.

⁷ *Wheatley v. Baugh*, 25 Pa. St. 528.

⁸ (1902) 2 Ch. 655.

⁹ (1881) 9 L. R. Ir. 172, followed in 1886 *Black v. Ballymena Township Commissioners*, 17 L. R. Ir. 459.

¹⁰ The Civil Law introduced the question of intention, D. 39, 3, 1, § 12. *Denique Marcellus scribit cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi; nec de dolo actionem. Et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem id fecit.* But this doctrine of intention has no place in the law of England: *Mayor, &c. of Bradford v. Pickles* (1895), A. C., per Lord Watson, 597.

Artificial water-course is the property of him who causes it to flow.

from or with the owners of the lands from which the water is artificially brought.² The water in an artificial stream, flowing in the land of the proprietor by whom it is caused to flow, is his property, and not subject to any rights of others. If a stream, so artificially constructed, is made to flow on a neighbour's land without his consent, an actionable wrong is committed. If there is a grant by the neighbour, the rights and liabilities of the persons concerned are regulated by it. Uninterrupted user of a neighbour's land, to discharge water on for a period of twenty years, is evidence of an easement; not that the land so sending water is bound to send it,³ but only that the land on which it is discharged is bound to receive it. Further, what was originally an artificial stream may become subject to the laws relating to natural streams, when it is shown that the person by whom it was made either intended to construct a permanent stream, or subsequently abandoned control over it.³

The considerations to be borne in mind in determining the rights attaching to artificial streams are "first, the character of the water-course, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created; and, thirdly, the mode in which it has been in fact used and enjoyed;"⁴ and these may culminate in a conclusion that what was originally an artificial stream and possibly private property may by user have become indistinguishable from a natural stream and clothed with all the legal incidents attaching.⁵

Artificial streams also subterranean.

The fact that artificial streams are also subterranean can work no difference. We have seen already⁶ that a natural subterranean stream flowing in a known and defined channel is subject to the same right as a natural stream flowing on the surface in a known and defined channel. Like a similar stream on the surface, though it may become subject to the laws governing natural streams,⁷ the presumption is that it is the private property of its constructor or maintainer, and that neighbouring proprietors have no rights.⁸ Until rights inconsistent with the liabilities thus imposed are acquired in it, water brought on land is subject to the rules of law developed by *Rylands v. Fletcher*,⁹ *Nichols v. Marsland*,¹⁰ *Carstairs v. Taylor*,¹¹ and the rest.

II. Where water runs by or through land, not in any definite channel.

(1) As to surface water. *Rawstron v. Taylor*.

II. What is the position of the owners of land by or through which water runs, not in any defined channel.

This we shall consider with reference (1) to surface water and (2) to subterranean water.

First, as to surface water.

The leading cases are *Rawstron v. Taylor*¹² and *Broadbent v. Ramsbotham*.¹ In the former, plaintiff brought his action to recover damages

¹ *Rameshuy Pershad Narain Singh v. Koonj Behari Pattuk*, 4 App. Cas. 121; *Kensit v. G. E. Ry. Co.*, 27 Ch. D. 122.

² *Mason v. Shrewsbury and Hereford Ry. Co.*, L. R. 6 Q. B. 578.

³ *Gaved v. Martyn* (1865), 19 C. B. N. S. 732. *Arkwright v. Gell*, 5 M. & W. 203; *Wood v. Waud*, 3 Ex. 748; *Gretnex v. Hayward*, 8 Ex. 291; *Sutcliffe v. Booth*, 32 L. J. Q. B. 136. See *Roberts v. Richards*, 50 L. J. Ch. 297; 51 L. J. Ch. 944.

⁴ *Baily & Co. v. Clark, Son & Morland* (1902), 1 Ch., per Stirling, L.J., 608.

⁵ *L.c.*, per Cozens Hardy, L.J., 672.

⁶ *Ante*, 466.

⁷ *Holker v. Porritt*, L. R. 8 Ex., per Kelly, C.B., 114.

⁸ *Gaved v. Martyn*, 19 C. B. N. S. 732; *Arkwright v. Gell*, 5 M. & W. 203.

⁹ L. R. 3 H. L. 330.

¹⁰ 2 Ex. D. 1.

¹¹ L. R. 6 Ex. 217.

¹² (1850) 11 Ex. 369. See Rankine, *Land-Ownership in Scotland*, 3rd ed. 502.

¹³ 11 Ex. 602. "I may add that the report [25 L. J. Ex. 115] is more correct than

for the injury to his mills caused by the diminished supply of water brought to them in consequence of the alleged unlawful acts of the defendant. In giving judgment for the defendant negating the right of action, Parke, B., said :¹ " This is the case of common surface water rising out of springy or hoggy ground, and flowing in no definite channel, though contributing to the supply of the plaintiff's mill. This water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases. The same observations apply to the water rising at the point K. This water has no defined course, and the supply is not constant, therefore the plaintiff is not entitled to it."

In the latter case, Alderson, B., said :² " The right to the natural flow of the water in Longwood Brook undoubtedly belongs to the plaintiff ; but we think that this right cannot extend further than a right to the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook ; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel. In this case a basin is formed in his land, which belongs to him, and the water from the heavens lodges there. There is here no watercourse at all. If this water exceeds a certain depth it escapes at the lowest point, and squanders itself (so to speak) over the adjoining surface. The owner of the soil has clearly a right to drain this shallow pond, and to get rid of the inconvenience at his own pleasure."

Broadbent v. Hamsbotham ; judgment of Alderson, B.

It is, then, clear that the owner of land on the surface of which water comes not in a defined stream, is entitled to appropriate it, and prevent any portion reaching any adjoining lands. The rights are varied when we come to consider the position of a landowner, anxious to get rid of the water on his land. He has an unqualified right to allow his surface water *naturally* to flow on his neighbour's land ;³ and he may further get rid of it in the best way he can ; but in relieving himself he must respect the rights of his neighbour, and cannot make his estate more valuable by an act which unnecessarily renders his neighbour's less valuable.⁴ In the civil law a distinction was drawn. If a man, for the purpose of cultivating the soil, does some work with the plough by which water was brought on the premises of his neighbour, no action lies, provided that the work so done is necessary for the purposes of raising crops ; if, however, the work is designed to improve the ground, an action lies. Again, *ditches* made to drain the ground, though the drainage is for agricultural purposes, are not permitted to be made for the purpose of conducting water into the land of a neighbour, because

Conclusions.

that in 11 Ex., which attributes to me too limited a view of the decision in *Dickinson v. The Grand Junction Canal Co.*, per Lord Wensleydale, *Chasemore v. Richards*, 7 H. L. C. 382. See *Ennor v. Barwell*, 2 Giff. 410 ; 1 De G. F. & J. 529.

¹ 11 Ex. 382.

² 11 Ex. 615.

³ *Hurdman v. N. E. Ry. Co.*, 3 C. P. D. 168.

⁴ *Sampson v. Hoddinott*, 1 C. B. N. S. 590 ; *Livingston v. McDonald*, 21 Iowa 160 ; *Boynston v. Longley*, 3 Am. St. R. 781. Cp. Code Civil art. 640. D. 39, 3, 1, § 10.

a man must not improve his premises in such a way as to injure his neighbour.¹

French law.

This distinction is found also in the French Code Civil: under which the tribunals are directed to decide in cases where a claim to make drains is made in such a way as to *reconcile the respect due to property with the interests of agriculture*² (*doivent concilier l'intérêt de l'agriculture avec le respect dû à la propriété*). This, Duranton³ interprets to mean that a landowner cannot make on his land any works which would change the natural passage of water upon the inferior estate, either by collecting it on a single point and giving it thereby a more rapid current, and making it more apt to carry sand, earth, or gravel upon the land; or by directing upon a point on the same land a much greater volume of water than it would have received without such works. The owner may make any work upon his land necessary or simply useful for the cultivation of it, such as furrows in a planted field, even though a storage or a diversion of water is an incidental result of his act. He may also, in planting vines or forming a meadow, make ditches for the irrigation of the meadow, or for the purpose of rendering his vines more healthy and vigorous.

English law as stated by Cotton, L.J., in *Hurdman v. N. E. Ry. Co.*

The effect of this in English law would be to leave to the jury, in any doubtful case, whether the use of land were the natural use for purposes of agriculture, or to improve the estate. And this appears to be the law, as stated by Cotton, L.J., in *Hurdman v. N. E. Ry. Co.*:⁴ "If any one, by artificial erection on his own land, causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at suit of him who is so injured; and this view agrees with the opinion expressed by the Master of the Rolls in the case of *Broder v. Saillard*."⁵

Exception in *Nield v. L. & N. W. Ry. Co.*

This must be taken subject to the exception in *Nield v. L. & N. W. Ry. Co.*,⁶ that the "flood is a common enemy, against which every man has a right to defend himself. And it would be most mischievous if the law were otherwise, for a man must then stand by and see his property destroyed out of fear lest some neighbour might say, 'You have caused me an injury.' The law allows what I may term a kind of reasonable selfishness in such matters; it says, 'Let every one look out for himself, and protect his own interest'; and he who puts up a harricade against a flood is entitled to say to his neighbour who complains of it, 'Why did not you do the same?' I think what is said in *Menzies v. Earl of Breadalbane*⁷ is an authority for this, and the rule so laid down is quite consistent with what one would understand to be the natural rule."⁸

Distinction.

The distinction, then, is between water coming on land in the normal way and water coming on abnormally. The former is an incident to property from which a man may not relieve himself at the expense of

¹ *De eo opere, quod agri colendi causa aratro factum sit, Quintus Mucius ait, non competere hanc actionem. Trebatius autem, non quod agri, sed quod frumenti duntaxat querendi causa aratro factum sit, solum excepit. Sed et fossas agrorum siccaudorum causa factas Mucius ad fundi colendi causam fieri; non tamen oportere corrigendas aque causa fieri. D. 39, 3, 1, §§ 3-4, *Martin v. Jeff*, 12 La. Rep. 501.*

² Art. 645.

³ Duranton, Cours de droit Français, vol. iii. Nos. 164, 165.

⁴ 3 C. P. D. 173. See *Bagnall v. L. & N. W. Ry. Co.*, 7 H. & N. 423; affd 1. H. & C. 544.

⁵ 2 Ch. D. 700.

⁶ L. R. 10 Ex. 4.

⁷ 3 Bligh (N. S.) 414. *Vinnicombe v. Macgregor*, 29 V. L. R. 32. *Solicitor-General v. Smith*, 14 N. Z. L. R. 681; *Inhabitants of the Mount Hutt Road District v. Dent*, 14 N. Z. L. R. 113.

⁸ L. R. 10 Ex. per Bramwell, B., 7.

his neighbour; the latter is a common enemy, against the advent of which each may take precautionary measures without regarding his neighbour; though when the evil has once befallen him, he may not shift it from his own shoulders to those of his neighbours; he may protect his land, but may not relieve his land from actual injury at the expense of his neighbour.¹

Secondly, as to subterranean water.²

In *Acton v. Blundell*³ the plaintiff's claim against the defendant was for subtracting water from plaintiff's well by carrying on mining operations on defendant's own land. The well had not been made twenty years. The Exchequer Chamber held that there was no right of action, yet intimated "no opinion whatever as to what might be the rule of law if there had been an uninterrupted user of the right for more than the last twenty years."

*Chasemore v. Richards*⁴ raised this point. The plaintiff was the occupier of an ancient mill who had himself, or by his predecessor in title, for more than sixty years before action enjoyed as of right the flow of a river for the purpose of working the mill. The water was supplied by the rainfall of a district many thousands of acres in extent, which percolated through the strata to the river. The defendant represented a local board, which, for the purpose of supplying its district with water, sank a well and pumped up large quantities of water, thereby intercepting an underground supply, not running in any defined channel, which would otherwise have found its way into the river and so to the plaintiff's mill.

Wightman, J., delivering the opinion of the judges, said: "It is impossible to reconcile such a right [as that claimed by the plaintiff] with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the plaintiff would interfere with, if not prevent, the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sank a well upon his own land, and the amount of percolating water which found a way into it had no sensible effect upon the quantity of water in the river which ran to the plaintiff's mill, no action would be maintainable; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water by the united effect of all the wells as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any one of them? and, if any, which? for it is clear that no action could be maintained against them jointly." "Such a right as that claimed by the plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable."⁵

The House of Lords coincided, though Lord Wensleydale⁶ "felt very great difficulty in coming to a conclusion" satisfactory to his mind. The question in this case seemed to resolve itself into an inquiry "whether the defendant exercised his right of enjoying the sub-

¹ *Whalley v. Lancs. & Y. Ry. Co.*, 13 Q. B. D. 131.

² Rankin, *Land-Ownership in Scotland*, 3rd ed. 455.

³ 12 M. & W. 324; *Wheatley v. Brugh*, 25 Pa. St. 528, where the French writers are referred to. See *Law Mag. (N. S.)* (1844), vol. i. 187.

⁴ 7 H. L. C. 349; affirming the Ex. Ch. 2 H. & N. 168, giving judgment without argument on the authority of *Broadbent v. Rumsbotham*, 11 Ex. 602.

⁵ 7 H. L. C. 370-1.

⁶ L. C. 380.

(2) As to subterranean water. *Acton v. Blundell*.

Chasemore v. Richards.

Opinion of the judges delivered to the House of Lords by Wightman, J.

Lord Wensleydale's difficulty.

terraneous waters in a reasonable manner." "Had he," says Lord Wensleydale, "made the well and used the steam-engines for the supply of water for the use of his own property and those living on it, there could have been no question. If the number of houses upon it had increased to any extent, and the quantity of water for the families dwelling on the property had been proportionately augmented, there could have been no just grounds of complaint. But I doubt very greatly the legality of the defendant's acts in abstracting water for the use of a large district in the neighbourhood, unconnected with his own estate for the use of those who would have no right to take it directly themselves, and to the injury of those neighbouring proprietors who have an equal right with themselves."¹

Effect of the decision of the House of Lords.

The House of Lords were unanimous in holding that one proprietor could not claim any right to the flow of subterranean water, unless flowing in a defined current, as against another proprietor, even though there may have been an actual taking of water flowing in that way during a period that would have conferred prescriptive rights had it been possible for them to be acquired. The doubt of Lord Wensleydale was whether one proprietor could drain the subterranean waters of a district, not for his own use merely, but to supply persons who had no rights whatever in or about the lands whence the water was collected, being neither landowners, nor residents, nor interested in the district, from which the supply was drawn. As this doubt was not shared by the other law Lords, the law may be considered as settled—that in no way whatever can a title be acquired to water flowing under ground in no defined channel, so as to impose an obligation on proprietors in their methods of draining and the use of their land; and of this view Farwell, J.'s, judgment in *Bradford Corporation v. Ferrand* is no more than the natural outcome.²

Limitation to the right to percolating water: *Grand Junction Canal Co. v. Shugar*.

*Grand Junction Canal Co. v. Shugar*³ has sometimes been considered to import a limitation on this principle. A local board, by means of a drain, intercepted water that the canal company had been used to draw from a pond. The local board asserted their right to intercept subterranean springs, and justified what they had done on the ground that the diminution of the plaintiff's supply of water was caused as a natural consequence of their assertion of their legal right. This view was adopted by the Master of the Rolls; but his judgment was overruled by the Lord Chancellor (Hatherley), holding that *Chasemore v. Richards*⁴ had no bearing at all on what might be done with water going in a defined channel, and that if underground water could not be collected without touching water in a defined channel it could not be got at all. "You are not, by your operations or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbours also, who have a clear right to use it, and have it come to them unimpaired in quality and undiminished in quantity."⁵

Corporation of Bradford v. Pickles.

North, J., however, in *Corporation of Bradford v. Pickles*,⁶ explained this as a case "in which subterranean water had passed into a defined channel, from which it was subsequently abstracted," and

¹ 7 H. L. C. 388.

² (1902) 2 Ch. 655.

³ L. R. 6 Ch. 483, distinguished in *English v. Metropolitan Water Board*, (1907) 1 K. B. 588.

⁴ 7 H. L. C. 349.

⁵ L. R. 6 Ch. 488.

⁶ (1894) 3 Ch. 70. See *Jordeson v. Sutton, & Gas Co.*, (1890) 2 Ch., per Williams, L.J., 251.

in the construction of a section of a private Act of Parliament he enjoined a proprietor from so digging on his land as to carry away water which would else have flowed into a trough in connection with the plaintiff's water supply. The water intercepted did not flow in a defined stream. The Court of Appeal reversed North, J.'s judgment, and the House of Lords¹ affirmed the reversal, holding that the section of the private Act contemplated that persons other than the company might divert the water, and that the acts against which the section was directed were "illegal diversion, alteration, or appropriation of the said waters." "No use of property which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious."²

A corollary to the position that underground water not running in a defined stream is not the subject of legal rights is that a man may drain his land, even though in doing so he incidentally subtracts the moisture from the strata under his neighbour's; and this was held in *Popplewell v. Hodgkinson*.³ This decision was held not applicable in *Jordeson v. Sutton, &c. Gas Co.*⁴ by the majority of the Court because what was subtracted was wet sand or running silt. Williams, L.J., differed on this point; his view seems to have been that if the defendants could not drain their land without pumping up sand with the water, they committed no actionable wrong in doing so. Any other principle would seem to whittle away the landowner's right to drain—if he may only draw off clean water and not muddied water. In the practically simultaneous case of *Trinidad Asphalt Co. v. Ambard*⁵ the decision was that "asphaltum is a mineral—not water."

Land may be drained even though moisture is drawn from neighbour's strata. Distinction drawn in *Jordeson's case*.

In *M'Nab v. Robertson*,⁷ a case of the construction of a lease, Lord Watson says the word "stream" in its primary and natural sense, "denotes a body of water having, as such body, a continuous flow in one direction. It is frequently used to signify running water at places where its flow is rapid, as distinguished from its sluggish current in other places. I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface; but, in my opinion water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream. And I may add that the insertion of a common rubble or other agricultural drain in these strata, whilst it tends to accelerate percolation, does not constitute a stream, as I understand that expression."

M'Nab v. Robertson.

II. WATER BROUGHT UPON LAND.

The principle of liability involved in bringing water on land applies equally to every material which, being brought or stored on land, is

Principle involved not confined to water.

¹ (1895) 1 Ch. 145.

² *Mayor, &c. of Bradford v. Pickles*, (1895) A. C. 587. *Salt Union v. Brunner Mond* (1906), 2 K. B. 822.

³ L. C., per Lord Watson, 598.

⁴ L. R. 4 Ex. 248.

⁵ (1899) 2 Ch. 217. Lindley, M.P., 239, questions the authority of *Popplewell v. Hodgkinson*. Any such principle as Lindley, M.P., seems to indicate would be very difficult to harmonise with the principle established by the House of Lords in *Wilson v. Waddell*, 2 App. Cas. 95.

⁶ (1899) A. C. 504.

⁷ (1897) A. C. 120.

likely to be dangerous or mischievous ; and is thus very much wider than a principle applicable to the case of water alone.

The inquiry whether the duty is absolute or merely to use reasonable precautions.

The duty of a man, to keep in what he has brought upon land and stores there, so that it may not escape and damage his neighbour's, has been admitted on all hands, both here and in America. Whether this duty is an absolute duty, or no more than a duty to take all reasonable and proper precautions, has been the subject of very considerable controversy.

The first view is that the person who brings anything dangerous on his land and fails to keep it in, is responsible for all the natural consequences of its escape. The second limits his responsibility to the case of negligence, and exonerates him from the consequences of an escape arising from a defect not to be detected by ordinary prudence and skill.

Reasoning in support of a duty merely to use reasonable precautions.

The rule expressing this second view is that the plaintiff must come prepared with evidence to show either that the defendant's *intention* is unlawful, or that he is in *fault* ; for, if the injury is unavoidable and the conduct of the defendant is free from blame, he will not be held liable.¹ This view has been supported by reasoning drawn from the nature of civil society, in which a principle of cession of natural rights, and compensation for their surrender, runs through the whole of the legal system of civilised States. I may not place or keep a nuisance upon my land to the damage of my neighbour, and I have my compensation for the surrender of this right to use my own as I will, by the similar restriction imposed upon my neighbour for my benefit. I hold my property subject to the risk that unavoidably or accidentally it may be injured by those who live near me ; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the correlative risk of being accidentally injured in my person by them without fault on their part.

Not adopted by the law of England.

This train of reasoning has not been accepted in the law of England, which draws a distinction between those cases where injury is done to personal property, or even to the person, by trespass, or constructive injuries ; and those cases where injury results from the collecting anything on land likely to do mischief if it escapes, and which does escape, even though without negligence.

It is agreed on all hands that traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk, and Blackburn, J.,² further suggests that "all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the same principle—viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself."

The law discussed and settled in *Fletcher v. Rylands*.

What the duty of a man is, who brings anything on his land, was fully discussed and finally settled in *Fletcher v. Rylands*.³ The plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on defendant's lands by defendant's order. In the House of Lords, Lord Cairns, C., adopted Blackburn, J.'s, language : "We think that the true rule of law is, that the person who, for his own purposes, brings on his land

¹ *Brown v. Kendall*, 60 Mass. 292 ; *Loose v. Buchanan*, 51 N. Y. 476, followed and the grounds of it amplified in *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 Am. St. R. 475. *Fletcher v. Rylands* is criticised in *Marshall v. Welwood*, 38 N. J. L. 339.

² Per Blackburn, J., *Fletcher v. Rylands*, L. R. 1 Ex. 287.

³ 3 H. & C. 774 ; L. R. 1 Ex. 265 ; L. R. 3 H. L. 330.

and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major* or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir,¹ or whose cellar is invaded by the filth of his neighbour's privy,² or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works,³ is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there) harmless to others, so long as it is confined to his own property, but which he knows will be mischievous if it gets to his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law, whether the things so brought be heasts,⁴ or water,⁵ or filth,⁶ or stench.⁷ This then may be accepted as embodying the settled law.

Rule formulated by Blackburn, J., in the Exchequer Chamber adopted in the House of Lords.

In *National Telephone Co. v. Baker*,⁸ the principle of *Fletcher v. Rylands* was applied to the case of an electric current discharged into the earth. "I cannot see my way," says Kekewich, J.,⁹ "to hold that a man who has created, or if that be inaccurate, called into special existence an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage which that current does to his neighbour, as he would have been if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or control its direction or force; but when once it is established that the particular current is the creation of or owes its special existence

National Telephone Co. v. Baker.

¹ *Harrison v. G. N. Ry. Co.*, 3 H. & C. 231.

² *Tenant v. Goldwin*, 1 Salk. 21, 360, 2 Ld. Raym. 1089, 6 Mod. 311. In *Humphries v. Cousins*, 2 C. P. D. 239, a drain case, the defendant's duty was expressed to be—to keep the sewage which he was himself bound to receive from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel. Cp. *The Chandler Electric Co. v. Fuller*, 21 Can. S. C. R. 337.

³ *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642.

⁴ *May v. Burdett*, 9 Q. B. 101; *Cox v. Burbidge*, 13 C. B. N. S. 430; 1 Hale, History of the Pleas of the Crown, 430.

⁵ *Baird v. Williamson*, 15 C. B. N. S. 376; *Smith v. Kenrick*, 7 C. B. 515.

⁶ *Tenant v. Goldwin*, 1 Salk. 21, 360, 2 Ld. Raym. 1089, 6 Mod. 311.

⁷ *Bamford v. Turnley*, 3 B. & S. 83; *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608, 11 H. L. C. 642.

⁸ (1893) 2 Ch. 186. In *Eastern and South African Telegraph Co. v. Cape Town Tramways Co.* (1902), A. C. 381, 394, the Privy Council discussed the applicability of the doctrine of *Rylands v. Fletcher* to legal systems founded on the civil law. They criticised Kekewich, J., who "in *National Telephone Co. v. Baker* seems to have been inaccurately informed on this point; for as matter of fact not only is the principle of *Rylands v. Fletcher* fully accepted in Scotland, but it had formed part of the law of Scotland before *Rylands v. Fletcher* was decided, and *Rylands v. Fletcher* has been treated by the Scottish Courts as an authoritative exposition of law common to both countries." The Privy Council accordingly held that the principle involved is not inconsistent with the Roman law.

⁹ L.c. 201.

Rule limited
by four
exceptions:

I. Where
damage
arises from
the natural
user of land ;
II. Where
damage is
caused by the
default of the
sufferer ;
III. Where
damage is the
consequence
of *vis major* ;
IV. Where
the damage
is the result
of statutory
enactment.

I. Damage
arising from
the natural
user of land
Bamford v.
Turnley.
Wilson v.
Waddell.

Hurdman v.
N. E. Ry. Co.

West Cum-
berland Iron
and Steel Co.
v. Kenyon.

to the defendant, and is discharged by him, I hold that if it finds its way on to a neighbour's land, and there damages the neighbour, the latter has a cause of action."¹

This being the rule, it will be noted that its generality is limited by four exceptions—

I. Where the damage to the plaintiff arises from the natural user of land—a user, that is, for which it may in the ordinary manner of the enjoyment of land be used.

II. Where the damage to the plaintiff is caused by his own default.

III. Where the damage to the plaintiff is the consequence of *vis major* or the act of God.

IV. Where the damage is the consequence of accumulation for public purposes under the express authority of a statute.

These cases we shall now proceed to consider :

I. Where the damage to the plaintiff arises from the natural user of land.

The natural user of land is stated by Bramwell, B., in *Bamford v. Turnley*² to mean "those acts necessary for the common and ordinary use and occupation of lands and houses," and which may be done without subjecting those who do them to an action. For instance, in *Wilson v. Waddell*³ the House of Lords decided that "the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals;" and, by consequence, when the minerals are removed, he is not liable for the accelerated passage to his neighbour's land of water naturally coming to his own. The other side of the rule is exemplified by *Hurdman v. N. E. Ry. Co.*,⁴ where the surface of the defendant's land had been artificially raised by earth placed thereon, and in consequence, rain-water, falling on defendant's land, made its way through defendant's wall into the house of the plaintiff adjoining, and caused substantial damage. On demurrer this was held to constitute a good cause of action; since the heap on the defendant's land must be considered an artificial work; and the effect of this being to cause water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, rendered him liable. The point of the decision is that the act of the defendant in doing what was not an act in the course of the natural user of property, threw a greater burden on his neighbour than would naturally have fallen to him.

In *West Cumberland Iron and Steel Co. v. Kenyon*⁵ the dealing with

¹ In the United States in *Cumberland Telephone and Telegraph Co. v. United Electric Ry.*, 42 Fed. Rep. 273, it was held that a telephone company could not maintain an action against an electric railway company for injury sustained by the escape of electricity from the rails; and that the test was, whether the injurious company was making use of the best means then known to science in the lawful user of their own property. The principle of *Fletcher v. Rylands* was not accepted.

² 3 B. & S. 83 (at *Nisi Prius*, 2 F. & F. 231); overruling *Hole v. Barlow*, 4 C. B. N. S. 334. See *Curry v. Ledbitter*, 13 C. B. N. S. 470. *Post*, 486, 497.

³ 2 App. Cas., per Lord Blackburn, 99.

⁴ 3 C. P. D. 168. In *Barkley v. Wilcox*, 86 N. Y. 140, by the building of the defendant, water was prevented naturally flowing from the plaintiff's land, and flooded his cellar. Held, that "to adopt the principle that the law of nature must be observed in respect to surface drainage would, we think, place undue restriction upon industry and enterprise, and the control by an owner of his property." See *Preston v. Mercer*, Hard. 60, explained *Reynolds v. Clarke*, 2 Ld. Raym. 399.

⁵ 11 Ch. D. 782. The American and English cases on what is the natural and lawful use of land are collected in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, where it is held that one working a coal mine in the usual manner may discharge the

the water was exclusively on the defendant's land; when the water left the defendant's land it all naturally found its way down to the plaintiff's levels in the same way, at the same point, and in the same quantity as it would if uninterfered with by the defendant. That being so, the Court of Appeal held that the defendant had a right to say, "What is it to you what I have been doing on my own land? The same quantity of water leaves my land, and leaves my land through exactly the same aperture, and gets into your field in exactly the same way, as it did before."¹

The fact that in *West Cumberland Iron and Steel Co. v. Kenyon* the burthen on the neighbouring proprietor was not increased by the use made of the water by the defendant distinguishes this case from *Whalley v. Lancs. & Y. Ry. Co.*,² where through the defendants' act a greater amount of injury was done to the plaintiff than would have been done by the passage of water in its ordinary course. The total amount discharged was not greater, but the manner of its discharge was more burdensome; and the defendant had no right to impose this greater or different obligation on their neighbours. The circumstances of *Whalley's case* imposed a barrier to the passage of flood water, there being a statutory authorisation to construct an embankment which would have justified the defendants had the damage occurred through the penning up of waters by the embankment. But they were not content with the effects worked by the flood and the embankment; to protect their embankment from the pressure of the water, they cut trenches in it, by which the water flowed through and flooded the plaintiff's land. The defendants' liability was accordingly based on their aggravation, in an endeavour to lighten the burthen on their own property, of the consequences of the flood to their neighbour.

An additional factor, that of contamination, was introduced in *Ballard v. Tomlinson*.³ The defendant used a well on his land for the reception of sewage, whereby filth percolated through into a well of his neighbour's—the plaintiff's—on a lower level. The case appears exactly covered by *Tenant v. Goldwin*:⁴ "He whose dirt it is must keep it that it may not trespass"; and was decided by Cotton and Lindley, L.JJ., on grounds applicable to that case. Brett, M.R., however, was of opinion that the shaft of the well was an "artificial thing," and "that the defendants therefore collected a quantity of sewage into an artificial reservoir."⁵

percolating water into a stream which naturally drains the land. This is not universally recognised in America; *Red River Roller Mills v. Wright*, 44 Am. R. 194; and is not the law in England. See *Aldred's case*, 9 Co. Rep. 59 a, where it is said that "if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a Glover sets up a lime-pit for calve-skins and sheep-skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged in Y. B. 13 Hen. VII. 26 b; and this stands with the rule of law and reason; *sc. Prohibetur ne quis faciat in suo quod nocere possit alieno: et sic utere tuo ut alienum non laedas*. Vide in the Book of Entries, tit. Nuisance, 406 h." *Jones v. Powell*, Palm. 536. See, too, *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161; L. R. 1 Ch. 349; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769. In *Crossley v. Lightowler*, L. R. 2 Ch. 478, the question of intention to abandon an easement was held a question of fact to be decided in each particular case.

¹ 11 Ch. D., per James, L.J., 787. Callis, 135, quotes an opinion of Brudnel, in 12 H. VIII., f. 3, "that if a man's ground be surrounded with waters he may make a trench in his own grounds to let the water run downwards, and to descend upon his neighbour's grounds, for water is an element descendible (*jure nature*)."

² 13 Q. B. D. 131.

³ 29 Ch. D. 115; *Kinnaird v. Standard Oil Co.*, 25 Am. St. R. 545.

⁴ 1 Salk. 21, 360, 2 Ld. Raym. 1089, 6 Mod. 311.

⁵ 29 Ch. D. 120.

Aqua currit et currere debet.

Whalley v. Lancs. & Y. Ry. Co.

Ballard v. Tomlinson.

Judgment of Brett, M.R.

Considered.

After the decision in *Rylands v. Fletcher*,¹ recognising the authority of *Tenant v. Goldwin*, whether the constructing a well were a natural or a non-natural user of land, in either case the fact of an escape of things brought on land, "whether the things so brought be beasts, or water, or filth, or stench,"² raises a legal obligation to compensate for the damage done by them; and the ownership of the percolating water is, in any event, immaterial; if, as is on authority undoubted, the plaintiff has a right to have his land and the enjoyment of it free from the defendant's filth; since, if the percolating water as befouled is the property of the defendant, he is bound to retain it. If it is not his property, he has, at any rate, no greater right to foul it and then to foist it on his neighbour than if it were his property. The right of action is therefore undoubted.

Digging well a non-essential circumstance in the case.

The digging of a well is not, then, an essential element in founding the action; it is but a circumstance in the development of the injurious agency. In *Hurdman v. N. E. Ry. Co.*,³ for instance, the placing of the heap was the cause of a greater flow of water to the plaintiff's property than would otherwise have gone there, and therefore actionable. In the present case the right of action is, not in respect of digging the well, but in respect of a particular user of it—for sewage. It is not increase of quantity, but difference in kind—filth, not water—that is brought on the plaintiff's property. There was an absolute duty to prevent filth brought on one's own land anyhow—whether by well or otherwise is not essential—flowing into the neighbour's land. That filth flowed by the well was an accident only—the essence of the wrong was the flowing at all—not affected by whether the having a well was a natural or non-natural user of the land.

Then, is a well an "artificial thing" so as not to admit of being used for any of the class of purposes, mentioned by Lord Cairns,⁴ "for which it might in the ordinary course of the enjoyment of land be used." If it be excluded, water naturally filtering into a well, and so percolating to a neighbour's property, would lay the foundation for an action by him; if it be not excluded, then no right of action could accrue. But it has been decided in *Chasemore v. Richards*⁵ that a landowner has a right to take subterranean water even to the detriment of his neighbour. Then may he not dig for it? In *Wilson v. Vaddell*,⁶ also in the House of Lords, it was decided that to dig for minerals is a natural use of land within Lord Cairns's exception; and it seems hard to draw a distinction between the consequences of digging for water to which a man has a right and digging for minerals to which he has a right; if the digging for minerals is a "natural purpose" in the ordinary course of the enjoyment of land, there is no reason apparent why digging for water should come under any other rule. In many country districts the possession of a well is essential to the development, or even to the user of property in any mode whatever; while digging minerals is merely a particular use of property, and, in an intelligible sense at least, not a natural use of it.⁷

¹ L. R. 3 H. L. 330.

² Per Blackburn, J., cited by Lord Cairns, C., *Rylands v. Fletcher*, L. R. 3 H. L. 330, 340.

³ 3 C. P. D. 168.

⁴ *Rylands v. Fletcher*, L. R. 3 H. L. 338.

⁵ 7 H. L. C. 349.

⁶ 2 App. Cas. 95.

⁷ For example:

"And that it was great pity, so it was,
This villainous saltpetre should be digg'd
Out of the bowels of the harmless earth,

What constitutes a natural use of land in law must be a matter to be determined in each case rather by what is customary and suited to the particular circumstances of place than by any certain rule.¹ "The opinion of the jury should be taken as to whether what was done by the defendants was done in the ordinary, reasonable, and proper mode of working the mine."² In *Crompton v. Lea*³ a demurrer to a bill averring that a mine which the defendants threatened to work could not be worked without letting in a river and flooding defendant's mine, and, through that, the plaintiff's, was overruled, because the right to work the mine was not an absolute right, but only a right to work the mine in an ordinary, reasonable, and proper way, which must be matter of evidence.

In the Scotch case of *Armistead v. Bowerman*⁴ a claim was made by the proprietor of a "fish hatchery" against the purchaser of timber higher up the stream for dragging his timber across the stream which fed the "fish hatchery," and thereby fouled and damaged it. The Court held that, apart from a right given in the grant to the pursuer restricting the removal of timber in the ordinary way of business, the pursuer had no right to recover, since the defendant was only performing an ordinary and legitimate operation in the ordinary and usual way.

In another Scotch case in the House of Lords, *Young v. Bankier Distillery Co.*⁵ water was pumped into a stream by an upper proprietor, thereby increasing its volume and impairing its purity, and, so far as contamination was concerned, to the detriment of a lower proprietor. The House of Lords, affirming the Court of Session and approving *Baird v. Williamson*,⁶ held the action of the upper proprietor to be unlawful. "The right of the upper heritor," says Lord Watson,⁷ "to send down, and the corresponding obligation of the lower heritor to receive natural water, whether flowing in a defined channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow whether above or below ground is due to gravitation, unless it has been unduly and unreasonably increased by operations which are *in æmulationem vicini*. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream. The law of Scotland upon this point is the same with that of England."⁸

II. Where the damage to the plaintiff is caused by his own default.

This is the ordinary case of contributory negligence. The proposition which the plaintiff has to prove in order to found a right of action is that damage is caused by the defendant's act; if it is caused by his own, he has not discharged the *onus* upon him.⁹

II. Damage caused by the plaintiff's default.

Which many a good tall fellow had destroy'd
So cowardly."—SHAKESPEARE, *Henry IV.* act i. sc. 3.

¹ *Turberville v. Stampe*, 1 *Ld. Raym.* 264, 1 *Salk.* 13; *Filliter v. Phippard*, 11 *Q. B.* 347.

² *Fletcher v. Smith*, *L. R.* 9 *Ex.* 67. See 2 *App. Cas.* 781, where the case, after the second trial ordered by the *Ex. Ch.*, was taken to the House of Lords.

³ *L. R.* 19 *Eq.* 115.

⁴ 15 *Rettie* 814.

⁵ (1893) *A. C.* 691.

⁶ 15 *C. B. N. S.* 376.

⁷ (1893) *A. C.* 696.

⁸ See *Blair v. Hunter, Finlay & Co.*, 9 *Macph.* 204.

⁹ *Wakelin v. L. & S. W. Ry. Co.*, 12 *App. Cas.* 41.

III. Damage
caused by
vis major.

III. Where the damage to the plaintiff is the consequence of *vis major*, or the act of God.

*Nichols v.
Marland.*

In *Rylands v. Fletcher*¹ the position of a landowner from whose land an injurious agency has been released by *vis major* was not determined, but it was rather suggested to be an exception to the universality of the rule there laid down. The point very shortly afterwards arose in *Nichols v. Marland*.² Defendant was the owner of a series of artificial ornamental lakes formed by damming up a natural stream into pools. In consequence of a most unusual fall of rain these lakes overflowed, and the water thus overflowing swept away county bridges lower down the stream. The jury found that there was no negligence, but that, had the flood been anticipated (which it could not reasonably have been), the result might have been prevented. On motion to enter the verdict for defendant, the Court of Exchequer made a rule absolute to that effect, which was sustained in the Court of Appeal, where the judgment was delivered by Mellish, L.J., who had been counsel in *Rylands v. Fletcher*.

Judgment of
Mellish, L.J.

The ordinary rule of law is that where a duty is raised by implication of law, and the person bound is unable to perform it, without default of his own, or by the act of God or the King's enemies, the law will excuse him; but where a person contracts for the performance of anything, he is bound, though incapacitated to perform it by accident or inevitable necessity.³ The duty to keep in water is a duty imposed by law, and not one created by contract, and the wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. "If," said Mellish, L.J., "the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands v. Fletcher*⁴ establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands v. Fletcher* in this, that it is not the act of the defendant in keeping this reservoir—an act in itself lawful—which alone leads to the escape of the water, and so renders wrongful that which but for such an escape would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping, without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water."

In the Court of Exchequer,⁵ Bramwell, B., drew a distinction

¹ L. R. 3 H. L. 330. There is a New South Wales case, *M'Mahon v. Commissioner for Railways*, 4 N. S. W. R. (Law) 170, on the liability for not providing sufficient means to carry off rain water which caused injury to goods deposited in a store.

² L. R. 10 Ex. 255, 2 Ex. D. 15.

⁴ L. R. 3 H. L. 330.

⁵ L. R. 10 Ex. 259, 260.

³ *Paradine v. Jane*, Ayleyn (K. B.) 26.

between agencies set in motion by *vis major* in cases of "the reasonable use of property in a way beneficial to the community," and in cases where a dangerous agency is kept for mere amusement. "Could it be said," he says, "that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbour's land and cause it to do damage; or a field of ripe wheat, which might be fired by lightning, and do mischief." And, on the other hand, "I am by no means sure that if a man kept a tiger, and lightning broke his chain and he got loose and did mischief, that the man who kept him would not be liable."

Distinction drawn by Bramwell, B., between beneficial user and user for purpose of mere amusement.

If the keeping of a tiger is unlawful this is clear. But though "a person who keeps such an animal is bound so to keep it that it shall do no damage," the keeping itself is nowhere declared to be unlawful. If not unlawful, how does it differ from the keeping of water penned up for ornament and amusement, the escape of which by the agency of *vis major* might sweep off a hamlet or devastate a county? while the utmost rage of a tiger thus loosened would be far less widely destructive.

Considered.

The keeping of water, as in *Nichols v. Marsland*, is not "a reasonable use of property in a way beneficial to the community" in any other sense than the conferring of pleasure makes it so: then how can it be entitled to the advantage of Bramwell, B.'s, exception in its favour to the exclusion of the tiger, the inspection of whom is a pleasure not different in nature from the inspection of the ornamental lakes?

Again, the storing of gunpowder under the regulations of an Act of Parliament is not unlawful. It may be "a reasonable use of property in a way beneficial to the community": for example, when it is kept for blasting in mining operations—a natural use of land; or it may be a dangerous agency kept for mere amusement, for making fireworks or for use in shooting. Can it be contended that the obligations imposed on the owner vary as his intention—maybe his secret intention—varies?

In *Chalmers v. Dixon*,² the Lord Justice-Clerk bases the decision in *Rylands v. Fletcher* on negligence: "I think that *culpa* does lie at the root of the matter. If a man puts upon his land a new combination of materials, which he knows, or ought to know, are of a dangerous nature, then either due care will prevent injury, in which case he is liable, if injury occurs, for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground." So limited, the act of the mischievous boy—an independent volition—is excluded; not so limited, it is difficult to see why the person, who brings the thing where it causes injury, escapes from liability for not keeping that on his land, which it was in his option not to have brought there at all, quite irrespectively of whether the immediate cause of the escape is the act of God or anything else which is incapable of forecast or control; but if not to take sufficient heed to the operation of the laws of nature is ground for an action when damage supervenes, a species of negligence must in all cases be found antecedently to the right arising.

Chalmers v. Dixon

*Box v. Jubb*³ countenances this view. By reason of the act of a

Box v. Jubb

¹ Crowder, J., *Besozzi v. Harr's*, 1 F. & F. 92; *Filburn v. People's Palace and Aquarium Co.*, 25 Q. B. D. 258.

² 3 Rettie, 461, 464. Holmes, *The Common Law*, 157, takes the same view.

³ 4 Ex. D. 76.

person above the defendants' land co-operating with the act of a person below the defendants' land, a reservoir on defendants' land overflowed and caused injury to a neighbouring proprietor. The Court of Exchequer held the defendants not liable; since the cause of the injury was *vis major*—"the unlawful act of a stranger"—which "the defendants could not possibly have been expected to anticipate," and "the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose." That being so, the obligation is not to keep what is brought on land at all hazards as has sometimes been stated; but to insure against the operation of natural laws causing injury in those cases in which negligence in the management of the injurious agency is not alleged; and in all cases to see that the dealings with the injurious agency are in all their stages free from negligence.

IV. Damage done under statutory authority.

IV. Where the damage is the consequence of an accumulation for public purposes under the express authority of a statute.

This principle has already been considered.¹ It is sufficient, therefore, here merely to reproduce the statement of it by Blackburn, J., in advising the House of Lords in *Hammersmith Ry. Co. v. Brand*:² "It is agreed on all hands that if the Legislature authorises the doing of an act (which if unauthorised would be a wrong and a cause of action) no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the Legislature has authorised, and consequently the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the Legislature has thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noisy traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit."

Water brought on premises by right paramount to that of the person injured by it.

We are now brought to the consideration of a class of cases that may be looked on as asserting a principle different from that in *Rylands v. Fletcher*, and not merely an exception to the universality of what was there laid down. *Rylands v. Fletcher* was the case of water brought on premises for the use of the person so bringing it, whence it escaped to other premises. In the cases we are now to consider, water is brought on premises by a right paramount to that of the person injured by it.

Carstairs v. Taylor.

*Carstairs v. Taylor*³ is the earliest of these. The plaintiffs were tenants of the defendant of the ground floor of a warehouse, the upper floors of which were occupied by the defendant. The water from the roof was collected by gutters into a box, from which it was discharged into the drains. A rat made a hole in the box, and water thereby entered the warehouse, and damaged plaintiff's goods. The box and gutters had been properly examined by the defendant, and there was no negligence. The case was argued both as a question of contract and of a duty at law. To the former view, it was answered that "one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently."⁴ To the latter, that "the accident was due to *vis major* as much as if

¹ *Ante*, 296.

² L. R. 4 H. L. 196. Cp. *Cattle v. Stockton Waterworks*, L. R. 10 Q. B. 453; *Dunn v. Birmingham Canal Co.*, L. R. 7 Q. B. 244; L. R. 8 Q. B. 42; *Madras Ry. Co. v. The Zamindar of Carvatenagarum*, L. R. 1 Ind. App. 364, 30 L. T. (N. S.) 770.

³ L. R. 6 Ex. 217.

⁴ L. R. 6 Ex., per Martin, B., 222.

a thief had broken the hole in attempting to enter the house, or a flash of lightning or a hurricane had caused the rent; "1 that " the roof was the common protection of both, and the collection of the water running from it was also for their joint benefit; " and that " the plaintiffs must be taken to have consented to this collection of the water, which was for their own benefit, and the defendant can only be liable if he was guilty of negligence."2 The decision of the principle involved in *Carstairs v. Taylor* was therefore somewhat obscured by the fact that the case could be explained on the ground taken by the Lord Chief Baron of *vis major*; and also because the apparatus for conducting the water was there as much for the benefit of the plaintiff as of the defendant.

In *Ross v. Fedden*³ both these elements were eliminated. Plaintiff occupied the ground floor of a house, of which the defendant occupied the second floor, where was a water-closet to which the defendant alone had access. The valve of the supply-pipe having got out of order, and the waste-pipe being stopped, an overflow was caused, which damaged the portion of the premises occupied by the plaintiff. There was no negligence. *Carstairs v. Taylor* was sought to be discriminated, because there was no *vis major* and no common interest. The Court of Queen's Bench, however, held that the plaintiff could not recover, and approved the reasoning of the county court judge,⁴ who said: "I think that in the words of Martin, B., in the case already referred to,⁵ 'one who takes a floor in a house must be held to take the premises as they are.' As far as he is concerned, I think the state of things then existing may be treated as the natural state of things and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water; I think he takes subject to the ordinary risks arising from the use of the rest of the house as it stands; and that one who merely continues to use the rest of the house as it stands, and in the ordinary manner, does not fall within the rule laid down in *Rylands v. Fletcher*,⁶ and in the absence of negligence is not liable for the consequences."

*Anderson v. Oppenheimer*⁷ was similar to *Carstairs v. Taylor* (which, however, was not cited in it), and was brought for breach of a covenant for quiet enjoyment. The Court of Appeal held that, the water being brought on premises for the common benefit of the tenants, no action

¹ Per Kelly, C.B., L. R. 6 Ex. 221.

² Per Bramwell, B., *l.c.* 222.

³ L. R. 7 Q. B. 661.

⁴ "The judgment is very well argued out, and I was prepared to agree with it as soon as I heard it read": per Blackburn, J., L. R. 7 Q. B. 665.

⁵ *Carstairs v. Taylor*, L. R. 6 Ex. 222. In *Humphries v. Cousins*, 2 C. P. D. 239, *Ross v. Fedden*, and *Carstairs v. Taylor*, are distinguished. Cp. *Weston v. Incorporation of Tailors of Potterrow*, 1 Dunlop, 1218, where the judgment of Lord Medwyn, 1223, should be looked at. Through defective plumbing work the stock in a shop was injured by an overflow of water from premises above; it having been clearly proved that the cause of the overflow was an insecurely closed pipe, the plumber was held liable, though four years had elapsed since the time of doing the work, for all expenses to which his employer had been put: *McIntyre v. Gallacher*, (1883) 11 Rettie 64.

⁶ L. R. 3 H. L. 330.

⁷ 5 Q. B. D. 602; *Harrison, Ainslie & Co. v. Muncaster*, (1851) 2 Q. B. 680, was an action for breach of a covenant of quiet enjoyment; the working of the plaintiff's mine being interrupted by a flow of water from another mine leased by the defendant, which was caused by those working the other mine having "pecked" the rock in the ordinary course of their working, and produced the inrush of water without negligence by striking on a "feeder," whose existence was unsuspected. The Court of Appeal held that this not having been directly caused, and not having been foreseen, or being an event that ought to have been foreseen at the time the covenant was entered into, was not a violation of the covenant.

Water supply
in houses.

lay. The principle we are now considering may therefore be regarded as exonerating from liability on the ground indicated by Blackburn, J., in *Fletcher v. Rylands*¹: that the injured person has placed himself in the position in which he sustains injury in such circumstances as show that he has taken the risk upon himself; either by partaking of a common benefit, subject to a common liability to damage as in *Carstairs v. Taylor*,² or by taking an interest with a liability to damage incident to it, as in *Ross v. Fedden*.³ In either case his position is determined by his contract. The same principle may be applied to the ordinary water supply to a house or row of houses. The water company supplies water under its statutory powers, and so is not liable for injury caused by the escape of water apart from negligence.⁴ Moreover, the occupier has no choice but to receive the water whether he likes it or not.⁵ The receiver's liability ought not therefore to be greater than the supplier's. The water supply system is constructed on the principle of communicating a common benefit, and thus liability in respect of the escape of water becomes dependent upon negligence and is not within the principle enunciated in *Fletcher v. Rylands*.

Damage from
rain water
pipes not
actionable
without
negligence.

Fletcher v. Rylands was invoked in *Gill v. Edouin*,⁶ where three properties had their rain water pipes discharge into a gully for the common use, but rain water from the defendant's premises escaped into the plaintiff's and caused damage. Wright, J., held that *Fletcher v. Rylands* did not apply for two reasons: first, that the defendant had done "no more than what was ordinary and reasonable in conducting the water from his roof to the gully," and, secondly, that "the position of the gully where it was, was for the common benefit of all parties concerned." The Court of Appeal held that as all the interests concerned must be taken to have agreed to the arrangement there must be negligence to raise liability. The same principle is illustrated by *Blake v. Woolf*.⁷ A tenant of the ground floor of premises whose landlord occupied the upper portion of the house, complained of a leakage from a cistern, on the fourth floor, which supplied water to the premises. The landlord instructed the plumber to put the cistern to rights. He was negligent and water continued to escape, and damaged the plaintiff's goods. The Court held that "the plaintiff, by taking these premises with water laid on to them and accepting his supply of water from the defendant's cistern must be taken to have assented to water being kept on the premises by the defendant." The test, says Wright, J., is: "was there negligence on the part of the defendant?" In *Hargroves, Aronson & Co. v. Hartopp*,⁸ the answer to this question was, Yes: and this differentiates the cases.

Blake v.
Woolf, water
escaping from
a cistern.

Water intro-
duced for the
benefit of one
proprietor is
an exception.

This immunity does not exist where water introduced for the benefit of one proprietor is the subject of the grant of rights to an adjoining proprietor. Unless the grant makes provision for damage being caused by overflow the common law duty to keep in the water remains. A man made a goit for his own purposes. By doing so he became under a duty to his neighbour to prevent the water from

¹ L. R. 1 Ex. 287.

² L. R. 6 Ex. 217.

³ L. R. 7 Q. B. 661; *Blake v. Land & House Property Corporation*, 3 Times L. R. 667; *Stevens v. Woodward*, 6 Q. B. D. 318; turns rather on scope of authority; *Raddeman v. Smith*, 5 Times L. R. 417. *Childs v. Lissaman*, 23 N. Z. L. R. 915; *Stevart v. Brookfield*, 35 Can. S. C. R. 494.

⁴ See *ante*, 286, 391.

⁵ *E.g.*, The Public Health (London) Act, 1891 (54 & 55 Vict. c. 70), ss. 37, 48.

⁶ 71 L. T. N. S. 762; 72 L. T. N. S. 579. 11 Times L. R. 378.

⁷ (1898) 2 Q. B. 426.

⁸ (1905) 1 K. B. 472.

it being a nuisance to him. Subsequently a grant was made of a right to the flow of the water in the goit. Yet this grant did not interfere with the duty of the maker of the grant to keep the shuttle in repair and so to prevent an overflow.¹

In Canada the rights of riparian owners have sometimes been in conflict with the claims of those engaged in the business of floating or driving timber down rivers—lumbermen. The industry dealing with floating timber is of national concern and has become the subject of legislative regulation.² In this aspect a distinction is drawn between floatable and navigable streams. Some floatable streams are not navigable.

Canadian case. Position of lumbermen.

The right to float timber down a non-navigable river is treated as a public easement; and the rights of the traders and the riparian owners are concurrent. "The degree of care, skill, and diligence required on the part of the log owner must necessarily depend upon the circumstances of each case. Facts which might constitute proper skill and diligence in the early stages of the settlement of the country, might easily assume the proportion of negligence when the country had become settled and the rivers had been crossed by numerous bridges. If the natural conformation of the river and lands through which it runs shows that there are narrow gorges or places where logs would be likely to jam," "a greater degree of care, skill and diligence is required of the owner of the logs at such special places than along the ordinary and broader reaches of the river."³

¹ *R. H. Buckley & Sons v. N. Buckley & Sons*, (1898) 2 Q. B. 608.

² *Dickie v. Campbell*, 34 Can. S. C. R. 205.

³ *Ward v. Township of Grenville*, 32 Can. S. C. R. 510, 528.

CHAPTER III.

FIRE.

Duty of
owner of land
to his
neighbours.

THE doctrine of the common law of the duty generally owed by the owner of land to his neighbours is summed up in the head-note to *Rylands v. Fletcher*, in the House of Lords,¹ as follows: "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned." The reasoning in this case obviously applies to fire as one of the things which, if a man brings on his land he is bound to see does no harm to his neighbour.

*Jones v.
Festiniog
Ry. Co*

The application of the principle to the case of fire was actually made in *Jones v. Festiniog Ry. Co.*,² by Blackburn, J., who said: "The general rule of common law is correctly given in *Fletcher v. Rylands*, that when a man brings or uses a thing of a dangerous nature on his own land he must keep it in at his own peril; and is liable for the consequences if it escapes and does injury to his neighbour. Ifere the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engine from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part."

Case in the
Year-Book.

The authorities for the common law duty of safeguarding a fire on land, *eo nomine*, commence with a case in the Liber Assisarum. "A man sued a bill against another for burning his house *vi et armis*. The defendant pleaded not guilty. It was found by the verdict of the inquest that the fire broke out suddenly in the house of the defendant, he knowing nothing about it, and burned his goods and also the house of the plaintiff. Wherefore upon this verdict it was adjudged that the plaintiff should take nothing by his writ, but should be amerced."³

¹ L. R. 3 H. L. 330.

² L. R. 3 Q. B. 736.

³ Liber Assisarum, 42 Ed. III. 259, pl. 9, translated in (Gibbons, Law of Dilapidations, 130. Most of the old cases on the law are carefully collected in Gibbons, Law of Dilapidations, together with a mass of very loose and inaccurate reasoning upon them (e.g., on *Jarmey v. Lowgar*, (Cro. Eliz. 461") 134-5; or compare note on the words "safely and securely," 136, with the judgment of Tindal, C.J., *Rosa v. Hill*, 2 C. B. 890.

In Rolle's Abridgment¹ the case is stated as follows: "If fire (I know nothing of it) suddenly break out in my house and burn my goods, and also the house of my neighbour, my neighbour shall have an action on the case against me, 42 Ass. 9. Admit. But it seems that it was adjudged there that the action did not lie; 'because it was *vi et armis*.'" Gibbons's conclusion from this is: "If anything can be inferred from the Year-book it is that it was adjudged that the action did not lie because the fire was not caused by the plaintiff's [? defendant's] fault." The passages quoted in Gibbons, *Law of Dilapidations*, from the Year-book and from Rolle, nevertheless seem perfectly consistent. The objection evidently was that the action was wrongly conceived, being brought in trespass and not upon case. The jury found that "the fire broke out suddenly in the house of the defendant, he knowing nothing about it." The judgment was that the injury was consequential, and therefore should have been brought in case, and did not lie because it was alleged *vi et armis*.²

A case more often cited than, and subsequent to, the last is *Beaulieu v. Fingham*.³ The declaration alleged that every person by the custom of this realm shall keep his fire safely and securely, and is bound so to keep it, lest any damage happen to his neighbour in any manner, and that Roger so negligently kept his fire that for want of due keeping his fire spread to the house of William, and William's goods were burned. Markham, J., said: "A man is bound to answer for the act of his servant or of his guest in such case, for if my servant or my guest puts a candle in a window and the candle sets light to the thatch and burns my house down and the house of my neighbour also, in this case I shall answer to my neighbour for the damage he sustained." "I shall answer to my neighbour for him who enters my house by my leave or knowledge, where he is guest to me or my servant, if he acts, or either of them acts, in such a way with the candle or other things that my neighbour's house is burned. But if a man outside my household against my will sets fire to the thatch of my house or does otherwise *per quod* my house is burned and also the houses of my neighbours, I shall not be held to answer to them, because this cannot be said to be ill on my part, but against my will."⁴ This case is cited as the authority for the statement in Comyns's Digest, Action on the Case for Negligence (A 6.), and in Viner's Abridgment, Actions (B) For Fire—that by the common law a man in whose house a fire originated, though by no act or fault of his, and even if it were accidental, was liable for whatever damage it caused to the house or goods of another; it is manifest that the liability there alleged does not necessarily arise independently of the negligence of master or servant or guest; further,

cited as the authority), which, however, cannot in a general treatise be examined in detail. As to Amercement, see Co. Litt. 120 b.

¹ *Action sur Case* (B), *par Fewe*, 2.

² See *Hunter v. Walker*, 6 N. Z. L. R. 690. The history of this allegation of *vi et armis* is summarised in Holmes, *The Common Law*, 84 *et seq.*; and the whole learning is elaborately collected and arranged in a note to Hammond's edition of Com. Dig. Action (M2). Action upon the case or trespass. See also *post*, 533 and 734.

³ 2 Hen. IV. 18, pl. 6.

⁴ To this, Horneby, the defendant's counsel, says: "This defendant is ruined and for ever impoverished if this action can be maintained against him; for then twenty other actions will be brought against him for the same matter." Thirning answers: "Que est cea a nous? Il est mieux que il soit tout defait, que la ley soit chaunge par luy." In Y. B. 28 H. VI. 7, pl. 7 is another case where action was brought showing that the fire was caused through negligence. No judgment was given.

negligence is alleged as the gist of the action. The point, then, that a man is liable for a purely accidental fire is not made out.¹

Anonymous case.

There is an *Anonymous case*:² "Snagg moved this case, and demanded the opinion of the judges on it. J. S. with a gun at the door of his house shoots at a fowl, and by this fireth his own house and the house of his neighbour; upon which he brings an action on the case generally, and doth not declare on the custom of the realm, as 2 Hen. IV., viz., for negligently keeping his fire. The question was, if this action doth lie? And all the Court held it did; for the injury is the same, although the mischance was not by common negligence, but by misadventure; and if he had counted upon the custom of the realm as 2 Hen. IV., the action had not been well brought; yet *consuetudo regni est communis lex*."

The objection may be noted, that though the fire was not caused by negligence, the act of firing the gun in the place in question may still have been improper, and thus, though the gun was discharged without negligence, the discharging it at all may have been fault enough to render the defendant liable for the consequences of his act.

Conclusion as to the old law.

1. Exception where the fire was caused by the act of a third person.

From the early authorities it appears then that, by the old law, if a fire occurred in a man's house or field, he was, *prima facie* at any rate, bound to control it so as to prevent damage to his neighbour;³ or to state the point in the words of Lord Tenterden, C.J.,⁴ "if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such an injury, would not be bound in the first instance to show how the fire began, but the presumption would be (unless it were shown to have originated from some external cause) that it arose from the neglect of some person in the house." To this rule there appears to have been an exception—where the fire was caused by the act of a third person without any intervention of the *terre* tenant.⁵ Thus, in the 2nd Inst.⁶ it is stated to have been adjudged in 9 Edward II. that if thieves burn the house of the tenant for life without evil keeping of the lessee for life's fire, the lessee shall not be punished therefor in an action of waste.

Croquet v. Morris.

In *Croquet v. Morris*⁷ it is indeed said, by way of illustration, and perhaps distinguishing a friend from a stranger, "if my friend come and lie in my house, and set my neighbour's house on fire, the action lieth against me." Rolle⁸ contains the proposition, "If a stranger, against my will, puts fire in my house by which the house of my neighbour is burnt, no action lies against me;" while in Comyns's Digest⁹ it is laid down that in an action for negligently keeping a fire. The defendant "may plead *quod ignotus combussit messuagium per quod*, and traverse the neglect in keeping his fire." With this accords what was said by Holt, C.J., in *Turberville v. Stampe*,¹⁰ "If a stranger set

¹ Cp. *Allen v. Stephenson*, 1 Lutw. 90, where a declaration alleging fire caused by the negligence of a lodger was held bad for "strangeness and insufficiency." An action for fire on the custom of the realm was held not to lie against a man's wife, or servant, or guest in *Shelly v. Burr*, Bemloc, (ed. 1601) 153.

² Cro. Eliz. 10.

³ *Smith v. Brampton*, *Smith v. Frampton*, 2 Sulk. 644.

⁴ *Bocquet v. MacCurthy*, 2 B. & Ad. 951, 958.

⁵ Co. Lit. 53 a.

⁶ 2 Inst. 303.

⁷ *Brownlow and Goldsborough*, 197. Cp. *Allen v. Stephenson*, 1 Lutw. 90.

⁸ *Abr. Action sur Case* (B), per Fewc. This is no more than a summary of what is said by Markham, J., in the case cited before from Y. B. 2 Hen. IV. 18, pl. 6.

⁹ Pleader (2 P 3.), citing 1 Brown, Entries 29.

¹⁰ 1 Id. Raym. 264. 12 Mod. 151.

fire to my house and burns my neighbour's house, no action will lie against me."

Another limitation may be collected from the same case of *Turber-ville v. Stampe*, which was an action on the case for negligently keeping a fire lit in a field, that extended to the plaintiff's field and burned his clothes. The objection was: "There is a difference between fire in a man's house and in the fields; in some counties it is a necessary part of husbandry to make fire in the ground, and some unavoidable accident may carry it into a neighbour's ground, and do injury there." On this Holt, C.J., and the rest of the Court, Turton, J., dissenting, held: "Every man must so use his own as not to injure another. The law is general; the fire which a man makes in his fields is as much his fire as his fire in his house; it is made on his ground, with his materials, and by his order; and he must at his peril take care that it does not, through his neglect, injure his neighbour; if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground and prejudice him, this is fit to be given in evidence."¹

Thus a second exception is, where the damage is caused by the intervention of a natural agency not to be calculated on, and the act is one done in the natural, ordinary, and proper enjoyment of property. To this effect also is the civil law: *Si quis in stipulam suam vel spinam comburenda ejus ignem immiserit et ulterius evagatus et progressus ignis alienam segetem vel vineam læserit, requiramus num imperitia ejus aut negligentia id accidit; nam si die ventoso id fecit, culpæ reus est; nam et qui occasionem præstat damnum fecisse videtur. In eodem crimine est, et qui non observavit ne ignis longius procederet. At si omnia quæ oportuit observavit, vel subita vis venti longius ignem produxit, caret culpa.*²

From *Turberville v. Stampe* we may extract yet a third exception. A man might kindle a fire on his land for the ordinary purposes of husbandry. For if "he must at his peril take care that it does not, through his neglect, injure his neighbour," the making the fire is lawful, and there must be neglect in order to fix liability.³

Soon after *Turberville v. Stampe* was decided, the 6 Anne, c. 58 (c. 31 Ruffhead),⁴ was passed, which enacted by s. 6 "that no action, suit, or process whatsoever shall be had, maintained, or prosecuted

II. Exception, where the damage is caused by the intervention of a natural agency not to be calculated on.

III. Exception, fire for the purposes of husbandry kindled without negligence. 6 Anne, c. 58 (31 Ruffh.), s. 6.

¹ "If, on the other hand, the fire has spread beyond its natural limits by means of a new agency—if, for example, after its ignition, a high wind should arise and carry burning brands to a great distance, by which a fire is caused in a place which would have been safe but for the wind—such a loss might fairly be set down as a remote consequence for which the railroad company should not be held responsible"; per Lawrence, C.J., *Fent v. Toledo, Peoria, and Warsaw Ry. Co.*, 14 Am. R. 13, 22.

² D. 9, 2, 30, § 3.

³ *Furlong v. Carroll*, (1882) 7 Ont. App. 145. *Post*, 494.

⁴ The clause set out in the text was originally to continue for the space of three years, but 10 Anne, c. 24 (c. 14 Ruffhead), s. 1 made it perpetual. In a note to Coke upon Littleton, Hargrave's edition (57 a, note 1), it is said, that, at common law losses are not liable for fire, either accidental or negligent: which is proved, as to the "accidental," by Fleta, lib. i. c. 12, *fortuna ignis vel hujus modi eventus inopinati*; as to the "negligent," by the *Countess of Shrewsbury's case*, 5 Co. Rep. 13 b; that the Statute of Gloucester (6 Ed. 1, c. 1), by making tenants for life and years liable to waste without any exception, made them liable for destruction by fire; but by the Statute of Anne the ancient law was restored. See *Pantam v. Isham*, 1 Salk. 19; if "one seised of a house in fee made a lease at will, and lessee negligently burns the house, no action lies; for he had it in his power to secure himself by covenant. Secus, if lessee for years make a lease at will, not but that he might secure himself by covenant: not because he is answerable over to his lessor, in that respect he shall have an action on the case. Also the Court held no action lay against the defendant

against any person in whose *house* or *chamber* any fire shall
accidentally begin, nor any recompense be made by such persons for
any damage suffered or occasioned thereby, any law, usage, or custom
to the contrary notwithstanding."

14 Geo. III.
c. 78, s. 86.

By 14 Geo. III. c. 78, s. 86, the Acts of Anne and 12 Geo. III. c. 73,¹
which had been substituted for them, were all repealed, but the clause
respecting fires was re-enacted, with a change in the wording: "Any
person in whose house, chamber, stable, barn, or other building, or
on whose estate any fire shall" "accidentally begin."

Vaughan v.
Menlove.

*Vaughan v. Menlove*¹ is the first reported case after *Turberville v. Stampe*. The defendant negligently³ managed a stack of hay on his premises, which took fire, and destroyed the plaintiff's property. The Court held that the test applicable in determining the question of liability was not whether the defendant acted to the best of his own individual skill and judgment, but, in the words of Tindal, C.J.:⁴ "It is for the jury to say whether or not under the circumstances the party has conducted himself with such a degree of care and caution as might be looked for in a prudent man." "To hold the degree of care to be sufficient if co-extensive with the judgment of the individual would introduce a rule as uncertain as it is possible to conceive. In the present case it appears to me that the defendant not only failed to observe the degree of care and caution that the law required of him, but was guilty of very gross negligence." In *M'Kenzie v. M'Leod*⁵ the law of Scotland was proved to be the same—that for actual negligence the tenant is liable. In neither case was the attention of the Court called to the statute;⁶ but a case tried at the assizes for Berkshire a year or two previously, before Alderson, B., was cited by Sergeant Talfourd, and approved of by the Court. There defendant, in burning couch in his field, set fire to and destroyed a plantation adjoining. His act was found to be a negligent one, and he was held liable.⁷

Judgment of
Tindal, C.J.:

M'Kenzie v.
M'Leod.

for the stable he took if the fire ceased there; but if it goes on and burns his next neighbour's, he shall have an action for his loss, because he is a stranger, and had it not in his power to make him covenant to be careful."

¹ Both these Acts, 14 Geo. III. c. 78, & 12 Geo. III. c. 73, related mainly, if not solely, to Metropolitan buildings; see *post*, n. 2, 492. See *Cleland v. South British Insurance Co.*, 9 N. Z. L. R. 177, for a full discussion of the general application of ss. 83, 84 & 86 of 46 Geo. III. c. 78. In an elaborate American treatise the opinion is advanced that "the statutes of 6 Anne & 14 Geo. III. could hardly be construed so as to include railroads, which were unknown at the time of the passage of the later of the two." This is not so. The statute applies generally to fires accidentally beginning on an "estate," and by any means, though the species of estate or the description of the means, whichever is implied by the passage, is of long subsequent constitution. For the law in Canada, *Murphy v. Labbe*, 27 Can. S. C. R. 126.

² 4 Scott 244; 3 Bing. N. C. 468.

³ "When the condition of the stack, and the probable and almost inevitable consequence of permitting it to remain in its then state, were pointed out to him he abstained from the exercise of the precautionary measures that common prudence and foresight would naturally suggest, and very coolly observed that 'he would chance it,'" per Vaughan, J., 4 Scott, 254.

⁴ *L.c.* 253.

⁵ 10 Bing. 385.

⁶ Which does not apply to Scotland. *Westminster Fire Office v. Glasgow Provident Society*, 13 App. Cas., per Lord Watson, 716: "In my opinion the Act was not intended by the Legislature to have any application to Scotland."

⁷ 4 Scott 248. Where a fire destroyed the defendant's house, leaving one of the walls standing in a dangerous condition, and the defendant knowing the fact neglected to secure or support the wall or to take it down, and some days after the fire it was blown down and damaged the plaintiff's house, the defendant was held, under the French law of Quebec, not entitled to shelter himself under the plea of *vis major*: *Nordheimer v. Alexander*, 19 Can. S. C. R. 248.

On the other hand, Blackstone says¹: "By the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burnt down thereby, an action lay against the master"; "but now the common law is altered by the statute 6 Anne c. 3." This passage was cited by Lord Lyndhurst, C., in *Viscount Canterbury v. Attorney-General*,² who yet refrained from giving an opinion on the point raised by it, observing: "By the statute, a party on whose estate a fire shall accidentally begin, shall not be liable to an action for any damage which may be thereby occasioned. Sir William Blackstone's construction is, that although the fire be occasioned by the negligence of the party, he shall not be liable." The Lord Chancellor then called attention to the fact that in *Vaughan v. Menlove*, the Court of Common Pleas had decided contrary to Sir William Blackstone's opinion, and that the law of Scotland appeared to coincide with the view of the Common Pleas; and pointed out that in his opinion the case before him could be decided on grounds rendering any decision on the point unnecessary; these he then proceeded to state. Shortly after occurred the case of *Filliter v. Phippard*,³ where the point had to be considered. Deuman, C.J., delivering the judgment of the Queen's Bench, held that the word "accidentally" in the Act of Parliament, as applied to fire, excluded "negligently," so that, in a case of negligence, the liability for fire still existed.

Blackstone's view of the operation of the statute.

Lord Lyndhurst, C., in *Viscount Canterbury v. Attorney-General*.

Filliter v. Phippard.

The effect of this decision is to require the plaintiff affirmatively to show negligence before he can recover; unless, indeed, the facts are such as raise the inference of negligence. Thus, in *Piggot v. Eastern Counties Ry. Co.*⁴—a case decided before *Filliter v. Phippard*, though throwing light on it—to show that the fire for which action was brought was caused by sparks or particles of ignited coke emitted from the funnel or chimney or from the fire-box of the engine, a witness stated that he had frequently seen pieces of ignited coke fall from the lower part of the engine. Other witnesses stated that they had frequently seen small particles of coke come from the chimneys of the company's engines, and that, sometimes, ignited coal fell from the fire-box and were thrown to a considerable distance. Tindal, C.J., held this constituted abundant evidence of negligence, and likened the case to *Baulieu v. Fingham*,⁵ adding, "there was no suggestion that it was necessary to define the particular sort of negligence that was complained of." And Maule, J., said "the matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendants' engine; and involved in that issue was the question whether or not the fire *could* have been so caused;" subsequently he adds with reference to damage done by fire to buildings adjoining the railway: "I am far from saying that it is impossible that this could have occurred without negligence on the part of the company. But it at least affords a strong presumption of negligence, in the absence of evidence to show that something had been done by the company to

Piggot v. Eastern Counties Ry. Co.

Judgment of Tindal, C.J.

Judgment of Maule, J.

¹ 1 Bl. Comm. 431.

² (1843) 1 Phil. 306, 320, 4 St. Tr. N. S. 767. The history of the duty to keep a fire so as to prevent it occasioning injury to a neighbour is traced in detail in the Lord Chancellor's judgment in this case.

³ 11 Q. B. 347; *Hunter v. Walker*, 6 N. Z. L. R. 600. This case establishes that the enactment applies to New Zealand.

⁴ (1846) 3 C. B. 229; to the same effect is *Grand Trunk Rd. Co. v. Richardson*, 91 U. S. (1 Otto) 454.

⁵ Y. B. 2 H. IV. 18, pl. 6.

lessen the chances of danger." In *Piggot v. Eastern Counties Ry. Co.*¹ the statute does not appear to have been mentioned during the argument; the case turned on negligence at common law.

14 Geo. III.
c. 78, s. 80.

The effect of 14 Geo. III. c. 78, s. 80,² seems to be that whereas before the Act, on a fire occurring, liability was assumed unless it was shown to have been due to the acts of strangers or to the unforeseen action of nature; since, the statute liability is negatived till circumstances are shown from which the inference of negligence may be drawn. Then it is for the defendant to show either that the fire was caused (a) by the act of strangers, or (b) by some unlooked-for natural agency, or (c) by accident in its widest sense—*e.g.*, by an occurrence similar to that in *Snook v. Grand Junction Water Co.*³ The effect of the statute may be stated as changing the *onus*, and limiting the class of acts importing legal wrong; or as a declension from the highest degree of diligence⁴ to that required of a prudent man in the provident conduct of his business.⁵

Effect on
liability of not
keeping
proper appli-
ances to
extinguish
fire.

A question has been raised whether, in the event of a fire happening without negligence, the person responsible for the premises can be rendered liable, "because, in the opinion of a jury, he did not keep on hand at all times proper appliances to put out a fire in case one should accidentally arise." There seems to exist a difference of obligation having respect to the different character of buildings involved. Care must in all cases be proportioned to risk. Since the breaking out of fire in dwelling-houses and buildings used for domestic purposes is of uncommon occurrence, the provision of appliances to put out fire is not necessary. In the use of fire for manufacturing purposes there is a difference; the risk is greater, and constant care is in some cases required to prevent its escape. Accordingly, where fires are liable to originate in engine and boiler-rooms, and the construction of the building is such that the surroundings are inflammable, an obligation arises not only to use care in tending the furnaces that are requisite for carrying on the work, but appliances for extinguishing fire, if it should break bounds, should be at hand; for this is a precaution which every ordinarily prudent man would adopt for the preservation of his own property; and the neglect of it is negligence.⁶

¹ 3 C. B. 229.

² The bulk of the statute was confined to the Metropolis, and was repealed by 28 & 29 Vict. c. 90, s. 34. Secs. 83 and 86 alone remain. They stand in the anomalous position of being general enactments in a local Act. In *Richards v. Easto*, 15 M. & W. 251, Parke, B., says the Act "is not of a local and personal character only; some of the clauses affecting all the Queen's subjects, as the 84th and 86th, relating to accidental fires, and the statute is in that respect public." This view is approved in *Filiter v. Phippard*, 11 Q. B., per Lord Denman, 355. Sec. 83 was held by Lord Westbury, in *Ex parte Gorley*, 4 De G. J. & S. 477, to apply to the whole of England, and not to be confined to the Metropolis. This decision was doubted in *Westminster Fire Office v. Glasgow Provident Society*, 13 App. Cas., by Lord Watson, 716, and by Lord Selborne, 713. Neither s. 83 nor s. 86 applies to Ireland, as the Act was passed prior to the Union; see *Andrews v. Patriotic Assurance Co. of Ireland*, 18 L. R. Ir. 355. The history of the Act is fully considered in *Udland v. South British Insurance Co.*, 9 N. Z. L. R. 177.

³ 2 Times L. R. 308. Cp. *Green v. Chelsea Waterworks Co.*, 10 Times L. R. 175, 259 (C. A.).

⁴ *Rylands v. Fletcher*, L. R. 3 H. L. 330.

⁵ *Faughan v. Menlove*, 3 Bing. N. C. 468, 4 Scott 244.

⁶ *McNally v. Colwell*, 30 Am. St. R. 494; also note, Liability of private person for Fire, 501-507. The rule of care is to be proportioned to the danger incurred. A porcelain factory, where a heat of 3000 degrees Fahrenheit was attained, was left unattended till the kiln became cold—a period of twelve hours or more; and a fire was communicated to adjacent property. The lack of attendance is evidence of

What cases there are, and they are mainly American, have decided, and in accordance with the principles of the common law, that the proprietor of a factory, hotel, or other large building is not liable for the death or injury of any one who may be therein, through fire arising from neglect to provide efficient means of exit or life-saving apparatus. A statutory obligation is now very generally imposed. In England this is done by the Factory and Workshop Act, 1901,¹ re-enacting and developing earlier legislation; and this casts the obligation on the owner on the requisition of the County Council in London and the district council throughout the rest of the country. The provisions of the section (14) are made enforceable by an inspector as "under the foregoing provisions of this Act with respect to matters punishable or remediable under the law relating to public health." There is consequently no right of action for the individual injured.² This has been decided in the United States where a workman was held not entitled to recover against the owner of a building on which he was employed and where the statutory duty of providing a fire escape had not been complied with, so that on the occurrence of a fire he was compelled to jump from the building and was injured.³

Neglect to provide life saving apparatus,

Statutory obligation.

The duty of a railway company in the construction and the use of their engines, with a view of avoiding liability for fire caused by them, is well stated by Williams, J., summing up in *Fremantle v. L. & N. W. Ry. Co.*⁴ The company, "in the construction of their engines, were bound not only to employ all due care and all due skill for the prevention of mischief accruing to the property of others by the emission of sparks or any other cause, but they were bound to avail themselves of all the discoveries which science had put within their reach for that purpose, provided they were such as, under the circumstances, it was reasonable to require them to adopt. For example, if the danger to be avoided were very costly and troublesome, or such as interfered materially with the efficient working of the engine, then the jury would have to say whether it could reasonably be expected that the company should adopt such a remedy for such an evil." On the other hand, "if the risk were considerable, and if the expense or trouble or inconvenience of providing a remedy were not great in proportion to the risk, then

Duty of railway company with regard to the construction and use of their engines.

Fremantle v. L. & N. W. Ry. Co.

negligence: *Haunch v. Hernandez*, 41 La. An. 992. The owner of premises worked by a steam engine which emits sparks must use a spark arrester if practicable, or else will furnish evidence of negligence in not using care proportioned to the danger. Sending a spark upon a neighbour's property is a trespass. *Lawton v. Giles*, 90 N. C. 374.

¹ 1 Edw. VII. c. 22, s. 14-16. Cp. *Horner v. Franklin*, (1905) 1 K. B. 479, a decision on the earlier Act.

² *Ante*, 305.

³ *Grant v. Slater Mill, &c. Co.*, 14 R. I. 380. There is a case, *Willy v. Mulledy*, 78 N. Y. 310, holding the owner liable for damages for not providing a fire escape, and also holding that in default of the local authority making regulations providing for fire escapes it is the duty of the owner to obtain their directions what to do. There is a further decision in the same state (N. Y.), that even then the question of their efficiency is for a jury: *Gorman v. McArdle*, 67 Hun 484. *Perry v. Bangs*, 161 Mass. 36—a decision of the Supreme Court of Massachusetts—is in accord with English law; that no duty arises till the local authority have set the law in motion, and made their requisitions under the statute and default has been made.

⁴ 2 F. & F. 340. A rule was moved for in this case, and refused: 10 C. F. N. S. 89. The statement of the law in the text was adopted by Keating, J., in *Dimmock v. North Staffordshire Ry. Co.*, 4 F. & F. 1058, as embodying "the rule by which the liabilities of companies for negligence in respect of their engines are governed." See also *Harrison v. Southwark and Vauxhall Water Co.*, (1861) 2 Ch. 409; *Groom v. G. W. Ry. Co.*, 8 Times L. R. 253.

they would have to say whether the company could reasonably be excused from availing themselves of such a remedy because it might, to some extent, be attended with cost or other disadvantage to themselves."¹

By the Railway Fires Act, 1905², railway companies are made liable to make good damage to agricultural land or agricultural crops up to an amount of £100 caused by fire arising from sparks or cinders emitted from any locomotive engine used on a railway. This enactment is irrespective of proving negligence in the use of the engine.

Mere occurrence of a fire sometimes evidence of negligence.
Scott v. London & St. Katharine Docks Co.

In some cases the mere occurrence of a fire is evidence of negligence. As was said by Erle, C.J., in the Exchequer Chamber, in *Scott v. London and St. Katharine Docks Co.*³ "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." In other cases something further shown⁴ he shown. This is stated in detail by Robinson, C.J., in *Dean v. M'Cartu*, in the Queen's Bench of Upper Canada:⁴ "To hold that what is so indispensable, not merely to individual interests, but to the public good, must be done wholly at the risk of the party doing it, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which, in other necessary business of mankind, is plainly settled and always upheld. If it could be shown that this business of clearing land could by means which we can suppose to be within the reach of those employed in it, be done at a time or in a manner that would make it wholly independent of any accident beyond the control of the party, then, perhaps, the bare fact of not having taken those certain means might be held to constitute negligence; in which case, the liability for damages would always as a matter of course follow the injury. But as we cannot, I think, venture to hold that there are any certain means of avoiding such accidents, it must in such cases be a question of fact for the jury, whether the defendant has any negligence to answer for or not."

Dean v. M'Cartu.

Furlong v. Carroll: Judgment of Patterson, J.A.

This passage was cited and approved in *Furlong v. Carroll*⁵ by the Canadian Court of Appeal in an admirable judgment by Patterson, J.A., in which the English authorities are considered and reviewed. The case may serve as an illustration of the distinction between the two classes just adverted to. It was there held that where fire has been

¹ In the United States it has frequently been held, laying down a special rule in the case of railway companies, that the burden is on the company to show that the engines they use are properly constructed—e.g., *Burke v. Louisville Rd. Co.*, 19 Am. R. 618, and note at 623. The statute does not seem to have been alluded to in that case; which probably would not be held good law in England. The plaintiff has to prove his cause of action; to show there has been a fire, and from an engine, does not prove negligence under the statute; some evidence of negligence would therefore appear requisite. See *Port Glasgow, &c. Sail Cloth Co. v. Caledonian Ry. Co.*, 20 Rettie (H. L.) 35, and the remark of Lord Herschell, C. at 39, as to the *onus* of proof being on the company. We have already noted that the statute does not apply to Scotland, *ante*, 490, n. 6. The *onus* would thus be on the defendants to excuse themselves for a fire caused by them. *Earl of Shaftesbury v. L. & S. W. Ry. Co.*, 11 Times L. R. 126, 269. *Jackson v. Grand Trunk Ry. Co.*, 32 Can. S. C. R. 245.

² 5 Edw. VII. c. 11. By sec. 3, notice of claim and particulars of damage in writing must be sent to the railway company proceeded against within seven days of the occurrence of the damage as regards the notice of claim, and within fourteen days as regards the particulars of damage. ³ 3 H. & C. 601. ⁴ 2 Upp. Can. Q. B. 448.

⁵ (1882) 7 Ont. App. 161. See also *Hilliard v. Thurston*, 9 Ont. App. 514.

properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time, and season, and managed with due care, he is not responsible for damage occasioned by it; on the ground that every man has a right to use his land in the way that seems best to himself, though in using fire he is bound to use proper precautions that it does not extend to his neighbour's. But where a lighted match had been thrown down, which set fire to combustible material, and which the defendant could easily have put out, yet which he, instead, merely isolated, so that the fire, after burning for four or five days, spread to the plaintiff's premises and burnt them down, the defendant is responsible; for he has brought a dangerous thing on his ground, and is responsible for all the damage which is the natural consequence of its spreading, unless the spreading is a consequence of *vis major*.

The rule defining the amount of diligence to be exercised is again expounded by Lord Neaves in a Scotch case¹ relating to "muirburning."² *Mackintosh v. Mackintosh*. He says: "The party conducting such an operation as a muirburn should exercise the care and diligence which a prudent man would observe in his own affairs, and which a prudent and conscientious man will observe as to the interests of his neighbours. While this is the general rule, it must be observed that in all cases the amount of care which a prudent man will take must vary infinitely according to circumstances. No prudent man in carrying a lighted candle through a powder-magazine would fail to take more care than if he was going through a damp cellar. The amount of care will be proportionate to the degree of risk run, and to the magnitude of the mischief that may be occasioned." The distinction drawn, in the Canadian cases just noticed, is between fire as an instrument of husbandry and fire as a dangerous agency.³ Whether before the Act of Anne there was equal liability in both cases may be doubtful. Since the Act, the happening of the fire in the one class of cases is evidence of negligence; in the other, some overt act is necessary to raise the presumption of negligence, without which liability does not attach. This is apparent from *Smith v. L. & S. W. Ry. Co.*,⁴ where, sparks from a passing engine having set fire to a heap of dry grass piled up by the side of the railway, the fire was carried across a road by a high wind and burned the cottage of the plaintiff. Bovill, C.J., and Keating, J., held there was evidence of negligence to make the railway chargeable, but Brett, J., dissented. Adopting the doctrine of *Rylands v. Fletcher* the liability of the defendants was clear. The effect of the statute was to limit their liability

Effect of
6 Anne, c. 58
(c. 31 Ruff-
head).

Smith v.
L. & S. W.
Ry. Co.

¹ *Mackintosh v. Mackintosh*, (1864) 2 Macph. 1362.

² An operation recognised as legal, under limitations, by Scottish statutes; e.g., 13 Geo. III. c. 54, ss. 4-7.

³ See *Gilson v. North Grey Ry. Co.*, 35 Upp. Can. Q. B. 475; and *Hilliard v. Thurston*, 9 Ont. App. 514, deciding that the person who uses fire as a motor instrumentality without legislative authority must bear the risk of the consequences rather than any individual whose property may happen to suffer from it. Cp. *Jones v. Festiniog Ry. Co.*, L. R. 3 Q. B. 733; *Powell v. Fall*, 5 Q. B. D. 597; *Burroughs v. Housatonic Rl. Co.*, 15 Conn. 124. In the *Canada Atlantic Ry. Co. v. Mozley*, 15 Can. S. C. R. 145, the question was considered of what was evidence of negligence to go to a jury in setting fire to a manure heap. In *Peers v. Elliott*, 21 Can. S. C. R. 19, the judge at the trial having held that the absence of a spark protector to a steam-engine used in running a hay press was in point of law negligence, a new trial was granted on the ground of misdirection. In *Port Glasgow, &c. Sail Cloth Company v. Caledonian Ry. Co.*, (1892) 19 Rettie 608 20 Rettie (H. L.) 35, the absence of a spark arrester to an engine was held not conclusive of negligence. See also *Güler v. Rawson*, 6 Times L. R. 17 (C. A.). *Earl of Shaftesbury v. L. & S. W. Ry. Co.*, 11 Times L. R. 126, 269.

⁴ 2 L. R. 5 C. P. 98. As to the duty of the railway company in extinguishing the fire, see *Missouri Pacific Ry. Co. v. Platzer*, 15 Am. St. R. 771 and note.

Brett, J.'s
dissent.

Case reviewed
in the
Exchequer
Chamber:
Judgment of
Kelly, C.B.

*Black v.
Christ Church
Finance Co.*

to those cases where negligence could be inferred. It was agreed that the mere circumstance of the fire being caused by sparks or cinders emitted from the engine of the company was not enough to give a cause of action against them. This was on a similar ground to that by which, in the Canadian case, a fire, in certain circumstances, was held a mere lawful operation of husbandry—that what happened in that respect was an incident of legally authorised business. The majority of the Court thought the presence of the bundles of dry grass was evidence of negligence to go to the jury; while Brett, J., was of opinion there was no duty, "because it was not shown that plaintiff's property was of such a nature and so situate that the defendants ought to have known that, by permitting rummage and hedge-trimmings to remain on the banks of the railway, they placed it in undue peril." Had the view of Brett, J., prevailed, the effect of the statute would have been extended by requiring negligence to be shewn with reference to any particular plaintiff.¹ On appeal to the Exchequer Chamber, the judgment of the majority in the Court below was sustained, Kelly, C.B.,² saying: "I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble field and so get to the plaintiff's cottage." "It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the *heaps were likely to catch fire*, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it." The effect of this is that, negligence being found, it is not necessary to find, in addition, an antecedent probability of damage to any given property or person.

In the Privy Council, in *Black v. Christ Church Finance Co.*,³ the obligation on one lighting a fire or authorising the lighting of a fire on land is thus stated: "The lighting of a fire on open hush-land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property." "And if he authorises another to act for him, he is bound not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences." But nowhere is the duty on an owner lighting a fire on his own land more clearly put than in a Maine case, *Hewey v. Nourse*:⁴ "Every person has a right to kindle a fire on his own land for the purposes of husbandry, if he does it at a proper time and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and

¹ *Higgins v. Dewey*, 107 Mass. 494, is decided on the same principle. A late case is *Adams v. Young*, 58 Am. R. 789, where there is a note examining the authorities, at 795. *New Brunswick Ry. Co. v. Robinson*, 11 Can. S. C. R. 688.

² L. R. 6 C. P. 14, 20.

³ (1894) A. C. 48, 54. *Threlkeld v. White*, 8 N. Z. L. R. 513. "The law in New Zealand is that if a person lights a fire on his own land he must, at his peril, prevent it spreading to the land of his neighbours": *Kelly v. Hayes*, 22 N. Z. L. R. 429.

⁴ 54 Maine 250.

it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence or only a want of ordinary care on the part of the defendant."

We now proceed to inquire what, if any, is the obligation that the use of land for a lawful purpose, though likely to prove dangerous to neighbours, imposes upon them.

Obligations attending use of land for a lawful purpose. Limitation.

On principle, it is clear that a man is entitled to the natural use of his property free from interruption or limitation by any special user of property by his neighbours. Yet this must not be stated universally. For instance, if an adjoining proprietor were to sow his field next a mining shaft with wheat or any other combustible crop, and through the falling of a spark from an engine the whole were consumed, it could not be said he was contributory to his loss. He must be allowed to use his land after the construction of the mine and its attendants as he did before it, where the use he is putting it to is not necessarily or inevitably dangerous.¹ If, however, in mere wantonness and not in the ordinary and natural use of his land, he were, so to speak, to solicit damage, his conduct would bear a very different aspect.² It must be remembered that the care required of one using fire is ordinary diligence, that is what the generality of mankind use in their own concerns in the circumstances.

With this limitation, it may be said that the owner of lands adjacent to those on which dangerous operations are carried on may cultivate or build upon, use his lands, or leave them in a state of nature, as he may see proper, and, by doing so, will take upon himself no other risks than those that are incident to the ordinary and natural user of the neighbouring properties;³ and will, moreover, in the event of injury arising from the negligence of his neighbours, be entitled to a remedy for damages for all the consequences flowing in natural and uninterrupted sequence from their wrongful acts. There is this further limitation to be added, in the case of an enterprise authorised to be carried on as a railway company, by statute, that all the ordinary and necessary processes in carrying out the statutory purpose become themselves authorised, and, though bringing damage, do not legally import injury.⁴

The interpretation of the Act 14 Geo. III. c. 78, s. 86, excluding fires arising from defendant's negligence from the protection of the Act, is the same in the United States⁵ as in England and Canada.⁶

¹ In *Gagg v. Vetter*, 13 Am. R. 322, 346, there is a most comprehensive review of the duty to prevent sparks from a chimney injuring a neighbour. In that case sparks from a brewery chimney were the cause of the burning of plaintiff's property. The question whether proper means have been taken to prevent the escape of sparks is for the jury; *Toledo, &c. Rd. Co. v. Pindar*, 5 Am. R. 57.

² *Holmes v. Midland Ry. of Canada*, 35 Upp. Can. Q. B. 253; *Jaffrey v. Toronto, Grey and Bruce Ry. Co.*, 23 Upp. Can. C. P. 553; *Port Glasgow, &c. Sudecloth Co. v. Caledonian Ry. Co.*, 19 Rettie 608, 20 Rettie (H. L.) 35.

³ *Philadelphia and Reading Rd. Co. v. Hendrickson*, 21 Am. R. 97.

⁴ *Hammermith Ry. Co. v. Brand*, L. R. 4 H. L. 171; *Delaware Rd. Co. v. Salmon*, 23 Am. R. 214, where there is a most exhaustive judgment.

⁵ *Scott v. Hale*, 16 Me. 326. In *Spaulding v. Chicago and N. W. Ry. Co.*, 11 Am. R. 550, a distinction is drawn between 6 Anne, c. 58 (c. 31 Ruffhead), s. 6, which is held

⁶ In addition to the cases already cited, see *Canada Southern Ry. Co. v. Phelps*, 14 Can. S. C. R. 132.

Insurance
against fire.

Story, J., has elaborately discussed,¹ the question whether insurances against fire cover losses occasioned by the fault or negligence of the assured unaffected by any fraud or design. The affirmative has repeatedly been accepted as law both in England and America.² The conclusion is unassailable on general reasoning, since, says Story, J., "if such losses were not within such policies the indemnity against such risks would be practically of little importance; since much the larger numbers of fires of this sort may be traced back to some negligence, slight or otherwise, of the members of families."³ The terms in which fire policies are drawn point to the same conclusion. By them the underwriters agree to pay "all loss or damage" sustained by the assured through fire on the insured property, while the exceptions against liability are specific, e.g., against loss from fire sustained in consequence of "any invasion, civil commotion, riot, or any military usurpation;" earthquakes and hurricanes are also excluded. All other losses may therefore be construed to remain by force of the maxim *Expressio unius est exclusio alterius*. The general policy of the law excludes fraudulent losses, *allegans suam turpitudinem non est audiendus*.⁴ This conclusion Story, J., thus expresses: "We are, then, of opinion that a loss by fire occasioned by the mere fault and negligence of the assured or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss; and also upon the ground that the express exceptions in policies against fire leave this within the scope of the general terms of such policies."

Story, J.'s
conclusion.

Subrogation.

It may be added that the right of the insurer to be subrogated to the rights of the assured in respect of torts causing the injury insured against, is as available in case of an insurance against fire on land as in that of a marine policy.⁵

Right to pull
down a house
to arrest a
fire.

The common law right to pull down a house to arrest a fire was asserted so far back as the reign of Henry VIII.⁶ when it is held as clear

to be part of the common law of America, and 14 Geo. III. c. 78, s. 86, which is there held not to apply at all. The opinion is also expressed that the construction of the Act is not to be made to include the liability of railway companies for fires caused by sparks from their engines; since nothing in the nature of a railway engine could have been within the contemplation of the framers of the statute. This method of construction, as noted previously (*ante*, 490, n.), is not tenable in England.

¹ *Columbian Insurance Co. of Alexandria v. Lawrence*, 10 Peters (U. S.) 507. "It may be doubted," says Mr. Holmes, 3 Kent, Comm. (12th ed.), 376, n. 1 (g.), "whether any negligence, even of the assured in person, not amounting to proof of a fraudulent intent to commit or permit an injury within the policy, would prevent a recovery."

² In England *Shaw v. Roberts*, 6 A. & E., per Lord Denman, 84; *Dobson v. Sotheby*, 1 M. & M., per Lord Tenterden, 93; *Austin v. Drew*, 4 Camp, p. 1; *Gibbs*, C.J., 362; and *Busk v. Royal Exchange Insurance Co.*, 2 B. & Ald. 73, may be cited. In the United States *Grim v. Phoenix Insurance Co.*, 13 John. (N. Y. Sup. Ct.) 451, was the leading authority previous to Story, J.'s judgment.

³ 10 Peters (U. S.) 517, 518.

⁴ 4 Co. Inst. 279, citing *Rich. de Raynham's case*, Y. B. Trin. 13 Ed. I., in *com. banco*.

⁵ *Castellain v. Preston*, 11 Q. B. D., per Bowen, L.J., 403; *Durrell v. Tibbitts*, 5 Q. B. D. 500; *Burnard v. Rodocanachi*, 7 App. Cas. 333; *Simpson v. Thomson*, 3 App. Cas. 279, 284; *Mobile and Montgomery Ry. Co. v. Jurcy*, 111 U. S. (4 Davis) 584.

⁶ Y. B. 13 Hen. VIII., 16, per Shelley, J.; Y. B. 12 Hen. VIII., 10, per Brooke, J. Cp. Y. B. 21 Hen. VII., 27, pl. 5; Bacon, Maxims, Reg. 5; *Maleverer v. Spinke*, Dyer 35 a, 36 b; *Gedge v. Minne*, 2 Buls. 60, 61 arg.; Bac. Abr. Trespass. (F) 683. See Metropolitan Fire Brigade Act, 1865, 28 & 29 Vict. c. 90; *Carter v. Thomas*, (1893) 1 Q. B. 673, under 10 & 11 Vict. c. 89, s. 32, incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 171. In *Gibson v. Leonard*, 36 Am. St. R. 376, it was held that a fire insurance patrol entering a building to save property while a fire is raging and under statutory authority, is a bare licensee with no right of action against the owner. In *Behler v. Daniels*, 19 R. I. 49, it is similarly decided that a fireman cannot recover

law that if a fire be taken in a street I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house in a city or town and distressed, and to save my life I set fire to mine own house which spreadeth and taketh hold upon other houses adjoining, this is not justifiable, but I am subject to their action upon the case, because I cannot rescue my own life by doing anything which is against the commonwealth. But if it had been but a private trespass, as the going over another's ground or the breaking of his inclosure when I am pursued for the safeguard of my life, it is justifiable.

The law is similarly stated in the case of the *King's Prerogative* Case of the King's Prerogative in Saltpetre. "For the common wealth, a man shall suffer damage; as, for saving of a city or town a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 Hen. VIII. fol. 15. And in this case the rule is true, *Princeps et respublica ex justa causa possunt rem meam auferre.*"¹

Closely allied with the subject we have been discussing is that of the use of fireworks. Use of fireworks.

By the English law regulations are placed on their sale, both with regard to the place in which they are sold, which has to be licensed,² and the person to whom they are sold, who is required to be not "apparently under the age of thirteen years," that is, if gunpowder enters into the constitution of the firework.³ And "if any person throw, cast, or fire any firework in or into any highway, street, thoroughfare, or public place, he shall be liable to a penalty not exceeding £5."⁴ If he were to injure any one when thus infringing the Act, his liability sufficiently appears from the well-known case of *Scott v. Shepherd*.⁵ Apart from the Act of Parliament, the explosion of fireworks in public places is wrongful at common law.⁶

Even where the explosion of fireworks is not unlawful the greatest care must be used with them, and failure in this imports liability. In one case⁷ Lord Ellenborough said that "if a master of a school, knowing that fireworks would be used, were to be guilty of negligence in not

Lord Ellenborough's view of a school-master's liability with regard to fireworks given to schoolboys.

as an invitee against the owner of premises which he enters to extinguish fire there. See *Y. B. 12 Hen. VIII. 2, 2*; and *9 Edw. IV. 35 b, pl. 10. Ante. 457.*

¹ 12 Co. Rep. 13; *Mouse's case*, 12 Co. Rep. 63. In Pepyn's Diary, under date Sept. 2nd, 1666, and succeeding days, are repeated entries indicating that this view of the law had practical effect given to it during the Great Fire of London; though the Lord Mayor was at first very lacking in resolution. "To the King's message (to spare no houses, but to pull down before the fire overy way), he cried, like a fainting woman, 'Lord! What can I do? I am spent; people will not obey me. I have been pulling down houses; but the fire overtakes us faster than we can do it.'"

² See the question discussed as to the limits within which this may be done. Pufendorf, *Le Droit de la Nature et des gens*, liv. ii. ch. 6, sec. 8. Vin. Abr. Necessity (A.) 8; *Stone v. Mayor, &c. of New York*, 25 Wend. (N. Y.) 156; *Russell v. Mayor, &c. of New York*, 2 Donc. (N. Y.) 461; *Bowditch v. Boston*, 101 U. S. (11 Otto) 16.

³ 3 Vict. c. 17, ss. 48, 49.

⁴ 38 Vict. c. 17, s. 31.

⁵ 38 Vict. c. 17, s. 80; see also 5 & 6 Will. IV. c. 50, s. 72.

⁶ 2 Wm. Bl. 892; 1 Sm. L. C. (11th ed.) 455.

⁷ *Conklin v. Thompson*, 20 Barb. (N. Y.) 218; *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. R. 578. The use of a highway as to place to fire an explosive is illegal, and for damage following such an act all persons concerned therein are liable.

⁸ *King v. Ford*, 1 Stark. (N. P.) 421; *Williams v. Eady*, 9 Times L. R. 637, 10 Times L. R. 41 (C. A.). *Makins v. Piggott*, 29 Can. S. C. R. 188.

preventing the use of them, he would be amenable for the consequences," and was of opinion that an action would be maintainable if it were shown that a schoolmaster had delivered out fireworks to boys, and that an accident had then occurred through the wilful misconduct of one of them. This is perhaps on an assumption that fireworks and boys are agencies dangerous in conjunction, however innocent apart, to which the words of Tindal, C.J., in *Vaughan v. Menlove*,¹ are applicable: "Put the case of a chemist, mixing substances which alone are perfectly innocent, but which are liable to explode on coming into contact, and thereby occasioning damage to his neighbour, who could for a moment doubt that the injured party would have a remedy by action?"

Lord Ellenborough's view.
Criticisms.

In Lord Ellenborough's view, as reported, fireworks must be taken to be necessarily dangerous, and to be kept from boys. The justness of this view must be dependent on age and circumstances. To supply a boy under thirteen years of age with fireworks would undoubtedly, *prima facie*, be an act rendering the schoolmaster or other person liable for the wilful mischief which he had supplied the means of the boy committing. If the boy were over sixteen and of a trustworthy character, the presumption would be the other way. In every case the peculiar circumstances would have to be considered.² The proposition required to support Lord Ellenborough's position in its full extent is that the possession of fireworks by schoolboys is in all circumstances unlawful; and includes as well the youth waiting at school the time to commence residence at the university, and the last importation into the boy's department from among the infants at a primary school. While in so far as it imports that a schoolmaster guilty of negligence (negligence in law presupposing a legal duty) is liable for negligence, it merely affirms an identical proposition and is useless.³ The proposition attributed to Lord Ellenborough in its generality, at any rate, does not seem in accord with good sense.

Williams v. Eady.

The principles laid down in *Williams v. Eady*,⁴ though at first sight raising similar considerations, do not really lend countenance to the views attributed to Lord Ellenborough in the report. It may well be the duty of a schoolmaster to keep dangerous chemicals out of the reach of his schoolboys, and yet there may be circumstances in which allowing them to let off a few squibs and crackers is wholly free from blame. Could it be said in the United States, for example, to be absolutely unlawful to allow a young boy to handle any description of firework on the 4th of July; or in England, on occasions of special festivity? If not, it must be conceded, not necessarily to follow, that the schoolmaster permitting his boys to have fireworks is liable for their wanton, mischievous, or reckless acts.

Lord Esher, M.R.'s statement of schoolmaster's duty

Lord Esher, M.R.'s, statement of a schoolmaster's duty, may with advantage be noted.⁵ "The schoolmaster was bound to take such care of his boys as a careful father would of his boys." "Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way." All this is conclusive against immunity for leaving dangerous chemicals within their reach, though

¹ 4 Scott 252; 3 Bing. N. C. 468.

² Cp. *Harris v. Cameron*, 29 Am. St. R. 891.

³ The Act of 9 Will. III. c. 7, had probably a material influence on the course of the case. It was repealed 23 & 24 Vict. c. 139, s. 1.

⁴ 10 Times L. R. 41 (C. A.).

⁵ *Williams v. Eady*, 10 Times L. R. 42 (C. A.).

it does not negative the possibility of their lawfully assisting at a display of fireworks.¹

*Whitby v. Brock*² deals with the amount of care to be used in the letting off fireworks in a lawful place and on a lawful occasion. Defendants were letting off fireworks for their own benefit in the Crystal Palace grounds, when plaintiff's wife, entering the Palace grounds, was struck on the leg by a firework and injured. Lord Esher, M.R., held that the mere occurrence of an accident was sufficient to warrant the Court leaving the question of negligence to the jury. And Lopes, L.J., referring to his judgment in *Parry v. Smith*,³ was of opinion that this case came under the principle there enunciated, that a duty to use the greatest care "attaches in every case, where a person is using or is dealing with a highly dangerous thing which, unless managed with the greatest care, is calculated to cause injury." The law is the same as that which regulates the use of firearms; "It was incumbent on him, who by charging the gun had made it capable of doing mischief, to render it safe and innoxious."⁴ Again, in an American case,⁵ the law was laid down with equal stringency that persons who take upon themselves the business of exploding fireworks must exercise great care; and the care to be used was required "to be proportioned to the dangerous character of the explosives used and the danger to be apprehended from the use of them." There is, however, a distinct difference which has been recognised in American cases between cases of injury through fireworks where the injured person is unconnected with the display and those where the injury results to a spectator at the place for the purpose of the display.⁶ It may well be that the injured passer-by may recover on the principle that it was the duty of the holder of the display to prevent his exhibition inflicting injury; while the person who resorts to a firework display should be put to prove negligence. It must be admitted that the judgment of Lord Esher, M.R., gives no countenance to this. But the analogy of members of a shooting party appears in point, where amongst themselves the liability is not the same as to the outside world. In the American case two judges dissented on the ground that the evidence did not show that the risk was appreciated. This dissent appears to admit the principle. Whether grown people in possession of their faculties who go to see fireworks are not, in the absence of evidence tending to a different conclusion, to be presumed to appreciate the risks attending their action raises a question of common sense rather than of law; so far as the law in England is ascertained, the question has been answered adversely to the dissentient judges.⁷

After the occurrence of an accident through a dangerous agency, where the mere fact of the occurrence is *prima facie* evidence of

¹ As to the duty and liability of a schoolmaster, 1 Bl. Comm. 453; *Fitzgerald v. Northcote*, 4 F. & F. 656, per Cockburn, C.J., 689, and reporters' note 663-669; *Price v. Wilkins*, 58 L. T. 680; *Hutt v. Governors of Haileybury College*, 4 Times L. R. 623. *In re Phillips's Charity*, 9 Jur. 959, 72 R. R. 802. It is not the duty of a schoolmaster of a free school to attend the trustees on all occasions.

² 4 Times L. R. 241 (C. A.).

³ 4 C. P. D. 325.

⁴ *Dixon v. Bell*, 5 M. & S. 198. *Sullivan v. Creed* (1904), 2 I. R. 317, a boy found his father's gun in a field, took it, and not knowing that it was loaded, pointed it at plaintiff; it went off and injured plaintiff, who recovered damages against the boy's father.

⁵ *Dowell v. Guthrie*, 17 Am. St. R. 598.

⁶ *Scanton v. Wedger*, 156 Mass. 462.

⁷ *Ch. Church v. Appleby*, 5 Times L. R. 88.

Amount of care requisite in letting off fireworks in a lawful place and on a lawful occasion.

(1) Where injured person is unconnected with the display.

(2) Where he is assistant.

Different circumstances alter the degree of care.

negligence—it is for the jury to decide whether there has been “absence of care according to the circumstances;”¹ and so where injury results from the storing of gunpowder the person responsible is held liable “even though the explosion is not chargeable to his personal negligence.”² Yet the circumstances may indicate very different degrees of care.³ “A hunter shooting in a wilderness is not bound to the caution of a person shooting in a populous neighbourhood.”⁴ It is therefore matter for a jury whether, on any facts “from which negligence may be reasonably inferred” being established, negligence ought to be inferred from them;⁵ so that, in those cases, where the mere occurrence of an accident is sufficient *prima facie* evidence of negligence to go to a jury,⁶ it is left practically to a jury to decide what degree of diligence is to be required, subject, of course, to the direction of the judge, who should call their attention to the fact that there is no undeviating and cast-iron rule as to what is negligence, and that negligence is “absence of care according to the circumstances.”

Province of the jury.

Within certain limits the verdict of a jury would be conclusive; but where they are shown to have affixed liability by requiring a different degree of diligence from that which the law demands, their verdict would probably be set aside as not warranted by the evidence. Thus, if a man shot on the moors of Yorkshire were to bring his action, and it were to be shown that every precaution was used customary for men out shooting, but notwithstanding this, the jury were to adopt for their standard of care that which should be adopted by a man carrying a gun down Fleet Street, the verdict would be set aside, because the jury had not applied their minds to the only relevant inquiry—“care according to the circumstances.”

Res ipsa loquitur.

Where the fact of injury happening is enough, in the absence of an answer, to entitle the plaintiff to recover, on the principle of *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery*,⁷ the determination of the evidence cannot in any case be withdrawn from the consideration of the jury, however overwhelming the circumstances pointing to exoneration from negligence may be. The defendant's remedy is, as just indicated, by application to the Court *in banc*; and the guiding consideration is whether the verdict is “such as reasonable men might find.”⁸

¹ *Vaughan v. Toff Vale Ry. Co.*, 5 H. & N., per Willes, J., 688.

² *Laftin, &c. Powder Co. v. Tearney*, 19 Am. St. R. 34.

³ *Regina v. Hutchinson*, 9 Cox C. C. 555, liability of army officers for firing, in the regular course of ball practice in a garrison town, whereby a man was killed.

⁴ Wharton, Negligence, § 882, citing *Bizzell v. Booker*, 19 Ark. 308.

⁵ *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 103, per Lord Cairns, C., 197.

⁶ Per Lord Esher, M. R., *Whitby v. Brock*, 4 Times L. R. 241 (C. A.).

⁷ 3 App. Cas. 1155.

⁸ *Metropolitan Ry. Co. v. Wright*, 11 App. Cas. 152.

CHAPTER IV.

FENCES AND PARTY WALLS.

I. FENCES.¹

"A FENCE," says Woolrych, "may consist of almost any kind of division or inclosure, but a hedge, ditch, or a wall will be most commonly found to answer that term."²

In agricultural districts the most usual way of fencing is by hedge and ditch.

The rule with regard to the presumptive ownership of hedges and ditches is that, where adjacent fields are separated by a hedge and ditch, the hedge and ditch *primâ facie* belong to the owner of the field that contains the hedge; for "no man making a ditch can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land: he is of course bound to throw the soil which he digs out upon own land."³

If there are two ditches, one on each side of a hedge, or if there be a bank on each side of a ditch, or a bank without a ditch, then the ownership of the hedge, ditch, or bank must be ascertained by proving acts of ownership.⁴

By the common law the owner of land is under no obligation to fence.⁵ He is bound to see that his cattle do not stray into his neighbour's land, since if they do he is guilty of trespass.⁶

In *Boyle v. Tamlyn*,⁷ Bayley, J., says: "The general rule of law is, Bayley, J.

¹ See an article, *The Law Relating to Fences*, *Law Mag.* (1828), vol. i. 590; Shearman and Redfield, *Negligence*, §§ 655-664; Wharton, *Negligence*, §§ 883-890.

² *Law of Fences*, 281. This does not seem to lay stress enough on palings, which have now become a primary sense of the word, though it certainly includes them. For the distinction between a wall and a bank, see *Callis*, 74.

³ Per Lawrence, J., *Vowles v. Miller*, 3 Taunt. 138; *Doe dem. Pring v. Pearsey*, 7 B. & C., per Holroyd, J., 307; *Strang v. Stewart*, 4 Macph. (H. L.) 5. *Marshall v. Taylor*, (1895) 1 Ch. 641 (where *Norton v. L. & N. W. Ry. Co.*, 13 Ch. D. 268, is cited for the easement to cut the hedge), and is followed: *Midland Ry. Co. v. Wright*, (1901) 1 Ch. 738; *Chorley Corporation v. Nightingale*, (1906) 2 K. B. 612; *Earl of Craven v. Pridmore*, 18 Times L. R. 282.

⁴ Per Bayley, J., in *Guy v. West*, 2 Selwyn N. P. (13th ed.) 1244. For the French law, see *Code Civil*, arts. 653-673.

⁵ This rule dates from the Year-books—*e.g.*, 20 Edward IV., fol. 10 b, cited and set out 17 C. B. N. S. 251 n., and considered in connection with the other authorities in the judgment of Blackburn, J., *Fletcher v. Rylands*, L. R. 1 Ex. 280. *Ante*, 423.

⁶ *Churchill v. Evans*, 1 Taunt. 529. See Y. B. 30 Edw. III. 3. If land be open to the highway and the beasts of a stranger enter upon the land, it is not justifiable. Otherwise if cattle in passage on the highway eat herbs or corn, *vaplin sparsim*, against the will of the owner, it will excuse the trespass: *Com. Dig. Trespass (D)*; *Droit*. (M. 2); *Pomfret v. Ricroft*, 1 Wms. Saund. 322 n (c).

⁷ (1827) 6 B. & C. 337.

that a man is only bound to take care that his cattle do not wander from his own land, and trespass upon the lands of others. He is under no legal obligation, therefore, to keep up fences between adjoining closes of which he is the owner; and even where adjoining lands which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose."¹

Working out
of the legal
theory.

Though the law is thus, the effect of it in grazing countries at least is indistinguishable from what it would be were there an absolute obligation to fence. Bigelow,² indeed, lays it down that "by the common law of England the owner of land is bound to keep it fenced," and cites Chancellor Kent as his authority for the proposition.³ In theory at least, the law is clearly otherwise, and there is no obligation to fence, though the natural effect of not fencing may involve a liability against which fencing is the only preventive.

Williams, J.,
in *Cox v.*
Burbidge.

Thus, Williams, J., in *Cox v. Burbidge*,⁴ says: "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." Again, in *Ellis v. Loftus Iron Co.*,⁵ where there was an iron fence on the plaintiff's land, notwithstanding which, a horse of the defendants' did damage to a horse of the plaintiff's through the fence, "It seems to me," said Lord Coleridge, "sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law;" and Brett, J.,⁶ "For a time I doubted whether, if the animal strayed upon the plaintiff's soil without negligence on the part of the defendants, a trespass would have been committed. However, upon reference to the authorities, I find that the owner of an animal, although he may be guilty of no default, is liable to be sued in trespass if he strays on to another's ground. A passage in 3 Black. Com. chap. xii. p. 211, might perhaps cause a little hesitation; the writer there says that 'a man is answerable, not only for his own trespass, but that of his cattle also'; but he then proceeds to speak of 'negligent keeping'; the language is not quite decisive. If, however, we refer to Com. Digest, Trespass, C 1, and 1 Chitty, on Pleading, pp. 93, 202 (7th ed.) we shall find that the

Ellis v.
Loftus Iron
Co.

¹ See *Lawrence v. Jenkins*, L. R. 8 Q. B. 274. As to strips of land adjoining a road, *Doe dem Pring v. Penrose*, 7 B. & C. 304; *Simpson v. Dendy*, 8 C. B. N. S. 433; *Dendy v. Simpson*, 18 C. B. 831; *Jones v. Williams*, 2 M. & W. 326; Vin. Abr. Fences.

² L. C. on Torts, 490.

³ 3 Kent, Comm. 438. The passage is: "The doctrine is, that at common law the tenant of a close was not bound to fence against an adjoining close, unless by force of prescription; and, if bound by prescription to fence his close, he was not bound to fence against any cattle but such as were rightfully in the adjoining close. If not bound at common law to fence his land, he was nevertheless bound, at his peril, to keep his cattle on his own grounds, and prevent them from escaping."

⁴ 13 C. B. N. S. 438, cited and approved by Blackburn, J., *Fletcher v. Rylands*, L. R. 1 Ex. 281.

⁵ L. R. 10 C. P. 10; *Lee v. Riley*, 18 C. B. N. S. 722—mare trespassed into a field of defendant's: there was a question also of remoteness of damages.

⁶ 44 L. J. C. P. 26.

owner is liable in trespass if cattle stray upon another's land, although he himself commits no fault."

A distinction must be taken, for the liability of a landowner for what escapes from his land is not absolute. Thus, in Comyns's Digest¹ it is laid down: "If a man has a tame fox, which escapes, and becomes wild and does mischief, the owner shall not answer for the damage done afterwards: per Twisden, J., 1 Ventris 295."

Hale,² however, has the following: "These things seem to be agreeable to law."

"1. If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it."

"2. Though he have no particular notice, that he did any such thing before, yet if it be a beast, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's case*, whose child was bit by a monkey that broke his chain and got loose."³

"And therefore, in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages."

Again, in *Nichols v. Marsland*,⁴ Bramwell, B., says: "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable."

To reconcile these *dicta* it is necessary to draw into prominence the distinction between animals natural to the country and animals brought in for the convenience or pleasure of their captors. A fox breaking its chain merely resumes its natural state in a country where other foxes exist; so, too, of hares, partridges, or pheasants.⁵ A monkey escaped, or a lion, or a bear, is a dangerous agency which of its own nature would not have been a peril to the neighbourhood, had it not been imported there. The distinction is between the introducing a new means of mischief and then permitting it to get free, and arresting an existing mischief to the ravages of which property is naturally subject, and which after an interval resumes its natural course. Could it be shown that by reason of the temporary confinement damage of a special character was done, there seems no reason why liability would not attach. The case of the tiger put by Bramwell, B., may assist to illustrate the rule. In this country the person responsible for the presence of the tiger would be liable for its escape. In India the proprietor of a territory acquired for tiger-shooting, having captured and confined a tiger, would not be liable for the ravages done on its escape, because the visitation of tigers is an incident of property thereabouts, and the escape of one merely restores the condition of things before the capture, and so imposes no liability. The liability

¹ Action upon the Case for Negligence (A 5). The case referred to is *Mitchell v. Alstree*; in 2 Lev. 172 *sub nom. Mitchell v. Alstree*, where this point is not noticed, and the authority for Twisden, J.'s, statement is *Leaver v. Ward*, Hob. 134. Most of the cases are cited in *Read v. Edwards*, 17 C. B. N. S. 245.

² History of the Pleas of the Crown, vol. i. 430.

³ See *May v. Burdett*, 9 Q. B. 101.

⁴ L. R. 10 Ex. 255, 260.

⁵ *Mitchell v. Alstree*, 1 Ventris 295. A tame fox escaped. It was held that "he that kept him before shall not answer for the damage the fox doth after he hath lost him and he hath resumed his wild nature." This is doubted by *Johnson, J.*, *Brady v. Warren*, (1900) 2 I. R. 632.

to danger from tigers is or was incident to the user of property in tiger-infested districts of India as damage from eats is to the owner of pleasure grounds in the suburb of an English town. This consideration is applicable to and explains the rule of the civil law: *Si ursus fugerit a domino et sic nocuerit, non potest quondam dominus conveniri quia desiit dominus esse ubi fera evasit.*¹ Bears are indigenous over all the region where the civil law prevailed.²

Duty towards neighbour's cattle.

Williams's Notes to Saunders.

Cases of liability to repair fences examined.

Unfenced land adjoining a highway.

The difference, between the liability alleged to exist in *Bigelow's Leading Cases on the Law of Torts*,³ and that which the law actually imposes, is of importance when we consider the position of a landowner with regard to his neighbour's cattle. If there were a liability to fence, then, in default of fencing, injury happening to his neighbour's cattle would import a right of action to the neighbour. Unless by prescription, or through the force of an agreement, no such liability exists. This appears from Williams's Notes to Saunders:⁴ "It must be observed that the general rule of law is that I am bound to take care that my beasts do not trespass on the land of my neighbour, and he is only bound to take care that his cattle do not wander from his land and trespass on mine; 6 Mod. 314, *Tenant v. Goldwin*. 1 Taunt. 529, *Churchill v. Evans*. 6 B. & C. 329, *Boyle v. Tamlyn*, 9 D. & R. 430, S.C.; and therefore, this kind of action [i.e., an action on the case for not repairing a fence] will only lie against a person who can be shown to be bound by prescription or special obligation to repair the fence in question for the benefit of the owner or occupier of the adjoining land. And no man can be bound to repair for the benefit of those who have no right." Where, then, an action has been held maintainable for an accident to the plaintiff's cattle by reason of defective fences on the defendant's land, the liability to repair the fences was either admitted as in *Rooth v. Wilson*,⁵ or was apparent from the terms of the holding, as in *Firth v. Bowling Iron Co.*,⁶ or was proved, as in *Boyle v. Tamlyn*,⁷ or was presumed, as in *Lawrence v. Jenkins*,⁸ from the fact that fences had been kept in repair, at the request of the neighbours, by the occupiers of the land sought to be charged. A twenty years' repairing in this manner will raise a presumption of liability, capable of being rebutted by proof that the party whose tenants repaired were under disability, or were merely tenants for life; if the proof be that repairs have been uniformly done for forty years, the prescription will be conclusive.⁹ The fact of repair, unaided by other circumstances, will not be sufficient; it must also be shown that such repairs have been made upon the requisition from time to time of the persons claiming the easement, or at least sufficient must be shown to warrant a jury making such a presumption.¹⁰

If unfenced land adjoins a highway the owner of cattle travelling along the highway is not liable, negligence being out of the way, for damage done by his cattle in straying into unfenced land.¹¹ This is an

¹ Inst. 4, 9.

² Encyclopædia Britannica (9th ed.), Bears.

³ Ante, 504.

⁴ *Pomfret v. Ricroft*, 1 Wms. Saund. 322a, n. (c).

⁵ 1 B. & Ald. 59.

⁶ 3 C. P. D. 254; *Bush v. Brainard*, 1 Cowen (N. Y.) 78, strayed cow drinking maple syrup; *Blood v. Spaulding*, 57 Vt. 422, cited Shearman and Redfield, Negligence (4th ed.), § 661.

⁷ 6 B. & C. 329, 9 D. & R. 430.

⁸ L. R. 8 Q. B. 274.

⁹ 2 & 3 Will. IV. c. 71. Cp. Gale, Law of Easements (6th ed.), 176-190 and 451-404; Gibbons, Law of Dilapidations, 284.

¹⁰ *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Earl of Craven v. Pridmore*, 18 Times L. R. 282.

¹¹ *Goodwyn v. Cheveley*, 4 H. & N. 631; *Tillett v. Ward*, 10 Q. B. D. 17.

exception to the general law requiring a man to keep his cattle on his own land, or, more accurately, to keep them off his neighbour's, and is made probably for the purpose of facilitating commerce. As long ago as 22 Edward IV.¹ Cateshy, J., said: "If one drive a herd of cattle along the highway where trees or wheat or any other kind of corn is growing, I say that if one of the heasts take a parcel of the corn, if it be against the will of the driver, he may well justify, for the law will intend that a man cannot govern them at all times as he would. But if he permitted them or continued them, then it is otherwise." And if the cattle are on the highway, not for passage, but to graze, such user is unlawful; for the public rights on a highway are only to pass and repass thereon, and the owner of cattle is liable for an entry of them in those circumstances on land adjoining the highway. The party who would take advantage of fences being out of repair as an excuse for his cattle escaping from a way into the land of another must show that he was lawfully using the easement when the cattle escaped; for it is no excuse that the fences were out of repair if the cattle were trespassers in the place from whence they immediately came.²

Cattle straying from the highway.

The ground of this is obviously the same as other exceptions from liability we have considered. The right of one man is limited by the equal right of others, and the natural user of property or of the highways must be maintained even though the owner is subjected to treatment that in other relations he has not to submit to, for the general good.

Reason of the rule.

With this exception, the law is absolute. Assuming, however, the obligation to fence, the sufficiency of the fence erected in discharge of the obligation is a matter for the jury, who have to say whether the fence was such as an adjoining landowner using his land according to the accustomed course of farming has a right to have.³ It is not to be "a fence so close and strong that no pig could push through it, or so

Sufficiency of fences where there is an obligation to fence.

¹ Y. B. 22 E. IV. § pl. 24.

² *Dovaston v. Payne*, 2 H. Bl. 527, 2 Sm. L. C. (11th ed.) 160. An entry on another's land may be justified in cases of necessity (as if a man who is assaulted and in danger of his life run through the close of another to escape) or to recover property carried on another's ground by force of the elements (as if the fruit of A's tree fell on B's land), Bac. Abr. Trespass (F); Vin. Abr. Tres. (Ha. 2). But if a tree had fallen on another's land through the owner's cutting it, he could not justify an entry, *Anthony v. Hawry*, 8 Bing. 192. "If a man take my goods and carries them into his own land, I may justify my entry into the said land to take my goods again, for they came there by his own act": Vin. Abr. Tresp. (L. a) 9, adopted *Patrick v. Colerick*, 3 M. & W. 483, distinguishing 3 Bl. Comm. 4, cited by Tindal, C.J., *Anthony v. Haney*, *supra*. As to trees growing near a boundary line, it was held in *Masters v. Pollie*, 2 Roll. Rep. 141, that though nearly an equal portion of the roots may grow into the adjoining land, the tree belongs to the owner of the land in which the trunk is. Holt, C.J., in *Waterman v. Soaper*, 1 Ld. Raym. 737, at *nisi prius* held the adjoining owners tenants in common, though if all the roots grew in one man's land and the branches overshadowed the others the roots drew to themselves the ownership of the branches and the property in the tree. In *Holder v. Coates*, M. & M. 112, the test was said to be in whose land was the tree first planted. In the Civil Law the property is in common, Inst. 2, 1, 31. The whole subject is well considered in *Lyman v. Hale*, 11 Conn. 177, which decides that he, in whose land the trunk is, is the owner, and his neighbour a trespasser if he meddles with any of the overhanging fruit. See also Vin. Abr. Trees. "If the branches of your tree overhang my land I may lawfully cut them but I cannot justify cutting them before they overhang my land for fear of their overhanging": *Norris v. Baker*, 1 Roll. Rep., per Croke, J., 394; *Earl of Lonsdale v. Nelson*, 2 B. & C., per Best, J., 311: who regards the permitting branches to extend beyond the soil of the owner of trees as "a most unequivocal act of negligence." This is probably one of those rash philanthropic generalisations for which Best, J., is noted. See per Palles, C.B., *Brady v. Warren*, (1900) 2 I. R. 662. If they do overhang I may cut them without giving notice. *Lemmon v. Webb*, (1895) A. C. 1. To allow trees to grow over a river so as to hinder the navigation is a nuisance, Bro. Abr. Presentments in Courtes, pl. 11; probably because the river is a highway, *ante*, 407, where *Smith v. Giddy*, (1904) 2 K. B. 448, is discussed.

³ *Bevan v. G. W. R. Co.*, 8 C. B. N. S. 368; *Wiseman v. Booter*, 3 C. P. D. 184.

high that no horse or bullock could leap it. One could scarcely reach the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side." The obligation is no more than to put "up such a fence that a pig, not of a peculiarly wandering disposition, nor under any excessive temptation will not get through it."¹

Occupier's
duty to
repair.

With regard to the public, it is so notoriously the duty of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against his tenant for not doing so.² This presumption does not exclude agreements between the landlord and tenant, the benefit of which against the landlord may be taken by any third person cognisant of their existence.³

Duty to
fence only
against
adjoining
owner.

At common law the owner of land, if bound to fence at all, is only bound to do so against cattle rightfully on the adjoining land.⁴ If the owner of such adjoining land happen to be a gratuitous bailee of a horse injured by the neglect to fence, he can recover;⁵ since beneficial ownership is not necessary.

Obligation to
fence by
statute.
Railways
Regulation
Act, 1842.

We are next to consider the statutory obligation to fence. By section 10 of the Railways Regulation Act, 1842,⁶ it is enacted that all railway companies shall be under the same liability of obligation to erect and to maintain and repair good and sufficient fences throughout the whole of their respective lines as they would have been if every part of such fences had been originally ordered to be made under an order of justices by virtue of the provisions to that effect in the Acts of Parliament relating to such railways respectively.

Railways
Clauses Act,
1845.

And by section 68 of the Railways Clauses Consolidation Act, 1845,⁷ railway companies are bound to supply sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle⁸ of the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles.

This section, says Jervis, C.J., in *Manchester, Sheffield, and Lincolnshire Ry. Co. v. Wallis*,⁹ "was plainly intended as a substitute for" the earlier provision.

¹ *Child v. Hearn*, L. B. 9 Ex., per Bramwell, B. 182. "I agree that the company are not bound to fence against animals of extraordinary capacities, or under unusual conditions; but they must have a fence sufficient against ordinary cattle": per Pigott, B., 183. Cp. *McIlvaine v. Lantz*, 100 Pa. St. 586.

² *Cheetham v. Hampson*, 4 T. R. 318.

³ *Payne v. Rogers*, 2 H. Bl. 349; *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311.

⁴ Fitzherbert, *De Natura Brevium*, 128, n. (a), cited by Jervis, C.J., and set out in *Ricketts v. East and West India Docks, &c. Co.*, 12 C. B. 160, 171; 1 Wms. Saund. 321, cited by Jervis, C.J., *Manchester, Sheffield, and Lincolnshire Ry. Co. v. Wallis*, 14 C. B., 218. In *Rust v. Low*, 6 Mass. 90, 99, it is pointed out by Parsons, C.J., that Hale's note to Fitzherbert, cited *supra*, is inaccurate. The history of this judgment is curious, and is given in Story's *Life and Letters*, vol. i. 116-118. Where the obligation to fence exists the obligation exists irrespective of any particular purpose to which the owner puts any portion of his land—e.g., the obligation is not discharged if he uses his lands immediately adjoining the lands that should be fenced as arable land, and his cattle stray from their meadows across the arable land and come to mischief through the fencing being defective against their incursion.

⁵ *Rooth v. Wilson*, 1 B. & Ald. 59. ⁶ 5 & 6 Vict. c. 55. ⁷ 8 & 9 Vict. c. 20.

⁸ Cattle—Beasts or quadrupeds in general serving for tillage or other labour, and for food to man. The word is said to include "perhaps swine": Webster. Cattle—Kine, horses, and some other animals appropriated to the use of man: Richardson. In *Child v. Hearn*, L. B. 9 Ex. 176, the word "cattle" was held to include pigs.

⁹ 14 C. B. 220.

The first reported case, *Sharrod v. L. & N. W. Ry. Co.*,¹ went off on the point that the action was framed in trespass instead of on the case. This was followed by *Fawcett v. York and North Midland Ry. Co.*,² brought on section 9 of the earlier Act,³ whereby an obligation was imposed on railway companies to keep the gates at the ends of level crossings closed against all persons or cattle upon the highway; the Court held that "that imposes an obligation to keep them closed as against everything, whether straying or passing," and that a company not performing this obligation is liable to an action for its breach of duty.⁴

This decision was strongly insisted on in *Ricketts v. East and West India Docks, &c. Co.*,⁵ which was brought under section 68 of the Railways Clauses Act, 1845. The company were bound to make and maintain fences in the terms of the statute. The plaintiff was the owner of a close adjoining a close belonging to the Great Northern Railway Company, which abutted upon the defendants' railway; the plaintiff was bound to repair the fences of his own close. By the defect of his own fences plaintiff's sheep escaped into the adjoining close and then passed to the defendant's railway, and, in consequence of the want of a fence between it and the railway, were killed. There was no allegation of negligence. The Court decided that where an obligation to fence existed under the common law, that obligation was limited to the benefit of adjoining owners, and that "the statute had most properly taken the common law rule as the measure" of railway companies' liability.

We have already seen that whilst cattle are passing along a highway, the owners of such cattle are using it according to the dedication of the owner of the soil, and that if, therefore, whilst passing along the road they stray into an adjoining field, the owner of the field cannot distrain them damage feasant if he were bound to keep up the fence against the road.⁶ But if they had strayed upon the road and thence into the field they may be distrained damage feasant, since they have no business on the highway and there is no duty to repair fences against straying cattle, but only for those rightfully on the highway. In America, however, there seems to be a rule requiring the land owner to fence against cattle generally.⁴

The distinction just noted is observed in fixing the import of a railway company's statutory liability to fence. In *Manchester, Sheffield, and Lincolnshire Ry. Co. v. Wallis*⁷—plaintiff's horses strayed on the highway which ran alongside the railway, and through defect of the fences of the defendant company got upon the railway and were killed. The Court held that the plaintiff could not recover, as his horses were not rightfully using the highway, and there was no obligation on the defendants to maintain a fence against them. The distinction between this case and *Fawcett v. York and North Midland Ry. Co.*⁸

¹ 4 Ex. 580.

² 16 Q. B. 610.

³ 5 & 6 Vict. c. 55.

⁴ Per Patteson, J., 618.

⁵ 12 C. B. 160; *Monklands Ry. Co. v. Waddell*, 23 Dunlop 1167, decides that the law in Scotland does not differ.

⁶ *Dovaston v. Payne*, 2 H. Bl. 527.

⁷ Thompson, Negligence, § 906.

⁸ 14 C. B. 213, designated by Lord Esher, M.R., in *Charman v. S. E. R. Co.*, 21 Q. B. D. 524, "a strong decision, but it was the decision of a very strong Court." "It is useless," he added, "now to cavil at that decision, and I think that no Court of Appeal ought to interfere with it and the cases that followed it." *Luscombe v. G. W. Ry. Co.*, (1899) 2 Q. B. 313. Cp. *Duncan v. Canadian Pacific Ry. Co.*, 21 Ont. R. 355.

⁹ 16 Q. B. 610.

Distin-
guished from
Fawcett v.
York & North
Midland
Ry. Co.

was pointed out to be that *Fawcett's case* was decided on another section,¹ by which an unqualified duty was imposed on the company to keep constantly closed gates across any turnpike road or public carriage road on a level; while the 68th section had been decided, in *Rickett's case*,² to impose no more than the common law obligation to keep up the fences against the cattle of the owners or occupiers of the adjacent land. Cresswell, J., instanced the case of *The King v. Pease*³ as "a strong authority to show that the Legislature having legalised railways, they are not subject to any liability beyond the ordinary common law liability, except where the Legislature has thought fit to impose it."

Corry v. G. W.
Ry. Co.

In *Corry v. G. W. Ry. Co.*⁴ the benefit of sec. 68 was held to enure to the occupier and to be absolute though the owner of lands adjoining a railway had received compensation from the company to discharge him from his obligation; and in *Dixon v. G. W. Ry. Co.*⁵ the section is declared to be independent of sec. 73, which requires accommodation works to be executed within five years, and the duty to fence is continuous.

The company's obligation under section 68 is limited to owners and occupiers of adjoining land, and therefore the want of fencing cannot be alleged as negligence by a mere passenger on the railway.⁶

Charman v.
S. E. Ry. Co.

In *Charman v. S. E. Ry. Co.*,⁷ horses of the plaintiff strayed from a common upon a road leading across the defendants' railway. The road was divided from the railway by properly constructed gates; beyond the limit of the road, on a triangular piece of ground belonging to the defendants, was a swing gate for the use of foot passengers. One of the posts was rotten, and a defect in the fencing was thereby caused, through which the horses made their way and were killed. The 68th section of the Act was not applicable, because the horses were straying. The wider provisions of the 47th section were, it was contended, also not applicable, because the duty of the company (possibly absolute as far as it extended) extended only so far as the breadth of the road, and since in this case the protection was afforded for the total breadth of the road, and the defect was off the road, it was urged that the statutory duty did not apply. The Court of Appeal held the company liable, and Lord Esher, M.R., said:⁸ "I think that the company are bound to make the gates not merely the width of the road, but of such a width that when they are closed they will fence in the railway so as to prevent cattle or horses, which are using the road as a road of passage, and acting as cattle or horses naturally would act upon such a road, from entering 'on the railway'—not merely from entering on the level crossing—but from entering on the railway, and, whatever the width of the road, if it is necessary to do so in order to give that protection, the gates must be wider than the road. To say, however, that the company would be obliged to make a fence a quarter

Judgment of
Lord Esher,
M.R.

¹ 5 & 6 Vict. c. 55, s. 9.

² 12 C. B. 160.

³ 4 R. & Ad. 30.

⁴ 7 Q. B. D. 322.

⁵ (1897) 1 Q. B. 300.

⁶ *Buxton v. N. E. Ry. Co.*, L. R. 3 Q. B. 549. See, however, 5 & 6 Vict. c. 55, s. 10, which has never in terms been repealed, though Jervis, C.J., in *Manchester, Sheffield and Lincolnshire Ry. Co. v. Wallis*, 14 C. B., 220, says section 68 of 8 & 9 Vict. c. 20 is substituted for it. In some States of the American Union neglect by a railway to fence when they have the power is visited by damages of double the value of any stock killed by straying on the line, *Minneapolis Ry. Co. v. Beckwith*, 129 U. S. (22 Dan. 91).

⁷ 21 Q. B. D. 524.

⁸ 21 Q. B. D. 530.

of a mile long, or even a hundred yards long—something which no one could call a gate—would be absurd and unreasonable.”

We have seen that, at common law, an adjoining owner can recover from a neighbouring proprietor bound to fence for damage caused by negligence to a horse of which he was gratuitous bailee.¹ *Dawson v. Midland Ry. Co.*² was a somewhat similar case, but under the Act. The licensee of the occupier³ of land adjoining the defendants' railway sued for injury to his horse, which was allowed to graze on the land, and managed to get through a defective fence on the defendants' line, and was killed. Kelly, C.B., held that “the plaintiff's horse was lawfully in the field, from which it escaped through defect of the defendants' fences.” Bramwell, B., said, “the statute appears to me to be for the benefit of all persons who are lawfully using adjoining land.” The term “cattle of occupiers” used in the Act must, then, be taken to include the cattle of all persons who are lawfully upon lands adjacent to a railway, and the liability cast on the company by the Act is “very much like the old prescriptive liability to fence.”⁴

An unsuccessful effort was made in *Midland Ry. Co. v. Daykin*⁵ to contend that a colt that had strayed on the highway, and which the owner's servants were in the act of driving home, when, by the negligence of the company's servants, it got upon the railway, was within this rule. The Court, however, was clear as to the liability of the railway company.

The cases of *Roberts v. G. W. Ry. Co.*⁶ and *Marfell v. South Wales Ry. Co.*⁷ remain for consideration. In the former, plaintiff sued for the loss of some cattle which were sent by railway, and on arriving at their destination were removed from the truck into a yard belonging to the company adjoining the railway, though not fenced therefrom. The cattle, being frightened, rushed on to the line and were killed. The plaintiff sued for negligence, alleging that the company had negligently omitted to fence the yard from the railway. The defendants denied their obligation to fence either by statute or at common law. The Court was of opinion that no legal liability was “cast upon the company to make or maintain any fence between their station yard and the railway.”⁸

In the latter case⁹ a railway and a tramway ran in parallel lines each on the land of the railway company. The plaintiff was using the tramway with horses and trucks by permission of the defendants, and was paying toll for the privilege. A fence had been placed between the railway and the tramway, in which fence was a gate which had been left open by the defendants' servants. The evidence was that plaintiff had never seen the gate shut. Through the opening thus left, plaintiff's horse swerved through fear on the railway and was killed. It was sought to put the defendants' liability on two grounds—first, that the company were liable under section 68; and secondly, failing that, at common law. The Court was agreed that there was no

¹ *Rooth v. Wilson*, 1 B. & Ald. 59. *Ante*, 508.

² L. R. 8 Ex. 8.

³ The Act is for the protection of “the cattle of the owners or the occupiers.”

⁴ *Wiseman v. Booker*, 3 C. P. D., per Lopes, J., 189.

⁵ 17 C. B. 126.

⁶ 4 C. B. N. S. 506.

⁷ 8 C. B. N. S. 525.

⁸ Cp. *Covington Stockyards Co. v. Keith*, 139 U. S. (32 Davies) 128, where a railway company holding itself out as a carrier of livestock is held to be under an obligation to provide suitable and necessary facilities for receiving and discharging livestock sent to or forwarded by them.

⁹ *Marfell v. South Wales Ry. Co.*, 8 C. B. N. S. 125.

liability under the first head. "It is clear," said Erle, C.J., "that the defendants are under no obligation to put any fence on their own land." The Chief Justice was also of opinion that there was no evidence of common law negligence, for "if it [i.e., the gate] was always open, there would be no ground for inferring a contract for keeping it shut; and upon the notes the plaintiff states that he never saw the gate shut." The majority of the Court,¹ however, thought that the defendants, having constructed a fence with a gate, were bound to use it; and sustained the verdict for the plaintiff. This reasoning does not strike one as convincing, not even as plausible.²

Wiseman v. Booker.

The neglect of a railway company efficiently to perform their obligations in *Wiseman v. Booker*³ enured to the detriment of their own tenant. The company let some of their land to a tenant, who planted it with vegetables, which were consumed by horses on the defendant's lands adjoining putting their heads over the fence that the railway company had set up in assumed discharge of their statutory obligation. On action being brought by the tenant, the defendant set up that the fence erected by the plaintiff's landlord was insufficient, and this objection was sustained. Lindley, J., thus interprets the language of the section: "The fence is to be for the benefit of the owner or occupier of the adjoining lands. The structure is to be sufficient to keep the cattle of the adjoining owners from straying on to the land of the company. The horses here were straying within the fair meaning of those words; and this it was the duty of the company to prevent. Suppose the company had after erecting such a fence as here described, planted yew-trees so near to it as to be within reach of the cattle of the adjoining owner, and they had eaten and died, would not the company have been responsible for their loss within the principle of the decision in *Ellis v. Loftus Iron Co.*?"⁴

Interpretation of the section by Lindley, J.

Duty to fence approach to unused mine.

There is also, under the Metalliferous Mines Regulation Act, 1872,⁵ an obligation on the owners⁶ and "every other person interested in the minerals" of every mine that is abandoned or the working thereof discontinued to cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced. And by the Quarry (Fencing) Act, 1887,⁷ any quarry dangerous to the public in open or unenclosed land, within fifty yards of a highway or place of public resort dedicated to the public and not separated therefrom by a secure and sufficient fence, shall be kept reasonably fenced for the prevention of accidents, and unless so kept is to be deemed a nuisance, and is liable to be dealt with summarily in manner provided by the Public Health Act, 1875.⁸ By

¹ Williams and Byles, JJ.

² "If a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard*": per Willes, J. *Skelton v. L. & N. W. Ry. Co.*, L. R. 2 C. P. 636.

³ 3 C. P. D. 184.

⁴ L. R. 10 C. P. 10. The principle of this case appears to be that "in the case of animals trespassing on land the mere act of the animal belonging to a man which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass." per Brett, J., 13. Cp. *Ponting v. Noakes*, (1804) 2 Q. B. 281. The duty in the case in the text was to fence for the benefit of the occupier. The breach was not so fencing.

⁵ 35 & 36 Vict. c. 77, s. 13.

⁶ *Knuckey v. Redruth Rural Council*, (1904) 1 K. B. 382.

⁷ 50 & 51 Vict. c. 19.

⁸ 38 & 39 Vict. c. 55, ss. 91-111. *Ante*, 433.

the Canals Protection (London) Act, 1898,¹ any part of a canal that abuts upon any highway existing at the time of the passing of the Act that is unprotected so as to involve danger to life is to be protected by such fences or rails as are necessary to obviate danger.

The law relating to the fencing of dangerous machinery under the Factory and Workshop Act, 1901,² is considered in connection with the law of Master and Servant.

II. PARTY-WALLS.³

The law as to party-walls remains to be noticed briefly.

In *Watson v. Gray*, Fry, J., says:⁴ "The words [party-wall] appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford*⁵ and *Cubitt v. Porter*.⁶ I think that the judgments in those cases show that that is the most common and the primary meaning of the term. In the next place, the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in *Matts v. Hawkins*.⁷ Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing-wall between the two tenements. The term is so used in some of the Building Acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favour of the owner of the other moiety."⁸

Fry, J., in *Watson v. Gray* as to meaning of term "party-wall."

1. If the adjoining owners are tenants in common, one cannot maintain an action for trespasses not amounting to an ouster, because all have equal rights of possession and property.⁹ If an act amounts to an ouster, an action will lie, as if the common property is destroyed or a chattel appropriated.¹⁰

1. Case of tenants in common of the wall.

The old rule of law, as illustrated by the judgment of Littledale, J., in *Cubitt v. Porter*,¹¹ was that trespass would not lie between co-tenants for anything short of a destruction of the common property. The doctrine now adopted, as laid down in *Murray v. Hall*,¹² is that trespass will lie by a co-tenant against a co-tenant for an ouster.

2. If the adjoining owners are entitled each to a strip of half the thickness of the wall, because half is on the land of one and half on the land of the other, "each party, for any injury done to the part which stands on his own land must have the ordinary remedy."¹³

2. Case of adjoining owners each having half the wall.

3. If the wall belongs to one owner, and the other has an easement over it, then the owner of the dominant tenement is entitled to put any amount of weight on the wall that does not endanger its stability.¹⁴

3. Case of one adjoining owner having ownership of the wall over which the other has an easement.

¹ 61 & 62 Vict. c. 16.

² 1 Edw. VII. c. 22, s. 10.

³ Hunt, Boundaries, ch. v. See the London Building Acts, 57 & 58 Vict. c. cxxiii. and 5 Edw. VII. c. cclx.

⁴ 14 Ch. D. 192, 194. Cp. *Mayfair Property Co. v. Johnston*, (1894) 1 Ch. 508.

⁵ 1 M. & Ry. 404, 8 B. & C. 259 n.

⁶ 8 B. & C. 257.

⁷ 5 Taunt. 20.

⁸ See note to *Wiltshire v. Sidford*, 1 M. & Ry. 408.

⁹ *Wilkinson v. Haygarth*, 12 Q. B. 837.

¹¹ 8 B. & C. 207.

¹⁰ *Jacobs v. Seward*, L. R. 5 H. L. 464.

¹² 7 C. B. 441. Com. Dig. Estates, by Grant (K 8.).

¹³ *Matts v. Hawkins*, 5 Taunt., per Mansfield, C.J., 23. See also *Bradbec v. Christ's Hospital*, 4 M. & G. 714, 760.

¹⁴ *Sheffield Improved Industrial, &c. Society v. Jarvis*, W. N. 1871, 208, W. N. 1872, 47.

4. Case of cross-easements.

4. If the ownership of the wall is in moieties, each being subject to a cross-easement, then each is similarly entitled to put any amount of weight on the wall; and each party, for any injury done to the part which stands on his own land (subject to the easement), must have the ordinary remedy.

Effect of Metropolitan Building Act, 1855, on the law.

Under the Metropolitan Building Act, 1855,¹ different considerations came into being. "Whatever the rights at common law might have been, such right no longer exists."² The object of the Act is to limit the acts of private owners for the general benefit of the public, to prevent the spread of fire, and for similar purposes. In order to determine whether a wall is a party-wall, it is not necessary to consider what rights of ownership the plaintiff and defendant have, but what is the physical condition, position, and user of the wall.³

57 & 58 Vict. c. cxxiii.

Sec. 3⁴ provides that "party-wall shall apply to every wall used or built in order to be used as a separation of any building from any other building with a view to the same being occupied by different persons." This Act was superseded by the completer code of the London Building Act, 1894; the definition in sec. 5 of which, though wider, is to the same effect.

The question of ownership, therefore, is become of small account; and when the circumstances of condition, position, and user that constitute a party-wall are determined, the rights are fixed by the provisions of the Building Act.

Fry, J.'s, judgment in *Knight v. Purcell*.

In this view, the following statement by Fry, J.,⁵ is of importance: "Acts of Parliament often take away some control of owners over their property for public purposes. Therefore I consider this wall to be a party-wall, but only so far as it is used by the plaintiff on the one hand and the defendant on the other as a support for their buildings. The case of *Weston v. Arnold*⁶ shows that a wall may be a party-wall for some part of its height, and above that height may be the separate property of one of the adjoining owners. In the same way I hold this wall to be, laterally, a party-wall for such distance as it is used by both plaintiff and defendant for their buildings, and no further. The result is that, for the distance that the plaintiff's closets extend,⁷ the wall is a party-wall, and, upon giving the proper notices under the Act, the defendant may deal with that part of the wall in accordance with the 88th section of the Act."⁸

¹ 18 & 19 Vict. c. 172. This Act is superseded as to party-walls and repealed by the London Building Act, 1894, Part viii.

² *Standard Bank of British South America v. Stokes*, 9 Ch. D., per Jessel, M.R., 73.

³ *Knight v. Purcell*, 11 Ch. D., per Fry, J., 415.

⁴ 18 & 19 Vict. c. 122. See now London Building Act, 1894, s. 5 (16): "The expression party-walls means (a) a wall forming part of a building, and used, or constructed to be used, for separation of adjoining buildings belonging to different owners, or occupied or constructed or adapted to be occupied by different persons; (b) a wall forming part of a building and standing to a greater extent than the projection of the footings on lands of different owners." The provisions of the French law are to be found in articles 653-673 of the Code Civil. See, too, Toullier, *Le Droit Civil Français*, liv. 2, ch. 3, § 1, *De la Mitoyenneté des Murs*; Demolombe, *Cours de Code Napoléon, Servitudes ou Services Fonciers, Des Murs Mitoyens et non Mitoyens*, liv. 12, tit. iv. ch. 2, § 1 *et seqq.*

⁵ *Knight v. Purcell*, 11 Ch. D. 415.

⁶ L. R. 8 Ch. 1084.

⁷ The facts showed that the plaintiff was the owner of a boundary wall built on his own land, against which he had built some closets, and the defendant, his adjoining neighbour, had recently built a substantial structure.

⁸ The section indicated is re-enacted in substance in sec. 95 of the London Building Act, 1894. See a Canadian case, *Brooke v. McLean*, 5 Ont. Rep. 209. The law relating to party-walls generally is treated in 3 Kent. Comm. (13th ed.) 437, and in a note to *Bloch v. Isham*, 82 Am. Dec. 289-306, where the right of building upon and adding

Under the Metropolitan Building Act, 1855, the builder was not exonerated from liability for damage arising from his negligence or want of care and skill. Though acting under statutory provisions he was still liable for loss and damage occasioned to another by any falling short on his part of requisite care and skill,¹ and the London Building Act, 1894, does not affect this liability.

Builder's
liability for
negligence
untouched.

to party-walls is discussed, as well as the ownership of such walls and the easements incident thereto. See also *Maloney v. Dixon*, 54 Am. R. 1. Perhaps the most exhaustive treatment of the subject from an English standpoint, and with reference to its practical as well as its legal bearings, is to be found in a paper on "Party and Party Fence Walls," by Mr. C. H. Bedell, in the Transactions of the Surveyors' Institution, vol. xxiv. 65-96, and the comments on it in Professional Notes, vol. v. 222-249. See also a Canadian case, *Joyce v. Hort*, 1 Can. S. C. R. 321, and *Baird v. Bell*, (1898) A. C. 420.

¹ *White v. Peto*, 58 L. T. 710. A tenant in possession of part of a house in an adjoining owner under 18 & 19 Vict. c. 122, and must be served with notice, *Fillingham v. Wood* (1891), 1 Ch. 51.

CHAPTER V.

ANIMALS.

ON this subject the English law has so many points of contact with the civil law that it may be well shortly to summarise some of the leading positions of that law previously to entering on the detailed examination of what amount of liability is imputed by the law of England to those who have the custody of animals.¹

Roman law.

In Roman law *noxia* is the name for damage, arising *ex delicto* or *quasi ex delicto*, done by a slave, who is himself termed *noxæ*; ² though this term is sometimes used to designate the damage done by him.³ The *actio noxalis* signifies the remedy, and gave the master the option either of paying the amount of the injury or of surrendering the slave or son for satisfaction.⁴ The noxal action first appears in the Twelve Tables:⁵ *Si quadrupes pauperiem fecisse dicetur, actio lege duodecim tabularum descendit: quæ lex voluit aut dari (id) quod nocuit, id est, id animal quod noxiam commisit; aut æstimationem noxiæ offerre.* This was extended by the *Lex Aquilia*. The distinction between the law of the Twelve Tables and the *Lex Aquilia* is thus explained: *Si servus scienter domino furtum fecit, vel aliam noxam commisit, servi nomine actio est noxalis; nec dominus suo nomine tenetur. At in lege Aquilia (inquit) dominus suo nomine tenetur, non servi.*⁶

Compared with English law permitting impounding of animal doing damage.

The effect of the provision of the law of the Twelve Tables on this point has been compared with the law of England,⁷ which, in the case of a heast straying and trespassing, permits the person on whose land it is found in certain circumstances to seize and impound it till the owner comes and redeems it by paying the damage and expenses of keep. In the event of the damage proving greater than the value of the heast, the owner was unlikely to do this. In that case the person damaged, not having at common law the right to sell, was practically without remedy, being unable to sue for the damage done by the animal.

¹ In *Card v. Case*, 5 C. B. 622, there is a learned argument and some very learned notes, at 627, 628, on the ancient and foreign law on this subject.

² Inst. 4, 8, 1; Gaius, 4, 75; D. 9, 1, 1, § 1.

³ Colquhoun, Roman Civil Law, § 2195.

⁴ Gaius, 4, 75: *Erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisque domnosam esse.*

⁵ D. 9, 1 pr. The fragment of the Twelfth Table says, *Si servus furtum fecit noxiamve nocuit.*

⁶ D. 9, 4, 2, § 1.

⁷ Y. B. 1 E. II. 18, pl. 2. Colquhoun, Roman Civil Law, *Actio Noxalis*, § 2196. The subject is also illustrated in that admirable book, Holmes, *The Common Law*, Lecture I., Early Forms of Liability.

so long as he held the distress ;¹ and being subject to the obligation of maintaining the heast, till 5 & 6 Will. IV. c. 59,² gave him the right to sell. Sir Patrick Colquhoun considers³ a similar difficulty to have been the origin of the chapter of the *Lex Aquilia*, which gave an action of malicious damage against the master, either on the hypothesis that he had refused the surrender of the *noxa*, slave or heast, or that the *noxa* in doing the damage acted under his direction.

The name strictly given to the damage done by an irrational animal belonging to another was *Pauperies*; *quia quasi pauperiorem facit lædatum. Pauperies est damnnum sine injuria facientis datum. Ne enim potest animal injuriam fecisse dici, quod sensu caret.*⁴ The term *pauperies* does not appear strictly to have been adhered to; for it occurs occasionally where the expressions *noxa* or *noxia*, and the action descending from them, *actio noxalis*, would appear to have been applicable.⁵

By the Twelve Tables the animal must have been four-footed,⁶ though by construction the remedy was extended, *hæc actio utilis competit et si non quadrupes sed aliud animal pauperiem fecit,*⁷ and thus an action could be brought for damage done by bipeds.

If the animal was given up in the satisfaction of the wrong, then the defendant went free.⁸

The action generally applied to those animals only *quæ contra naturam moventur.*—*Ceterum si genitalis sit feritas, cessat actio.*

The law of the Twelve Tables and the *Lex Pesulania de cane* forbade any one to keep a savage beast (and it is noteworthy that a dog is here mentioned with a boar, a bear, and a lion) near to a public road *quæ vulgò iter fit*; and if a beast so kept did damage to a passer-by, it was forfeited by way of indemnity, if even the most remote blame could be laid to the owner's charge; while the later *Ædilitian edict* ran: *Quid vulgò iter fiet, ita hobuisse velit, ut cuiquam nocere, damnnumve dare possit. Si adversus ea factum erit, et homo liber ex ea re perierit, solidi ducenti præstabuntur; si nocitum homini libero esse dicetur, quanti bonum et æquum judici videbitur, condemnnetur; cæterarum rerum, quanti damnnum datum factumve sit, dupli.*¹⁰ No action lay if an animal were irritated or roused by anyone. Thus, when a horse was spurred, and reared and kicked any person, it did not commit *pauperies*.¹¹ In this case the person that irritated the horse was liable, and not the owner. So when a dog was chained in a house, and some one stumbled on it

¹ *Boden v. Roscoe*, (1894) 1 Q. B. 608.

² 5 & 6 Will. IV. c. 59, s. 4, is repealed by 12 & 13 Vict. c. 92, which does not re-enact the power of sale. *Post.* 524.

³ Colquhoun, *Roman Civil Law*, § 2190.

⁴ D. 9, 1, 1, § 3. *Pauperies damnnum est sine injuria facientis datum; ut cum animal quod sensu et ratione caret damnnum intulerit. Pauperiem damnnum defuit esse quod quadrupes facit. Caper in libro de orthographia, paupertatem a pauperie ita separatur ut paupertas ipsa conditio sit pauperies damnnum: Lexicon Juridicum, sub nom.*

⁵ Colquhoun, *Roman Civil Law*, § 2190.

⁶ D. 9, 1, 1, § 2: *Quæ actio ad omnes quadrupedes pertinet.* 7 D. 9, 1, 4.

⁷ *Inst.* 4, 9. The law of England anciently seems to have been similar. In Fitzherbert, *De Natura Brevium* (Hale's ed.), 89, L. note (b), it is said: "If my dog kills your sheep and I freshly after the fact tender you the dog, you are without remedy: 7 Edw. III., Barr. 200." The reference is to Fitzherbert's *Abridgment*.

⁸ About £120; a *solidus* ranged in value from 11s. 4d. to 11s. 8d.

¹⁰ D. 21, 1, 42.

¹¹ Paul, *Sent.* 1, 15, 3. *Ei, qui irritatu suo feram bestiam vel quamcumque aliam quadrupedem in se proriverit, eaque damnnum dederit, neque in ejus dominum, neque in custodem actio datur*, printed in Meerman, *Thesaurus Juris Civilis*, vol. vii. 694.

accidentally and was bitten, the owner was not liable.¹ If the owner took it where he ought not, and allowed it to slip, he was liable for all the damage, from which the surrender of the dog would not excuse him.²

We have seen that a dog was associated with a hoar, a bear, and a lion; it is therefore not unfair to assume that a similar liability would arise in those cases where there was negligence. The responsibility for the animal follows its ownership (*noxæ caput sequitur*³). If the animal died naturally or by accident the owner's liability was extinguished.⁴ Where a domestic beast did damage, even *secundum naturam suam*, by straying and grazing on another's land, an action lay under the Twelve Tables.⁵

Lord Esher, M.R.'s, division of animals as regarded by the law of England.

Lord Esher, M.R., in *Filburn v. People's Palace and Aquarium Co.*,⁶ lays down that "the law of England recognises two distinct classes of animals; and as to one of these classes it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous."

Those not of a dangerous nature he further subdivides into a class "harmless by its very nature" and a class "that has become so by what may be called cultivation." All that are not within these two classes fall "within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself." The test determining to which class any particular animal may belong, is, says Bowen, L.J., "the experience of mankind."⁷

There is, however, high authority⁸ for distinguishing the legal liabilities affecting those animals, in which by law there is at least a qualified property, from those of a savage and irreclaimable character, both of which are descriptions included in Lord Esher, M.R.'s, class of dangerous animals. While as to the other class of "not dangerous" animals, a dog and an ox would appear to be included under the same subdivision; yet the legal position of their owners, for instance, as regards their trespasses, is not identical. Therefore, for the purpose

¹ D. 9, 1, 2, 1: *Si quis aliquem evitans, magistratum forte, in taberna proxima se immisiisset, ibique à cane feroce latus esset, non posse agi canis nomine, quidam putant; at, si solutus fuisset, contra.* The following passage will show that the legal obligation to have dogs under control is no new one: *Si quisquam canem habens in plateis, aut in viis publicis, eum diurnis horis in ligamina non redegerit, quidquid damni fecerit, id a domino dissolvatur*: Paul. Sent. 1, 15, 1.

² D. 9, 1, 1, § 5.

³ D. 9, 1, 1, 12.

⁴ D. 9, 1, 1, § 13, 16. In the middle ages animals were judicially tried for offences. There is a very curious article on this superstition, entitled *Prosecutions against Animals*, in *Am. Jur.* vol. i. 223, being a translation of two articles from the *Paris Themis*, vol. i. 194; vol. viii. 43.

⁵ D. 19, 5, 14, § 3: *Si glans ex arbore tua in meum fundum cadat, eamque ego immisso pecore depascam, Aristo scribit, non sibi occurrere legitimam actionem, qua experiri possim; nam neque ex lege duodecim tabularum de pastu pecoris, quia non in tuo pascitur; neque de pauperie, neque damni injuria agi posse. In factum itaque erit agendum. To which there is a gloss of Accursius: Sed quid si mea pecora in tuo glandes tuas pasta fuerunt sine mea immissione? Respondit habet locum forte de pauperie Accursius.*

⁶ 25 Q. B. D. 258.

⁷ *L. c.* 261.

⁸ *Bramwell, B., Nichols v. Marsland*, L. R. 10 Ex. 260; and *Maule, J., Morgan v. Earl of Abergavenny*, 8 C. B. 768.

of discussing the legal relations that arise, it seems more convenient to examine the subject under four classes.

Animals, then, may be considered as :

I. Those of a savage and irreclaimable character, as lions, tigers, bears, &c. Four classes.

II. Those *feræ naturæ* and unreclaimed, yet not of a savage and irreclaimable character.

III. Those that in their state of domestication never wholly lose their wild natures and destructive tendencies, and are kept either for uses which depend on retaining those native instincts or else for the whim and gratification of the owner.

IV. Those that have been thoroughly tamed, and are used for hurden or husbandry or for food, such as horses, cattle, and sheep, and which are as truly property of intrinsic value and entitled to the same protection as any other kind of goods.

I. In regard to savage and ferocious animals the duty of one professing to keep them is absolute and independent of negligence. The propensity of such animals to dangerous mischief is well known. The duty with regard to them corresponds with that respecting other dangerous agencies as laid down in *Rylands v. Fletcher*;¹ and is to exercise such a degree of care as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animal as he is naturally inclined to commit, in any way whatever. To such an extent is this carried that Bramwell, B., in *Nichols v. Marsland*, is reported: "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable."²

I. Savage and ferocious animals.

Lord Raymond, C.J., in *Rex v. Huggins*,³ lays down the law very clearly: "There are, indeed, cases of murder where no act was done by the persons guilty, as the letting loose a wild beast, which the party knows to be mischievous, and he kills a man (3 Edw. III. corone 311⁴; Staunf. 17⁵; Crompt. 24 h⁶), the owner of the beast is guilty of murder. In answer to those cases, there is a difference between beasts that are *feræ natura*, as lions and tigers, which a man must always keep up at his peril, and beasts that are *mansuetæ natura*, and break through the tameness of their nature, such as oxen and horses.⁷ In the latter case an action lies if the owner has had notice of the quality of the beast; in the former case an action lies without such

Rex v. Huggins: law stated by Holt, C.J.

¹ L. R. 3 H. L. 330, in Ex. Ch. L. R. 1 Ex. 265.

² L. R. 10 Ex. 260.

³ The reference I cannot verify.

⁴ 2 Ld. Raym. 1583.

⁵ Where it is said *que si home ad un jument que est accoustome amale faire, et le owner ceo bien sachant, ne liga luy, eins luy sufra daller alarge, et puis le jument tua un home; que ceo est felony in le owner, ce que per tiel sufferance, le owner semble daver volente a tuer*. The date of this is 1583.

⁶ "Office et auctorité de Justices de Peace, in part collect per Sir Anthonie Fitzherbert." "Inlarge per Richard Crompton," 1606.

⁷ Besides the distinction between animals *feræ natura* and *mansuetæ natura*, there is a further distinction between animals *mansuetæ natura* and *mansuetæ natura*—that is, where an animal having been caught and shut up, has changed its wild nature, and no longer tries to escape, *si ex consuetudine abire et redire solet*, it is called *mansuetæ natura*; where its nature is tame, it is called *mansuetæ*. *Scientia* was an element also in liability under the Mosaic law. If an ox gored a man or a woman that they die, then the ox shall be surely stoned, and his flesh shall not be eaten, but the owner of the ox shall be quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death: Exod. xxi. 28, 29. See Hale, History of the Pleas of the Crown, vol. i. 430.

notice. As to the point of felony, if the owner have notice of the mischievous quality of the ox, &c., and he uses all proper diligence to keep him up, and he happens to break loose and kills a man, it would be very hard to make the owner guilty of felony. But if through negligence the beast goes abroad after warning or notice of his condition, it is the opinion of Hale that it is manslaughter in the owner. And if he did purposely let him loose and wander abroad with a design to do mischief—nay, though it were hut with a design to frighten people and make sport—and he kills a man, it is murder in the owner.”

Rule laid down by Lord Denman, C.J., in *May v. Burdett*.

The rule is also stated by Lord Denman, C.J., in the leading case of *May v. Burdett*,¹ “that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*, and that, if it does mischief, negligence is presumed without express averment.” The first impression from these words would probably be that some proof of knowledge must be given; that this is not so appears from Crowder, J.’s, charge to the jury in the subsequent case of *Besozzi v. Harris*:² “The statement” “that the defendant knew the bear to be of a fierce nature must be proved, as every one must know that such animals as lions and bears are of a savage nature. For though such nature may sleep for a time, this case shows that it may wake up at any time. A person who keeps such an animal is bound so to keep it that it shall do no damage. If it be insufficiently kept, or so kept that a person passing is not sufficiently protected, the owner is liable.”

Knowledge non-essential.

Elephants.

An elephant comes under the same rule;³ since “it cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant does so at his own risk; and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities.”⁴ But the animal must not be meddled with; as where zebras were tied up in their stable the door of which was standing open and a passer-by went in and stroked one which injured him, the Court of Appeal held that no action lay for the injury.⁵

Zebras.

Suggested distinction between animals indigenous and imported.

By the Roman law, as we have already seen, if a wild animal escaped, without negligence, the temporary owner of it would not be liable to make it good: *Si genitilis sit feritas [actio] cessat*.⁶ By English law a distinction must be taken between animals indigenous and animals imported. If a man brings a bear on his land (since bears are not now native animals) he must keep “it safe” at all hazards; but if he brings a fox, and it escapes, the liability of the sometime owner terminates with the escape; of course excluding negligence.⁷

¹ 9 Q. B. 101, 112.

² 1 F. & F. 93. A very similar case is *Wyatt v. Rosherville Gardens Co.*, 2 Times L. R. 282; which was followed in *Shaw v. Mercury*, 19 Ont. R. 39.

³ *Filburn v. People's Palace and Aquarium Co.*, 25 Q. B. D. 261.

⁴ See *Harper v. Marks*, (1804) 2 Q. B., per Wright, J., 323. So too the Roman law: *Item fera bestiarum nec mancipi sunt velut ursi, leones, item ea animalia quae sine bestiarum numero sunt, veluti elefantes et camelus; et ideo ad rem non pertinet quod haec animalia collo darsere domari solent*: Gaius 2, § 16.

⁵ *Marlor v. Ball*, 16 Times L. R. 239.

⁶ Inst. 4, 9. The distinction is taken between inborn fierceness (*genitilis feritas*) and a confirmed vicious habit (*calctroous, pectere solitus*).

⁷ Com. Dig. Action on the Case for Negligence (A 5). See *ante*, 505.

The language of Bowen, L.J., in *Filburn v. People's Palace and Aquarium Co.*,¹ would include liability for an escaped tame fox as well as for an escaped tame bear. He says: "If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do." But the point before the Lord Justice was merely as to the mischief done while it was the property of the person sued (for which undoubtedly the owner would be liable), and the Lord Justice was considering the matter as an instance of the "broad principle" laid down in *Fletcher v. Rylands*. In some instances this would undoubtedly include the fox, e.g., if the fox were kept in a town where otherwise it would not have found its way. Still, there seems a clear distinction, where a tame fox kept in a fox-hunting district escapes and resumes its natural habits, from the case of a bear, or wolf, or lion which has been imported, escaping and doing mischief. The difficulty may admit of being solved by the consideration of "ownership." The property in the fox, when he escaped, would cease to exist. It does not necessarily follow that it would in the case of the other animals, though the assumption that it would has been frequently made; it is not by any means manifest that their escape is correlative with a resumption of their natural state.²

Dictum of Bowen, L.J., in *Filburn v. People's Palace and Aquarium Co.*

In *Gundry v. Feltham*³ it was held that a man may hunt a fox into the ground of another, and not be liable for trespass; apparently on the authority of a dictum of Brooke, J., in 12 Hen. VIII. 10, that "a man might justify entering into the land of another to kill a fox, gray, or an otter, because they are heasts injurious to the commonwealth."⁴ In the *Earl of Essex v. Capel*,⁵ Lord Ellenborough, speaking of fox-

Hunting. *Gundry v. Feltham*.

Earl of Essex v. Capel.

¹ 25 Q. B. D. 261.

² This is not so by the Roman law. There "*naturalem autem libertatem recipere videtur cum aut oculos nostros evaserit, aut, licet in conspectu sit nostro, diffidis tamen ejus rei persecutio sit*": Gaius 2, § 67. But this is not said with reference to imported animals.

³ 1 T. R. 334; *Nicholas v. Badger*, 3 T. R. 259 n.; *Gedge v. Minne*, 2 Bulstr. 60. In this case Doddridge, J., having observed, "It is not lawful by the common law for any one to hunt for pleasure or for profit, but otherwise, where it is for the good of the commonwealth," subsequently Croke, J., "agreed the difference before taken by Doddridge, and demanded whether it was lawful for any one to come into another's orchard for to kill a bullfinch there, being a hurtful bird for picking the blossoms off from the trees; and this may be alleged to be for the public good, but yet this is not lawful for one so to do; the Court in this case did agree that upon a pursuit he might well follow and kill, but not otherwise without the assent of the owner of the ground, and that the case of 12 H. VIII. ought to be intended to be in the case of a pursuit." The case, Y. B. 12 H. VIII. 9, pl. 2, is referred to and explained by Lord Ellenborough in *Earl of Essex v. Capel*. The passage is set out in the text. In Scotland the same distinction has been established between hunting foxes for the purpose of sport and the pursuit of those animals by farmers for the protection of their flocks. Farmers may enter enclosures in pursuit: *Colquhoun v. Buchanan*, Morison (Dict. of Decisions), 4907. Mr. Steel, Attorney-General to the Commonwealth, in his argument on the trial of the Duke of Hamilton, said: "If one pass over another's land without his consent, to fetch a falcon or the like, he may be punished as a trespasser; but not so, if to hunt or kill a fox or an otter, because these are creatures *contra bonum publicum*": 4 How. St. Tr. 1171.

⁴ Cp. speech of Oliver St. John on the *Trial of the Earl of Strafford*, 3 How. St. Tr., at 1509: "It is true we give law to hares and deers, because they be beasts of chase. It was never accounted either cruelty or foul play to knock foxes and wolves on the head as they can be found, because these be beasts of prey." In *Mitten v. Faudrye*, Poph. 161, it is said a man may hunt and pursue a fox into any man's land, "because a fox is a venison creature to the commonwealth." *Viu. Abr. Hunting; Com. Dig. Chasa (H), Hunting, or Hawking in a forest*.

⁵ Hertford Assizes, 1809, Chitty. Game Laws, 32, note (f), which book may be referred to on the whole of the subject. See, too, Campbell. Lives of the Chief Justices, vol. iii. 164.

hunting, was of a different opinion: "These pleasures are to be taken only when there is the consent of those who are likely to be injured by them, but they must be necessarily subservient to the consent of others. There may be such a public nuisance by a noxious animal as may justify the running him to his earth, but then you cannot justify the digging for him afterwards, that has been ascertained and settled to be law;¹ but even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have, therefore, a right to follow the dogs and trespass on other people's lands. I cannot see what it is that is contended for by the defendant. The only case which will at all bear him out is that of *Feltham v. Gundry*. If it be necessary, I should be glad that that case should be fully considered. I have looked into the case in the Year-book 12 Henry VIII. pl. 9. That seems to be nothing more than the case of a person who had chased a stag from the forest into his own land, where he killed it, and on an action of trespass being brought against the forester who came and took the stag, he justified that he had made fresh suit after the stag, and it was held that he might state that he was justified, and the plaintiff took nothing by his writ. This is the case upon which that of *Feltham v. Gundry* is built, but it is founded only on an *obiter dictum* of Justice Brooke, and it does not appear to me to be much relied on; but even in that case it is emphatically said by the judge that a man may not hunt for his pleasure or his profit, but only for the good of the common weal, and to destroy such noxious animals as are injurious to the common weal. Therefore, according to this case, the good of the public must be the governing motive." In the subsequent case of *Hume v. Oldacre*,² before Lord Ellenborough, damages were allowed to be recovered against a huntsman, not only for the mischief done by the defendant himself, but also for that done by the concourse of people who accompanied him.

*Hume v.
Oldacre.*

The distinction taken by Lord Ellenborough between entering another's land in pursuit of a noxious animal for the sole purpose of killing and doing so for purposes of sport was adopted in *Paul v. Summerhayes*,³ where the true view was expressed to be—that a person has no right, in the pursuit of the fox as a sport, to come upon the land of another against his will. The ruling of Lord Tenterden, C.J., in *Baker v. Berkeley*,⁴ goes even further: "If a gentleman sends out his hounds and his servants, and invites other gentlemen to hunt with him, although he does not himself go on the lands of another, but those other gentlemen do, he is answerable for the trespass that they may commit in so doing, unless he distinctly desires them not to go on those lands." This case is obviously misreported. No man is liable for the independent tort of another; and the ownership of a pack of hounds is not penalised by a liability for the trespasses of the owner's guests. The case is very different if a necessary or probable consequence of hunting a country is to ride over lands the occupier of which objects to such a licence being taken. There is, then, a duty on the owner of hounds to warn his guests against interference with the rights of property of another. No such duty arises unless

Lord Tenterden, C.J.'s, ruling in *Baker v. Berkeley.*

No such duty arise.

¹ The reference is probably to *Gedge v. Minne*, 2 Buls. 60, holding that a badger might not be dug out on another man's land. See Com. Dig. Pleader (3 M. 37).

² 1 Stark. (N. P.) 351. There is a curious discussion of the question whether it is lawful for a bishop to hunt in 2 How. St. Tr. 1165-1181, in the Proceedings against Abp. Abbot for homicide through the glancing of an arrow as he was shooting at a deer.

³ 4 Q. B. D. 9.

⁴ 3 C. & P. 32.

antecedently a trespass seems necessary or probable. For example, a guest separated from the bunt, which he rejoins by a short cut over lands out of the direct course, would not affect his host by his independent act. The proposition should be limited to those acts done by guests as a portion of the hunting party.

II. Animals *feræ naturæ* and unreclaimed.

The common law includes in this class only those animals which are native to the country. Imported savage beasts, as lions, and the rest, come under the class we have just discussed, while bears and other such savage beasts once common, though now as indigenous animals extinct, are also exceptionally regarded.

II. Animals
feræ naturæ
and un-
reclaimed.

By the civil law the person who captures any animal *feræ naturæ* acquires the property in it.¹ Such is not the law of England;² which yet agrees with the civil law to the extent of holding that in wild animals not captured there is a qualified property as long as they remain on land.³ When, then, a wild animal is killed or caught on land, the animal so killed or caught, by the law of England becomes the absolute property of the owner of the soil; unless the land is subject to the franchise anciently granted by the Crown in virtue of the prerogative, whereby a right was given to one man of killing and taking animals *feræ naturæ* on the land of another; when they become the property of the owner of the franchise.⁴

While game remains on the land of any particular landowner he has a property in it, dependent on its continuance there. So soon as it strays his property is gone. If it is killed on his land his property becomes absolute; if it is killed off his land while voluntarily straying, he has no property whatever. If, however, it be driven off by a trespasser and killed on another man's land, Holt, C.J., in the case of *Sutton v. Moody*,⁵ was of opinion that the property should be in the trespasser. Lord Chelmsford, on the other hand, in *Blades v. Higgs*, thought that the ownership would rather be in him on whose land the animal was killed.⁷ "Almost all the jurists on general jurisprudence agree," says Kent,⁸ "that the animal must have been brought within the power of the pursuer before the property in the animal vests." This is of course with reference to *feræ naturæ* apart from the claim

Property
in game.

¹ D. 41, I, 5, § 1.

² Com. Dig. Biens (F), What things are *nullius in bonis*. *Feræ naturæ*.

³ The owner of the soil may grant a right to others to come and take them by a grant of hunting, shooting, fowling and so forth; per Lord Campbell, *Ewart v. Graham*, 7 H. L. C. 344; *Wickham v. Hawker*, 7 M. & W. 63. The English law as to "Game" is exhaustively treated in Burn, Justice, *sub voce*, also in Bac. Abr. As to the meaning of the term, *Jeffries v. Evans*, 34 L. J. C. P., see per Erle, C. J., 263; 1 & 2 W. IV. c. 32, s. 2; *Spicer v. Barnard*, 1 E. & E. 874; *Padwick v. King*, 29 L. J. M. C. 42.

⁴ *Blades v. Higgs*, 11 H. L. C. 621, where the whole matter is considered. *Falkland Islands Co. v. Regina*, 2 Moo. P. C. C. N. S. 266. "If," says King, C.J., "a man shoots at a wild fowl, wherein no man hath any property, and by such shooting happens unawares to kill a man, this homicide is not felony, but only a misadventure or chanco medley, because it was an accident that happened in the doing of a lawful act; but if this man had shot at a tame fowl wherein another had property, but not with intention to steal it, and by such shooting had accidentally killed a man, he would then have been guilty of manslaughter because done in prosecution of an unlawful action, viz., committing a trespass on another's property; but if he had had an intention of stealing this tame fowl, then such accidental killing of a man would have been murder, because done in prosecution of a felonious intent, viz., an intent to steal": *Woodburn's Case*, 16 How. St. Tr. 80.

⁵ 1 Ld. Raym. 250; *Churchward v. Studdy*, 14 East, 249. Bac. Abr. Game.

⁶ 11 H. L. C. 639.

⁷ One who finds game on his own ground cannot pursue it into the land of another; *Deane v. Clayton*, 7 Taunt. 489; 2 Marsb. 577.

⁸ 2 Comm. 349. Cp. Puf. 4, 6, 5.

of the owner of the land. In *Pierson v. Post*¹ it was accordingly held that an action would not lie against one for killing and taking a fox which had been pursued by another, and was then actually in the view of him who had originally started and chased it. Actual taking is not requisite, but possession must be so far established that the animal cannot escape, before a pursuer can assert any legal right in his quarry.²

Damage
done by
animals.

For damages done by animals *feræ naturæ* the landowner who harbours them is not liable. As is said in *Boulston's case*,³ "for as soon as the coney come on his neighbour's land he may kill them, for they are *feræ naturæ*, and he who makes the coney borough has no property in them, and he shall not be punished for the damage which the coney do in which he has no property, and which the other may lawfully kill."⁴ Nevertheless, a man is liable for bringing excessive quantities of rabbits or game on land, when these injure the crops of a neighbour, or of the agricultural tenant, even when sporting rights are reserved.⁵ He is liable on the ground that his user of his land creates a nuisance. His act produces injury. In *Boulston's case* the damage arose from a refusal to act.

Rabbits
imported do
not make
successor of
importer
liable.

In Ireland it has been held⁶ by a strong Court that a landowner is not liable for "the natural and reasonably to be expected trespasses of rabbits," though for the purpose of improving the breed he had let loose foreign rabbits. The point was further taken that the act of letting loose the rabbits, if wrong in the person doing so, would not affect his successor as an occupier of the land.

III. Animals
which never
lose their
wild nature.

III. Animals that in their state of domestication never wholly lose their wild natures and destructive tendencies; and are kept either for uses which depend on retaining those native instincts, or else for the whim and gratification of the owner.⁷

¹ 3 Caines (N. Y.), 175 (Livingston, J., dissenting, 179), and followed in *Buster v. Newkirk*, 20 Johns (N. Y. Sup. Ct.), 75. The custom in the Greenland whale fishery is that the whale belongs to the first striker only so long as his harpoon is in the whale and under his control; note to *Fennings v. Lord Grenville*, 1 Taunt. 241. *Aberdeen Arctic Co. v. Sutter*, 4 Macq. (H. L. Sc.) 355, and the case in the Year Book 12 Hen. VIII. 9 pl. 2, cited ante, 521.

² *Illud quæsitum est, an, si fera bestia ita vulnerata sit, ut capi possit, stultim tua esse intellegatur. Quibusdam placuit, stultim tuam esse et eo usque tuam videri, donec eam persequaris; quodsi desieris persequi, desinere tuam esse et rursus fieri occupantis. Alii non aliter putaverunt tuam esse quam si ceperis. Sed posteriorem sententiam nos confirmamus, quia multa accidere solent, ut eam non capias, Inst. 2, l. 13. Plerique non aliter putaverunt eam nostram esse, quam si eam ceperimus; quia multa accidere possunt, ut eam non capiamus; quod verius est: D. 41, l. 5, § 1.*

³ 5 Co. Rep. 104 b, limited by *Birkbeck v. Paget*, 31 Beav. 403, which was followed, *Farrer v. Nelson*, 15 Q. B. D. 258. This case is criticised by Pilles, C.B., *Brady v. Warren*, (1900) 2 I. R. 661. *Boulston's case* is better reported *sub. nom. Boulston v. Hardy*, C. C. Eliz. 547. The resolution in *Boulston's case* as to dove-cotes is dissented from in *Dewell v. Sanders*, Cro. Jac. 490, where it is said that though the erection of a dove-cote is not a common nuisance, a person who sustains a private injury from the doves may have redress. Q. for negligence in keeping? *Boulston's case* is followed in *Hinsley v. Wilkinson*, Cro. Car. 387, and by Bayley, J., *Hannam v. Mockett*, 2 B. & C. 939.

⁴ See "*The Rooks Case*," *Hannam v. Mockett*, 2 B. & C. 934. *Woolwich v. Gataker* 32 J. P. 455. The judgment in *Aldrich v. Wright*, "*The Mink Case*," 53 N. H. 398, contains all the authorities on the subject of killing wild vermin in defence of property. This was an action to recover penalties under a statute for killing minks in the close time. The defendant admitted the killing of four minks, but alleged in justification that he honestly believed the animals were at the time pursuing his geese. This was held a legal excuse.

⁵ *Farrer v. Nelson*, 15 Q. B. D. 258; *Birkbeck v. Paget*, 31 Beav. 403; *Hilton v. Green*, 2 F. & F. 821.

⁶ *Brady v. Warren*, (1900) 2 I. R. 632.

⁷ See as to this *Harper v. Marrks*, (1894) 2 Q. B., per Wright, J., 323. The County

This class of animals includes dogs, cats, squirrels, parrots, singing birds, ferrets,¹ and "other creatures kept for whim and pleasure," which, says Blackstone,² "though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation that the crime of stealing them amounts to larceny."³

The test whether an animal belongs to the class of wild or tame animals must be referred to our knowledge of their habits derived from experience.⁴ If the animals are of wild nature, the owner is not liable for their trespasses as he is for those of his cattle.⁵ This, in fact, constitutes the chief distinction between animals that are "valuable property" and those that are tame, but in which by common law a valuable property is not admitted, viz.—that for the trespasses of the one class the owner is liable, while for the trespasses not provoked by him of the other sort he is excused.⁶ A dog, however, may be seized damage feasant while trespassing,⁷ though not shot,⁸ even when running after a hare in another man's ground, unless the place is a warren,⁹ and there is no other way of saving the game,¹⁰ or preventing further molestation.¹¹

The same rule applies to the other animals in this class. Although they are not valuable property at common law, any interference with them may amount to a civil injury, and be redressed by a civil

Test.

Interference with this class of animals a civil injury.

to Animals Acts, 1840-54 (12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 39), are extended to "any bird, beast, fish or reptile which is not included" in those Acts by the Wild Animals in Captivity Protection Act, 1900 (63 & 64 Vict. c. 33).

¹ *Rex v. Scaring*, Russ. & R. (Cr. Cas.) 350; Bac. Abr. Game. Deer in a park may be so reclaimed as to pass to executors: *Morgan v. Abergavenny*, 8 C. B. 708; post, 536.

² 4 Comm. 236.

³ *Regina v. Robinson*, Bell, C. C. 34; *Wright v. Ramscot*, 1 Notes to Wms. Saund. 108. See now Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 18, 19, 20, 21, 22, 23; *Brown v. Giles*, 1 C. & P. 118, and the cases cited in the note.

⁴ Puf. 4, c. 6, § 5. *Fiburn v. People's Palace and Aquarium Co.*, 25 Q. B. D. 258.

⁵ *Mitten v. Faudry*, Poph. 161; *Read v. Edwards*, 17 C. B. N. S. 245. Cp. *Sanders v. Teape*, 51 L. T. 263.

⁶ *Mason v. Keeling*, 12 Mod. 332; *Smith v. Cook*, 1 Q. B. D. 79.

⁷ *Boden v. Roscoe* (1894), 1 Q. B. 608; *Bunch v. Kennington*, 1 Q. B. 679. The plaintiff has either the remedy by action or may distrain an animal taken damage feasant. If he elect the latter remedy, he must at his peril find a proper pound and in proper condition: *Bignell v. Clarke*, 5 H. & N. 485.

⁸ *Cornor v. Champneys*, cited *arguendo Deane v. Clayton*, 2 Marsh. 584, 7 Tannt. 489.

⁹ *Vere v. Cawdor*, 11 East 568. "He (the dog) should have been in the very act of killing the fowl," per Lord Ellenborough, C. J., *Janson v. Brown*, 1 Camp. 42. It is the same if a dog runs after deer in a park: *Barrington v. Turner*, 3 Lev. 28; Com. Dig. Pleader (3 M 33). In *Wells v. Head*, 4 C. & P. 568, a dog having worried sheep was shot by defendant, the owner of the sheep "when he had left the field in which the sheep were, had crossed an adjoining close and was in a third." Defendant was liable, for "the dog was not shot in protection of the defendant's property." Putting up the common notice that dogs found trespassing on this property will be shot will not justify the shooting of any stranger's dog found there: *Cornor v. Champneys* (MS.) cited 2 Marsh. 584. It is not even permissible to shoot a dog who has bitten one and who is running away: *Morris v. Nugent*, 7 C. & P. 572. *Mills v. Hutchings*, (1903) 2 K. B. 714, is a decision on 24 & 25 Vict. c. 97, s. 41. If more than this, it would be alarming to dogs whose propinquity merely to a pheasant aviary seems to suggest much trouble to them. If, instead of proceeding under the Malicious Damages Act, 1861, the owner of the dog had gone to the County Court armed with *Janson v. Brown* and its followers he would probably have found no difficulty.

¹⁰ *Read v. Edwards*, 17 C. B. N. S. 245.

¹¹ *Protheroe v. Mathews*, 5 C. & P. 581, with the notes; *Kellett v. Stannard*, 4 Ir. Jur. 50. Cp. *Aldrich v. Wright*, 53 N. H. 398. Vin. Abr. Trespass (L. a). Trespass justifiable.

*Anima re-
vertendi.*

action¹ in the same manner as with other property.² They differ from the class we have been considering in this, that they "are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning,"³ a maxim which is borrowed from the civil law:⁴ *Revertendi autem animum videntur desinere habere cum revertendi consuetudinem deseruerint.*⁵

Scientia.

To affect an owner with liability for injuries inflicted on human beings by his dog there must be *scientia*; he must know or be affected with knowledge of the dog's disposition to bite mankind.

Evidence of
knowledge.

Evidence of knowledge must obviously vary in different circumstances; and, as the keeping of animals is lawful, knowledge of a mischievous propensity is not conclusive without negligence, though it is a very strong indication of negligence.⁶

*Beck v.
Dyson.*

In *Beck v. Dyson*,⁷ Lord Ellenborough held that it was not suffi-

¹ 2 Bl. Comm. 393. Amongst the ancient Britons cats were looked upon as "creatures of intrinsic value." See the curious note in Blackstone to the passage just quoted. In *Whittingham v. Ideson*, 8 Upp. Can. L. J. 14, A. having a property in a cat which strayed from his premises and was killed by B, was held entitled to recover, in an action for damages, something beyond the market value of the thing destroyed if the destruction were attended with circumstances of aggravation. In Y. B. 12 Hen. VIII. 3, there is a discussion whether an action would lie for taking away a bloodhound. It was urged that it was of no value or profit, only for pleasure. No felony could be committed of it; therefore no trespass. The Court held *ubi jus ibi remedium*. Though only for pleasure that was enough; "as a popinjay which sings and refreshes my spirits" to take him away, against my will, was not lawful. *Hoc facias alteri, quod tibi vis fieri*. Though not felony trespass well lies, for if a man cut my trees and take them he commits a trespass, though not a felony.

² 2 Kent, Comm. 348, citing *The Case of Swans*, 7 Co. Rep. 15 b. In Finch's Law, 176 (ed. 1750), is the following: "The ownership of a chattel personal is termed a property which of wild beast, both fowls of the air, fishes in the sea, beasts upon the earth, and generally all fowl of warren, fessants, partridges, deer, conies, hares, and such-like cannot be in any; and therefore it is no felony to steal them; and a writ of trespass shall be *quare warrenam suam intravit et mille lepores cepit* without saying *suos*; nor after they are made tame, longer than they remain in one's possession. As my tame hound that followeth me, and is with my servant; my hawk that is flying at a fowl; my deer that is chased out of my park or forest; and the forester maketh fresh suit; these all remain in my possession, and the property is in me; but if they stray it is lawful for any man to take them. Otherwise it is of hens, capons, geese, ducks, peacocks, &c." Cp. the distinction before noted between animals *mansuetæ naturæ* and *mansuetæ naturæ*. Pigeons if tame and unreclaimed may be subjects of larceny although not in a state of confinement, but living in an ordinary dove-cote which gives them free access at their pleasure to the open air: *Regina v. Cheafor*, 21 L. J. M. C. 43.

³ *Rex v. Brooks*, 4 C. & P. 131.

⁴ Inst. 2, 1, 15. *In his autem animalibus quæ ex consuetudine abire et redire solent, veluti columbis et apibus, item cervis qui in silvas ire et redire solent, talem habent regulam traditam, ut si revertendi animum habere desierint, etiam nostra esse desinant et sunt occupantium, revertendi autem animum videntur desinere habere cum revertendi consuetudinem deseruerint*: Gains 2, § 68. Bees kept "in unreasonable numbers and at an unreasonable place and with appreciable danger" to a neighbour, having done damage, were held to affect their owner with liability: *O'Gorman v. O'Gorman*, (1903) 2 L. R. 573.

⁵ 2 Bl. Comm. 392.

⁶ See per Bramwell, B., *Cooke v. Waring*, 2 H. & C. 338.

⁷ 4 Camp. 198. As this case is inconsistent with the law as subsequently settled, it may be well to quote the remark of the Lord Chancellor (Cranworth), in the House of Lords, in *Williams v. Bayley*, L. R. 1 H. L. 213, where, speaking of Campbell's Reports, he says: "On all occasions I have found, on looking at the reports by the late Lord Campbell of Lord Ellenborough's decisions, that they really do, in the lawest possible words, lay down the law very often more distinctly and more accurately than it is to be found in many lengthened reports; and what is so laid down has been subsequently recognised as giving a true view of the law as applied to the facts of the case."

cient to show that a dog is of a fierce and savage disposition and usually tied up, and that the defendant promised to compensate the plaintiff after the latter had been bitten by the dog. In *Jones v. Jones v. Perry*¹ Lord Kenyon laid great stress on the circumstance that the defendant had had his dog tied up, and said that it showed a knowledge that the animal was fierce and unruly, and not safe to be let go abroad. Abbott, J., also, in *Judge v. Cox*,² left it to the jury to say whether, from a caution not to go near a dog, they would infer knowledge of its disposition. Parke, B., in *Thomas v. Morgan*,³ held that an offer of compromise was so far an admission of liability that it ought to have been left to the jury, but "it ought to have been submitted to them with a strong observation in favour of the defendant. Lord Ellenborough thought it entitled to so little weight, that he refused to leave it to a jury. But though we think, strictly speaking, it is a fact to go to the jury, yet it ought to have little or no weight at all with them, for the offer may have been made from motives of charity without any admission of liability at all." In *Worth v. Gilling*⁴ knowledge of an animal's ferocity was considered sufficient to fix the owner with liability for subsequent injury, and that actual previous damage had been done by it need not be shown. The question there agitated was whether knowledge of actual harm done was not requisite to raise a right of action in contradistinction to knowledge of a disposition to do harm, not whether knowledge without negligence was enough.

The decision accords with the judgment of the Exchequer in *Hudson v. Roberts*,⁵ where the inquiry was as to what facts inferred knowledge. The injury arose from driving a hull through a street, where the plaintiff lawfully was. Plaintiff was wearing a red handkerchief, which irritated the animal, that ran at him and did him considerable injury. The defendant was proved to have said after the accident that the red handkerchief was the cause of it, for he knew that the hull would run at anything red. Another witness gave evidence that on a different occasion the defendant said that he knew that a hull would run at anything red. The Court thought "that either expression was some evidence to go to the jury that the defendant knew that this animal was a dangerous one; and the first expression no doubt afforded distinct evidence that he knew that such was the character of this animal."

Where there is actual negligence, though no knowledge of vicious disposition, it seems that an action lies, otherwise, the owner of an animal would be in a better position than other people. The point does not appear to be decided; Maule, J., in *Card v. Case*,⁶ alludes to it: "It may be, that the allegation of negligence, coupled with the

Where there is absence of knowledge of vicious disposition, but actual negligence, an action lies. Maule, J., in *Card v. Case*.

¹ 2 Esp. (N. P.) 482.

² 1 Stark. (N. P.) 285.

³ (1835) 2 Cr. M. & R. 502, 4 Dowl. Prac. Cas. 223, 5 Tyr. 1085.

⁴ (1866) L. R. 2 C. P. 1. *Barnes v. Lucille*, Times newspaper, 20th March, 1907.

⁵ 6 Ex. 697. In the American case of *Earhart v. Youngblood*, 27 Pa. St. 331, where a hull had an antipathy to grey horses, Lowrie, J., 332, said: "The rule is very plain and very just that the owner of an animal known to be vicious must take sufficient precautions that it shall do no injury to the public; it must be so confined that strangers may pursue their own objects with security from it. The public are entitled to act upon the presumption that all dangerous animals are properly confined, and are therefore exonerated from any special caution against them except when, without right, they go upon their owners' land, and within the place where they may be lawfully kept: 1 Esp. 203; 5 C. & P. 489; 3 Id. 139."

⁶ 5 C. B. 622, 634.

consequent damage to the plaintiff, would show a cause of action." The difficulty is rather in finding a case where negligence can be shown apart from *scientia* productive of injury with regard to which *scientia* has usually to be proved. In all other classes of actions there can be no doubt that negligence alone is actionable; e.g., a man would undoubtedly be liable for throwing his dead dog into the highway, whereby the plaintiff's gig was overturned and the plaintiff injured, nor is he the less liable for chaining his living dog so that a similar accident happens. If, then, his negligence is the occasion of his dog biting, there seems no reason why he should go free. The law, as Lord Cranworth says, proceeds through knowledge to negligence.¹

*Brock v.
Copeland.*

*Sarch v.
Blackburn.*

The keeping of a fierce and vicious dog with knowledge of its savage propensities is not in itself unlawful.² Thus, in *Brock v. Copeland*,³ Lord Kenyon held that a man has a right to keep a dog for the preservation of his house, and where the dog has been properly let loose and injury has arisen from the plaintiff's own fault, he cannot recover. This was accepted in *Sarch v. Blackburn*⁴ before Tindal, C.J.: "If a man puts a dog in a garden, walled all round, and a wrongdoer goes into that garden, and is bitten, he cannot complain in a Court of Justice of that which was brought upon him by his own act. . . . Undoubtedly a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it." The *dictum* of Lee, C.J., in *Smith v. Pelah*,⁵ is not now law, "that if a dog has once hit a man, and the owner having notice thereof keeps the dog and lets him go about or lie at his door, an action will lie against him at the suit of a person who is hit, though it happened by such person's treading on the dog's toes, for it was owing to his not hanging the dog on the first notice," and the King's subjects ought not to be endangered. As Cresswell, J., says, in

¹ *Fleming v. Orr*, 2 Maeq. (H. L. Sc.) 23. See per Edwards, J., in *Paterson v. Fleming*, 23 N. Z. L. R. 676. As to the word *scienter*, North, C. J., says it "implies no more than having notice, and in those actions" (i.e., where proof of *scientia* is necessary) "he" (the defendant) "must inform himself at his peril, and may, if he doubts, avoid danger by putting away those things which give offence." *Bernardiston v. Soame*, 6 How. St. Tr. 1114. In *Parsons v. King*, 8 Times L. R. 114, a dog bit the same man twice within half an hour. It was held impossible to say there was no evidence of *scientia*. If it were intended that in that case there was evidence, no more need be said, but if a general proposition is intended there is a very plain *non sequitur*. Many a dog absents himself from the custody of his guardians for a longer period; or the two bites within half an hour may be two stages of the same transaction.

² *Beck v. Dyson*, 4 Camp. 196. Cp. *Jones v. Perry*, 2 Esp. (N. P.) 482. *Ante*, 526.

³ 1 Esp. (N. P.) 203, cited *Bird v. Holbrook*, 4 Bing. 628, at 638.

⁴ 4 C. & P. 297, where it was also said that a printed notice that a ferocious dog was tied up near was not enough, since the person bitten might not be able to read. See also *Curtis v. Mills*, 5 C. & P. 489; *Sylvester v. Maag*, 155 Pa. St. 225; 35 Am. St. R. 878. *Bird v. Holbrook*, 4 Bing. 628, has some points of analogy; it proceeds from the position that setting spring-guns without a notice was, even independently of the statute, an unlawful act. "The correctness of that position may perhaps be questioned"; *Jordin v. Crump*, 8 M. & W., per Alderson, B., 789. The rule there stated is: "The law in certain cases makes an exception to the right of setting instruments capable of causing deadly injuries to human life, where such injury will be a probable consequence of setting them; but with the exception of those cases, a man has a right to do what he pleases with his own land." *Ante*, 425 *et seqq.* As to the law of Scotland, see *Daly v. Arrol*, 24 Sc. L. R. 150.

⁵ 2 Str. 1264. See *post*, 529, 533 note 1. Cp. *Jones v. Perry*, 2 Esp. (N. P.) 482, where evidence of a common report that the dog was mad was admitted. The report of this case in Peake, Law of Evidence, § ii. Actions founded in Negligence, 292, is very different from that in *Espinasse*.

Charlwood v. Greig,¹ "Our criminal law has been much modified since that time, and that would not now be considered as a proper mode of proceeding." In *Line v. Taylor*,² it having been proved that a dog had previously sprung upon people, and on one occasion torn the collar of a man's coat, though "it did not appear that on either occasion the dog really meant to bite or to inflict a wound, as from his size and strength he easily could have done had he meant so to do," the dog was produced in court, when the jury "examined him, and appeared to be of opinion that, from the expression of his eye and other indications, he was not of a vicious disposition," and a verdict was given for the defendant. Yet in *Worth v. Gilling*,³ where the dog had shown a savage disposition to the knowledge of his owner, and a verdict was given for the plaintiff, the Court refused a rule moved for on the ground that, though fierce, the dog had not actually hit any one.

Comment by Crosswell, J., in *Charlwood v. Greig*.
Line v. Taylor.

Worth v. Gilling.

In *Hartley v. Harriman*⁴ Lord Ellenborough, C.J., had said, apparently as a *reductio ad absurdum*: "unless it be inferred that a dog accustomed to attack men is *ipso facto* accustomed also to attack sheep, there is no evidence to support this declaration." In *Osborne v. Choqueel*⁵ it appeared that at some stage of his earlier life, while in the possession of a previous owner, a dog had chased a goat; from this the learned County Court judge deduced the conclusion that the dog was ferocious to a subsequent owner's knowledge; but the Queen's Bench Division was of opinion that the law required evidence that the dog had to his master's knowledge bitten or attempted to bite some person before his aggression on the plaintiff, and that what Lord Russell of Killowen, C.J., termed⁶ "the unhappy incident of the goat" did not warrant the County Court judge's inference.

Hartley v. Harriman.
Osborne v. Choqueel.

The decision of the Second Division of the Court of Session, in *Burton v. Moorhead*,⁷ is questionable; for it is there laid down that a man keeping "a powerful and ferocious dog" "of a most savage character and that had bitten several people," "keeps it at his own risk," and "the precautions he takes must be effectual"; for it is plain from the foregoing cases that the keeping a ferocious dog is not unlawful; and that being so, to found an action some circumstance of blame must be proved; while the fact that precautions were not effectual does not necessarily connote blame. But at the date of this decision some of the members, at any rate, of the Second Division of the Court of Session, were not a little zealous against the injurious acts of animals, whether oxen or dogs.

Burton v. Moorhead.

In no branch of law, probably, does the personal predilection of the judge more often and distinctly show itself than when the misdeed of a dog has to be adjudicated on. The zeal of the County Court judge in *Osborne v. Choqueel*⁸ on the one side finds its opposite in a story the author heard Lord Esher, M.R., tell of Martin, B., who,

Anecdote of Martin, B.

¹ 3 C. & K. 48. In Scotland the Lord Justice-Clerk engrafts an exception on the law in the case of friends visiting with knowledge of a vicious dog being on the premises; there is no obligation on them "to stay away from his premises;" for which, however, he cites no authority: *Smillie v. Boyd*, 24 Sc. L. R. 150.

² 3 F. & F. 731. In 35 J. P. 813, it is said that a dog in the habit of flying at horses and carriages so as to render an accident probable would be a dangerous dog. Its habit of biting mankind would, however, be no more established than that of the dog in *Osborne v. Choqueel*, (1855) 2 Q. B. 109.

³ L. R. 2 C. P. 1. *Fraser v. Bell*, 24 Sc. L. R. 583, was a decision only that the case should go to proof.

⁴ 1 B. & Ald. 820.

⁵ (1896) 2 Q. B. 109.

⁶ L. C. 110. *Post*, 532.

⁷ (1881) 8 Rettie, 802.

⁸ (1896) 2 Q. B. 109.

trying a dog case where facts of exceeding ferocity were detailed, had the dog brought on the bench. Seated beside the judge, a great lover of dogs, as he summed up, the dog received the judge's caresses with affectionate approbation, and while the evidence of the savagery of the animal was being dealt with, the jury had the sight of the judge's fingers opening the dog's mouth with immnity and apparently with the animal's willing acquiescence. The verdict was for the defendant.¹

*Stiles v.
Cardiff
Steam Navi-
gation Co.*

Where knowledge of a habit to bite mankind is to be imputed to the owner is more difficult to determine. In *Stiles v. Cardiff Steam Navigation Co.*,² plaintiff went on defendants' premises to take away his luggage; not finding it in the place appropriate, he went to the other side of the road, where there were persons of whom he could inquire. On his way back a dog before unseen by him sprang out and hit him. Of the disposition of the dog the only evidence was, that "on some former occasion some of the servants had heard, and perhaps one of them had seen, the dog spring upon and bite some one else." The Court was "clearly of opinion that the company were guilty of negligence"; and also, as regards liability, that there was "no difference between a corporation and an individual." But on the question of *scientia*, Crompton, J., said: "I quite agree that the knowledge of a servant representing his masters, and acting within the scope of their delegated authority, may be competent to affect his masters with that knowledge. But is it found in this case that any such persons had knowledge, persons competent to bind the defendants by their admissions, for such evidence is in the nature of an admission? No doubt there must be some such person, for there must have been some one on the premises to control the business of the defendants. It would have been sufficient to show knowledge in the manager, or in some person having the control of the yard. I had some doubt whether the knowledge must not be brought home to some person who kept and had care of the dog, and had power to put an end to the keeping of it, but perhaps it would be enough if he had the care of the dog. But all that was found is that some persons, who appear rather to have had the care of the horses, had seen or had heard that the dog had bitten a person before. It is more like the case of a gardener or a cook hearing that their mistress's lap-dog was given to bite, and I think that the evidence wholly fails to bring home the knowledge to any person whose knowledge in point of law would be that of the defendants."

Crompton, J.

*Gladman v.
Johnson.*

The next case is *Gladman v. Johnson*,³ where evidence of knowledge was held to be given by proof that a complaint of the dog had been made to the wife of the defendant—a milkman—the wife attending to the business in the absence of her husband. This was followed by *Baldwin v. Casella*⁴ in the Exchequer, where the opinion of Crompton, J., in *Stiles v. Cardiff Steam Navigation Co.*⁵ was referred to with approbation, yet the defendant was held liable, as "the dog was kept in the defendant's stable, and the defendant's coachman was appointed to keep it; the coachman knew that the dog was mischievous, and it

*Baldwin v.
Casella.*

¹ See F. & F. 732. In *Hubbard v. Preston*, 30 Am. St. R. 426, a right was successfully asserted to kill barking, quarrelling, and fighting dogs become a nuisance; but there the occurrences complained of were habitual, not casual. There is no right to kill a dog merely because one is annoyed with his barking. Cf. *Ten-Hopen v. Walker*, 35 Am. St. R. 598.

² 33 L. J. Q. B. 310. As to knowledge of viciousness of dog apart from the fact of its having actually bitten any one, *Knowles v. Mulder*, 16 Am. St. R. 627.

³ 30 L. J. C. P. 153.

⁴ L. R. 7 Ex. 325.

⁵ 33 L. J. Q. B. 310.

is immaterial whether he communicated the act to his master or not; his knowledge was the knowledge of his master."

In the subsequent case of *Applebee v. Percy*,¹ the whole subject was much discussed. Two persons, who had upon previous occasions (one of them twice) been attacked by a dog of which defendant was the owner, gave evidence that they had gone to the defendant's public-house and made complaint to two persons who were behind the bar serving customers, and that one of them had also complained to the barmaid. The Court were divided on the question whether this was sufficient to affect the defendant with notice; Lord Coleridge, C.J., and Keating, J., being of opinion that it was; while Brett, J., dissented,² on the ground that "it seems to me to be impossible to say that either of the persons to whom the communications respecting the dog were made in this case, was a person having the management of the business or the care of the dog, in the sense indicated in either of these cases;"³ and I am aware of no case in which it has been held that notice to one standing in any other relation is equivalent to knowledge of the master." Neither was there any duty on the servants to communicate to the master, or any evidence that they had done so. The view of the majority was that they were bound by *Gladman v. Johnson*; ⁴ which decision they interpreted as affirming that what is sufficient notice "must be a question of degree in each case; and that, if a communication of this sort is made to one who, as in that case, was entrusted even occasionally only with the conduct of the defendant's business, with intent that it should come to the knowledge of the defendant, it is for the jury to say whether or not it amounts to notice to him." On one principle the whole Court was agreed. "It may be taken to be quite clear," says Lord Coleridge,⁵ "that a mere notice to any servant of the owner of the dog will not do." In accordance with this in *Colget v. Norrish*⁶ the Court of Appeal held, in a case where a collie dog rushed out of doors and hit a postman, that notice to a domestic servant was not sufficient.⁷

Applebee v. Percy.

² Dissent of Brett, J.

Knowledge of domestic servant that dog bit postman does not charge master.

The ownership of the dog need not be proved to affect a defendant with liability. It may be presumed. Thus, in *M'Kone v. Wood*,⁸ it was proved that the dog was seen about the premises of the defendant; it appeared that in fact the dog was not the defendant's, and belonged to a servant of his who had left him; yet Lord Tenterden, C.J., held that it was not material whether the defendant was the owner of the dog or not—if he kept it, that was sufficient; further, that the harbouring a dog upon premises, or allowing it to resort there, was sufficient to support an action, as it was the defendant's duty either to have destroyed the dog or to have it sent away. This case was cited in *Smith v. G. E. Ry. Co.*,⁹ where the circumstances from which evidence of liability may be inferred are discussed. The case, however, turns entirely on its particular facts.

Ownership of dog not necessarily to be proved.

¹ L. R. 9 C. P. 647.

² L. C. 651

³ *I.e.*, *Stiles v. Cardiff Steam Navigation Co.*, 33 L. J. Q. B. 310, and *Baldwin v. Casella*, L. R. 7 Ex. 325.

⁴ 36 L. J. C. P. 153.

⁵ L. R. 9 C. P. 655.

⁶ 2 Times L. R. 471.

⁷ See *Cleverton v. Ufernel*, 3 Times L. R. 509, a case turning on what constitutes charge of a dog.

⁸ 5 C. & P. 1; *Vaughan v. Wood*, 18 Can. S. C. R. 703.

⁹ L. R. 2 C. P. 4. The head-note of this case is justly celebrated for its unconscious humour, and deserves study as an example of the misuse of pronouns. In *Gray v. North British Ry. Co.*, 18 Rettie, 76, a dog escaped from the charge of a railway porter while being conveyed by the defendant company, and bit a stranger.

Joint injuries
committed
by dogs.

In America it has frequently been laid down that where two or more animals belonging to different persons commit injuries at one and the same time, the owners cannot at common law be made jointly liable. Each owner is separately liable for so much only of the damage as is done by his own animal.¹ The only difficulty in this case arises from an ambiguity in the use of the word joint, which may indicate either co-operation or only simultaneousness. The law of England undoubtedly is that all parties engaged in a common wrongful act are liable jointly and severally.² Dogs worrying sheep are not necessarily engaged in a common act; they are, perhaps, most commonly engaged at the same time and in the same place in an act that is equally wrongful in both, yet in which each acts independently and without reference to the other, and the fact of the coincidence in wrongdoing in itself would not import the co-operation necessary to make the wrong a joint one.³ In so far, then, as this is the case, each owner is liable for the source of mischief he himself should restrain, and does not. The case of two dogs of different masters coursing an animal belonging to a third person would perhaps raise the point of whether they can engage in a "common wrongful act." There would then be co-operation, and the damage arising would not be the act of either of them, but the result of the acts of both, for which both owners would seem to be liable.⁴

*Lewis v.
Jones.*

The case of *Lewis v. Jones*⁵ is an authority for the existence of very wide powers of the Court to draw inferences where an unlawful act has once been established.

Quere,
whether the
fact that a
dog has a
habit of
worrying
sheep is
evidence of
his being of a
savage and
ferocious
disposition.

It has been asked whether the fact that a dog has a habit of worrying sheep is any evidence that it is of a savage and ferocious disposition. In *Mason v. Keeling*, Gould, J.,⁶ is reported as saying: "If a dog be *assuet* to bite cows, and the master know it, that will not be sufficient knowledge to make him liable for his biting sheep." And in a well-known American treatise⁷ is the statement: "Proof of the owner's knowledge that the dog had worried sheep would not suffice, since thousands of curs, who would not dare to touch a man, delight in attacking sheep." Both the opinion and the reason on which it is based commend themselves to common sense. The "nature" of even domestic dogs is to hunt sheep unless trained, while all domestic dogs are presumed to be trained not to attack men.

There is a case cited in Oliphant, Law of Horses,⁸ where the converse was held, viz., that, where a dog four years previously had bitten a girl, an action for worrying sheep would lie at common law. This may, perhaps, be correct, as a reasoning from the greater to the less; though no authority in reasoning from the less serious act, the worrying of sheep, to the more grievous, the biting of human kind; and probably is best treated as a case of imperfect analogy.⁹

¹ Shearman and Redfield, Negligence, § 638.

² Bullen and Leake (3rd ed.), 708.

³ *Auchmuty v. Ham*, 1 Denio (N. Y.), 495; *Van Steenburgh v. Tobias*, 17 Wend. (N. Y.) 502.

⁴ See *Page v. Birkbeck*, 3 F. & F. 683. As to dogs fighting and the circumstances in which an action will lie, see *Wheeler v. Brant*, 23 Barb. (N. Y.) 324; *Wiley v. Slater*, 22 Barb. (N. Y.) 506. ⁵ 49 J. P. 198. ⁶ 12 Mod. 332, 335. *Ante*, 529.

⁷ Shearman and Redfield, § 631. The work of these authors may be with great advantage consulted on the whole of the subject now being treated, §§ 626-643.

⁸ (5th ed.) 332, *sub nom. Gething v. Morgan*, heard on Appeal from the County Court of Monmouthshire, before Lord Campbell, C. J., and Wightman, Erle, and Crompton, JJ., and reported in the Times newspaper of 2nd May, 1857.

⁹ *Ante*, 529.

The common law rights of dogs have been considerably abridged by statute.¹ Statutory enactments.

The decision in *Fleeming v. Orr*² produced the passing of The Dogs Act, 1865,³ section 1 of which enacts that the owner of every dog shall be liable in damages for injuries done to any cattle or sheep by his dog, and that it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity. The Dogs Act, 1865.

Section 2 enacts that the occupier of premises where any dog is permitted to live is to be deemed the owner, unless he can prove that the dog was there without his knowledge, and that he was not the owner. In the case of plural occupancy, the owner is to be deemed to be the person in the occupancy of that particular part of the premises where the dog has been permitted to remain at the time of the injury.

This and the corresponding Scotch and Irish Acts are now repealed by The Dogs Act, 1906,⁴ which substantially re-enacts the two sections, with some variations of language. Damages not exceeding £5 may be recovered by virtue of this Act under the summary jurisdiction Acts as a civil debt.

In *Wright v. Pearson*⁵ the protection given to cattle was held to include horses.

The Dogs Act,⁶ 1871, provides :

First, that any police officer or constable may take possession of any dog he has reason to suppose to be savage or dangerous straying on any highway, and not under the control⁷ of any person; and such dog may be detained, and sold or destroyed.⁸ The Dogs Act, 1871.

Secondly, that any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous and not kept under proper control, and may order such dog to be kept under proper control or destroyed.

Thirdly, that the Act is not to affect the powers contained in section 18 of the Metropolitan Streets Act, 1867,⁹ or in any local or other Act of Parliament for the same or like purposes.

¹ This sentence has been criticised in a Scottish review of this book as an error, the privilege being "the dog's master's, not the dog's." I can only refer in my justification to the dictum of a distinguished Scottish judge: "the dog has in fact the privilege of one worry," per the Lord Justice-Clerk Moncreiff, *Burton v. Moorhead*, (1881) 8 Rottie, 895. The common law has often been the subject of satirical reference for its liberal views as to dogs; the deliberate wisdom of the Victorian Legislature as expounded by the Supreme Court may well serve as a foil to it. In *Regina v. Mare, Ex parte Schneider*, 14 Viet. L. R. 89, the facts showed that a boy coming on defendant's premises struck a dog there, and was bitten by it. The Court, notwithstanding, held that by the terms of The Colonial Dog Act, 1834, "evidence to show that the dog was of a quiet disposition, or that the owner was ignorant of its mischievous disposition, was inadmissible." *Ante*, 528.

² 2 Macq. (H. L. Sc.) 14.

³ 28 & 29 Viet. c. 60. The Scotch Act is 26 & 27 Viet. c. 100, and is much more meagre in its terms than the English Act. *M'Intyre v. Carmichael*, 8 Macph. 570, is a decision on its interpretation. The Irish Act is 25 & 26 Viet. c. 59.

⁴ 6 Edw. VII. c. 32.

⁵ L. R. 4 Q. B. 582; *Cowell v. Mumford*, 3 Times L. R. 1; *Elliott v. Longden*, 17 Times L. R. 648. ⁶ 34 & 35 Viet. c. 56.

⁷ Control is a question of fact, and, in the absence of positive evidence to the contrary, that a dog is unmuzzled and not led is sufficient to prove that it was not under proper control: *In the Matter of an Application for a Rule for a Mandamus*, 3 Times L. R. 24.

⁸ Whether old or destroyed is at the option of the justices: *Pickering v. Marsh*, 43 L. J. M. C. 143, followed *The King v. Dymock*, 17 Times L. R. 593.

⁹ 30 & 31 Viet. c. 134. Section 18 provides for taking possession of any dog found in the streets and not under control; also for regulations as to muzzling, selling, or destroying. *McKay v. City of Buffalo*, 9 Hun (N. Y.) 401, affd. (1876) 74 N. Y. 619.

The Dogs Act, 1906.

By the Dogs Act, 1906,¹ when a dog is proved to have injured cattle or chased sheep it may now be dealt with as a dangerous dog under section 2 of the Act of 1871. By section 22 (xxx), (xxxi), of the Diseases of Animals Act, 1894,² the Board of Agriculture may make orders for muzzling dogs and the seizure, detention and disposal (including slaughter) of stray or not muzzled dogs. And by The Dogs Act, 1906,³ orders under section 22 of the last cited Act may be made for prescribing and regulating the wearing by dogs of collars in the public streets, and for their prevention from straying between sunrise and sunset.

IV. Animals that have been thoroughly tamed.

IV. Animals that have been thoroughly tamed and are used for burden or husbandry, or for food.

These are the subjects of larceny at common law. Of this class are ducks, fowls, geese, turkeys, peacocks; all which, with their eggs and young, are alike protected by law.⁴

A man is answerable not only for his own trespass, but for those of his cattle also; since if by his negligent keeping they stray upon the land of another, and tread down the herbage, and spoil the corn or trees, the owner must answer in damages; and the law gives the party injured a double remedy, either by permitting him to distrain the cattle thus damaged, or else by a common law action.⁵

Mason v. Keeling.

This appears from Holt, C.J., in *Mason v. Keeling*:⁶ "The difference is between things in which the party has a valuable property, for he shall answer for all damage done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality, and the law takes notice that a dog is not of a fierce nature, but rather the contrary." "If any beast in which I have a valuable property do damage in another's soil in treading his grass, trespass will lie for it; but if my dog go into another man's soil no action will lie." Holt, C.J.'s distinction is between animals which are a "valuable property"—that is, which are the subject of larceny at common law—and those which are not. This latter class he divides into those which are "naturally mischievous in their kind" and those which are of a tame nature. The former we have already considered; the latter we shall consider presently.

Holt, C.J.'s division:
(i) Animals which are a valuable property;
(ii) Animals which are not.

With regard to those that are a "valuable property" at common law, the owner is to "answer all damage done by them"—e.g., by straying and trampling down grass or corn. For though the owner of an animal, such as a cow, which he allows to roam about is responsible for damage caused by its trespassing, yet animals not of mischievous nature, he is entitled to suppose, will not injure any one until he has actual knowledge to bring him to a contrary opinion.⁷ That is, whether animals are "valuable property" at common law, or merely is a curious case of an action brought against a municipal corporation for the negligence of a policeman in shooting a dog supposed to be mad.

¹ 6 Edw. VII. c. 32, s. 1, sub-s. 4. By ss. 3, 4, stray dogs may be seized. By s. 5 sheep-dogs are exempted from excise licence.

² 57 & 58 Vict. c. 57; s. 51, is the penalty section.

³ 6 Edw. VII. c. 32, s. 2, sub-s. 1.

⁴ 1 Hale Hist. P. C. 511; Hawk. P. C. bk. i. c. 33, § 43. As to bees, *O'Gorman v. O'Gorman*, (1903) 2 Ir. R. 573.

⁵ 3 Bl. Comm. 211. Bullen Distress (2nd ed.) 257-276. *Goodwin v. Chevelry*. 4 Il. & N. 631.

⁶ 12 Mod. 332, 335, 1 Ld. Raym. 606.

⁷ Per Blackburn, J., *Smith v. Cook*, 1 Q. B. D. 79. In *Sanders v. Teape*, 51 L. T. 263, defendant's dog jumped over a low wall on the other side of which plaintiff was working digging. The dog fell on him and injured him. Plaintiff was held not entitled

“ of tame nature,” without being “ valuable property,” the same rule applies that the owner must have notice of any peculiar savageness of disposition—which is not the property of the class as reclaimed, but the speciality of any individual member of it—before any liability can attach from it; for their trespasses he is in any event liable; “ but if the owner know that the beast has a vicious propensity to attack man he will be answerable for that too.”¹

The law on this point was settled in three cases, *May v. Burdett* in the Queen’s Bench,² *Jackson v. Smithson* in the Exchequer,³ and *Card v. Case* in the Common Pleas;⁴ and was most clearly expressed and explained by the Lord Cranworth in *Fleeming v. Orr*.⁵ “ The reason why by the English law it is necessary to allege and prove the *scientia* is that no harm will arise from leaving it at large. Starting from that presumption, it follows that there cannot be blame or negligence in the owner merely from his allowing liberty to an animal which has not by nature the propensity to cause mischief. Blame can only attach to the owner when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits, and therefore, according to the English law, it is necessary to aver and prove this knowledge on the part of the owner. But, after all, the *culpa* or negligence of the owner is the foundation on which the right of action against him rests, though the knowledge of the owner is the medium, and the only medium, through which we in England arrive at the conclusion that he has been guilty of neglect—and in that sense it is said that the *scientia* is the gist of the action.” Blackburn, J.’s, comment⁶ is: “ I suppose that this law was suited to the convenience of earlier times, when cattle were left to wander about on open commons, and it was thought that the mere fact that bulls sometimes toss people was not by itself enough to make their owners liable for their acts.”

Scientia in the case of animals of *mansuetæ naturæ*.

The Court of Appeal in New Zealand in *Fleming v. Paterson*⁷ held that trespass apart from negligence does not entitle a person to recover damages who has been injured by a domestic animal not known to be vicious—an ox landed by being slung from a steamer into shallow water and then driven ashore, and which being frightened, bolted and injured the plaintiff.

Trespass apart from negligence not actionable.

In Ontario⁸ the alighting of a turkey cock on the highway where he frightened the plaintiff’s horse and thereby caused injury to the plaintiff has been held not to be a cause of action. There was no

to recover, since the dog’s act was mere frolic, and there could be no recovery without evidence of a mischievous disposition. Where, however, coupled greyhounds rushed against plaintiff and injured him on the highway, he was held entitled to recover without proof of the *scientia*: *Jones v. Owen*, 24 L. T. (N. S.) 587.

¹ Per Blackburn, J., *Fletcher v. Rylands*, L. R. 1 Ex. 280. ² 9 Q. B. 161.

³ 15 M. & W. 563. ⁴ 5 C. B. 622. See *Hogan v. Sharpe*, 7 C. & P. 755.

⁵ 2 Macq. (H. L. Sc.) 23. By the French Code neither knowledge in the owner of the mischievous qualities of the animal, nor even the existence of these qualities, is regarded: Code Civil, art. 1385.

⁶ *Smith v. Cook*, 1 Q. B. D. 82. The *scientia* was required to be proved in an action against a man whose dog bit the plaintiff’s sheep so far back as Y. B. 28 H. VI. 7, pl. 7, according to Reeves, *Hist. of Eng. Law* (2nd ed.), vol. iii. 391. See as to *Scientia*, *Bac. Abr. Trespass* (I), 696.

⁷ 23 N. Z. L. R. 676, distinguished *Lysnar v. Binnie*, 24 N. Z. L. R. 241.

⁸ *Zumstein v. Schrumm*, 22 Ont. App. 263; so too a bicyclist was held not entitled to recover against the owner of a fowl which collided with his machine on a highway, *Hadwell v. Rightson*, *Times newspaper*, 15th May 1907.

negligence other than the descent of defendant's bird on the highway; and it was pointed out that in an agricultural and poultry-rearing country, the obligation to restrain flying fowl with property boundaries would be excessively onerous. Hegarty, C.J., likened the occurrence to a "horse shying at a sheet of white paper blown from the land" of defendant and without negligence, or "a fowl of any kind sitting on the track."

Deer.

A word may here be said with regard to the position of deer as to which there seems uncertainty. They do not readily fit into Lord Esher's classification in *Filburn v. People's Palace and Aquarium Co.*,¹ since they cannot be called dangerous animals. Neither can they without several limitations be strictly referred to either of his subclasses of non-dangerous animals—those harmless by their very nature—or those that have become so by cultivation.

Willes, C.J.'s, classification.

Willes, C.J., delivering the judgment of the Common Pleas in *Davies v. Powell*,² adopted a different principle from Lord Esher, M.R. "When," he says, "it was holden that deer were not distrainable, it was because they were kept principally for pleasure and not profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses, cows, sheep, or any other cattle." This was said in considering whether deer might be distrained for rent; and the distinction drawn between pleasure and profit was between beasts of venery and those kept either for actual money-making or for ornament. The question whether deer are tame or wild animals came again before the Court of Common Pleas in *Morgan v. Earl of Abergavenny*,³ where the issue was whether deer in a park went to the executor or to the heir. After a most elaborate argument, Maule, J., delivered the considered judgment of the Court, in the course of which he said: "It is truly stated that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in ancient legal parks or in modern enclosures so called; the instances being very rare in which deer in such places are kept and used for sport; indeed their whole management differing very little, if at all, from that of sheep or of any other animals kept for profit." Subsequently, Wood, V.C., on a similar question arising in *Ford v. Tynite*,⁴ said: "On the authority of *Morgan v. Earl of Abergavenny*, I must hold that these deer are tame and no longer part of the inheritance."

Maule, J., delivers the judgment of the Common Pleas in *Morgan v. Earl of Abergavenny*.

Conclusion.

Since, then, it is obvious that deer cannot universally be affirmed either to be tame or not tame, the question must be decided, in each particular case, previously to determining whether the owner is liable for injuries done by them, and must be a question of fact left to the jury. If, then, the jury find that any particular deer are "of tame nature" or "of valuable property,"⁵ and the cases last cited seem to point out *indicia* to which their attention should be directed, the owner would not be responsible for injury done by one to any person, unless he were shown to have knowledge of its vicious disposition. If the jury find that any particular deer are not of "tame nature" or

¹ 25 Q. B. D. 258. As to the property in deer, see Y. B. 18 E. IV. 14 pl. 12; Reeves, *Hist. of Eng. Law* (2nd ed.), vol. iii. 370; *Re Longpoint Co. v. Anderson*, 19 Ont. R. 487; *Bac. Abr. Trespass* (I), 696.

² Willes (C. P.), 46, 51; see also at 48. The note of the case is "Deer in an enclosed ground may be distrained for rent." See 1 Sm. L. C. (11th ed.) 446.

³ 8 C. B. 708, 708. The argument in this case should be referred to for the authorities.

⁴ 2 J. & H. 150, 154.

⁵ "Valuable property" in the sense here applicable would seem to be determined by the answer to the inquiry, are they kept for food?

"valuable property," then the owner would be liable for injury done by them without notice of a vicious disposition.

This seems to be the effect of Maule, J.'s, judgment in *Morgan v. Abergavenny*.¹ It is also consistent with the United States case of *Spring Co. v. Edgar*,² where the respondent in error sued for injuries inflicted on her by a male deer in the appellants' park. The declaration alleged that the appellants "knew the deer to be dangerous," and this allegation was taken to be established. Thus, whether the deer in the park were wild or tame, the appellants were fixed with liability. The question then suggests itself, what is the position of visitors in a park frequented by deer—for example, in Greenwich Park? Assuming the deer are tame, liability would, it is manifest, only arise from a knowledge of a vicious disposition in any particular animal which subsequently does mischief. If the deer are to be regarded as not tame, and are known not to be tame, visitors to the park are probably in the position of mere licensees, who go there subject to the presence of the deer; unless perchance they have a right to use the park, and the deer are placed there as an addition to the attractions of the scenery, when there would seem to be an undertaking on the part of those introducing them that they will do no injury if not interfered with. There is the further consideration, applicable to all the cases put, that if any danger more than ordinary is likely to arise, as in the rutting season,³ warning must be given of it. Deer in a deer forest would affect their owner with no liability whatever, neither while they remain nor if they stray, since they are indigenous;⁴ but tame deer must not be allowed to trespass.⁵

We have seen that the owner is liable for the trespasses of his animals where they are "valuable property." If they are trespassing and do injury "not in accordance with the ordinary instinct of the animals," the owner is not liable for the injury, apart from the trespass (though he may be for the trespass), unless he knows of the particular vice which caused the injury.

This rule is illustrated by *Cox v. Burbidge*⁶ and an American case, *Dickson v. M'Coy*.⁷ In the former a horse grazing on a newly made road lashed out and severely injured a young child playing in the road. In the absence of any evidence that the horse was vicious, the plaintiff was held disentitled to recover; though it was intimated⁸ that "no doubt, if the horse was trespassing there, the owner of the highway

¹ 8 C. B. 798.

² 99 U. S. (9 Otto) 645.

³ See *Spring Co. v. Edgar*, 99 U. S. (9 Otto) 645. The Roman law says: *Cervos quoque ita quidam mansuetos habent, ut in silvis ire et redire soleant, quorum et ipsorum feram esse naturam nemo negat*: Inst. 2, 1, 15. That, however, was with regard to the ownership of them. As to Hunting and Deer-stealing, Com. Dig. Justices of Peace (B 47.).

⁴ *Ante*, 505, 520.

⁵ *Brady v. Warren*, (1900) 2 I. R. 632.

⁶ 13 C. B. N. S. 430. Cp. *Marsland v. Murray*, 148 Mass. 91, 12 Am. St. R. 520. See *Jackson v. Smithson*, 15 M. & W. 563—the case of a ram.

⁷ 39 N. Y. 400. Evidence of fractious and vicious conduct of a horse twenty months after an accident was admitted in *Kennon v. Gilmer*, 131 U. S. (24 Davis) 22, as tending to prove a vicious disposition at the time of the accident! "The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind," per Bigelow, C. J., *Todd v. Inhabitants of Bowley*, 90 Mass. 51, at 58. In *Wormsdorf v. Detroit City Ry. Co.*, 13 Am. St. R. 453, plaintiff was permitted to show the general reputation of a horse among the drivers and employes of its owners, as being an unsafe and untrustworthy horse to drive in a tramcar, in order to affect the owners with notice of its qualities. "In case a dog bites pigs, which almost all dogs will do, a scienter is necessary," per Holt, C. J., *Mason v. Keeling*, 12 Mod. 335, referring to *Boulton v. Banks*, Cro. Car. 254.

⁸ Per Willies, J., 12 C. B. N. S. 441.

Trespass
contra
naturam
suam.

Cox v.
Burbidge.

Dickson v. McCoy.

Result of the cases.

might have an action against the owner of the horse. So, possibly, the owner of the horse might be liable to an indictment for obstructing the highway, or to a fine." In the American case the owner was affected with notice of a habit of his horse to kick on the sidewalks, and was therefore held liable.¹

The result of the cases is that there is no presumption made of vicious inclinations in animals whose natural tendency is not to do mischief. If animals of this sort do unexpected mischief, the owners are not liable. They become liable so soon as they have reason to suspect the occurrence of any particular injury; and this is the reason why the owner of a blind dog which is permitted uncontrolled to range the streets *may be liable* for injury done by it. A Divisional Court in such a case held, apparently as matter of law,² that to allow a blind dog to be at large in public places is not, that is, cannot be, negligent. In the particular case as a fact it may not be. Till this decision, dogs which have attached to them some inseparable accident known to their masters rendering them dangerous or injurious were not distinguishable from other actionable nuisances under the control of their owners. Apart from the decision alluded to, it would appear beyond question that the owner of a blind dog which had, say, a habit of lying in front of a neighbour's door, and when disturbed snapping at any one going in or out, would be liable for the nuisance, and if the case arises it is not improbable that the Court before which it comes will "distinguish" the earlier decision.

Smith v. Cook.

The decision in *Smith v. Cook*³ may most conveniently be noticed here. Plaintiff's horse was placed in a field by the defendant, an agister of cattle, with a number of heifers, the defendant knowing that a bull kept in an adjoining land had several times been found in the field, and that there was no sufficient fence to keep him out; he did not know that the bull was of a mischievous disposition. The horse was gored by the bull, and the plaintiff brought his action against the defendant as agister. The point pressed on the Court was that want of knowledge of the bull's mischievous quality justified the defendant in putting the horse in the field. It was answered that the action was on a contract to take care of the horse, and that the defendant took such bad care of it that it was killed. The Court sustained the claim, Blackburn, J., saying:⁴ "It is a question of fact whether he [the defendant] took sufficient care or not, and the doctrine of *scienter*, which, as I have said, depends mainly upon authority, ought not to be extended to a contract to take reasonable care." The same law has been laid down in the United States.⁵

Simson v. London General Omnibus Co.

*Simson v. London General Omnibus Co.*⁶ had previously been decided on similar grounds. Plaintiff, while travelling in an omnibus of

¹ *Lee v. Riley*, 18 C. B. N. S. 722, is distinguishable from this class of cases on the ground that the defendant's mare was trespassing as against the plaintiff, and the injury was not too remote.

² *Milns v. Garratt*, Times newspaper, 6th March 1906. *Ante*, 528.

³ 1 Q. B. D. 79. "Knowledge of the fierceness of the animal, called in pleading the *scienter*, was long ago held to be necessary. There is a case in *Dyer's Rep.* 25 pl. 162, where it was so held, and in the margin of that case there are references to earlier authorities in the Year Books and to the Book of Exodus, c. xxi. v. 29," per Blackburn, J., 82. The report in *Dyer* is as follows: *Notu que in evidence a un enquest, juit agre per Fitzherbert et Shelley, que si homme ad un chien que tua brebis, le master del chien esteant ignorant de tiel condition et property del chien, le master ne serra puny pur cest tuer, autrement est s'il ad notice del condition le chien.* This case was decided in 1537.

⁴ 1 Q. B. D. 83.

⁵ *Sargent v. Slack*, 19 Am. R. 130.

⁶ L. R. 8 C. P. 390. *Patterson v. Kidman*, 8 N. S. W. R. (Law) 499.

the defendants, was injured by a blow from the hoof of one of the horses, which kicked through the front panel. The Court said the mere fact of the horse having kicked was *prima facie* evidence for the jury. The case for the plaintiff was, however, placed on a breach of duty in the defendants not using reasonable care to make their carriages safe, and it was argued (and successfully) that in such circumstances the happening of an accident is sufficient to call for an answer. This point of view evidently differs from the common case of a horse kicking. There the ownership and user of the animal is lawful, and the duty to keep him from kicking only arises where it is shown that he has kicked or is inclined to kick, while the contractual duty to carry with reasonable care is absolute.¹

In *Tillett v. Ward*² the law was considered to be clear that, while the owner of sheep or cattle which are placed in a field is bound to keep them from trespassing on the land of his neighbours, he is not responsible for injury they do when being lawfully driven along the highway. The same latitude is extended to injuries done by cattle, where the owner is not negligent, to property adjoining the highway.³ The test of negligence is whether a reasonable time has or has not elapsed for their removal. In *Tillett v. Ward*² it is said there is "no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town."

The Scotch case of *Harpers v. Great North of Scotland Ry. Co.*⁴ treats of the rule of diligence to be observed in safeguarding cattle going through a public thoroughfare. A bull was being led through the streets secured by a ring in its nose, with a rope attached thereto, and by a halter upon its head. It was irritated by boys in the street, and struggled; the ring in its nose broke through a latent defect; the animal escaped and injured a passenger, who claimed damages for his injury. The earlier cases of *Burton v. Moorhead*⁵ and *Hennigan v. M'Vey*⁶ were cited, and distinguished, since the injuries in those cases were caused by a "ferocious dog" and "a hoar" respectively. The reason of the judgment in both cases was that a person keeping such animals did it at his own risk. *Phillips v. Nicoll*⁷ was also distinguished, on the ground that the peculiar circumstances tending to excite the cow which did the injury in that case required special caution to be taken. The cow had been confined for some time in a slaughter-house, which, there was evidence, had great effect in exciting such animals, and thus imposed on their keepers the duty to use special precautions. The majority of the Court considered that as the method of driving the bull through the street in *Harpers v. Great North of Scotland Ry. Co.* was the usual way, and reasonably safe, the law did not impose any higher duty—that is, if the animal were in a normal condition. The Lord Justice-Clerk (Moncreiff) dissented, because "when the animal is a bull, which is always known to be subject to paroxysms of sudden fury, and when furious so much more dangerous than the animals in question in those cases," I am of opinion that, when allowed to go into the streets and crowded thoroughfares, it can

Tillett v. Ward.

Scotch case: *Harpers v. Great North of Scotland Ry. Co.*

¹ *Villiers v. Amy*, 3 Times L. R. 812, was a case independent of contract.

² 10 Q. B. D., per Stephen, J., 21. Cp. a case cited in *Mitten v. Faudrye*, Poph. 161.

³ *Goodwyn v. Cheveley*, 4 H. & N. 631. The case at *Nisi Prius* is reported, 1 F. & F. 313. Cp. *Bouchier v. Mitchell*, 17 Viet. L. R. 27.

⁴ 13 Rettie, 1139; *Linnchan v. Sampson*, 126 Mass. 506.

⁵ 8 Rettie, 892.

⁶ 9 Rettie, 411.

⁷ 11 Rettie, 592.

⁸ I.e., *Burton v. Moorhead*, 8 Rettie, 892; *Phillips v. Nicoll*, 11 Rettie, 592.

be considered in no other light than that of a wild animal, and that the person who brings it there is responsible that the conditions under which it is so brought shall render it absolutely safe." This, however, is not the view of the law of England,¹ nor yet of the law of Scotland, if Lord Justice-Clerk Inglis's statement is sound. "Can we affirm," he says, "in this country, where the breeding of cattle is of so much importance, that the owners of bulls are under an obligation to treat them as wild beasts, and in such a way as greatly to interfere with the breeding of cattle? There is no authority for that. I hold that the owner of a bull is only bound to use a reasonable discretion, and is not bound to confine it unless when it has shown some more than ordinary vicious propensity."²

¹ *Hudson v. Roberts*, 6 Ex. 697.

² *Clark v. Armstrong*, (1862) 24 Dunlop, 1320. The same subject is treated from a Victorian point of view in *Scott v. Edington*, 14 Vict. L. R. 41, where the consideration of what class of facts will satisfy the *onus* of showing *scientia* is gone into.

CHAPTER VI.

COLLISIONS ON LAND.¹

IN natural course we should now proceed to consider the duty of an owner of property to prevent a collision with the property of others whether on land or on water. But since in a subsequent portion of this work we shall be largely concerned with inquiring into the special relations of carriers by water, that part of our subject which deals with collisions on water will be postponed for the more convenient grouping of all matters relating to water carriage. Here, accordingly, we shall discuss collisions on land only.

We have already referred² to the *dictum* of Blackburn, J., in *Fletcher v. Rylands*,³ that "traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger."

Dictum of Blackburn, J., in Fletcher v. Rylands.

In these cases, they cannot recover without proof of want of care or skill occasioning the accident;⁴ since for a pure accident there is no liability.⁵ Still there are certain rules necessary for the fullest enjoyment of the highways, the lack of observance of which, in riding or driving, constitutes evidence of that negligence which affixes liability for an accident occurring on a highway.

The custom or law of the road is that horses and carriages should respectively keep on the near or left side, and foot-passengers take the right hand—and this is judicially recognised without proof.⁶ This

Law of the road.

¹ The consideration of collisions on water, which naturally falls to be treated here, is postponed, and treated in connection with common carriers by sea.

² *Ante*, 474.

³ L. R. 1 Ex. 286. Cp. *River Wear Commissioners v. Adamson*, 2 App. Cas. 767.

⁴ *Manzoni v. Douglas*, 6 Q. B. D. 145; *Holmes v. Mather*, L. R. 10 Ex. 261.

⁵ *Wakeman v. Robinson*, 1 Bing. 213, 8 Moo. (C. P.) 63; *Gibbons v. Pepper*,

1 Ld. Raym. 38.

⁶ The rule is best known in the following doggerel rhyme:

"The rule of the road is a paradox quite.
As I think you will see by this song;
For if you go left you go right,
And if you go right you go wrong."

It has also been put into Latin as follows:—

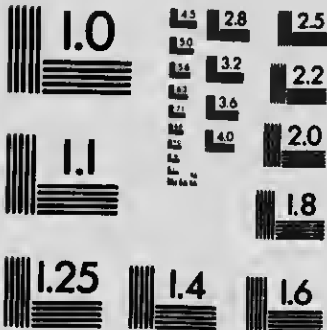
*Sed precor hoc posthac reminiscere carpe sinistram,
Dextram occurrenti linguere norma jubet.*

On some parts of the Continent and in America the rule is the other way, travellers, vehicles, and animals under the charge of man all taking the right when meeting, if it



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rule was laid down in all its generality before tramcars were an incident of the road. In Scotland the Lord President (Inglis) has since expressed an opinion that the introduction of tramways requires a new rule of the road, that a tramcar should be passed by a following vehicle on the left-hand side, and, in the circumstances in which he enunciated the rule, it seems one generally applicable.¹

Person riding or driving not absolutely bound to keep his side.

The person riding or driving is not *bound* to keep his side; yet if he does not, he must keep a better look-out to avoid collision than would be necessary if he were on the proper part of the road.² The mere fact of a man driving on the wrong side of the road is, *per se*, no evidence of negligent driving in an action brought for running over a person who was crossing the road on foot.³ Of course the fact that a person is driving on the wrong side of the road does not justify another in wantonly injuring him; and if the road is of sufficient breadth, it is incumbent on any person coming the other way "to take that course which should carry him clear of the person who was on his wrong side," and in the event of an injury happening from his acting otherwise, he will be liable to the person so riding or driving on the wrong side.⁴

Circumstances may warrant a deviation from the rule. *Wayde v. Carr.*

Again, circumstances may warrant a deviation from the law of the road; as is said in *Wayde v. Carr*,⁵ "In the crowded streets of a metropolis . . . situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary." In general the rule holds, and applies not merely to horses drawing carriages, but to saddle horses,⁶ and "to any other animal under like circumstances."⁷ Though there is one case, not unambiguously reported, which seems to hear another construction,⁸ the fact that a person driving is on the wrong side of the road indicates carelessness, and hence *prima facie* points to negligence.⁹ Any other view would be destructive of the rule; for if conformity does not raise a presumption of right conduct, observance or disobedience of the rule becomes absolutely indifferent in the case of an action; as negligence having to be shown apart from the rule, the rule would be neutralised. If conformity to the rule is presumably going right, non-conformity would seem presumably to be not going right.¹⁰ This *prima facie* presumption is rebuttable; so that in the case of a man, driving on his wrong side, colliding against the vehicle of another traveller, the *prima facie* presumption is rebutted

is reasonably practicable to do so. The "Customary Rules for Driving" are given in 2 Steph. N. P. 984; the note 1 Taylor, Evidence (8th ed.), 7, may also be referred to. See further Oliphant on Horses (5th ed.), 279-328.

¹ *Jardine v. Stonefield Laundry Co.*, 14 Rettie, 839, and *post*, 548. In Scotland by 41 & 42 Vict. c. 51, s. 123, (Sch. C.), incorporating 1 & 2 Will. IV. c. 43, s. 97, the law is that "if the driver of any sort of carriage shall not keep to the left or near side of such (i.e., turnpike) road on meeting or on being overtaken by any other carriage or any rider, or shall wilfully prevent any other person passing him or his carriage; such driver shall for every such offence forfeit and pay a sum not exceeding £5 over and above the damages occasioned thereby."

² *Pluckwell v. Wilson*, 5 C. & P. 375. By the Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 78, the negligence of drivers, which is specified, is made punishable criminally.

³ *Lloyd v. Ogleby*, 5 C. B. N. S. 667; *Aston v. Heaven*, 2 Esp. (N. P.) 533.

⁴ *Clay v. Wood*, 5 Esp. (N. P.) 44; *Turley v. Thomas*, 8 C. & P. 103.

⁵ 2 D. & R. (K. B.) 255; per Coleridge, J., *Turley v. Thomas*, 8 C. & P. 103.

⁶ *Turley v. Thomas*, 8 C. & P. 103.

⁷ Shearman and Redfield, Negligence, § 644 n.

⁸ *Wayde v. Carr*, 2 D. & R. (K. B.) 255.

⁹ *Burdick v. Worrall*, 4 Barb. (N. Y.) 596.

¹⁰ *Chaplin v. Hawes* 3 C. & P. 554; *Mayhew v. Boyce*, 1 Stark (N. P.), 423.

by proof that, there being ample room for both, the other traveller insisted on occupying that portion of the way along which the person on his wrong side was driving.¹ Being on his wrong side, a traveller must leave more than barely enough room for other travellers.² It is matter of evidence for the jury whether the accident arose from want of sufficient room. As was said by Rooke, J.,³ "the driver was not to make experiments; he should leave ample room, and if an accident happened from want of that sufficient room he was no doubt liable"; and he has no right by his conduct to impose on other people using the road any greater exertion of care and skill than they would have had to exert had he seen fit to conform to the general rule of travelling.⁴ In the case of fog, or at night, the rule must be strictly observed, even though no other people appear to be on the road.⁵

The rider or driver of a horse is required to have a competent knowledge of horses and adequate skill in their management—that is, that knowledge and that degree of care which prudent men exercise, or should exercise, in similar matters. If the defendant's act fall below the standard, he is liable, though not unless.⁶

In *Flower v. Adam*,⁷ A placed lime rubbish in a highway; dust blowing from it frightened the horse of B, which would have run against a waggon had not B hastily pulled him round; he then ran over a lime-heap lying at C's door. In an action by B against C, B was held not entitled to recover. The ground of this decision must be either that B's conduct was such as a competent driver would not have been guilty of even in the emergency, or else that the occurrence was a pure accident. Had the action been against A, the scope of the inquiry would have been different, and would have been whether the act of the defendant was one reasonably productive of confusion of mind, and whether the act of the plaintiff was a consequence flowing from such confusion produced by the defendant's wrongful act.⁸ As against C, it could only be whether in the circumstances there was any breach of duty towards B; A's act and its consequences would not affect C's liability so long as C was acting within his rights. On the other hand, if A obstructs a road which B is using and C claims to use, C must modify his use as against B with reference to the condition of the road as obstructed by A. A's wrongful act curtails the user of everybody else—there are equal rights in the user of the road, and C must use the diminished road with the care that its narrowed dimension demands.

A competent rider or driver is not bound to know the peculiarity of any horse he may happen to have the charge of; though he is bound to know the general habits and disposition of horses. It is, therefore, not negligence to drive a horse that becomes unmanageable, and inflicts injury on a passer-by, if the driver has no notice of the peculiarity

Knowledge of the particular horse driven is not necessary though a general knowledge of horses is required.

¹ Per Patteson, J., *Reed v. Tate*, cited Oliphant, Law of Horses (5th ed.), 307; *Clay v. Wood*, 5 Esp. (N. P.) 44; *Cruden v. Fentham*, 2 Esp. (N. P.) 685.

² *Chaplin v. Hawes*, 3 C. & P. 554.

³ *Wordsworth v. Willan*, 5 Esp. (N. P.) 273.

⁴ *Pluckwell v. Wilson*, 5 C. & P. 375; *Brooks v. Hart*, 14 N. H. 307, where the law is laid down clearly and at length.

⁵ *Cruden v. Fentham*, 2 Esp. (N. P.) 685.

⁶ Bigelow, L. C., on Torts, 595. It has been held not negligence *per se* for a one-armed man to drive a horse: *Reynolds v. Hanrahan*, 100 Mass. 313.

⁷ 2 Taunt. 314. The fact that the driver of a carriage was intoxicated when he ran against the plaintiff is some evidence that he was negligent: *Wynn v. Allard*, 5 Watts & S. (Pa.) 524; the evidence so given is, however, not to be used to inflate damages.

⁸ *Larrabee v. Scwa!*, 66 Me. 376; *Jones v. Boyce*, 1 Stark. (N. P.) 493.

Pace. of character which results in the accident, and is not negligently ignorant of it.¹ If, however, a person, riding a vicious horse, spurs it when close to a bystander, and the horse kicks out and injures him, the rider is guilty of negligence.² The pace at which a horse is driven should be moderate;³ and reckless driving which frightens a horse so that he runs away, to the injury of the plaintiff's property, has been held in New York to constitute a cause of action, even though no actual collision has resulted.⁴

Too rapid driving. What is too rapid driving is, however, a question dependent upon circumstances. A rate of speed allowable in driving along a country lane would be excessive and dangerous in the city of London.⁵

Duty of drivers to foot-passengers. Duty of foot-passenger. "It is the duty of persons," said Pollock, C.B.,⁶ "who are driving over a crossing for foot-passengers which is at the entrance of a street to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon a crossing at the entrance of a street, so as not to get among the carriages, and thus receive injury." In all circumstances the driver must keep his horse well in hand, and look to see that the way is clear,⁷ and he specially careful in turning corners.⁸

A foot-passenger is justified in assuming that a car coming towards him will be driven moderately and prudently; and may cross the road on that assumption and is not disentitled to recover because, acting on that assumption, he has crossed the road without looking and has sustained injury through the car being driven at an excessive pace.⁹

Defect in the vehicle. In addition to accidents arising from the conduct of the driver or the circumstances of the horse, they may arise from defect in the vehicle. When this is the case, some circumstance of negligence must still be shown.

Mere happening of an accident on a highway not evidence of negligence. The mere occurrence of an accident on a highway is not enough. Thus, where it was shown that an axle-tree had broken, Willes, J., held that negligence was not thereby to be attributed to the owner.¹⁰ The ruling in *Sharp v. Grey*¹¹ may at first sight seem inconsistent with this; the action, however, was *in assumpsit* by a passenger, while the case before Willes, J., was in tort by a stranger. If any circumstance can be shown which affects the owner with negligence in not providing good tackle, to which he is bound, he will be held liable.¹²

¹ *Hammack v. White*, 11 C. B. N. S. 588; cp. *Michael v. Alestree*, 2 Lev. 172.

² *North v. Smith*, 10 C. B. N. S. 572.

³ *Butterfield v. Forrester*, 11 East, 60. In *Payn v. Smith*, 4 Dana (Kentucky), 497, the Chief Justice says: "He who is so unmindful of the peace and security of others as to ride or drive in a gallop or rapid trot or pace, through a crowded city or town, is held by the common law responsible for all damage that any other person, without fault, shall sustain in consequence of such voluntary and perilous imprudence."

⁴ *Burnham v. Butler*, 31 N. Y. 460.

⁵ *Martin v. North Metropolitan Tramways Co.*, 3 Times L. R. 600 (C. A.); *Reed v. Inhabitants of Deerfield*, 90 Mass. 522.

⁶ *Williams v. Richards*, 3 C. & K. 81.

⁷ *Phelps v. Wait*, 30 N. Y. 78. The principal point decided was that a joint action will lie against the master and servant for a personal injury caused by the negligence of the latter (in the absence of the former) in the course of his employment.

⁸ *Springett v. Ball*, 4 F. & F. 472.

⁹ *Toronto Ry. Co. v. Gosnell*, 24 Can. S. C. R. 582.

¹⁰ *Doyle v. Wragg*, 1 F. & F. 7. No action will lie against the mere driver not owner apart from actual negligence.

¹¹ 9 Bing. 457. *Hyman v. Nye*, 6 Q. B. D. 685, was also a case of the existence of a contractual obligation. See as to this class of cases *post*, Bailments, Hire of Things.

¹² *Welsh v. Lawrence*, 2 Chit. (K. B.) 262. No action will lie against the driver for injuries caused by defect in the vehicle where he has not been guilty of negligence: *Doyle v. Wragg*, 1 F. & F. 7.

The case of *Templeman v. Haydon*¹ must be noticed. There the plaintiff merely proved the fact of a collision; the defendant then proved that the accident arose from the horse suddenly beginning to kick, whereby the shafts of the cart were broken, the driver thrown out, and the horse, starting off, ran against and injured the plaintiff's horse. The County Court judge gave judgment for the plaintiff; and stated a case on the question whether, on the evidence, the plaintiff ought to have been nonsuited or a verdict found for the defendant. "I am of opinion," says Crosswell, J., "that the plaintiff ought not to have been nonsuited. We are not asked to say whether the evidence warranted the verdict for the plaintiff or not." The decision is no more than an affirmation that there was some evidence in favour of the plaintiff's case.

In *Moffatt v. Bateman*,² the kingbolt by which the front wheels of a carriage were attached to the hind part broke, through jolting over an uneven road; this was held not evidence of negligence in the circumstances. That being so, the breaking of the shafts of a cart in an unexplained way would not seem any more to be ground for attributing negligence; while the circumstances that the breakage was brought about by a kicking horse would not bring in any additional element of negligence to what before existed.³

It has been held not negligence to remove goods from a cart without putting a person at the head of the horse to prevent his moving.⁴ In the often-cited case of *Illidge v. Goodwin*⁵ the owner of a horse and cart left standing in a street without any one to watch them was held liable for damage done by them; though the horse was a very quiet one, and the proximate cause was the act of a passer-by in striking him. "If a man," said Tindal, C.J., "chooses to leave a cart standing in the street he must take the risk of any mischief that may be done."⁶ This case has not escaped comment. Its justification must stand either on the inaccuracy of the earlier case, or on the special facts proved, showing that in the circumstances it was a wrongful act to leave the horse and cart unattended; or that, though not at first wrongfully left, they were so left unattended for an unreasonable time. Unless some such features as these are discovered, it seems to fall under the principle that one is not bound to anticipate mischievous or wrongful acts on the part of others, and consequently is not required to guard against them.⁷ To leave a perfectly quiet horse unattended in St.

¹ 12 C. B. 507.

² L. R. 3 P. C. 115.

³ *Cox v. Burbidge*, 13 C. B. N. S. 430. See also *Abbott v. Freeman*, 35 L. T. N. S. 783, reversing 34 L. T. N. S. 544, where the plaintiff was kicked by a horse while attending a sale of horses.

⁴ *Hayman v. Hewitt*, Peake's Add. Cas. 170.

⁵ 5 C. & P. 190. *Lynch v. Nurdin* was regarded by Lord Denman, C.J., 1 Q. B. 36, as an *a fortiori* case after *Illidge v. Goodwin*; see 2 & 3 Vict. c. 47, s. 54, sub-s. 4, 1 & 2 Will. IV. c. 22, s. 55. *Lynch v. Nurdin* was approved in *Union Pacific Ry. Co. v. McDonald*, 152 U. S. (45 Davis), per Harlan, J., 270.

⁶ Adopted in *Bates v. Brett*, 18 N. S. W. (L. R.) 267, 271.

⁷ *Parker v. City of Cohoes*, 10 Hun (N. Y.) 531. "Surely a man in his own yard or field may leave his horse and cart unattended. If he does so, in my judgment he owes no duty to any one, unless he has reason to know at the time he so leaves it, that by so doing he is likely to injure an individual who in fact may be there, or is known as likely to be there, so as to be injured thereby": per Smith, J., *Tolhausen v. Davies*, 57 L. J. Q. B. 393; see *Mann v. Ward*, 8 Times L. R. 699 (C. A.), which was repudiated by the C. A. of Ontario, *Myers v. Sault St. Marie Paper Co.*, (1902) 3 Ont. 600. *Illidge v. Goodwin* was followed in *McLbourne Tramway Co. v. Spencer*, 14 V. L. R. 95.

Paul's Churchyard, even while only engaged in removing goods from a cart, may "well in itself be negligence, as being "to the common danger"; yet it does not follow that to do the same on a country road would be other than a perfectly lawful act. There is no rule of law that a horse and cart must be in charge of two persons at least when engaged in loading or unloading. Tindal, C.J.'s, *dictum* is probably correct if limited to the circumstances. The difficulty of the decision is well tackled by Ernest Pollock *arguendo* in *Gwilliam v. Twist*.¹ "The head-note in *Illidge v. Goodwin* is a note, not a decision, but of a mere *obiter dictum*, the jury having stated that they did not believe that the horse had ever been struck by a passer-by at all.² And that *dictum* is not good law."

General rule fixing liability.

The general rule of law is that where, between the act or neglect of one person and the injury inflicted, the independent act of another person intervenes, and directs the first negligence to the object it ultimately effects, the person whose default has caused the first negligence is not liable. This is illustrated in the Roman law³ by the passage, *Celsus scribit, si alius mortifero vulnere percusserit, alius postea exanimaverit, priorem quidem non teneri quasi occiderit sed quasi vulneraverit; quia ex alio vulnere periit; posteriorem teneri quia occidit; quod et Marcello videtur et est probabilius*; and in English law by Erle, C.J., in *The Queen v. Ledger*:⁴ "A mistake, indeed, was said to have arisen from the negligence of the defendant. Still, if the particular negligence imputed to the prisoner appeared not to have been the proximate and efficient cause of the catastrophe, the bill for manslaughter ought not to be found; and if it appeared that other causes had intervened, the prisoner's negligence would not have been the proximate and efficient cause of the deaths which had occurred. That this was in entire accordance with the authorities will appear from the most recent cases. The case is to be clearly distinguished from that of *joint negligence*."⁵

The Queen v. Ledger.

Injurious act to be the necessary or ordinary or likely result of the negligence.

To constitute joint negligence it is not necessary that both the negligent persons should be partakers in the very act causing injury; for as Pollock, C.P., says:⁶ "When two persons are driving together, encouraging each other to drive at a dangerous pace, then, whether the injury is done by the one driving the first or the second carriage, I am of opinion "the other shares the guilt." Once more, as explained by Parke, B.,⁷ the injurious act should be "the necessary or ordinary or likely result of that negligence." In *Illidge v. Goodwin* it is to be observed that besides the act of an independent person intervening, there is an independent trespass by an adult, which can scarcely be brought within Parke, B.'s, postulate. If it is conceded that the *act of leaving* a horse and cart unattended is the negligent act, the dissociation between the first negligence and the act producing the injurious result appears distinct, and the difficulty of reconciling the case with principle insuperable. The negligence, it may be said, is probably the absence of the master at the time of the wilful blow, and thus may be regarded rather as concurrent than independent. Even

¹ (1895) 1 Q. B. 559.

² See 5 C. & P. 192.

³ D. 9, 2, 11, § 3.

⁴ 2 F. & F. 857, note at 858.

⁵ Cp. *Scott v. Shepherd*, 2 Wm. Bl. 892, 11 Sm. L. C. (11th ed.) 454. The definition of inevitable accident is the same on land as by sea, per Lopes, L. J., *The Schwan*, (1892) P. 419, 434.

⁶ *Reg. v. Swindall*, 2 C. & K. 233.

⁷ *Bank of Ireland v. Evans's Trustees*, 5 H. L. C. 410.

in this view there is a difficulty in holding a negligent person responsible for the *wilful* act of a third person, since the law does not presume a breach of law and trespass to be "the necessary, ordinary, or likely result of negligence." In any event the sweeping nature of Tindal, C.J.'s, remark, "If a man chooses to leave a cart standing in the street he must take the risk of any mischief that may be done," must be considerably qualified and restrained.¹ The circumstances are infinite; and what is negligence in St. Paul's Churchyard is not necessarily so in St. Albans.

In the United States it has been laid down that a traveller on foot or on horseback must give way, and, if necessary, cross the road, for a vehicle with a heavy load,² and that a lightly loaded vehicle must give way to one heavily loaded.³ United States cases.

If a person do anything *per se* wrongful or that is a public nuisance he thereby puts himself in the position of an insurer of the public and is liable to any one exercising ordinary care quite irrespective of any care used by him in the safeguarding his encroachment.⁴

The rule of the road has, as we have seen,⁵ had to be modified in its application to tramcars, which cannot get out of the way, as they move only along the rails laid down for them. They are put on the same footing with other vehicles, and so ought not to be deemed in their nature terrific things. The legislative authorisation of tramcars does not, as in *Rex v. Pease*,⁶ authorise a user independently of whether what was done was a nuisance or not. The inability to run them at all was merely removed and the user of them was rendered subject to all common law obligations incumbent on the drivers of other vehicles.⁷ Still a tramway company has a right "to use these rails for the passage of their tramway-cars to which, seeing that they cannot be deviated from the track, other vehicles meeting or passing them must give precedence. But the respondents' use of their track is in no other sense exclusive. Any other vehicle, which does not run on flanged wheels, may use the track and the rails as freely as any other part of the street, whenever and so long as these are not actually occupied by the respondents' cars. Beyond the possession of these privileges, which are all that the statutes confer upon them, the respondents are in no better position and have no higher right than the appellant and other persons who use the highway."⁸ Tramcars.

¹ *Sullivan v. McWilliams*, 20 Ont. App. 627. In *Hevey v. Dennis*, 47 Am. R. 378, where defendant, having left a tub of fish-brine by the side of the way, which was wilfully turned over by a third person into the gutter, the plaintiff's cow drank of the spilled brine, and died in consequence, the defendant was held liable to the plaintiff for the loss; but see the cases cited in the note, at 381 of the report, where an opinion adverse to the case is given. Cp. *Sharp v. Powell*, L. R. 7 C. P. 253.

² *Beach v. Parmeter*, 23 Pa. St. 196.

³ *Grier v. Sampson*, 27 Pa. St. 183.

⁴ *Bizzell v. Booker*, 16 Ark. 308.

⁵ *Ante*, 542. The 55th section of the General Tramways Act, 1870 (33 & 34 Vict. c. 78), providing that "the promoters or lessees, as the case may be, shall be answerable for all accident, damages and injuries happening through their act or default or through the act or default of any person in their employment by reason or in consequence of any of their works or carriages" was held in *Brocklehurst v. The Manchester, Bury, Rochdale, and Oldham Steam Tramways Co.*, 17 Q. B. D. 118, to apply only to a wrongful act or default, and not to make the promoters or lessees answerable for mere accident caused without negligence, by their use of tramcars.

⁶ 4 B. & Ad. 30.

⁷ *Rattee v. Norwich Electric Tramway Co.*, 18 Times L. R. 562.

⁸ *Ogston v. Aberdeen District Tramways Co.*, (1897) A. C. 118; *Dublin United Tramways Co. v. Fitzgerald*, (1903) A. C. 99; *Toronto Ry. Co. v. City of Toronto*, 24 Can. S. C. R. 589.

Rule as to
carriages
meeting
tramcar.

In America it has been laid down that carriages meeting tramcars should turn to that side which appears to be the safest, without regard to the usual rule; and the fact that either was on the left of the road at the time of a collision is no evidence of negligence.¹ Again, when a collision occurs between an ordinary vehicle and a tramcar travelling in the same direction, the presumption is that the driver of the vehicle is negligent.²

There is no English case that goes that length, and when one considers the variety of circumstances in which a tramcar may collide with another vehicle, *i.e.*, in driving down hill it may overdrive it, or in clearing a hill may overrun it, it is highly improbable with the existing tendencies of English law that any such decision will have any authority. There clearly is a presumption that a tramcar is not on its wrong side. In any other case the presumption would be the same as where a powerful and swift vehicle brings injury to another less heavy and less powerful.

Alighting
from
tramcar.

In *Jardine v. Stonefield Laundry Co.*,³ Lord President Inglis made some forcible remarks on the alterations in the rule of the road brought about by the conditions in which tramcars are run. He said: "Tramway-cars are no longer a novelty among us." "There is one rule of the road which has been very much altered by the appearance of these new vehicles, *viz.*, that one carriage overtaking another is bound to pass it upon the right-hand side. The new rule requires that when a carriage is coming up behind a tramway-car and the car stops, the driver of the other vehicle shall pass upon the left-hand side. That is the opposite of the old rule. The new rule has been introduced from considerations of convenience and safety; and the reason is very obvious, because tramway-cars pass upon two lines of tramways, one in one direction and another in the other. If vehicles were to pass a car on the right-hand side, there would be very great danger of their coming into collision with another car coming the opposite way. That is the reason of the rule. If a person gets off a tramcar on the left-hand side, which is the proper side for the purpose, it is quite obvious that in passing from the tramcar to the pavement he is passing across a carriage-way, and a carriage-way which he ought to know may be travelled over at any moment by vehicles passing alongside of the tramcar. He is just as much bound to look after his own safety in crossing that carriage-way as if he were crossing from one side of the street to the other. It is just as much a carriage-way as the whole street, and while vehicles are bound to go at a steady pace and not to be driven furiously, foot-passengers crossing the carriage-way are bound to look after their own safety, and not to run obvious and unnecessary risk."⁴ It had previously been laid down by the other Division of the Court of Session⁵ that "the space between the car and

¹ *Hogan v. Eighth Avenue Rd. Co.*, 15 N. Y. 380. In Brightly's *New York Digest*, under Highways, X, Law of the Road, are collected a number of cases on this subject.

² *Suydam v. Grand Street, &c. Rd. Co.*, 41 Barb. (N. Y.) 375. As to running tramcars along the highway upon a 'railway in a defective condition, see *Sadler v. South Staffordshire and Birmingham District Steam Tramways Co.*, 23 Q. B. D. 17, in which case to do so was held an unlawful act, that rendered the company liable for a trespass in respect of a personal injury caused thereby.

³ 14 Rettie, 839.

⁴ *Forwood v. The City of Toronto*, 22 Ont. R. 351; *M'Dermid v. The Edinburgh Street Tramways Co.*, 12 Rettie, 15, are cases of tramcars not pulled up in time to avert an accident.

⁵ *Ramsay v. Thomson*, 9 Rettie, 140, per the Lord Justice-Clerk (Moncreiff), 140.

the pavement must be looked upon in the same way as an ordinary street-crossing. The traffic is not bound to stop at every crossing. The first duty of a member of the public at such a place is to see that the coast is clear, and if it is not, to wait until there is a safe opportunity to cross." The tramways affect the ease thus far that it is safer to cross from the middle of a street than from one side to the other, because in the former case there is only one-half of the distance to go.

Lastly, as to foot-passengers, the law was laid down in the case of *Cotterill v. Starkey*¹ by Patteson, J., as follows: "A foot-passenger has a right to cross a highway, and" "it was held in one case² that a foot-passenger has a right to walk along the carriage-way. But, without going that length, it is quite clear that a foot-passenger has a right to cross, and that persons driving enririages along the road are liable if they do not take care so as to avoid driving against the foot-passengers who are crossing the road; and if a person driving along the road cannot pull up because his reins break, that will be no ground of defence, as he is bound to have proper tackle. With respect to what has been said about the carriage being on the wrong side of the road, I think you should lay it out of your consideration, as the rule as to the proper side of the road does not apply with respect to foot-passengers; and as regards the foot-passengers the carriages may go on whichever side of the road they please."³ There is no doubt, said the Lord Justice-Clerk (Moncreiff) in another case,⁴ that "it lies on the driver to keep clear of foot-passengers. If a person is guilty of such fault as to increase the burden of that obligation, that is another matter, but the primary obligation is undoubted—to keep clear of foot-passengers"; and the same learned judge has also laid down⁵ that "there is the strongest presumption [of negligence] both in fact and in law against a driver who runs down a person in daylight."

The law does not require either of two travellers going in the same direction to turn to the right of the other.⁶ It is the duty of a foot-passenger to use due care and caution in going upon a crossing at the entrance of a street to avoid the carriages passing.⁷

The New Zealand case of *Shearer v. Corporation of Dunedin*⁸ disclosed most extraordinary facts. The plaintiff alleged that while endeavouring to cross the road late at night he was knocked down by a motor-car driven at excessive speed and dragged along more than one hundred and thirty yards under the car before the driver was apprised of the plaintiff's perilous position and stopped. Williams, J., held that "though it is the duty of the motor-man to keep a constant eye on the track, I see no duty on him at night on a solitary road to look beyond the track to see whether" any straggling passenger

¹ 8 C. & P. 694; *Lloyd v. Ogleby*, 5 C. B. N. S. 667.

² *Boss v. Litton*, 5 C. & P. 407; *Coombs v. Purrington*, 42 Me. 332; *M'Kechnie v. Couper*, 14 Rettie, 345; *Anderson v. Blackwood*, 13 Rettie, 443.

³ *Slater v. Swann*, 2 Str. 872, is too broadly expressed. The right of the tradesman could only arise if the impediment was for an unnecessarily long time; see per Jessel, M.R., *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713. Cp. *Bell v. Quebec (Corporation)*, 5 App. Cas. 84. See ante, 330. The rights of foot-passengers are treated with great fulness in *Stringer v. Frost*, 9 Am. St. R. 875, and in the note, at 878.

⁴ *M'Kechnie v. Couper*, 14 Rettie, 345.

⁵ *Clerk v. Petrie*, 6 Rettie, 1076.

⁶ *Bolton v. Colder*, 1 Watts (Pa.) 360.

⁷ *Williams v. Richards*, 3 Car. & K. 81, approved by Erle, C.J., *Cotton v. Wood*, 8 C. B. N. S. 572.

⁸ Of which by the favour of the learned judge who tried the case, I have a report in my possession.

that may be about "proposes to come on the track and to collide with the car." "The plaintiff having got where he was through his own negligence it was for him to prove, not merely that the motor-man did not see him when he ought to have seen him, but that if the motor-man had seen the plaintiff when he ought to have seen him, he could have pulled up in time to avert the collision. The burden of proving this lay strongly on the plaintiff." "Generally, I think that if a car runs over a man on the track and the motor-man does not know he has been run over, a jury would be entitled to find that the motor-man was negligent in not keeping a good look-out, although the motor-man might aver that he had kept a look-out."

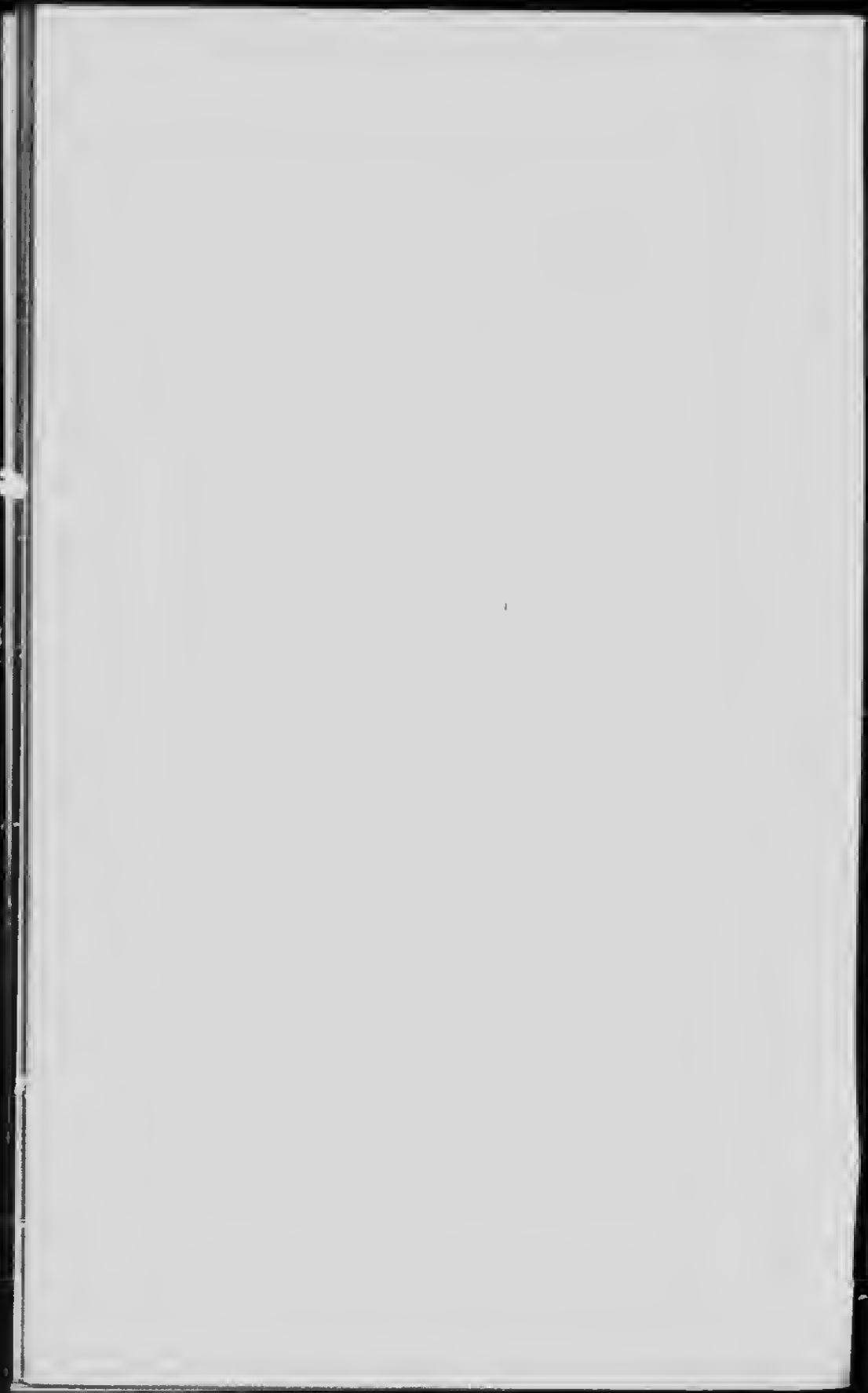
Driving
against
impediment
in road.
Default in
passenger.

In *Simon v. London General Omnibus Co.*,¹ plaintiff, who was leaning his arm on the rail of an omnibus in which he was riding, was injured through the driver, in turning a corner in order to avoid an electric tram car, drawing in close to the kerb and thus bringing the plaintiff's arm in contact with an electric light standard. The Divisional Court upheld a non-suit, holding that there was no evidence of negligence on the driver's part in going close to the kerb, and no evidence that the accident would have happened had the plaintiff been riding reasonably with his arm within the limits of the vehicle he was on.

¹ 23 Times L. R. 463.

BOOK IV.

DUTY TO ANSWER FOR ONE'S OWN
AND OTHERS' ACTS.



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BOOK IV.

DUTY TO ANSWER FOR ONE'S OWN AND OTHERS' ACTS.

CHAPTER I.

DUTY TO ANSWER FOR ONE'S OWN ACTS.

THE consideration of the limitations or the duty to answer for one's own actions raises several points of difficulty. On the one hand, the rule has been formulated that though criminally a man is under no liability in the absence of a *mens rea*, yet civilly he acts at his peril; ^{Two views of the extent of liability.} ¹ on the other, it is said that a trespass to the person is only actionable where there is fault ² in the person acting. There has been much discrepancy in the working out of the principle thus alternatively expressed. We shall probably find that each expresses an aspect of the true view, which is a combination of both.

The former of these two statements of principle is most strongly brought out by the facts of some of the early cases. In *Y. B. 6 E. IV. 7, pl. 18*, the doctrine is broadly stated. ^{First view illustrated by case in Y. B. 6 E. IV. 7, pl. 18.} Defendant, in cutting his hedge, let cuttings fall on his neighbour's land; the neighbour brought trespass in respect of the wrong. The defendant pleaded that the cuttings fell on plaintiff's land against his will, and that he went quickly on the land and took them, which was the trespass complained of. On this there was a demurrer; and judgment was given for the plaintiff. If, said Littleton, J., your cattle come on my land and eat my grass, notwithstanding you come freshly and drive them out, you ought to make amends for what your cattle have done, be it more or less. . . . And, sir, if this should be law that he might enter and take the thorns, for the same reason, if he cut a large tree he might come with his waggons and horses to carry the trees off, which is not reason, for perhaps he has corn or other crops growing, &c. Choke, J., held that—when the principal thing is not lawful, that which depends upon it is not lawful; for when the plaintiff cut the

¹ This is the law of the Digest, D. 9, 2, 45, § 4: *Si defendendi mei causa, lapsum in adversarium misero, sed non eum sed praetercurrentem percussero, tenebor lege Aquilia.*

² This was the law in Gaius's time: *itaque impunitus est qui sine culpa et dolo malo casu quodam damnum committit*: Gaius 3, 211.

³ Holmes, *The Common Law*, 82. The measure of culpability in the ancient law is discussed in Pollock and Maitland, *Hist. of English Law* (2nd ed.), vol. ii. 470-476.

⁴ Ames, *Cases in Tort*, 69.

Comment.

thorns and they fell on the defendant's land the falling was not lawful, and so the coming to take them out was not lawful; "as to what was said about their falling in *ipso invito* that is no plea, but he ought to show that he could not do it in any other way or that he did all in his power to keep them out." This case, it is true, is concerned with a trespass to realty, while our inquiry is primarily with regard to the duty of a person to another; nevertheless, it cannot be disregarded, and is very important as marking the governing tendency of the law in its dealings with interferences by one person with another's rights; though the law may well impose a more absolute barrier to transgressions against property rights than it regards as necessary in merely personal actions.

Case in Y. B.
21 H. VII. 27.
pl. 5.

Again in Y. B. 21 H. VII. 27, pl. 5, in an action of trespass, the defendant justified on the ground that the corn for which action was brought was severed from the nine parts as tithes and was in jeopardy of being destroyed, wherefore he took and brought it to the plaintiff's barn. There was a demurrer which was allowed, Rede, J., saying: "The intent cannot be construed, but in felony it shall be. As when a man shoots at the butts and kills a man it is not felony, for there is no intent; and so of a tiler on a house, who with a stone kills a man unwittingly, it is not felony. But when a man shoots at the butts and wounds a man, though it is against his will, he shall be called a trespasser against his intent."

Anonymous
case in Croke
Elizabeth.

So in an Anonymous case in 1582,¹ where a man, having shot at a fowl and thereby set fire to his house, whence the house of his neighbour caught, was held liable; "for the injury is the same, although this mischance was not by a common negligence, but by misadventure; and if he had counted upon the custom of the realm as 2 H. IV., the action had not been well brought; yet *consuetudo regni est communis lex.*"²

Weaver v.
Ward.

Reference is invariably made to *Weaver v. Ward*,³ decided in 1616, whenever the question of the extent of liability in trespass is raised. Defendant set out in answer to a declaration in trespass that the plaintiff and he were skirmishing in a train-band with their musket, and that in doing so the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging his piece, wounded the plaintiff.⁴ The plaintiff demurred and obtained judgment, the Court saying: "No man shall be excused of a trespass (for this is in the nature of an excuse, and not of a justification, *prout ei bene licuit*) except it may be judged utterly without his fault. As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran across his piece when it was discharging, or had set forth the case, with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

Gilbert v.
Stone.

In 1662 *Gilbert v. Stone*⁵ was decided. Gilbert brought "an

¹ Cro. Eliz. 10.

² See *ante*, 488.

³ Hobart, 134. As to the authority of Hobart's Reports, see the preface to Jenkin's Eight Centuries of Reports, 1771.

⁴ Mr. Holmes, The Common Law, 84, points out that "the words *vi et armis* and *contra pacem*, which might seem to imply intent, are supposed to have been inserted merely to give jurisdiction to the King's Court." Reeves, Hist. of Eng. Law (2nd ed.) vol. ii. 149. As to the allegations *vi et armis* and *contra pacem*, Vin. Abr. Trespass (Q. a. 3), (Q. a. 4), (Q. a. 5). The old cases are collected Shepp. Abr. Trespass; also *ante*, 423.

⁵ Style 72.

action of trespass *quare clausum fregit*, and taking of a gelding" The defendant pleaded that "for fear of his life, and wounding of twelve armed men who threatened to kill him if he did not the fact, [he] went into the bouse of the plaintiff and took the gelding." Thereon there was a demurrer, and Rolle, J., said: "This is no plea to justify the defendant; for I may not do a trespass to one for fear of threatenings of another; for by this means the party injured shall have no satisfaction, for he cannot have it of the party that threatened."

Then came *Bessey v. Olliot*.¹ A gaoler having received a prisoner from a bailiff of a liberty who had taken him outside his jurisdiction, the prisoner brought an action of false imprisonment against the gaoler who had received him under the illegal caption. This was held by the majority of the Court not to lie. Sir T. Raymond dissented, saying: "In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering." For this proposition he cites the cases already mentioned. Sir Thomas Raymond's statement of the policy of the law, it may be pointed out in passing, is indubitably correct; and yet only goes, as in this case, to the question of *onus*. Given a state of facts the law will not inquire into the actual intent of those that bring them about; neither will the law refuse to regard other facts which prevent the legal conclusion of intent arising; or, if it has arisen, will so affect the total result as to wipe away what at the first sight appeared conclusive.

*Dickenson v. Watson*² comes next, and was decided in 1682. The defendant was a collector of hearth money; "and for the better discharge of his office, and more sure custody, and keeping of the money by him collected and to be collected, he provided himself with firearms, and having one of his pistols in his hands and intending to discharge it *ne aliquod damnum eveniret*, he discharged it (*nemine in opposito visu existente*), and while he discharged it, the plaintiff *casualiter viam illam praterivit et si aliquod malum ei inde accederet hoc fuit contra voluntatem* of the defendant. *Quæ est eadem transgressio.*" Plaintiff demurred to the sufficiency of this, and the Court sustained the demurrer, "for in trespass the defendant shall not be excused without unavoidable necessity which is not shown here. Besides, the defendant did not traverse *absque hoc quod aliter seu alio modo* as was done in the case of *Weaver v. Ward*, Hob. 134. And yet judgment was there given for the plaintiff."

Then comes *Underwood v. Hewson* reported as follows: "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass."

No case in the law is better known than *Scott v. Shepherd*; and in this, in 1773, is found the most uncompromising assertion of the extreme liability in personal trespass; where Blackstone, J., says: "Not even menaces from others are sufficient to justify a trespass

¹ (1677). This is twice reported; Sir T. Raym. 421, under the name of *Lambert v. Olliot v. Bessey*; and at 467 as *Bessey v. Olliot*. In the former report only Sir Thomas Raymond's opinion is given without any intimation that the judgment of the Court was otherwise. The best report is Sir T. Jones, 214. Cp. as to protection of an officer of the law, *Tarleton v. Fisher*, 2 Doug. 671.

² Sir T. Jones 205.

³ To appreciate the significance of this, see Macaulay, Hist. of Eng. vol. i. 225 vol. ii. 426.

⁴ (1724) 1 Str. 596.

⁵ 2 Wm. Bl. 892, 1 Sm. L. C. (11th ed.) 457.

⁶ L. c. 896.

against a third person ; much less fear of damages to either his goods or his person, nothing but inevitable necessity." "So in the case put by Brian, J.,¹ and assented to by Littleton and Cheke, C.J.,² and relied on in Raym. 467. 'If a man assaults me so that I cannot avoid him, and I lift up my staff to defend myself, and in lifting it up undesignedly hit another who is behind me, an action lies by that person against me ; and yet I did a lawful act in endeavouring to defend myself.'" It has been sought to qualify this statement by saying it is the statement of law by a dissentient judge.³ De Grey, C.J., however, says :⁴ "I agree with my brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or the unlawfulness of the original act ; for actions of trespass will lie for legal acts when they become trespasses by accident ; as in the case cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind."

Lord Mansfield in *Tarlton v. Fisher*.

Lord Mansfield, too, in *Tarlton v. Fisher*,⁵ says : "This is a direct action of trespass *quare vi et armis*, and not on the case ; and there is this distinction between them which always ought to be attended to : In trespass innocency of intention is no excuse ; in case, the whole turns upon it ; malice, or the *quo animo* is the very gist of the action."

Leame v. Bray.

*Leame v. Bray*⁶ came before the Court on the question of setting aside a nonsuit entered where a collision, occasioned negligently and not wilfully, had been declared on in trespass instead of in case. The Court made the rule of setting the nonsuit aside absolute on the ground that the injury being immediate from an act of force, trespass was the right remedy. In the course of the argument the legal aspect of unintentional acts was much considered. Grose, J., referring to Y. B. 21 H. VII. 27, pl. 5,⁷ which has been already noticed, calls attention to an illustration put there by Rede, J. : "There is a case put in the Y. B. 21 H. VII. 28a, that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." In giving judgment, Lord Ellenborough, C.J., said :⁸ "It is immaterial whether the injury be wilful or not. As in the case alluded to by my brother Grose, where one shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act and no unlawful purpose in view ; yet having accidentally wounded a man, it was holden to be a trespass, being an immediate injury from an act of force by another." Grose, J., said :⁹ "Looking into all the cases from the Year Book in the 21 H. VII. down to the latest decision on the subject, I find the principle to be that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass"; and Lawrence, J.,¹⁰ "In actions of trespass the distinction has not turned either on the lawfulness of the

Lord Ellenborough, C.J.'s, view.

¹ Mr. Holmes, *The Common Law*, 103, says as to this : "The statements of law by counsel in argument may be left on one side, although Brian is quoted and mistaken for one of the judges by Sir William Blackstone in *Scott v. Shepherd*."

² This is probably a mistake, and we should read here Littleton and Choke, J.J. : Choke, not Cheke, was never Chief Justice. Foss, vol. iv. 487. Cp. Dugdale, *Chronica Series* 66, *sub anno* 1462, and 72, *sub anno* 1485 ; *Dictionary of National Biography, sub nom.* Choke.

³ Holmes, *The Common Law*, 104.

⁴ (1781) 2 Doug. 674.

⁵ *L.c.* 596.

⁶ *L.c.* 600.

⁷ 2 Wm. Bl. 899.

⁸ (1803) 3 East, 593.

⁹ *L.c.* 599.

¹⁰ 3 East 601.

act from whence the injury happened, or the design of the party doing it to commit the injury."

Again, in *Rylands v. Fletcher*,¹ Lord Cranworth said: "In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond.² And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum*." *Rylands v. Fletcher.*

With these must be taken the American case of *Castle v. Duryee*.³ *Castle v. Duryee.* Militia were being reviewed and were firing, under the orders of the defendant, their colonel, what was supposed to be blank cartridge. The plaintiff, who was looking on in front of the firing-line, was wounded by a bullet, which could only be accounted for by concluding that one of the men's pieces had been loaded with ball cartridge. Plaintiff sued in "trespass for an assault." A verdict for the plaintiff was affirmed on appeal, as the Court held there was evidence of negligence. Denio, C.J., said: ⁴ "The defendant was not required by any public duty to cause his men to discharge their firearms at all, while people were within musket range." "It is not the law, that if one, supposing a musket to be unloaded, or to be charged only with powder, snaps it at another, and he is wounded, he is irresponsible in a civil action; and it is of no consequence, so far as maintaining the action is concerned, that he acted upon the most plausible or the most reasonable grounds, and fully believed that the gun was not charged with anything that could injure another."

The foregoing cases are those usually cited for the former mode of statement. The other view, also, is said to derive countenance from a long list of cases. The earliest is in 1481, in Y. B. 21 E. IV. 64, pl. 37. Second view illustrated by case in Y. B. 21 E. IV. 64, pl. 37. Trespass was brought for taking the plaintiff's cattle. The defendant pleaded that he found the cattle of the defendant in his land damaged, and chased them towards the pound, where they escaped from him and went upon other land, where he retook them. This was held a good plea.

In the following year ⁵ there is a case of trespass against defendant for going on adjoining land to turn the plough while ploughing his own land. The defendant justified by reason of a custom "that they which plough may turn their plough upon the land of another, and that for necessity." This was held good. Case in Y. B. 22 E. IV. 8, pl. 24.

In 1624 comes *Mitten v. Faudrye*.⁶ An action for trespass was brought for chasing the plaintiff's sheep. The plea was that they were trespassing on defendant's land, who chased them out with a little dog, and as soon as the sheep were out of the land he called in his dog. To this there was a demurrer. The earlier cases were all referred to, and for the defendant it was argued "a dog is ignorant of the bounds of land." Crewe, C.J., referring to the case in Y. B. 6 E. IV.,⁷ explained that there trespass lay because the defendant "did

¹ (1868) L. R. 3 H. L. 341.

² (1865) 2 Keyes (N. Y.) 169.

³ Y. B. 22 E. IV. 8, pl. 24.

⁴ Poph. 161.

⁵ Sir T. Raym. 421.

⁶ L. C. 172.

⁷ *Inte*, 553.

not plead that he did his best endeavour to hinder their (the thorns) falling there (on the plaintiff's land); yet this was a hard case. But this case is not like to these cases, for here it was lawful to chase them (the sheep) out of his own land, and he did his best endeavour to recall the dog, and therefore trespass does not lie." Dodderidge, J., said: "Here it appeareth to be an involuntary trespass, 8 E. 4. A man is driving goods (*sic*) through a town, and one of them goes into another man's house and he follows him, trespass doth not lie for this, because it was involuntary, and a trespass ought to be done voluntarily, and so it is *injuria* and a hurt to another, and so it is *damnum*." The same case is reported in Latch¹ where Dodderidge is represented as saying: "Clearly trespass does not lie here, insomuch as note for a rule that in all trespasses there ought to be a voluntary act and also damage, otherwise trespass does not lie."

Gibbons v. Pepper.

*Gibbons v. Pepper*² is one of those cases so numerous in the days of strict pleading, where the decision is given on a point of form, yet where incidentally points of substance are treated. The Court said: "If I ride upon a horse and J. S. whips the horse so that he runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I, by spurring, was the cause of such accident, then I am guilty. In the same manner, if A takes the hand of B, and with it strikes C, A is the trespasser and not B."

Beckwith v. Shordike.

In 1767, the King's Bench decided *Beckwith v. Shordike*.³ The marginal note is: "Involuntary trespass may be justified, but not a voluntary one." Defendants were going through plaintiff's paddock with a dog, which, escaping from control, killed one of plaintiff's deer. A verdict was given for the plaintiff, on which there was a motion, as the judge was of opinion that the jury ought not to have found the defendants guilty, "it being an accident that happened without their intention and contrary to their inclination." The decision may be summed up in the last sentence of the report: "The present case can't be considered as an accidental involuntary trespass."

Davis v. Saunders.

Davis v. Saunders,⁴ in 1770, was an action in respect of injuries caused "by the rolling of the sea, and the howling of the wind," whereby plaintiff's vessel was impelled against defendant's. The rule of law approved was—if in the prosecution of a lawful act an accident purely accidental arise, no action can be supported in respect thereof.

Wakeman v. Robinson.

Wakeman v. Robinson,⁵ decided in the Common Pleas in 1823, comes next. As defendant was driving his gig between a coach and a waggon through an interval where there was room for two or three carriages abreast, his horse became frightened by the rattle of another conveyance, swerved and ran the shaft of the gig against one of the waggon-horses, which was so injured that it died in consequence. The defence was that the injury was occasioned by unavoidable accident, without negligence or default of the defendant. In summing up, the judge directed the jury that the action being for trespass, if the injury was occasioned by an immediate act of the defendant, it was immaterial whether that act was wilful or accidental. The jury

¹ Twice; at 13, *sub nom. Millen v. Hawery*, whence the quotation in the text is taken; and at 119, *sub nom. Millen v. Fawdry*.

² (1695) 1 *Ld. Raym.* 38.

³ 4 *Burr.* 2093.

⁴ 2 *Chit. (K. B.)* 639. *Cp. Covell v. Laming*, 1 *Camp.* 497, and note.

⁵ 1 *Bing.* 213.

having found for the plaintiff, defendant moved for a new trial on the ground of misdirection. The proper direction, he contended, was that if the mischief was occasioned by unavoidable accident, without any negligence or default, the defendant was excused. A new trial was refused on the ground that the facts as proved showed negligence. "If," said Dallas, C.J., "the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie; but, under all the circumstances that belong to it, I regret that this case comes before the Court."¹

*Hall v. Fearnley*² is a decision on the then new pleading rules of 1842. Defendant was driving a cart in the road near the pavement, at the edge of which the plaintiff was walking; plaintiff alleged that defendant drove so close to the pavement as to knock the plaintiff down and run over and break his leg. Defendant endeavoured to show, under a plea of "Not Guilty," that the plaintiff slipped from the curb as the cart was passing, and so got his leg under the wheel. Wightman, J., told the jury they were to see whether the injury arose from inevitable accident or by the defendant's fault. The jury found for the defendant. The Court ordered a new trial, because there was no special plea, and because any defence admitting the trespass complained of to be the act of the defendant must be pleaded specially. Under "Not Guilty," the alleged act may be shown to be the result of an accident, or of some agency over which the defendant had no control, so that, substantially, it was not his act; but any defence that admits that the act is a trespass, and was the defendant's act, although unintentional or accidental, must be specially pleaded, because the defence is in the nature of an excuse for what, *prima facie*, is not justifiable.

*Holmes v. Mather*³ was the case of horses bolting with a carriage, the groom in charge not being able to control them, so that they drove over plaintiff's wife. As Cleasby, B., put the matter, "the horses were not driven there by the defendant's servant, but they went there in spite of him, so far as he directed them at all." The defendant was held not liable. "If," said Bramwell, B., "I am being run away with, and I sit quiet and let the horses run wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible." Here it may be pointed out the injurious agency was in full career independently of the defendant's act, which was an effort to bring it within bounds that was ineffectual, and not an act in any respect moving mischief.

The consideration of *Stanley v. Powell*,⁴ the most recent of the English cases, is for the moment deferred until the American law has been noted, and the whole subject is before us.

The law in the United States is thus stated:⁵ For a purely accidental occurrence, causing damage without the fault of the person

Law in the United States.

¹ The negligence proved was that the defendant's horse was young and spirited; that he had no curb rein; that the defendant pulled the wrong rein, and that he ought to have continued a straight course, allowing the coach to pass between him and the waggon.

² (1875) L. R. 10 Ex. 261.

³ 3 Q. B. 919.

⁴ (1891) 1 Q. B. 86.

⁵ Cooley, Torts (2nd ed.), 91. There are a large number of cases collected in the note at 92, which need not here be referred to in detail.

to whom it is attributable, no action will lie, for though there is damage, the thing amiss—the *injuria*—is wanting.”

Terms un-
defined.

Two important terms in this statement, on which the significance of it greatly depends, are undefined—what is a purely accidental occurrence and what marks fault. The cases, however, will materially assist us in arriving at their meaning.

Harvey v.
Dunlop.

In *Harvey v. Dunlop*,¹ where one child threw a stone at another child which put out her eye, Nelson, C.J., says: “No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. . . . All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility.”² Fault, then, exists where an act is done resulting in injury to another which human care and foresight are able to guard against. What is a purely accidental occurrence is illustrated by *Brown v. Kendall*.³

Brown v.
Kendall.

The defendant, while trying to separate two dogs which were fighting (one of them being his own), having raised his stick over his shoulder in the act of striking, accidentally hit the plaintiff in the eye; this was the injury sued for. At the trial the judge instructed the jury, “if the defendant, in heating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict, but a popular sense.” The jury found for the plaintiff. Defendant thereupon moved for a new trial on the ground of misdirection.

Judgment of
Shaw, C.J.

Shaw, C.J., delivered judgment, making the rule absolute.⁴ “We think as the result of all the authorities” “that the plaintiff must come prepared with evidence to show either that the intention was unlawful or that the defendant was in fault; for if the injury was unavoidable and the conduct of the defendant was free from blame he will not be liable.”⁵ If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom.⁶ In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover. In using this term, ordinary care, it may be proper to state that what constitutes

¹ Hill and Denio, Suppl. Vol. by Lalor, 193. *Bullock v. Babcock*, 3 Wend. (N. Y.) 391.

² See *Vincent v. Stinehour*, 7 Vt. 62.

³ (1850) 60 Mass. 292.

⁴ 60 Mass. 292, 295.

⁵ 2 Gr. Int. Ev. §§ 85-92, *Wakeman v. Robinson*, 1 Bing. 213.

⁶ *Davis v. Saunders*, 2 Chit. (K. B.) 639; Com. Dig. Battery, A. (Day's ed.) and notes; *Vincent v. Stinehour*, 7 Vt. 62.

ordinary care will vary with the circumstance of cases. In general, it means that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest would be required to use less circumspection and care than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed."

In connection with this the case of *Morris v Platt*¹ must be noticed, *Morris v. Platt.* where the same train of thought is pursued. Defendant, while engaged in lawful self-defence, fired a pistol at his assailant, whom he missed, and wounded an innocent bystander;² but was held not liable, because, in the circumstances, guilty of no negligence. "An accident," says Butler, J.,³ "is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made. In the first class are all those which are inevitable or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class, those which result from human agency alone, but were unavoidable under the circumstances; and in the third class, those which were avoidable, because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency have been avoided. Thus, to illustrate, if A burn his own house and thereby the house of B, he is liable to B for the injury; but if the house of A is burned by lightning, and thereby the house of B is burned, A is not liable; the accident belongs to the first class, and was strictly inevitable or absolutely unavoidable. And if A should kindle a fire in a long-disused flue in his own house which has been cracked without his knowledge, and the fire should communicate through the crack and burn his house, and thereby the house of B, the accident would be unavoidable under the circumstances and belong to the second class. But if A when he kindled the fire had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked and might endanger his house and that of B, and so was guilty of folly, he would be liable although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate."

¹ (1864) 32 Conn. 75.

² Cp. D. 9, 2, 45, § 4: *Qui cum aliter tueri se non possunt damni culpam dederint, innoxii sunt; vim enim vi defendere omnes leges omniaque jura permittunt. Sed si, defendendi mei causa, lapidem in adversarium misero, sed non eum sed praterirentem percussero, tenor lege Aquilia: illum enim votum, qui vim inferi, ferire conceditur: et hoc, si tuendi dumtaxat, non etiam ulciscendi causa factum sit.*

³ 32 Conn., 85.

The Nitro-Glycerine Case.

The line marked by these cases was approved in the *Nitro-Glycerine Case*¹ by the Supreme Court of the United States. "No one," it is said, "is responsible for injuries resulting from unavoidable accident whilst engaged in a lawful business." "The measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own."

Comyns's Digest.

For the understanding of the law it may be well to refer now to Comyns's Digest. In Hammond's edition² in a note³ the statement is made, that where one man has been the occasion of damage to another, in order to constitute such damage a legal injury, it is essential that some degree of blame be imputable to the party producing it; and no one can in any shape be made amenable for consequences which his prudence could not avert. Hence the terms *inevitable necessity*, *unavoidable accident*, and their equivalents, which are constantly to be met with in the books. Nor is this rule open to any abuse; for so anxious is the law to preserve unimpaired the rights of personal safety and of property, that it regards not those acts only which invade them through design, but likewise all others that infringe them through carelessness and neglect, without the concurrence of evil disposition; and characterises conduct as negligent and careless, if, by any extraordinary degree of circumspection greater than is usually practised in the ordinary affairs of life, the person acting might have guarded against the accident. This general rule, the note continues, is not without its exceptions, one of which is discovered in the case where an officer innocently executes the process of a court having no jurisdiction in the particular matter. With respect to the rule itself, one of the expressions alluded to as an equivalent to inevitable necessity and unavoidable accident is *involuntary trespass*. This is to be interpreted that the defendant must, at the time, have a command over his will and actions, otherwise he is not a trespasser; and when the reverse happens, and the defendant is disabled from exercising control, then, and then only, is he excused from rendering to the plaintiff a compensation for the damage he *involuntarily* occasions. In order to render a trespass excusable, the act itself must be inevitable, and the defendant altogether blameless in producing the circumstances leading to it; for if the defendant wrongfully places himself in a situation whereby he becomes the instrument of mischief to another, he cannot excuse himself by saying that the accident happened without the possibility of his preventing it at the time.

Review of the cases.

I. Those cited in support of the more stringent view.

In looking through the cases it may be noted that, in every one of those cited for the stricter statement of the rule, there is room, at any rate, for the admission of the more liberal. Thus there would be liability in either view in the case from the Year Book, 6 E. IV. A man may not elect to clip his hedge so as to inconvenience his neighbour. Neither, referring to the case in Y. B. 21 H. VII.,⁴ is a man constrained to have his property protected without his authorisation or assent. One meddling with another's property does so at his peril, or, at least, takes the risk of the owner resenting and repudiating his intervention. Again, in *Weaver v Ward*,⁵ the demurrer was allowed, because it did not appear from the defendant's plea that the occurrence

¹ (1872) *Parrot v. Wells*, 15 Wall. (U. S.) 524, 537, 538.

² 5th (1822).

³ Battery (A) note (d).

⁴ *Ante*, 554.

⁵ Hobart, 134.

"had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt." *Gilbert v. Stone*¹ merely shows that defendant had a choice of two courses, and preferred to save himself at the expense of his neighbour. *Bessey v. Olliot*² is really an authority the other way, for the *dictum* cited is only that of Sir Thomas Raymond. The decision was that the gaoler was not liable, though he had taken and imprisoned the plaintiff, because he had acted in the discharge of an absolute duty. *Dickenson v. Watson*³ is an authority that unavoidable necessity excuses a trespass. *Underwood v. Hewson*⁴ is at least consistent with want of care in performing a dangerous operation. The *dicta* in *Scott v. Shepherd*,⁵ which are the most thorough-going of all, yet admit the exception of "inevitable necessity." In *Leame v. Bray*⁶ the limits of liability in trespass were only incidentally treated, the mind of the Court being turned rather to the definition of trespass. Admitting, too, that a plea of general want of intention discloses no good defence to trespass, it does not follow that some species of unintentional acts may not so be set out as to suffice, e.g., acts done of necessity or even under strong moral compulsion, as from motives of self-preservation or the preservation of others from destruction.⁷ In *Rylands v. Fletcher* Lord Cranworth⁸ was contemplating injury done to another in the management of one's own affairs. Compulsive action, or action under disinterested reasons of any kind, does not seem to have been in his mind. Lastly, in the New York case,⁹ "public duty" was recognised as an exception to liability; and the utmost that is laid down is that, where there is no call of public duty, so dangerous an act as firing a musket in the presence of a crowd must be done with the greatest precautions. Thus it appears that in not one of the cases cited is the rule that a man acts at his peril borne out in all its unqualified breadth.

On the other hand, the cases which are cited for the laxer rule are not inconsistent with any of those vouched for the more exigent. The first case from the Year Book¹⁰ is explainable by reference to the special law as to animals; the second is at most a special rule in the interests of agriculture, if not a more limited custom still. *Mitten v. Faudrye*¹¹ is concerned with a rule of public policy as to dogs; so is *Gibbons v. Pepper*¹² as to horses. *Beckwith v. Shordike*¹³ recognises that an involuntary trespass is excused; but is an authority against the view that what, as an immediate act, cannot be helped is therefore excusable as a trespass. In *Davis v. Saunders*¹⁴ the alleged trespass is excusable because the injury was caused "by the rolling of the waves and the blowing of the wind," in circumstances where plaintiff and defendant were both entitled to be, and one with no greater right than the other. *Wakeman v. Robinson*¹⁵ again, so far as it can be cited for any general proposition, negatives the view that, where a man has a right to do a particular act, and, in doing it, places himself in such a position that damage ensues to another also in the exercise of a legal

II. Those cited in support of the laxer view.

¹ Style, 72.

² Sir T. Raymond, 421, 467; Sir T. Jones, 214.

³ Sir T. Jones, 205.

⁴ 1 Str. 596.

⁵ 2 Wm. Bl. 892, 1 Sm. L. C. (11th ed.) 454.

⁶ 3 East, 593.

⁷ Com. Dig. Battery A. n (d) 9.

⁸ L. R. 3 H. L. 330.

⁹ *Castle v. Duryce*, 2 Keyes (N. Y.) 169.

¹⁰ Y. B. 21 Ed. IV. 64, pl. 37. *ante*, 557.

¹¹ Poph. 161.

¹² 4. Burr. 2693.

¹³ 1 Ld. Raym. 38.

¹⁴ 1 Bing. 213.

¹⁵ 2 Chit. (K. B.) 639.

right, the former is excused, if the immediate cause of the injury is outside his own control. *Hall v. Fearnley*¹ notes an antithesis between inevitable accident and defendant's fault. *Holmes v. Mather*² is once more the familiar principle—excusing unaccountable freaks of animals. Then come the important American cases. In *Morris v. Platt*³ a reasonable effort at self-preservation was held to excuse the infliction of incidental harm. In *Brown v. Kendall*,⁴ though the defendant may have been under no legal obligation to separate the dogs, there was at least a social obligation, possibly a moral one, to do so. Mr. Holmes, in his comment on this case, says:⁵ “The Court held that, although the defendant was bound by no duty to separate the dogs, yet, if he was doing a lawful act, he was not liable, unless he was wanting in the care which men of ordinary prudence would use under the circumstances, and that the burden was on the plaintiff to prove the want of such care.”

Brown v. Kendall.

Mr. Holmes's interpretation of the decision.

Judgment of the Court.

The passage alluded to in the judgment is as follows: “We are not aware of any circumstances, in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which the distinction would be important.” “The act of the defendant, in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and lawful means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie.”

Mr. Holmes's statement criticised.

From this it appears that Mr. Holmes has overstated the principle of the decision. The distinction in the mind of the Court was manifestly between compulsory acts, as where officers act under process, and non-compulsory; for example, the act in this case. Any distinction in the quality of non-compulsory or lawful acts was rendered unnecessary by the narrow ground taken for the judgment. “The act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act which he might do by proper and lawful means.” Mr. Holmes argues from a particular kind of lawful act carefully specified with two distinct limitations—(1) that the dog was defendant's own; (2) for the injurious acts of which he might be responsible—to the doing of any lawful act,⁶ disregarding wholly the carefully inserted limitations.

Tested whether by English law or principle, a generalisation that

¹ 3 Q. B. 919.

² L. R. 10 Ex. 261.

⁴ (9) Mass. 292.

³ 32 Conn. 75.

⁵ The Common Law, 106.

⁶ Denman, J.'s definition in *Stanley v. Powell*, (1891) 1 Q. B. 93, of a lawful act may be given *quantum valent*, “lawful, by which I understand justifiable, even if purposely done to the extent of purposely inflicting the injury, as, for instance, in a case of self-defence.” With Mr. Holmes a lawful act is one that may be lawfully done, an act in itself allowable; the question of care, &c., is posterior. Denman, J.'s definition would include an act in itself distinctly unlawful, e.g., the shooting of a man if justifiable in the circumstances.

excludes all lawful acts done with adequate care from the category of trespass does not seem correct. On the other hand, the cases we have examined clearly demonstrate that the notion of an absolute liability for damage done to another is misconceived; since even those cases which support the strictest view¹ exclude things done under "inevitable necessity" from the category of actionable wrongs.

In passing it may be noted that in law the burden lies on the defendant to show this "inevitable necessity." Injury *prima facie* imports liability. If the defendant wishes to show his conduct was inevitable, he is put to show either the cause of the occurrence complained of, and that the result of the cause was inevitable; or that of every possible cause which could have produced the effect, in fact not any one actually did so.

Does to show inevitable necessity.

The cases further point to the conclusion that liability has its root in blame; else "inevitable necessity," or, as appears above, the absence of blame, would not excuse. If, then, blame is at the root of liability, the doer of an *unlawful act*² is *a fortiori* liable for the consequences of it.

The converse of this is, however, by no means necessarily true—that the doer of a lawful act is not liable for the consequences of it. In those of the American States which do not accept the law as expounded in *Rylands v. Fletcher*,⁴ the theory of absence of liability for the consequences of a lawful act may require examination; but in England any such theory is in conflict with the law as there laid down, and is thus concluded by authority. For the moment, putting this point aside, let us consider how the theory advanced agrees with principle. In *Brown v. Kendall* the defendant's act was directed to stopping his dog fighting. He was held free from liability, in respect of what happened incidentally and without negligence, in his pursuance of this endeavour, because what he was doing was right and proper in the particular circumstances. His act was justifiable in the result; whether in the abstract and without the particular circumstances may be doubtful. If the dog had not been the defendant's dog, and had not been fighting, yet had been beaten by the defendant on the highway, and the accident had thus happened, the complexion of the whole affair would have been different. Suppose, again, that the dog, being the defendant's dog, was yet at the time of the beating not actually engaged fighting, but only *had been* fighting on some other occasion; or had got lost and been recovered, and was being punished for a transgression past and gone. To beat a dog is, within limits, as lawful an act as to prevent it fighting; and beating a dog does not become other than lawful, in ordinary language at least, because the beating is in a street. If the accident had happened while chastising the dog, would the injured person be precluded from recovery because the act out of which the injury arose was a lawful one? If he could recover, the test of whether beating a dog in the street is a lawful act or not is not

Mr. Holmes's principle that the doer of a lawful act is not liable in trespass examined.

¹ E.g., *Scott v. Shepherd*, 2 Wm. Bl. 892, 1 Sm. L. C. (11th ed.) 454.

² *The Merchant Prince*, (1892) P., per Fry, L.J., 189.

³ Not in the sense of Denman, J., an act done without justification, but an act, apart from the question of justification, primarily against law.

⁴ L. R. 3 H. L. 330: "The drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country," says Doe, J., in a case where apparently the law of the two countries is identical: *Brown v. Collins*, 53 N. H. 442. The judgment herein contains a very full collection of the class of cases now being considered.

the correct test. If he could not, the maxim of law, *Sic uti tuo ut alienum non laedas* is reversed or limited, with some reference, perhaps, to real rights alone. The quiet citizen must keep out of the way of the exuberantly active one. The duty is to avoid being injured, not to avoid injuring.

As a point of pleading.

Test the matter by pleading. A trespass is only actionable when it results from other than a lawful act; consequently, a declaration setting out the facts would often be insufficient as being consistent with a lawful as well as an unlawful act; for illegality is never to be presumed. *Hall v. Fearnley*¹ shows this view of a trespass is not correct. "The act of the defendant was *prima facie* unjustifiable and required an excuse to be shown," are the words of Wightman, J. In *Milman v. Dolcell*,² Lord Ellenborough says: "The defendant allows that he intermeddled with goods which were the property and in the possession of the plaintiff. By so doing he is presumed to be a trespasser." Obviously, because any act interfering with person or property of another is presumably a trespass.³

Ambiguity in the use of the term "lawful acts."

The difficulty lies in the ambiguity in the use of the term "lawful acts," which, we have already seen, may be made to cover different states of fact. An act, it is plain, may be lawful in itself, or only in the circumstances in which it is possible for it to be performed. Denman, J., taking the latter meaning, declares acts lawful if justifiable. This change of wording, by which "justifiable acts" are substituted for lawful acts, tends rather to darken the matter; since "justifiable" is a wider term than "lawful," and, while not any clearer in its meaning must be used in a non-natural sense and include "excusable acts," or else must give rise to a confusion which, till the introduction of the new term, we were free from. Besides, it lands us in a maze of particulars. An act is lawful if justifiable; and justifiable, if the circumstances warrant the act being done. If we are driven to this tedious inquiry in every case, there is no help for it; the tediousness and inefficiency of the process, however, raise a strong presumption against its correctness. The other method of proceeding seems greatly preferable. An act interfering with the person or property of another, which is *prima facie* a trespass, must be either a lawful or a not-lawful act. If the act is not lawful, the interference is a wrong and therefore actionable. If the act is lawful, in some circumstances it may yet be actionable. To say that an act is actionable when it is not justifiable does not sensibly add to our knowledge. What we have to do is to discriminate lawful acts, which do not enure as trespasses, although they interfere with the person or property of another, from lawful acts which, though done without negligence, become trespasses so soon as they interfere with the person or property of another.

Lawful Acts.
I. Absolute and obligatory duties.

At one end of the scale of lawful acts are those that are to be performed as absolute and obligatory duties. The gaoler in *Bessey v. Olliot* had to act under his warrant; so that though the imprisonment of Olliot was illegal, the legal obligation imposed upon Bessey protected him from what else had been the consequences.

II. Exercises of legal right lawful so long as they do not interfere with others.

At the other end of the scale of lawful acts are exertions of right, like a man's right to beat his dog, which possibly should be done

¹ 3 Q. B. 919. Nearly every case, ancient and modern, points to the same conclusion.

² 2 Camp. 378.

³ Cp. *Coward v. Baddeley*, 4 H. & N. 478, originating in a criminal charge. See per Martin, B., 481.

subject to the rights of others. If a man chooses, for example, to beat his dog in the street where people may pass, even though he does not see any sign of any one at the time he strikes his dog, it is not unreasonable he should be made to answer for any injury his act may cause to another who happens to come on the scene. The owner may indeed choose where he will beat his dog. If he chooses the public highway he is to that extent blameworthy that he has not chosen a more private place, though his punishment of the dog may be judicious and properly carried out.

Between these two extremes there is the large class of cases where, while there is, or may be, no legal duty to act, there is nevertheless, in fact, good reason to act rather than to forbear.¹

In *Brown v. Kendall* the defendant was very probably under no legal duty to prevent his dog fighting (unless he knew the dog was a fighting dog); nevertheless the owner of a dog, seeing it fighting in the street, perhaps injuring the property of some one else, certainly creating disturbance and alarm, has a clear social duty to restrain it. If he leaves his dog to fight out its quarrel, himself standing passively by, he may perchance come under no head of legal liability, yet his conduct is distinctly censurable, "as determined by the existing average standards of the community."²

If, then, being placed without fault on his own part in such circumstances that he ought to act in some particular way, the law will not punish him for doing what is the only thing consistent with the discharge of his obligations. An analogy is suggested with those cases,³ where trespassers on railway lines to save life have been held entitled to recover against the railway company on the ground, as put by Lord Macnaghten,⁴ that "to protect those who are not able to protect themselves is a duty which every one owes to society;" or, to put the underlying principle more broadly, as action in such cases is more beneficial for the community than inaction, the law protects reasonably careful action with immunity, or, in the railway cases, with indemnity. In the present case the duty is to act in a particular manner where action is advisable, and is rather incumbent on one person than another.

To complete the view we are taking there is a further limitation that must not be passed over. Besides those acts which are prompted by a motive which justifies them, and consequently excuses injury while doing them, without negligence, there is also a class which may be done in ordinary course and irrespective of any injury they may accidentally cause. Blackburn, J., delivering judgment of the Exchequer Chamber in *Fletcher v. Rylands*,⁵ points out, in a passage we have already more than once referred to, that: "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk;"⁶ and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to

III. Things done under inducements to act.

User of highways is not subject to liability for involuntary acts. Blackburn, J.'s, statement.

¹ *Alderson v. Watstall*, (1844) 1 G. & K. 358, bears out this distinction.

² Holmes, *The Common Law*, 125.

³ E.g., *Eckert v. Long Island Rd. Co.*, 43 N. Y. 502; *Pennsylvania Co. v. Langendorf*, 20 Am. St. R. 553; ante, 156.

⁴ *Jenoure v. Delmege*, (1891) A. C. 77.

⁵ L. R. 1 Ex. 286.

⁶ Inevitable risk is here obviously used in a different sense from what it is in, e.g., *Scott v. Shepherd*, and to quote the phrase used in *Brown v. Kendall*, "not in a strict but a popular sense."

their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the licence of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care, or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself."

Bramwell,
B.'s, state-
ment.

If, in walking along the street, I brush against a person without negligence, I am not liable; because the liability to such contact is inseparable from any reasonable general user of the highway;¹ so, too, if I am splashed with mud by some one in the ordinary course of driving; as Bramwell, B., says:² "for the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid."

Conclusion.

The conclusion is that the doing a lawful act is not in itself sufficient to save from liability, unless further it is done in circumstances that free the doing of it from taint of blame. It is not enough that when once the actual doing of the act has been resolved on, the carrying out of the act itself is free from blame. The antecedents must be looked to; and an act cannot be without blame and involuntary where there is free, unfettered choice to act or refrain independently of any considerations outside the will of the person whose decision determines the action. In regard to personal trespasses no one is entitled to act as to throw upon others the responsibility of avoiding the consequences of his acts. Every one is bound to act so as not injuriously to affect others, without the concurrence of their wills, with the consequences, even though his action is in the abstract lawful.

Stanley v.
Powell.

We may now turn to *Stanley v. Powell*,³ which, in intention at least, deals directly with the principle under discussion. The judgment, proceeds on findings that defendant, who was one of a shooting party, fired at a pheasant and struck it; the bird began to lower and turn back towards the heaters. The defendant fired again, and a shot glancing from the hough of an oak struck the plaintiff, who was employed as one of the party to carry cartridges and birds. The oak was partly between the defendant and the bird, but was not in a line with the plaintiff. The distance between plaintiff and defendant was about thirty yards. Before summing up, Denman, J., who tried the case, "called the attention of the parties to the doctrine which seemed to have been laid down in some old cases—that, even in the absence of negligence, an action of trespass might lie."⁴ The jury found there was no negligence on the part of the defendant. On further consideration judgment was given for the defendant on the ground that the injury was "accidental."

¹ *Cole v. Turner*, (1705) 6 Mod. 149, Case 210, per Holt, C.J. There is a case in Clayton, 22 pl. 38 (circa 1650), on the point, so quaint that I give it in full. "Kerifford, an attorney, was plaintiffe in battery, and the case was thus: He was walking in the market (as attorneys do too much), and the defendant and he had some angry words there, upon which the defendant did presse to go by him, and in going, by reason of the throng of people there, he justled the plaintiffe, and for this he brought this action, in which if an assault onely be proved, it is sufficient, and holden it was no assault, for the touching him or justle was to another end, namely, to get by him in the throng and not to beat him, &c."

² *Holmes v. Mather*, L. R. 10 Ex. 267.

³ (1891) 1 Q. B. 86.

⁴ L. c. 88.

An unexceptionable ground for the decision, that the plaintiff was a member of the shooting party, and as such must be treated as having taken on himself all the risks ordinarily incident to the sport, is referred to in a note as having been urged on behalf of the defendant, yet is not even alluded to in the judgment. Therefore it must be conceded so far as the judgment goes—(1) that the plaintiff was in no different position from any member of the community not connected with the shooting party, and lawfully at the place where he was injured; and (2) that, to quote the words of Erle, C.J. :¹ “The law of England in its care for human life requires consummate caution in the person who deals with dangerous weapons.” Now, neither of these considerations seems to have been brought to the attention of the jury. Thus their verdict may not unreasonably have been given on the basis of the plaintiff being a member of the shooting party, and exposing himself to all the risks; against which “no greater than ordinary precautions were necessary.”

Case criticised.

Reverting for a moment to *Morris v. Platt*,² where it will be remembered the trespass complained of was firing a pistol in self-defence, which missed the assailant and injured the plaintiff, the firing which was yet held justifiable, it may be possible from a case so amply vindicating the right of free action to extract a passage bearing on Denman, J.'s, views in the present case. We find the law thus stated :³ “If the act of firing the pistol was not lawful, or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons, which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act, though strictly lawful and necessary, was done with wantonness, negligence, or folly, then, although the wounding was unintentional and accidental, it is conceded, and undoubtedly true, that the defendant would be liable.”

Morris v. Platt.

Viewing, then, the plaintiff in *Stanley v. Powell* as one of the public, lawfully where he was, the act of the defendant was an act “which the defendant was not required by any necessity or duty to perform,” and was, moreover, an act “attended with possible danger to third persons,” and “which required of him more than ordinary circumspection and care,” and was therefore an act according even to the more liberal tests of the American law for which the defendant would be liable.⁴

Suggested principle applicable to *Stanley v. Powell.*

It would be a useless labour to follow the judgment through its confused⁵ and inaccurate⁶ review of the cases. As far as can be surmised, the view presented therein is an amplification of a passage from Bacon's Abridgement :⁷ “If the circumstance, which is specially pleaded in an action of trespass, do not make the act complained of lawful, and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental, but likewise that it was not owing to neglect, or want of due caution”; with the gloss that by accidental “I understand that the injury was unintentional.”

¹ In Ex. Ch. *Potter v. Faulkner*, 1 B. & S. 805.

² (1864) 32 Conn. 75.

³ L.c. 87.

⁴ *Brown v. Collins*, 53 N. H. 442, 16 Am. R. 372; ante, 560.

⁵ *Passim*, but particularly at 91.

⁶ Cp. the last sentence about *Leame v. Bray* (3 East, 593) on 92 with the extracts from the judgments therein, set out ante, 566, and particularly with what Lord Ellenborough says at 599 of the report in East as to the case of accidentally wounding a man with an arrow.

⁷ *Trespass*, 706.

Now intent is an inference of law, not a matter of direct proof; as is said in *Busely v. Clarkson*:¹ "For it appears the fact was voluntary, and his intention and knowledge are not traversable; they can't be known." This was said with reference to a plea to an action, *quare clausum fregit*, that the defendant was mowing his land and involuntarily and by mistake mowed down some of the plaintiff's grass; upon which the plaintiff had judgment on demurrer.

Conclusion.

If, then, the reasoning of Denman, J., in *Stanley v. Powell*, is correct, it is manifest that the contention of the present chapter is wrong; and that in effect the law of England is that a man must in all circumstances be on the alert to avoid receiving injury and cannot, unless in exceptional cases, throw the risk of acting on him doing the act. That the law of England is not so must be apparent to every student of Blackburn, J.'s, judgment in *Fletcher v. Rylands*.²

¹ 3 Lev. 37, cited Holmes, *The Common Law*, 99, whose invaluable remarks on the signification of intent in law may here generally be referred to. Y. B. 17 Ed. IV. 2, pl. 2. For the philosophic ground of the rule of law, see a striking note to Hume's *Inquiry Concerning the Principles of Morals*, Section III. Of Justice, Part II. Cp. Lord Mansfield, *Tarlton v. Fisher*, 2 Dong. 674.

² L. R. 1 Ex. 277 *et seqq.*

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CHAPTER II.

DUTY TO ANSWER FOR THE ACTS OF OTHERS.

PRINCIPLES DETERMINING THE MASTER'S LIABILITY FOR HIS SERVANT.

BEFORE entering on the inquiry of the manner in which the relation of master and servant affects the master with liability, it is advisable to fix working definitions of the terms master and servant. A master, is one who not only prescribes to the workman the end of his work, but retains "the power of controlling the work,"¹ while he who works on these terms is a servant so long as he acts with the view of serving the prescribed end.² Bramwell, L.J., says:³ "A servant is a person subject to the command of his master as to the manner in which he shall do his work." A slight change in phraseology makes clear the correlative position of the master.

Definitions of
master and
servant.

Bramwell,
L.J.'s.

The same learned judge, giving evidence before the First Committee of the House of Commons on the Employers' Liability, distinguishes between a contractor and a servant, thus:⁴ "To my mind, the distinction of the cases where a man is, and where he is not liable for the negligence of another person, may be defined in this way. If there is a contract between them, so that the person doing the work or doing the act complained of has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end, and not at the other'; there the relation of master and servant does not exist and the employer is not liable. But if the employer has a right to say to the person employed, 'You shall do it in this way, that is to say, not only shall you do it by virtue of your agreement with me, but you shall do it as I direct you to do it,' there the law of master and servant applies, and the master is responsible."

Once again, the distinction between a servant and an agent is the distinction between serving for and acting for.⁵ An agent as contrasted with a servant has a discretion as to the time and manner of performance, and sometimes as to acting or not acting; as contrasted with a contractor, the difference is often that between a general

Servant and
agent.

¹ *Crompton, J., Sadler v. Henlock*, 4 E. & B. 578.

² *Limpus v. London General Omnibus Co.*, 1 H. & C. 526.

³ *Yewens v. Noakes*, 6 Q. B. D. 532.

⁴ Minutes of Evidence on Employers' Liability, Parliamentary Papers, 1876, vol. x. 58.

⁵ Cp. Austin, Jurisprudence (3rd ed.), 976, 977. *Northey v. Trevillion*, 18 Times L. R. 648.

Agent and
contractor.

and special agent. The agent so-called has indefinite functions; the contractor's are defined or special. The act of a contractor or of an agent does not affect the employer with liability unless it is done in the necessary conduct of the work, as, for example, in *Percival v. Hughes*,¹ or in performing work incumbent on the employer by statute.²

Employ.

By the death of one of a firm of masters the servant is discharged, unless the contrary is stipulated for by the terms of the contract; but where two of a firm had retired from business it has been held³ that the dissolution of partnership does not operate *ipso facto* to discharge an agreement to employ for two years. There is the same distinction between a compulsory and a voluntary winding up of a company; the former does the latter does not work a discharge.⁴ If wages are to be paid in the form of commission there is implied a term of the contract that work is to be found;⁵ but the word "employ" in a contract of service means "hire" or "keep in a service" and does not extend to guarantee the supply of any particular sort of work.⁶

Civil Law.

The Roman law expresses the liability of the master for the servant thus: *Illud in summa admonendi sumus id, quod jussu patris dominive contractum fuerit quodque in rem ejus versum fuerit, directo quoque posse a patre dominove condici, tanquam si principaliter cum ipso negotium gestum esset. Ei quoque, qui vel exercitoria vel institoria actione tenetur directo posse condici placet quia hujus quoque jussu contractum intellegitur.*⁷ The actions *exercitoria* and *institoria* carried in them the germs of the law of agency, which in Roman law was of slow growth and development.⁸ Slaves committing delicts came under the rules of the noxal action.⁹ If a slave committed a delict by his master's orders, the master alone was answerable,¹⁰ and even where the master could have prevented the wrong the injured person had his choice between a direct and a noxal action.¹¹ Otherwise only the slave was liable, and if manumitted might he sued.¹² If an action were brought against the master he could escape liability by surrendering the slave; if he did not surrender the slave he was liable.¹³ If the slave died before judgment, the master's liability was extinguished;¹⁴ *d fortiori*, for the tort of a freeman the master was not liable.

The liability of the master in the English law for the tortious act of his servants, done either without authority or in defiance of it, is

¹ 8 App. Cas. 443.

² *Brace v. Calder*, (1895) 2 Q. B. 253.

³ *Midland Counties District Bank v. Attwood*, (1905) 1 Ch. 357.

⁴ *Turner v. Goldsmith*, (1891) 1 Q. B. 544; *Devonald v. Rosser*, 21 Times L. R. 595.

⁵ *Emmens v. Eiderton*, 4 H. L. C., per Parke, B., 668, per Crompton, J., 642; *Turner v. Sawdon*, (1901) 2 K. B. 653.

⁶ For these actions, see D. 14, 1, and D. 14, 3; Hunter, Roman Law, (3rd ed.) 617-620.

⁷ Inst. 4, 7, 8.

⁸ From Gaius, 4, 71, the conclusion is drawn that these actions were originally against the son or the slave, but were afterwards extended to *extraneum quem cumque*. The reason of this is given, D. 14, 1, 1; *cum interdum ignari, cujus sint conditionis vel quales, cum magistris propter navigandi necessitatem contrahamus, æquum fuit, eum qui magistrum navi imposuit, teneri: ut tenetur, qui institutorem tabernæ vel negotio præposuit; cum sit major necessitas contrahendi cum magistro, quam institore. Quippe res patitur, ut de conditione quis institoris dispiciat, et sic contrahat; in navis magistro non ita; nam interdum locus, tempus non patitur plenius deliberandi consilium.*

⁹ Inst. 4, 8; Holmes, The Common Law, 8-12.

¹⁰ *Nam servum nihil deliquisse, qui domino jubenti obtemperavit: D. 9, 4, 2, § 1.*

¹¹ D. 9, 4, 2-5.

¹² D. 9, 4, 6.

¹³ D. 9, 3, 1.

¹⁴ D. 9, 4, 39, § 4. The legal position of a slave is fully treated by Dr. Moyle, art. *Servus*, Smith, Dictionary of Greek and Roman Antiquities (3rd ed.).

² *Ante*, 286.

much more extensive and is referred to the maxim, *Respondeat superior*.¹ This maxim, in its original use, applied only "to those who, having the custody of gaols of freehold or inheritance, commit the same to another that is not sufficient," and was found in the concluding section of Statute of Westminster 2 [13 Edw. I.], c 11: *Et si custos gaolæ non habeat per quod justicietur, vel unde solvat, respondeat superior suus qui custodiam hujus modi gaolæ sibi commisit per idem breve*. From this limited beginning its scope has become so almost universal in modern law that Jessel, M.R., thus comments on it:² "It is clear that on principle a man is liable for another's tortious act if he expressly directs him to do it, or if he employs that other person as his agent, and the act complained of is within the scope of the agent's authority. I agree that the Court ought to be very careful how it extends the doctrine *Respondeat superior*. It has been carried in our law very far indeed. I think quite far enough. If I had to enact a law upon the subject, I doubt whether I should carry it so far."

Maxim, *Respondeat superior*.

Jessel, M.R., on the extension of the doctrine.

The maxim, *Respondeat superior*, is, in truth, rather the formula whereby liability is referred to its source than the reason for the existence of a liability.

The equally familiar maxim, *Qui facit per alium facit per se*,³ has been by some sought to be applied in a narrower sense than *Respondeat superior*; and its meaning is taken to be that he who authorises an act to be done, which is done under his authority, is as liable as he who, personally and for his own benefit, does the same. This undoubtedly is so; though there is no good reason why its meaning should be limited to those cases where authority has actually been given.⁴

Maxim, *Qui facit per alium facit per se*.

The First Committee on the Employers' Liability in their Report⁵ say that, the maxim is "inapplicable to cases where the act causing the injury is done either without authority or in defiance of it." There is a fallacy in this mode of expressing cases of liability. The master is never liable where the servant acts without authority—that is, without authority express or implied. The whole ground of the master's liability, in the extreme cases alluded to, is that the master has given, or appeared to give, such an authority to the servant that the master cannot be permitted to deny the validity of such acts, subsequently done by the servant, in following out the objects which have been committed to him, as seem naturally to flow from the position the servant holds while doing them. In those cases where the maxim does not in fact apply, though a legal obligation is imposed notwithstanding on the master, the explanation is that the law estops the master from averring that the act is not his, because he has placed the servant in a position from which a power to do similar acts would ordinarily, or naturally, or probably, be supposed to flow.

Report of House of Commons Committee.

The maxim, *Qui facit per alium facit per se*, then, is the statement of a Mutual relations of those maxims.

¹ 2 Co. Inst. 379. Vin. Abr. Escape (F. 2). For the American view see Shearman and Redfield, Negligence, § 143; Thompson, Negligence, §§ 518-616. See also Paley, Agency, part iii. sec. 1; Livermore, Principal and Agent, vol. ii. ch. 10, sec. 2; Pothier, Des Obligations, Nos. 433-456; Domat, Civil Law, bk. i. tit. 16, sec. 3, No. 1.

² *Smith v. Keal*, 2 Q. B. D. 351.

³ The maxim, as appears in Co. Lit. 258 a, runs, *Qui per alium facit per se ipsum facere videtur*. Fitzh. Abr. Annuities, pl. 51.

⁴ *Keighley Maxsted v. Durant*, (1901) A. C. 249.

⁵ Report of the House of Commons Committee on Employers' Liability, 1877. (Parl. Papers 1877, vol. x. iii.)

rule of law, the scope of which is not limited by express authorisation, and extends to cases where authority to act is implied only; and establishes an irrehuttahle presumption in the circumstances in which it becomes applicable.¹

The maxim, *Respondeat superior*, is the legal expression of the consequence arising from the application of the rule of law just stated; where, by reason of the principal's direct authorisation of the acts in question, or by a conclusion of law which imputes them to him whether he authorised them or not, the principal is precluded from showing that he personally is not accountable for certain acts. He who does a thing by his agent, express or implied, does it himself; therefore the superior must answer for all acts done by the other for him, whether he has actually authorised them, or left the matter open, or even forbidden them.

Fundamental principle.

The principle at the bottom of this very extensive liability is an irrehuttahle presumption²—that the master authorised every act done in advancement of the master's business, pending the authority, and covered by its objects. An authorisation for what, very possibly, has been absolutely forbidden is implied by law from the mere existence of the relation of employer and employed, and on two grounds: First, that the real principal should be affected with responsibility for his acts; secondly, that he should not be able, by secret agreement or special terms, to avoid the detriment, while assuming the benefit, of acts appropriate to, or consequential on, the existence of the relation of master and servant.³ So soon as it is admitted that there is authority to do a thing, the hand that actually does it may be the servant's, yet the reason of the act is the master's authorisation or the master's interest; therefore the master, as the motive power, is responsible.⁴

Grounds for the establishment of the principle.

The law goes even further than this; and where there is authority to do an act the master's authorisation covers all acts, whether implicated in, or subsidiary to, the main action, and not those merely which are necessary to the effectually doing it. Therefore the question of what is implicated in, or subsidiary to, any particular relation must be settled previously to affirming liability, or non-liability, in respect

¹ "Every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act, according to the maxim, *Qui facit per alium facit per se*": per Lord Chelmsford, *C., Barlonskill Coal Co. v. McGuire*, 3 Macq. (H. L. Sc.) 306.

² *Bayley v. Manchester, Sheffield, and Lincolnshire Ry. Co.*, L. R. 8 C. P., per Kelly, C.B., 152: "The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the act done may be the very reverse of that which the servant was actually directed to do."

³ *Limpus v. London General Omnibus Co.*, 1 H. & C. 526. "The law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability": per Willes, J., 539. *Byrne v. Londonderry Tramway Co.*, (1902) 2 I. R. 457. Objections have been made to the justice of imposing on the master, the possibly ruinous consequences of his servant's negligence. The answer is, That the master, for his own purposes, has armed his servant with the destructive agency. The misuse of it should enure to the master's detriment rather than that those injured by it should suffer loss. In reply it is urged that in criminal procedure, the master is not liable at all. The criminal law has no regard to the loss of the individual, but exclusively looks to the good regulation of the State. The test of damages can never be what would be an adequate pecuniary penalty for the offence, since penalty and damages are for different objects, and have no point of relation. The penalty is a payment for breach of the law; damages for infringement of a personal right.

⁴ In *Gillespie v. Hunter*, 25 Rettie, 916, the proprietor of a public-house was held not liable for the act of his manager, who pitched plaintiff out of the house for persisting in talking politics with the manager who had asked him to desist.

to any act. Through all the relation the principle runs, that if the act is not the master's act expressly authorised, it is yet an act done with circumstances that the law requires should raise the presumption of the master's authority.

Willes, J.'s, statement of this principle of law has been often approved:¹ "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master he proved."² That principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo.³ It has been held applicable to actions of false imprisonment in cases where officers of railway companies intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws.⁴ It has been acted upon where persons employed by the owners of boats to navigate them and to take fares have committed an infringement of a ferry or such-like wrong.⁵ In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

Willes, J., in *Barwick v. English Joint Stock Bank*.

Lord Herschell, too, very tersely expresses the same in *Baumwoll Manufactur von Carl Scheibler v. Furness*⁶ thus: "It cannot be disputed as a general proposition of law, that a person who does not himself enter into a contract, can only be made liable upon the contract if it was entered into by one who was his agent or servant acting within the scope of his authority; and it is equally indisputable that a liability by reason of a wrong or a tort can only be established by proving, either that the person charged himself committed the wrong, or that it was committed by his servants or his agents acting within the scope of their authority."⁷

Lord Herschell in *Baumwoll Manufactur von Carl Scheibler v. Furness*.

We are now to consider some features of the growth of this principle of the master's vicarious responsibility. There is no reason to doubt

History of the law.

¹ *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 265. "The true rule was, as it seems to me, enunciated by the Exchequer Chamber in a judgment of Willes, J., delivered in the case of *Barwick v. English Joint Stock Bank*. . . . This definition of liability has been constantly referred to in subsequent cases as adequate and satisfactory, and was cited with approval by Lord Selborne, in the H. of L., in *Houldsworth v. City of Glasgow Bank* (5 App. Cas. 317). *Mackay v. Commercial Bank of New Brunswick* (L. R. 5 P. C. 394) is consistent with this principle. It is a definition strictly in accordance with the ruling of Martin, B., in *Limpus v. London General Omnibus Co.* (1 H. & C. 526), which was upheld in the Exchequer Chamber (see per Blackburn, J.): per Bowen, L. J., *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 717; *Thorne v. Heard*, (1894) 1 Ch., per Kay, L. J., 611.

² See *Laugher v. Pointer*, 5 B. & C. 554.

³ *Ewbank v. Nutting*, 7 C. B. 797.

⁴ *Goff v. Great Northern Ry. Co.*, 3 E. & E. 672, explaining *Roe v. Birkenhead Ry. Co.*, 7 Ex. 36; and see *Barry v. Midland Ry. Co.*, 1r. Rep. 1 C. L. 130.

⁵ *Huzzey v. Field*, 2 C. M. & R. 440.

⁶ (1893) A. C. 16.

⁷ This judgment does not appear to have been cited in *Hambro v. Burnand*, (1903) 2 K. B. 392, 416, where Bigham, J., speaks of the test there proposed as "a loose and unsatisfactory test of the liability." In C. A., (1904) 2 K. B. 10, Bigham, J., is reversed.

that the recognition of a liability of the master for the torts of the servant is pretty well coeval with the recognition of the master's liability in contact. In the Y. B. 2 H. IV. 18, pl. 6, the principle is acted upon.¹

Three propositions from the Year Books.

Law in the time of Charles I.

Michael v. Alestree.

Again, in the Year Book of 9 Henry VI. 53, B. 37 three propositions illustrative of the law are to be found; all three based on the master's liability for the act of his servant which is treated as indisputable law.

In the time of Charles I. the law is thus laid down: If a servant keep his master's fire negligently, an action lies against the master; otherwise, if he carry it negligently in the street. If I command my servant to distrain, and he ride on the horse taken for the distress, he shall be punished, not I.²

An action, *Michael v. Alestree*,³ was brought against both master and servant for that "the defendants in Lincoln's Inn Fields, a place where people are always going to and fro about their business, brought a coach with two ungovernable horses, and *eux improvide incaute et absque debita consideratione ineptitudinis loci*, there drove them to

¹ Mr. J. Brown, Q.C., Minutes of Evidence taken before the Select Committee on Employers' Liability, Parliamentary Papers, 1876, vol. ix. 38, speaking on the liability of a master for the tort of his servant, says: "I found there was no case whatever, prior to the one by Lord Holt in the reign of William III., when the master was held responsible for the negligent acts that his servant committed in the course of his employment. Lord Holt appears to have been the first who laid down this law. He was a great judge, no doubt; but before that time there is reason to believe the law was the other way." The case referred to is *Kington v. Booth*, (1685) Skinner, 228. Mr. Brown's researches do not appear to have been very exhaustive. In Ashe's Promptuarie, ou Repertory General de les Annales, et plusieurs autres livres del common ley Dogleterre (1614), under the title Servant, the proposition, that *le master serro charge, et respondra, pur l'act, l'offence ou tort fait per son servant*, is laid down as clear law, and is supported by references to no less than seven cases. In Sheppard's Abridgment (1675), under the title Master and Servant, repeated instances of the principle are found, which is also asserted absolutely and not as restricted to keeping fire safely; a restriction moreover inconsistent with Holt, C.J.'s, *ratio decidendi* in *Turberville v. Stamp*, 1 Ld. Rayn. 264: "for it shal, be intended that the servant had authority from his master, it being for the master's benefit." The authorities cited are Doctor and Student (18th ed.), 236; Y. B. 2 H. IV. 18, pl. 6; *Bunlieu v. Finglam: Home est tenu de rendre del fait son servent ou de son hosteller en tout case, car si mon servent ou mon hosteller mette un chandel et un pariet, en le chandel eschiet en le straw, et arce tout ma maison et le (sic) maison de mon virine auri, en cest case jro. respondra al mon vicine del damage que il ad*: (Cp. Fitzh. Abr. *Areion sur le case*, 11 pl. 25). Fitzh. De N. B., 94; Y. B. 22 H. VI. 24. This last reference I have not been able to verify. Noy, 94. See Rastell Entrees, Tropus, Justification per Agistment; *Peniger v. Fogossa*, (1551) Plowd. 11a.; *Parkes v. Mosac*, (1590) Cro. Eliz. 181. Prof. Wigmore in Harvard L.R., vol. vii. 315, 383, 441, has collected and classified the cases. The first decision I can find in Scotland of the master's liability for the acts of the servant while he is absent is *Keith v. Keir*, so late as 1812: Decisions of the Court of Session, 183. See also *Baird v. Hamilton*, (1826) 4 Shaw, 790.

² Noy, Maxims, ch. 44, 95. In *Southern v. How*, Cro. Jac. 468, referring to *Rosvel v. Vaughan*, Cro. Jac. 106, it is said that if a man sells wine knowing it to be corrupt, an action of deceit lies against him, although there be no warranty. This is on the authority of Y. B. 11 E. IV. 6, pl. 10.

³ (1677) 2 Lev. 172, reported also *sub nom. Mithil v. Alestree*, 1 Ventris, 295, and *sub nom. Michell v. Alestry*, 3 Keb. 659. In *Roe v. Lalouette*, 9 Ir. C. L. R. 9, the case of *Michael v. Alestree* is said to be sustainable after verdict on the ground that the allegation in the declaration that the defendant acted *improvide et absque consideratione ineptitudinis loci*, is tantamount to an allegation of negligence. Jessel, M.R., must have been under a misapprehension that hitherto the law had not allowed joinder of master and servant in one writ, when he said in *Eyolfsheld v. Londonderry (Marquis of)*, 4 Ch. D., 708 (affd. 38 L. T. 303, 26 W. R. 540): "A coachman, who by his negligence in driving his master's carriage runs over a child, is liable to an action at the suit of the child, and the master is also liable. I apprehend that under the new practice they might be joined as defendants." See *Whitmore v. Waterhouse*, 4 C. & P. 383. Partial compensation has been recovered against the servant the master is released: *Wright v. London General Omnibus Co.*, 46 L. J. Q. B. 429. 2 Sm. L. C. (11th ed.) 766. Cp. *Midland Ry. Co. v. Martin*, (1893) 2 Q. B. 172.

make them tractable and fit them for a coach; and the horses, because of their ferocity, being not to be managed, ran upon the plaintiff and hurt and grievously wounded him. The master was absent, yet the action was brought against him as well as his servant." The gist of the case is rather the question of negligence than of liability—was there negligence, not was there liability if there was negligence. In the report in *Ventris* there is no reference whatever to the question of the master's liability; which in both the other reports is no more than incidentally mentioned, and not as matter for argument, but as recognised law.

*Kingston v. Booth*¹ has been (though inaccurately) referred to² as the starting-point of the law of the master's liability for the acts of the servant done within the scope of the master's business. The master was sued in trespass for assault committed by his servant in carrying out his orders. The decision seems to have been that if, in the course of carrying out the master's lawful orders to pull down a house in which plaintiff was, the servant assaulted the plaintiff, the master "was not guilty of the wounding, and the pulling down the house was a lawful act"—very questionable law indeed at the present day, unless the wounding were an independent trespass. *Kingston v. Booth.*

In 1697 in *Turberville v. Stampe*³ Holt, C.J., said that: "If my servant throws dirt into the highway, I am indictable. So in this case if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended that the servant had authority from his master, it being for his master's benefit." *Turberville v. Stampe.*

A case, cited from Lord Raymond's reports as anonymous,⁴ appears to be a portion of the case reported in Holt, under the name of *Jones v. Hart*,⁵ and decided shortly subsequently to *Turberville v. Stampe*. "A servant to a pawnbroker took in goods, and the party came and tendered the money to the servant, who said he had lost the goods. Upon this, action in trover was brought against the master; and the question was, whether it would lie or not? Holt, C.J.: "The action well lies in this case; if the servants of A with his cart ran against another cart, wherein is a pipe of wine, and overturn the cart and spoil the wine, an action lieth against A. So where a carter's servant runs his cart over a hoy, action lies against the master for the damage done by this negligence. And so it is if a smith's man pricks a horse in shoeing, the master is liable. For whoever employs another is answerable for him, and undertakes for his care to all that make use of him." *Jones v. Hart.*

¹ (1685) *Skinner*, 228.

² By Mr. J. Brown, Q.C. Minutes of Evidence taken before the Select Committee on Employers' Liability, Parliamentary Papers, 1876, vol. ix, 38.

³ 1 *Ld. Raym.* 284. *Brucker v. Fromont*, 6 T. R. 659, was decided on the authority of *Turberville v. Stampe*. The declaration set out that the defendant was driving a cart. The proof was that the servant was driving. Objection was taken to the generality of the pleading, which, however, was held good on the ground that the servant's act was in law the master's. See *Huzzey v. Field*, 2 C. M. & R. 440: "The servant was acting at the time in the course of his master's service, and for his master's benefit; and his act was that of the defendant, although no express command or privity of his master was proved." "It is part of the history of the law that the judgment in *Huzzey v. Field*, although delivered by Lord Abinger, was prepared by Lord Wensleydale": per Willes, J., *Limpus v. London General Omnibus Co.*, 1 H. & C. 540.

⁴ 1 *Ld. Raym.* 739; 2 *Salkeld*, 441.

⁵ Cases temp. Holt, 642. This is the second of two cases given by Mr. J. Brown to the House of Commons Committee (see *ante*, 576), to "show when the law was altered." *Kingston v. Booth* is the other. Cp. *Jones v. Hart*, 1 *Ld. Raym.* 738.

The act of a servant is the act of his master, where he acts by authority of his master."

Inference deducible from this case.

The report of this case seems rather to point to the conclusion that the remark of Pollock, C.B., made in another connection,¹ might be applied here also, "The law must have been the same long before it was enunciated in this Court," even supposing so definite and categorical a statement to have been a first formulating of the law on the point, than to warrant the inference drawn by an expert witness² that the law was at one time the other way, and that it was at this period that the transition to the modern view occurred. On the previous page, in Salkeld's Reports, is another case,³ but decided ten years previously, where Holt, C.J., says: "The owners are liable in respect of the freight, and not employing the master; for whoever employs another is answerable for him, and undertakes for his care to all that make use of him;" as if enunciating an axiom and not an innovation.

Boson v. Sandford.

Middleton v. Fowler.

About the same time, Holt, C.J., stated the proposition, viewed from its other aspect, "that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given by his master, and then the act of the servant is the act of the master."⁴ This *dictum* was not necessary for the decision of the case, which is that a stage coachman is not within the custom as a common carrier to receive parcels for conveyance, and so to bind his master, unless a regular charge is made for conveyance;⁵ notwithstanding this, it has been accepted as a weighty authority. Lord Kenyon, in particular, quotes it, with the comment: "Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act."⁶ Later cases are only a reaffirmation of this principle.

Distinction between trespass and trespass on the case.

Much stress used to be laid on the distinction between trespass and trespass on the case as affording a mean of discriminating between those acts of the servant for which the master is answerable and those in respect of which he goes free.

By the operation of the Judicature Acts, and the Rules of the Supreme Court made in pursuance thereof, these distinctions of form have lost their significance.⁷ Nevertheless, the distinction between a negligent act of the servant and a wilful act, though not in itself conclusive, still indicates a difference of legal obligation on the master. In the one case he answers for his servant's act, in the other, necessarily and at all events, he does not do so.⁸

¹ *Vose v. Lancashire and Yorkshire Ry. Co.*, 2 H. & N. 728. The remark was there made with reference to the law as laid down in *Priestley v. Fowler*, 3 M. & W. 1.

² Mr. J. Brown, Q.C., in his evidence before the House of Commons Committee on Employers' Liability, *ante*, 576.

³ *Boson v. Sandford*, 2 Salk. 440. Cp. *Mitchell v. Turbutt*, 5 T. R. 649, and Bullen and Leake, *Proc. of Plead.* (3rd ed.) 708. For remarks on *Boson v. Sandford*, see *Govett v. Radnidge*, 3 East, 62; *Powell v. Layton* 2 B. & P. (N. R.) 365; and per Lord Blackburn, *Kendall v. Hamilton*, 4 App. Cas. 543.

⁴ Referring to *Upshere v. Adee*, 1 Com. Rep. (K. B.) 25.

⁵ *Middleton v. Fowler*, 1 Salk. 282. See *Butler v. Basing*, 2 C. & P. 613: "It is equally clear, that if persons be foolish enough to send parcels by the waggoner, for a hire paid to him, which is never intended to find its way into the pocket of the owner of the waggon, then the owner is not liable in case the parcel is lost."

⁶ *M'Manus v. Crickell*, 1 East, 108. This case is discussed in *Howe v. Newnarch*, 94 Mass. 49.

⁷ 36 & 37 Vict. c. 66, s. 24.

⁸ *Morley v. Guisford*, 2 H. Bl. 441, note (a); *Oyle v. Barnes*, 8 T. R. 188; Bullen

The distinction was canvassed in *Croft v. Alison*.¹ Defendant's coachman struck plaintiff's horses with his whip, so that they moved forward, and the chariot was overturned. There was a verdict for the plaintiff. A new trial was moved for as the plaintiff was not the owner of the carriage, and because the injury arose from the act of defendant's coachman in wantonly whipping the plaintiff's horses. A rule was refused on both points. As to the latter, the Court said:

"The distinction is this: if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment."

To the same effect is *Patteson, J.*, in *Lyons v. Martin*:² "A master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one"; and *Parke, B.*, in *Gordon v. Rol*:³ "The result of the authorities is, that if a servant in the course of his master's employ, drives over any person, and does a wilful injury, the servant, and not the master, is liable in trespass; if the servant by his negligent driving causes an injury, the master is liable in case; if the master himself is driving, he is either liable in case for his negligence, or in trespass, because the act was wilful."

A very curious case illustrating the application of the rule of law is *Williams v. Jones*.⁴ Plaintiff having sold some boards to the defendant, allowed him to use a shed where he might have them made into a signboard. Defendant employed a carpenter, and, whilst he was at work, a stranger came into the shed, filled his pipe with tobacco, supplied the carpenter with some, and lighted a match. The carpenter lighted a shaving, let it fall and caused a fire that burned down the shed. The jury found that the relation of master and servant existed between defendant and his carpenter. The Court of Exchequer entered a nonsuit; as, "after much consideration, we think it im-

and *Leake*, *Proc. of Plead.* (3rd ed.) 369. See the note (a) to *Com. Dig.* (Hammond's edition) *Action (M 2)*, where the distinction between trespass and case is fully investigated. *Viner, Actions*, Case (M. c. 8), Case where, and where trespass; *Trespass (Y. 2)* *Trespass*, and not case.

¹ (1821) 4 B. & Ald. 592; *Seymour v. Greenwood*, (1861) 7 H. & N. 355: A master is liable for injury caused by the wanton and violent conduct of his servant in the performance of an act within the scope of his employment. With this case should be compared *Eastern Counties Ry. Co. v. Broom*, 6 Ex. 314; an inspector of the railway company professing to act as their servant, took the plaintiff out of a railway carriage and gave him into custody on "charges of not producing his ticket, of not paying his fare, and of annoying the company by being intoxicated." The charge of intoxication was not preferred before the magistrate, one of assault being substituted. In an action for the assault brought against the company the Court held there was no evidence of ratification, and that there was not sufficient evidence to go to the jury in the absence of such evidence of ratification. In *Bank of New South Wales v. Ouston*, 4 App. Cas. 285, it is said that the decision is "scarcely consistent with later authorities." No presumption of the relationship of master and servant arises from the fact that one man is driving in a trap belonging to another; *Pourell v. McGlynn*, (1902) 2 I. R. 154. As to ratification, *Bracton*, f. 294 a. b.; *Keightley Marsted & Co. v. Durant*, (1901), A. C. 240. ² (1838) 8 A. & E. 515. ³ (1849) 4 Ex. 366.

⁴ (1865) 3 H. & C. 256, in Ex. Ch. 602. There is a very similar American decision. A fire was lighted by men in the employment of a railway company, on a right of way belonging to the company, for the purpose of warming their coffee. The plaintiff's property was in consequence set on fire. It was held no more within the scope of their employment than would be "the act of one of these men in lighting his pipe after eating his dinner and carelessly throwing the burning match into the grass"; *Morier v. St. Paul, &c. Rd. Co.*, 17 Am. R. 793.

Judgment of
the Ex-
chequer
Chamber de-
livered by
Keating, J.

possible to hold that a person who employs another for a sum of money to do certain work is responsible, because the person so employed lights his pipe—a very common and natural act—and which the jury have found to be negligence." The Exchequer Chamber were divided. The judgment of the majority¹ was delivered by Keating, J. :² "That a master is liable for the negligence of his servant in the course of his employment admits of no doubt; and, if it could be said that the act of lighting a pipe of tobacco for the purpose of smoking it was in any way connected with the making of the signboard, which alone Davis [the carpenter] was employed by the defendant to do, there would be no difficulty in saying the master would be liable; but we can see no such connection. It was not necessary that he should smoke in order to make the signboard, nor was the act of lighting the pipe in any way whatever for the benefit of his master, or in the furtherance of the object of his employment.³ It is said he was negligent whilst using the shed, and that, in a sense, is true. It seems to us, however, that, in order to make the master liable, the servant must not only have been negligent in using the shed, but in using it for the purposes of his master, and in the course of his employment."

Dissent of
Blackburn
and Mellor,
JJs.

Statement
general rule
of law by
Blackburn, J.

Blackburn and Mellor, JJ., dissented. Blackburn, J., considered the point as, "not one admitting of being elucidated by argument or by decided cases; in truth the whole case depends upon" what "is a correct statement of the effect of the facts." The general rule of law is :⁴ "That where the relation of master and servant exists between one directing a thing to be done and those employed to do it, the master is considered in law to do it himself, and, as a consequence, that the master is responsible, not only for the consequences of the thing that he directed to be done, but also for the consequence of any negligence of his servants in the course of the employment, though the master was no party to such negligence, and even did his best to prevent it; as, in the ordinary case, where a master selecting a coachman believed to be sober, sends him out with orders to drive quietly, and the coachman gets drunk and drives furiously. In such a case it may seem hard that the master should be responsible, yet he no doubt is if he be his master within the definition stated by Parke, B., in *Quarman v. Burnett*,⁵ that the person is liable 'who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey.' But the master is not liable for any negligence

¹ Erle, C.J., Montague Smith and Keating, JJ.

² 3 H. & C. 611, 612.

³ See *Turberville v. Stamps*, 1 Ld. Raym. 264.

⁴ 3 H. & C. 609.

⁵ 6 M. & W. 510. The relation of master and servant exists when the employer retains the right to direct not only what shall be done, but how it shall be done: *Rd. Co. v. Hanning*, 15 Wall. (U. S.) 656. A person was held a servant who was employed under a written contract to sell sewing machines, and to be paid for his services by commissions on sales and collections. The company supplied a wagon, and he furnished a horse and harness to be used exclusively in the business. He furthermore agreed to give his whole time to the business, and to employ himself under the direction of the company under such rules as it or its manager should prescribe: *Singer Manufacturing Co. v. Bahn*, 132 U. S. (25 Davis) 518. *Willitt v. Boote*, 6 H. & N. 26, may also be noted as illustrating the relation of master and servant. There, by an agreement in writing, the appellant agreed to serve the respondents, potters, as biscuit-oven placer, at daily wages for twelve months. By another agreement of the same date R. also agreed to serve them for the same period as biscuit-oven firmer to be paid by piecework, he paying the appellant his wages out of what he earned. Held that the relation of master and servant subsisted between the respondents and the appellant notwithstanding his wages were paid by R.

or tort of the servant which is not in the course of the employment, for such negligence or tort cannot be considered as in any way the act of the master." The learned judge then adds: "In the present case the difficulty is to apply these rules to the facts." Though the facts are peculiar, the report of them is not without value as bearing on the law applicable to a case of possibly not infrequent occurrence. "Supposing a miner employed in a coal mine (assuming him to be a servant) improperly and contrary to orders, for the purpose of lighting his pipe or anything of that sort, opens his safety lamp, and there is an explosion which kills a passer-by." ¹ Though not identical, the case of *Williams v. Jones* would, in all probability, have a determining effect on such a problem. The view of the majority seems the better.

The law, as laid down in *Croft v. Alson*, was accepted in *Limpus v. Limpus v. London General Omnibus Co.*,² in the Exchequer Chamber. An omnibus driver, contrary to printed instructions from his employers, tried to hinder and obstruct the passage along the road of the plaintiff's omnibus; in consequence the plaintiff's omnibus was overturned. At the trial, Martin, B., in effect, directed the jury that, if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may, in one sense, be wilful on the part of the servant.³ The defendants took exception to this direction, in that the judge made the issue whether the defendant's driver was doing what he believed to be for the interest of his employer, an essential part of the jury's inquiry; whereas the real question was, whether the driver thought the act necessary for carrying out his master's orders. The Exchequer Chamber (*dissentiente* Wightman, J.) were not of this opinion. "If a master employs a servant to drive and manage a carriage, the master is responsible for any misconduct of the servant in driving and managing it, which must be considered as having resulted from the performance of the duty entrusted to him, and especially if he were acting for his master's benefit, and not for any purpose of his own."⁴ The expressions here used limit the rule to the case of the driver of a carriage; their effect is, of course, equally applicable to all cases where the relation of master and servant exists. Wightman, J.'s objection was,⁵ that the act, though done by the driver "whilst employed in the service of the defendants, cannot be considered an act done by him in the course of his service."

Judgment of the Exchequer Chamber.

Ground of Wightman, J.'s objection.

¹ See evidence of Mr. R. S. Wright before House of Commons Committee on Employers' Liability for Injuries to their Servants, Parliamentary Papers, 1876, vol. ix. 47, quest. 605. "As I understand the law it seems clear that the employer would not be held liable."

² (1862) 1 H. & C. 520; *Howe v. Neumarch*, 94 Mass. 49. In *North v. Smith*, 10 C. B. N. S. 572, defendant was riding with his groom, past plaintiff, who was driving three horses with a waggon; as they passed, defendant put his horse to a trot, and the groom spurring his horse to keep up with his master, the horse struck out and injured the plaintiff. The Court held that there was negligence on the part of the groom, for which the master was liable, as being within the scope of the employment.

³ *L.c.*, per Byles, J., 541.

⁴ Per Williams, J., 1 H. & C. 537. When a quarrel arose between the servants of a tram company and of an omnibus company, and the tramcar servant got on the step of the omnibus to take the number of the driver, who, while whipping at him to get down, struck the plaintiff, the defendants were held liable for an act done within the scope of their servant's authority: *Ward v. London General Omnibus Co.*, 42 L. J. C. P. 265. For a case where the act of the servant commenced for the benefit of his master terminated in an affray, provoked by the insulting language used to the servant, for which the master was held not liable, see *Peary v. Georgia Rd. and Banking Co.*, 12 Am. St. R. 334; *Mackenzie v. Goldie*, 4 Macph. 277.

⁵ 1 H. & C. 536.

Gregory v. Piper.

Proposition of Littledale, J.

Judgment of the rest of the Court.

Joel v. Morison.

Steath v. Wilson.

Fenn v. Harrison.

An earlier case, *Gregory v. Piper*,¹ is to the same effect. The defendant employed a labourer to lay down rubbish near the plaintiff's land in order to obstruct the way; but he gave particular instructions that none of the rubbish was to touch the plaintiff's wall. As the rubbish dried it naturally shingled down. Plaintiff brought trespass, obtained a verdict, and sustained it on motion; since the trespass was the natural consequence of the act ordered to be done, and being as much the defendant's act as if done by his express command, an action in respect of it could be maintained. A proposition laid down by Littledale, J., seems rather too broadly expressed.² "Where a servant does work by order of his master, and the latter imposes a restriction in the course of executing his order which it is difficult for the servant to comply with, and the servant, in execution of the order, breaks through the restriction, the master is liable in trespass." The judgment of the other judges goes only the length of deciding that, where the injurious consequence is a natural or probable result from the execution of the main business, the master must be held to have authorised the act, though in fact he may have forbidden it. The law presumes a servant to have the authority ordinarily necessary for doing the work his master gives him to do. If, in fact, he has not that authority, the master is still liable, provided that the servant assumes to exercise such authority; for the position the master places him in is a public advertisement that he has it; and secret instructions must not countervail open manifestations of authority. If the person wronged by the servant has knowledge of the secret limiting instructions, the law is otherwise; since to him the servant is no longer clothed with the general authority from which liability springs.

Joel v. Morison is a *Nisi Prius* case.³ Defendant's servant, while driving defendant's cart on defendant's business, made a detour for some purpose of his own, and while doing so ran over the plaintiff. Parke, B., directed, that if the defendant's servant took out his cart without leave defendant was not liable, but is liable if, while on his master's business, he was going *extra viam* against his master's implied commands. The plaintiff in such a case has in the first instance to prove that the cart is the master's, and that the person responsible for the driving, either driving himself or beside the driver so as to have control,⁴ is the servant, then the *onus* is changed to the defendant to show that the wrongful act was not done in the service."

Again, if the servant chose to visit a friend in the master's cart when not on the master's business, the master would not be liable;⁵ and the law is the same if the servant lent the cart to a person who was driving without the master's knowledge; or if he were "on a frolic of his own," without being at all on his master's business.⁶ On the other hand, the master is liable if the servant, being on his master's business,

¹ (1829) 9 B. & C. 591.

² 9 B. & C. 594.

³ (1834) 6 C. & P. 501.

⁴ *M'Laughlin v. Pryor*, 4 M. & G. 48.

⁵ *Steath v. Wilson*, 9 C. & P. 607; approved in the American case, *Philadelphia and Reading Rd. Co. v. Derby*, 14 How. (U. S.) 468, where the American rule is very comprehensively stated at 486; whether the default of the servant be one of omission or commission, whether negligent or fraudulent. "If it be done in the course of his employment the master is liable; and it makes no difference that the master did not authorise or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment"; *New Jersey Steamboat Co. v. Brockitt*, 121 U. S. (14 Davis) 637.

⁶ *Fenn v. Harrison*, 3 T. R. 762, 4 T. R. 177; *Mitchell v. Crassweller*, 13 C. B. 237.

takes a detour to call upon a friend. The test proposed is, was the servant acting in the course of his employment at the time of the accident?

The circumstances were slightly varied in *Booth v. Mister*.¹ A person, not the servant of the defendant, was driving when the accident happened, and the servant whose duty it was to have charge of the cart was sitting beside him. Lord Abinger thought that the reins being held by another made no difference, but reserved the point. The ruling was not further questioned.

The law, as laid down by Parke, B., in *Joel v. Morison*, was approved in *Mitchell v. Craswell* by the Common Pleas,² Jervis, C.J., saying: "I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant originally has started on his master's business; in other words, he must be in the employ of his master at the time of committing the grievance."

What "acting in the course of the employment" means is analysed in *Martin v. Temperley*. "The question is," says Coleridge, J., "were the defendant and the persons employed by him master and servants? If they were, the general principle applies. And the tests leave no doubt that they were. First, the men were selected by the defendant; secondly, they were paid by him; thirdly, they were doing his work; fourthly, they were under his control—that is, in doing the work in the ordinary way." Whether any act done is done in the employment is a question for the jury; and in *Whatman v. Pearson*,⁴ where a man in charge of a horse and cart had authority "to conduct the horse and cart during the day,"⁵ the Court would not set aside a verdict against the employer on the ground that there was no evidence that the driver was acting in the scope of his employment, the evidence being that the man, contrary to his instructions, went home to dinner at a place about a quarter of a mile out of the line of his work, and left the horse and cart in the street before his house, hence the accident.

The cases were reviewed by the Queen's Bench in *Storey v. Ashton*,⁶ when Cockburn, C.J., said: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence in the course of his employment as servant. I am very far from saying, if the servant when

¹ 7 C. & P. 66.

² 13 C. B. 246.

³ 4 Q. B. 312.

⁴ (1868) L. R. 3 C. P. 422. See also *Edwards v. Vestry of St. Mary, Islington*, 22 Q. B. D. 338, which is distinguished from *Whatman v. Pearson*. In *Brady v. Giles*, 1 Moo. & R. 495, Lord Abinger, C.B., said: "It had always appeared to him that the Court of King's Bench had pursued an erroneous course in *Laugher v. Pointer* (5 B. & C. 547), when they allowed the question now raised to be discussed as if it were a question of law for the judge to decide. It always appeared to him that it was impossible to lay down any rule of law on such a point. No satisfactory line could be drawn, at which, as a matter of law, the general owner of a carriage, or rather the general employer of the driver, ceased to be responsible and the temporary hirer became so. Each case of this class must depend upon its own circumstances; and the jury, taking the circumstances in the present case into consideration, must undertake the task of deciding." "I think it was a question for the jury, whether Fisher in this case was a person having such authority": per Jervis, C.J., *Giles v. Taff Vale Ry. Co.*, 2 F. & B. 830.

⁵ L.C., per Byles, J., 425; see also *Burns v. Poulson*, 1 L. R. 8 C. P., per Brett, J., 570.

⁶ (1869) L. R. 4 Q. B. 479. *Storey v. Ashton* is distinguished in *Wilson v. Owens*, 16 L. R. Ir. 225, where the cases are collected in a considered judgment. *Rayner v. Mitchell*, 2 C. P. D. 357; *Johnson v. Pritchard*, 8 N. S. W. R. (Law) 6; *Quinn v. Power*, 87 N. Y. 535.

going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey."

Rule in
Kimball v.
Cushman.

An American case¹ states the sole inquiry to be, whether at the time the accident occurs the person in charge is so in charge of the defendant's property with the assent of the owner and engaged in his business and in respect to that property and business under his control, without a reference to the question whether the wrongdoer is in the general employment of another.

M'Laughlin v.
Pryor.

An old case, *M'Laughlin v. Pryor*,² illustrates this. Defendant and others hired a carriage and horses driven by postilions, the servants of the owner of the horses. Defendant rode upon the box. The postilions by misconduct overturned plaintiff's gig and injured plaintiff himself, for which he brought his action for trespass against defendant. Tindal, C.J., in holding the action maintainable, said:³ "If he had remonstrated or expostulated with them at the time, I do not think he [defendant] could have been held liable in this action, even upon the supposition that the post-boys were his servants; for no servant can make his master a trespasser against his will." "Or if he had been inside the carriage, and had not seen what was going on, and the post-boys, of their own will had done the injury, I do not think the defendant would have been liable. But the fact of his being outside the carriage, with a full view of, all that was taking place and not interfering, though I do not say it is strong evidence, is some evidence, to go to the jury that he assented to the act of the post-boys."⁴

The fact that there is an intermediate party in whose general employment the person whose acts are in question is engaged, does not prevent the principal from being liable for the negligent conduct of the sub-agent or under-servant, unless the relation of such intermediate party to the subject-matter of the business in which the under-servant is engaged be such as to give him exclusive control.⁵

Question of
what is
within the
scope of a
servant's
employment
for the jury.

The inquiry as to the scope of a servant's employment being for the jury (unless the act is manifestly out of the course of the servant's employment, when a nonsuit is proper), the reported cases turn in nearly every instance either on the validity of the finding, or on the question of whether there is evidence for the jury.⁶ The general principle is clear, and has already been enunciated; the particular facts which embody it are of course infinitely various. To enumerate a few—after a verdict by a jury that the servant was on his master's business at the time of the accident, the master was held responsible, where the servant, who was possessed of a horse and gig, was going to see his medical attendant, and also purposed calling upon one of his master's customers for payment of a debt, and whilst on his way to the

Cases where
the master
was held
liable.

¹ *Kimball v. Cushman*, (1870) 103 Mass. 194.

² 4 M. & G. 48. *Wheatley v. Patrick*, 2 M. & W. 650, where a man having borrowed a horse and chaise and sitting along with the driver when the accident happened, for which action was brought, was held rightly charged as in the possession and control of them. The inference drawn from somewhat similar facts was different in *Muse v. Stern*, 3 Am. St. R. 77. *Chandler v. Broughton*, 2 L. J. Ex. (N. S.) 25, is to the same effect as the case in the text.

³ 4 M. & G. 58.

⁴ Distinguished in *Pike v. London General Omnibus Co.*, 8 Times L. R. 164.

⁵ *Kimball v. Cushman*, 103 Mass. 194.

⁶ *M'Kenzie v. M'Leod*, 10 Bing. 385.

former place the accident occurred.¹ Thus, too, the plaintiff recovered; where defendant having hired a labourer for six weeks at weekly wages, the plaintiff, not knowing of such arrangement, employed the same labourer to do a job for him, which was being done when the defendant claimed and received of the plaintiff payment for the job, on the ground that the labourer's earnings during the six weeks belonged to him—upon which the plaintiff claimed for damages arising from the negligent way in which the work, thatching wheat, was performed;² where the defendant having sent a barge to a wharf to be loaded, the lighterman in charge was unable to get to the wharf in consequence of plaintiff's barge lying in the way without any one in charge of it, and by direction of the foreman of the wharf, he pushed plaintiff's barge away and moored his own alongside, in such a way that on the ebbing of the tide the plaintiff's barge settled on a projection and was injured;³ where a stevedore employed to ship iron rails had a foreman whose duty it was (assisted by labourers) to carry the rails from the quay to the ship, and a carman having brought them to the quay was unloading them there, but, as he was not doing the work to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one of them fell upon and injured a person who was passing;⁴ where the carman of a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the footway which covered an opening communicating with the coal-cellar, no warning being given by the carman that the plate was taken up, and in consequence the plaintiff, who was passing along at the time, fell in and was injured;⁵ where the master of a ship made a deviation in order to perform salvage services;⁶ and where plaintiff was standing on defendant's platform on his way from another company's terminus to the booking-office of a third company waiting for his luggage, and a porter of the defendants negligently drove a truck laden with luggage so that a portmanteau fell off and injured the plaintiff;⁷ and yet again, where a nuisance arose from volumes of smoke issuing from furnaces inefficiently tended.⁸

The act of the servant was held not within the scope of his authority, and the master consequently was held not liable; where the defendant's servant hurnd down a house demised to the defendant, by lighting furze and straw with a view to cleanse the chimney, which smoked;⁹

Cases where the master was held not liable.

¹ *Patten v. Rea*, (1857) 2 C. B. N. S. 606. In an Irish case, on somewhat similar facts, the Court refused to hold as a matter of law, that the master was responsible for the negligence of the servant: *Cormack v. Digby*, 9 Ir. R. C. L. 557; A herd got leave from his master to go for a day to a neighbouring town to transact business of his own, and borrowed his master's horse and tax cart for the purpose; it was afterwards agreed that he should bring home some meat from the town for his master. The accident, which was the cause of action, arose from negligence in driving.

² *Holmes v. Onion*, 2 C. B. N. S. 790.

³ *Page v. Defries*, 7 B. & S. 137; overruling *Lamb v. Palk*, 9 C. & P. 629, where a coachman got off his box and seized hold of the heads of van horses which were obstructing his way, causing them to move, whereby a packing-case fell down and was broken.

⁴ *Burns v. Poulson*, (1873) L. R. 8 C. P. 563. Brett, J., dissented, on the ground "that the defendant's duty did not begin till the iron rails had been thrown out of the cart."

⁵ *Whitely v. Pepper*, 2 Q. B. D. 276; *Clapp v. Kent*, 122 Mass. 481; *Braithwaite v. Watson*, 5 Times L. R. 331.

⁶ *The Thetis*, L. R. 2 Adm. 365.

⁷ *Tebbutt v. Bristol and Exeter Ry. Co.*, L. R. 9 Q. B. 73.

⁸ *Barnes v. Akroyd*, L. R. 7 Q. B. 474.

⁹ *M'Kenzie v. M'Leod*, 10 Bing. 385. The definition of the words "the servant's duty," given by Alderson, B., seems quite inconsistent with the rule laid down in

where a local board of health, being occupiers of a sewage farm, entrusted the management to B, and there being a ditch between the plaintiff's land and the farm, B went on the plaintiff's land and pared away his side of the ditch and cut away the brushwood and underwood that impeded the flow of the drainage, to render the ditch more capable of carrying off the drainage from the farm; ¹ where plaintiff occupied premises beneath the offices of the defendants, one of whom had a lavatory for his own use exclusively, and his orders to his clerks were that no clerk should come into his room after he had left, yet one of them went into the room to wash his hands at the lavatory after his employer had left, turned the tap and negligently left the water running, so that water overflowed into the plaintiff's premises and damaged them; ² and where forage was put down to the account of the master who had a contract with his servant that the servant should supply forage and an amount was paid with his wages in respect thereof. ³

Legal obligation limited to ordinary events.

Hautayne v. Bourne ⁴ is most often cited for the dictum of Parke, B.: "The law provides for that which is common, not for that which is unusual; on that principle it is that the master of a ship has authority to charge his owners because ships are ordinarily exposed to casualties." This was elicited by a case put in argument: ⁵ "Suppose a coach were to break down on its journey, would not the coachman have authority to hire another, on the credit of his employers, for the conveyance of the passengers to the end of the journey?" In *Guilliam v. Twist* in the Divisional Court ⁶ Wright, J., answers it: "I think that in cases of sudden emergency a servant has an implied authority from his employer to act in good faith according to the best of his judgment for the employer's interests, subject to this, that in so doing he must violate no express limitation of his authority, and must not act in a manner which is plainly unreasonable." *Hautayne v. Bourne* was not cited to him. In the Court of Appeal, ⁷ Lord Esher, M.R., was "very much inclined to agree with the view taken by Evre, C.J., in the case of *Nicholson v. Chapman*,⁸ and by Parke, B., in the case of *Hautayne v. Bourne*,⁹ to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of a bill of exchange for the honour of the drawer." In the case before the Court Lord Esher, M.R., did not think it necessary to decide "whether, if there were a necessity for a servant to delegate his duty to another person, that delegation would make that other person a servant of the master so as to render the latter responsible for his acts." "It seems to me," he continued, "perfectly clear that a servant employed for a particular

subsequent cases. "In that case the servant burnt the house down in trying to cleanse the chimney: but it was distinctly shown that it was not her duty in any case to cleanse the chimney, but only to light the fire, and therefore she was not acting in the course of her employment": per Blackburn, J., *Bayley v. Manchester, Sheffield, and Lincolnshire Ry. Co.*, L. R. 8 C. P. 152. See *Baird v. Graham*, 14 Dunlop, per Lord Ivory, 620.

¹ *Bolingbroke v. Swindon New Town Local Board*, (1874) L. R. 9 C. P. 575.

² *Stevens v. Woodward*, (1881) 6 Q. B. D. 318; in *Ruddeman v. Smith*, 5 Times L. R. 417, the tenant was held liable. See *Wardrope v. Duke of Hamilton*, 3 Rettie, 876, where employment as a gamekeeper was held not to imply authority to shoot dogs; also *Baird v. Graham*, (1852) 14 Dunlop, 615, where a servant having put up his master's horse, which was glandered, but not to the knowledge of defendant, in pursuer's stables, where it infected horses and cattle there, the master was held liable.

³ *Wright v. Glyn*, (1902) 1 K. B. 745.

⁴ L. C. 598.

⁵ (1895) 2 Q. B. 87.

⁶ 2 H. Bl. 254.

⁷ 7 M. & W. 595.

⁸ (1895) 1 Q. B. 557, 559.

⁹ 7 M. & W. 598.

purpose can have no authority to delegate the performance of his duty to another person, unless there is a necessity for so doing." The Court of Appeal accordingly overruled the Divisional Court, and held, the facts proved showing that police ordered the driver of an omnibus a quarter of a mile from home to discontinue driving, because he was drunk, and the driver and the conductor authorised a third person to drive the omnibus home and an accident happened on the way by the negligence of this person, that there was no necessity to delegate and so no authority. Smith, L.J., said: "To constitute a person an agent of necessity he must be unable to communicate with his employer; he cannot be such an agent if he is in a position to do so. The impossibility of communicating with the principal is the foundation of the doctrine of an agent of necessity."

Agent of necessity only constituted when there is the impossibility of communicating with the principal.

In *Beard v. London General Omnibus Co.*¹ the evidence of the plaintiff showed that the conductor was driving in the absence of the driver, when the accident happened. The Court of Appeal held that the plaintiff had not discharged the *onus* of showing that the conductor's act was within the scope of his authority. Williams, L.J., appears to have had a leaning towards the view that a conductor is the driver's "understudy." The incongruity between the functions of a driver of horses and one whose office is to take fares, keep the time and see to the comfort of passengers, is too complete to make this view reasonable.²

*Sanderson v. Collins*³ and *Cheshire v. Bailey*⁴ must be noticed here, though their principal importance is in another connection. In the former, a coachman took out a carriage bailed to his master for his own purpose, and during his use it was injured. In an action to recover the costs of repairing the carriage, the act of the coachman was held to be outside the scope of his employment, and therefore the master was not liable. The case is indistinguishable from *Coupe Co. v. Maddick*;⁵ a very loosely reasoned decision of a Divisional Court; for though Collins, M.R., thought the case distinguishable on the ground that "the act done by the coachman was admittedly within the scope of his authority,"⁶ reference to the first paragraph of Cave, J.'s, judgment shows that was not so: that the principle of scope of authority was rejected as not applicable, and that the ground of decision was that even though the act was without the scope of authority the master was still liable. The distinction taken was between a tort done to a stranger by the servant, where the principle applies; and injury to goods bailed to the master; in which latter case the master's liability was alleged not to be limited to acts within the scope of the authority of the servant. *Cheshire v. Bailey*⁷ was a decision on the same lines. The master is not liable for the criminal act of his servant.

Sanderson v. Collins.
Cheshire v. Bailey.

Here we may refer to an Irish case,⁸ which also exemplifies the principle of *Sharp v. Powell*. A railway porter had wheeled a trunk of luggage to the head of a flight of steps—an improper place—at the foot of which were a number of outside porters, who were usually restrained by a police

Murphy v. G. N. Ry. Co. of Ireland.

¹ (1900) 2 Q. B. 530.

² See *Whitehead v. Reader*, (1901) 2 K. B., per Collins, L.J., 51; and cp. *Engelhart v. Farrand*, (1897) 1 Q. B. 240.

³ (1904) 1 K. B. 628.

⁵ (1891) 2 Q. B. 413.

⁷ (1905) 1 K. B. 237.

⁴ (1905) 1 K. B. 237.

⁶ (1904) 1 K. B. 632.

⁸ *Murphy v. Great Northern Ry. Co.*, (1897) 2 I. R. 301.

man stationed there. He left his post, and the porters immediately rushed up the steps to get at the luggage; in their struggle a package rolled down the steps and injured a passenger. The railway company was held not liable by the Irish Court; and O'Brien, J.,¹ enunciated the principle that "defendants can only be made liable through the acts of third persons which happen in the ordinary course of the business which they carry on, and they are not responsible for consequences that happen through the negligence or improper conduct of such persons."

Principle.

Robinson v. Reid's Trustees.

*Robinson v. Reid's Trustees*² carries us to another class of facts, but illustrates the same principle. While a man was cleaning a window the sash-line broke and by the jar of the fall the window was broken; the broken glass fell on a passenger and injured him. He sued the proprietor of the house in respect of his injuries. The Court held the accident too unlikely a contingency to be foreseen by even an ordinarily careful person; so there was no liability.

Peculiar American case.

An American case,³ quite irreconcilable with those we have been noticing, carries the liability of the master for the act of the servant to the very verge of absurdity—if, indeed, it should not be held considerably to have overstepped that verge. A female passenger, travelling in a railway car, was kissed by the conductor. The conductor was arrested, convicted on a criminal charge of assault, fined, and committed until the fine and the costs of the prosecution were paid; he was also discharged from the employment of the defendant company immediately upon their being informed of the charge made against him by the plaintiff. An action was brought against the railway company for the assault; the jury awarded large damages. No evidence of want of care in the selection of the servant was given.

Ryan, C.J.'s judgment.

On appeal, Ryan, C.J., held that the defendants were clearly liable. "It is contended," he says, in the course of a long judgment, plentifully garnished both with authorities and rhetoric,⁴ "that though the principal would be liable for the negligent failure of the agent to fulfil the principal's contract, the principal is not liable for the malicious breach, by the agent, of the contract which he was appointed to perform for the principal; as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleeps while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf, and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*. The radical difficulty in the argument is that it limits the contract. The carrier's contract is to protect the passenger against all the world; the appellant's construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her; reserving to the shepherd's dog a right to worry the sheep. No subtleties in the hooks could lead us to sanction so vicious an absurdity."

Criticised.

The doctrine of the English law most unquestionably is, that the obligation is, not to insure the fitness of the servant morally, but to use all reasonable precautions to obtain a servant in all respects suitable.⁵

¹ L.c. 308.

² 2 Fraser, 928.

³ *Crocker (or Craker) v. Chicago & N. W. Rd. Co.*, (1875) 17 Am. R. 504.

⁴ L.c. 510.

⁵ *Poultton v. L. & S. W. Ry. Co.*, L. R. 2 Q. B. 534. In *The Queen v. Great North of England Ry. Co.*, 9 Q. B. 326, Lord Denman, C.J., says: "The Court of Common Pleas lately held that a corporation might be sued in trespass (*Maud v. The Monmouthshire Canal Co.*, 4 M. & G. 452), but no body has sought to fix them with acts of

The *onus* of showing unsuitability is on the plaintiff, and proof of the act sued on is not in an ordinary case evidence to fix the defendant with negligence in the appointment of the servant. In *New Orleans, &c. Rd. Co. v. Jopes*,¹ the rule laid down seems to be regarded as an exception in the case of railway companies.

In the class of cases we have been considering a difficulty not unfrequently arises in determining the identity of the defendant's servant. Thus in *Joyce v. Capel*,² where a barge ran down a "lug boat" belonging to the plaintiff, it was proved that the name of Capel was on the barge, and the No. 1055, which was the number belonging to the defendant's barge, affixed in accordance with the regulations of the Waterman's Company; but when the men in the employ of the defendants were shown to him at their wharf, he was unable to identify the man who steered the barge. Nevertheless Lord Denman, C.J., ruled that the plaintiff had discharged the *onus* upon him, and that there was *prima facie* evidence of the bargeman being the defendants' servant till they explained it. If, then, the fact was that the barge was on hire, it was for the defendants to show it.

Evidence of employment.

Hibbs v. Ross,³ must be taken in connection with this. An accident having happened to the plaintiff, through the negligence of a ship-keeper on board a ship laid up in dock for the winter, the only evidence given to fix the defendant with liability was the certified copy of the ship's register, in which the defendant's name appeared as owner. This was held sufficient by the Court of Queen's Bench, though by a divided Court, on the ground that "the facts lie so entirely in the knowledge of the defendant, and may so easily be proved by him, that I think a jury would be fully warranted in acting on the *prima facie* inference that the persons having the actual custody of the ship are

Hibbs v. Ross.

immoral. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation which as such has no such duties cannot be guilty in these cases." In *Ellis v. Turner*, 8 T. R. 533, Lord Kenyon, C.J., says: "The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage." The decision, nevertheless, has been apparently approved by the Supreme Court of the United States, in *New Jersey Steamboat Co. v. Brackett*, 121 U. S. (14 Davis) 637. This last case was distinguished in *New Orleans, &c. Rd. Co. v. Jopes*, 142 U. S. (35 Davis) 18, on the ground that as a railway servant may use force to protect other passengers, so he may to protect himself. There is no misconduct where force is used in self-defence. But see *Lake Shore, &c. Ry. Co. v. Prentice*, 147 U. S. (40 Davis) 101. The tendency of the American cases is to follow *Croaker's case*, if not to adopt the somewhat tropical analogies in the judgment. Thus a leading text-writer, commenting on the Louisiana decision of *Lafitte v. New Orleans City, &c. Rd. Co.*, 43 La. Am. 34, limiting the liability of street railway companies for the wilful and tortious acts of their servants to acts done within the scope of the employment, delivers his opinion that "this is unsound, since such misconduct is a violation of the implied engagement of the carrier to transport the passenger safely." An English lawyer would say that such a statement of the duty was a *petitio principii*; and a logician that the analogy was merely misleading.

¹ 142 U. S. (35 Davis) 18.

² 8 C. & P. 370. *Stables v. Eley*, 1 C. & P. 614, used to be cited for the proposition that if a man allows a carriage to go out with his name upon it, he holds himself out as liable for injury occasioned by the negligence of any person driving it. In this sense it has been determined in *Smith v. Bailey*, (1891) 2 Q. B. 403, to be wrong. In that case Lord Esher, M. R., suggests that the extent of the proposition should be that under such circumstances there would be *prima facie* evidence of liability, which might be met by showing the truth of the matter. This view seems to accord with the cases quoted in the text.

³ L. R. 1 Q. B. 534.

employed by the owners, unless some evidence to the contrary is given."¹

Power of particular agent to put the criminal law in motion.

There is a series of cases on the power of a servant to arrest offenders against his master's property, mostly relating to the liability of railway companies for wrongful arrests by their servants. These require separate consideration. The general effect of them is to establish that the authority to arrest offenders is only implied where the duties which the officer is employed to discharge can not be efficiently performed, unless he has the power to take prompt measures for apprehending offenders,² or cannot prevent the loss to his master's property committed to his charge otherwise than by taking or giving the offender into custody.

Eastern Counties Ry. Co. v. Broom, and Roe v. Birkenhead, &c. Ry. Co.

In each of the two earliest cases, *Eastern Counties Ry. Co. v. Broom*,³ and *Roe v. Birkenhead, &c. Ry. Co.*,⁴ the plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held that there was not sufficient evidence of such authority to go to the jury. The former of these decisions is scarcely consistent with later authorities. In the latter, Parke, B., thought there was no proof that the servant "had ever received any general authority from the Company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to show that, as a servant of the company, he was authorised to make any arrest on their behalf, much less that he had any direct authority to take the plaintiff into custody."⁵

Giles v. Taff Vale Ry. Co.

Both cases were decided in 1851. In 1853, in *Giles v. Taff Vale Ry. Co.*,⁶ the principle involved was more fully elucidated by the Exchequer Chamber. The question was whether there was evidence of the conversion of certain quicks belonging to the plaintiff by the Taff Vale Ry. Co. The quicks had been brought in two parcels to two different stations belonging to the defendants; when asked for, reference was made to one Fisher, who was called "the general superintendent of the line," and who refused to deliver them. The argument turned on whether Fisher's act bound the Company. The majority of the Court⁷ agreed that "it is the duty of the Company, carrying on a business, to leave upon the spot some one with authority to deal on behalf of the Company with all cases arising in the course of their traffic as the exigency of the case may demand." The whole of the Court,⁸ however, assented that a "general superintendent" has authority to bind the Company in all matters requiring a prompt decision, if they arise in the course of the ordinary business of the Company.

Goff v. G. N. Ry. Co.

In *Goff v. G. N. Ry. Co.*,⁹ Blackburn, J.'s, comment upon *Giles v.*

¹ Per Blackburn, J., L. R. 1 Q. B. 543.

² *Bank of New South Wales v. Owen*, 4 App. Cas. 288.

³ 6 Ex. 314.

⁴ 7 Ex. 36.

⁵ Cp. *Bank of New South Wales v. Owen*, 4 App. Cas. 285.

⁶ 2 E. & B. 822.

⁷ *Jervis, C.J., Pollock, C.B., Alderson, B., Maule, J., Platt, B., Williams, J., and Talfourd, J.*, 2 E. & B. 829.

⁸ Parke and Martin, BB., doubted as to certain facts of the case. See *The Apollo*, (1891) A. C. 499.

⁹ (1861) 3 E. & E. 681. *Cor v. Midland Counties Ry. Co.*, 3 Ex. 268, decided that it is not incident to the employment of a station-master or other servants of a railway company to bind the company by contracts for surgical attendance on injured

Tuff Vale Ry. Co.,¹ is: "The question in that case arose as to the evidence of authority to deal with goods, and, the language of the different judges, with reference to that subject, they speak only of the exigencies of traffic, or of the business of a carrier of goods; but the same principles, we think, applicable to all exigencies that may be naturally expected to arise in the ordinary course of any business of the Company. If these are of such a nature that a decision must be made on behalf of the Company promptly, the Company may reasonably be expected to authorise some one on the spot to decide for them in such cases."

The plaintiff in *Goff's case* had been arrested by an inspector of the Company, acting under the direction of a superintendent, for travelling on the line without a proper ticket. The Court said² that, "from the nature of the case, the decision whether a particular passenger shall be arrested or not must be made without delay, and as the case may be not of infrequent occurrence, we think it a reasonable inference that, in the conduct of their business, the Company have on the spot officers with authority to determine, without the delay attending on the convening the directors, whether the servants of the Company shall, or shall not, on the Company's behalf, apprehend a person accused of this offence." The explanation was added in a subsequent case³ that "by giving the guard authority to remove offensive passengers [the Company] necessarily gave him also authority to determine whether any passenger had misconducted himself."

Servant authorised to act in emergency.

A distinction was next drawn between acts which the Company could themselves do and those they had no authority to do, as marking the boundary-line between acts within the implied authority of a superintendent and those outside it.

Distinction between acts intra vires and extra vires.

In *Poulton v. L. & S. W. Ry. Co.*,⁴ a station-master took the plaintiff into custody because, as he erroneously supposed, he had not paid the fare for a horse that had been carried on the defendants' railway. By statute⁵ the station-master had authority to arrest and detain in custody any person that did not pay his fare; though where goods were not paid for they might only be detained.⁶ Since the Company could not themselves lawfully make an arrest, to do so was held outside the scope of the station-master's authority, and an act for which the Company could be no more responsible than if their servant had committed an assault or done any other act which the Company never authorised. The same principle was applied in *Edwards v. L. & N. W. Ry. Co.*,⁷ where a foreman porter in temporary charge of a station was held to have no implied authority to arrest a person whom he suspected of stealing the Company's property.

Poulton v. L. & S. W. Ry. Co.

Edwards v. L. & N. W. Ry. Co.

passengers. The authority of this case was questioned and shaken in *Walker v. G. W. Ry. Co.*, L. R. 2 Ex. 228, where it was held that the general manager of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance. See, too, *Moore v. Metropolitan Ry. Co.*, L. R. 8 Q. B. 36, "this case cannot be distinguished from *Goff v. G. N. Ry. Co.*," per Lush, J., 41; which "was a well-considered case, and the principles there laid down have never been deviated from," per Blackburn, J., 38.

¹ 2 E. & B. 822.

² 3 E. & E. 681.

³ *Seymour v. Greenwood*, 7 H. & N. 358. See also *Walker v. S. E. Ry. Co.*, L. R. 5 C. P. 640. This case turns wholly on its peculiar facts.

⁴ (1867) L. R. 2 Q. B. 534; *Charleston v. London Tramways Co.*, 4 Times L. R. 157; (C. A.) 629; *Maliv. Lord*, 39 N. Y. 381.

⁵ 8 & 9 Vict. c. 20, ss. 103, 104. See the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), sched.; and also The Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 5.

⁶ 8 & 9 Vict. c. 20, s. 97.

⁷ (1870) L. R. 5 C. P. 445.

The general proposition that every servant who is entrusted with the property of his master has an implied authority to put the law in motion with reference to any offence that may be committed in connection with that property was considered in *Allen v. L. & S. W. Ry. S. W. Ry. Co.*¹ Plaintiff took a ticket at one of the defendants' stations and tendered in payment a two-shilling piece. Amongst the change handed the plaintiff by the booking-clerk was a French two-sons piece, which the plaintiff refused to accept and the clerk to take back. The plaintiff then reached over the counter to put his hand into the bowl of the till which contained copper coin. The booking-clerk seized him, called a policeman, and the plaintiff was taken to the station and locked up for the night. The Court held that the clerk had no authority to act as he did. Blackburn, J., said: "There is a marked distinction between an act done for the purpose of protecting property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who, he supposes, has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property, it is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company—which is a corporation—and a private individual." Two possible cases of limitation are suggested: "If a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, it might be that that also might be within the authority of a person in charge of a till."²

Judgment of
Blackburn, J.

Two limita-
tions of the
rule laid
down there'in.

*Van Den
Eynde v.
Ulster Ry. Co.*

In an Irish case³ three judges, in the Irish Exchequer Chamber, held—where the allegation against the plaintiff, and for which he had been arrested, was of stealing a ticket—that if the ticket-clerk and station-master had reasonable grounds for believing that a ticket had been abstracted they had implied authority from the railway company to detain the plaintiff in order to regain the ticket. The majority of the Court preferred to place their decision on the ground that there was evidence to show that the Company's servants detained the plaintiff in the belief that he was attempting to travel on the defendants' railway without payment of his fare, by means of a stolen ticket, and that they were assuming to act within the powers of the Railways Clauses Consolidation Act, 1845.⁴

The Apollo.

There was great doubt expressed in the House of Lords whether the facts in *The Apollo*⁵ showed an act within the scope of the authority of the acting barbour-master in that case. A ship in dock being

¹ (1870) L. R. 6 Q. B. 65.

² Cp. *Blades v. Higgs*, 12 C. B. N. S. 501; 11 H. L. C. 621; when a servant has reasonable grounds for believing that property of his master entrusted to his charge has been wrongfully taken out of his custody, it is within the scope of his duty to detain a person whom he reasonably suspects as the wrongdoer in order to regain possession of the property, provided that in so doing he uses no unnecessary violence.

³ *Van Den Eynde v. Ulster Ry. Co.*, 5 Ir. R. C. L. 6; 328.

⁴ 8 & 9 Vict. c. 20, ss. 103, 104. See *ante*, 591.

⁵ (1891) A. C. 490.

Injured required to take the ground for the purpose of being examined. There being no dry dock, the acting harbour-master suggested that she should be placed in the lock at the entrance of the dock. Before accepting this suggestion the master of the vessel made all reasonable inquiries, and received assurances which satisfied him. There was a ridge at the bottom of the lock, of the existence of which the master was not informed. His vessel being heavily loaded settled on this, and sustained severe injuries in consequence. Two points were made. First, that there was no duty on the harbour-master in regard to the plaintiff in the matter, and so no negligence. Secondly, that, if there were negligence, then the acts complained of were not done in the course of the harbour-master's duty or within the scope of his authority. As to the first, the majority of the House of Lords were of opinion, based upon an examination of the terms of two special Acts of Parliament, that there was a duty on the harbour-master "to inform himself of the condition of the lock, and to ascertain that it was not such as to cause damage to the vessel." Secondly, as to the scope of authority, it was said by Lords Bramwell and Morris: "The normal use of the lock was for the passage of vessels, and the use of it as a substitute for a dry dock was an extraordinary and abnormal use of the lock."¹ The prevailing view was, however, that expressed by Lord Herschell:² "I think it must be within the scope of his" (the harbour-master's) "authority to point out in what part of the harbour the vessel may ground, and the lock was within the ambit of the port and harbour, and just as much a part of it as any other, and it had, as I have said, been used on various previous occasions, extending over a considerable period, for that purpose." This view certainly seems the more reasonable one. The harbour-master's authority is not limited to the making of contracts, as Lord Bramwell implies;³ it extends to the giving general directions to secure the efficient conduct of the dock company's business, or, in the words of Jervis, C.J., quoted by the Lord Chancellor,⁴ "to deal on behalf of the company with all cases arising in the course of their traffic as the exigency of the case may demand."

Somewhat different is *Bayley v. Manchester, Sheffield, and Lincolnshire Ry. Co.*⁵ There plaintiff was assaulted, not arrested. It was the duty of the company's porters to prevent passengers going by wrong trains. A porter seeing the plaintiff in a carriage, and conceiving it was a wrong one, pulled him out. The passenger was right; the porter wrong; the passenger was injured. The company were held liable on the ground that "where orders are given to some extent inconsistent, and such that it may not always be easy under all circumstances to comply literally with the provisions of all of them—for instance, where, as in the present case, there is a general order to prevent persons from travelling in the wrong carriage if possible, accompanied by a direction not to remove them from the carriage—it is obviously very likely that the servant may, while acting in the performance of the general duty cast upon him, neglect the particular direction as to the mode of doing it. But it appears to me that he will be none the less acting within the scope of his employment."⁶

Duty of
harbour-
master.

Scope of
harbour-
master's
authority.

*Bayley v.
Manchester,
&c. Ry. Co.*

Principle of
the cases.
Kelly, C.B.

¹ Per Lord Morris, (1891) A. C. 519.

² L. C. 518.

³ L. C. at foot of 511.

⁴ L. C. 507, from *Giles v. Tuff Vale Ry. Co.*, 2 E. & B. 820.

Niven v. Ayr Harbour Trustees, 24 Rottie, 883.

⁵ L. E. 7 C. P. 415, in Ex. Ch. L. R. 8 C. P. 148.

⁶ Per Kelly, C.B., L. R. 8 C. P. 153.

Lord Esher,
M.R.'s
comments.

"It may well be," says Lord Esher, M.R., commenting on this decision in *Dyer v. Munday*,¹ "that the question whether the offence is a criminal one may be a material fact for the jury to consider from that point of view, but the mere fact that it is a criminal offence is not sufficient to take the case out of the general rule. The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable."

*Bank of New
South Wales
v. Owen*.

Bank of New South Wales v. Owen,² is chiefly valuable for a concise examination of the leading decisions by Sir Montague Smith.³ The point for decision was, whether an acting manager of a bank had authority to direct a prosecution where the clear inference from the evidence was that he was subordinate to the general manager, who was himself subject to the authority of the directors. The decision was, that no general authority to prosecute on behalf of the bank was given by his position alone; and this is in complete accord with the earlier cases.

Sir Montague
Smith's judg-
ment

"In none of the cases referred to," it is said, "did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of acting would be material circumstances to be considered in determining the question of authority."⁴

adopted in
every
respect by
Lord Esher,
M.R.

In the subsequent case of *Abrahams v. Deakin*,⁵ Lord Esher, M.R.,⁶ speaking about the *Bank of New South Wales v. Owen*,⁷ said: "Though we are not bound by that decision, I have no intention of differing from it; on the contrary, I adopt it in every respect." The same learned judge, in the same case,⁸ thus summarises the effect of *Allen v. L. & S. W. Ry. Co.*:⁹ "Although a servant is acting with a view to protect his employer's property against similar" (*i.e.*, felonious) "attempts in the future, he has no implied authority to take a man into custody for that which has already been done."

*Hanson v.
Waller*.
Two
propositions.

In *Hanson v. Waller*¹⁰ the unreported case of *Jones v. Duck*¹¹ in the Court of Appeal is cited for the propositions: "The cases showed that a servant had an implied authority to give a person into custody, if it was necessary to do so in order to protect the master's property."

¹ (1895) 1 Q. B. 740.

² 4 App. Cas. 270.

³ L.c. 288.

⁴ *Ashton v. Spicers and Pond*, 9 Times L. R. 600 (C.A.).

⁵ (1891) 1 Q. B. 516; followed in *Stedman v. Baker*, 12 Times L. R. 451.

⁶ L.c. 521.

⁷ 4 App. Cas. 270.

⁸ (1891) 1 Q. B. 520.

⁹ L. R. 6 Q. B. 65.

¹⁰ (1901) 1 K. B. 390.

¹¹ *The Times*, 16th March, 1900.

"The cases also showed that a servant might have such an implied authority derived from the exigency of a particular occasion."

A word must be added on the liability criminally of the master for the act of his servant. It is a general principle of law that a man is not liable criminally for the act of his servant, but such a liability is sometimes imposed by statute. It is obvious, however, that the master is liable for the criminal acts of the servant when he has expressly commanded them or personally co-operated with the servant in their commission.² The law may perhaps be more correctly stated by saying that the relation of master and servant does not render the master the less liable to answer when he is accessory, whether before or after the fact, than if no relation of master and servant existed.³ If the master co-operates with the servant the master is then himself a principal, and must answer for his own wrongdoings. No amount of mere negligence short of becoming an accessory, or aiding, abetting, or inciting the commission of an offence renders the master criminally liable for his servant's crime.

Liability of master criminally for act of servant.

"I know," said Pollock, B., in *Roberts v. Woodward*⁴ "of no instance in which a master is criminally liable for the act of his servant, unless he is made so by statute, or unless the act of the servant is, from its very nature, obviously the act of the master. The instances cited in the argument are inapplicable to this case (i.e., the offence of giving short weight in a sale of coals). In the case of a servant selling an indecent book, it would be presumed to be the act of the master, who was keeping indecent books for sale; and the liability of a master for the act of his servant in supplying drink to a constable on duty arises, not by virtue of an express statutory enactment that he should be liable, but because to permit him under such circumstances to avail himself of a plea that he was ignorant of his servant's acts would be contrary to the whole spirit of legislation on the subject."

Criminal liability of master for his servant considered by Pollock, B., in *Roberts v. Woodward*.

Some quasi-criminal cases there are where the master is liable for the act of his servant. For example, in *The King v. Dixon*⁵ it was held that if a master baker puts alum in his bread he is liable criminally for injurious consequences brought about by his servant's disregard of his instructions. The chief head of this quasi-criminal responsibility is found in the cases under the revenue laws. A master is answerable for the illegal act of his servant, if within the scope of his probable authority, and done for the master's benefit. Thus, in *Attorney-General v. Siddon*,⁶ where, after the detection of smuggled tobacco concealed in a cellar, a servant in his master's absence procured a permit by which he intended to protect the goods from seizure, the master was held liable for the penalty attached to the offence of unduly using a permit; because "this is not properly a criminal proceeding; but, as a civil proceeding for the debt of the Crown, it is penal in its nature, as are also informations for penalties on the statute of usury, or against a master for the giving unstamped receipts by

Cases of criminal liability noted.

A. G. v. Siddon.

¹ *Woodgate v. Knatchbull*, 2 T. R. 148; *Harcastle v. Bilby*, (1892) 1 Q. B., per Collins, J., 712.

² *Foster*, Cr. Cas. 125; as to the criminal liability of the sheriff, *Woodgate v. Knatchbull*, 2 T. R. 118. *Ante*, 271.

³ *E.g.*, *Brown v. Foot*, 31 L. J. M. C. 110.

⁴ 25 Q. B. D. 412. There is a discussion as to the extent to which the acts and declarations of an agent may affect his principal criminally in *Lord Melville's case*, 29 How. St. Tr. 747 *et seqq.*

⁵ 3 M. & S. 11.

his servant. Whether the information here is penal or civil in its nature, the act of the servant is by law to be considered as done by the master, if it is within the scope of the probable authority which must be considered to be given by the master to the servant, for the carrying on the business of the former."¹ In criminal proceedings for libel, too, a sale by the servant in the shop of the master, without the knowledge, privity, or concurrence of the master in the sale, or even without a knowledge of the contents of the libel sold, is sufficient evidence to convict the master, though liable to be contradicted.² So also where a public nuisance is caused by the way in which a man's servants conduct his business, the master is indictable.³ As Holroyd says *arguendo* in *Lyon v. Mells*:⁴ "Where a bricklayer's servant leaves the rubbish of his work in the street, the master is indictable for the nuisance," as he is also under the special language of particular Acts of Parliament.⁵ As a general principle, however, in the absence of special legislative provision, where proceedings are a prosecution for a crime, the master is not liable for the act of his servant.⁶

Public
nuisance.

Territorial
limits of the
principle
*Respondet
superior*.

Judgment of
James, L.J.

The application of the principle *Respondet superior* outside the realm was considered in *The M. Mozham*.⁷ An English company possessed a pier in a Spanish port, which was injured by an English ship being driven against it, through the negligence of the crew. If the law of Spain were applicable the shipowners were not liable. The plaintiff's contention was that the ship carried the principle of *Respondet superior* with her to Spain. This contention was overruled by the Court of Appeal. "One can understand," said James, L.J., "that a contract between master and servant, or the relations between principal and agent, may affect a contract made by the agent *quâ* agent with foreigners, that is to say, it may affect the nature and extent of his agency; but the liability of one man to answer for the acts of another in matters of tort seems a thing which cannot be carried by the agents into a foreign country. If I take my coachman to France, and he, in driving my carriage, injures a carriage in France, I do not take with me the law of *Respondet superior* so as to make me liable. It seems to me that the law of the country in which we are trying the question does not apply, but it is the law of the place where the act is done which does apply."

If there is a contract between master and workmen for work to be executed in a foreign country, by the construction of the contract the English law may be incorporated and become applicable; failing proof of this, the local law governs.⁸

¹ *L.c.*, per Bayley, J., 49.

² *Rex v. Almon*, 20 How. St. Tr. 838, 5 Burr. 2686. See *The Queen v. Holbrook*, 3 Q. B. D. 60, 4 Q. B. D. 42; *Emmens v. Pottle*, 16 Q. B. D. 354, which was discussed in *Vizetelly v. Mudge's Limited*, (1900) 2 Q. B. 170.

³ *The Queen v. Stephens*, L. R. 1 Q. B. 702. See also *Commonwealth v. Stevens*, 153 Mass. 421, 25 Am. St. R. 647.

⁴ 5 East, 432.
⁵ *E.g.*, *Mullins v. Collins*, L. R. 9 Q. B. 292; *Redgate v. Haynes*, 1 Q. B. D. 89; *Cundy v. Leccog*, 13 Q. B. D. 207; *Bond v. Evans*, 21 Q. B. D. 249; and the discussion of these cases in *Somerset v. Wade*, (1894) 1 Q. B. 574; *Commissioners of Police v. Cartman*, (1896) 1 Q. B. 655; *Collman v. Mills*, (1897) 1 Q. B. 396; *Coppen v. Moore*, No. 2, (1898) 2 Q. B. 306; *Emery v. Nolloth*, (1903) 2 K. B. 264. See also *Massey v. Morris*, (1894) 2 Q. B. 412. For breach of excise law, 2 Will. IV. c. 16, s. 13, affecting the master with criminal responsibility, see *Advocate-General v. Grant*, 15 Dunlop, 980.

⁶ *Newman v. Jones*, 17 Q. B. D. 132; *Hosford v. Mackey*, (1897) 2 I. R. 292. See as to a proceeding under 16 & 17 Vict. c. 128, *Chisholm v. Doulton*, 22 Q. B. D. 736; also *Budd v. Lucas*, (1891) 1 Q. B., per Pollock, B., 412.

⁷ 1 P. D. 107.
⁸ *Lloyd v. Gubert*, L. R. 1 Q. B. 115; *In re Missouri Steamship Co.* 42 Ch. D. 321; *Prichard v. Norton*, 106 U. S. (16 Otto) 124.

CHAPTER III.

LIMITATIONS ON EMPLOYER'S LIABILITY WHERE WORK IS DONE UNDER AN INDEPENDENT CONTRACT.

THE relation between contractor and employer is much more complicated than that between master and servant; and legal opinion on the subject, after having undergone considerable fluctuations, has at length settled itself, in a course of decision, quite opposite to the line of the earlier cases.

For a time there was an inclination to favour the proposition that a person is answerable for injury arising in executing work that he has employed another to do;¹ and to hold that the question whether a man were contractor or servant made no difference in the liability of his employer.²

The tendency then changed, and ultimately the view was adopted that limited the liability of the owner of premises to those acts which he definitely authorises, or that are in the nature of a nuisance which he permits. In the words of Lord Westhury:³ "It would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation . . . to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons." It is the progress of legal authority from the former to the latter of these views that we have now to consider.

The leading case on the earlier view of the law is *Bush v. Steinman*.⁴ A having a house by the roadside, contracted with B to repair it. The materials were to be furnished by C and D. D's servant brought a quantity of lime and placed it in the road; the plaintiff's carriage was driven against it and upset. The Court held A liable for the damage sustained. At the trial, Eyre, C.J., had nonsuited; on the motion he changed his opinion: "Though I still feel difficulty in stating the precise principle on which the action is founded, I am

¹ Eyre, C.J., in *Bush v. Steinman*, 1 B. & P. 407, says, indeed, this "seems to be too large and loose"; but no other principle is substituted as the basis of the decision.

² Per Eyre, C.J., 1 B. & P. 408.

³ *Daniel v. Metropolitan Ry. Co.*, L. R. 5 H. L. 61.

⁴ (1799) 1 B. & P. 404; *Hilliard v. Richardson*, 69 Mass. 349; Bigelow, L.C., on Torts, 636.

*Stone v.
Cartwright.*

satisfied with the opinion of my brothers." ¹ Three cases were relied on—*Stone v. Cartwright*,² *Littledale v. Lord Lonsdale*,³ and a case stated upon the recollection of Buller, J. *Stone v. Cartwright* was a case of injury done upon the land of the defendant's ⁴ principal, and by the principal's servants; the actual decision being that an action must be brought "against the hand committing the injury, or against the owner for whom the act was done."⁵ A case that proceeds on the assumption of the existence of the relation of master and servant is no authority where the relation of master and servant does not exist.⁶

*Littledale v.
Lord
Lonsdale.*

The next case is *Littledale v. Lord Lonsdale*.⁷ "Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference), that an injury was done to the plaintiff's house, and his Lordship was held responsible. Why? Because the injury was done in the course of his working the colliery." The acts done were on the property of the defendant, and were done in the course of working mines (for which purpose the land was occupied), and were in the nature of a nuisance interfering with the property of a neighbour. If the working was by agents or servants in the method prescribed by the master, a difference of the rule applicable is apparent. For the reasoning proceeds from the relation of master and servant to a relation not that of master and servant. Its validity is therefore dependent on the identity of two relations; and this identity does not in fact exist. The case is accordingly distinguishable from *Bush v. Steinman*; and the decision must be sustained on independent grounds.

Case re-
collected by
Buller, J.

The third case was one "my brother Buller recollects."⁸ "It was this: a master having employed a servant to do some act, the servant out of idleness employed another to do it, and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable." The facts as given are very vague. Assuming that the case was well decided, the relation of master and servant is stated to exist, a relation that may be sufficient for the decision, and which did not exist in *Bush v. Steinman*. It would also be necessary to presume an authority empowering the servant to delegate his duties.⁹

Examined.

Other cases were referred to by the other judges, which may be

¹ 1 B. & P. 408.

² 0 T. R. 411. See per Kelly, C.B., *Weir v. Barnett*, 3 Ex. D. 32, 40.

³ 1 B. & P. 407.

⁴ "He hired and dismissed the colliers at his pleasure," 6 T. R. 411.

⁵ Per Lord Kenyon, C.J., 6 T. R. 412.

⁶ "The relation between master and servant as commonly exemplified in actions brought against the master is not sufficient": per Eyre, C.J., 1 B. & P. 406.

⁷ 1 B. & P. 407. This case is reported as *Earl of Lonsdale v. Littledale* in 2 H. Bl. 267, 299, and is on the point that a peer of Parliament, having pleaded in chief to a bill cited against him in the Court of King's Bench, cannot afterwards assign for error that he ought to have been sued by original writ and not by bill. The facts may, however, be collected from the pleadings set out in the report. Those in the text are taken from Eyre, C.J.'s, judgment in *Bush v. Steinman*. See note to *Jordeson v. Sutton, &c. Gas Co.*, (1899) 2 Ch. 233.

⁸ 1 B. & P. 408.

⁹ "If I select a person in whom I place confidence, can he employ another?" per Lord Campbell, C.J., *Sadler v. Henlock*, 4 E. & B. 575. This point, if it needs decision, has been definitely decided in America. A servant, not having express authority to employ other servants, engaged one G to assist him in moving a crate of crockery. Through the negligence or inefficiency of G, combined with carelessness of the servant himself, the crate was overturned. Held, that the employer was not liable, as the acts done were outside the servant's authority. *Jewell v. Grand Trunk Ry. Co.*, 55 N. H. 84.

classed either as acts done by servants or agents under efficient control of the defendants, or as nuisances created upon the premises of the defendants, and causing injury to the plaintiffs.

In *Bush v. Steinman* the servant of the lime-burner was, in no ordinary sense, the servant of the defendant. There was no nuisance on the defendant's land. The lime was not on the defendant's land at all, and he had no control over the person who placed it where it actually was placed. Special facts in *Bush v. Steinman*.

Heath, J., takes the short ground: ¹ "All the sub-contracting parties were in the employ of the defendant." This is almost the terms of a statement of the proposition that a person is answerable for any injury arising in the execution of work which he has employed another to do. Rooke, J., states the same proposition in different words: ² "The person from whom the whole authority is originally derived is the person who ought to be answerable, and great inconvenience would follow if it were otherwise." Judgment of Heath, J., in *Bush v. Steinman*.

This position has long since ceased to be law; though two *Nisi Prius* cases before Lord Ellenborough, gave sanction to it.

In *Sly v. Edgley*,³ defendant, who owned cottages which were subject to be overflowed, employed a bricklayer to sink a sewer in the street. The bricklayer was negligent, and the plaintiff was injured. The defence was that the bricklayer was not the servant to the defendant. Lord Ellenborough is reported to have said: "It was the rule of *Respondeat superior*, what the bricklayer did was by the defendant's direction." Probably this was so; the case would then not differ from *Sadler v. Henlock*,⁴ and may be thus sustained. But the marginal note is: "If a person employs a tradesman to do any work for him, and in the execution of it the tradesman or his servants by their negligence cause an injury to any one, the person employing them is liable for the injury arising from such neglect." This is not borne out by the case as reported; and, if it were, has long since been held to be incorrect. *Sly v. Edgley*.

The other *Nisi Prius* case is *Matthew v. West London Waterworks Co.*⁵ Defendant contracted with pipelayers to lay down pipes for the conveyance of water through the streets of the city. The pipelayers' workmen were negligent; and Lord Ellenborough held that the plaintiffs could recover; though no reason is given. *Matthew v. West London Waterworks Co.*

Maule, J., in *Overton v. Freeman*,⁶ alluding to this decision, says: "It is but a *Nisi Prius* case; the report is short and unsatisfactory; and the particular circumstances are not detailed." Maule, J.'s comment.

*Leslie v. Pounds*⁷ can he maintained altogether independently of *Bush v. Steinman*, and, therefore, lends no support to it. Defendant was the proprietor of a house; Daniels was his lessee, who, for about six months previously to the action being brought, had ceased to occupy in order to have the house thoroughly repaired; the repairs were done at the expense of the lessee, but under the superintendence of the defendant. Defendant had been remonstrated with by the local authority on the dangerous state of a cellar-door opening in the pavement; he had promised to take care of it, and had put some boards over the cavity as a temporary covering. These got displaced; the *Leslie v. Pounds*.

¹ 1 B. & P. 408.

³ 6 Esp. (N. P.) 6.

⁴ 4 E. & B. 570.

⁵ 11 C. B. 867, 872.

² 1 B. & P. 410.

Espinasse is a notoriously untrustworthy reporter.

⁶ 3 Camp. 403.

⁷ 4 Taunt. 649

plaintiff fell into the cellar and was hurt. The Court held that the plaintiff could recover, for "the defendant takes on himself these repairs, not as the agent of Daniels, but as the landlord of the house." The defendant had personally interfered about his own property, and therefore the fact that he had an agreement about it with a third person became immaterial. Neither of the grounds on which *B... v. Steinman* was decided—that all the sub-contracting parties were in the employ of the defendants; and that the case was within the rule of the three authorities¹—has any material bearing on the decision in *Leslie v. Pounds*.

In *Bush v. Steinman*, Heath, J., says: ² "Where a person hires a coachman upon a job, and a job-coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant." This is precisely the point raised in *Laugher v. Pointer*.³ At the trial, Ahhott, C.J., directed a nonsuit. A rule nisi for a new trial was granted. On the argument, the judges differing, the case was directed to be argued before the twelve judges, all of whom, except the Chief Baron, met for that purpose in Serjeant's Inn Hall. Judgment was ultimately given by the judges of the King's Bench; when Littledale, J., and Ahhott, C.J., were for discharging the rule, Holroyd and Bayley, JJ., holding the nonsuit to be wrong. Holroyd and Bayley, JJ., founded themselves on the authority of *Bush v. Steinman*, which was cited for the propositions that "responsibility is not confined to the immediate master of the person who committed the injury, and that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen."⁴ Those propositions being established, it was argued that liability followed.

Laugher v. Pointer.

Judgments of Holroyd and Bayley, JJ.

Judgment of Littledale, J.

Littledale, J., controverts this in two ways—First,⁵ by an examination of authorities tending to show that the owner of the horse would be liable; and (since "the law does not recognise a several liability in two principals who are unconnected") liable to the exclusion of the traveller. Secondly, by drawing the distinction that in *Bush v. Steinman* "the injury was done upon or near and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants or by contractors or their servants."⁶ *Smith v. Lawrence* came before the same Judges that had differed in *Laugher v. Pointer*; the facts were identical, except that the horses were post-horses, and not job-horses. This

¹ *Stone v. Cartwright*, 6 T. R. 411; *Earl of Lonsdale v. Littledale*, 2 H. Bl. 267; *Buller, J.'s case*, 1 B. & P. 408.

² 1 B. & P. 409.

³ (1826) 5 B. & C. 547. The case of charterers of ships and shipowners was referred to in the judgments; with reference to this class of cases, *Fenton v. Dublin Steam Packet Co.*, 8 A. & E. 835, and *Dalyell v. Tyrer*, E. B. & E. 699, may be looked to.

⁴ Per Holroyd, J., 5 B. & C. 567.

⁵ 5 B. & C. 558; *Fletcher v. Braddick*, 2 B. & P. (N. R.) 182. As to this case see the note *ante*, 222. *Nicholson v. Mouncey*, 15 East, 384; *Sammell v. Wright*, 5 Esp. (N. P.) 263; *Dean v. Branthwaite*, 5 Esp. (N. P.) 35.

⁶ L. C. 580. Cp. *White v. Jameson*, L. R. 18 Eq. 303, and *Sarby v. Manchester, Sheffield, and Lincolnshire Ry. Co.*, L. R. 4 C. P. 198.

⁷ (1828) 2 Man. & Ry. (K. B.) 1.

distinction was taken hold of by Bayley, J., as showing that "they are taken never to be out of the possession of their actual owner," and the Court unanimously held the defendant liable.

In *Quarman v. Burnett*,¹ where the horses were job-horses, the view of Littledale, J., and Ahhott, C.J.—viz., that the hirer was not, but the job-master was liable—was adopted, and has since been followed.

The reasons given for the rule of law suggested by Littledale, J., as applicable to fixed property, Parke, B., says "appear to us to be quite satisfactory; and the general proposition above referred to" (i.e., that a person is liable for any injury which arises from the act of another person, in carrying into execution that which that other person has contracted to do for his benefit, and not merely for the acts of his own servant), "upon which only can the defendants be liable for the acts of persons who are not their servants, seems to us to be untenable."

Among the cases referred to in *Quarman v. Burnett* is *Randleston v. Murray*.² A warehouseman employed a master porter to remove a barrel from his warehouse. The master porter employed his own men and tackle; through the negligence of the men the tackle failed, the barrel fell and injured the plaintiff. The argument was that the men whose negligence caused the injury were not the servants of the warehouseman, or that at least the question was for the jury.³ Lord Denman, C.J., considered that, "had the jury in this case been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendants, there can be no doubt they would have found in the affirmative." Littledale, J., probably having in his mind the rule he suggested in *Laugher v. Pointer*, was of opinion that it made "no difference whether the persons whose negligence occasions the injury he servants of the defendant, paid by daily wages, or be brought to the warehouse by a person employed by the defendant." Had the jury taken Lord Denman's view there can be no doubt as to the justice of the decision. It is perhaps with reference to the other view, that the men were not the servants of the warehouseman, that Pollock, C.B., says in *Murphy v. Caralli*:⁴ "The case of *Randleston v. Murray* seems at variance with the current of authority." Lord Denman, in commenting on *Randleston v. Murray* in *Milligan v. Wedge*,⁵ says: "The work was, in effect, done by the defendant himself at his own warehouse; if he chose, instead of keeping a porter, to hire one by the day, he did not thereby cease to be liable for injury done by the porter while under his control." Considered from this point of view, the case accords with the later authorities.⁷

¹ (1840) 6 M. & W. 499. It was attempted to carry the cases somewhat farther in *M'Laughlin v. Pryor*, 4 M. & G. 48, but Tindal, C.J., held that the conduct of the defendant, who sat on the box and assented to the wrongful action of the post-boys, made him *dominus pro tempore*. *Shiells v. Edinburgh and Glasgow Ry. Co.*, 18 Dunlop, 1199, is a Scotch decision in point. See also *Musc v. Stern*, 3 Am. St. R. 77. In *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890, *Quarman v. Burnett* was followed, defendants being held not liable for the negligence of the driver of a water-cart supplied to them with a horse under contract. Grove, J.'s, opinion that there is a difference between the cases of a master lending a general servant for a consideration and lending him gratuitously was overruled in *Donovan v. Laing, Wharton, and Down Construction Syndicate*, (1893) 1 Q. B. 629.

² *Brady v. Giles*, 1 Moo. & R. 494.

³ 6 M. & W. 511.

⁴ 8 A. & E. 109.

⁵ 3 H. & C. 465.

⁶ 12 A. & E. 737, per Lord Denman, C.J., 741.

⁷ In *Peachey v. Rowland*, 13 C. B. 186, Maule, J., says: "*Randleston v. Murray* was not the case of a public wrong, but some one caused a board to fall upon the

Milligan v. Wedge.

*Milligan v. Wedge*¹ marks the first recession from the doctrine advanced by Littledale, J., in *Laugher v. Pointer* (of a special rule attributable to real property) and adopted by Parke, B., in *Quarman v. Burnett*. Referring to the latter case, Lord Denman, C.J., says: "It may be another question whether I should agree in all the remarks delivered from the bench in that case; if I felt any doubt, it would be, whether the distinction as to the law in the cases of fixed and of movable property can be relied upon."

In *Milligan v. Wedge*,¹ the huyer of a bullock employed a licensed drover to drive it. The drover employed a boy. Damage was done by the bullock through the boy's careless driving. The case was argued on the ground taken in *Bush v. Steinman*—"the person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise"²—but the Court adhered to the opinion of Littledale, J., and Ahcott, C.J., in *Laugher v. Pointer*, confirmed by the Court of Exchequer in *Quarman v. Burnett*, and held that the drover was "a person carrying on a distinct employment of his own,"³ and that, unless the relation of master and servant exist between the owner of the bullock and the licensed drover, the act of the one creates no liability in the other.⁴

Martin v. Temperley.

It was sought, but unsuccessfully, to bring the facts in *Martin v. Temperley*⁵ within the rule in *Milligan v. Wedge*. The owner of a barge hired two licensed persons to navigate it; by their negligent management plaintiff's boat was injured. The distinction was taken that in *Milligan v. Wedge* the drover was pursuing a separate trade, while in *Martin v. Temperley* the men were merely servants selected out of a number limited by Act of Parliament, among whom "the defendant had the power of selection, though from a limited number; and no case has gone so far as to decide that the person hired ceases to be the servant of the person hiring if he is necessarily selected from a number, though limited,"⁶

Rapson v. Cubitt.

The decision in *Rapson v. Cubitt*⁷ was entirely on the ground that the relation between the defendant and the person through whom the injury occurred was that of contractor and sub-contractor, and not that of master and servant. Defendant, a builder, was employed to alter a building. He made a sub-contract with a gasfitter, through whose negligence there was an explosion which injured the plaintiff.

plaintiff; it did not appear that the place where the accident happened was a public way; and Lord Denman said there was evidence to go to the jury whether the persons who caused the mischief were the servants of the defendant, employed by him to do the work in the particular way they did. No doubt a man may maintain an action for an injury negligently occasioned to him in a place where he lawfully was at the time, and in some instances, and under some circumstances—as in the much-contested cases of the dog-spears and the spring-gun—in places where he was trespassing."

¹ 12 A. & E. 737, per Lord Denman, C.J., 740. ² 1 B. & P., per Rooke, J., 410.

³ Per Littledale, J., *Laugher v. Pointer*, 5 B. & C. 555.

⁴ See, too, *Cuthbertson v. Parsons*, 12 C. B. 304, where commissioners under an Act of Parliament entered into an arrangement with steamboat proprietors to provide boats. Held, that the commissioners were not liable on the occurrence of an accident. *Cuthbertson v. Parsons* is decided on its special facts, and does not seem to elucidate any principle.

⁵ 4 Q. B. 298. *Slater v. Mersereau*, 64 N. Y. 138; also a curious case where defendant, an undertaker, was sued for damage done to plaintiff by a carriage in the procession owned by the driver; the driver was held to be a sub-contractor: *Boniface v. Relyea*, 6 Rob. (S. C. N. Y.) 397; 36 How. (N. Y.) Pr. 457. The Scotch Court of Session, in *M'Lean v. Russell*, 12 Dunlop, 887, dissented from *Bush v. Steinman*, and followed *Rapson v. Cubitt*.

⁶ Per Patteson, J., 4 Q. B. 310.

⁷ (1842) 9 M. & W. 710.

Parke, B., said: "The true rule on this subject was laid down by this Court in the case of *Quarman v. Burnett*, which is directly in point, and cannot be distinguished from the present case. The Court there said: The liability by virtue of the principle of relation of master and servant must cease when the relation itself ceases to exist; and no other person than the master of such servant can be liable on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable." Parke, B., takes the occasion to reiterate his adhesion to Littledale, J.'s, doctrine with reference to a different rule being applicable to real and to movable property. It would seem, that on this principle an action was maintainable against the builder's employer; unless the plaintiff, being their servant, were disentitled to bring it.

Liability is dependent on the existence of the relation of master and servant.

In *Burgess v. Gray*¹ the facts bore a great resemblance to *Bush v. Steinman*. The owner of premises adjoining a highway employed one Palmer to make a drain. Palmer's men put gravel on the highway, in consequence of which the plaintiff was injured. The question was whether there was evidence that the defendant "sanctioned the placing of the nuisance on the road";² the Court held that there was. The case is important as showing an anxiety not to have the decision on the controverted doctrine of *Bush v. Steinman*, and to prefer the simpler and more indubitable ground that the defendant had, by his acts, made an admission that he was exercising dominion.

Burgess v. Gray.

*Allen v. Hayward*³ is another case where the wrongful act was done in relation to real property, yet the Queen's Bench held the defendants not liable. "On a careful reference," says Lord Denman, C.J., "to *Laugher v. Pointer*⁴ (in which the opinions delivered by Lord Tenterden and Littledale, J., must be taken to lay down the correct law), *Randleson v. Murray*,⁵ *Quarman v. Burnett*,⁶ *Milligan v. Wedge*,⁷ and *Rapson v. Cubitt*,⁸ it seems perfectly clear that, in an ordinary case, the contractor to do works of this description [i.e., the diversion of a creek] is not to be considered as a servant, but a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them."⁹

Allen v. Hayward.

We have seen that the original ground on which *Bush v. Steinman* was decided—that the person from whom the whole authority is originally derived is the person who ought to be answerable—has, on nearly every occasion on which it has been alluded to, been reflected on.

In *Reedie v. L. & N. W. Ry. Co.*¹⁰ the alternative suggested by Littledale, J., came up for discussion—whether where a man is in possession of fixed property he must take care that his property is so used or managed that other persons are not injured, and that irrespective of

Reedie v. L. & N. W. Ry. Co.

¹ (1845) 1 C. B. 578.
² (1840) 7 Q. B. 960.
³ 8 A. & E. 109.
⁴ 12 A. & E. 737.
⁵ Per Cresswell, J., 593.
⁶ 5 B. & C. 547.
⁷ 6 M. & W. 499.
⁸ 9 M. & W. 710.

⁹ For Scotch cases see *Nisbett v. Dixon*, (1852) 14 Dunlop 973; *Cleghorn v. Taylor*, (1856) 18 Dunlop 664, commented on in *Campbell v. Kennedy*, 3 Macph. 121, and *Laurent v. Lord Advocate*, 7 Macph. 607.
¹⁰ (1849) 4 Ex. 244. See two American cases, *McCullough v. Shoneman*, 105 Pa. St. 169; *Stevens v. Armstrong*, 6 N. Y. 435, and a Canadian case, *Kearney v. Oakes*, 18 Can. S. C. R. 148.

Rolfe, B.'s
Judgment.

whether his property be managed by his own immediate servants or by contractors with them or their servants. A railway company contracted for the construction of a bridge over a highway. The contractor's workmen negligently allowed a stone to fall, which killed a person passing beneath the bridge. Rolfe, B., delivered the considered judgment of the Court of Exchequer—Parke, B. (who had on several occasions expressed approval of Littledale, J.'s, suggested distinction) having been present and taken part in the argument: "On full consideration, we have come to the conclusion that there is no such distinction [i.e., between the liabilities attaching to movable and the liabilities attaching to real property] unless, perhaps, in cases where the act complained of is such as to amount to a nuisance;¹ and, in fact, that, according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the Court proceeded." In some cases it may be that the owner of real property is so responsible.

Application
of the rule to
the case of
real property.

"But then, his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law *sic utere tuo ut alienum non ledas*. This is referred to by Cresswell, J., in delivering the judgment of the Court of Common Bench in *Rich v. Basterfield*,² as the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which property is enjoyed." "The wrongful act here could not in any possible sense be treated as a nuisance. It was one single act of negligence; and in such a case there is no principle for making any distinction by reason of the negligence having arisen in reference to real and not to personal property." A subsidiary point, decided by *Reedie v. L. & N. W. Ry. Co.* should be noticed. By the contract for the construction of the works the railway company had the power of removing workmen appointed by the contractor, who was yet not considered under their control. We must conclude from the case that a provision of this description does not make the owner of the property responsible for the workman's negligence.

Power of
removing
contractor's
workmen does
not render
employer
liable.

Another proposition involved in *Reedie v. L. & N. W. Ry. Co.* is, that the rule of *Respondet superior* is applicable only to the immediate superior of the person who does the injury, and that there can be no more than one such responsible superior for the same subordinate at the same time and in respect of the same transaction.

Knight v.
Fox.

In *Knight v. Fox*,³ which followed *Reedie v. L. & N. W. Ry. Co.*, the distinction was taken that the contractor was the servant of the defendants, as he was paid an annual salary. The defendants had entered into a distinct contract, by which their general servant had specifically agreed to supply scaffolding for a fixed sum, independent of his general salary. The accident arose from a defect of this scaffold.

¹ "That means a nuisance as connected with a man's house or with his fixed property," per Parke, B., *Knight v. Fox*, 5 Ex. 724. Butt, J., in *The European*, 10 P. D. 101, seems unconscious that the views of Parke, B., in *Quarman v. Burnett*, have been subverted by subsequent decisions.

² 4 C. B. 802.

³ (1850) 5 Ex. 721.

The Court defined the question for decision to be whether the negligent act by which the injury was occasioned to the plaintiff was done in the capacity of the defendants' servant, or whether the admittedly general servant of the defendants "was acting in the character of a sub-contractor," and "did the work on his own individual account."¹ *Overton v. Freeman*² was governed by *Knight v. Fox*, from which the Court said they were unable to distinguish it; and *Peachey v. Rowland*³ merely added to the number of authorities. Maule, J.,⁴ in the course of the argument in that case, thus limits his view of the absolute liability of contractors: "If the thing complained of—that is, the work which the defendants procured to be done—could not be done otherwise than in an unlawful manner, no doubt they would be responsible for the consequences."

Double capacity—servant and contractor.

Overton v. Freeman.
Peachey v. Rowland.

The soundness of this limitation was questioned in *Ellis v. Sheffield Gas Consumers' Co.*⁵ Defendants made a contract to break open streets for the purpose of laying gas-pipes. There being no legal excuse for breaking open the streets, the work involved creating a public nuisance. An accident having happened, the objection was taken that the cause was the negligence of the servants of the contractors. To this Lord Campbell said: "Mr. Jones argues for a proposition absolutely untenable, namely, that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. I perfectly approve of the cases which have been cited.⁶ In those cases the contractor was employed to do a thing perfectly lawful: the relation of master and servant did not subsist between the employer and those actually doing the work; and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do, and, that being lawful, he was not liable at all. But in the present case the defendants had no right to break up the streets at all." "It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done." The rest of the Court concurred.⁷

Where the work cannot be done otherwise than in an unlawful manner.

Ellis v. Sheffield Gas Consumers' Co.

In *Gayford v. Nicholls*⁸ the defendant contracted with a builder to erect buildings on the border of his land, which abutted on land and certain modern buildings of the plaintiff. In doing the work the plaintiff's wall was thrown down, and bricks and other material fell upon defendant's land and were carted away by the contractor's workmen. The County Court judge at the trial said: "If the jury should be of opinion that the workmen, whilst they were on the land by the defendant's permission, had from want of due care injured the

Gayford v. Nicholls.

¹ L.c., per Alderson, B., 725.
² (1853) 13 C. B. 182. The marginal note in this report states the principle of the decision too generally; per Lord Campbell, *Sadler v. Henlock*, 4 E. & B. 573.
³ L.c. 185.
⁴ (1853) 2 E. & B. 767. The same point is decided in *Congreve v. Morgan*, 5 Duer (N. Y.) 495, affirmed *sub nom. Congreve v. Smith*, 18 N. Y. 79. See *ante*, 416.
⁵ *Knight v. Fox*; *Overton v. Freeman*; *Peachey v. Rowland*.
⁶ The Canadian case of *Walker v. McMillan*, (1882) 6 Can. S. C. R. 241, is on a similar point. Defendant was there held liable for his contractor's act because the work executed was itself illegal. Gwynne, J., however, dissented in a judgment, where he reviews both the English and American authorities.
⁷ (1854) 9 Ex. 702.
⁸ L.c., per Parke, B., 708.

plaintiff's property, or had carried away the plaintiff's materials, the defendant would be liable for those acts." This was held a misdirection. Parke, B., said: "I am clearly of opinion that no action would lie against him unless he carried away the materials himself, or unless that was done by some servant authorised by him to do so as his servant."

Sadler v. Henlock.

An attempt was made in *Sadler v. Henlock*¹ to carry the reasoning applicable to independent employment to an extreme by treating as a contractor a common labourer employed for five shillings to clean out a ditch. To this Lord Campbell, C.J., answers:² "The defendant might have said: 'Fill up the hole in the road, but not as you are now doing it, lest when a horse goes over the place he may be injured.' Pearson was therefore the defendant's servant, and if so *cadit questio*." The practical effect of this decision—though this is not absolutely expressed—is, that the whole circumstances of the employment must be looked to, and that the real effect of the actual relation existing must not be lost sight of, by seizing on the circumstance of a special payment or a special term, such as a provision for supervision or for dismissal, that does not go to the root of the relation.³ In short, as Crompton, J., put it, the question is,⁴ "Whether the defendant retained the power of controlling the work?"

Steel v. S. E. Ry. Co.

*Steel v. S. E. Ry. Co.*⁵ is another illustration of the principle. The work being done under a contract and no negligence being shown, the fact that the defendants' surveyor directed the thing to be done was treated as an immaterial circumstance, there being a contract regulating what was done.

Hired plant or material.

There is no liability on the part of the owner where plant or material has been hired (and with it the men who have charge of the working while in the use of the owner), when an injury occurs through negligence while in charge of the hirer;⁶ and it has been decided, and is self-evident, that where such an accident occurs and the owner's men have not ascertained for themselves the safety of a direction given to them in the course of the work, by the person entrusted with the duty of

¹ (1855) 4 E. & B. 570. See *Martin v. Temperley*, 4 Q. B. 312: "It is said that a difference arises where the workman is paid so much for doing the whole job. But the defendant might pay either for a given time or a given work; and the men here were as much under the defendant's control as a gentleman's coachman is under that of his master." Cp. *Donovan v. Laing, Wharton, and Down Construction Syndicate*, (1893) 1 Q. B. 629, and the American cases, *Morgan v. Smith*, 159 Mass. 570, and *Charlock v. Freed*, 125 N. Y. 357, where the test question is said to be, Had the defendant the right to control in the given particular, the conduct of the person doing the wrong.

² 4 E. & B. 577.

³ As was said in *Cuff v. Newark and New York Ry. Co.*, 6 Vroom (N. J.), 17, cited in Bigelow, L.C., on Torts, 654: "The point of inquiry was not under what circumstances was the owner, who lets the particular contract, exempt from liability for the negligence of the employees of the contractor. The question of liability depended upon the relation of master and servant, incident to which was the power to select the servant, direct him in the performance of his work, and to discharge him when found incompetent; and also the duty to so control his acts that no injury might be done to third persons."

⁴ 4 E. & B. 578.

⁵ (1855) 16 C. B. 550. The head-note of this case is incorrect. The ground of the decision is that if the direction given by the company's superintendent had been obeyed by the contractor's men, the damage complained of would not have occurred: see per Jervis, C.J., 552.

⁶ *Donovan v. Laing, Wharton and Down Construction Syndicate*, (1893) 1 Q. B. 629; *Oldfield v. Furness, Withy & Co.*, 9 Times L. R. 515 (C. A.); *Murray v. Currie*, L. R. 6 C. P. 24; *Wallis v. Hinc*, 4 Times L. R. 472 (C. A.); *Union Steamship Co. v. Charidg.*, (1894) A. C. 185, discussed by Williams, L.J., *Marrow v. Flimby, &c. Co.*, (1898) 2 Q. B. 607.

giving, or abstaining from giving, the order (in the actual case the hirers), there is no liability on the owner; since the giver of the order has the duty of seeing to the propriety of it.¹

*Jones v. Scullard*² has a certain superficial resemblance in its facts to *Quarman v. Burnett*. The livery-stable keeper supplied the coachman, but the defendant used his own brougham, horse and harness; he provided the livery worn by the coachman, who had never before driven the horse supplied. Lord Russell of Killowen, C.J., distinguished the cases and concluded: "The principle, then, to be extracted from the cases is that, if the hirer simply applies to the livery-stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to me to be altogether a different case where the brougham, the horse, the harness and the livery are the property of the person hiring the services of the driver"; in a case of that sort there is at least evidence to warrant a jury in concluding that the driver is the servant of the hirer and not of the livery-stable keeper. In *Waldock v. Winfield*³ the conclusion was the other way. There was a contract under the terms of which the Court of Appeal held that the defendant who had contracted with ironfounders to do their cartage was liable for the driver's negligence while engaged in the work. No new view of law was expressed. On the facts the Court were satisfied that defendant had not parted with the control.

"The right to take the work out of a man's hands is one thing; the right to say that he is to continue the work and direct him during its continuance is another. It is only in the latter case the right to control exists, and the existence of that right is the test of liability."⁴

The distinction between the liability of one who contracts to do a thing, and that of one who merely receives a delegation of authority to act for another, is fundamental. If an agency is an undertaking to do the business, and the contract looks mainly to the thing to be done, and is for the due use of all proper means of performance, the responsibility of the agent extends to all necessary and proper means to accomplish the object by whomsoever used. But if the agency is no more than a delegation of authority to act for another, and provides only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility of the agent ceases with the limit of the personal services undertaken.⁵ It has also been decided that a stipulation that work shall be done to the satisfaction of the employer's engineer is not evidence of such an assumption of a right to control the details and method of doing work as will render the principal liable for the negligent way of doing the work by the sub-contractor or his servant.⁶

Distinction between an agent to complete work and agent to whom an authority to act is delegated.

¹ *Wilson v. Caledonian Ry. Co.*, 24 Sc. L. R. 540.

² (1898) 2 Q. B. 565, (distinguished in *Dewar v. Tasker*, 22 Times L. R. 303, which was over-ruled in C. A. 23 Times L. R. 259), but followed in *Perkins v. Stead*, 23 Times L. R. 433.

³ (1901) 2 K. B. 596, 709.

⁴ Per Williams, J., *Paterson v. Fleming*, 23 N. Z. L. R. 676.

⁵ *Exchange National Bank v. Third National Bank*, 112 U. S. (5 Davis) 276. For a collection of the cases on the principle that for the acts of a sub-agent the principal is liable, but for the acts of the agent of an independent contractor he is not liable, see Story on Agency, § 454.

⁶ *Powell v. Construction Co.*, 17 Am. St. R. 925.

CHAPTER IV.

MASTER'S DUTY TO HIS SERVANT.

Master's liability to his servant not based on any peculiar principle.

It is often said that the liability of the master for accident happening to his servant has been treated on too narrow a basis. Liability is not traceable to principles peculiar to the relation of master and servant; it is rather referable to the wide common law generalisation that where fault is there is liability: *culpa tenet suos auctores tantum*; and in the absence of fault there is, *prima facie* at any rate, an absence of liability.¹

Constructive fault.

The law, it is true, in some cases fixes a sort of constructive fault which carries with it liability even where superficially there is no imputation of blame. Nevertheless the broad rule is that unless fault is shown there is no liability; and that loss lies where it falls. For example, the duties of an owner of fixed property, in respect of the condition of that property, arise out of general principles that govern all legal relationships, and not out of a contract or any special relation with the person injured.² So, too, when we turn to those special duties which the law casts on masters with regard to the safety of their servants, while working upon premises, or with machinery, we see that they are only a class of duties, considered more in detail, or on which more attention is concentrated as more frequently arising, that fall under the principle which governs the master's relations to the world at large that where fault is there is liability.

View that the master's liability arises from the terms of the contract as made with the servant.

A common view is, that the liability of the master arises from the contract made with the servant; but the *contract* is evidenced by the terms of it, and the terms of providing against danger or accident seldom, if ever, appear. Then it is contended, that the requisite *terms* to effect the object in view are implied. But why? in what way? And, if implied, why is not every duty from the master to the servant implied? Such a method of interpretation will extend the law of contracts indefinitely, and will cause needless complications in what is, after all, a simple matter. The master is liable to the servant in the terms of the contract; and further, he is liable in respect of those occurrences which take their rise from the existence of the contract just as if no contract existed and the rights of the parties were regulated by the general rules of the common law.

For example, as regards the liability of the master for his personal negligence, or for the condition of premises or machinery, it is com-

¹ Cp. Pollock and Maitland, *Hist. of Eng. Law*, 2nd. ed. vol. ii. 528.

² *Ferrier v. Trepannier*, 24 Can. S. C. R. 86, 101.

prehended in the few simple principles that regulate his liability with regard to the outside world. The master is liable for personal negligence whereby hurt is caused to his servant; so is one servant liable for injury caused to another servant; so is the master for his own personal negligence to the world at large. The master further is liable when he knows, or should know, that his premises or machinery are unsafe, and when the servant is ignorant of the fact;¹ so is the master to the outside world when an accident happens from their leaving business relations with him. In short, the duty which the master owes the servant is just the same that he owes to every other person with whom he has business relations; he must not conceal from him dangerous circumstances which, if known, might cause him to alter his position, nor personally be negligent in any respect.

Master's duty the same as that which he has to the world generally,

For damage caused by the ordinary risks of the employment the master is not liable at common law. First, because there is no fault of the master; second, because the risk arises out of the very thing to be done—the coming in contact with agencies that may be dangerous and men who may be negligent, with respect to which the master can exercise no protective power, or does not contract to do so; third, because workmen undertaking a work must be supposed to have a prevision of its ordinary risks as well as of its labours, and as they secure by their engagements remuneration for the one, they must be held to secure insurance in their wages against the other. Or, to state the matter more briefly, there are two presumptions made in actions arising out of alleged breach of duty by the master to the servant in the circumstances of his work. First, that the master has discharged his duty by providing suitable appliances for the business. Second, that the servant has assumed all the usual and ordinary hazards of the business. And till one of these at least is displaced by evidence an action cannot be maintained by a servant against a master for injury suffered in the course of his employment; that is, such an action cannot be maintained at common law and independent of statutory modification. Bearing in mind these cautions, then, we have now to consider those cases which work out the duty owing to the servant by the master in respect (1) of the dangerous condition of property, machinery, or tools, and (2) of his own personal negligence.

but not liable to the servant for damage caused by the ordinary risks of the employment.

I. THE DUTY OWING TO THE SERVANT BY THE MASTER IN RESPECT OF THE DANGEROUS CONDITION OF PROPERTY, MACHINERY, OR TOOLS.

I. Duty owing by the master to the servant in respect of the dangerous condition of property, machinery, or tools.

Two Scotch cases in the House of Lords, *Paterson v. Wallace*,² and *Brydon v. Stewart*,³ first authoritatively elucidate this principle. In

¹ *Griffiths v. London and St. Katharine Docks Co.*, 13 Q. B. D. 259; *Groves v. Fuller*, 4 Times L. R. 474.

² (1854) 1 Macq. (H. L. Sc.) 748. In *Vose v. Lancs. & Y. Ry. Co.*, 2 H. & N. 732. Pollock, C.B., commenting on Lord Cranworth's statement—"It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so; and if from any negligence in this respect damage arises, the master is responsible"—says: "That is merely the *dictum* of the Lord Chancellor in a Scotch case, not a decision of the House of Lords." The law has, however, long been so established.

³ 2 Macq. (H. L. Sc.) 30.

Paterson v. Wallace.

Paterson v. Wallace, the cause of action was that the husband of the pursuer had lost his life by reason of the masters' negligence, in having carelessly left a large stone on the roof of a mine in so dangerous a position that it fell on the workman while engaged in digging out coal, and killed him.

Two propositions to be established to fix liability.

The House of Lords held that the pursuer to succeed must establish two propositions. First, that the stone was dangerous owing to the negligence of the master; secondly, that the workman whose life was forfeited, lost it by reason of that negligence, and not by reason of rashness on his own part.

Paterson v. Wallace discussed.

As to the first point. It is good law, said Lord Cranworth, C.,¹ that if "the defenders' manager had failed in his duty in timeously directing the stone in question to be removed, it would afford no defence that Paterson [the deceased] continued to work after the orders for the removal of the stone had been ultimately given."

Dictum of Lord Brougham.

The decision of the House of Lords turned on the fact that the case had been withdrawn from the jury by the Lord Ordinary, who himself decided the fact against the pursuers, that the death was occasioned by the workman's own rashness. The House pointed out that the case was not to be disposed of without findings by the jury, and indicated the issues that must be submitted to them. In the course of the argument, Lord Brougham remarked: "Workmen in mines are proverbially reckless. This makes it incumbent on the masters of such men to be more than ordinarily careful": a *dictum* probably based on the opinion of the Lord Justice-Clerk Hope, who in the Court below said: "We have had occasion to lay down the doctrine that mere rashness on the part of the workmen would not exclude a claim of reparation if the employer had neglected his duty."² In moving the judgment of the House the Lord Chancellor notices this: "It is said that by the law of Scotland the master is bound to provide against the rashness of his workmen; and I see in one of the learned judges' opinions an expression which might give countenance to such a notion. But with great deference to that learned judge, I apprehend the proposition is one which, as matter of law, can never be sustained. In England, in Scotland, and in every civilised country, a party who rashly rushes into danger himself, and thereby sustains damage, cannot say to the master, 'This is owing to your negligence.' As a question of fact it may very well be laid down that that which would be reasonably treated as rashness in other persons might not be treated as rashness in a workman, if the master knew that the rashness was of a kind which workmen ordinarily exhibit; and that, perhaps, was all the learned judge meant."

Lefroy, C.J., in Potts v. Plunkett.

Some expressions dropped in this case have been alleged to be inconsistent with the rule first laid down in *Priestley v. Fowler*;³ and in *Potts v. Plunkett*,⁴ Lefroy, C.J., is reported as saying: "The decision in that case [*Paterson v. Wallace*] did not rest upon any supposed warranty on the part of the employer, but upon the fact that the employer virtually knew and was aware of the cause by which the mischief which occurred was occasioned; because the person to whom he had delegated the superintendence of the mine was called upon and warned, by the persons employed in the mine, of the danger to which

¹ 1 Macq. (H. L. Sc.) 757.

² Referred to in a note to 1 Macq. (H. L. Sc.) 753.

³ 3 M. & W. l.

⁴ 9 Ir. C. L. R. 290, 299.

they were exposed from the stone overhanging their heads, the fall of which ultimately occasioned the accident which happened. . . . The superintendent, however, disregarding that warning, compelled the men under him to go on with the work; and as the master is liable, as a matter of course, for the acts and defaults of those whom he places in his stead, and to whom he deposes his authority, in that case the master was properly held liable." This is manifestly an inaccurate statement of the law; for had the superintendent been negligent, the negligence would have been that of a fellow servant within the rule, and the employer would not have been liable; and further, the authority of *Priestley v. Fowler*, though saved by the interpretation of the C.J. from destruction in one way, would to a great extent have perished through the interpretation that was to have saved it.¹

Criticised.

The real ground on which *Paterson v. Wallace* was decided is better stated in the argument than in the judgment in *Potts v. Plunkett*. In *Paterson v. Wallace* the employers ought to have known that the condition of the works was insecure; for the jury found the death was occasioned by the unsafe state of the roof of the mine, and the negligence or unskillfulness of the owners in having left it so when the workmen were sent to work there. Had there not been the finding of the jury, the case might have been considered to conflict with certain aspects of *Priestley v. Fowler*. The finding of the jury brought it under the limitation of that rule which excepts matters in which the employer has a personal responsibility. The master is not liable for the negligence of his superintendent; but he is bound to see that his works are suitable for the operations he carries on at them; and he cannot, by leaving the supervision of his works to his superintendent, escape liability: for the duty is one of which he cannot divest himself. If the superintendent is negligent the master is not answerable for the superintendent's negligence if he has done his best to secure one who is competent and has secured one whom he thinks to be so. If the appliance he supplies for working are not reasonably suitable, the neglect is the master's. That this was the law before the decision in *Smith v. Baker* may have been arguable, but the acceptance there of the proposition that "a master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used"² appears to be final; and does not conflict with Lord Cairns, C.'s, *dictum*.³ "The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work," is not inconsistent with the master's indefeasible personal liability for the securing an efficient scheme and appliances of work any more than a trustee's duty to consult experts in making his investments exclude his duty to apply his own personal judgment in their selection.⁴ Yet, if the appliances with which the men have to work are not reasonably suitable, the neglect is the master's.

Ground of decision in *Paterson v. Wallace*.

Master bound to see to the suit-ability of his works for the operations to be carried on at them.

¹ See *Wilson v. Merry*, L. R. 1 Sc. App. 326.

² Per Lord Watson, (1891) A. C. 353.

³ *Wilson v. Merry*, L. R. 1 Sc. App. 332.

⁴ *Learoyd v. Whiteley*, 12 App. Cas. 727. The point is fully discussed *Canada Woollen Mills v. Traplin*, 35 Can. S. C. R. 424.

Paterson v. Wallace compared with *Hall v. Johnson*.

The decision in *Paterson v. Wallace* may be better appreciated by comparing it with *Hall v. Johnson*¹ in the Exchequer Chamber. The facts are almost identical. The second count of the declaration set out that the defendants neglected to see that "the person by them employed to see that the roof of the mine was made secure for the safety of the plaintiff should be a fit person to be so employed." As to this the judgment of the Exchequer Chamber² is that there was no evidence of such neglect, and that the fact that the person chosen was negligent was not sufficient, since it was only the negligence of a fellow servant; and that did not import liability. There was also a count—and it is in this that the likeness to *Paterson v. Wallace* consists—setting out that "the plaintiff was employed by the defendants to work for them in an underground passage in a coal mine which the defendants possessed, which passage was dangerous and unsafe for the plaintiff to work in, on account of the roof of the passage being liable to fall down upon him while he was so working, unless reasonable and proper care and precautions were taken by the defendants to prevent such roof from falling, of all which premises the defendants had notice and knowledge." The evidence did not sustain this, as it showed that "the mine had been worked in the ordinary course for the last six years."³ The distinction between the two cases is thus clear. In *Paterson v. Wallace*, there was a question for the jury whether the master had been personally negligent in respect to the condition of the works, raised by the presence of facts that were consistent with negligence; in *Hall v. Johnson*, from the admitted facts, the master could not be presumed to be personally negligent, for "the mine had been worked in the ordinary course for the last six years." The negligence proved was the negligence of a workman not shown to be incompetent; therefore the employer was not liable. It is true that in *Paterson v. Wallace*, as in all the earlier cases, expressions occur which must be referred to the very indeterminate notions prevalent as to the responsibility of the employer for the negligence of a superintendent (this is true also of *Hall v. Johnson* itself); but the real ground of decision is, that there was an allegation of the personal negligence of the master, and facts that required to be determined by a jury in the one case; while in *Hall v. Johnson* no such facts existed, or were offered to be proved.

Brydon v. Stewart.

The second case, *Brydon v. Stewart*,⁴ raised the point of the master's responsibility for defective machinery occasioning injury to workmen while pursuing their own affairs and apart from the work for which

¹ 3 H. & C. 589. ² Delivered by Erle, C.J. ³ Per Erle, C.J., 3 H. & C. 594.

⁴ (1855) 2 Macq. (H. L. Sc.) 30. Cp. *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291. Plaintiff was returning from work in a "pick-up train" when injured. Held, that he was injured while in the service of his employer, "for it was part of his contract that he was to be carried by the train to and from the place where his work happened to be." The same point is raised by two American cases, *Gillshannon v. Stony Brook Rd. Corporation*, 64 Mass. 228, and *Russell v. Hudson River Rd. Co.*, 5 Duer. (N. Y.) 39. The former of these is consistent, the latter inconsistent, with the English case. In *O'Donnell v. Allegheny Valley Rd. Co.*, 59 Pa. St. 239, the principle was formulated that the workman has the rights of a passenger if he gives consideration for his carriage. Cp. *Rohl v. Metropolitan Ry. Co.*, 7 Times L. R. 2. The effect of the distinction ought to be pointed out. If the person carried is a passenger, the carrier is answerable for any injury happening through a want of the highest degree of care. If he is a servant the degree of care owing is but ordinary. If the workman travelling was doing so for his own purposes, and the right of the master to exact performance of services was in abeyance, the workman is a passenger and not a servant; *Dickinson v. West End Street Ry. Co.*, (1901) 177 Mass. 365; *McNulty v. Pennsylvania Rd. Co.*, 152 Pa. St. 479.

they are engaged by him. Men were leaving a mine, without working, from no apprehension of danger, and of their own accord, for a purpose of their own, against their employer's interest, and in a hody, in order to make some complaint tell more effectually with the manager of the defendant, and not in the course of their ordinary occupation; while they were leaving the accident happened. The House of Lords decided that the master who let the men down was hound to bring them up, even if they come up for their own business and not for his, and is answerable for the state of his tackle.

The principle established by these cases is that when a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks,¹ or as the law was expressed by Lord Wensleydale in another Scotch case in the House of Lords: "All that the master is hound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen in a fit and proper manner."

Principle stated.

The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him, as towards them, to keep the work, which they are actually engaged in constructing, in a safe condition through all its stages and at every moment of their work.² Neither is he hound to furnish the completest possible sets of tools or appliances. When he has furnished his workmen "with tools and appliances, which though no the best possible may, by ordinary care, be used without danger, he has discharged his duty and is not responsible for accidents."⁴ In another case it is said: "The test is general use,"⁵ and in a still later case,⁶ the employer's duty was limited to providing machinery, "such as is ordinarily used by persons in the same business and such as can with reasonable care be used without danger to the employe"; which if done, "is all that is required of the employer and is the limit of his responsibility." And again,⁷ employers are "hound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter."

Obligation of master as to condition of work in course of construction

and to provide plant and machinery such as is in ordinary use in the same business by reasonably careful men.

This obligation is affirmed in a succession of American cases too numerous to quote, throughout the whole breadth of the continent; and the test of fitness deduced by an author in whose work they are collected and passed in review is "not that others use like tools and machinery, but to consider whether they are reasonably safe and suitable for the work to be done, and such as a reasonably careful man would use under like circumstances."⁸ This seems preferable to the view that general use is the test; for a general conspiracy of employers might possibly exist in certain trades to use a particular kind of

General use in itself is not the test.

¹ *Bartonshill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.), per Lord Cranworth, 288. Byles, J., in *Searle v. Lindsay*, 11 C. B. N. S. 439, after quoting the sentence in the text, adds: "That is the extent of the master's responsibility. The obligation the law casts upon him is to take due and proper care that his machinery is sufficient and his workmen reasonably competent." Cp. *Cairns v. Caledonian Ry. Co.*, 18 Rottie, 618.

² *Weems v. Mathieson*, 4 Macq. (H. L. Sc.) 215, 227; *McKinney v. Irish N. W. Ry. Co.*, Ir. R. 2 C. L. 600, on demurrer in Irish Ex. Ch.

³ *Armour v. Hahn*, 111 U. S. (4 Davis) 313, 318.

⁴ *Pittsburgh, &c. Rd. Co. v. Sentmeyer*, 92 Pa. St. 276.

⁵ *Iron-Ship Building Works v. Nuttall*, 119 Pa. St. 149, 158.

⁶ *Lehigh, &c. Coal Co. v. Hayes*, 128 Pa. St. 294, 15 Am. St. R. 680.

⁷ *Washington, &c. Rd. Co. v. McDade*, 135 U. S. (28 Davis) 554, 570.

⁸ *Thompson, Negligence*, § 3989.

No duty to adopt the latest inventions in machinery or the newest processes.

Question for jury.

Duty of the master with regard to the use of machinery and appliances.

Juries not to impose a standard, but to affirm whether the ordinary standard has been attained.

machinery, when a safer method, procurable at a reasonable price, was generally known. If the one method were associated with danger and the other with safety, universality of use, though an important element in fixing the standard of duty, would certainly not be conclusive; while again machinery, though not in general use, reasonably safe in the using would satisfy the law's requirements.¹ An employer is not hound to adopt the latest inventions in machinery or the newest processes in work; to discard an old machine for a new invention.² If there is deterioration he must see to it, but if not he is not hound to discard it, though antiquated.³ "Every manufacturer has a right to choose the machinery to be used in his business, and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances, and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, or occupy an old or new house as he pleases. The employee, having knowledge of the circumstances, and entering his service for the stipulated reward, cannot complain of the peculiar taste and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service."⁴ The question for the jury is not whether the master could have taken a precaution that would have prevented the injury; but, the circumstances being such as they were, was there any lack of the exercise of ordinary care and precaution in dealing with them? Was the machinery for its kind in good condition and safeguarded?⁵

The obligations of the master with regard to the use of machinery and appliances are so forcibly set out in an American case⁶ that they may very profitably be inserted here. The master, it is said, performs his duty when he furnishes machinery "of ordinary character and reasonable safety, and the former is the test of the latter; for in regard to the style of implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to

¹ *Williams v. Birmingham Battery & Metal Co.*, (1899) 2 Q. B., per Romer, L.J., 345.
² *Clarke v. Holmes*, 7 H. & N. 937; *Race v. Harrison*, 9 Times L. R. 567, 10 Times L. R. 92; *Gill v. Thornycroft*, 10 Times L. R. 316.

³ *Hanson v. Lancs. & Y. Ry. Co.*, 20 W. R. 297; *Wisely v. Aberdeen Harbour Commissioners*, 14 Rettie, 445.

⁴ *Hayden v. Smithville Manufacturing Co.*, 29 Conn. 548, 558, approved; *Tuttle v. Milwaukee Ry. Co.*, 122 U. S. (15 Davis) 194. The same is laid down for law in Scotland, *M'Gill v. Bowman*, 18 Rettie, 206.

⁵ Cf. *Labatt, Master and Servant*, 86; *Moore v. Ross*, 17 Rettie, 706; *Mitchell v. Patullo*, 23 Sc. L. R. 207; *Noonan v. Dublin Distillery Co.*, 32 L. R. Ir. 399.

⁶ *Titus v. Bradford, &c. Rd. Co.*, 130 Pa. St. 618, 626, 20 Am. St. R. 944.

set up a standard which shall, in effect, dictate the customs or control the business of the community."

Some *dicta* in the Privy Council in *McArthur v. Dominion Cartridge Co.*¹ may not impossibly be cited as adverse to the well-settled law we have been considering. The appellant was injured by an explosion at the respondents' works, where he was engaged filling shells or cartridges with powder and shot. The work was done with an automatic machine. The design was that each cartridge as loaded "should be clutched by automatic fingers and carried off to another part of the machine and there presented, sitting upright on the inside edge of a hollowed cup, to receive the blow or punch which would complete the operation." Cartridges were sometimes, through irregularity of working the machine, presented in a wrong posture. "It seems to be a not unreasonable inference from the facts proved that in one of these blows that failed, a percussion cap was ignited and so caused the explosion." As the jury negatived negligence of the appellant "there was no other reasonable explanation of the mishap." The machine used was an invention apparently for this particular factory. The inventor was called and spoke, as might have been anticipated, in the highest terms of his invention. No more efficient way of doing the work seems to have been suggested, and save for the occasional "uncertain" or "erratic manner" of working of the "automatic fingers" no fault was alleged against the machine, unless indeed the complaint that "the box had been strengthened externally" may be so considered. Respondents' witness said that improvements were being introduced in a machine which was being constructed in substitution of the one in use. But there was no evidence of any complaints of the one in use or persistence in using a dangerous machine where one less dangerous might be substituted. The work of punching cartridge by any method was obviously very dangerous. The jury found that the explosion occurred through neglect of the respondents "to supply suitable machinery" and "to take proper precautions to prevent an explosion." Lord Macnaghten, delivering the judgment of the Privy Council, allowing the workman's appeal from the Supreme Court of Canada, which entered judgment for the defendants, says: "That there was evidence to justify the verdict in the present case can hardly be doubted." That as the employment was dangerous and about a dangerous machine, the jury were within their rights in finding for the plaintiff, and that their verdict could not be disturbed cannot be doubted; for the happening of an accident out of the ordinary course of things cast on the respondents the *onus* of explaining it and discharging themselves. It is a case of *res ipsa loquitur*. The jury were entitled to their opinion that the respondents had not exculpated themselves, and so their liability remained. Instead of doing this they find that there was a neglect to supply suitable machinery, and Lord Macnaghten sees evidence of this because there was "fault or defect of the machine." According to the authorities just quoted this is not so. Dangerous work cannot be done without its concomitant danger. As Lord Coleridge, C.J., says:² "If it were negligence to direct a man to do work more or less dangerous, it would be impossible to do such work." No safer way of doing the work is hinted at. The

McArthur v. Dominion Cartridge Co.

Lord Macnaghten's judgment in the Privy Council.

Criticised.

¹ (1905) A. C. 72; *Grand Trunk Ry. Co. v. Hainer*, 36 Can. S. C. R. 180.

² *Booker v. Higgs*, 3 Times L. R. 618.

only evidence, which truly the jury were entitled to disbelieve, was that the machine was perfect. The duty on the respondents was not to supply a perfect machine, not even a machine without defects, but only one reasonably safe and efficient, making allowance for the essential dangers of the work and the state of knowledge of mechanical invention in that branch of work. Lord Macnaghten also says that: "The jury may have reasonably thought that the explosion would or might have been comparatively harmless if the powder-box on the outside had been 'properly constructed.'" This last phrase is as purely question-begging as the conclusion of the Court below, that "the machine was perfect and worked regularly and properly." The only fact the case discloses is that "the box had been strengthened externally"—in the opinion of the expert—"properly constructed." Subsequent experience may have shown that a differently constructed machine might have worked better; but such considerations are irrelevant. As Bramwell, B., says in *Lay v. Midland Ry. Co.*:¹ "To say that this occurrence ought to have been foreseen, ought to have been anticipated, that the man who made the fence [strengthened the box] ought to have foreseen the possible result of so making it, and that if he had not been negligent he would have foreseen it, is really absolute downright nonsense."

Seymour v. Maddox.

The case of *Seymour v. Maddox*² turned more on a point of pleading than of law. The relation between plaintiff and defendant was that of master and servant; facts were alleged which did not raise a duty where that relation existed; facts, however, might have been alleged which, possibly, would have raised a duty. It was held that a general allegation of duty is insufficient to let in evidence of facts not set out in the declaration; and on those facts that were, a cause of action was not shown. No rule of law was laid down; though, by implication, an absolute duty on the master to supply machinery in all respects fit, without regard to the workman's knowledge or acquiescence, is negatived. Had the declaration averred a concealed danger, it would probably have been held good; so, too, had it alleged a negligent or dangerous state of things, known to the master, and which the servant neither knew nor had the means of knowing; all it actually did was to allege facts, which, from anything that appeared, were in the knowledge of the plaintiff, and with reference to which he may have accepted

¹ 30 L. T. (N. S.) 531. Cp. *Cribb v. Kynoch*, *The Times Newspaper*, 18th May, 1907.

² 16 Q. B. 320. This case is questioned in *Ryan v. Fowler*, 24 N. Y. 410, and followed in *Murphy v. New York Central Rd. Co.*, 11 Daly (N. Y.) 122. Cp. *Williams v. Clough*, 3 H. & N. 258; *Griffiths v. London and St. Katharine Docks Co.*, 12 Q. B. D. 493; 13 Q. B. D. 259. "I conceive that a party cannot merely, by putting into a record a statement that a duty lay upon the defender, compel the Court to grant him a jury trial. The question whether a duty exists or not may sometimes be a mere question of fact, but in general it is not simply a question of fact. A duty arises either out of the relation of parties, or out of express paction, or other special circumstances; and in order to make a relevant allegation of duty the foundation of it must be set forth. It is easy to say that a duty existed; but that allegation will be of no avail unless the grounds on which it rests are relevantly averred": per Lord Neaves, *Robertson v. Adamson*, 24 Dunlop, 1234; *M'Neill v. Wallace*, 15 Dunlop, 818. In *Davies v. England*, 33 L. J. Q. B. 321, the first count of the declaration setting out that it "was the defendant's duty to take care that healthy and sound beasts were supplied," was held bad, as alleging a duty without setting out facts that raised the duty. *Brown v. Mallett*, 5 C. B. 599, is an authority that the allegation of duty in a declaration is immaterial, inasmuch as the duty will be raised or not by the acts which are there stated: per Williams, J., *White v. Phillips*, 33 L. J. C. P. 37. As to duties inferred by law see *M'Kinney v. Irish N. W. Ry. Co.*, Ir. R. 2 C. L. 600.

Allegation of duty insufficient without facts that raise a duty.

his employment; thus the plaintiff failed to discharge the *onus* upon him of averring actionable facts.

II. THE DUTY OWING TO THE SERVANT BY THE MASTER IN RESPECT OF HIS OWN PERSONAL NEGLIGENCE.

II. Duty owing to the servant by the master in respect of his own personal negligence.

This duty is threefold: to take care:

- (1) In providing proper materials;
- (2) In providing efficient fellow servants;¹ and
- (3) To avoid any negligence whereby injury is occasioned to the

servant when the master is himself working with the servants.²

The principle appears from Crompton, J., in *Ashworth v. Stanwix*.³ "It has never been doubted that for personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable."³ And in the subsequent case of *Mellors v. Shaw*⁴ the same judge quotes and confirms certain observations made by himself in *Ormond v. Holland*.⁵ "The master is not liable unless there be personal negligence on his part, which negligence may be either in personally interfering in the work, or selecting the servants who do interfere." "I think it is negligence for which the master is liable, if he knows that the machinery or tackle to be used by the persons employed by him is improper and unsafe, and notwithstanding that knowledge sanctions its use."⁶

Principle stated by Crompton, J., in *Ashworth v. Stanwix*.

¹ *Roberts v. Smith*, 2 H. & N. 213; *Hough v. Texas, &c. Ry. Co.*, 100 U. S. (13 Otto) 213.

² *Ashworth v. Stanwix*, 3 E. & E. 701. This case was distinguished in *Drew v. East Whiby*, 46 App. Can. Q. B. 107. In Scotland the same proposition as in *Ashworth v. Stanwix* was laid down in *Finnighan v. Peters*, 23 Dunlop, 260. As to unreasonable risks, see *Warren v. Wildie*, W. N. 1872, 87, also reported as a note to *Fowler v. Lock*, 41 L. J. C. P. 104, where a servant was injured by an explosion of gas caused by the master's negligence.

³ 3 E. & E. 708. "For his own personal negligence a master was always liable, and still is liable, at common law, both to his own workmen and to the general public who come upon his premises at his invitation on business in which he is concerned"; per Bowen, L.J., *Thomas v. Quartermaine*, 18 Q. B. D. 691. Where the director of a company gave directions to the superintendent of works to have defective machinery repaired before recommencing operations, but the superintendent neglected to carry them out, and the repairs were not made, it was held that the director's intervention was not such as to take the case out of the general rule of law as to the non-liability of the employer for accidents due to the negligence of a fellow workman: *Matthews v. Hamilton Powder Co.*, 14 Ont. App. 261. Where a captain hired incompetent sailors the employer was held not liable, in *Wilson v. Hume*, 30 U. C. C. P. 542.

⁴ 1 B. & S. 444.

⁵ E. B. & E. 106.

⁶ Cp. *Coombs v. New Bedford Cordage Co.*, 102 Mass., per Gray, J., 596, recognising the general principles "that an employer is under an implied contract with his servant to find suitable instruments and means of carrying on the business, and a suitable place in which the servant himself, exercising due care, may perform his duty without exposure to dangers, not coming within the obvious scope of his employment; and that the implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk, is the foundation of the master's liability." *Coombs's case* is distinguished in *Ciriack v. Merchants' Wooden Co.*, 151 Mass. 152: It is not "the duty of the master to admonish his servant to be careful when the servant well knows his danger, and the importance of using care to avoid it. It is the duty of the servant to exercise care proportionate to the danger of his situation as he understands it, and if he fails to do so the fault is his, and not his master's." "The risk of the safety of machinery is not assumed by an employee unless he knows the danger, or unless it is so obvious that he will be presumed to know it. He takes the risk of known or obvious dangers and not of others": *Myers v. Hudson Iron Co.* 150 Mass. 134. *Holmes v. Clark*, 6 H. & N. 349; 7 H. & N. 937, is an authority for the liability of the master for personal negligence. This obligation, however, does not import a warranty. See per Byles, J., *Searle v. Lindsay*, 11 C. B. N. S. 439.

Negligence of master combining with negligence of fellow servant. Two exceptions to the general principle.

It follows that if the negligence of the master combines with the negligence of a fellow servant, and the two contribute to the injury, the servant injured may recover damages against the master.¹

The general principle being as stated, there have been two limitations engrafted upon it, under which the servant is disentitled to recover. First, if he have the same means of knowledge of the danger or inefficiency of machinery as the master;² and secondly, if he contracts to work under conditions of greater risk than those ordinarily attaching to the employment. Whether he has contracted to do this may be shown either by antecedent agreement, or inferred from subsequent conduct.

Skipp v. Eastern Counties Ry. Co.

*Skipp v. Eastern Counties Ry. Co.*³ is a case which may be ranked under the latter heading. The company's staff was insufficient; nevertheless the plaintiff had been engaged for three months, and had never complained till he was injured. The Court refused to allow the question to go to a jury of how many servants a railway company should employ. Any one contracting with them, and continuing without complaint in their employment, is not entitled when injured to turn round and bring his action. "If he found that he could not do the work that was set him, he ought to have declined it in the first instance."⁴ Subsequent cases have very considerably declined from this standard of independence and freedom of contract.

Now the case would be left to the jury to determine whether in entering on his contract the workman had knowledge of the risk and accepted it. The case would be put, not of the jury dictating to the company how many and what sort of servants they should keep, but of the knowledge of the employee that he was entering an employment where the risk would be greater than normal.⁵

No restrictions from putting a man to dangerous work.

There is no disability at law to put a man to a dangerous work, with his consent;⁶ but the precautions that are available against risk should be adopted. If the necessary orders are given to ensure the safety of the workman so far as is, in the circumstances, reasonably practicable, the master's duty is discharged; and a workman who has had the requisite orders given to him to safeguard his working and who disregards them is not to be heard to say that the master is liable for an injury sustained by him because the foreman did not see the orders were not disobeyed;⁷ or where the danger is intensified by his own insensate folly.⁸

Couch v. Steel: first point.

The obligation of the shipowner to merchant seamen was discussed in *Couch v. Steel*.⁹ The declaration contained two counts; the first alleged that a certain vessel, in which the plaintiff was engaged as a sailor, was "so carelessly and negligently managed, fitted out and equipped," that it "was wholly unseaworthy and in a leaky and dangerous condition and unfit to be sent or to go to sea," by reason whereof the plaintiff became sick.

The declaration was drawn in reliance on the authority of certain

¹ *Grand Trunk of Canada v. Cummings*, 106 U. S. (16 Otto) 700. *Ante*, 76.

² *Potts v. Plunkett*, 9 Ir. C. L. R. 238.

³ (1853) 9 Ex. 223; *Northern Pacific Rd. Co. v. Herbert*, 116 U. S. (9 Davis) 642.

⁴ *Per Martin, B.*, 9 Ex. 226.

⁵ *Thomas v. Quartermaine*, 18 Q. B. D. 685.

⁶ *Davidson v. Stuart*, 34 Can. S. C. R. 215.

⁷ *Royal Electric Co. v. Paquette*, 35 Can. S. C. R. 202.

⁸ *Bunt v. Sierra Butte Gold Mining Co.*, 138 U. S. (31 Davis) 483.

⁹ (1854) 3 E. & B. 402. Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 458.

expressions used by Martin and Parke, BB., in advising the House of Lords in the ship insurance case of *Gibson v. Small*.¹ Baron Martin's words² were: "It is his [the owner's] bounden legal duty towards the mariners for the safety of their lives, and towards the merchants who load their goods, 'that the ship should be tight, staunch, and strong, and in every way fitted for the voyage,' or, in other words, 'seaworthy'"; Parke, B., said:³ "The owner of a ship has, generally speaking, the power to make the ship seaworthy at the commencement of the voyage. In the ordinary course of navigation he always does so for his own sake; he is bound to do so for the safety of his crew and for the safety of the cargo placed on board."

On the authority of these *dicta* it was contended that in the case of a seaman a different rule applied than what governed in the ordinary law of master and servant; but the Court negatived this contention, both because there was no substantive averment of fact sufficient to raise a duty, and because the relation of shipowner and sailor is no more than a case under the general law.

The second point raised in *Couch v. Steel*,⁴ whether those sustaining a private injury from the breach of a statutory duty are entitled to maintain an action to recover damages, has already been considered at length.⁵

Couch v. Steel, if directly an authority that shipowner and seamen are within the general law of liability, is less directly an authority for a wider proposition—that a servant may have no remedy against his master for want of care in providing appliances for carrying on his business, even though that want of care may be productive of actual harm to the servant. "The defendant may have been perfectly ignorant of the defects of the vessel, whilst the plaintiff may have examined the vessel before he engaged himself, and have known her state well."⁶ That is, the defendant is not liable, whatever the condition of the machinery, if only the plaintiff has not been entrapped into working exposed to dangers of which he has no means of knowledge; or where the master, having knowledge of something in the condition of the work likely to render the risk different from ordinary, has not communicated the circumstances to him.

The case most frequently cited as the authority for the first of these limitations is *Dynen v. Leach*.⁷ Defendant, a sugar-refiner, had employed the intestate as a labourer, part of whose duty it was to fill sugar-moulds and hoist them up to higher floors in the warehouse by means of machinery. From motives of economy the defendant substituted a cheaper way of raising the bags for the usual method. On the occasion in question deceased filled the mould and fastened it to the clip by which, under the defendant's new method, the moulds were raised. The mould slipped, fell on deceased's head, and killed him. The judge nonsuited the plaintiff, and gave leave to move. Blackburn having moved accordingly a rule was refused; Pollock, C.B., saying: "The deceased not only contributed to the accident which caused his death, but did the act which directly caused it." Channell, B., rested his judgment "on the ground that the deceased himself

¹ 4 H. L. C. 353.

² L. C. 370.

³ L. C. 404.

⁴ 3 E. & B. 402.

⁵ *Ante*, 305.

⁶ Per Lord Campbell, C.J., 3 E. & B. 407.

⁷ 26 L. J. Ex. 221.

Gibson v. Small.

Attempt to make an exception in the case of seamen.

Couch v. Steel: second point.

Considered.

Dynen v. Leach.

Judgment of Pollock, C.B.
Judgment of Channell, B.

Judgment of
Bramwell, B.

continued in the employ of the defendant, and in the use of the clip, with full knowledge of all the circumstances, so that he directly contributed to the accident"; while Bramwell, B., whose judgment is most frequently cited, noting, first, that the workman had known all the facts, and, secondly, that though as well acquainted with the nature of the machinery as the master, he had yet voluntarily used it said: "There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion, when, as in this case, the workman has known all the facts and is as well acquainted as the master with the nature of the machinery and voluntarily uses it."¹ Or, as the rule was more shortly expressed by Pollock, C.B., during the argument: "A servant cannot continue to use a machine he knows to be dangerous at the risk of his employer."² The distinction, between cases like *Puterson v. Wallace*³ and the present case, was pointed out to be that in the Scotch case the workman was injured by the fall of a stone with which he had nothing to do; while in the present case the injury was caused by the very machinery with which it was the deceased's duty to work, and on which he was actually employed at the time of the accident; the actual occurrence moreover was not shown to be other than consistent with his personal negligence in the very matter. More recent cases are inconsistent with *Dynen v. Leach* in so far as the decision affirms a power in the judge to nonsuit. Whether continued working in circumstances of danger amounts to an acceptance of the risk or not, is now settled to be a question of fact that must not be withdrawn from the jury.⁴

Principle as
stated by
Pollock, C. B.

In fact the decisions seem to have veered round to accord with the hrocard: *Præsumitur ignorantia, ubi scientia non probatur*.⁵

Willes, J., in
Saxton v.
Hawksworth.

Subsequently to *Dynen v. Leach*, in *Saxton v. Hawksworth* in the Exchequer Chamber, Willes, J.,⁶ laid down the law in the following terms: "A master is not justified in exposing his servant to any risk or danger of which the servant is ignorant, and if the servant chooses to enter into his employ without knowing of the risk, which is known to the master and not to the servant, and the servant suffers accordingly, then a consideration arises like that in the case in the Court of Common Pleas,⁷ where a person employed another to carry a carboy of nitric acid, and, in the course of carriage, the latter tripped and fell, and was

¹ There is a note to *Williams v. Clough*, 3 H. & N. 259, as follows: "The case [i.e., *Dynen v. Leach*] was not reported in 2 H. & N. because no point of law was decided by it. There was no evidence that the machinery used was improper, and it was consistent with the facts that the workman's own negligence caused his death." Cp. *Gurling v. Hurst*, 6 Times L. R. 94; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Wheeler v. Wason Manufacturing Co.*, 135 Mass. 294.

² On the same principle see *Assop v. Yates*, 2 H. & N. 768; *Griffiths v. Giddow*, 3 H. & N. 648; *Kain v. Smith*, 89 N. Y. 375; *Wannamaker v. Burke*, 111 Pa. St. 423.

³ 1 Macq. (H. L. Sc.) 748.

⁴ E.g., *Thomas v. Quartermaine*, 18 Q. B. D. 685, 697; *Smith v. Baker*, (1891) A. C. 325, 335; *Williams v. Birmingham Battery & Metal Co.*, (1899) 2 Q. B. 338, 345.

⁵ *Sext. V. De Regulis Juris*, 48.

⁶ (1872) 26 L. T. (N. S.) 853. Cp. *Cowley v. Mayor, &c. of Sunderland*, 6 H. & N. 566, which decides that apart from the relation of master and servant, where the danger is one which the plaintiff might reasonably fail to appreciate, and there has been no contributory negligence, the plaintiff may recover.

⁷ *Farrant v. Barnes*, 11 C. B. N. S. 553.

injured by the acid. The Court thought the employer was answerable because, knowing the danger, he ought to have informed the person who was carrying the carboy of its dangerous character. But if a servant enters into an employment knowing there is danger and is satisfied to take the risk, it becomes part of the contract between him and his employer that the servant shall expose himself to such risks as he knows are consistent with the employment."¹

With this must be taken the law as exemplified in *Sword v. Cameron*.² Defendants were lessees of a stone-quarry, and the pursuer was employed there by them working a crane. Other servants were employed to blast rock. When the blasting was going on notice was given. On the occasion of the accident an insufficient time was allowed to get out of reach of the explosion consequent on the blasting.

The pursuer, a workman, was severely injured; and in an action in respect of his injuries, was held entitled to recover. In *Bartonshill Coal Co. v. Reid*,³ Lord Cranworth thus explained the decision: "The injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions. It is to be inferred from the facts stated, that the notices and signals given were those which had been sanctioned by the employer; and that the workmen had been directed to remain at their work near the crane till the order to fire had been given, and then, that after the interval of a minute or two the explosion should take place. The accident occurred, not from any neglect of the man who fired the shot, but because the system was one which did not enable the workmen at the crane to protect themselves by getting into a place of security." The distinction between the cases may be thus expressed: The master is liable in respect of all unnecessary dangers in the system of work, unless they are of a nature which the servant either knows or can judge of equally with the master. In practice there seems to be a presumption that the servant has this equal knowledge in all matters with which his work is directly concerned, and a presumption that he has not equal knowledge where it is the "system" from which the accident arises.⁴

This latter is the principle on which *Cook v. Stark*,⁵ another Scotch case, was decided. A workman in a quarry had been sent by the manager to assist an experienced man who had been engaged for half an hour in attempting to draw an unexploded charge of gunpowder from a rock, and was using a steel "pumper" for that purpose, which

¹ In *Smith v. Dowell*, 3 F. & F. 238, Martin, B., directed a nonsuit where plaintiff was employed to make hulkheads, between two hunkers, to be filled with coal. Whilst so employed, defendant came to see, and said two struts were wanted to support the hulkhead, but told the men to get on with their work, and promised to send iron struts. Before they came the accident happened. The Court was afterwards moved, though no rule was granted. From the head-note it appears that any direction given by defendant was to be construed, not for them to do the dangerous work, but to do other work that might be proceeded with without danger. In *Oyden v. Rummens*, 3 F. & F. 755, Bramwell, B., said: "If a master knew of a danger, which his servant did not, and set him to it, he would be liable; but otherwise, if he did not know of it, or if his servant did, if a man chose to run a risk it was his own look-out."

² 1 Dunlop, 493.

³ 3 Macq. (H. L. Sc.) 290.

⁴ *Robertson v. Brown*, 3 Rettie, 652, may be referred to on this point, though there the facts, and not the law, were in dispute. See also *M'Ghie v. N. W. Ry. Co.*, 24 So. L. R. 370, where an engine-driver was killed while looking over the side of his engine by his head coming in contact with a bridge. Hold, his representative could not recover. Cp. *Bist v. L. & S. W. Ry. Co.*, 23 Times L. R. 471.

⁵ 14 Rettie, 1.

generated sparks and caused an explosion, whereby the man was injured. The Court looked on the operation as "highly dangerous and almost unprecedented," though not "so obviously dangerous that the pursuer, an inexperienced workman, was inexcusable in continuing to assist" in obedience to the order of the manager, and held the pursuer entitled to recover.

Smith v. Baker.

Sword v. Cameron was accepted in *Smith v. Baker*¹ in the House of Lords as a correct decision and as sufficient authority to decide the case then before the House. The plaintiff was employed to drill holes in a rock cutting near a crane worked by men in another department of his employer's work. The crane was used for lifting stones, which were sometimes swung over the plaintiff's head without warning. A stone so swung fell on the plaintiff and injured him. The House of Lords, Lord Bramwell dissenting, were of opinion that a defective system of work under which workmen are not adequately protected, renders the employer liable in the event of injury being caused thereby. "I think," said Lord Halsbury, C.,² "the cases cited at your Lordships' bar, of *Sword v. Cameron*,³ and the *Bartons Hill Coal Co. v. McGuire*,⁴ established conclusively the point for which they were cited, that a negligent system or a negligent mode⁵ of using perfectly sound machinery may make the employer liable."

Williams v. Birmingham Battery and Metal Co.
Later development of the law.

Smith v. Baker was followed in *Williams v. Birmingham Battery and Metal Co.*,⁶ and the modern law was summarised;⁷ if the employment is of a dangerous nature a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of a breach of that duty a servant suffers injury, the employer is *prima facie* liable; and it is no sufficient answer to the *prima facie* liability of the employer to show merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into, or continued in his employment, with knowledge of the risk and of the absence of precaution is important, but not necessarily conclusive, against him.⁸

Williams v. Clough.

*Williams v. Clough*⁹ and *Watling v. Oastler*¹⁰ both turn on points of pleading.

Griffiths v. London and St. Katharine Docks Co.

Griffiths v. London and St. Katharine Docks Co.,¹¹ is an action of negligence brought by a servant against his master for the unsafe

¹ (1891) A. C. 325. See per Lord Halsbury, C., 339, per Lord Watson, 357, and per Lord Herschell, 363.

² L. C. 339.

³ 1 Dunlop, 493.

⁴ 3 Macq. (H. L. Sc.) 300.

⁵ By "a negligent mode" the Lord Chancellor probably intended to indicate a practice or method of doing business which is part of the general scheme of work; for the mode of doing any particular act would appear from the authorities to be attributable to the individual workman and not to the master, unless there were circumstances which fixed the latter with responsibility for the way in which such act was done.

⁶ (1899) 2 Q. B. 338.

⁷ L. C., per Romer, L. J., 345.

⁸ *Medway v. Greenwich Inland Linoleum Co.*, (1898) 14 Times L. R. 291.

⁹ 3 H. & N. 258. The dictum of Crompton, J., in *Davies v. England*, 33 L. J. Q. B. 322, is not in accord with what was actually decided in *Williams v. Clough*, 3 H. & N. 258.

¹⁰ L. R. 6 Ex. 73.

¹¹ (1884) 12 Q. B. D. 493; 13 Q. B. D. 259, followed *MacLeod v. The Caledonian Ry. Co.*, 23 Sc. L. R. 68; *M'Ternan v. White*, 17 Rettie, 368. As to the averment of knowledge in a declaration and for a classification of the cases, see *Smyley v. Glasgow and Londonderry Steam-Packet Co.*, Ir. R. 2 C. L., per Pigot, C. B., 29.

state of the premises on which the servant was employed, where it was held that the statement of claim must contain averments of two facts: that "the danger which caused the accident was known to the master and unknown to the servant," without which there could be no cause of action for "wrongful condition of machinery on the premises on which the servant is to act." It, however, the actionable wrong is the personal negligence of the master, or may be so construed, there is nothing to prevent the servant recovering as if he were a stranger; and knowledge of the servant of the danger he incurs by working with a personally negligent master must be set up by pleading contributory negligence.

Even the conjunction of the circumstances of knowledge of the servant and ignorance on the part of the master is not necessarily conclusive against the servant's right to recover. In *Clarke v. Holmes*,¹ *Clarke v. Holmes*, Judgment of Cockburn, C.J. a case where the judgment of the Exchequer Chamber turned on the common law liability of the master for defective machinery, Cockburn, C.J., thus expressed himself: "No doubt, when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental thereto; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract, shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept."

The judgment of Byles, J., went far beyond this. He was of opinion² "that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition"; and further, that "it is in most cases impossible that a workman can judge of the nature of a complex and dangerous machine wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both." From this he draws the conclusion: "The master is neither, on the one hand, at liberty to neglect all care, nor, on the other, is he to insure safety, but he is to use due and reasonable care. The degree and nature of that care are to be estimated on a consideration of the facts of each

¹ 7 H. & N. 937. "I do not think the majority of the Court there [in *Clarke v. Holmes*] coincided with what was said by two of the judges": per Byles, J., *Murphy v. Smith*, 19 C. B. N. S. 365. "I cannot follow the reasoning of some of the judges in the Ex. Ch." in *Holmes v. Clarke*: per Bramwell, B., in *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 136. "The case of *Clarke v. Holmes* is one which it is not easy to place upon any very well-defined principle": per Hoar, J., *Coombs v. New Bedford Cordage Co.*, 102 Mass. 586. "The case of *Clarke v. Holmes* has been observed upon, but it has never been overruled, and it seems to me to be this case. It is binding on us, and, moreover, it is in my opinion rightly decided": per Lord Esher, M.R., *Thomas v. Quartermaine*, 18 Q. B. D. 690. "The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced. The case of *Clarke v. Holmes* is a case of that sort": per Bowen, L. J., 696.

² 7 H. & N. 943.

³ L. C. 947.

particular case. I do not say that the degree of care is, in all cases, the same as the master must observe towards strangers."

Willes and Wightman, JJ., laid more stress on the statutory liability.¹

Three different views, therefore, appear to have been advocated in *Clarke v. Holmes* :

First. That of Byles, J., that there is a special duty with regard to dangerous machinery "wielding irresistible mechanical power."

Second. That of Cockburn, C.J.,² that there is an obligation on the employer to keep machinery without material deterioration during the employment.

Third. That of Willes and Wightman, JJ., that a statutory obligation imposes special duties. This we shall discuss subsequently.

The first opinion is that of Byles, J. The common law imposes no duty on a master to safeguard his servant from the risks incident to the employment,³ provided only the servant has equal means of knowing the risks with the master.⁴ This being so, it is obvious that the use of dangerous machinery in itself creates no greater liability than the use of ordinary machinery. The probability of the circumstances which import liability—knowledge on the part of the master, want of knowledge on the part of the servant, and a failure, from any cause, to assume the risks of the service—is, however, very much greater where machinery is in its nature dangerous, than where danger does not prominently exist. Byles, J., states a principle which involves a shifting of the ordinary legal presumption; for he lays it down that "it is in most cases impossible that a workman can judge of the condition of a complex and dangerous machine, wielding irresistible mechanical power and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine."

In cases of this sort, then, the injured servant would have to give evidence, first, of injury; and next, that the machinery was dangerous. Thereupon the master would have to show, what Byles, J., regards as "in most cases impossible," that the servant correctly estimated the risks. To do this, a presumption of incapacity, similar to that made in the case of young children employed in dangerous occupations, would have to be raised. Save for the opinion of Byles, J., there does not appear to be adequate authority for this; while it seems contrary to principle to presume an incapacity, especially in a case where the fact of undertaking the work would seem rather to presume a capacity, to execute it.⁵

¹ 31 L. J. Ex. 359, 360.

² Crompton, J., seems in part at least to have concurred with Cockburn, C.J. After declining to give an opinion on the point of statutory liability, he says, 7 H. & N. 946: "There was a neglect of duty on the part of the defendant in not keeping the machinery fenced, for which he is responsible."

³ *Bartonsbill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 290; *Dynen v. Leach*, 26 L. J. Ex. 221; *Saxton v. Hawkesworth*, 26 L. T. (N. S.) 851; *Laz v. Mayor and Corporation of Dartington*, 5 Ex. D., per Bramwell, L. J., 35.

⁴ *Ogdenv. Rummens*, 3 F. & F. 751; *Macleod v. Caledonian Ry. Co.*, 23 Sc. L. R. 66, 70.

⁵ *Toute personne peut contracter si elle n'en est pas déclarée incapable par la loi*: Code Civil, art. 1123. Upon which Rognon observes: *Le principe général est que tout le monde est capable; les incapacités sont conséquemment des exceptions, qui ne doivent jamais s'entendre aux cas non prévus*. In America it has been held, that when the master has notice of inexperience he is bound to give explicit warning, *Rummell v. Dilworth*, 111 Pa. St. 343; and that where there is a duty to give notice, actual notice must be given, and it is not enough to use reasonable care, *Wheeler v. Wason Manufacturing Co.*, 135 Mass. 4.

Willes and
Wightman,
JJ.'s, views.

Three views
of liability
in *Clarke v.*
Holmes.

View of
Byles, J.,
considered.

There is no doubt that the recent tendency of the judges has been towards the presumption of the workman's want of knowledge. Where an unskilled workman is injured by working about machinery of complicated construction, the presumption of his lack of knowledge of its complicated construction naturally arises; just as if—to draw an illustration from the law of bailments—a blacksmith were intrusted with the mending of a watch, a very different amount of skill would be looked for from him than from a chronometer-maker of established fame. Where the injured workman is one who has undertaken charge of the machinery, and whose proper work it is, any such presumption of want of appreciation is unreasonable. To have been intrusted with the work, he must *primâ facie* have represented himself as of adequate knowledge and skill to undertake it; and he should not, in the event of injury happening to him, be permitted to aver a different condition of things from that under which he was appointed.¹ Yet this view is now discredited.

Recent tendency of the law.

The next view is that of Cockburn, C.J. His opinion, "that the danger contemplated on entering into the contract, shall not be aggravated by any omission on the part of the master to keep the machinery" without material deterioration during the employment, has the assent of Kelly, C.B.,² and is recognised in the earlier cases.³ The proposition is, notwithstanding, perhaps too broadly expressed, as importing an absolute duty on the master, and ignoring the possible application of the maxim *Volenti non fit injuria*. This we have already seen is not excluded; and the master is not necessarily liable for even the most dilapidated condition of machinery.⁴ Under recent decisions which require the matter to be submitted to the jury for them to draw the inferences of knowledge and consent, in practice the master is well-nigh invariably found liable.

View of Cockburn, C.J., considered.

The rule of the master's liability for dangerous machinery was expressed in the *Nisi Prius* ruling in *Holmes v. Worthington*,⁵ by Willes, J. The facts showed that from defect of a rope used in hoisting casks, the rope broke and a cask fell upon plaintiff. Willes, J., refused to nonsuit, saying: "There is no case deciding that where the employer and the servant are both aware that the machinery is in an unsafe state, and the servant goes on using it under a reasonable belief that it will be set right by the employer, and it is not set right, and he suffers an injury, he cannot sustain an action." In summing up he said: "If the defendants knew of the defect and undertook to repair it, and the plaintiff went on working, relying on their repairing it, then they may be liable. If the plaintiff complained of the defect and the defendants promised that it should be remedied, he is not to be deprived of his remedy, merely because, relying on their promise, he remained in their employment. You must, however, be satisfied that they (*i.e.*, the defendants) were aware of the defect, and that the accident arose from it, and not from plaintiff's want of care." Bowen, L.J., very clearly states the law in *Thomas v. Quartermaine*:⁷ "Knowledge is not a conclusive defence in itself. But when it is a knowledge

Holmes v. Worthington.

View of Willes, J.

Bowen, L.J., in *Thomas v. Quartermaine*.

¹ *Cp. Britton v. Great Western Cotton Co.*, L. R. 7 Ex., per Bramwell, B. 136, and *post*, 635.

² *Murphy v. Phillips*, 35 L. T. (N. S.) 478.

³ *Per Lord Cranworth*, 3 Macq. (H. L. Sc.) 290.

⁴ *Ante*, 613.

⁵ 2 F. & F. 534.

⁶ *I.e.*, "ought to have been." See *per Cockburn, C.J., Webb v. Rennie*, 4 F. & F. 608.

⁷ 18 Q. B. D. 697. The Irish case of *Ratray v. Cork and Macroom Ry. Co.*, 4 L. R. Ir. 386, appears to lean to the view that knowledge *per se* is enough. To the extent

under circumstances that leave no inference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete."

The Scotch decisions not at one with the English, *Crichton v. Keir*.

The judges in the Scotch Court of Session, in *Crichton v. Keir*,¹ seem to have misread the English case of *Clarke v. Holmes*,² as they distinguish it on the ground of "an antecedent statutory obligation on the master to fence the machinery."³ This we have already seen was not the *ratio decidendi*. Proceeding, however, on that assumption, they distinguish the case before them where the servant was induced to continue in an employment by a promise of providing a young and efficient horse in place of an old and inefficient one, and held that where "a servant in the face of manifest danger chooses to go on with his work, he does so at his own risk, and not at the risk of his master"⁴—in other words, that knowledge is, *per se*, an answer to the action. This is, as we have seen, contrary to the English cases, by which knowledge is an element for consideration and not the sufficient test of voluntary continuance in dangerous work.

Fraser v. Hood.

*Fraser v. Hood*⁵ professedly follows *Crichton v. Keir*, and is open to the same criticism. The pursuer, a servant of the defendants, was directed to tie up a horse, which hit him as he was doing so. In his averments the pursuer set out that "the horse in question, which was an entire horse, was a vicious and dangerous animal, and on several previous occasions it had attacked, hit, and severely injured those who were in charge of it." The defender objected that the pursuer's averments showed him to be aware the horse was vicious, and that he incurred danger by entering its stall when it had got loose; and the Court allowed the objection to prevail.

Case of sailor engaged in dangerous work.

The recent tendency of the decisions render obsolete this case also. All the elements that the Lord President assumed must now go to the jury to be "disentangled." The inequity of the state of law which presumed, from a continuance in the work, an acceptance of the risk is manifest when the position of a sailor is considered. An American decision, *Eldridge v. Atlas Steamship Co.*,⁶ gives an admirable illustration. A sailor was ordered to work a dangerous winch and was injured. "The defendant insists that the command to operate this dangerous winch was not lawful, and therefore plaintiff might rightfully have refused obedience. If it be conceded that the command was unlawful, it does not necessarily follow that the plaintiff's obedience was negligence. For whether the command was lawful or unlawful, the evidence is to the effect that his disobedience would have

it does this it is of course not an authority. Lord Herschell's remarks on *Thomas v. Quartermaine*, in *Smith v. Baker*, (1891) A. C. 365 *et seq.*, are merely *obiter* and balanced by the view taken by Lord Morris at 369. Further, they appear to have been induced by an incorrect apprehension of the facts. See *Law Quarterly Review*, (1892) vol. viii. 202, an article on *Smith v. Baker*.

¹ 1 Macph. 407.

² 7 H. & N. 937.

³ Per Lord Benholme, 1 Macph. 411: "It appears to me, however, unnecessary to decide this question" (i.e., whether any liability in the defendants arises under the statutes providing for the fencing of machinery): per Cockburn, C.J., *Clarke v. Holmes*, 7 H. & N. 943.

⁴ Per Lord Justice-Clerk Inglis, 1 Macph. 411.

⁵ 15 Rottie, 178. Cp. *Wilson v. Boyle*, 17 Rottie, 62, where the decision seems correct, though the first finding of the jury "that the defendant was blameworthy in having the horse in his possession, for use by his carters, not being broke to steam engines" seems beyond their competence. Their second finding, "the pursuer knew of the horse's condition and character, and the risk he ran in taking charge of it," justifies the judgment for the defender.

⁶ 134 N. Y. 187, 190.

resulted in his punishment. The boatswain, under whose orders plaintiff was operating the winch, testified that the plaintiff 'was bound to obey the order that I gave him; if he did not obey the order he would have been put in irons and fined.' Grant that the plaintiff had been so learned in the law as to know that the Courts would ultimately decide the command was unlawful and disobedience to it lawful, he could know no way of escape from the ship's punishment of his disobedience, for there was none." If the sailor refuses obedience he is a mutineer, if he obeys he is a voluntary agent. Either position seems so contrary to justice that an interpretation of law which rendered either possible may reasonably be looked on as unsound.¹

In this place, *Riley v. Bazendale*² may be noted, a case in which an attempt was made to avoid the law as laid down in *Williams v. Clough*³ by alleging a contract that "the defendants should take due and ordinary care not to expose the said J. R. to extraordinary danger and risk in the course of his said employment." The effect of this was to prevent the defendant demurring, and put him to a traverse of the fact. The judge at the trial nonsuited the plaintiff on the opening,⁴ and the non-suit was upheld on motion, Pollock, C.B., saying: "Generally speaking, a mere duty cannot be turned into a contract, and great inconvenience would result if we were to permit it to be declared on as such. If the obligation had been alleged as a duty, the defendant might have demurred. But when it is alleged as a contract, the defendant cannot demur, because it is possible that there may be such a contract in point of fact." There is no such implied contract.

Riley v. Bazendale.

Duty cannot be turned into a contract.

The obligation on the master with regard to machinery, where the question of direct personal negligence is not raised, is considered in *Vaughan v. Cork and Youghal Ry. Co.*⁵ on demurrer. The declaration set out that the deceased was employed by the defendants to work in a passage where was a wall of which the defendants had absolute control, and that "whilst" the deceased "was actually" engaged at his work "along the said passage" for the said defendants as aforesaid, and at their request, the said wall became, and was, ruinous, and fell upon "the deceased."

Obligation of the master with regard to machinery where there is no question of direct personal negligence.

Vaughan v. Cork and Youghal Ry. Co.

Judgment of Pigot, C.B.

"For some time," says Pigot, C.B.,⁶ "I was disposed to think that the plaintiff did not sufficiently disclose a cause of action. It is clearly established that, if a servant voluntarily undertakes an employment which, in its nature, is an employment of danger, he does so as his own insurer against the risk. The master is not responsible to his servant for injuries resulting from the danger of an employment into which the plaintiff voluntarily enters, under circumstances in which the risk is necessarily and obviously connected with the employment." "But the employer is bound to use all reasonable care to protect his workmen from dangers which are unknown to them, and which he knows, and must be presumed to know. And on looking more narrowly into the frame of this summons and plaint, I think it must be construed as showing that the wall became ruinous and dangerous by the defendants' negligence after the plaintiff was engaged in the service, and while

¹ Cp. *Rothwell v. Hutchison*, 13 Rettie, 463.

² (1861) 8 H. & N. 445.

³ 3 H. & N. 258.

⁴ As to the correctness of this now, see *Fletcher v. L. & N. W. Ry. Co.* (1892) 1 Q. B. 122, and *ante*, 14.

⁵ (1860) 12 Ir. C. L. R. 297. The Scotch cases are noted in *Wall v. Neilson*, 15 Rettie, 772. For cases as to "known danger," see *post*, 632, et seqq.

⁶ 12 Ir. C. L. R. 303.

he was actually employed in doing the work, the wall being in the actual 'possession and under the control and dominion of the defendants.' Upon that statement the defendants can hardly be treated otherwise than as directly and personally cognisant of the altered condition of the wall; and if the wall became ruinous and dangerous, while the deceased was engaged in the work near it, either he ought to have been made acquainted with the change which caused new risk to his employment, or precautions ought to have been taken to secure him from the danger."¹

Rule indicated by this judgment.

The case is important as laying stress on the fact that, with reference to the same man and the same machinery, there may be two different species of obligation. If the machinery is in a dangerous condition when the workman enters on the work, no obligation is presumed on the employer to alter or improve it² unless the jury find that the workman was without knowledge of the state of things and did not appreciate the risk to which he was exposing himself; but where the workman enters on the work with all the accessories in a reasonably fit condition, and by reason of non-repair or absence of supervision such condition becomes altered so that an accident occurs, then the presumption is that the employer is guilty of negligence; for it is not the duty of the workman to watch the gradual attrition of machinery or plant until it is in such a state that danger may probably arise, and then to give notice to the master, so that repairs may be executed, or, in the alternative, the contract varied; while it is the duty of the employer, when the workman has entered upon an employment with reasonably fit and proper machinery, and undertaking no more than the ordinary risks, to keep all the surroundings of the work in suitable condition; and the hurthen of proof lies on him to show he has done so. The workman's duty is to get on with his work to the best of his ability, and while doing his duty he is entitled to trust to the master doing his.

Acted on in *Murphy v. Phillips*

This is in accord with the law as laid down in *Murphy v. Phillips*.³ Plaintiff was injured by the breaking of a chain, caused partly by bad welding, and partly by its worn condition. "It then became a question whether, from whatever cause the accident may have occurred, it was or not the duty of the defendant, as the master and employer of the plaintiff, to see and examine from time to time the state and condition of the chains and other machinery employed upon his premises in his business. I am of opinion very clearly that it was, and that the defendant was bound from time to time, as the occasion might require, to have the chains used in his business, and of course, therefore, the particular chain in question, properly and duly examined and tested periodically."⁴

Webb v. Rennie.

Again, in *Webb v. Rennie*,⁵ where injury arose from the fall of a

¹ *M'Inally v. King*, 24 Sc. L. R. 15. ² *Dynen v. Leach*, 26 L. J. Ex. 221.

³ (1876) 35 L. T. (N. S.) 477; *Spicer v. South Boston Iron Co.*, 138 Mass. 426, the case of a flaw in an iron hook used to raise a furnace door, which a careful inspection would have revealed. *Henderson v. Carron Co.*, 16 Rettie, 633; *Milne v. Townsland*, 19 Rettie, 830. *Murphy v. Phillips* is distinguished in *Black v. Ontario Wheel Co.*, 19 Ont. R. 578, and in *Hawrahan v. Ardnamult Steamship Co.*, 22 L. R. Ir. 55.

⁴ 35 L. T. (N. S.), per Kelly, C.B., 478. Cp. *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485.

⁵ 4 F. & F. 608, 612, followed in *Gillies v. Cairns*, 8 Fraser, 174; *O'Donnell v. Allegheny Valley Rd. Co.*, 59 Pa. St. 239, a case where wood, that had been in the soil an unreasonable length of time, gave way.

scaffold-pole through rottenness and it was proved that the end had been in the earth two years without examination, Cockburn, C.J., directed the jury that "the servant had a right to expect that he shall only be exposed to the ordinary risks of the employment, and that the machinery or apparatus about which he is to be employed, and out of which danger arises, shall be attended to with reasonable care, to ensure its being in a fit state to be worked without undue or extraordinary danger to those employed in or about it; and although in general an employer was not liable unless he knew of the danger, yet it was his business to know if, by reasonable care and precaution, he could ascertain whether the apparatus or machinery were in a fit state or not. It was not enough, therefore, that the master did not know of the danger if, by reasonable care he might have known, and if, reasonably, he ought to have known, and to have taken the proper means of knowing. It followed that, although he would not be liable merely on account of the negligence of his servants, yet it was his duty either himself to take the proper means of knowing of the danger, or to employ some competent person to do so."

Cockburn, C.J.'s, statement of the principle.

Negligence is not to be imputed to the master who has engaged competent men to inspect his machinery and works, and who have inspected it, but whose judgment is at fault and who come to a mistaken conclusion as to the existence of danger or defect.¹

Fault of judgment of competent advisers does not affect the master with liability.

Care must be taken not to confuse this proposition with the very different one² that it is the duty of the master to provide adequate machinery and a suitable scheme of work. This is an antecedent obligation to that now noted and applies to the scheme and machinery in work and not to the character of the provision for working.

If the master has a greater means of knowing than the workman he owes a greater duty to him; for the matter in question being not within the ordinary sphere of duties of the servant, he is not to be presumed to concern himself with them, or to be acquainted with them; and is entitled to assume, in the absence of a suggestion to the contrary, that everything is efficiently and carefully provided for.

A second ground on which these cases may be supported.

*Allen v. New Gas Co.*³ was argued and decided (at least so far as appears from the report) exclusively on the ground of the duty of employers to employ a competent person to take charge of their premises, and without reference to their duty to see to the condition of the tackle and machinery. Plaintiff's injuries were caused by the falling upon him of some gates built into a framework on the premises of the defendants where the plaintiff was at work. They had been some time out of repair, gradually getting "from bad to worse." If closed, or partially closed, they were unsafe, but if left open and wedged up they were safe. Defendants' manager had notice of the unsafe condition of the gates and directions to repair had been given, but nothing was shown to have been done. When the plaintiff left work, the gates were opened and wedged up; when he returned, one was open, the other shut. How this came about there was no evidence to show. By reason of their defective condition they fell upon the plaintiff and injured him. A verdict for the plaintiff was set aside by the Divisional Court, and a verdict entered for the defendants, on the ground that the plaintiff "had not shown that the persons employed by the

Allen v. New Gas Co.

¹ *Canadian Asbestos Co. v. Girard*, 36 Can. S. C. R. 13.

² *Ante*, 613.

³ 1 Ex. D. 251.

defendants were incompetent, and the negligence, if any, which caused the accident was that of a fellow workman of the plaintiff."

Question as to a personal duty on the employer to see to the maintenance of his premises.

The point that there is a personal duty on the employer to see to the maintenance of his premises in a condition of reasonable safety is thus glanced at in the judgment: "There was no evidence to show that the premises of the defendants were dangerous,¹ that these gates were defective in their original construction, or that they had not been perfectly safe when first put up. If they had fallen into a state of decay, and had been permitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have employed, and there was no evidence to show that such persons were not proper and competent for the defendants to employ." However, what the learned judge² who delivered the judgment in *Allen v. New Gas Co.* considered "could scarcely he said," had actually been held, as we have seen, by Pigot, C.B., in *Vaughan v. Cork and Youghal Ry. Co.*,³ and by Cockburn, C.J., in *Webb v. Rennie*,⁴ while the Exchequer Division itself, a few weeks after the judgment in *Allen v. New Gas Co.*, arrived at a decision in conflict with the learned baron's dictum.⁵

Allen v. New Gas Co. discussed.

From anything that appears in the report, there is no suggestion that it was the special duty of any one to see to the condition of the working surroundings at the gas works;⁷ and if the fact of there being a foreman were sufficient to discharge the employer's liability to see to the reasonably safe condition of his premises, the special duty on the employer requiring him personally to see to machinery and plant would be negated and evaded by the mere appointment of such a foreman. Moreover, as we have seen,⁸ the fact that the attention of the manager had been directed to the unsafe condition of the gate, and orders given, but not carried out, to remedy this, would not in itself be conclusive against the plaintiff's right to recover. Again, it seems to be assumed throughout that, though there was a complaint and a promise of remedy, the plaintiff would be deprived of his right to recover, even supposing him to have remained, merely because he relied on the promise so made. To put the matter shortly, on the assumption that the plaintiff had no knowledge, or no sufficient knowledge, of the condition and the dangers of the gates, he was disentitled to recover, because there was a foreman who, in the ordinary course of things, should have looked after the gates, and did not; and on the assumption that the plaintiff had knowledge, he, as a proposition of law, and necessarily, could not recover, because he consented to the risk. In either view the decision is unsatisfactory.⁹

¹ *L.c.*, per Huddleston, B., 256.

² "The evidence was, that these gates if left open and wedged up, were safe; but if closed, or partially closed, there was danger that they might fall," *L.c.* 251; and also by consequence if they were left open but not wedged up. In short, without additional and special precautions, they were dangerous.

³ Huddleston, B.

⁴ 4 F. & F. 613.

⁵ 12 Ir. C. L. R. 297, 304.

⁶ *Murphy v. Phillips*, 35 L. T. (N. S.) 477. Cp. *Spicer v. South Endon Iron Co.*, 138 Mass. 426.

⁷ Huddleston, B., says, "assuming it to have been the negligence of Farren, that would be negligence of a fellow servant." Quite so. But why assume it at all? Why not discuss the case as raising the question of the duty of the employer to see that the risks surrounding the work are not greater than was apparent?

⁸ *Holmes v. Worthington*, 2 F. & F. 533; *Stanforth v. Burnback Foundry Co.*, 24 Sc. L. R. 722.

⁹ Another inaccuracy in the judgment may be noted. Huddleston, B., says, 254:

The master is not required so to provide as to dispense with any forethought on the part of the man. He will discharge his duty if he provides proper appliances, although he leaves the determination of the time for resorting to them to the men; that is, if the opportunities of the men for determining on the matter are at least equal to his own. When the necessity of executing repairs springs from the daily use of appliances, the master is of course bound to provide the means of executing the repairs necessary; but when the master has done his duty in this respect, it is for the servants themselves to secure themselves in those matters which may easily be remedied and do not involve permanent operations of the labour of skilled mechanics; for instance, where ropes have a habit of wearing out and the master has supplied an ample stock which may be resorted to when required in order to replace those worn out in his service, the duty of substituting new for old when requisite and of judging when requisite is on the servants and not on the master; and so with the use of tools liable to break, buckets to become leaky, protections in dangerous occupations to become ineffectual from any constant or recurrent cause, and other materials coming within the scope of the principle involved.¹ The only cases in which this principle has been definitely laid down are, it is true, American, yet the principle itself seems the necessary outcome of doctrines recognised alike in English and American law and, should occasion arise, will doubtless be authoritatively engrafted amongst English decisions.

Master not required to think instead of his workmen.

Maintaining the condition of plant.

Here it may be well to note a distinction marking the line between those cases where the injured person cannot recover against the employer because the employer is not responsible for the happening of the injurious event which is brought about through miscarriage of machinery; and those in which he is held liable on account of the bad condition of machinery. The master is liable in all cases where there has been neglect in providing proper machinery and competent servants. He is not liable when the injury results from the management of proper machinery by servants not incompetent.²

Distinction between cases where the action arises from neglect in providing proper machinery and competent servants, and the cases where the injury arises from the management of machinery.

III. STATUTORY DUTY.

We now come to consider the effect of the imposition of a statutory duty on the master's liability. *Senior v. Ward*³ is the first case to note. Rules for the regulation of the defendant's coal mine were

III. Statutory duty. *Senior v. Ward.*

"We think that the mischief in this case arose from the conduct of the plaintiff's fellow workmen as such, and not from the defendants' default, nor from the default of any manager or vice-proprietor." It is clear from the decisions that the Courts refuse to recognise any such distinction. *Wilson v. Merry*, L. R. 1 Sc. App. 326; *Howells v. Landore Siemens Steel Co.*, L. R. 10 Q. B. 62.

¹ *E.g., Toohy v. Equitable Gas Co.*, 179 Pa. St. 437. *Labatt, Master and Servant*, 1743.

² *Bartonskill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 266, 297. *Cp. Ormond v. Holland*, E. B. & E. 102, where it was a ladder that caused the accident, and the defendants "used more than ordinary care, and took extraordinary precautions that the plant should be sufficient," per Lord Campbell, 105; also *Armour v. Hahn*, 111 U. S. (4 Davis) 313. The master's duty with regard to ropes and appliances of that sort which are in daily use and which when they become defective may easily be remedied by the servants themselves, is well treated in *Oregan v. Marston*, 126 N. Y. 508, 22 Am. St. R. 854.

³ 1 F. & E. 285. See *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209, 46 Am. Rep. 458; *McClain v. Henderson*, 187 Pa. St. 253.

approved under the 18 & 19 Vict. c. 108.¹ One of these every morning, before any one descended the shaft of the mine, directed the cage to be inspected by the engineman, and "the ropes and loaded cages are then to be run slowly twice up and down the pit before any person descends or ascends." The defendant, who superintended the working of his colliery, allowed the rule to be neglected. The night before the accident the rope by which the cage was suspended was injured by fire. On the morning of the accident the miners were told by the banksman that they had better examine the rope before they went down; they neglected to do so, the rope broke as the cage descended, and those in it were killed. The Court held that the case came within the maxim *Volenti non fit injuria*; yet indicated its opinion that, apart from knowledge and acceptance of the danger by the deceased, the defendant would have been liable, though the negligence was, in the last instance, the negligence of the banksman, who was a fellow workman; as there was most culpable negligence on the part of the defendant personally in neglecting to see to the observance of the statutory rule and in keeping a banksman whom he knew habitually disregarded it; and either of these circumstances was sufficient to import liability.

Two questions suggested by the decision, and requiring more attention for their elucidation than they received, are:

The maxim
*Volenti non fit
injuria.*

- (1) What is the precise import of the maxim *Volenti non fit injuria*?
- (2) With what circumstances, if any, does the maxim apply in the case of the violation of a statutory obligation?

(1) What is
the import of
the maxim?
History.

(1) THE IMPORT OF THE MAXIM VOLENTI NON FIT INJURIA.

The maxim *Volenti non fit injuria* has been traced back to Aristotle,² perhaps more in faith than by reason. It is found unmistakably in the Civil Law, where the case is put of a man in *patria potestate* being sold with his own consent. The father has his action for *injuria*: *fili vero nomine non competit, quia nulla injuria est quæ in volentem fiat.*³

It is found also in the Canon Law; where it appears in the form *Scienti et consentienti non fit injuria neque dolus.*⁴ This is a notable testimony to Bowen, L.J.'s, legal insight, according exactly with his observation that the "maxim is not '*scienti non fit injuria*,' but '*volenti*'"; that "mere knowledge may not be a conclusive defence."⁵ The first time it is met with in the English reports is in the Year Book of the 33 Edw. I.⁶ and its modern use starts, so it is said, from *Hott v. Wilkes*⁷

¹ See now 35 & 36 Vict. c. 70. Part II.

² This is probably in the fashion of the schoolmen who resorted to him as the fount of all wisdom. In Book V. c. xi. of the Eudemian Ethics he discusses—a bit discursively—the question, Can a man injure himself? and concludes, *αὐτὸς ἑδραῖον τὰ αὐτὸ ἕνα καὶ τὸ αὐτὸ καὶ τὸ αὐτὸ.* *Ἐπι δὲ ἂν ἔλεβρα ἀδικεῖσθαι*—which is purely an ethical proposition much more akin to the discussion in Plato's *Gorgias*, whether it is better to do or to suffer injustice, than to anything pertinent to the present topic.

³ D. 47, 10, 1, § 5.

⁴ Sext. V. *De Regulis Juris*, 28. Pollock and Maitland, in their *History of English Law*, vol. ii. (2nd ed.) 217, stop short at the Canon Law in tracing back the genealogy of the maxim. In Sir Walter Scott's novel, "The Betrothed," Father Aldrovand says: "I hold with the learned scholiast, *Volenti non fit injuria*," c. 29 towards the end.

⁵ *Thomas v. Quartermaine*, 18 Q. B. D. 696.

⁶ Y. B. 33-35 Edw. I. (ed. Horwood) 8. Bracton f. 413h uses it in the form, *cum scienti et volenti non fit injuria*. The maxim is available as a defence under the French law of Quebec. *Richelieu, &c. Navigation Co. v. St. Jean*, 28 Lower Canada Jurist. (Q.B.) 91.

⁷ 3 B. & Ald. 304.

though probably much earlier instances might be found of its use to formulate the legal consequences of acting at the agent's own risk.¹

Bowen, L.J.,² points out that the effect of the maxim is by no means identical with the defence of contributory negligence. "Contributory negligence," says he, "arises when there has been a breach of duty on the defendant's part, not where, *ex hypothesi*, there has been none. It rests upon the view that, though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness, covered the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury. It is for this reason that under the old form of pleading the defence of contributory negligence was raised in actions based on negligence under the plea of 'not guilty.' It was said, and said rightly, in *Weblin v. Ballard*,³ that, in an inquiry whether the plaintiff has been guilty of contributory negligence, the plaintiff's knowledge of the danger is not conclusive. Obviously such knowledge may have even led to exercise extraordinary care. But the doctrine of *Volenti non fit injuria* stands outside the defence of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards the one individual who knows and runs the risk, and by dealing with the case as if it turned only on a subsequent investigation into contributory negligence. In many instances it is immaterial to distinguish between the two defences, but the importance of the distinction was pointed out by Erle, C.J., in his summing up to the jury in *Indermaur v. Dames*,⁴ and by Cockburn, C.J., in *Woodley v. Metropolitan District Ry. Co.*⁵ To prove negligence it is not enough to show that the defendant has been negligent to others; the plaintiff must show that there has been a breach of duty towards himself. These two defences, that which rests on the doctrine *Volenti non fit injuria*, and that which is popularly described as contributory negligence, are quite different."

Bowen, L.J., distinguishes between cases of contributory negligence and cases where the maxim applies.

That a person guilty of contributory negligence should not recover even when the injury arises from neglect to observe a statutory duty is not only reasonable, but clear law.⁶ For, in such a case, the plaintiff

Contributory negligence as affected by statutory duty.

¹ *E.g., Brisbane v. Dacres*, (1813) 5 Taunt. 143, 158.

² *Thomas v. Quartermaine*, 18 Q. B. D. 697. "I was surprised to find that any person could gravely raise a doubt on this question, as we have decided over and over again in this Court, and notably in the case of *McCarthy v. British Shipowners' Co.*, 10 L. R. Ir. 384, that a defence of contributory negligence is only an amplified form of denial that the injury was caused by the negligence of the defendant," per Dowse, B., *McEvoy v. Waterford Steamship Co.*, 18 L. R. Ir. 165.

³ 17 Q. B. D. 122.

⁴ L. R. 1 C. P. 277.

⁵ 2 Ex. D. 390.

⁶ *Senior v. Ward*, 1 E. & E. 385; *Caswell v. Worth*, 5 E. & B. 849. The remark of Pigott, B., "I should have been better satisfied if *Caswell v. Worth* had been otherwise decided; and that the master there should have been held liable, as he had been clearly guilty of a breach of his statutory duty," overlooks the difference in the application of the maxim *Volenti non fit injuria*, and the defence of contributory negligence. That the distinction was not absent altogether from his mind appears from the following passage: "It seems that even although there may be a statutory duty imposed on the employer, the workman must still be careful of his own safety"; *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 139. The case of *Caswell v. Worth*, was, however, decided on demurrer, where the only point was whether a plea that set up contributory negligence was good. *McEvoy v. Waterford Steamship Co.*, 18 L. R. Ir. 159.

has failed to establish the proposition on which alone he is entitled to recover damages—that the injury happened through the defendant's negligence.¹ The neglect of the statutory duty may involve the person guilty thereof in penalties, yet the law will not allow the injured person to recover because he is himself consenting to the violation of law and to his own wrong. The consideration of this view of the matter must, for the present, be postponed.²

Dangerous
work.

Where there is no contributory negligence, and the injury arises from the dangers of the work, the position of things is different.³ There is, first, a duty on the employer to provide reasonable and fit machinery. And his liability in this respect is determined by considering whether he has knowledge, and his servant is ignorant, of all defects in the condition and repair of the surroundings amongst which the servant has to work.⁴ In that event—of knowledge of the master and ignorance of the servant—the master is liable; even though the condition of things is the same as when the servant entered the employment. And this is so because the law implies an obligation on the master to make the servant as well acquainted with the circumstances of the work as he is himself; failure to discharge this duty imposed by law affects the master with a similar liability to that which would arise if he were a fellow workman with his servant, and negligently or recklessly using tools, caused an injury to his servant. This brings us to a detailed consideration of the scope of the rule summarised in the maxim *Volenti non fit injuria*.

Who is
volens?

The maxim is applicable in diverse circumstances, and its weight is by no means uniform. In its widest signification it affirms that "one who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong."⁵ Persons incapable of intelligent assent are of course without its ambit. Neither can one be allowed to consent to an act against a law of general policy and obligation, though whether he could assert a personal claim after such consent involves other considerations. In many cases he would be *particeps criminis*. *Ex turpi causa non oritur actio*.⁶

A trespasser who injures himself by intermeddling cannot, by his wrongful act, impose a duty upon another; ⁷ his act being wrongful, he cannot claim in respect of the risks with which it was attended.

Again, he who roams over the property of another must be held to do so subject to the liability of himself bearing all injury from dangers encountered while so using the licence; with the proviso,

¹ "In most cases it is well-nigh impossible for the plaintiff to lay his evidence before a jury or the Court without disclosing circumstances which either point to or tend to rebut the conclusion that the injured party was guilty of contributory negligence": per Lord Watson, *Wakelin v. L. & S. W. Ry. Co.*, 12 App. Cas. 48.

² See post, 643.

³ *Mulligan v. M'Alpine*, 15 Rettie, 789. In *Sim v. Dominion Fish Co.*, (1901) 2 Ont. L. R. 69, it was held that the owner of a fishing tug is liable at common law for the death of a fireman, who fell overboard and was drowned through the breakage of a defective handle to a fish-box he was dragging along the deck, according to the accustomed practice. The ground of the decision is that the defect being discoverable by inspection was evidence of a defect implying personal default in the master. Some remarks of Armour, C.J., importing that if the case had gone under the Employers' Liability Act, it would have been necessary to send the case back to a jury to determine whether some employee superior to the plaintiff was aware that the appliances were defective, are obviously suggested by the terms of the English Act.

⁴ *Griffiths v. London and St. Katharine Docks Co.*, 12 Q. B. D. 493; 13 Q. B. D. 259.

⁵ *Smith v. Baker*, (1891) A. C., per Lord Herschell, 360.

⁶ *Collins v. Blantern*, 2 Wils. 341; 1 Sm. L. C. (11th ed.) 369.

⁷ *Degg v. Midland Ry. Co.*, 1 H. & N. 782.

however, that the owner of the property is not wilfully to deceive him, or to do any act which may place him in danger.¹ But it is in the case of the existence of the relation of master and servant that the application of the rule is now most frequently invoked.

The existence of the risk from which the injury has arisen may either have been (a) contemporaneous with, or (b) subsequent to, the entry upon the employment, and may arise from a state of things either indifferent in itself or forbidden by statutory enactment.

Risk either contemporaneous with, or subsequent to, the entry by the servant upon the employment.
(a) Where the risk is contemporaneous.

(a) If the existence of the risk is contemporaneous with the entry by the servant upon the employment, and manifest to him, and there is no statutory duty to remedy it, it forms one of the terms of the employment, and the rule, *Volenti non fit injuria*, applies, since the risk is thus a condition of the service. This is expressed by Lord Esher, M.R., in *Yarmouth v. France*:² "Before the Employers' Liability Act there was this condition in the contract of hiring, that if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk. That is the doctrine which is embodied in the maxim *Volenti non fit injuria*." If the risk exists at the time of the employment and is not manifest and one that might reasonably be expected not to exist, the servant is entitled to assume that the terms and conditions of the employment are normal, unless it is otherwise stated.

(b) The conditions of an employment may be altered and become dangerous after the contract of employment is entered into.

(b) Where the risk is subsequent.

An American case, *Knisley v. Pratt*,³ distinguishes between the assumption of those risks which inhere in the work undertaken, and are not expressed, yet which bind by virtue of the "implied contract" to undertake them, that is the essence of the agreement, and "an independent act of waiver," which is subsequent to the contract and accepts a liability that is not included in its constitution. *Volenti non fit injuria* is the expression of this waiver.

This case was, apparently, not for the moment present to the mind of Lord Esher, M.R., when he said, in *Yarmouth v. France*:⁴ "The maxim *Volenti non fit injuria* was not wanted as between master and servant. It was only wanted, if at all, where no such relation as that of master and servant existed." Since that relation seems one where the maxim is certainly not exclusively yet still particularly applicable.⁵ In its inception the contract of the workman with his employer is to work on machinery in a certain condition. During the employment a change, either in the machinery itself or in its condition, followed by an accident, raises, not the question of the original employment, but the effect of the workman's subsequent conduct. The application of the rule, and the difference in its operation from the former case, are noticed by Cockburn, C.J., in *Clarke v. Holmes*:⁶ "There is a sound

Dictum of Lord Esher, M.R.

Dictum of Cockburn, C.J.

¹ *Gautret v. Egerton*, L. R. 2 C. P. 371.

² 19 Q. B. D. 653.

³ (1898) 148 N. Y. 372. *Doyle v. New Zealand Candle Co.*, 20 N. Z. L. R. 680, where the learned judge appears to overlook the consideration of on whom the onus of proof lies in the absence of evidence.

⁴ L. C. 651. This statement by Lord Esher, M.R., is scarcely to be reconciled with the passage just quoted above from the same judgment.

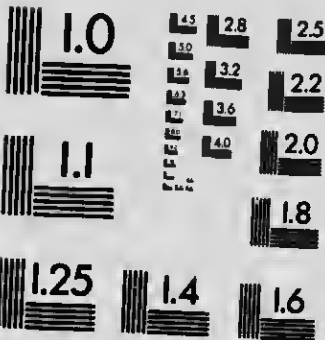
⁵ "The maxim," says Lord Herschell, in *Smith v. Baker*, (1891) A. C. 360, "has no special application to the case of employer and employed, though its application may well be invoked in such a case."

⁶ 7 H. & N. 944.



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distinction between the case of a servant, who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied."¹ A plea by the master, that the servant undertook the risks, is met by the replication that the existing state of the machinery differed from its condition at the time of entering on the employment, and is not one of the risks which the servant undertook to bear. On proof that the condition of things has been altered subsequently to the servant entering upon the employment, the master has to show that the workman has voluntarily undertaken the danger; for the risk involved constitutes an addition to those incident to the service; and it is not more than the dangers ordinarily incident to the service that the common law holds the servant to undertake. Then comes the question, What is a voluntary undertaking? In *Woodley v. Metropolitan District Ry. Co.*,² Cockburn, C.J., answers thus: "A man who enters on a necessarily dangerous employment with his eyes open, takes it with its accompanying risks. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or in the alternative to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages." In the same case Mellish, L.J.,³ refused his assent to the proposition that it is "a necessary inference in point of law," that working after knowledge of danger is an acceptance of the risk incurred. In the Lord Justice's opinion the workman was entitled to say: "I know I was running great risk, and did not like it at all, but I could not afford to give up my good place, from which I get my livelihood, and I supposed that, if I was injured by their [the defendant's] carelessness, I should have an action against the company." In the light of the later decisions the view of Mellish, L.J., is to be preferred.

What is a voluntary undertaking?
Different views in *Woodley v. Metropolitan District Ry. Co.* Cockburn, C.J.'s, view.

Mellish, L.J.'s, view.

McInulty v. Primrose.

In the Scotch case *McInulty v. Primrose*⁴ the Court held a contractor for the brickwork of an unfinished house not liable to his workman for injuries caused by the collapse of a staircase erected shortly before by another contractor, on the ground that the employer was entitled to rely on the sufficiency of the structure without

¹ Cp. Mellish, L.J., *Woodley v. Metropolitan District Ry. Co.*, 2 Ex. D. 393.

² 2 Ex. D. 388.

³ *L. c.* 393.

⁴ 24 Rettie, 442. The principle is enforced in the Massachusetts cases of *Regan v. Donovan*, 159 Mass. 1; *Lynch v. Alyn*, 160 Mass. 248.

examination. Any other conclusion would seem impossible with any regard for the conditions on which work is to be done.¹

"Mere knowledge," says Bowen, L.J., in *Thomas v. Quartermaine*,² "may not be a *conclusive* defence. There may be a perception of the existence of the danger without comprehension of the risk." "There may, again, be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily." This conclusion is itself, says Lord Esher, M.R.,³ a question of fact; and, he argues, should *therefore* be left to the jury, and the failure to leave this question to them makes the decision in that case wrong. But though findings of fact must be the basis for this conclusion, it does not follow that there is a question for the jury unless there is what Lord Hatherley calls "a contest of fact."⁴ The finding of facts is for the jury. The conclusion from the facts is strictly one of law; therefore, where facts have been established or admitted, as to which there is no contest to warrant calling in the aid of a jury in settling them, it is for the judge to say whether the conclusion of negligence can be drawn from them or not, and if, in his opinion, on an undisputed state of facts, the inference of negligence cannot be drawn, there is no case to leave to the jury.⁵

Thomas v. Quartermaine.

Lord Esher, M.R.'s, contention in *Yarmouth v. France.*

In the case put by Lindley, L.J.:⁶ "If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before *in order to avoid dismissal*," the distinction between the workman being *sciens* and being *volens* is apparent. If the case had been one of seeing the danger, reporting it, and continuing at the work, Lindley, L.J., also says he should still regard the materials as sufficient to warrant calling on a jury to determine whether "fear of dismissal rather than voluntary action might properly be inferred." In cases of this description it is always for the plaintiff to make out his case; and if he can only show facts equally consistent with the inference of liability or non-liability, he does not discharge the *onus* upon him. If, then, the inferences to be drawn were of equal probability, he would not have done so. The fact is, however, that in such a case as that suggested by Lindley, L.J., the inferences cannot be drawn with equal probability. The making a complaint raises a strong presumption against assuming an acceptance of the risk, which is not rebutted by the mere continuance in the employment.

Lindley, L.J.'s, view considered.

¹ Cp. *Kiddle v. Lovett*, 16 Q. B. D. 605.

² 18 Q. B. D. 696. Lord Herschell's strictures on this case, in *Smith v. Baker*, (1891) A. C. 325, 365 *et seq.*, are *obiter* merely and not involved in the decision; on the other side there is the view of Lord Morris at 308 *et seq.* See Law Quarterly Review, (1892) vol. viii. 202, article on *Smith v. Baker*. The elements contained in being *volens* are discussed, *Collins v. Munro*, 14 Viet. L. R. 1. In America the law has been laid down in an identical sense, that knowledge is a fact to be considered by the jury in connection with other facts in determining whether that caution was exercised that the circumstances required; *District of Columbia v. M'Elligott*, 117 U. S. (10 Davis) 821; *Hough v. Texas, &c. Ry. Co.*, 100 U. S. (10 Otto) 213, 225.

³ *Yarmouth v. France*, 19 Q. B. D. 654.

⁴ In *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery*, 3 App. Cas. 1166. See *Wakelin v. L. & S. W. Ry. Co.*, 12 App. Cas. 41.

⁵ *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 197. The rule in America has been thus stated: "When the facts are agreed upon, or otherwise appear, what is ordinary care is a question for the Court. When the facts are in dispute the proper course for the judge is to explain what would be ordinary care under certain hypotheses as to facts, and have the jury to apply the law to the facts as they find them": *Wallace v. Western, &c. Rd. Co.*, 2 Am. St. R. 346. This case, in its facts, is very like *Jackson's case*.

⁶ *Yarmouth v. France*, 19 Q. B. D. 661; *Robb v. Bulloch*, 19 Rettie, 971; *Greer v. Turnbull*, 19 Rettie, 21; *Shields v. Murdoch*, 20 Rettie, 727.

The presumption is rather that continued working was in anticipation of a remedy being applied than due to an acceptance of the risk, the existence of which had been brought home to the master by the complaint. There is yet a third condition of things possibly arising out of the facts suggested by the Lord Justice—if the workman sees danger and goes on as before—that is, if knowledge and nothing more be proved. The more natural inference from knowledge of a danger attending work, and a continuance in the work without protest or remark, seems to be that the workman is *volens* within the meaning of the maxim. If so, the workman does not discharge the *onus* of proof on him, and there is no case to go to a jury.

Hawkins, J.,
in *Thrussell v.*
Handyside.

There are indeed statements scattered about in judgments and reports from which it might be argued that the case cannot be withdrawn from a jury at all, and, therefore, where knowledge and continuance in the work are proved, the true inference is for the jury just as when there is a conflict of evidence. In *Thrussell v. Handyside*,¹ for example, where the injury sued for was caused by a defect in the scheme of work, Hawkins, J., discussing the question of the application of the maxim *Volenti non fit injuria*, remarks, as if laying down a universal rule, "That question, as is shown by the judgments in *Yarmouth v. France*,² was for the jury." In support of his view, he appealed to the recently decided case of *Membery v. G. W. Ry. Co.*³ as almost "identical in principle with the present case." But that decision was, shortly afterwards, reversed in the Court of Appeal, where Bowen, L.J.,⁴ said, on the point now being considered: "If a man voluntarily incurred a risk he could not afterwards complain. The question whether his conduct was voluntary or not was an issue of fact, but it was not always for the jury. If the evidence was all one way, it was for the judge to withdraw the case from them. If there was conflicting evidence, as if, for instance, there was evidence of compulsion, as in *Yarmouth v. France*, the question must be left to the jury."⁵ There must be some evidence of compulsion for the jury to consider. The jury are not in all cases to pass their opinion whether the plaintiff takes the risk of injury on himself. Lord Esher, M.R., assented to the decision, on the same ground, viz., that there was no evidence whatever of compulsion on the plaintiff to act as he did.

Bowen, L.J.,
in *Membery*
v. G. W. Ry.
Co.

Membery v.
G. W. Ry. Co.
in the House
of Lords.

In the House of Lords the judgment of the Court of Appeal in *Membery v. G. W. Ry. Co.*⁶ was affirmed. The Court of Appeal had directed judgment to be entered for the defendants, on the ground that the plaintiff had acted voluntarily and with full knowledge of the danger he ran. He had been injured while himself shunting a truck without assistance. Lord Halsbury, C., said:⁷ "The man (the plaintiff) obviously encountered a known risk which he had encountered for a period of seven years, and therefore he is not entitled to recover, upon the ground that he was voluntarily incurring the risk—he knew that the risk existed; and further, he was himself doing the very thing which caused danger and ultimately injury to himself." That is, in the circumstances, the question was one not proper to leave to a jury.

¹ 20 Q. B. D. 359, 364.

² 19 Q. B. D. 647.

³ 4 Times L. R. 265.

⁴ 4 Times L. R. 504, affirmed in the House of Lords, 14 App. Cas. 179.

⁵ Lindley, L.J., assented: "There was no evidence of any compulsion, and in this respect the case differed from *Yarmouth v. France*."

⁶ 14 App. Cas. 179.

⁷ *L. C.* 186.

The head-note of the Law Reports to the report of *Smith v. Baker*¹ in the House of Lords contains the statement that "the question whether he (the workman) has so undertaken the risk is one of fact and not law. And this is so both at common law and in cases arising under the Employers' Liability Act, 1880." The opinions of the Law Lords in that case, however, as reported, lay down no such proposition, and, indeed, rather point to the contrary as being the rule. For instance, Lord Watson is reported as saying:² "In the circumstances of this case the question whether he had accepted the risk is one of fact; there is no arbitrary rule of law which decides it"; and Lord Herschell:³ "I find myself unable to concur in the view that this could properly be held, under the circumstances, as matter of law." These dicta clearly point to the conclusion that there may be cases where only one view is possible, which must be ruled as law by the Court without reference to the jury, but that, where the indications are ambiguous, there the facts from which the inferences of law are to be drawn are for the jury.

Head-note of *Smith v. Baker* in the Law Reports incorrect.

Where "evidence of compulsion" is given, the *onus* is changed and thrown upon the employer. Where there is no "evidence of compulsion," the fact of knowledge raises a presumption, though it is not conclusive. This is pointed out by Bowen, L.J.,⁴ giving judgment in *Thomas v. Quartermaine*: "Knowledge, as we have seen, is not conclusive where it is consistent with the facts that, from its imperfect character or otherwise, the entire risk, though in one sense known, was not voluntarily encountered, but here, on the plain facts of the case, knowledge on the plaintiff's part can mean only one thing. For many months the plaintiff, a man of full intelligence, had seen this vat—known all about it—appreciated its danger—elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk." That is conclusive as to the *onus*. Still, before a conclusive case is made out, there may be a prescriptive case against the plaintiff liable to be ousted by further proof—as, for instance, by "evidence of compulsion"; and this is the position in which the plaintiff seems to be placed when he shows knowledge of an added danger and continuous working with that knowledge. He has not in that event proved his case.

Onus changed.

Bowen, L.J.'s statement of the working of the principle involved in the maxim *Volenti non fit injuria*.

*Osborne v. L. & N. W. Ry. Co.*⁵ must be also noticed in this connection. A railway passenger fell down a worn flight of steps and was injured. The County Court judge found "that the steps had not been properly and efficiently swept and cleaned from the caked snow, which, added to the worn condition of the steps, caused the plaintiff to fall."⁶ This seems sufficient, but Wills, J., preferred to lay down the wide proposition that "where the existence of negligence on the part of the defendants, and the absence of contributory negligence on the part of the plaintiff, are specifically found as matters of fact, if the defendants desire to succeed on the ground that the maxim *Volenti non fit injuria* is applicable, they must obtain a finding of fact, 'that the plaintiff voluntarily and knowingly, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.'"⁷

Osborne v. L. & N. W. Ry. Co.

¹ (1891) A. C. 325.

² L. c. 357.

³ L. c. 366, alluding to *Thomas v. Quartermaine*.

⁴ 18 Q. B. D. 699.

⁵ 21 Q. B. D. 220. *Pinkham v. Topsoe*, 104 Mass. 78; *Jones v. Grand Trunk Ry. Co.*, 16 Ont. App. 37.

⁶ 21 Q. B. D. 223.

⁷ Following the words of Lord Esher, M.R., in *Yarmouth v. France*. The word

This seems based on a lack of appreciation of the significance of the maxim, which plainly does not apply where there is negligence.¹

Church v. Appleby.

In *Church v. Appleby*,² the Court followed *Membery v. G. W. Ry. Co.*, as decided in the Court of Appeal, and held "as to the man's knowledge of the danger there was no doubt, and as to his being willing to incur it, the knowledge of it and working with knowledge of it, was sufficient evidence."

Smith v. Baker.

The import of the maxim *Volenti non fit injuria* was elaborately considered in *Smith v. Baker* in the House of Lords.³ A workman sued his employers for injuries received from a stone falling from a crane intermittently working over his head, while he was engaged in working a drill, and was thus prevented from giving attention to avoid the danger, when, in the course of the work, the stones lifted by the crane were swung round over his head. The jury found negligence on the part of the employer; and the point, whether there was evidence of negligence, not having been taken in the Court below, was not open to the employer in the House of Lords. One ground of the decision of the House accordingly was that the jury having found negligence in the scheme of work the case was governed by *Sword v. Cameron*⁴ and the *Bartonshill Coal Co. v. McGuire*.⁵

Two views of the meaning of the maxim. Lord Bramwell's view.

But the chief importance of the case is due to the elaborate examination of the significance of the maxim *Volenti non fit injuria*. Two views were propounded: One, the view of Lord Bramwell,⁶ which was: "The maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work." Lord Bramwell's meaning is further explained in *Membery v. G. W. Ry. Co.*,¹ where he says: "I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies."

Lord Watson's view.

The other view is that expressed by Lord Watson:⁸ "The maxim, as now used, generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed, that if injury should befall him, the risk was to be his and not his master's. When, as is commonly the

"agreed," as suggesting a contract in the matter, does not seem wholly apt; since the maxim *Volenti non fit injuria* is applicable where there is no contractual relation existing whatever. The facts more often indicate election than agreement.

¹ Lord Bramwell puts the matter with his usual clearness in *Smith v. Baker*, (1891) A. C. 344: "In the course of the argument I said that the maxim *Volenti non fit injuria* did not apply to a case of negligence; that a person never was *volens* that he should be injured by negligence. . . . The maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work." (Or the point may be stated as follows: Negligence is failure to bestow the care and skill which the situation demands; therefore, if the situation does not demand it, it is not negligence to omit what is not demanded. "Negligence," says Wharton, *Negligence* (2nd ed.), § 132, "necessarily excludes a condition of mind which is capable either of designing an injury to another or of agreeing that an injury should be received from another." In the United States no man can contract himself out of liability for negligence: *Rd. Co. v. Lockwood*, 17 Wall. (U. S.) 357; but *Volenti non fit injuria* is the rule of law there as here: *Ludd v. New Bedford Rd. Co.*, 115 Mass. 412.

² 5 Times L. R. 88.

³ (1891) A. C. 325; *Brooke v. Ramsden*, 63 L. T. 287; *Wallace v. Cutler Paper Mills Co.*, 19 Rettie, 915.

⁴ 1 Dunlop 493.

⁵ (1891) A. C. 344.

⁶ (1891) A. C. 355. Cp. *Webster v. Foley*, 21 Can. S. C. R. 580: a case severely criticised by Mr. Labatt, *Master and Servant*, 1983, n. 3.

⁷ 3 Macq. (H. L. Sc.) 300.

⁸ 14 App. Cas. 187.

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case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at work with such knowledge and appreciation will, in every case, necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case."

It is pointed out by Lord Watson that an agreement to undertake risk is valid. The difficulty is to determine the existence or not of such an agreement where the existence of an agreement is matter of implication and is not expressly stated. Now cases like *Griffiths v. London and St. Katharine Docks Co.*¹ show that where the risk is existing before the entering into an agreement, the *onus* is on the servant to show his master's knowledge and his own ignorance of it. In such cases then the knowledge of the servant is presumed, and also that he is willing to undertake the risk. But where the risk is superadded to the employment the presumption is the other way. Here there is a variation of the contract originally entered into caused by the addition of the risk. The *onus* is on the master to show that the servant accepted the altered conditions. Proof of the original contract and of the variation from it causing injury would, unanswered, entitle the plaintiff to recover. Cross-examination might elicit from the plaintiff, as it did in *Smith v. Baker*, that he continued working with knowledge of the altered conditions. Then the question comes of the amount and adequacy of such knowledge; and as to this, whatever the preponderating weight of evidence on the one side and the insignificance of it on the other, the opinion of a jury must be taken in accordance with the view of the majority of the House of Lords in *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery*.² The cross-examination of the plaintiff may elicit that he had full knowledge of the danger and accepted the risk. Then, in the words of Lord Hatherley in the case just cited, there is nothing "left for the jury to decide, there being no contest of fact."³ But except in this possibility the matter must be left to the jury.

Agreement to undertake risk valid.

(2) VOLENTI NON FIT INJURIA AS MODIFIED BY STATUTORY OBLIGATION.

We now come to consider the case of a man working at a dangerous employment, where there is a statutory obligation on the master to take precautions, and which precautions are neglected. Whether the precautions are neglected contemporaneously with the employment or subsequently will not determine this case; since there is the independent obligation imposed on the master by State authority to afford protection. Thus, by the Factory Act, 1901,⁴ a penalty is imposed on the employer for neglect to fence machinery enforceable under the criminal law, and independent of all agreements or consents whatever.

(2) In what circumstances the maxim *Volenti non fit injuria* applies in the case of a violation of a statutory obligation.

¹ 13 Q. B. D. 259.

² 3 App. Cas. 1155.

³ 3 App. Cas. 1169, quoted and approved by Lord Watson in *Wakelin v. L. & S. W. Ry. Co.*, 12 App. Cas. 48.

⁴ 1 Edw. VII. c. 22, Part I. (ii.) s. 10; Part IX. s. 135. *Groves v. Lord Wimborne*, (1898) 2 Q. B. 402.

Where duty
to the State
violated.

In a case of this sort, where the State imposes a duty, and annexes a penalty to the violation of it, a presumption is raised that the employer who violates his duty to the State has not discharged his duty to his workpeople, rather than a presumption that, because a workman continues at work in illegal circumstances, even with knowledge of them, he must be taken to waive their effect upon him; or, to state the matter in another way, criminal negligence on the part of the master is more consistent with a neglect of civil duty to his workman than with the existence of an agreement between master and workman to avoid the obligation of the law. This view is in accordance with the weight of authority.

*Coe v.
Platt.*

In the earliest case¹ dealing with the fencing clauses of the Factory Act, 1844,² Puke, B., said: ³ "Though its main object may have been to afford security to children and young persons, who are more likely to sustain injury than others; yet there is a positive enactment that in all factories within the interpretation clause, when any part of the machinery is used for any manufacturing process it shall be securely fenced; consequently, if any person sustains an injury through the violation of this enactment, he has a right to bring an action."⁴

*Holmes v.
Clarke*

Opinion of
Pollock, C.B.

The point, however, was most canvassed in the well-known case of *Holmes v. Clarke*,⁵ though with no certain result. In the Court of Exchequer,⁶ Pollock, C.B., laid down the law as follows: "Where machinery is required by Act of Parliament to be protected so as to guard against danger to persons working it, if a servant enters into the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous in consequence of the protection being decayed or withdrawn, but complains of the want of protection, and the master promises to restore it, but fails to do so, we think he is guilty of negligence, and that if any accident occurs to the servant he is responsible."

Considered.

The proposition of the Chief Baron seems to be sedulously narrowed down to comprehend no more than the facts of the case on which he was giving judgment. The actual assertion of the duty, in favour of the servant, to fence machinery required by Act of Parliament to be protected is limited to those cases: (1) where it actually was so protected at the entry of the servant into the service; (2) where complaint is made of its deteriorated condition; (3) where the master has promised to restore it and fails to do so. Even this narrow proposition did not commend itself to some of the judges in the Exchequer Chamber. Cockburn, C.J., thought the proposition that the plaintiff could take advantage of the statutory requirements "open to considerable doubt owing to the plaintiff being an adult," and decided

*Holmes v.
Clarke in the
Exchequer
Chamber.*

¹ *Coe v. Platt*, 6 E. L. 752, 7 Ex. 460, 923. This case, which was argued on arrest of judgment, turned on the point whether the declaration should allege that the machinery was in motion for some manufacturing process, and not allege that it was in motion simply. This was decided affirmatively.

² 7 & 8 Vict. c. 15. See now 1 Edw. VII. c. 22. See *Creery v. Hannay's Patents Co.*, 16 Rettie, 993, as to the precautions to be adopted in whitelead works; also what is "whitelead" under the Act of 1878.

³ 6 Ex. 757.
⁴ In *Doel v. Sheppard*, 5 E. & B. 856, it was held, that "all mill-gearing, while in motion for a manufacturing purpose, is to be fenced." Cp. *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130.

⁵ 6 H. & N. 349; 7 H. & N. 937. The Law Journal Report of the case in the Ex. Ch., 31 L. J. Ex. 356, is the better, as it contains, *inter alia*, some important remarks by Wightman, J., which had the sanction of Willes, J., and which are not in the other reports.

⁶ 6 H. & N. 358.

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the case on the ground that the defendant was guilty of negligence independent of statute. He was followed by Compton, Byles, and Keating, JJ.¹ Wightman, J., expressly reserved his assent to the reasoning of the Chief Justice, and said: "I attribute more importance to the statutory obligation than has been put upon it by my lord." Willes, J., merely expressed concurrence.

The distinction between a statutory and a common law liability was pointed out in *Britton v. Great Western Cotton Co.*² Bramwell, B., having expressed his inability to "follow the reasoning of some of the judges in the Exchequer Chamber" in *Holmes v. Clarke*, proceeded to consider the applicability of the maxim *Volenti non fit injuria*:³ "The jury have found him [the decedent] not guilty of contributory negligence either in going or being there [*i.e.*, where there was unfenced machinery which there was a statutory duty to fence], and I cannot say they were wrong. I do not myself see that the place was necessarily dangerous. At any rate, the decedent may well have thought it was not. Indeed, the accident seems to have resulted, not from the necessarily dangerous character of the place, but from some misfortune which might have happened anywhere. It is further contended that, at any rate, the decedent knew the danger as well as his employers. That may be doubtful in fact, for he seems not to have been a skilled workman, but a coal-trimmer. Assuming, however, that he did share his employers' knowledge, it must be remembered that the liability of the defendants is not at common law, but by statute. They are in default to begin with, and the mere circumstance that the decedent entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was exposed." The Law Journal report⁴ is somewhat different. There the sentence last extracted reads as follows: "Here the plaintiff is not placed in the dilemma which arises when the action is for a breach of a duty at common law. That dilemma is this—either the danger was obvious or it was not. If obvious, the servant must have known it as well as the employer; if it was not obvious, there was no negligence in the employer. That dilemma is not in the plaintiff's way here, for the duty is a statutory one. If the decedent dispensed with the performance of it knowing the duty and knowing the danger, I think he would be *volens*, but not otherwise." The rest of the Court agreed.

Distinction between a statutory liability and a common law liability, as pointed out in *Britton v. Great Western Cotton Co.*

Report in the Law Journal.

There is, perhaps, a want of precision in some of these expressions. Judgment is manifest that a distinction is drawn between the common law liability and the statutory liability. The statutory obligation imposed is not of such a nature that in no event can it be waived by the servant —so far, that is, as his own rights under it are concerned; since Bramwell, B., recognises the servant's ability to dispense "with the performance of it knowing the duty and knowing the danger."⁵ In the case of the ordinary law he is, with similar circumstances, presumed to do this; but the statutory obligation displaces "the dilemma which arises when the action is for a breach of a duty at common law." The difference pointed at seems, therefore, to be that, by the common

criticised.

Conclusion.

¹ 31 L. J. Ex. 359.

² (1872) L. R. 7 Ex. 136. *Robb v. Pultock*, 19 Rettie, 971; *Shields v. Murdoch*, 29 Rettie, 727.

³ L. R. 7 Ex. 137.

⁴ 41 L. J. Ex. 99, 101.

⁵ Cp. *Winch v. Conservators of the Thames*, L. R. 9 C. P. 389.

law, working with circumstances of knowledge of the danger, lets in the presumption *Volenti non fit injuria*; while in the case of the statutory obligation, the *onus* remains on the master, and he has to prove, in addition to knowledge of the risk, that, as a matter of fact, the servant has dispensed with the performance of the master's statutory duty, with a knowledge of what the duty dispensed with is and what the danger involved is.

Bowen, L.J.,
in *Thomas v.*
Quartermaine,
on the effect
of knowledge
of danger.

The distinction between a breach of duty at common law and the breach of a statutory duty is touched on by Bowen, L.J., in his masterly judgment in *Thomas v. Quartermaine*.¹ "It is plain," he says, "that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk; as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily. The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced. The case of *Clarke v. Holmes* is a case of that sort, and has been so explained subsequently by judges of authority." "The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which, but for a breach of duty on his own part, would not exist at all." Fry, L.J., in the same case, also alludes to the distinction:² "Knowledge is not, of itself, conclusive of the voluntary character of the plaintiff's actions; there are cases in which the duty of the master exists independently of the servant's knowledge, as when there is a statutory obligation to fence machinery."³

Fry, L.J., in
Thomas v.
Quartermaine,
on the effect
of knowledge
of danger.

Conclusion.

The reasonable conclusion from these *dicta* is that, where a statutory duty exists, the maxim *Volenti non fit injuria* is not to be presumed to avail, or, as Wills, J., says in his judgment in *Buddleley v. Earl Granville*,⁴ "would not apply"⁵ at all where the injury arose from a direct breach by the defendant of a statutory obligation.

Wills, J., in
Buddleley v.
Earl
Granville.

The civil remedy of the person injured has so far only been considered. Whatever the nature of the workman's assent or whatever the amount of contributory negligence which brings about an accident, the liability to the penalties of the Factory and Workshop Act, 1901,⁶ attaches to the employer as occupier if his factory or workshop "is not kept in conformity with this Act"⁷ or if "in consequence of the occupier of a factory or workshop having neglected to observe any provision of this Act or any regulation made in pursuance of this Act"⁸ any person is killed or suffers bodily injury.

Buddleley v.
Earl Granville.

In *Buddleley v. Earl Granville*, through breach of a statutory duty imposed by the Coal Mines Regulation Act, 1872,⁹ the plaintiff's husband was killed; and, in an action under the Employers' Liability Act, 1880, it was held that the maxim *Volenti non fit injuria* was not applicable, where the injury was from the breach of a statutory duty on the part of the employer. It should be pointed out that, on the facts of the case, the defendant was liable in any event; since, a

¹ 18 Q. B. D. 696.

² *L.c.* 703.

³ The Irish Ex. Ch. had expressed this conclusion very clearly some seventeen years previously in *Hoey v. Dublin and Belfast Junction Ry. Co.*, 5 Ir. R. C. L. 206.

⁴ 19 Q. B. D. 426.

⁵ *L.c.*, *primâ facie*.

⁶ 1 Edw. VII. c. 22.

⁷ s. 135.

⁸ S. 136.

⁹ 35 & 36 Vict. c. 76, rep. 50 & 51 Vict. c. 58, s. 81.

statutory duty being shown to exist and to have been negated, the defendant had not "dispensed with the performance of it" within the meaning of *Bramwell, B.*, in *Britton v. Great Western Cotton Co.*,¹ and therefore the decision is sustainable quite independently of the actual finding reason alleged for it.²

In the Ontario case of *Thompson v. Wright*,³ *Boyd, C.*, discussing the effect of a failure to guard dangerous machinery within the provisions of the Ontario Factory Act, describes the failure as "per se evidence of negligence"; and the phrase is accepted in a string of cases as expressing the determination of the Courts not to interfere with the verdicts of juries acting on the view that the maintenance of unguarded machinery is negligence, though the condition of the machinery in other respects is unexceptionable. In *James v. Westinghouse Brake Co.*,⁴ the proposition that neglect to fence a dangerous machine from which an accident happens is actionable negligence was disputed on the same ground as in *Groves v. Lord Wimborne*,⁵ that a penalty was imposed for the neglect;⁶ in which latter case the Court held that where "there has been a failure in the performance of an absolute statutory duty," "there is no need for the plaintiff to allege or prove negligence on the part of any one in order to make out his cause of action." On the other hand, proof of a breach of statutory duty to fence machinery does not disentitle those guilty of it to set up the defence of contributory negligence.⁷

And in the Scotch case of *Kelly v. Globe Sugar Refining Co.*,⁸ the protection of the Factory Acts, 1878 and 1891, was held to extend to every person employed in the factory; so that there is no necessity that, at the time of the happening of an accident, the injured person should be actually engaged in the performance of his duty.

Our conclusions may be summed up in three propositions:

1. Where the risk is plain and apparent at the time of entering on the employment, the presumption of law is, that the workman enters on the employment on the terms of encountering the risk, even though, in fact, he has no knowledge of it.

2. Where the risk is superadded after the commencement of the employment, the presumption of law is, that the workman does not undertake the work subject to the risk, till it appears that he has actual knowledge and a full appreciation, and has continued in his employment, so knowing of and appreciating the risk; and not even then if his continuance in the employment is explained by other circumstances—e.g., a promise to remove the danger.⁹

3. When the master is under a statutory liability to take precautions

¹ 41 L. J. Ex. 102.

² The reasoning of the judgment in *Baddley v. Earl Granville* is minutely examined in an article in the *Law Mag.* (1887), 4th series, vol. xiii. 19. See the rule formulated in *Clegg, Parkinson & Co. v. Early Gas Co.*, (1890) 1 Q. B. 592.

³ 22 Ont. R. 127. *O'Connor v. Hamilton Bridge Co.*, 21 Ont. App. 596, 24 Can. S. C. 598. See *McLoherly v. Gule Manufacturing Co.*, per Osler, J.A., 19 Ont. App. 117, the case of a woman's hair caught by an unguarded revolving horizontal which passed through the room near the ceiling and in front of a window she opening when she was caught and injured.

⁴ *The Times Newspaper*, February 1, 1898.

⁵ (1898) 2 Q. B. 402.

⁶ See now 1 Edw. VII. c. 22, s. 136.

⁷ *Hes v. Abercrombie & Co.*, 2 Times L. R. 547. Cf. *Groves v. Lord Wimborne*, (1898) 2 Q. B., per Williams, J., 419.

⁸ *Smith v. Baker*, (1891) A. C. 325. *Ante*, 636. ⁹ 20 Rettie, 833.

There is a manifest difference between continuing to work with knowledge of a danger without complaint, and after complaint pending the application of a promised remedy: see *ante*, 625.

in any particular work, the presumption of law is that, as between the master and the workman, the fact of the workman working in the absence of the statutory safeguards does not discharge the master from his liability to compensate the workman for injuries sustained through the master's neglect to provide the statutory safeguards; and this presumption can only be rebutted by proof of an undertaking of the employment by the workman with a knowledge of the risk involved, and of the master's duty in respect thereof.¹

In what circumstances a workman can contract to undertake risks.

We have, while investigating the nature of a statutory duty, in effect, though incidentally, investigated the question whether a workman can definitely contract to undertake risks, and in what circumstances. This we have found he can do, unless he is prohibited by any statute.² And he is prohibited when a penalty is imposed for doing or omitting the act which is the subject of legislation;³ he is not prohibited where an Act of Parliament makes a contract for him, and does not in doing so impose a general rule of conduct, but confines itself to presuming a benefit for either an individual or a class.⁴

IV. Duty of the master to the servant with regard to the employment of fellow servants.
Hutchinson v. York, Newcastle, and Berwick Ry. Co.
Tarrant v. Webb.

IV. THE DUTY OF THE MASTER TO THE SERVANT WITH REGARD TO THE EMPLOYMENT OF FELLOW SERVANTS.

The legal expression of this duty was first formulated by Alderson, B., in *Hutchinson v. York, Newcastle, and Berwick Ry. Co.*, as follows:⁵ "The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care." The rule was formulated in *Tarrant v. Webb*⁶ that "the master may be responsible where he is personally guilty of negligence; but certainly not where he does his best to get competent persons. He is not bound to warrant their competency."⁷ The judge had directed the jury that, "if they were of opinion that the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or, that the person employed by the defendant for the purpose of erecting it was an incompetent person, the plaintiff was entitled to recover." This was held a misdirection, as it failed to point out that the defendant might have used every possible care, and yet the servant he had selected might prove incompetent; in which case the injured servant could not recover. *Tarrant v. Webb* was approved in *Wilson v. Merry*, where the Lord Chancellor (Cairns) says:⁸ "Negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants."

¹ *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Doublington Iron & Steel Co. v. Dun*, 31 Can. S. C. R. 387, 392. For the law in the United States see *Kohn v. M. Nalla*, 147 U. S. (40 Davis) 238; *Union Pacific Ry. Co. v. McDonald*, 152 U. S. (45 Davis) 262.

² *Ridpath v. Allan*, L. R. 4 P. C. 511.

³ *In re Cork and Foughal Ry. Co.*, L. R. 4 Ch., per Lord Hatherley, C., 758: "Everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever."

⁴ *Griffiths v. Earl of Dudley*, 9 Q. B. 11, 357; and the cases cited *ante*, 641. See *post*, 725 note 4.

⁵ (1850) 5 Ex. 353. *Deverill v. Grand Trunk Ry. Co.*, 25 Upp. Can. Q. B. 517.

⁶ (1856) 18 C. B. 707, per *Jervis*, C. J., 804.

⁷ *Cp. Potts v. Plunkett*, 91r. C. L. R. 290.

⁸ (1860) L. R. 1 Sc. App. 332.

In *Potts v. Port Carlisle Dock and Ry. Co.*,¹ the accident was caused by the breaking of a turn-table, originally defectively constructed. Cockburn, C.J., said: "In order to establish the liability of the defendants and to sustain this action, it is necessary that the plaintiff should make out, not only that the turn-table was so defective in its construction as to show that there had been negligence somewhere, but also that the defendants had been guilty of negligence in this—that they had not used care in employing competent persons to do the work. Negligence on the part of the person employed is not sufficient; there must also be negligence on the part of the employers. If the plaintiff had given evidence of the incompetency of the persons employed to construct this turn-table, she would have been entitled to recover damages in this action. Or if she had shown that the turn-table was grossly defective, and that the defect was so clear and apparent as unmistakably to lead to the inference that an incompetent person had been employed in its construction, she would in that case also have been able to sustain this action."² The law as thus laid down, in so far as it imports that when the plaintiff has given evidence of the incompetency of a servant he is entitled to recovery without further evidence is clearly incorrect. As was pointed out in *Tarrant v. Webb*,³ it is quite consistent with the master using every care that the servant may, notwithstanding, prove incompetent; and, even though the servant be incompetent, if the master has used all reasonable care in his selection he is not liable. Two facts have to be established—(1) incompetency of the servant, and (2) want of care on the master's part; and proof of neither, singly, is enough.⁴

Potts v. Port Carlisle Dock and Ry. Co.
Statement of the Law by Cockburn, C.J.

Criticised.

Smith v. Howard.

This is illustrated by *Smith v. Howard*.⁵ A boy was engaged by the defendant's foreman; complaint was made of his incompetence to the foreman; subsequently to which complaint an accident happened, in respect of which an action was brought, alleging the incompetency of the boy as the cause. The claim was held unsustainable; for if the ground of action was the incompetency of the servant, it must be shown that the foreman, and not the boy merely, was incompetent; otherwise the case was merely that of the negligence of a fellow servant in employing an incompetent boy. A master is not bound to the personal selection of the servant he employs; if he makes all reasonable provision for the selection of competent servants, his

¹ 8 W. R. 524, 2 L. T. (N. S.) 283. The Law Times report of this case is the fuller, that in the Weekly Reporter is the clearer. The head-note in the Weekly Reporter runs: "In order to render a master liable for an injury to his servant caused by the breaking of a machine belonging to the master, it is not sufficient to show that the machine was defectively constructed, but there must be evidence that the master employed incompetent persons to construct the machine." This is putting the master's duty much too high. His duty is no more than to use reasonable care to employ competent servants. If after that they prove incompetent, the master is not liable. See the argument in *Brown v. Accrington Cotton Co.*, 3 H. & C. 511.

² This sentence in the Law Times report reads thus: "If the negligence of companies is to be deduced from the business of the work itself, then the plaintiff must show that the accident arose from the clear negligence of the defendant; if she can show the work was so grossly bad, then I am quite willing to admit that it may not be necessary to call evidence of negligence."

³ 18 C. B. 804.

⁴ It is said that the person appointed to examine the materials was selected because he was gatekeeper, and that he is therefore presumably incompetent. I should rather infer that he was made gatekeeper because he had been selected to examine the materials; but, at all events, there was no evidence that he was incompetent, or, even if he was, that there was any negligence in the defendant's personal selection; per Wightman, J., *Ormond v. Holland*, E. B. & E. 105.

⁵ (1870) 22 L. T. (N. S.) 130.

duty is discharged, even though, through the negligence of his deputy, the provision in any case may prove inadequate.

Lord Cairns's statement of the law in *Wilson v. Merry*.

That the law is in accordance with the decision in *Smith v. Howard* appears from Lord Cairns's statement in *Wilson v. Merry*:¹ "In the event of his—i.e., the employer's—not personally superintending and directing the work, [he] is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master."

Onus changed on proof of the incompetency of the servant.

On proof of the incompetency of the servant—that is, of the servant responsible for competency—as illustrated by *Smith v. Howard*, the onus of proof is changed; for proof of incompetency of the servant is *primâ facie* evidence of want of care on the part of the master in selecting him; and the fact that requisite care has been exercised lying peculiarly within the knowledge of the master, when the servant is shown to be incompetent, there is no injustice to call on him to show that he exercised due care in his selection.² On the other hand, it has been said that, as the negligence is the not taking due care to employ a competent servant, the burden of proving the whole proposition on which the negligence depends lies on the party asserting it.

Conflict of opinion.

Better opinion.

The better opinion seems to be that, "When it is shown that a servant is incompetent, and that through his incompetency injury results to his fellow servant, the mere fact of his incompetency throws the onus on the master of showing that he exercised due and reasonable care in selecting him, and, in the absence of such evidence, justifies the question of negligence in the master being left to the jury."³ This was the course adopted in *Edwards v. London and Brighton Ry. Co.*,⁴ where evidence having been given that deceased was a person of inferior grade, and the work he was employed on required skill, evidence to rebut this was at once given, without putting the plaintiff to prove independently the want of care in the appointment. It seems doubtful, notwithstanding, whether this can be laid down as a rule of law. It is clear that incompetency may be so gross and palpable that it may raise an irresistible presumption of negligence in the appointment of the incompetent person; it is equally true that incompetency, as undoubted and as harmful, may be so disguised that its existence is quite consistent with a due care on the part of the master. The result seems to be that the question in each case is for the judge, whether the proof given of incompetency is sufficient to raise a presumption of want of due and reasonable care in the selection of the servant; for the jury, whether it does.⁵

Edwards v. L. & B. Ry. Co.

M'Carthy v. British Shipowners' Company; law laid down by Dowse, B.

There remains to consider what is sufficient evidence of incompetency to affect the master. In *M'Carthy v. British Shipowners' Co.*,⁶ Dowse, B., thus states the law: "It is not true, as a general proposition of law, that all negligence is evidence of incompetency. It

¹ L. R. 1 Sc. App. 332. *Crabb v. Kynoch*, The Times Newspaper, 18th May, 1907.

² *Murphy v. Pollock*, 15 Ir. C. L. R. 224. The case of *Wanstall v. Pooley*, 6 Cl. & F. 919 n., shows "that the employment of a tipsy man was an act of negligence"; but it does not throw light on the proposition in the text, for on other grounds the master was clearly liable for the negligence of his servant whereby a stranger was injured.

³ Per Palles, C.B., *Skerritt v. Scallan*, Ir. R. 11 C. L. 401. See *Swift v. Macken*, Ir. R. 8 C. L., per Dowse, B., 141.

⁴ 4 F. & F. 530.

⁵ *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193.

⁶ 10 L. R. Ir. 392.

may, I admit, in some cases be evidence of incompetence; but I think that sometimes the most competent people are the most negligent, whether out of carelessness, or temper, or negligence in the real sense of the word. I say, therefore, that it is not correct to assume that all negligence is evidence of incompetency."

That in some circumstances a single act of negligence may be sufficient is pointed out by Fitzgerald, B.,¹ and quoted with approval by Pallet, C.B., in *Skerrit v. Scallan*.² Fitzgerald, B., said: "I can conceive that, even the single act of a man may be evidence—nay, satisfactory evidence—of incompetence; but it seems to me that this is where the act is of such a nature, or done under circumstances such that the doing of it may be reasonably thought only accountable for on the supposition of malice, which is not to be presumed, or incompetency." It should be pointed out that, in the case of malice the master would not be liable in any event.³ Fitzgerald, B., then goes on to deal with a difficult point. "Assuming however, that a reasonable man might, from this single instance, reasonably infer want of ordinary skill and care in Linehan, will incompetence thus inferred from a single act in a man, as to whose conduct on other occasions there is no evidence, be itself evidence from which a reasonable man can infer want of reasonable care on the master's part in selecting him, or knowledge of his incompetence? I cannot go this length."⁴

Fitzgerald, B.,
in *Murphy v.*
Pollock.

This accords with the decision of the Court in *Baster v. London and County Printing Works*⁵—a case where a workman was dismissed for a single instance of forgetfulness which resulted in damage to a valuable machine. "The question," it was said, "must depend upon the particular circumstances of each case." The negligence of an engine-driver, a railway signalman, a foreman machinist, or of any one responsible for the irresistible agencies that are used in modern industrial enterprise, may result in widespread calamity, and one single failure or lapse may not only justify, but necessitate the removal of its author from a post of such dangerous responsibility. On the other hand, it has been justly said that "intelligent men of good habits, who are engineers or brakemen or switchmen on railroads" are not "inevitably to be discharged for the first error or act of negligence."⁶

Baster v.
London and
County
Printing
Works.

Specific acts of incompetency should first be shown. Then the master's knowledge, actual or constructive. The fact of knowledge may be shown by general reputation amongst other workmen engaged in the same business. Evidence that the workman alleged to be incompetent had been suspended or discharged in some previous employment has been admitted; so has a general reputation for intemperance;⁷ but the mere fact of recklessness or negligence on the particular occasion inquired about is not evidence of negligence of the master in hiring the workman. Evidence of general reputation for competency may manifestly be given on the part of the master.

Evidence
of in-
competency.

Evidence of the reputation of the servant was tendered as evidence that would bind the master where the servant's incompetency was

¹ *Murphy v. Pollock*, 15 Ir. C. L. R. 232.

² Ir. R. 11 C. L. 400.

³ *Croft v. Alison*, 4 B. & Ald. 590, and the cases following it.

⁴ See *Avery v. Bowden*, 6 E. & B. 974, cited by Wightman, J., in *MacMahon v. Lennard*, 6 H. L. C. 993.

⁵ *Bowlee v. New York, &c. Rd. Co.*, 59 N. Y. 356.

⁶ (1899) 1 Q. B. 901.

⁷ *Baltimore, &c. Ry. Co. v. Campe*, 65 Fed. R. 952; *Baltimore, &c. Ry. Co. v. Henthorne*, 73 Fed. R. 634. See also 81 Fed. R. 807.

notorious in the neighbourhood.¹ The evidence was admitted "to show that the master would have found out that the servant was incompetent if proper means had been taken to ascertain the qualifications of the servant." "We cannot say," the Court added, "that it may not be a matter of common repute in a community that a man is physically weak and is partially blind and deaf."²

Analogy with the law as to machinery.

When the incompetency of the servant is established, the law differs nothing from that which is applicable to machinery tackle. The obligation of the master is to see that machinery is reasonably sufficient. So, too, with servants; still there may be a waiver by conduct on the part of the servant of his right to suitable machinery or competent fellow servants. In both cases the allegation that the servant had knowledge is not sufficient; for as knowledge of defective machinery may be consistent with a reasonable belief that the master would remedy it, and the servant's continuance in the work may be only on this assumption;³ so with incompetent servants, the plaintiff may have knowledge of their incompetence; and this, though evidence to disentitle him from recovering, is not in itself a complete legal answer to the claim; for knowledge may be consistent with many circumstances that warranted the plaintiff continuing in the employment.⁴

The rule in the United States.

The degree of diligence required of a master in the selection of a servant has been considered in the United States. On the one hand it was sought to prescribe an inelastic standard, on the other, one variable with the particular exigencies. The latter view has been adopted, and may also be taken to correctly express the English law. "Ordinary care," it was said, "in the selection and retention of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as in view of the consequences that may result from negligence on the part of employees is fairly commensurate with the perils or dangers likely to be encountered."⁵

Expert or professionally qualified servants.

What has been said is mainly with reference to the obligation of the master to the servant not to choose an incompetent servant. There is yet another aspect in which incompetency of the servant is to be looked at—though perhaps the class we are to turn to are rather agents than servants in their relation to the outside world. Their duty is not to act for their employer, but to bring their own judgment and knowledge to bear in his employment, for the advantage of those relying on his skill in their selection. The employer holds himself out to supply advisers or assistants where particular and professional skill is offered; and which must be rendered through specialists whom the understanding is that he is to provide; and he in no way holds himself out as qualified or ready personally to act. His subordinates act not on his particular instructions, but on their own experience and judgment. What the employer professes is to select his assistants from the ranks

¹ *Monahan v. Worcester*, 150 Mass. 439, 15 Am. St. R. 226; *Park v. New York &c. Rd. Co.*, 155 N. Y. 215.

² In *Gilman v. Eastern Rd. Co.*, 95 Mass. 433, the accident in respect of which the action was brought was caused by the negligence of an habitual drunkard. Evidence of reputation was held admissible to show that his intemperate habits ought to have been known to the officers of the corporation. *Flynn v. M'Gau*, 18 Rettie, 554, is a decision "one of relevancy only."

³ *Clarke v. Holmes*, 6 H. & N. 349, 7 H. & N. 937.

⁴ *Hoey v. Dublin and Belfast Junction Ry. Co.*, (1870) 5 Ir. R. C. L. 206.

⁵ *Wabash Ry. Co. v. McDaniel*, 107 U. S. (17 Otto) 454, 460.

of those who have recognised qualifications. When they are appointed those dealing with them rely on their skill, judgment and experience, not on the qualities of the employer, who may even be forbidden to act in the matter under the sanction of legal penalties. In this case the employer has to exercise care in the selection of his agents, but when they are appointed cannot direct the advice they give or the action they take, and is only responsible for the appointment of persons presumably qualified, and of whom, having exercised care in the selection, he knows nothing to the contrary. If then they act with bad judgment or negligence he is not responsible.¹

V. MASTER'S DUTY TO YOUNG PERSONS IN HIS EMPLOYMENT.

V. Duty to young persons.

We have considered so far the duty owing to servants who are adults. A different and greater duty is owing by the master to young persons. The principles by which this is fixed have been already treated of in connection with the general principle regulating contributory negligence.² The extent of the master's duty remains shortly to be illustrated.

The leading statement of this is Cockburn, C.J.'s, at *Nisi Prius*, in *Grizzle v. Frost* :³ "I am of opinion that if the owners of dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions as to its use or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware ; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery."

Cockburn, C.J.'s, statement of the law in *Grizzle v. Frost*.

At common law there does not appear to be any disability on the employment of young children. The ordinary rule that when a workman is employed on any work he is presumed to undertake only such risks of the employment as are plain and apparent ordinarily to a person in his position of life, would of itself afford no small protection in the case of young children to whom risks are plain and apparent in a much less degree than in the case of adults ; and to whom consequently the common law affords an ampler protection in proportion as naturally they are less able to protect themselves.

Common law rule considered.

But Lord Chelmsford in *Bartons Hill Coal Co. v. McGuire*,⁴ in commenting on *O'Byrne v. Burn* intimates an even larger measure of protection.⁵ The learned lord points out that it was hardly possible to apply the principle of acceptance of the service with a knowledge of the risks incident to it in this case ; since "she was an inexperienced girl employed in a hazardous manufactory, placed under the control, and, it may be added, the protection, of an overseer who was appointed by the defender and intrusted with this duty. And it might well be

Bartons Hill Coal Co. v. McGuire.

¹ *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 ; *Glavin v. Rhode Island Hospital*, 34 Am. R. 675 ; *Hall v. Lees*, (1904) 2 K. B. 602 ; *Evans v. Mayor, dec. of Liverpool*, (1906) 1 K. B. 100.

² *Ante*, 160.

³ (1863) 3 F. & F. 625. In Canada the employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Canadian Factories Act, and, therefore, beyond the mere penalty imposed the employer has to exercise more than ordinary precaution for the wellbeing and safeguarding of children who have been put to work contrary to legislative prohibition : *O'Brien v. Sanford*, 22 Ont. R. 136.

⁴ 3 Macq. (H. L. Sc.) 311.

⁵ (1854) 16 Dunlop, 1025.

Lord
Cranworth's
suggestion.

considered that by employing such a helpless and ignorant child the master contracted to keep her out of harm's way in assigning to her any work to be performed." Lord Cranworth¹ suggests that the rule of common service is modified to the extent of holding that children are not engaged in the common work with the superintendent: "It may be that if a master employs inexperienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy whom he puts in his place, they are not, within the meaning of the rule in question, employed in a common work with the superintendent." This departure from the general rule might, perhaps, be better stated as a principle that an overseer or superintendent of work has additional duties cast upon him if he employs inexperienced persons; duties which arise from such persons' incapacity to protect their own interests, and are measured by the extent of their incapacity and inexperience; since it is not the scheme of work that is altered, but the mutual relations of those engaged in it.

Gemmill v.
Gourock Rope
Work Co.

The contention that an additional duty is thrown on the master by the employment of children and young persons, and that the extent of the additional obligation is measured by their presumed incapacity, is borne out by the Scotch case of *Gemmill v. Gourock Rope Work Co.*² There it was held that the particular machinery described in the case should have been fenced as against children or young persons. This is a stronger authority than the earlier case of *O'Byrne v. Burn*³ and the contemporaneous case of *M'Millan v. M'Millan*.⁴ These, though pointing in the same direction, go no further than to hold that the allegation of a greater duty towards an inexperienced child is not demurrable.

Murphy v.
Smith.

The English case of *Murphy v. Smith*⁵ has sometimes been cited for a contrary view. The facts must be looked at to explain the decision. A boy engaged in making lucifer matches interfered in a part of the work that he had no business to, and which was dangerous; an explosion took place through the meddling, and the boy was injured. A man, not a foreman, standing by, did not interfere, and was so far guilty of negligence in that he permitted an inexperienced person to act thus. The man was morally negligent in letting the boy injure himself. The point for consideration was whether he was under any legal duty to interfere so that his neglect to do so was hindering on the common employer. The Court assumed that had he been a foreman the employer would have been liable, and thus recognised the distinction that is set up on behalf of inexperienced persons. As the man was not foreman, but only a fellow workman, they held there was no liability on the employer. It should be noted that the boy was not employed on the work, and there was no evidence that any direction was given to him in the matter, or that he was doing anything else than interfering. Had a liability been imposed in this case, it would have indicated a great extension of the master's liability beyond any alleged in previous cases, and would, moreover, have, in effect, prohibited the employment of inexperienced workmen on dangerous work except on onerous terms, and have asserted the existence of an obligation not to employ them where they would be able to injure themselves by interfering with dangerous work.

¹ *Bartonshill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 294, 295.

² 23 Dunlop, 425.

³ 16 Dunlop, 1025.

⁴ 23 Dunlop, 1082.

⁵ (1865) 19 C. B. N. S. 361.

In *Traill v. Small and Boase*,¹ the Second Division of the Court of *Traill v. Small* Session held that "the pursuer, being under fourteen and engaged at the time" (i.e., of an accident by which he lost his arm) "in his ordinary occupation, had not liberated the defenders from their responsibility" by acting in a way which, in the case of an ordinary workman, would have been contributory negligence. The decision expressly avoids saying that a boy under fourteen cannot be guilty of contributory negligence, nor yet does it say there is a different rule for those under fourteen years of age from those older. It considered the pursuer's youth as an element in the evidence on which it decided—that is, that the duty of the employer was increased by reason of employing youthful workpeople. Again, the Court of Session, in *Darby v. Duncan*,² held *Darby v. Duncan* the master liable where a machine, not, indeed, defective in itself, though incapable from its very nature of being used in an unfenced state without danger to life and limb, was left without due and sufficient fencing. The proposition as laid down is broad and without qualification. The injured person was a boy of thirteen; and Lord Deas appears to have decided on the authority of *O'Byrne v. Burn*,³ which turned entirely on the inexperience of the plaintiff; so that this case should, it is submitted, be similarly limited, and at least goes to prove the existence of the rule in the circumstances now being considered.

A United States case in the Supreme Court, *Union Pacific Rd. Co. v. Fort*,⁴ *American decision.* throws considerable light on this subject. A boy, sixteen years of age, was ordered by the person under whose superintendence he was working to do dangerous work not within the scope of his employment, but within that of the superintendent's. While obeying he was injured. The contract for the boy's service was made by the father with the company. The Court held that "the father had the right to presume when he made the contract of service that the company would not expose his son to such a peril [i.e., dangerous work]. Indeed, it is not possible to conceive that the contract would have been made at all if the father had supposed that his son would have been ordered to do so hazardous a thing. If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger. Or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. *Not being able to judge for himself*, he had a right to rely on the judgment of the foreman."

The ground taken in this decision seems sound. If persons employ *Considered.* young children in dangerous work they must safeguard them. To keep a mischievous boy out of danger is very probably an impossible task. Whether it be so or not there is a duty to keep a watchful eye

¹ (1873) 11 Macph. 888.

² (1861) 23 Dunlop, 529. The decision of the First Division of the Court of Session in *M'Millan v. M'Millan*, 23 Dunlop, 1082, turned mainly on the facts that should be brought before the jury.

³ 16 Dunlop, 1025.

⁴ 17 Wall. (U. S.) 553, 558. For the collected cases, see Labatt, *Master and Servant*, notes to § 459, and for the discussion of them, the judgment of Bray, J., in *Cribb v. Kynock*, *The Times Newspaper*, 18th May, 1907.

upon him and only to allow him contact with dangerous machinery after giving him stroug cautions. The duty alleged in *Murphy v. Smith*,¹ that all grown men in the master's service should use active means of restraining a hoy from meddling with dangerous matters, goes further than the law provides. Notwithstanding this, the master's duty towards boys is more extensive than it is towards adults, and is similar in kind to that which he has to adults with regard to the safety and efficiency of the methods and appliances of working, and is very much greater in degree.

Bunker v. Midland Ry. Co.

In *Bunker v. Midland Ry. Co.*,² a hoy of fifteen was injured through obeying an order of a foreman which the boy knew the foreman was not empowered to give. The action was brought under the Employers' Liability Act, 1880,³ and was decided under sub-section 3 of section 1 of that Act, on the ground that the hoy was not "hound to conform" to the order of the foreman. If the rule laid down in the American case is a just one, the hoy had a common law right of action, on the ground of the constraint put upon him by the foreman's position and authority, and his "right to rely on the judgment" of the superintendent. This does not seem to have been suggested.

Crocker v. Banks.

The tendency of some of the later English cases is strongly in the direction of the American rule. Thus, in *Crocker v. Banks*⁴ the Court of Appeal adopted the rule that a greater duty is owing from the master to young persons in his employment than to adults. A girl of *seventeen* was injured by the bursting of a soda-water bottle while she was engaged in filling it as part of her duty in the employment of a soda-water manufacturer. "There was on the machine an automatic guard during the period of filling and corking the hottles, but when it became necessary to take the bottle from the machine that guard dropped and the operator was unprotected." A mask was also provided, which the girl did not use. Lord Esher, M.R.'s, remark is: "The fact that the defendant provided masks for all at this time was strong evidence that he knew of the danger which then existed." The girl—who was described as an "expert hand"—swore that she did not know of the danger against which the mask was provided. Lord Esher, M.R., said: "It was not negligent for a girl of *her age* to omit to put on the mask if she did not know that she was bound to do so at that period of the operation." The Court sustained the verdict of the jury in favour of the plaintiff.⁵

The duty of the employer was emphasised in *Robinson v. W. H. Smith & Son*.⁶ A hoy of twelve was employed to deliver newspapers from a bookstall at a railway station to customers in the town. The hoy was in the habit of crossing the railway metals as a short cut from the stall to the town instead of going by a footbridge. He was run over and lost his leg. "Every one," said Wills, J., in the Divisional Court, "knew that if hoyes were not well watched they would get themselves into danger when there was an opportunity of doing

¹ 19 C. B. N. S. 361.

² 47 L. T. 476. *Marley v. Osborn*, 10 Times L. R. 388.

³ 43 & 44 Vict. c. 42.

⁴ 4 Times L. R. 324 (C. A.). *O'Brien v. Sanford*, 22 Ont. R. 136; *Milligan v. Muir*, 19 Kettie, 18.

⁵ The Scotch Courts seem disposed to take a more exacting view of the intelligence of a "boy of sixteen" than the English Court of Appeal of a "girl of seventeen" (which Lord Esher, M.R. *l.c.*, describes as a "tender age"): *Forbes v. Aberdeen Harbour Commissioners*, 15 Kettie, 323.

⁶ 17 Times L. R. 235, 423.

so; and it did look as if things were done in a haphazard way in this case. It seemed that the plaintiff was allowed to be shown his duties by another boy. As the evidence stood, he was given no instructions or warnings not to go on the line; and one knew that boys were certain in some cases to be ambitious and try to get a reputation for smartness. A reasonable precaution, therefore, would have been for the defendants to make it known among the boys that to get a reputation for smartness by risking their lives on the line was not the way to get promotion." In the Court of Appeal, Smith, M.R., spoke to the same effect: "The master ought to order the child not to cross over the rails, but to go over the line by the bridge. The duty which the master owed to the child was a superior duty to that which he would owe to a man." The master's duty where a young person¹ is concerned is to be free from fault. In one case it was said that a boy who is dull at fifteen was probably dull at fourteen; and therefore evidence of a witness who only knew the injured boy after the accident was admissible to show that he had no memory and was not bright. This obviously would not be so where the alleged effect of the accident would be to produce loss of memory or dullness.²

VI. MASTER'S DUTY GENERALLY.

As to the general formula for the duty owed by the master to the servant, there are two ways in which it has been expressed. One is that the master is bound to exercise the general average care and skill used in similar employments. The other, that the degree of care ordinarily exercised is not necessarily due and proper care; that due care must be independently determined by the jury with special reference to the circumstances of time and place, and by considerations not limited to the practice of any particular calling, but by reference to the ordinary habits and safeguards in working of the community at large.³ This latter seems the preferable way of looking at the question.⁴

General formula of the duty owed by the master to the servant.

The master is bound to indemnify the servant from the consequences of obedience to his orders. It is obvious that if the servant acts contrary to his master's orders, and is thereby exposed to liability, he must himself bear the loss.⁵ Again, though the general relation between the master and servant may subsist to render the master liable to indemnify the servant, it is necessary that the relation should exist in that particular matter in which the servant is damaged. If the Legislature imposes duties on a special class of servants, their masters are not liable to indemnify them for acts done in the discharge of the duty thus imposed. For example, sewer-men might have imposed on them duties to report to the Local Government Board, or to a county council, certain particulars as to the sewers which they are employed by the local sanitary authority to attend to. In the event of the discharge of their statutory duty bringing them loss, they could not claim indemnity from the local sanitary authority, for the

Indemnity of servants by master.

¹ By Shop Hours Act, 1862 (35 & 36 Vict. c. 62), s. 9, a "young person" means a person under the age of eighteen years. Cp. 1 Edw. VII. c. 22, s. 156 (1). *Ante*, 160.

² *La Plante v. Warren Cotton Mills*, 165 Mass. 487. For duty to young person, *Labatt, Master and Servant*, 558, 890, where, as usual, all the cases are collected.

³ See *Wabash, &c. Ry. Co. v. McDaniels*, 107 U. S. (17 Otto) 461.

⁴ *Smith v. Baker*, (1891) A. C. 325.

⁵ *Gryllo v. Davies*, 2 B. & Ad. 514.

relation of master and servant would not *ex hypothesi* exist. This principle is of importance in regard to relieving officers and others, on whom, apart from contract and without reference to their employers, the Legislature has imposed duties.¹ A servant, however, may do an illegal act at the bidding of his master and still be entitled to indemnify; yet such act must not be "palpably illegal," and, moreover, must be "done honestly in discharge of the directions of the master," while the servant must neither know nor have "reasonable ground for believing that that which he did was wrongful."²

*Nash v.
Cunard
Steamship Co.*

The duty of a foreman at common law in giving orders was considered in *Nash v. Cunard Steamship Co.*,³ where an accident had happened, as was alleged, through the plaintiff conforming to an order of the foreman. The judge at the trial directed the jury that if the foreman at the time of giving the order "thought everything was perfectly clear, then he would not be guilty of negligence." The Court of Appeal held this a misdirection, considering the test to depend "not upon what he thought, but upon what he ought to have thought."⁴

¹ *Ante*, 326, and *post*, Medical Men.

² *Macdonell, Master and Servant*, 177.

³ 7 Times L. R. 597 (C. A.).

⁴ Per Lindley, L.J., 7 Times L. R. 598.

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CHAPTER V.

DISABILITIES OF THE SERVANT AT COMMON LAW TO RECOVER FOR INJURIES RECEIVED IN THE COURSE OF HIS EMPLOYMENT.

THERE is no general rule making one man liable for the negligence of another. The rule of law is the other way, *Culpa tenet suos auctores tantum*.¹ To this law there has long been an exception established—that the master must answer for the act of his servants when strangers are injured thereby. This exception we have already considered.² It is referable to the maxim of agency, *Qui facit per alium facit per se*, and the legal conclusion is, *Respondent superior*—where the existence of the relation of master and servant is established, the master is to answer for acts done by the servant within the sphere of the agency; and, on grounds of policy, not merely for those authorised by him, but sometimes even for those actually forbidden: where the position of servant prompts the wrongful act, and not merely affords opportunity for it. In addition, we have considered certain aspects of the rule, *Culpa tenet suos auctores tantum*, as it extends to make the master liable for his own personal negligence whereby those in his employment are injured. We have seen that the master is liable to his servants for his own personal negligence in the actual performance of work, or for failure to provide appliances for the proper carrying on the work, or for default in the appointment of competent servants.

We are now to consider a further exception grafted on the rule of *Respondent superior*, itself an exception to the wider rule, *Culpa tenet suos auctores tantum*: that the master is not liable to his servants for injuries to them produced by the negligence of a fellow servant engaged in the same business, provided there be no negligence in the appointment of such negligent servant, or in the retention of such servant after notice of his incompetency.³

The ground of this exception has been much canvassed. On the one hand it has been said to arise from an implied contract that the workman should take the risks of the employment; one of which risks is the danger of sustaining injury from workmen engaged in the same scheme of labour. On the other hand, it is said that the workman is not entitled to recover from the master, because he had not

¹ *Woodhead v. Gartness Mineral Co.*, 4 Rettie, 469; also per Bramwell, L.J., Evidence before House of Commons Committee on Employers' Liability for Injuries to their Servants, Parliamentary Papers, 1877, vol. x. quest. 1100.

² *Ante*, 573.

³ Wharton, Negligence, § 224, and the cases cited in the notes; Labatt, Master and Servant, 418.

contracted to be indemnified; and, therefore, that the original rule of law, *Culpa tenet suos auctores tantum* remains unaffected.¹ Whichever explanation is adopted, the germ of the law laying down the master's immunity from liability in the case of injury caused by a servant to a servant is traced no higher up than the case of *Priestley v. Fowler*,² decided in 1837.

Priestley v. Fowler.

Priestley v. Fowler was a decision given on motion to arrest judgment, *non obstante veredicto*, and thus, as was pointed out in *Wigmore v. Jay*,³ was a decision of the greater authority, since, as the question was raised on the record, it might, had the decision been doubtful, have been taken to the Exchequer Chamber. The declaration set out that the defendant was a butcher who directed the plaintiff, his servant, to take goods in a van with another servant; that it was the duty of the defendant to see that the van was in a proper state of repair, and not overloaded; nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of which neglects the van gave way, and the plaintiff was injured.

Objection to the declaration.

The Court of Exchequer directed judgment to be arrested, after verdict for the plaintiff, on the ground that the declaration disclosed no legal liability; since from the mere relation of master and servant no contract, and therefore no duty, could be implied on the part of the master to cause the servant to be safely and securely carried; or to make the master liable for damage to the servant arising from any vice or imperfection unknown to the master in the carriage, or in the mode of loading and conducting it.

Lord Abinger's judgment.

"The mere relation of the master and the servant," said Lord Abinger, C.B.,⁴ "never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the

¹ Evidence of Brainwill and Brett, L.J.J., before House of Commons Committee on Employers' Liability, Parliamentary Papers, 1877, vol. x, quests. 1100, 1919.

² (1837) 3 M. & W. 1. Brett, L.J., says: "I think it may be suggested that the law as to the non-liability of masters with regard to fellow servants arose principally from the ingenuity of Lord Abinger in suggesting analogies in the case of *Priestley v. Fowler*"; Evidence before House of Commons Committee on Employers' Liability, Parliamentary Papers, 1877, vol. x, quest. 1919. The actually first decision on the precise point is alleged to be *Murray v. South Carolina Rd. Co.*, 1 McMullan, 385, in 1841. See *Chicago, Milwaukee, and St. Paul Ry. Co. v. Ross*, 112 U. S. (5 Davis) 377, per Field, J., 384. Labatt, Master and Servant, 1306, concludes "that such a declaration as in *Priestley v. Fowler*" would clearly be good at the present day in the United States."

³ 5 Ex. 358. Brett, L.J., in his evidence before the House of Commons Committee on the Employers' Liability for Injuries to their Servants, Parliamentary Papers, 1877, vol. x, at quest. 1922, says: "*Priestley v. Fowler*" is one of those unsatisfactory cases in which, under the old system, the question did not arise upon what were the real facts, but upon how they were stated on the record; which meant that, although the proof at the trial might even have gone somewhat beyond the declaration, the question was, whether the declaration itself was good when you came to look at it." This remark may be of the greatest force as applied to the difficulty of doing substantial justice in the particular case, as apart from justice in a technical conformity to rule; but as a means of eliciting a definite rule of law, it would appear better calculated to reach its end, as the facts are necessarily definitely formulated, than where the facts are to be collected in a less precise and accurate form. "The case of *Priestley* was decided on a general view of mixed facts; the causes of the accident being: (1) defect in the waggon; (2) overloading; and (3) careless driving; and the Court held that, as the servant injured knew the waggon, and knew of the loading, he was as well able to judge of the risk as the master could be"; per Lord Justice-Clerk (Moncreiff), *Gregory v. Hill*, 8 Macph. 285.

⁴ 3 M. & W. 6.

safety of his servant, in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

It has been suggested that the injury in this case was occasioned either through a want of care in loading the van or through a defect in the van itself. If the former, the decision might be justified on the ground that it was the duty of the servant to see that the van was not more than properly loaded; which duty he neglected, and was in consequence injured through his own contributory negligence. In that view no principle of law had to be applied in any new sense. Or, secondly, assuming that the servant had nothing to do with the overloading the van, the case might still be sustained on the principle that the master was not bound to warrant the van, and was not shown to be guilty of any negligence in providing it. Parke, B.'s explanation¹ is: "The Court considered the allegation of duty as altogether insufficient, the declaration not stating facts from which duty could be inferred." This being so, the decision goes the full length of asserting that there is no duty on a master to see that the van is in a sufficient state of repair and not overloaded, or that the plaintiff is safely and securely carried; and that the workman must be bound to undertake the work in just the state it is, without implying any obligations on the master in respect of its safety.

Suggested grounds of decision.

The question of the effect of knowledge by the defendant of a defect is not raised; and the Court confine their decision to cases where the servant must be taken to know as well as his master the condition of the work on which he is engaged.

Neither is the case any authority—as has sometimes been stated—for the proposition that the master is liable for personal neglect. It enunciates the broad proposition—if Parke, B.'s, explanation of it is to be taken as authoritative—that there is no duty implied by law, in certain cases, for the master to take those precautions for the safety of his servant that he would be bound to take with regard to strangers.

Proposition established by *Priestley v. Fowler*.

The analogies with which Lord Abinger illustrated his judgment are, however, very loose and inaccurate: "For instance, all those *dicta* about a negligent chambermaid and a negligent cook and so on are quite equally applicable to the relation between innkeeper and guest, and most of his remarks are equally applicable to the relation between carrier and passenger, and there is no reason why they should apply exclusively to the relation between master and servant."²

Lord Abinger's illustrations.

In any view, the legal relationship of fellow servants as affecting their employer is not raised; since the case does not even suggest that the defendant had another servant than the plaintiff. The proposition

The question of the legal relationship of fellow servants not raised.

¹ *Metcalf v. Hetherington*, 11 Ex. 270.

² Mr. C. P. Ilbert, Evidence before House of Commons Committee on Employers' Liability, Parliamentary Papers, 1876, vol. ix, quest. 282: "The master, for example, would be liable to the servant for the negligence of the chambermaid for putting him in a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to the health; of the builder for a defect in the foundations of the house whereby it fell, and injured both the master and the servant by the ruins"; 3 M. & W. 6.

that is to be extracted is that the rights of servants against their masters are not identical with the rights of strangers in the event of personal injury.

Farwell v. Boston and Worcester Rd. Corporation.

The next case in order of date to *Priestley v. Fowler* is *Farwell v. Boston and Worcester Rd. Corporation*; ¹ which though not strictly binding on the English courts, has so often been mentioned with approbation by the English courts, and more particularly by the Law Lords in the case of *Burtonhill Colliery Co. v. Reid*,² that it has a place in the history of the English law.

"Two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose, that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labour and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer."³ This question the Court answered in the negative.

A somewhat different question from that in *Priestley v. Fowler* is raised. In *Priestley v. Fowler* the plaintiff undertook the risk, with knowledge of all the circumstances; accordingly, in *Farwell v. Boston and Worcester Rd. Corporation* counsel for the plaintiff admitted that *Priestley v. Fowler* was rightly decided, although he questioned several of the expressions used in the judgment. But in *Farwell v. Boston and Worcester Rd. Corporation* the servants, though employed by the same company, were to perform separate duties, but which tended to fulfil a common purpose.

Judgment of Shaw, C.J., summarised.

The reasoning of the Court is as follows: Where a servant injures a stranger in the course of his employment, and acting within the scope of his authority, the master is liable in a civil action. Where, however, the servant is injured in the course of his employment, and while acting within the scope of his authority, the master is not liable, for the risks and perils the servant and the employer respectively intend to assume may be regulated by express or implied contract between them. Thus, the maxim of *Respondent superior*, which binds the master to indemnify a stranger for damage caused by acts of the servant done in fulfilling his service, does not cover the case of injury done to a servant in the course of his employment. As there is no contract expressed, the right of the servant to recover must depend on an implied contract of indemnity. Now the authorities shew no such implication, and are to that extent against the contention.

Principle involved.

To turn to the question of principle. The perils to which a servant is exposed, while equally apparent to him and his master, are perils incident to the service, which may, in theory at any rate, be averted by care and forethought. To argue that the master should be liable because the acts are caused by his agent is the very point to be proved.

¹ 45 Mass. (4 Met.) 49; printed also 3 Macq. (H. L. Sc.) 316.

² 3 Macq. (H. L. Sc.) 266.

³ Per Shaw, C.J., delivering the judgment of the Court, 316.

Servants are agents to some extent and for some purposes, but whether the master is responsible in a particular case is not decided by showing that for some purposes they are his agents.

In the case of fellow servants it has been said that each is an observer of the conduct of others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be more effectually secured than by a resort to the common employer for indemnity in case of loss by the negligence of any of them.

It is then objected that the principle applies only where servants are employed in the same department of duty. Such a rule would vary in each case. What is to constitute a department? What a distinct department of duty? Further, the reason of the rule is not that the servant has better means of providing for his safety, but that the implied contract does not extend to indemnify the servant against the negligence of any one except himself; and there is no tort, as the relation is regulated by contract.

This case, therefore, may be cited as the first reasoned development of the proposition that, where a master uses due diligence in the selection of servants, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service.

In 1850, the two cases of *Hutchinson v. York, Newcastle, and Berwick Ry. Co.*¹ and *Wigmore v. Jay*² were decided on the same day in the Court of Exchequer. Both were actions brought under Lord Campbell's Act³ for deaths caused by the negligence of fellow servants in the course of their duty.

Hutchinson v. York, Newcastle, and Berwick Ry. Co.
Wigmore v. Jay.

In *Priestley v. Fowler*⁴ the element of negligence of one servant causing danger to another was entirely absent. These raised the same question as in *Farwell v. Boston and Worcester Rd. Corporation*; to which the facts in *Hutchinson v. York, Newcastle, and Berwick Ry. Co.*¹ were not dissimilar. The Court, after consideration, held that there was no distinction in principle between the case of an injury occasioned to one servant, while discharging his duty, by the negligence of another servant, in the discharge of his duty, and the case of *Priestley v. Fowler*.

Judgment of Alderson, B.

The rule and the reasons for it are thus enunciated by Alderson, B.:⁵ "The difficulty is as to the principle applicable to the case of several servants employed by the same master and injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible, when he has selected persons of competent care and skill." "They have both engaged in a common service, the duties of which impose a certain risk on each of them; and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow servant and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk."

"The principle is, that a servant, when he engages to serve a master,

¹ 5 Ex. 343. ² 5 Ex. 354.
³ 9 & 10 Vict. c. 93. ⁴ 3 M. & W. 1.
⁵ 5 Ex. 350.

undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant whenever he is acting in discharge of his duty as servant of him who is the common master of both."

The English cases¹ that immediately succeeded the decision of *Hutchinson v. York, Newcastle, and Berwick Ry. Co.*, dealt principally with the question of what risks are incident to the service. In Scotland a series of decisions indicated a very strong disposition on the part of the Scotch judges to strike out an independent course.² But the law of the two countries was declared to be identical by the House of Lords in *Bartonhill Coal Co. v. Reid*,³ and *Bartonhill Coal Co. v. McGuire*⁴ two cases arising out of the same facts. The former was heard before Lord Chancellor Cranworth, sitting as the sole law Lord; the latter was heard two years afterwards before Lord Chancellor Chelmsford, and Lords Brougham and Cranworth. Judgment was given in both cases on the same day. The accident which resulted in the death of two miners, whose widows were respectively pursuers in the cases, was caused by the negligence of a competent workman in drawing them up from the pit in which they had been working; in consequence of which negligence the cage in which they were being drawn up was upset, and they were thrown out and killed. The Scotch judges approved a direction that, if the jury were satisfied on the evidence that the injury was caused by the culpable negligence and fault of the person having the management of the machinery, the defendants were in law liable. The appellants contended that this direction was wrong, and said the proper direction was, if the jury were satisfied on the evidence that the defendants used due and reasonable diligence in the selection of the workman, and that the workman was fully qualified for his work and furnished with proper machinery, then the defenders were not liable for his carelessness.

It was not alleged that the machinery was other than sufficient, and the workman generally competent. The claim of the pursuers was rested entirely on the liability of the appellants, the defenders, for the fault of their workman.

Lord Cranworth delivered the leading opinion and stated the general rule to be that where an injury is occasioned to any one by the negligence of another, in order to charge any person other than the actual wrongdoer, the person injured must show that the circumstances are such as to make some other person responsible. In general it is sufficient to show that the wrongdoer is acting in the course of his employment as a servant; when the maxim, *Respondeat superior*, applies, and the master is responsible.

An exception to this is where a workman is injured by the want of care of other workmen in the same employment.

But when a master employs a servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in

¹ *E.g.*, *Scymour v. Maddox*, 16 Q. B. 326; *Skipp v. Eastern Counties Ry. Co.* 9 Ex. 223; *Couch v. Steel*, 3 E. & B. 402.

² *E.g.*, *Dixon v. Rankin*, 14 Dunlop, 420; *Gray v. Brassey*, 15 Dunlop, 135; *Inird v. Addie*, 16 Dunlop, 490; *Brownlie v. Tennant*, 16 Dunlop, 998; *O'Byrne v. Burn*, 16 Dunlop, 1025.

³ (1856) 3 Macq. (H. L. Sc.) 266; *Randall v. Baltimore and Ohio Rd. Co.*, 109 U. S. (2 Davis) 478.

⁴ (1858) 3 Macq. (H. L. Sc.) 300.

Scotch decisions follow a different course from the English.

Bartonhill Coal Co. v. Reid.

Bartonhill Coal Co. v. McGuire.

Facts.

Decision of Scotch Courts.

Appellants' contention.

Lord Cranworth's opinion. General rule of the law.

Exception.

a safe and proper condition, so as to protect the servant against unnecessary risks.

Again, the master may be responsible for a defective system of working which does not adequately protect the workman. A further limitation is, that the servant injured and the servant injuring must be employed on the same work. If, for example, a gentleman's coachman were to drive over his gamekeeper, the master would be just as responsible as if the coachman had driven over a stranger.¹

To constitute employment on the same work, it is not necessary that the workman causing, and the workman sustaining, the injury should be engaged in performing the same, or similar, acts. "The driver and the guard of a stage-coach, the steersman and the rowers of a boat, the workman who draws the red-hot iron from the forge, and those who hammer it into shape, the engineman who conducts a train, and the man who regulates the switches or the signals, are all engaged in a common work. And so in this case. The man who lets the miners down into the mine . . . and afterwards brings them up . . . is certainly engaged in a common work with the miners themselves."²

Workmen employed in the same work.

Lords Chelmsford and Brougham assented to the opinion of Lord Cranworth. Lord Chelmsford suggests for a test of common employment, the consideration of "what the servant must have known or expected to have been involved in the service which he undertakes;" all such risks as these he undertakes by his contract.³

Suggested test of common employment by Lord Chelmsford.

Bartons Hill Coal Co. v. Reid is the starting-point of a number of decisions. Their general effect is indefinitely to extend the application of the term "common employment"; which rapidly came to cover the most dissimilar occupations. Thus it was decided that a labourer is the fellow servant with an engine-driver,⁴ a third engineer with a chief engineer,⁵ a ganger of platelayers with the guard of a train,⁶ a platelayer with one whose duty it was to assist in pushing the trucks,⁷ a scaffolder with a huilder's manager,⁸ a miner with an underlooker of the mine,⁹ the manager of a lucifer manufactory with a boy about sixteen years of age engaged in the manufactory,¹⁰ a carpenter engaged in mending the roof of a station with the men engaged in shifting a locomotive engine on a turn-table in the station,¹¹ a labourer employed

Common employment.

¹ The principle is illustrated by a curious American case, *Gannon v. Housatonic Rd. Co.*, 17 Am. R. 82, where, on a bill of exceptions, it was contended in the Supreme Court of Massachusetts, that a husband could not recover for consequential damage sustained by the wife while travelling on the husband's employers' line of railway. The argument that sought to maintain the position admitted that the wife could recover for damage received to herself, and even conceded she might, though the injuries were caused by the negligence of her husband, but urged that the obligation on the servant was to protect the master's business, so far as care and diligence could, from liabilities incidental to his business. The Court, however, adhered to the English rule, that the servant is only precluded from an action against the master in the case of "those direct injuries to which he is exposed in the course of his employment." A laundress was held in the same employment as her employer's coachman, in *McGuirk v. Shattuck*, 160 Mass. 45.

² 3 Macq. (H. L. Sc.) 295

³ 3 Macq. (H. L. Sc.) 30. See *The Petrol*, (1893) P. 320.

⁴ *M'Eniry v. Waterford and Kilkenny Ry. Co.*, (1858) 8 Ir. C. L. R. 312.

⁵ *Searle v. Lindsay*, (1861) 11 C. B. N. S. 429.

⁶ *Waller v. S. E. Ry. Co.*, (1863) 2 H. & C. 102.

⁷ *Lovegrove v. L. B. & S. C. Ry. Co.*, (1864) 16 C. B. N. S. 669.

⁸ *Gallagher v. Piper*, 16 C. B. N. S. 669.

⁹ *Hall v. Johnson*, 3 H. & C. 589.

¹⁰ *Murphy v. Smith*, (1865) 19 C. B. N. S. 361.

¹¹ *Morgan v. Vale of Neath Ry. Co.*, (1864) L. R. 1 Q. B. 149.

by a railway company in loading waggons with ballast and the guard of a train by which he was returning from his work,¹ a workman in the employment of a maker of locomotive engines with the foreman of the workshop,² a railway labourer with an inspector,³ an engine-driver with a labourer uncoupling waggons,⁴ and the porter and carpenter with the stewardess of a steam-vessel.⁵ These are mere illustrations of a principle the examples of which are multitudinous.⁶

Their tendency is strongly towards including all grades of service, to the very highest, within the principle of non-liability in the case of common employment. In several of the cases allusion was made to a possible exception in the case of an *ulter ego*, or vice-principal; yet in none were the prescribed constituents met with;⁷ till the possibility of such a case existing was denied by the decision in *Wilson v. Merry*.

Wilson v. Merry.

*Wilson v. Merry*⁸ marks the complete development of the principle adopted in *Bartonshill Coal Co. v. Reid*. That case gave the ultimate judicial sanction to the position that one of the incidents of a common employment is the undertaking all the risks known or involved in the service; but there it was not necessary to define the term "fellow servants." Such a definition had, however, to be given in the case of *Wilson v. Merry*, where the negligence was imputable to the pit manager, and Lord Cairns, C., thus indicates it:⁹ "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow workmen." Lord Cranworth said:¹⁰ "Workmen do not cease to be fellow workmen because they are not all equal in point of station or authority." Lord Colonsay added:¹¹ "The terms 'fellow workman' and 'collaborateur' are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organisation that now exist. And these expressions, if taken in a strict or limited sense, are calculated to mislead. The same may be said of such words as 'foreman' or 'manager.' We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent

Common employment described by Lord Cairns, C.

By Lord Colonsay.

¹ *Tunney v. Midland Ry. Co.*, (1865) L. R. 1 C. P. 201.

² *Feltham v. England*, (1866) L. R. 2 Q. B. 33.

³ *Macfarlane v. Caledonian Ry. Co.*, (1867) 6 Macph. 102.

⁴ *Robertson v. Linnithgow Oil Co.*, 18 Rettie, 1221.

⁵ *Quebec Shipping Co. v. Merchant*, 133 U. S. (26 Davis) 375.

⁶ There are twenty-eight pages with double columns in Labatt, Master and Servant, 1360-1377, and 1405-1415, wherein are collected the cases affirmative and negative of the existence of common employment, and one hundred and five pages in Thompson, Negligence, §§ 5014-5270.

⁷ Cp. *Feltham v. England*, L. R. 2 Q. B. 33. Mr. Labatt treats of Vice-Principalship, Master and Servant, 1416-1573.

⁸ (1868) L. R. 1 Sc. App. 326. See *Wright v. Dunlop*, 20 Rettie, 363.

⁹ L. R. 1 Sc. App. 332.

¹⁰ L. c. 334.

¹¹ L. c. 345.

part. Nor is it of any consequence that the position he occupies in such organism implies some special authority, or duty, or charge, for that is of the essence of such organisations."

The effect of this decision was: "First, to reject the view that the foreman might be considered the delegate of his employer, or that the question of his position might be left to the jury; secondly, to enforce the wide meaning which the English judges had given to the term 'common employment';" "and, lastly, to place the doctrine of the master's immunity on broader grounds, and to show that the true criterion is, not whether the person causing, and the person suffering from the accident are fellow workmen in any strict sense of the word, but whether the damage was within the risk incident to the service undertaken for reward; that is to say, the rule is based, not on the phrase 'common employment,' but on the meaning of the contract; on the terms expressed or implied in the contract between the employer and the person employed."¹

Effect of the decision summarised.

A "common employment" is thus defined in an American case:² "All who are engaged in accomplishing the ultimate purpose in view" "must be regarded as engaged in the same general business within the meaning of the rule." To make this a strictly accurate guide in practice, some stricter limitations than those suggested by the phrase "engaged in accomplishing" seem advisable; since in its present form the definition covers all the different stages of a manufacture carried on, not only at different times and places, but also under several independent controls; whereas the fundamental notion to be expressed is, co-operation under one control.

Definition in an American case.

A question not decided in terms in *Wilson v. Merry*, came up for decision in *Howells v. Landore Siemens Steel Co.*,³ There it was conceded in argument that the liability of the master for the acts of a person whom he leaves, as it were, as his vice-principal, in the management of the concern was exploded; but it was contended—first, that the defendants, as a corporation, could only act by their manager, for whom, therefore, they were liable. On Blackburn, J., saying, "that cannot make any difference; in *Morgan v. Vale of Neath Ry. Co.* the defendants were a corporation, and nobody thought of suggesting any distinction on that ground," the contention was abandoned, and a second point argued—that under s. 26 of the Coal Mines Regulations Act, 1872,⁴ by which the owner of a coal mine was obliged to appoint a certified manager, the manager so appointed was in a different position from an ordinary manager. The Court, however, would not even grant a rule on the point, Cockburn, C.J., saying: "I cannot say that

Howells v. Landore Siemens Steel Co.

¹ Evidence of Mr. C. P. Ilbert before the House of Commons Committee on Employers' Liability, Parliamentary Papers, 1870, vol. ix. quest. 290.

² *Hard v. Vermont and Canada Ry. Co.*, 32 Vt. 473, cited Shearman and Redfield, Negligence, § 239, note 3.

³ (1874) L. R. 10 Q. B. 62. In *Conway v. Belfast and Northern Counties Ry. Co.*, Ir. R. 9 C. L. 501 (n), the report of this case in 44 L. J. Q. B. 25 is noticed as being "a materially different report of this case" from that in the Law Reports. This, on examination, does not appear to be so. The Law Journal report is very much shorter but to precisely the same effect as the Law Report. From that report it would seem that the very point of the distinction between a manager and an *alter ego* was taken. The effect of the Employers' Liability Act is to make the manager a principal, and not a servant under the control of the owner. Lord Watson, in *Johnson v. Lindsay*, (1891) A. C. 387, adopts "the compendious definition of the principle upon which the master's non-liability rests," given by Blackburn, J., in *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 64.

⁴ 35 & 36 Vict. c. 76, repealed 50 & 51 Vict. c. 58, s. 84.

Thomas here was anything more than a vice-principal, or manager, and he was, therefore, a fellow servant."

Leddy v. Gibson.

Almost at the same time as this case an attempt was made in the Scotch Courts to except the captain of a ship from the principle laid down in *Wilson v. Merry*.¹ A sailor sued the owners for injuries caused by the captain's negligence during the voyage.² The Lord Ordinary dismissed the summons, on the authority of Lord Cranworth's *dictum* in *Wilson v. Merry*, that "workmen do not cease to be fellow workmen because they are not all equal in point of station or authority. A gang of labourers employed in making an excavation, and their captain, whose directions the labourers are bound to follow, are all fellow labourers under a common master, as has been more than once decided in England, and on this subject there is no difference between the laws of England and Scotland." On appeal it was argued that there was no analogy between such a case as *Wilson v. Merry* and the present; that the captain was, in all matters connected with the management of the ship, absolute master of the sailors, so that even the owners themselves could not interfere. The Lord Ordinary's decision was, however, unanimously affirmed; and the Court pointed out that if an injury be done to third persons the owners would be liable, because the captain is the servant of the owner; and that if he is the servant of the owner, then the owners are not liable, because the captain and crew are fellow servants according to any recognised test, as they are "all equally and wholly interested in the navigation of their vessel, and in the safe prosecution of its voyage."³

Ramsay v. Quinn.

Judgment of Morris, J.

Shortly afterwards a very similar case came before the Irish Court of Common Pleas on demurrer.⁴ The negligence alleged was that the captain of a ship "so unskilfully and improperly ordered the said John Ramsay" "to abandon the said ship," that the said John Ramsay was drowned. The demurrer raised the point that the captain was a fellow servant. The Court (Monahan, C.J., and Morris, J.) overruled the demurrer; Morris, J., on the ground that there was no necessary conflict between *Wilson v. Merry* and *Murphy v. Smith*; which latter case recognised the principle "that where an employer has an agent or representative, held to be so by the jury, and who is not merely a fellow workman of the party sustaining the injury, the employer is liable for an injury to his servant occasioned by the negligence or unskilfulness of his agent or representative." "Under which category, then," says Morris, J., "is the captain or master of the vessel in this case to be placed? Are we to regard him merely as a fellow servant of the deceased, or as the agent and representative of the defendants? In my opinion he comes within the latter description, and, if so,—*cadit questio*. He is the agent and representative of the owners during the voyage." "He has authority to bind the owners for repairs and necessaries. He can even settle claims for demurrage." Monahan, C.J., concurred, but preferred to rest his decision on the facts alleged in the plaint, "that the deceased was bound to obey the orders of the captain, independently of any authority which the latter would, from his position as captain or master of the vessel, possess."

Judgment of Monahan, C.J.

¹ L. R. 1 Sc. App. 326.

² *Leddy v. Gibson*, (1873) 11 Macph. 304.

³ Per Lord Cowan, 11 Macph. 305.

⁴ *Ramsay v. Quinn*, Ir. R. 8 C. L. 322.

The decision in *Ramsay v. Quinn*¹ was much pressed on the Court of Appeal in *Hedley v. Pinkney and Sons Steamship Co.*² where the negligence of the captain, in leaving an opening in the ship's bulwarks unprotected by a rail during a storm, was the cause of the loss of life of the plaintiff's husband. The Court held the negligence to be the negligence of a fellow servant. "I must decline," said Lord Esher, M.R., "to accept the decision in the case of *Ramsay v. Quinn* as authority with regard to the English law on the subject, and if the Court in that case meant to hold that what they were deciding was the English law on the subject, I must say that I cannot agree with them. To my mind, it is clear that the plaintiff cannot rely on the negligence of the captain, because he was the fellow servant of the deceased man." The Lords Justices concurred. In the House of Lords it was again urged that the master of a vessel, although in some respects the servant of the shipowner, possesses in relation to the crew powers and duties independent of him, so that the exemption of the master from liability to his servant does not apply to such a case. Lord Herschell, C., thus disposes of the point:³ "The only authority cited for this proposition was a case of *Ramsay v. Quinn*, in the Court of Common Pleas (Ireland).⁴ But in view of the judgment of this House in *Wilson v. Merry*,⁵ which was recently considered in the case of *Johnson v. Lindsay*,⁶ I do not think it is possible to give effect to the contention of the appellant." The judgment of the Court of Appeal was consequently affirmed.

Hedley v. Pinkney and Sons Steamship Co.

The captain is the servant of the owner if the owner appoints him and exercises authority over him, or has a right as between themselves to exercise the authority which an owner usually exercises over his captain. He ceases to be his servant where there is a charter party with the whole possession and control of the ship under which the charterer has authority to do what he pleases with regard to the captain, the crew, and the general management of the ship, even though the owner is still on the register as "managing owner."⁷ The charterer then becomes in the place of the owner, the owner's responsibility does not arise and the charterer is not liable for injury caused by the captain to the crew, his fellow servants.

Position of the captain of a ship.

The case of a seaman on board ship is different from that of a workman on land, since the maxim *Volenti non fit injuria* can apply to him, if at all, in only a qualified manner. For example, if a seaman is told to perform some duty while at sea because something is manifestly wrong with the gear of the ship, and refuses to obey orders, the loss of the lives of all on board may be the result of his conduct. Since, then, it is impossible for him to strike work, so also it would be against

Position of a seaman on board ship.

¹ Ir R. 8 C. L. 322.

² (1892) 1 Q. B. 58, affd. in H. of L., (1894) A. C. 222. *Gordon v. Pyper*, 20 Rettie (H. L.), 23, was an action for damages against the owner of a steam trawler by one of the seamen, who averred that while engaged with other seamen in raising the trawl he received an injury in consequence of the defective splicing of two ropes. The House of Lords held that as the purser did not aver that the splicing was defective at the time the vessel was equipped, the action was not relevant. Lord Watson said, at 27: "I should not have been prepared to hold that a mere defect in the splicing of the tackle, which is obvious, constitutes any default of duty on the part of the shipowner if he provides the master and crew with the proper materials for correcting the defect in the course of the voyage."

³ (1894) A. C. 226.

⁴ L. R. 1 Sc. App. 326.

⁴ Ir. R. 8 C. L. 322.

⁶ (1891) A. C. 371.

⁷ *Baumwoll Manufactur von Scheibler v. Gilchrest*, (1892) 1 Q. B. 253, in H. L., (1893) A. C. 8, *sub nom. Baumwoll Manufactur von Carl Scheibler v. Furness*.

the very rudiments of justice to allow his employers to escape liability in the event of his sustaining injury, by the plea that he, knowing and appreciating the risk, entered on the employment; and this has been in terms laid down in Scotland.¹

Smith v. Steele.

With these cases should be noticed *Smith v. Steele*.² There the question arose whether a compulsory pilot under the then Merchant Shipping Acts is a fellow servant within the rule excluding such from recovering from their masters, on the ground of a common employment. The answer is: ³ By 35 and 36 Viet. c. 73, s. 9,⁴ power is given "to allow any pilot or class of pilots any rate less than the rate for the time being demandable by law; but no power is given to enable a pilot to demand more. He cannot, therefore, make any special bargain to receive larger pay in consideration of his taking the risk upon him. An ordinary servant has, as Lord Cairns points out⁵ (at least theoretically) the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business, or, as an alternative, to be responsible for the negligence of those he employs. The pilot has no such choice: he must conduct the ship on the terms fixed by the statutes which regulate pilotage; and we can find nothing in those statutes to justify the conclusion that the pilot is to take upon himself the risk." The result is that an action lies by the pilot against the shipowners for injuries caused to him while acting on the defendants' vessel, by the negligence of their servants.

Irish cases endeavour to reassert liability for the acts of an *alter ego*.

In the Irish Courts, in *Conway v. Belfast and Northern Counties Ry. Co.*,⁶ another attempt was made to set up the doctrine of a special liability for the acts of an *alter ego*, on the authority of *dicta* in *Murphy v. Smith*,⁷ and *Feltham v. England*.⁸ The action was under Lord Campbell's Act for damages for the death of Conway, a workman on the defendants' line, alleged to have been caused through the negligence of the traffic manager. The defendants contended that the traffic manager was not a fellow servant with a mileman, but was a vice-principal or representative. The Common Pleas, in giving judgment, cited the cases of *Wilson v. Merry*, and *Howells v. Landore Siemens Steel Co.*, and decided that they were, "therefore, obliged to hold that the defendants are not liable for the neglect of their manager Cotton."⁹

¹ *Rothwell v. Hutchison*, 13 Rettie, 463. *Ante*, 618.

² (1875) L. R. 10 Q. B. 125. In the Ex. Ch. in *The General Steam Navigation Co. v. British and Colonial Steam Navigation Co.*, L. R. 4 Ex. 238, the relation of master and servant was held not to exist between the owner of a vessel and the compulsory pilot. Cp. *The Stettin, B. & L.* (Adm.) 199, where the vessel was within her port and exempt from compulsory pilotage. *Bowcher v. Noidstrom*, 1 Taunt. 668.

³ L. R. 10 Q. B. 129.

⁴ Now 57 & 58 Viet. c. 60, s. 626 (2).

⁵ Referring to *Wilson v. Merry*, L. R. 1 Sc. App. 326.

⁶ (1875) Ir. R. 9 C. L. 498; Ir. R. 11 C. L. 345.

⁷ 19 C. B. N. S. 361. Erie, C.J., is reported at 366 as saying: "The question is, whether Debor is to be considered as the vice-principal of the factory. I avoid the word manager, which is an ambiguous one, and may mean either a person retained generally to represent the principal in his absence, or one who has the superintendence of a particular contract or job, in which latter case he would be in no different position from that of a fellow workman."

⁸ L. R. 2 Q. B. 36, where Mellor, J., says: "We think that the foreman or manager was not, in the sense contended for, the representative of the master. The master still retained the control of the establishment, and there was nothing to show that the manager or foreman was other than a fellow servant of the plaintiff, though he was a servant having greater authority. As was said by Willes, J., in *Gallagher v. Piper*, 33 L. J. (C. P.) 335, 'A foreman is a servant as much as the other servants whose work he superintends.'"

⁹ Ir. R. 9 C. L. 504.

The case was then taken to the Irish Exchequer Chamber. Palles, Judgment of Palles, C.B., in Irish Exchequer Chamber. in his judgment cites the list of cases from *Clarke v. Holmes* to *Murphy v. Smith* and *Wilson v. Merry*, and draws two conclusions: ¹

"First—that there is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment, in consequence of their being workmen of different classes: But,

"Secondly—that a master may so depute to another the entire control of his establishment as to constitute such other person, as between himself and the workmen in the establishment, not a fellow servant having greater authority, but the *alter ego* or representative of the master; and that for the acts of such a person the master would be responsible to a fellow-servant." The Chief Baron then proceeds: "I cannot find in any of the cases an attempt to define, with any degree of strictness, when the character of 'servant having greater authority than others' ceases, and that of representative, vice-principal, or *alter ego* of the master is acquired. Possibly it may hereafter be held that it is essential to the latter character that he should have been invested by the master with such authority that, as between him and the master, nothing done by him in relation to the business of which he has control would be an act unauthorised by the master. It is, however, unnecessary for us to draw this line. The application to the case before us, of conceded principles is, in our view, sufficient for our decision." The Irish Exchequer Chamber therefore draw the *prima facie* inference that those employed by the company are fellow servants, and permit the plaintiff to rebut the inference by showing the status of the negligent person to be that of vice-principal or representative.

If the case of *Howells v. Landore Siemens Steel Co.* had been brought to the attention of the Irish Exchequer Chamber it is difficult to understand how that Court could have avoided noticing it; and as the case was distinctly referred to in the judgment of the Court below, it is equally difficult to see how it could fail to be brought to their notice.²

There is a distinct divergence of opinion between the Irish Exchequer Chamber and the English Court of Queen's Bench on the point. This difference must be referred to the authority of the House of Lords in *Wilson v. Merry*.³ There the Lord Chancellor says: "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master." This opinion does not seem to have been excepted to by any of the other Law Lords; and if Blackburn, J., is right in the concluding sentence of his judgment in *Howells v. Landore Siemens Steel Co.*, the decision of the House of Lords is distinct, at least so far

¹ Ir. R. 11 C. L. 353.

² The reporter in Ir. R. 9 C. L. 501 n, alleges a "materially different report" of *Howells v. Landore Siemens Steel Co.*, to have been given in 44 L. J. Q. B. 25, from that in L. R. 10 Q. B. 62, but, whatever the terms of the report, it is incontestable that in that case the certificated manager by statute was to have "the control" of the mine. Notwithstanding this the Court held that he did not hold a position different from that of a fellow workman.

³ L. R. 1 Sc. App. 332.

as this, that the fact that the servant holds the position of vice-principal does not affect the non-liability of the master for his negligence as regards a fellow servant. The case of *Conway v. Belfast and Northern Counties Ry. Co.*, then, so far as it draws a distinction between a "vice-principal" and a manager and foreman, runs counter to authority.

Sneddon v. Moss End Iron Co.
Lord Ardmillan's interpretation of the decision in *Wilson v. Merry*.

The Scotch Courts at once accepted the full effect of Lord Cairns's judgment. This is clear from *Sneddon v. Moss End Iron Co.*,¹ where Lord Ardmillan says:² "In that case" (*Wilson v. Merry*) "I then attempted, as I had done on previous occasions, to make a distinction and exception in regard to the position of a superior manager with general superintendence, whom I was disposed to regard as the representative of the master rather than as a fellow workman of the man injured. This distinction was not accepted. The House of Lords, in affirming the judgment, placed the case on the broader ground that in a question of damages for injury inflicted by the fault of one servant on another, down through the whole gradation of servants, the employer is not responsible, unless personal fault on his part is instructed. The opinion of Lord Chancellor Cairns leaves no doubt on this matter." "To a certain extent it is true, as has been remarked, that these observations were not absolutely necessary to the decision of the case immediately before the House. But they were the natural supplement and corollary of the views which he had previously expressed; and it is vain to contend against the conviction that the law is now as Lord Cairns has declared it."

Conclusion.

The conclusion is, therefore, inevitable that persons in all grades of employment that can be comprehended as "common," are included within the disability to recover against the employer for injuries sustained from the negligence of persons of any grades whatever in the same employment.³

Formula of Brett, L.J.

In *Charles v. Taylor*,⁴ Brett, L.J., reduced this principle to the following formula: "When the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other."

Warburton v. G. W. Ry. Co.

This follows the language of Kelly, C.B., in an earlier case,⁵ argued by the Lord Justice when at the bar, and which marks a class of cases wanting the element of a common master, though the employment is a common employment. The plaintiff, in the employment of the London and North-Western Ry. Co., was at work in Manchester at the Victoria Station which was used under an agreement in common by the plaintiff's employers and the defendants. An engine-driver in the employment

¹ (1876) 3 Rottie, 868. In *Wright v. Dunlop*, 20 Rottie, 363, however, there are expressions inconsistent with what has been regarded as the settled law: see per Lord Trayner, at 369. The concluding paragraph of the head-note is in distinct conflict with the rule laid down in *Howells v. Landore Siemens Steel Co.*, L. R. 10 Q. B. 62 (see ante, 665), and can only be explained by Blackburn, J.'s, remark at 65: "In Scotland it seems that a vice-principal had been held to be in a different position from an ordinary fellow servant." See, however, per Lord Cranworth, *Bartonshill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 285, cited, *post*, 678.

² 3 Rottie, 874.

³ *Cribb v. Kynoch*, The Times Newspaper, 18th May, 1907.

⁴ 3 C. P. D. 496; cp. *Sweeney v. Duncan*, 19 Rottie, 870.

⁵ *Warburton v. G. W. Ry. Co.*, L. R. 2 Ex. 30; also *Vose v. Lancs. & Y. Ry. Co.*, 2 H. & N. 723, where a blacksmith, working for the East Lancashire Ry. Co., was killed through the negligence of the servants of the Lancs. & Y. Ry. Co., working under joint rules; also *Graham v. N. E. Ry. Co.*, 18 C. B. N. S. 229.

of the Great Western Ry. Co. shunted a train belonging to the defendants, and in doing so, was guilty of the negligence complained of. Brett, Q.C., argued that the test of fellow service was not the doing work for a common object or being engaged in a common work; neither was it being paid by the same person, as was shown by the case of *Degg v. Midland Ry. Co.*;¹ for there the volunteer who was paid nothing was considered as on the same footing as the defendants' paid servants; but it was the working subject to a common direction and control. Both the plaintiff and the defendants' servants were bound to work according to the regulations of the London and North-Western Ry. Co., and under the control of their station-master. Kelly, C.B., states the rule of law applicable as follows: "Where two or more persons are the servants of one master, and engaged in one common employment, the master is not liable to an action for any injury sustained by one servant by reason of the negligence of another, in the work or employment which is common to both, or incidental to the carrying on of the general business or the operations in which the one and the other are engaged." Having thus enunciated the proposition, the Chief Baron comments on it thus: "The ground upon which these decisions have been pronounced is, that it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant, under the same master and in the same employment, and that such risk is part of the consideration for the wages which he is entitled to receive. This proposition, to the extent to which I have stated it, and which is to be deduced from the case of *Morgan v. Vale of Neath Ry. Co.*,² and many other authorities, has now become established law. But we are of opinion that, inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, *not in the course of any common employment or operations under the same master*, but by negligence in the discharge of his ordinary duty to the defendants alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption, and that therefore the action is maintainable."³

Formula of Kelly, C.B.

His comment on it.

*Swainson v. N. E. Ry. Co.*⁴ is a similar case, taken to the Court of Appeal a few months previously to the decision in *Charles v. Taylor*.⁵ *N. E. Ry. Co.* Bramwell, L.J., there says the test⁶ is whether "a relation has been established between the person who complains and the master of the person who does the injury"; Brett, L.J., anticipating the formula which he framed in *Charles v. Taylor*,⁷ said: "I think that the authorities hear out the proposition," "that in order to give rise to the exemption there must be a common employment and a common master; it is not necessary that there should be a common service for a definite time or at fixed wages; or the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment; a volunteer puts himself under the control of another person, and in respect of that other person he is for the time being in the position of a servant. . . . The question is, Did the deceased adopt such terms of service as placed him under the orders of the

Test suggested by Bramwell, L.J.

¹ 1 H. & N. 773.

² L. R. 1 Q. B. 149.

³ *Grand Trunk Ry. Co. v. Huard*, 26 Can. S. C. R. 655.

⁴ 3 Ex. D. 341; *Page v. Metropolitan Ry. Co.*, 4 Times L. R. 103.

⁵ 3 Ex. D. 348.

⁶ L. C. 310.

⁷ 3 C. P. D. 492.

defendants? If he did, I think that would be sufficient to exempt them from liability."

These later cases of *Swainson v. N. E. Ry. Co.*¹ and *Charles v. Taylor*² are, however, only important as showing the working out in practice of the principle formulated by Lord Cairns, and not as marking any further development of legal principle.

COMBINED WORKING.

Work done
under a sub-
contract.

*Wiggett v.
Fox.*

We have seen that though various employments may be so implicated in their various stages that they become in effect one combined operation, yet for the purpose of ascertaining liability in the event of accident arising from negligence, each is held to remain distinct, if only the different portions of the work are carried on by independent contractors. We now come to consider whether the fact of the one employer being dependent on the other—the work being done under a sub-contract—makes any difference in the liability. *Wiggett v. Fox*³ is the first case raising this point. The deceased had been a workman employed under a sub-contractor. The death arose from the carelessness or negligence of another workman engaged in doing work for the defendants, who were the general contractors for the whole, and under whom the sub-contractor, whose servant the deceased was, had been engaged to perform a definite part of the whole contract. The jury found that the deceased was employed by the sub-contractor, and was not directly employed by the defendants.

On this finding the Court nonsuited: a master is not in general responsible to one servant for an injury occasioned by the negligence of a fellow servant whilst acting in one common service. "We think," it was added,⁴ "that the sub-contractor and all his servants must be considered as being, for this purpose, the servants of the defendants whilst engaged in doing work, each devoting his attention to the work necessary for the completion of the whole, and working together for that purpose."

*Abraham v.
Reynolds.*

Wiggett v. Fox was followed by *Abraham v. Reynolds*.⁵ The plaintiff, a servant of persons employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry, when in consequence of the negligence of the defendants' porters, a bale fell upon him. It was held that the plaintiff and the defendants' servants not being under the same control or forming part of the same establishment, were not so employed upon a common object as to deprive the plaintiff of a right of action against the defendants for such negligence.

Compared.

These cases have sometimes been treated as not reconcilable. In fact they proceed upon distinctive principles. Even without Channell, B.'s,⁶ gloss on *Wiggett v. Fox*, in *Abraham v. Reynolds*, it may be noted that in *Wiggett v. Fox* the injured and the injuring persons were members

¹ 3 Ex. D. 341; *Page v. Metropolitan Ry. Co.*, 4 Times L. R. 103.

² 3 C. P. D. 402.

³ (1856) 11 Ex. 832.

⁴ 11 Ex. 838.

⁵ 5 H. & N. 143; *Wyllie v. Caledonian Ry. Co.*, 9 Macph. 463, is a Scotch case, very similar in principle, and decided upon similar principles. Cp. *Calder v. Caledonian Ry. Co.*, 9 Macph. 833, and *Gorman v. Morrison*, 12 Rettie, 1073. *Wiggett v. Fox* was followed in *Johnson v. City of Boston*, 118 Mass. 114.

⁶ Channell, B., was counsel for Fox in *Wiggett v. Fox*. See, too, the case as reported. 25 L. J. Ex. 188; and remarks of Cockburn, C.J., in *Kourke v. White Moss Colliery Co.*, 2 C. P. D. 207, 208.

of the same establishment—that is, were working under the same direction and under the same rules, and were also working jointly for a common object; while in *Abraham v. Reynolds* they were not members of the same establishment, and there was mere contact in work, not co-operation in a common scheme. As Watson, B., points out: ¹ “It is not a joint operation. Suppose a woman went to a grocer’s shop to buy vinegar, and the grocer’s boy, in giving what he supposed to be vinegar, poured oil of vitriol over her hands, could she be said to be the servant of the master of the shop, because in one sense assisting in the operation?” *Abraham v. Reynolds* can in no sense be said to be the case where two persons serve the same master, since there exists no subordination between them. The contract to carry bales is independent work, complete in itself, and distinct; while the sub-contract to build the Crystal Palace was a step in the co-operation towards the completion of a general scheme of work in which each portion was in subordination to the carrying out of the general design, and the whole was under a paramount direction. The gloss of Channell, ² B., accentuates the principle, which even without these additional circumstances is an intelligible one. His words are: “It was proved that the deceased was paid by the defendants, and it further appeared by the printed rules which were given in evidence, and by the evidence of Moss, one of the sub-contractors, that the defendants had a control over, and a power to dismiss, Wiggett, though engaged by the contractors.”³ When the relation between the employed is that of superiority and inferiority in carrying out a common scheme of work—that is, when the general control of work and the arrangements for its progress are in the hands of one contractor, while the carrying out of some portion of the details of the work is in the hands of another—then the servant of the inferior is not to recover against the superior; but where there is no relation of superiority or inferiority in the carrying out a common scheme of work, but the relation is a mere relationship of co-operation, then the employments are distinct, and the servant of the one can recover against the servant of the other.

*Murray v. Currie*⁴ is consistent with this distinction. The servant of a stevedore, while engaged in unloading a ship, was injured by the negligence of one of the ship’s crew, who had been temporarily engaged for the same purpose. The injured man sued the shipowner in whose general employment the injuring man was. Willes, J., points out that the stevedore and his men were acting altogether independently of the shipowner’s control. Bovill, C.J., takes the same view: The stevedore “had entire control over the work, and employed such persons as he thought proper to act under him.” “The defendant did not stand in the relation of a superior.” And *Turner v. G. E. Ry. Co.*⁵—a case, according to Lord Coleridge, C.J., “exceedingly near the line”—recognises a similar principle. The defendants employed a contractor to unload coal trucks. The contractor engaged his own men, and had entire control over them. The plaintiff, while working for the contractor, was injured by the negligent shunting of one of the defendants’ engines bringing coal trucks to the sidings. This was

¹ 5 H. & N. 146.

² 5 H. & N. 150.

³ See the case as reported, 25 L. J. Ex. 188.

⁴ (1870) L. R. 0 C. P. 24, which is distinguished in *Oldfield v. Furness, Withy and Co.*, 9 Times L. R. 515; *Marling v. Adams*, 32 W. R. 430. See also *Cunninghame v. Grand Trunk Ry. Co.*, 31 Upp. Can. Q. B. 350.

⁵ (1875) 33 L. T. (N. S.) 431.

held to be within the principle of *Abraham v. Reynolds*, and not within the principle of *Higgitt v. Fox*; for "the defendants did not pay the plaintiff, and had no control over him so as to be able to engage or dismiss him." Grove, J., says: "No doubt the cases do run into fine distinctions, but there is sufficient breadth of distinction here, in my opinion, to entitle the plaintiff to our judgment."

Discussed.

This distinction, though not thus expressed by the Court, may perhaps be described as that between a "sub-contractor" and an "independent contractor," where the relation is one of contact in independent work, and not of co-operation in common work. The Court, on the facts of the case, held, that the work of the contractor was independent, and not a portion of a scheme, Lord Coleridge, C.J., using the caution: "The case is a difficult one, as I have said, because it is so near the line; and the line to be drawn is one which is not easy to state in language, and I will not attempt to give a definition calculated to meet all cases. Each case must depend upon its particular circumstances, and no single circumstance can be stated as being a certain and single test of general application; but several circumstances may, at any rate, be remarked upon, all or some of which, when they occur, may show what is on one side or the other of the line which is not itself easy to be drawn."

Rourke v. White Moss Colliery Co.

*Rourke v. White Moss Colliery Co.*¹ was decided on the following facts: The defendants were the proprietors of a coal mine, who commenced sinking a shaft themselves, and ultimately entered into a contract with one Whittle to continue the work; the plaintiff then became the servant of Whittle, and was paid by him. The injury sued on arose from the negligence of one Lawrence, an engineer, appointed by the defendants to work a steam-engine, which, under the contract with Whittle, was provided by the defendants to facilitate the work. Lawrence, though employed and paid by the defendants, was, with the engine, placed under the sole orders and control of Whittle. "If, under these circumstances," says Lord Coleridge, C.J., "the plaintiff and Lawrence were both in the employ of Whittle, the plaintiff is, upon the principle laid down in *Priestley v. Fowler*,² and several subsequent cases, debarred of remedy against the defendants. If Lawrence was not in Whittle's employ, then the defendants are liable." His conclusion is that the case fell within *Priestley v. Fowler*. In the Court of Appeal, Mellish, L.J., guards against an adoption of Lord Coleridge, C.J.'s, opinion, that, "if Lawrence was not in Whittle's employ, then the defendants were liable." He states the point thus: "There are two questions—first, whether Lawrence, in doing the act complained of, was acting as the servant of the defendants or of Whittle. If he was not acting as the defendants' servant they would not be liable; but if he was acting as the servant of the defendants they might be liable. But then the second question would arise, whether or not the plaintiff was his fellow servant." In the result, the Court of Appeal affirmed the Common Pleas Division, on the narrow ground "that Lawrence was practically in Whittle's service at the time he was guilty of the negligence complained of."³

¹ (1870) 1 C. P. D. 556, 2 C. P. D. 205.

² 3 M. & W. 1.

³ Per Cockburn, C.J., 2 C. P. D. 209. This case is noteworthy from the fact that in the Divisional Court, the judges, Lord Coleridge, C.J., Archibald and Lindley, J.J., express doubt about the decision of *Abraham v. Reynolds*; while in the Court of Appeal, Cockburn, C.J., doubts as to *Higgitt v. Fox*: "It is quite unnecessary to say whether

Rourke v. White Moss Colliery Co. was approved and followed by the Court of Appeal in *Donovan v. Loring, Wharton, and Down Construction Syndicate*,¹ where the facts were very similar. Defendants selected the man whose negligence was the cause of the injury, and paid him, but lent him to another firm to work a crane, in negligently doing which the accident happened; and since this other firm had the control of him while working the crane and might discharge him, during his occupation he ceased to be the defendants' servant. "We have only to consider," said Bowen, L.J.,² "in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act," or as the same learned judge said in *Moore v. Palmer*.³ "The tests were, who had the power of selecting, of controlling, and of dismissing? . . . The great test was this, whether the servant was transferred, or only the use and benefit of his work."

Donovan v. Loring, Wharton, and Down Construction Syndicate.

*Rourke v. White Moss Colliery Co.*⁴ was distinguished in *Chrudge v. Union Steamship Co.*,⁵ a New Zealand case. Plaintiff, who was employed as a labourer by stevedores, was injured while discharging a cargo of coal from one of the respondent company's steamers, through the negligence of a winch-driver provided by the defendants, and who was one of the crew of the steamer. The cargo was being discharged under a contract between the stevedores and the defendants, by which defendants provided the winch-driver. The Court considered the case to differ from *Rourke's* in that there the contract expressly provided that the engineers and engine should be under the control of the contractor; while in the case before the Court "from the terms of the contract between the defendant company and the Stevedores Association it is a natural inference that the seamen employed were to remain under the orders of their own officers." "The maintenance of discipline amongst a crew and the general economy of a ship required that the direct control of the seamen should not be parted with by the defendant company. The decision in *Rourke's case* is founded on the conclusion at which the Court arrived—that the engineer had been put under the control of the contractor. The present case, in our opinion, belongs to the class referred to by Cockburn, C.J., in which the defendants have undertaken to do part of the work themselves by means of their machinery and servants." The decision of the New Zealand Court was affirmed by the Privy Council. Lord Watson observed:⁶ "That the servant of A may, on a particular occasion, and for a particular purpose, become the servant of B, notwithstanding that he continues in A's service, and is paid by him, is a rule recognised

Chrudge v. Union Steamship Co.

the case of *Wiggitt v. Fox*, 11 Ex. 832, which was relied on for the defendants, was rightly decided. My own view is that it was not; though I might agree with the decision if I could come to the conclusion that the facts were what Channell, B., appears to have thought they were, in the explanation he gives of that case in *Abraham v. Reynolds*,⁷ at 208. The other judges refrain from comment on either of the cases. *Wiggitt v. Fox* was much canvassed in the various stages of *Johnson v. Lindsay*, particularly in the Court of Appeal, 23 Q. B. D. 512, 513. In the House of Lords, Lord Herschell said of it, (1891) A. C. 379: "If the law there laid down would determine the present case in favour of the respondents, I should feel bound to reject it as inconsistent with all the other English authorities." See also per Lord Watson, 383. *Roberts v. Tottenham Lager Beer Brewery Co.*, 6 Times L. R. 4.

¹ (1893) 1 Q. B. 629.

² 2 Times L. R. 781 (C. A.).

³ 11 N. Z. L. R. 294, affirmed by the Privy Council, (1894) A. C. 183.

⁴ *Union Steamship Co. v. Claridge*, (1894) A. C. 188.

⁵ L. C. 633.

⁶ 2 C. P. D. 205.

⁷ 11 N. Z. L. R. 294, affirmed by the Privy Council, (1894) A. C. 183.

by a series of decisions"; but the case did not call for any discussion of legal principles, and was determined exclusively on its facts.

*Woodhead v.
Gartness
Mineral Co.*

The principle applicable in this class of case was exhaustively discussed by the Scotch judges in *Woodhead v. Gartness Mineral Co.*¹ Two miners contracted with the defenders to drive a level in a mine. They engaged other miners to do the work, amongst whom was Woodhead. At the time of the accident there were two sets of workmen engaged in the mine—one in sinking, the other, under the contract, in driving the level. A servant of the defenders, unconnected with either of the working sets of servants, was underground manager. He had entire control of the ventilation, and was charged with the duty of keeping the pit safe, under special rules made by virtue of the Coal Mines Regulation Act,² s. 52. The defenders did not approve the employment of Woodhead further than by allowing him to work; they had nothing to do with the wages, either as to amount or as to conditions of payment; and he might have been dismissed by the contractors without the consent or even against the will of the defenders. The underground manager might also have dismissed Woodhead under special rules made for the conduct and guidance of the persons acting in the management of this mine, or employed in or about the same, "to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine," which Woodhead had signed.³ The death of Woodhead was caused by the negligence of the underground manager in having incautiously removed a plank while making an alteration in the arrangement for the ventilation of that part of the mine which was at the time occupied by the sinkers.

The jury found a verdict for the pursuer. The judges of the Inner House of the Court of Session, by a majority of six to one, the Lord Justice-Clerk (Moncreiff) being the sole dissentient, entered judgment for the defendants on the ground that "the mineowner is free from responsibility, not because the injured and the injurer are both his own hired and paid servants, but because he is not personally in fault, and has not warranted the injured workman against the perils of the work."⁴

Followed in:
*Wingate v.
Monkland
Iron Co. &c.*
*Maguire v.
Russell.*

Three more of the Scotch judges⁵ concurred in the decision in *Woodhead's case*, in *Wingate v. Monkland Iron Co.*,⁶ which was decided on almost identical facts, and in *Maguire v. Russell*⁷ a further extension of the rule was made. One tradesman had contracted to execute plumber's work and another to lay asphalt paving in the same building. They worked under independent contracts, and while so engaged a workman employed in asphalt paving was injured by a hammer which fell through a skylight by reason of the negligence of one of the plumber's servants. The injured man brought an action against the plumber; and the Second Division of the Court of Session held it indistinguishable from *Woodhead v. Gartness Mineral Co.*⁸

¹ 4 Rettie, 469.

² 35 & 36 Vict. c. 76, now superseded by 50 & 51 Vict. c. 58.

³ By the same rule it was provided that miners and other workmen should be subject to the control and orders of the agent, where one had been appointed, and of the manager and overman.

⁴ Per Lord President Inglis, 4 Rettie, 478.

⁵ Lords Young, Craighill, and Rutherford Clark.

⁶ 12 Rettie, 91.

⁷ 12 Rettie, 1071. *Congleton v. Angus*, 14 Rettie, 309, which was questioned in *Smyth v. Turnbull*, 17 Rettie, 877.

⁸ 4 Rettie, 469.

Finally the House of Lords, in *Johnson v. Lindsay*,¹ reviewed the decisions and fixed the law. Builders contracted to erect a block of houses under a specification prepared by the owner's architect. Certain fire-proof portions of the house were to be executed by the respondents. The respondents dealt directly with the architect, and were not in any way under the direction or control of the builders. During the progress of the work, a workman of the builders was injured by the negligence of one of the respondents' workmen. A verdict for the plaintiff was set aside and judgment ordered to be entered for the defendants by the Queen's Bench Division, on the ground that the plaintiff at the time of the accident was engaged in a common employment with the servants of the defendants, whose negligence caused his injury. This judgment was affirmed by the Court of Appeal, whose decision was reversed by the House of Lords.

It was considered that on the facts the plaintiff, the appellant, was in no sense a servant of the respondents; and since to sustain the immunity claimed it is essential that the person suing should himself be the servant of the master by whose servant's negligence the injury is caused, the plaintiff was held entitled to retain his verdict. "It must be remembered," said Lord Herschell,² "that whilst a servant contracts with his master to bear the risks of the negligence of his fellow servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take due care to select competent servants. And it would be most unreasonable to hold that he is exempt from liability for his servants' negligence in any case where he is not under this obligation. But I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative and to be implied from the relation of master and servant created between the parties." So far as *Wiggett v. Fox* was contrary to the view expressed in the House of Lords, it was rejected "as inconsistent with all the other English authorities";³ it was, however, said⁴ that, as explained by Channell, B., in *Abraham v. Reynolds*,⁵ "it does not support the argument of the respondents, and comes within the rule enunciated by Lord Cranworth."⁶

The result of the decision is that, to exclude the liability of one person for injury occasioned by his workman's fault to the workman of another, while engaged in a common work, it must be shown that the workman at the time of doing the negligent act had submitted himself to the control of some other person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment.⁷ The enunciation

¹ (1891) A. C. 371. *Cameron v. Nystrom*, (1893) A. C. 308.

² (1891) A. C. 378.

⁴ Per Lord Watson, (1891) A. C. 383, 384.

⁵ 5 H. & N. 150.

⁶ *Bartonhill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 266.

⁷ In *Ruth v. Surrey Commercial Dock Co.*, 8 Times L. R. 116 (C. A.), Lord Esher, M.R., says: "It was a question for the jury whether the Dock Company did not reserve to themselves the power of interfering with the manner in which the work was done. If they had reserved that power, then although the work was done through contractors, and although the accident was caused by the negligence of a man employed by those contractors, yet the defendants were responsible, because the contractors were not independent contractors and their servant through whose negligence the accident happened was also the servant of defendants."

Judgment of the House of Lords.

Considered.

Lord
Watson's
view of the
decision in
Woodhead v.
Gartness
Mineral Co.

Lord Cran-
worth's view
of the rela-
tions of
general prin-
ciples of
jurisprudence
to English
and Scotch
law
respectively.

Woodhead v.
Gartness
Mineral Co.
decided on a
misapprehen-
sion of a
passage in
Lord Cairns's
opinion in
Wilson v.
Merry.

Nystrom v.
Cameron.

Judgment of
Williams.

of this principle destroys the authority of *Woodhead v. Gartness Mineral Co.*,¹ which, in the opinion of Lord Watson,² "goes the full length of affirming that, in cases of common employment under different masters, each master is freed from responsibility for injuries inflicted upon the workmen of other masters by the negligence of his servants." "I have therefore," he adds, "no hesitation in affirming that it is not the law of England." But if not the law of England, neither is it the law of Scotland. For, as was said by Lord Cranworth, in a case³ not a little quoted in *Johnson v Lindsay*,⁴ and with reference to a very cognate matter, "if such be the law of England, on what ground can it be argued not to be the law of Scotland? The law, as established in England, is founded on principles of universal application, not of any peculiarities of English jurisprudence; and unless, therefore, there has been a settled course of decision to the contrary, I think it would be most inexpedient to sanction a different rule to the North of the Tweed from that which prevails to the South."

The case of *Woodhead v. Gartness Mineral Co.*,⁵ was decided on a misapprehension of a passage in Lord Cairns's opinion in *Wilson v. Merry*.⁶ "I do not think," that learned lord is reported to have said, "the liability, or nonliability, of the master to his workmen can depend upon the question whether the author of the accident is not or is, in any technical sense, the fellow workman or *collaborateur* of the sufferer. In the majority of cases in which accidents have occurred, the negligence has, no doubt, been the negligence of a fellow-workman; but the case of the fellow workman appears to me to be an example of the rule, and not the rule itself." Hence, it was argued that the test of immunity for the master is not service under a common employer, but service at a common work. Lord Watson, however, shows⁷ that this was not Lord Cairns's meaning, and by a review of the authorities at the time of the delivery of the opinions in *Wilson v. Merry*, he makes it clear that Lord Cairns's expression was directed to correct a current interpretation of the word "*collaborateur*" that restricted its application to fellow servants labouring with their hands, so as to adjust its use to the comprehension of all grades of service up to that of the general manager, and not to stretch its application to include those who are not servants.⁸

Subsequently to the decision of *Johnson v. Lindsay* in the Court of Appeal, and while the case was waiting for decision in the House of Lords, the Court of Appeal in New Zealand, in *Nystrom v. Cameron*,⁹ refused to follow the English Court of Appeal, regarding it as a decision "not justified by the previously decided cases," and as introducing "a new rule of law foreign to the rule on which the earlier cases were decided, and which cannot be said to be a legitimate development of that rule."¹⁰

The decision of the majority of the New Zealand Court of Appeal, as stated by Williams, J.,¹¹ not only anticipated, but forcibly expresses the conclusion of the House of Lords. "In all the previous cases the defendant was in some sense the master of the injured man, and it will

¹ 4 Rettie, 469.

³ *Bartonshill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 285.

⁴ (1891) A. C. 371.

⁶ L. R. 1 Sc. App. 331, 332.

⁵ See (1891) A. C., per Lord Watson, 385, 386.

¹⁰ *L.c.*, per Williams, J., 426. The judgment of this learned judge contains a discussion of the authorities.

² (1891) A. C. 384.

⁵ 4 Rettie, 469.

⁷ (1891) A. C. 386.

⁹ 9 N. Z. L. R. 413.

¹¹ *L.c.* 427.

be found that the exemption of the defendant from liability was strictly based upon the fact that this relation was shown to have existed between them. I think it is clear from the language of the judgments that had no such relation been established, the ordinary rule that the defendant was liable for the negligent acts of his servants in the course of their business would have been applied by the Courts." The Privy Council affirmed this decision,¹ and Lord Herschell, C., thus formulates² the decision in *Johnson v. Lindsay*—that "where the person sued has committed negligence by one of his servants, the defence of common employment is only available to him where he can show that the person suing was also his servant at the time of the occurrence of the injury."

Affirmed by the Privy Council.

In *McCallum v. North British Ry. Co.*,³ the Court of Session followed *Johnson v. Lindsay*, definitely stating that since that decision the law of Scotland as expressed in *Woodhead's case* had been changed.

McCallum v. North British Ry. Co.

Some of the considerations applicable to determining the liability of the master for occurrences in the course of carrying out work, are indicated by an American case of the highest authority.⁴ The case was decided under a law similar to the English Employers' Liability Act. A workman was injured by the fall of steel rails which he and other labourers were trying to load from the ground upon a flat car. A rail while being raised struck the side of the car and fell back. The plaintiff was injured. The negligence alleged was that the foreman, one McCormick, moved out the construction train to which the flat car belonged in the face of an approaching regular freight train, to avoid which the labourers were hurrying to load the rails. It was charged that the foreman failed to give the customary word of command to lift the rail in concert; but with the approaching freight train in sight, and with oaths and imprecations ordered the men to get the rail on in any way they could; they lifted it without concert; hence the accident. The Court were unanimous that no case was shown. "The fact that McCormick hurried the men does not show any negligence on his part or excuse any negligence on theirs. The necessity of keeping the construction train out of the way of the freight train was one of the risks of the employment. The use of oaths and imprecations by McCormick was not an element of negligence. The fact that McCormick urged the men to hasten, even if, as a consequence, the plaintiff and his fellow workmen became confused and failed to act in concert, cannot be regarded as a fault or negligence in McCormick. Whatever negligence there was, was the negligence either of the plaintiff himself or of his fellow servants, who, with him, had boid of the rail."⁵

Occurrences in the course of carrying out work. *Coyne v. Union Pacific Ry. Co.*

POSITION OF VOLUNTEERS.

*Degg v. Midland Ry. Co.*⁶ has already been cited as an authority for the proposition that the legal conception of fellow servants, so far as the master's immunity for their negligence amongst themselves

Degg v. Midland Ry. Co.

¹ (1893) A. C. 308.

² L. c. 311.

³ 20 Rettie, 385.

⁴ *Coyne v. Union Pacific Ry. Co.*, 133 U. S. (26 Davis) 370.

⁵ 133 U. S. (26 Davis) 374.

⁶ (1857) 1 H. & N. 773. A passer-by casually appealed to by a workman for information, does not make himself a volunteer by affording it. *Cleveland v. Spier*, 16 C. B. N. S. 399.

goes, is not limited by the fact of his payment and their receipt of wages. We are now to consider the class of cases, of which it is the leading authority, where persons unsolicited, and as volunteers, place themselves in the position of servants for the benefit of other persons.

A volunteer has been defined by Lord Herschell: ¹ "A person who is not under any paid contract of service" but who "may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such." The legal reason at the bottom of the considerations that determine the status of a volunteer is that the intermeddler with the employer's work has associated himself with it without the knowledge or consent—whether explicit or implicit of the master, and so can acquire no better position than if he were properly appointed to the post, whose duties he chooses to assume.

Degg v. Midland Ry. Co. was an action under Lord Campbell's Act. A widow sued for damage caused by the death of her husband while assisting in the turning of a railway truck of the defendants. The deceased was engaged in unloading a truck upon a siding. Next to the truck was a turn-table, at which servants of the Company were attempting to turn a truck. The deceased, who was not in the employ of the Railway Company, went to their aid. Whilst he was there a steam-engine came into a siding, where the turn-table was, for the purpose of shunting some empty trucks. The deceased was struck, injured, and ultimately died from the effects of the injuries he received. Bramwell, B., drew a distinction between injuries deliberately inflicted on trespassers ² and injuries consequentially arising to them from their trespass. For instance, if a man steps on the rotten cover of a well while trespassing on another person's property and falls in, ³ no action would lie against the owner for having a rotten cover to his well. On the other hand, if a trespasser is walking in a park where the owner is driving, who, though seeing him, yet recklessly drives over him, despite his being a trespasser, the person injured could recover. "No man, by his wrongful act, can impose a duty, and as a direction by the master to drive furiously, or in any way called carelessly, in his park, would not be wrong in the master, it cannot be made so by a trespasser getting there and being hurt, so that *quoad* the master it is *damnum absque injuria*; and if not a wrong in the master when expressly ordered, it cannot be if done by the servant against his orders."⁴ The defendants might have directed their servants to act in the way they were doing, when the accident happened, without violating any duty, and the coming there of the deceased could not constitute a duty, so that the action was not maintainable.

Potter v. Faulkner,⁵ in the Exchequer Chamber, distinctly affirms the principle of *Degg v. Midland Ry. Co.* *Potter v. Faulkner* was

¹ *Johnson v. Lindsey*, (1891) A. C. 377.

² *Deane v. Clayton*, 7 Taunt. 489; *Hott v. Wilkes*, 3 B. & Ald. 304; *Bird v. Holbrook*, 4 Bing. 628; *Lynch v. Nurdin*, 1 Q. B. 29. As to this case, Erle, C.J., in *Potter v. Faulkner*, *infra*, note 4, said: "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons. You may put aside that class of cases." Cp. *ante*, 424.

³ 1 H. & N. 777.

⁴ L. C. 782.

⁵ (1861) 1 B. & S. 800; *Kelly v. Johnson*, 128 Mass. 530; a Scotch case, *Little v. Sumnerlee Iron and Coal Co.*, 17 Dunlop, 310; and an Irish case, *O'Sullivan v. O'Connor*, 22 L. R. Ir. 467, in the C. A. 476. See also per Lord Gifford in *Woodhead v. Gartness Mineral Co.*, 4 Rettie, 503; and *Lunnie v. Glasgow & S. W. Ry. Co.*, (1906) 8 Fraser, 546.

Distinction between injuries directly inflicted on trespassers and those incidentally arising.

Potter v. Faulkner.

decided on a special case. The plaintiff had been injured by the fall of a bale of cotton in the course of removing cotton from the defendant's warehouse. Some of the defendant's servants were employed in lowering bales of cotton from the warehouse, and another was receiving them into the defendant's cart. The plaintiff was waiting on the premises for his turn to load his cart. He intervened to assist the servant who was in the cart, and, so far as the master was concerned, made himself a volunteer. A bale fell and injured him. The Queen's Bench, on the authority of *Degg v. Midland Ry. Co.*, and without hearing argument, held that the judge at the trial was bound to nonsuit, and suggested that the case should go to a court of error. In the Exchequer Chamber, Erle, C.J., formulated the principle that, in circumstances such as those proved, no one can "stand in a better position than those with whom he associates himself in respect of his master's liability; he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ."

In *Holmes v. N. E. Ry. Co.*,¹ however, a limitation of the rule in *Degg v. Midland Ry. Co.* was imposed in favour of those with a personal interest in the work at which they assist. It was the custom for waggons consigned to a certain station on the defendants' line, and containing coal or lime, to be shunted into a siding, and there unloaded by means of drops or cells into which the contents of the waggons were shot. It was also customary for the consignees of goods, or their servants, to assist in unloading; and for that purpose to pass along a flagged way, which was by the side of the shunted waggons and above the cells into which they were unloaded. A coal waggon consigned to the plaintiff was shunted, but could not be immediately unloaded, as no drop was vacant. The plaintiff, being in want of coal, went to the station, and was told by the station-master that he could not get delivery till some lime was removed. Plaintiff said he must have the coal, and would get on the waggon and take what he needed thence. The station-master made no reply, and the plaintiff, with his servant, proceeded towards the waggon, got upon the buffer, took some coal, and descended on the flagged way. The flag being worn, broke; the plaintiff was thrown to the bottom of the cell and injured. A verdict was given in his favour and a rule to enter it for the defendants was discharged by the Court of Exchequer, on the ground that there was a duty on the defendants to keep the way in such a condition as to enable persons coming to assist in unloading the waggons in the ordinary way to pass safely; and that they were liable to such persons for the consequences of the insecurity of the flags; and further they were under a duty to the plaintiff when, instead of his unloading his waggon by tipping, he did the same thing by transferring the coals by hand from the waggon into his own cart. The Exchequer Chamber affirmed the Court of Exchequer without comment.

In the Court of Exchequer, Bramwell and Channell, B.B., drew a distinction similar to that drawn by Willes, J., in *Indermaur v. Dames*, between "licensees" and "mere licensees." By a "mere licensee" it appears is to be understood a person who has permission to go upon ground for his own purposes without any relation to the occupier, and who goes taking all the risks attending his so doing, and

Limitation on the rule in *Degg v. Midland Ry. Co.* *Holmes v. N. E. Ry. Co.*

"Licensees" and "mere licensees."

¹ (1860) L. R. 4 Ex. 254; L. R. 6 Ex. 123. Cp. *Carroll v. Freeman*, 23 Out. R. 283; *Rogers v. Toronto Public School Board*, 27 Can. S. C. R. 448.

Principle
stated.

not imposing any liability on his licensor; ¹ by a "licensee" is to be understood one who is invited on land by the occupier for some purpose in which he and the occupier have some common interest. The two learned judges acquiesced in the decision of the Court with some little difficulty, not from dissent to the principle asserted, yet having doubts as to the correct application of the principle to the facts of the case. The principle may be stated thus: Where a person is on premises of others, with their assent, engaged in a transaction of common interest to both parties, the owners of the premises are liable for the negligence of their servants in the course of the transaction.

Wyllie v.
Caledonian
Ry. Co.

The Scotch case of *Wyllie v. Caledonian Ry. Co.*,² which was decided almost at the same time, was somewhat similar in its facts. A drover in the employment of a cattle-dealer was engaged along with the company's servants in trucking his master's cattle, when an engine, negligently driven by one of the company's servants, entered the siding where plaintiff was engaged, and injured him. The Lord President (Ingليس) held, that the true effect of what was being done, taking into account the difficulty involved in driving cattle, was that the railway company's servants were taking delivery in pursuance of the contract of carriage, and the servants of the cattle-dealer were engaged in giving delivery; consequently a duty to take care was owing. This *ratio decidendi* seems satisfactory. Although the other English cases were cited in the argument, no mention appears to have been made of *Holmes v. N. E. Ry. Co.*, nor of the wider principle laid down in the Exchequer. The case clearly comes under the principle there advanced, of co-operation joined with an interest in the work.

Wright v.
L. & N. W.
Ry. Co.

Next came the case of *Wright v. L. & N. W. Ry. Co.*³ Plaintiff sent a heifer by defendants' train. On the arrival of the heifer at her destination there were not sufficient porters to shunt the box, in which the heifer had been carried, to a siding, from which only she could be delivered. The plaintiff went to assist, and by the negligence of the defendants' servants he was injured. The judgment of Mellish, L.J., varies, and in so doing explains, the phrase "a mere licensee," used by Channell, B., in *Holmes v. N. E. Ry. Co.* "The plaintiff," he says,⁴ "was not a mere volunteer, but was assisting to get his own heifer." The distinction to be drawn is, that where the company is doing its own work in its own way, and some bystander is prompted to interfere from a motive peculiar to himself and not importing a duty, he does so at his own risk; if, however, a company allows persons to do what they ought to have an efficient staff to do, they must take the consequences if the person so interfering—supposing him to have an interest in the work—is injured through default in their method of working.

Distinction.

The Scotch decision would seem in point here also, with the difference that there the drover was giving, here he was taking, delivery.

Little v.
Neilson.

In the Scotch case of *Little v. Neilson*,⁵ defendant's manager asked the pursuer to turn out of the road and assist him, which he did, and, while rendering the aid asked, was injured; the Lord Justice-Clerk (Hope) found the claim relevant, on the ground that the manager was authorised to make the request. This was before the decision in *Bartonshill Coal Co. v. Reid*. Since, then, it would seem that, where such assistance is given at the request of the servants, the volunteer would

¹ *Bolch v. Smith*, 7 H. & N. 736.

² *Wright v. L. & N. W. Ry. Co.*, (1875) L. R. 10 Q. B. 298; 1 Q. B. D. 252.

³ J. B. D. 256

⁴ 9 Macph. 463; *ante*, 672.

⁵ 17 Dunlop, 310.

by acting be constituted a fellow servant, unless he acts in pursuance of an interest; and if he does not assist at the request of the servants, but from his own meddlesomeness only, his rights are no greater than a servant's.

A distinction must, nevertheless, be drawn between acts done with a view to assist, and acts done the effect of which is to assist, though no such object originally prompted them. The one class renders the persons acting a volunteer, the other does not. Thus it is pointed out¹ that if a runaway horse is stopped by a person whose safety is jeopardised by its course, such person does not, by stopping the horse, become the servant of the owner. Nor, when a house is burning, does an imperilled neighbour lose his rights as a stranger by assisting to put out the fire.

Actions done for the purpose of protecting person or property will not be construed as done with any object inconsistent with that purpose. Difficulty, however, exists in determining the motive to action in these cases. The learned authors just cited suggest as one test—"to inquire whether the person rendering the assistance would probably have done so if the property with which he interfered had no owner." The test seems an unnecessary complication of the proposition that each case must be decided, as it arises, on its own facts, in the light of the principles we have been discussing.

An American case,² decided by the Supreme Court of Pennsylvania, forcibly sets out the considerations on which the law on the point we have been considering is based. A boy of ten was asked by a foreman watering an engine to fix the hose on the boiler while he cleaned out the ash-pan. Some trucks without a breaksman ran against the engine, threw the boy off, and killed him. Agnew, J., giving the judgment of the Court, said: "Here the boy was voluntarily where he had no right to be, and where he had no right to claim protection; where the company was in the use of its private ground, and was not abusing its privileges, or trespassing on the rights or immunities of the public. The only apology for his presence there, is the unauthorised request of one who could not delegate his duty, and had no excuse for visiting his principal with his own thoughtless and foolish act. Nor can the mere youth of the boy change the relations of the case. That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of the company, or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation."

This obviously just conclusion has been cavilled at, and the doctrine of care towards young children has been vouched as warranting a conclusion of liability in the railway company. If any negligence can be shown in the company this would be so. Failing negligence, there is no case against them. The only negligence the case seems to suggest is their selection of an incompetent servant, and doing this would assuredly not operate to clothe him with powers greater than those of a competent servant. If the servant were competent he had no authority to delegate his duties or to engage an assistant.

¹ Shearman and Redfield, *Negligence*, § 183

² *Flower v. Pennsylvania Rd. Co.*, (1871) 69 Pa. St. 210; *Holmes v. Cromwell & S. Lumber Co.*, 51 La. Ann. 352.

LENDING SERVANTS.

Murray v. Currie.

*Murray v. Currie*¹ has already been treated in another connection. It is also an authority for the proposition that, "if I lend my servant to a contractor who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor."² This proposition was subsequently affirmed in *Rourke v. White Moss Colliery Co.*³

Wood v. Cobb.

The principle is well illustrated by a Massachusetts case.⁴ Plaintiff was injured by a boy in the general employment of the defendants. It was proved that defendants, fish dealers, employed a "truckman" to deliver their barrels once a week. He, being ill and unable to drive, sent up his team, and told the defendants they could have it if they wanted it, and would let their boy, the general servant of the fish dealers, drive for him. The boy, on being asked, said he must ask the defendants, and the defendants said he might drive. Bigelow, C.J., on these facts, held, that at the time the injury was done to the plaintiff the person in charge of the horse and waggon "was not in the employment or service of the defendants, but was acting as the servant of a third person, who exercised an independent employment in no way subject to the command or control of the defendants as to the mode in which it should be carried on. It is too well settled to admit of debate that under such circumstances no liability for the acts done attached to the defendants."

Principle expressed in *Kimball v. Cushman.*

This case is thus generalised in the subsequent Massachusetts case of *Kimball v. Cushman*:⁵ "It is not necessary that he (the plaintiff) should be shown to have been in the general employment of the defendant [in that case the special master was being sued], nor that he should be under any special engagement of service to him, or entitled to receive compensation from him directly. It is enough that, at the time of the accident, he was in charge of the defendant's property, by his assent and authority, engaged in his business, and, in respect of that property and business, under his control."

Thus, as was said in *Jones v. Scullard*,⁶ a man may at the same time in law serve two masters, while that one alone will be answerable for his neglects in whose service he was acting at the time of the default, and to whose control he was then subject. If he was in a joint service the injured person has the option to sue all, or any, of the masters.

Effect of there being an intermediate party between the servant and the person sued as special master.

Kimball v. Cushman may be cited also for the further proposition: "The fact that there is an intermediate party in whose general employment the person whose acts are in question is engaged, does not prevent the principal from being held liable for the negligent conduct of the sub-agent or under-servant, unless the relation of such intermediate party to the subject-matter of the business in which the under-servant is engaged be such as to give him exclusive control of the means and manner of its accomplishment and exclusive direction of the persons employed therefor."

¹ (1870) L. R. 6 C. P. 24.

² *L.c.*, per Brett, J., 28.

³ 2 C. P. D. 205. Cp. *Moore v. Palmer*, 2 Times L. R. 781 (C. A.); *Wallis v. Hine*, 4 Times L. R. 472 (C. A.).

⁴ *Wood v. Cobb*, 95 Mass. 58.

⁵ 103 Mass. 198. See also *Hasty v. Sears*, 157 Mass. 123.

⁶ (1898) 2 Q. B. 565.

LIAILITY OF SERVANTS.

There remains to be considered the responsibilities incurred by servants either to strangers or one to another. Those obligations which the law imposes on all persons independently of contract manifestly not be affected by the constitution of relations to which the injured person is not a consenting party; and as the servant is liable for any injury he may do to the person or property of another by force or his position as a member of the community and subject to its laws; so his own act in putting himself in relations of subordination to another will not excuse him from answering for the consequences of acts or omissions he would otherwise have been bound to.

The same considerations apply in the case of fellow servants, and would need no exposition save for the decision of a well-known Massachusetts case, *Albro v. Jaquith*,¹ and for a dictum of Pollock, C.B., in *Southcote v. Stanley*.²

In the former, the Court held that the considerations that led to the adoption of the rule, "that a party who employs several persons in the conduct of some common enterprise or undertaking is not responsible to any of them for the injurious consequences of the mere negligence or carelessness of the others in the performance of their respective duties, have an equal significance and force when applied to actions brought for like causes by one servant against another." In the latter case,³ Pollock, C.B., says: "The rule [*i.e.*, that the servant undertakes to run all the ordinary risks of service, including those arising from the negligence of fellow servants] applies to all the members of a domestic establishment, so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow servant; neither can one servant maintain an action against another for negligence whilst engaged in their common employment."

These expressions of opinion have caused uncertainty where else, both on principle and on authority, there is no room for doubt. On principle, the injuring servant can claim no greater rights under the contract than the master and the injured servant between whom the contract is made, yet for his own personal negligence the master is liable to the servant,⁴ while the negligent servant is liable to an action in respect of his negligence by his employer.⁵ If the law were otherwise the principle would cover most cases of personal injury, since the person injured walks the streets, frequents public or private places, or does his work or takes his pleasure mainly in circumstances where he well knows that he is exposed to indefinite risks. The differentia is that he has not, like the master with his servant, any contract which has been interpreted to expose him to those risks without recourse in the event of injury.

A paid servant or a volunteer is in similar case. The principle of law is "that, if a man has a peculiar knowledge, and he offers his services to another person, he is liable for gross negligence whilst

¹ 79 Mass. 99. This decision has since been overruled in the same State, *Osborne v. Morgan*, 130 Mass. 102, where numerous authorities are cited. *Kulleck v. Dering*, 109 Mass. 200.

² 1 H. & N. 247. Authority seems always to have been on the other side. Thus so early as Y. B. 2 Hen. VII. 11, pl. 9, a shepherd is held liable in case for negligence in care of sheep.

³ *Southcote v. Stanley*, 1 H. & N. 247, 250.

⁴ Per Lord Cranworth, C., in *Brydon v. Stewart*, 2 Macq. (H. L. Sc.) 37; *Roberts v. Smith*, 2 H. & N. 213.

⁵ *Green v. New River Co.*, 4 T. R. 589.

Liability of servants.
I. Personally to strangers.

II. To fellow servants.

Pollock, C.B., in *Southcote v. Stanley*.

Principle of the servant's liability for his own acts.

Sir J. Hannen's judgment in *The Rhosina*.

performing his undertaking." Sir J. Hannen thus illustrates the principle in giving judgment in *The Rhosina*.¹ "Suppose one coachman driving allows another coachman, whom he thinks knows the road perfectly well, to drive; he is a volunteer in that sense, and suppose he wishes to go at a greater speed than some other vehicle on the road, and in attempting to get past drives over a heap of stones and upsets the coach, he will not be excused by saying, 'I was only a volunteer.'"

Sir J. Hannen's use of the term "gross negligence" in this connection.

Note may be taken of the use by Sir J. Hannen of the phrase "gross negligence." This cannot be taken to imply any difference in degree between the negligence which would suffice to charge the man if driving on his own account and his negligence when volunteering for another, so far, that is, as any third person injured is concerned. The character of his liability to the coachman for whom he undertook to drive would vary with the different aspect the circumstances might bear. If the supposition that he knew the road "perfectly well" were gratuitous, then the test of liability would be "gross negligence"—the negligence of an unskilled person—*quâ* knowledge of the road, but the negligence of a skilled person *quâ* the fact that he was a coachman. If, on the other hand, he had represented that he knew the road "perfectly well," then *Spondet peritiam artis*,² he would be liable for slight negligence—want of the skill of an expert whether the service he professed to render were gratuitous or remunerated is altogether immaterial to the founding of liability.³

Authorities.

The authorities on the point of the servant's liability for his own negligence are, moreover, both numerous and conclusive. It will suffice to call special attention to one of the earliest: Lord Kenyon in *Stone v. Cartwright*:⁴ "There is no pretence whatever for imputing liability to the defendant in this action; it might as well be contended that a similar action would lie against the steward of another for all the defaults of improper conduct of the men employed under him by which any other person received damage. In all these cases I have ever understood that the action must be brought either against the hand committing the injury, or against the owner for whom the act was done"; and to one of the most emphatic, when Bramwell, L.J., giving evidence before the House of Commons Committee on the Employers' Liability, said:⁵ A "workman would undoubtedly be able to maintain an action against the fellow workman who had done the mischief if he were worth suing."⁶

¹ 10 P. D. 29, affirmed 131.

² *Intc*, 543.

³ *Shiells v. Blackburne*, 1 H. Bl. 161.

⁴ 6 T. R. 412. See *Weir v. Barnett*, 3 Ex. D., per Kelly, C.B., 40, and *Wilson v. Peto*, 6 Moore (C. P.) 47, as to the limitation of the principle.

⁵ Parliamentary Papers, 1877, vol. x, quest. 1156.

⁶ For other authorities see *Laugher v. Pointer*, 5 L. & C., per Littledale, J., 538; *Wiggett v. Fox*, 11 Ex., per Alderson, B., 839; *Morgan v. Vale of Neath Ry. Co.*, 5 B. & S., per Blackburn, J., 578; in Ex. Ch. 736; *Swainson v. N. E. Ry. Co.*, 3 Ex. D. per Pollock, B., 344; Wharton, *Negligence*, § 245; Shearman and Redfield, *Negligence*, § 245; the judgment of Gray, C.J., in *Osborne v. Morgan*, 130 Mass. 402; *Hare v. McIntire*, 82 Me. 240, 17 Am. St. R. 470; and *Mackenzie v. Goldie*, 4 Maiph. 277.

CHAPTER VI.

THE EMPLOYERS' LIABILITY ACT, 1880.

(43 & 44 Vict. c. 42.)

THE relation of master and servant at common law, as developed in the preceding chapters, may be stated in the following proposition: A master is not liable to any servant for any injury which arises from the act or default of any fellow servant, whether that fellow servant be in a position of authority or not; and, in ascertaining whether the person to whose act or default the injury is due is a fellow servant, the widest possible construction is given to the term "common employment."¹ To this there are certain exceptions. The servant is saved from the operation of the general rule, and held to have his action, if he shows either:

Proposition stating the common law

First, that the master has omitted to provide suitable materials and facilities for the work; or,

Exceptions.

Secondly, that the master has been in default in engaging incompetent workmen through whose incompetence the injury happens; or,

Thirdly, that the master has personally been guilty of the negligence that causes the injury.

In 1876 a Committee of the House of Commons was appointed to inquire into the legal relations of master and servant with regard to injuries suffered by servants in the course of their employment. The Committee was reappointed in the following session, and ultimately reported in favour of amending the common law in two particulars:

House of Commons Committee on Employers' Liability.

First, in order to render the master liable in cases where he has delegated his authority.

Secondly, in order to narrow the doctrine of common employment to those cases where each servant is an observer of the conduct of the other, and can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require.

Amendments suggested by their Report.

The outcome of this Report was the Employers' Liability Act, 1880, which we are now to consider.²

¹ Report of House of Commons Committee on Employers' Liability, Parliamentary Papers, 1877, vol. x. iii.

² 43 & 44 Vict. c. 42. The Colonies have generally adopted similar legislation. In Newfoundland the British Act is followed *verbatim*. In New South Wales the existing Act is one of the year 1877 (61 Vict. No. 28); in the Queensland Act, 50 Viet. No. 24, there is a provision forbidding contracts to exclude the Act; in Victoria,

Fry, L.J.'s
criticism.

Fry, L. J.'s, criticism of the Act in *Whatley v. Holloway*¹ is indubitably just: "It appears to me to be a piece of legislation which does not carry into effect any one simple idea, but is, on the contrary, a compromise, so to speak, between two contending schemes of legislation or lines of thought on the subject of the liability of a master to an employé. Every word of it represents the result of a conflict or struggle of thought." Its main object, according to Lord Watson,² was "to place masters who do not upon the same footing of responsibility with those who do personally superintend their works and workmen by making them answerable for the negligence of those persons to whom they entrust the duty of superintendence, as if it were their own."

Governing
principle of
the Em-
ployers'
Liability Act,
1880.

The governing principle of the Act is that, in certain circumstances, presently to be considered, a workman³ "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

It has been decided, and perhaps somewhat superfluously reported, that "the relation of employer and employed" must exist, and be set forth by the pursuer, to warrant action under the Act;⁴ and further, "that the Act has no application where a man is conducting his own business, and where the fault, if any, is imputable to himself";⁵ or where the injury arises from pure accident,⁶ even though the possibility of the occurrence of such an injury might be obviated by extreme precautions.⁷

Objects of the
Act.
Lord Young
in *Morrison*
v. Baird.

The object of the statute has been most diversely regarded. The most accurate estimate of its scope is that of Lord Young in *Morrison v. Baird & Co.*,⁸ where he says that the Employers' Liability Act "does no more than remove a defence, in the class of actions to which it

50 Vict. No. 894, in terms almost identical with the Act of the United Kingdom, is amended by The Employers and Employé's Act, 1890, No. 1087, and this is amended in 1891, No. 1219. In Ontario the statute in force is 55 Vict. c. 30 (Ont. Rev. Stat. 1897, c. 160), which, while adopting the essential features of the English Act, makes considerable additions. In New Zealand the Act is 46 Vict. No. 20, and applies to Crown servants. In Quebec, the doctrine of common employment, I am informed by a kind correspondent, has never been a part of the law of that province. Mr. Justice Burlidge, of the Exchequer Court of Canada, has so decided in *Filson v. The Queen*, 4 Ex. C. R. 134; *Grenier v. The Queen*, 6 Ex. C. R. 276. See also *Robinson v. Canada Pacific Ry. Co.*, (1892) A. C. 481. In Nova Scotia "The Employers' Liability Act" was passed in 1900. In Massachusetts too the Act is a close copy of the British Act, and this has been the occasion of a special rule of interpretation, that the Massachusetts Courts must assume that the Legislature with the words of the English Act accepted the interpretation placed on them: *Ryalls v. Mechanics Mills*, 150 Mass. 190; and this canon has been accepted by several other States. *Labatt, Master and Servant*, 1930; where the Acts in force in different States are given textually.

¹ 62 L. T. 639, 640.

² *Smith v. Ba'ler*, (1891) A. C. 354.

³ Section 1. *Thomas v. The Great Western Colliery Co.*, 10 Times L. R. 244.

⁴ *Nicolson v. Macandrew*, 15 Rettie, 854; *Sweeney v. Duncan*, 19 Rettie, 870.

⁵ *Bruce v. Barclay*, 17 Rettie, 811; per Lord Young, 814.

⁶ *Callender v. The Carlton Iron Co.*, 9 Times L. R. 646; (C. A.), 10 Times L. R. 368 (11. L.). Ante, 541, 558.

⁷ *Thomson v. Dick*, 19 Rettie, 804.

⁸ 10 Rettie, 278; *M'Avoy v. Young's Paraffin Co.*, 9 Rettie, 100; *Dailly v. Beattie*, 20 Sc. L. R. 92. *Morrison v. Scottish Employers' Liability and Accident Assurance Co.*, 16 Rettie, 212, where a policy to indemnify an employer for "all sums which such employer shall become liable for, under or by virtue of the Employers' Liability Act, 1880," was held not to render the insurer liable for damages recovered in a common law action, though the circumstances were such that damages might have been recovered under the Act.

refers, which was theretofore competent, by providing that an employer against whom such action is raised shall not, in certain circumstances specified in the statute, be entitled to plead what the common law entitled him to plead—that he is not responsible to one employee for the fault of others. The statute does no more than remove that defence in certain specified circumstances¹; or, as it is put by Smith, J., in *Webbin v. Ballard*,² “That the workman, when he sues his master Webbin v. Ballard. under the provisions of the Act for any of the five matters designated in it, shall be in the position of one of the public suing, and shall not be in the position a servant theretofore was when he sued his master; in other words, that the master shall have all the defences he theretofore had against any one of the public suing him, but shall not have the special defences he theretofore had when sued by his servant.” The same learned judge, in the same judgment,³ states that he regards the result of this to be that “the defence of common employment, and also the defence that the servant had contracted to take upon himself the known risks attending upon the engagement are taken away from him [the employer] when sued by a workman under the Act.” To the same effect is Lord Esher, M.R.:⁴ “It has been suggested that Lord Esher, M.R., in Thomas v. Quartermains. this Act has only the effect of doing away with the doctrine of the immunity of the master from damage arising from the negligence of another servant in the common employment of the master. To my mind it is clear that the statute has taken away from the master another defence”—that the servant undertook to take all the ordinary risks incident to the employment, unless they were concealed or known to the master and not to the servant.⁵ It is apparent, notwithstanding, on consideration that the Act has not “the effect of doing away with the doctrine of the immunity of the master for damage arising from the negligence of another servant,” otherwise the limitations in sub-sections 2, 3, 4, and 5 of section 1 would be unnecessary;⁶ while the operation of the sub-sections is to do away with so much of the “doctrine,” &c., as is included within their scope, and the absence of any other legislation leaves what is not included within them still subsisting.

As to the second alleged operation of the Act, that “it has taken away the defence from the master that the man undertook to take all the ordinary risks incident thereto,” on the assumption that this is so, it is curious to note that the objects laid down by the House of Commons Committee’s Report on the Employers’ Liability specifically exclude this. The suggestion was to narrow the doctrine of common employment to those cases where each servant “is an observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precaution and employ such agents as the safety of the whole party may require.”⁷ Effect on the defence that the workman undertook the risks of the employment.

¹ 17 Q. B. D. 125. ² *L.c.*, 125. ³ *Thomas v. Quartermains*, 18 Q. B. D. 688.

⁴ Lord Esher, M.R., in *Yarmouth v. France*, 10 Q. B. D. 653, 654, says: “I never entertained a doubt that the Employers’ Liability Act does not prevent the proper application of the maxim *Volenti non fit injuria*; and I can only say, as an excuse for the part I took in *Thomas v. Quartermains*, that that doctrine had never been mentioned on the argument of that case, but was for the first time suggested in the judgment of my brother Bowen.”

⁵ *McGiffin v. Palmer’s Shipbuilding Co.*, 10 Q. B. D. 5; *Shaffers v. General Steam Navigation Co.*, 10 Q. B. D. 356; *Kellard v. Rooke*, 19 Q. B. D. 585; 21 Q. B. D. 367.

⁶ These words are adopted by the Committee from the judgment of Shaw, F.J., in *Farwell v. Boston Rd. Corporation*, 3 Macq. (H. L. Sr.) 319.

View of the majority of the Court of Appeal in *Thomas v. Quartermaine*.
Bowen, L.J.

Moreover, the judgment of the majority of the Court in *Thomas v. Quartermaine*¹ establishes that the view of Lord Esher, M.R., is not a correct reading of the Act. "An enactment," says Bowen, L.J.,² quoting the first section, "which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot, except by violent distention of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman and other rights in addition. It cannot in the case of a defect in the employer's works be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman which would not exist as regards anybody else. If the language of the section were not even so precise, the point would be concluded, one might well think, by the observation that if the Act had intended to prescribe some new measure of duty the least one might expect would be that it should define it." Fry, L.J., adds:³ "If the workman is to have the same rights as if he were not a workman, whose rights is he to have? Who are we to suppose him to be? I think that we ought to consider him to be a member of the public entering on the defendant's property by his invitation. Can such a person maintain an action in respect of an injury arising from a defect, of which defect and of the resulting damage he was as well informed as the defendant? I think not. To such a person it appears to me that the maxim *Volenti non fit injuria* applies."⁴

The common law doctrine may be taken from the statement of Lord Esher, M.R. :⁵ "Before the Employers' Liability Act there was this condition in the contract of hiring, that, if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk." There are, doubtless, expressions by other judges, and by the same judge in other cases, superficially at variance with this, which have been elsewhere collected and considered,⁶ but subject to the minuter distinction there considered in full the outcome of the principle is as thus stated. What, then, is the effect worked by the Employers' Liability Act on the principles of the common law?

Scope of the Act.

¶ We have already seen that the central conception of the Employers' Liability Act, 1880, is to place the workman in the same position with regard to the employer, in certain enumerated circumstances, as would be held by any person not in the employment suffering injury.

The consideration of the definition of a workman under the Act, will for the present be deferred; and we shall now proceed to consider the way in which the common law is affected by the Act.

I. Workman to recover where the injury is caused by defect in the condition of ways, works, machinery, or plant, &c.

I. DEFECT IN CONDITION.

The workman is to be in the same position as "if the workman had not been a workman of, nor in the service of, the employer, nor

¹ 18 Q. B. D. 685. ² 18 Q. B. D. 692. ³ *L.c.* 700.

⁴ The Supreme Court of Victoria had previously arrived at the same conclusion: *Davidson v. Wright*, 13 Vict. L. R. 351. The New South Wales case of *Simat v. Silva*, 8 N. S. W. R. (Law) 415, is at common law, and holds that, where a plaintiff's knowledge is equal to the defendant's, the rule involved in *Volenti non fit injuria* applies. There the plaintiff was the engineer of a steam-tug. See, too, the Scotch cases, *M'Avoy v. Young's Paraffin Co.*, 9 Rettie, 100; *Morrison v. Baird*, 10 Rettie, 271; *Robertson v. Russell*, 12 Rettie, 634.

⁵ *Yarmouth v. France*, 19 Q. B. D. 653.

⁶ *Ante*, 632-646.

engaged in his work"¹—in other words, he is to be in the same position as if he were a licensee²—where the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, where the defect arose from or had not been discovered or remedied owing to :

1. The negligence of the employer.³

2. The negligence of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition.⁴

To give a right of action it is therefore necessary to show a defect in some of the specified appliances. In *Heske v. Samuelson*,⁵ Lord Coleridge, C.J., suggests, as a test of a defect in the condition of the thing complained of, the question whether it "was not in a proper condition for the purpose for which it was applied." This was adopted by the Court of Appeal in *Cripps v. Judge*.⁶ Thus, where a crane was used to tear up sleepers, and injury resulted, there was held to be defect in the condition of the machine.⁷

In *Walsh v. Whiteley*,⁸ the county court judge had left it to the jury to say whether there was in fact a defect in the condition of the machine—a carding machine, the disc of the wheel of which was not solid throughout (had the disc been solid the accident would not have happened)—telling them that to be defective it must be such as a reasonable, careful, experienced man, reasonably careful of the safety of his workmen, would not use. The jury found a defect, and on appeal, the Divisional Court were divided. In the Court of Appeal, Lord Esher, M.R.'s, view was :⁹ "The true question seems to me to be whether the machine is dangerous, and whether a careful consideration would show it to be dangerous to the workmen using it. I am prepared to say that if a careful consideration would show a master that the machine was dangerous to the workman using it, even although that machine could not be improved upon, it is negligence on the part of the master to use for his profit a machine which is dangerous to his workman, and, if he does use it, he can only do so upon the terms of being liable to pay compensation to the workman, if he is thereby injured."¹⁰

¹ Sec. 1, sub-sec. 1.

² *Thomas v. Quartermaine*, 18 Q. B. D., per Bowen, L.J., 693.

³ In *Roberts and Wallace's Employers' Liability* (3rd ed.), 208, it is pointed out that the Act "makes no pretence to deal with the employer's own personal liability," and the suggestion is made that probably these words were inserted to enable the workman to recover more than £50 against the employer in a county court, and not drive him to a second action in the High Court, if at the trial the fact showed a common law liability merely. Messrs. Spens and Younger's national feeling will not admit this suggestion, since the reason for it is not applicable to the Sheriff Courts of Scotland: *Law of Employer and Employed*, 183. Their alternative suggestion seems intrinsically the more probable one.

⁴ Sec. 2, sub-sec. 1. See *Thomas v. The Great Western Colliery Co.*, 10 Times L. R. 244.

⁵ 12 Q. B. D. 30. The facts in *Murray v. Merry*, 17 Rettie, 815, are somewhat similar, though the conclusion is different. *Corcoran v. East Surrey Iron Works*, 5 Times L. R. 103, where a trolley "was in the usual form, and it was admitted that there was no danger if the stanchions were packed as usual." *Hamilton Bridge Co. v. O'Connor*, 24 Can. S. C. R. 598; *Finlay v. Miscampbell*, 20 Ont. R. 29.

⁶ 13 Q. B. D. 583.

⁷ *Walsh v. Moir*, 12 Rettie, 590. Cp. *Racon v. Dawes*, 3 Times L. R. 557.

⁸ 21 Q. B. D. 371. *Smith v. Harrison*, 5 Times L. R. 406. Cp. *Morgan v. Hutchings*, 6 Times L. R. 219, and the comment on the decision, *post*, 694, 697. In Scotland the pursuer must aver specifically in what respect the ways, works, &c., are insufficient or defective: *Waterson v. Murray*, 21 Sc. L. R. 695. Cp. *McCloherly v. The Gale Manufacturing Co.*, 19 Ont. App. 117; *Southern Pacific Co. v. Seley*, 152 U. S. (45 Davis) 145.

⁹ 21 Q. B. D. 370.

Judgment of
the majority
of the Court.

The majority of the Court (Lindley and Lopes, L.JJ.) held that :¹ "There must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark,² but it is essential that there should be evidence of negligence of the employer, or some person in his service entrusted with the duty of seeing that the machine is in proper condition."

Lord Esher,
M.R.'s, view
considered.

The effect of adopting the principle contended for by Lord Esher, M.R., would, using an illustration given by Lopes, L.J.,³ involve the consequence that giving a workman "an ordinary sharp knife" with which he managed to cut himself would import liability. Apart altogether from the argument by *reductio ad absurdum*, the Act, as we have seen, requires negligence either of the employer or of a supervisor in his employment.⁴ In the opinion of Lord Esher, M.R., the use of a dangerous machine is equivalent to negligence, and the question of negligence is for the jury. This, at least, is not the common law, by which, "all that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or by his workmen in a fit and proper manner."⁵ The matter for the consideration of the jury is not whether the machinery is dangerous, and therefore defective, but whether the machinery, even if dangerous, is "fit and proper for the work," and is properly superintended. "Defective" is not inclusive of "dangerous" at common law. What ground, then, exists for putting a different meaning on the term under the Act? for nowhere is there any different meaning given to it by the Act, and nowhere in the Act is the word used in a sense inconsistent with its accustomed usage.

Defect and
defective
condition.

McGiffin v.
Palmer's
Shipbuilding
Co.

In *McGiffin v. Palmer's Shipbuilding Co.*⁶ the question arose whether the Act drew a distinction between a "defect" merely and a "defect in the condition" of the ways, &c. A workman was employed in the defendants' ironworks, to take puddled iron, while at a white heat, upon a two-wheeled hand-car, along an iron-plate roadway to a steam-

¹ L. c. 378.

² As an instance how judicial interpretation differs sometimes from the legislative conception of a measure, the following quotation from the Times newspaper report of the discussion in the House of Commons Committee on the Employers' Liability Bill, under date August 4, 1880, may be noted: "Lord R. Churchill asked whether a farmer would be liable if his servant were injured while riding a horse which, to the knowledge of the owner, was afflicted with nervous disease, or disease in the foot. The Solicitor-General (Sir F. Herschell) said the employer in that case would not be liable, as the disease would not have arisen from his neglect."

³ 21 Q. B. D. 379. This consequence is accepted by Wills and Wright, J.J., *Hindle v. Birtwistle*, (1897) 1 Q. B. 192, interpreting the words "all dangerous parts of the machinery" in sec. 6, sub-sec. 2, of the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75).

⁴ Sec. 2, sub-sec. 1.

⁵ Per Lord Wensleydale, *Weems v. Mathieson*, 4 Macq. (H. L. Sc.) 227; *Ovington v. M'Vicar*, 2 Macph. 1066; *Macfarlane v. Thompson*, 12 Rettie, 232. *Ante*, 613. In *Houison v. Barrett*, 4 Times L. R. 449 (C. A.), the Lord Chancellor propounded the question whether machinery which had been safely used for three years could be called defective. The point, however, was not decided, the case turning on the facts, though an absolute obligation to have the best machinery was negatived. Absence of an accident may be equally consistent with fortunate negligence as with unfortunate diligence.

⁶ 10 Q. B. D. 5. Cp. *Thomas v. Quartermaine*, 17 Q. B. D., per Wills, J., 417; also *Pratt v. Inhabitants of Weymouth*, 147 Mass. 245, 9 Am. St. R. 691.

hammer. While so engaged the car struck against a piece of substance, used for lining the furnaces, which had got upon the roadway; some of the iron fell upon the workman, who was killed. The Court (Field and Stephen, J.J.) held that there was not "a defect in the condition of the way." "A defect," said Stephen, J.,¹ "in the machinery would be the absence of some part of the machinery, or a crack, or anything of that kind. A defect in the condition of the way, or works, or machinery, or plant, is certainly wider, but I do not think it is very much wider. It means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use. For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases I should say that the way itself is not defective, but the condition of the way, by reason of the water which is incorporated with it, or from its being in a freezing state, is affected." Or, as Field, J., said with regard to the same illustration:² "That would be a defect in the condition of the way, because the way is the thing which people walk upon, and the thing itself is actually altered."

The Scotch case of *Mitchell v. Coats Iron and Steel Co.*,³ in which *McGiffin's case* was cited, seems to lean to a different view; for the employer was held liable for an injury arising through a bar of iron projecting over the way where the injured man was. The Lord Justice-Clerk (Moncreiff), however, said: "We have had difficulty and some difference of opinion in arriving at a decision in the present case. But on the whole matter we are not inclined to disturb the judgment of the sheriff." So that in any view the decision is not of high authority. The subsequent case of *M'Quade v. Dixon*⁴ leaves the point open, for there the decision is that when an obstruction is taken off and put by the side of a way, and there causes injury, the employer is not liable.⁵ The distinction between the two cases is that, in the case where liability was held to exist, the obstruction was on the way; in the other case only by the side of it.⁶

In England, *McGiffin's case* was followed in *Pegram v. Dixon*,⁷ and it must be taken that the defect in the condition of any of the specified particulars must be of a permanent or quasi-permanent nature.

This is pointed out by the Court of Appeal in *Willets v. Watt*.⁸

¹ 10 Q. B. D. 9.

⁴ 24 Sc. L. R. 727.

² L. c. 8.

³ 23 Sc. L. R. 108.

⁵ L. c., see per Lord Young, 728.

⁶ In the English case of *Wood v. Dorrall*, 2 Times L. R. 530, the injury was caused by the absence of a rail to a staircase, which left an opening through which the plaintiff fell; this was held to be a defect in the condition of the way; and rightly, since the sides are as much part of the way as the ground. Spens and Younger, Law of Employer and Employed, 200, are of opinion that the decision in *Mitchell v. Coats Iron and Steel Co.*, 23 Sc. L. R. 108, "must be held in Scotland to overrule the judgment given in the case of *McGiffin*."

⁷ 55 L. J. Q. B. 447, the case of a boy throwing a board down an opening through which workmen ascended to the upper portion of a building, the opening having been previously used for the purpose. See *Conway v. Clemence*, 2 Times L. R. 80; *Ayres v. Bull*, 5 Times L. R. 202.

⁸ (1892) 2 Q. B. 92. Cp. *Moore v. Ross*, 17 Rettie, 796, where Lord M'Laren, 799, speaking of "known danger," says: "One class of cases of this sort is where the master by the adoption of some known and suitable appliance may diminish the danger to his servants, and does not adopt it; in such cases, the rule of the statute as to injuries resulting from defects in the ways, works, or plant, will probably apply. But the other class of cases is where the danger is one against which it is perfectly in the power of the servant to guard himself, simply by keeping his eyes open. That is the typical

Mitchell v. Coats Iron and Steel Co.

M'Quade v. Dixon.

Willets v. Watt.

A way was constructed to serve a twofold purpose. Its usual function was to serve for purposes of passage; when, however, a lid was removed in the surface there was a well or catch-pit disclosed. The construction was proper for both purposes. It was accordingly held by the Court of Appeal that an accident arising from a workman falling down the well did not arise from "defect in the condition of the way," but rather from a negligent user of it. "It appears to me," said Fry, L.J.,¹ "that the language of sub-sec. 1 points to a defect of a chronic character and not to a defect arising from negligent user, and that view is supported by the judgment of the majority of this Court in *Walsh v. Whiteley*,² where a defect of condition is contrasted with negligent user." In the particular case of *Willets v. Watt*³ the plaintiff was unable to avail himself of this alternative stating of his cause of action, since the particulars were limited to sec. 1, sub-sec. 1.

*Morgan v.
Hutchins.*

Under sec. 1, sub-sec. 1, it was held, in *Morgan v. Hutchins*,⁴ that the fact that a machine is dangerous, that is "defective with regard to the safety of the workman" who uses it, is a "defect in the condition of the machinery" which entitles the workman to recover damages against his employer for an injury caused by the machine even though it is effective for the purpose for which it is used. The Court which decided this protested that they were not going to act against the decision of the Court of Appeal in *Walsh v. Whiteley*; yet it is difficult to reconcile this decision with the decision of the majority in that case, where it is said:⁵ "It is said there is evidence of the machine being dangerous. So are most machines, so is even an ordinarily sharp knife, unless used with care, but that does not make it defective in its condition, nor does it imply negligence in the employer, if an accident happens, who furnishes it to his workman for him to use with reasonable care."

The phrase of Fry, L.J.—"defect of a chronic character"—in *Willets v. Watt*⁶ was the subject of criticism in *Tate v. Latham*.⁷ A movable guide necessary to protect a circular saw had been removed by a workman for convenience in working "and had been left off for some considerable time." A fellow workman was injured in consequence. An argument was addressed to the Court founded on Fry, L.J.'s, expression that the defect must be of a "chronic character," that the temporary removal of a saw-guard to facilitate working was not within the Act. Reference to Fry, L.J.'s, judgment will show that such a meaning cannot fairly be attributed to his words. The lid there was properly removed to perform one of the dual purposes for which it was constructed. The accident occurred through the workman negligently using it for the other. In the present case the saw was being used for its proper purpose, but without fitting an adjunct necessary for its safe use.⁸

case in which the law says the servant must take the consequences of his own neglect": *Foreyth v. Ramage*, 18 Rettie, 21; *Thomson v. Scott*, 25 Rettie, 54; *Metcalf v. Great Boulder Proprietary Gold Mines*, (1906) 3 C. L. R. (Australia), 543. See *ante*, 628.

¹ (1892) 2 Q. B. 100.

² 21 Q. B. D. 371.

³ (1892) 2 Q. B. 92.

⁴ 38 W. R. 412. As to defect in the condition of a deck, see per Lord Lee, *Gray v. Thomson*, 17 Rettie, 200.

⁵ 21 Q. B. D. 379.

⁶ (1892) 2 Q. B. 100.

⁷ (1897) 1 Q. B. 502.

⁸ *Hamilton v. Groesbeck*, 10 Ont. R. 76, conflicts with this. The want of a guard was held not a defect in the condition of a saw, "when such guard was no part of the saw, nor of the machinery connected therewith, nor at all necessary for any proper or reasonable fitness of the saw for the purpose for which it was used." This point was not raised on the Appeal, 18 Ont. A. R. 437.

The defect must further be in the condition of ways, &c., "connected with or used in the business of the employer." This is pointed out in *Howe v. Finch*,¹ where it was sought to recover for injury caused by the fall of a wall forming part of the defendant's works, and which wall at the time of the accident had not been completed, and had never been used, though it was intended to be used for the business. The Divisional Court held the plaintiff not entitled to recover. "Ways," says Smith, J.,² "means the ways used in the business, not partly made ways not used. If that is to be so as to 'ways,' it is so as to 'works,' I do not agree that if a whole structure fell or caused damage to a workman he would not have a right of action, for I think that he would. But here it was partly finished. I think 'ways, works, &c.,' mean the existing and completed works."³

Defect connected with or used in the business of the employer.
Howe v. Finch.

"Ways."

"Works."

This decision must extend to the case of "machinery," &c., brought into a place for the purpose of being used, though not fixed for use. Neither is the employer liable where he has put out the work to be done by a competent contractor and is not guilty of negligence; and where danger is not apparent;⁴ nor where the very nature of the work manifestly involves considerable risk, as in securing a tottering wall, and the accident happens in the circumstances connoting the risk.⁵

Effect of the decision.

Where a heavy machine had to be moved over an uneven depression which was filled in with slips of wood covered by a thin covering of iron, and in moving, the slips of wood gave way, and an accident resulted, the Second Division of the Scotch Court of Session held that there was a defect in the condition of a way.⁶ In a somewhat similar case, where the plaintiff came out of a mill-yard where she was engaged, and was obliged to pass over a hole in the ground where a weighing-machine was being set up, and over which certain planks were placed, one of which, being loose, tipped up as she stepped on it, and caused her injury, the Court of Appeal held that "the place was a 'way' within the meaning of the sub-section, and the way was defective and defective owing to the negligence of the defendants, and the defendants were liable."⁷

Bowie v. Rankin.

Bromley v. Cavendish Spinning Co.

In *Willetts v. Watt*,⁸ the Divisional Court (Hawkins and Wills, JJ.) put a somewhat forced construction on the language of Field, J., in *McGiffin v. Palmer's Shipbuilding Co.*,⁹ and held that to constitute a "way" there must be a "defined way," and one "habitually used" as such. The Court of Appeal disagreed with this construction.

Willetts v. Watt.

¹ 17 Q. B. D. 187. *Rae v. Milne & Sons*, 24 Rettie, 165. In *Braunigan v. Robinson*, (1892) 1 Q. B., 344, the injured man was not engaged upon pulling down a wall, but was injured by an unsafe wall while he was otherwise employed than attending to it, and so the case is within *Smith v. Baker*, (1891) A. C. 325. The work was done in an unsafe way, and was not in its nature unsafe. In *Lynch v. Allyn*, 160 Mass. 248, the Court considered these cases to conflict. In *Davidson v. Stuart*, 34 Can. S. C. R. 215, the work itself was dangerous. Cp. *Nordheimer v. Alexander*, 19 Can. S. C. R. 248, *Ante*, 625.

² 17 Q. B. D. 190.

³ See *Conway v. Clemence*, 2 Times L. R. 80.

⁴ Cp. *Kidde v. Lovell*, 16 Q. B. D. 605; *Kettlewell v. Paterson*, 24 Sc. L. R. 95.

⁵ See per Day, J., in *Griffiths v. London and St. Katharine Docks Co.*, 12 Q. B. D. 493; *Ogden v. Rummens*, 3 F. & F. 751. Also the Scotch cases, *Fraser v. Hood*, 15 Rettie, 178, where a stableman, who undertook the care of a horse that he knew to be vicious, was disentitled to recover for injuries received from it. As to this *quere* and see *ante*, 626; and *Mulligan v. M'Alpine*, 15 Rettie, 789, a defective system of blasting; also *Fliott v. Tempest*, 5 Times L. R. 154; *Moore v. Gimson*, 5 Times L. R. 177.

⁶ *Bowie v. Rankin*, 13 Rettie, 981.

⁷ *Bromley v. Cavendish Spinning Co.*, 2 Times L. R. 881 (C. A.).

⁸ (1892) 2 Q. B. 92.

⁹ 10 Q. B. D. 8.

Judgment of
Lord Esher,
M.R.

"The second of these arguments," says Lord Esher, M.R.,¹ referring to the requirement of an habitual use, "is not tenable, for if it were the Act would not apply to the first user of a way, however defined it might be, but would only apply after considerable user of it. I cannot therefore regard habitual user as necessary. Nor do I think that it is necessary the way should be marked out and defined. If a way passes where the user would make no mark and where there are no defined boundaries, is it to be said that is not a way within the Act? Difficulties in so holding have been pointed out in the course of the argument, and I cannot come to that conclusion. The definition which strikes me as sufficient for the determination of this case is—the course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so, must be regarded as a 'way' within the meaning of the statute."

Instances
of "ways."

A temporary staging erected by the side of a woodpile to enable the workmen to place wood thereon and pile it higher and so movable from time to time has been held a "way";² so has a temporary derrick at a stone-yard erected to move stones from cars to where stonecutters could use them;³ and a plank put down to serve as the fulcrum of a lever where it is placed in such a position that servants have to pass over it in the course of their duties;⁴ and a manhole on the side of a railway in a mine so obstructed with rubbish that it cannot be resorted to on the approach of cars.⁵ But a mere pile of hoards is not.⁶

"Works."

Lord Watson in *Smith v. Baker*⁷ refers to the dangerous arrangement of machinery and tackle in that case as constituting a defect in the condition of the "works," and the phrase may be taken as covering the method of and the appliances for working. It has also been decided that an arrangement of machinery not in itself defective, but placed in the hands of unskilled labourers, must be regarded in connection with any obvious danger likely to arise from their use of it; and in the absence, in the condition of the machinery taken as a whole, of any sufficient safeguard against probable and obvious danger there is a defect.⁸

Defect in the
condition of
machinery.
Machine.

The cases on defects in the condition of machinery have already incidentally been treated.

A machine has been defined to include "every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result."⁹ It is defective in its condition if it is not in a proper condition for the purpose for which it is applied.¹⁰ This is well illustrated in the Scotch case of *Johnson v. Mitchell*,¹¹ which was an action to recover damages for injuries

Johnson v.
Mitchell.

¹ (1892) 2 Q. R. 97.

² *Pendible v. Connecticut River Manufacturing Co.*, 160 Mass. 131.

³ *McMahon v. McHale*, 174 Mass. 320.

⁴ *Caldwell v. Mills*, 24 Ont. R. 462.

⁵ *Ferris v. Coudenbath Coal Co.*, 24 Rettie, 615.

⁶ *Campbell v. Dearborn*, 175 Mass. 183.

⁷ (1891) A. C. 354.

⁸ *Stanton v. Scrutton*, 62 L. J. Q. B. 405.

⁹ *Corning v. Burden*, 15 How. (U. S.) 267.

¹⁰ *Paley v. Garnett*, 16 Q. B. D. 52. Cp. *Walsh v. Whiteley*, 21 Q. B. D. 371; *Barter v. Wyman*, 4 Times L. R. 255. Where the evidence showed that a machine was the one in general use, it was held that its particular construction was not a defect: *Clurton v. Mowlem*, 4 Times L. R. 756; *Race v. Harrison*, 9 Times L. R. 567, 10 Times L. R. 92 (C. A.); *Gill v. Thornycroft*, 10 Times L. R. 316. *Ante*, 614.

¹¹ 22 Sc. L. R. 698.

sustained by crushing a hand while shutting a sliding door on the occasion of an alarm of fire. It was proved that the door was constructed for the purpose of preventing fire communication from one room to another, and that, when hastily closed, it would run on till brought up by the handle. The Court held the plaintiff entitled to recover, on the ground that the door, if shut quietly and deliberately, could hurt no one, and if plaintiff had looked to see how the door shut there would have been no chance of danger; yet, as the door was intended to be used on the occasion of a sudden fire, when people act very hurriedly, its construction was not suitable for the purpose for which it was to be applied.

In *Bacon v. Dawes*¹ a difference was relied on between a defect in the condition of a machine and a defective result in working caused by the negligence of the man in charge of it. This may well be. In the case in question, however, the evidence pointed to a defect in the machine itself, which was held to be within the Act. The jury found that the injury was caused by defective pressure in the machine, and their finding was held to warrant a verdict for the plaintiff.

Distinction between defect in the condition of a machine and defective result in working.

In a Canadian case² want of a guard to a saw was held not a defect in the condition of a saw, "when such guard was no part of the saw, nor of the machinery connected therewith, nor at all necessary for any proper or reasonable fitness of the saw for the purpose for which it was used." But Lords Coleridge and Esher, sitting as a Divisional Court, are reported to have said, in *Morgan v. Hutchings*,³ a case which has already been noticed, that all the judges in *Walsh v. Whiteley* agreed in holding "that danger is a defect"⁴ within the Employers' Liability Act; and to have held that a liability arose where a machine was not defective with reference to its purpose if it was so with reference to the danger arising from its use. The scope of this decision must not, however, be extended beyond "dangerous machinery used by children or young persons,"⁵ despite expressions in the report in the Weekly Reporter which are apparently of a most general application. One of the material facts in it is that "the inspector of factories had warned defendant against employing young persons" on the particular machinery there called in question. The probability, therefore, is that the decision turned on these special facts, and that the principle in *Walsh v. Whiteley*⁶ is in no way involved in the decision; though the report in the Weekly Reporter makes the learned judges assert the decision in *Walsh v. Whiteley* to be the distinct contradictory of the reported judgment, which is that evidence of a machine being dangerous "does not make it defective in its condition, nor does it imply negligence in the employer if an accident happens."⁷

Defect in the condition of plant.

Morgan v. Hutchings

To decide what is "plant" within the Act is a matter of more Plant difficulty. Lindley, L.J., in *Yarmouth v. France*⁸ says: "In its

¹ 3 Times L. R. 557.

² *Hamilton v. Groesbeck*, 19 Ont. R. 76, affd. 18 Ont. A. R. 437, for the reason that the proximate cause of the injury was not the unguarded condition of the saw by which the plaintiff was hurt, but the fact that he tripped over a pile of staves.

³ 38 W. R. 412, 6 Times L. R. 219.

⁴ *L.c.*, per Lord Coleridge, C.J., 413: "If the machine is dangerous to the man without whose assistance it cannot be worked, and that without any fault of his own, that is a defect in the condition of the machinery. That was the opinion of all the judges in *Walsh v. Whiteley*," per Lord Esher, M.R., 413. *McIntosh v. Stewart*, 19 N. Z. L. R. 152, 156.

⁵ 21 Q. B. D. 371.

⁶ 6 Times L. R. 219.

⁷ 19 Q. B. D. 658.

⁸ 21 Q. B. D. 379. *Intc.* 691.

ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business.”¹ The question arose in that case whether a horse was plant within the sub-section. On this the Lord Justice observes: “The word ‘defect’ and the words ‘way and machinery’ which occur in the section, throw some doubt on whether plant can include horses; but I do not think the doubt sufficient to require the Court to hold that plant cannot include horses, or to hold that plant must be confined to inanimate chattels. The defendant in this case has a number of horses for use in his business; they were part of his plant, not only in the ordinary sense of the word, but also, in my opinion, in the sense in which the word is used in sec. 1, sub-sec. 1, of the Employers’ Liability Act.” The horse, being vicious, was held to be defective plant, as whatever renders plant unfit for the use for which it is intended, when used in a reasonable way, and with reasonable care, is a “defect” in the condition within the Act. Lord Esher, M.R., was of the same opinion.²

Haston v. Edinburgh Street Tramway Co.

In the Scotch case of *Haston v. Edinburgh Street Tramway Co.*³ the sheriff held that the word “plant” includes animals used for the purpose of a business. When the case came before the Court there appears to have been no argument on the point, and Lord Young took it as indisputable that horses are plant within the Act; so that permitting a horse unfit to be used to continue at work is conduct that makes an employer liable for a defect in the condition of his plant.⁴ In the Victorian case of *Monahan v. Moore*,⁵ “a rope, horse and hucket connected together and used to lower cement down a sewage shaft” were held “plant” and an insecure fastening of them a “defect.”

Injury must be “caused” by the defect.

Lastly, the injury must be “caused” by the defect; for it is not enough that a defect exists in some particular, and that injury from the works, ways, &c., occurs subsequently to the existence of the defect. The relation of cause and effect in natural and ordinary sequence is necessary before a liability on the part of the master can be established.⁶

The workman cannot recover if the occurrence causing the injury is pure accident;⁷ nor if any appliance fails under some unexpectedly severe strain;⁸ nor if the negligence is the work of a fellow servant not in the exercise of superintendence. The fact that a defect existed in machinery, which the plaintiff had been told off to remedy, has been held not the proximate cause of an injury received by him though a

¹ See *Blake v. Shaw*, Johns. (Page Wood, V.C.), 732.

² Per Lord Esher, M.R.: The defendant “must use horses and carts or waggons. They are all necessary for the carrying on of the business. It cannot be contended that the carts and waggons are not ‘plant.’ Can it be said that the horses, without which the carts and waggons would be useless, are not?” This method of reasoning may be yet further extended; e.g., can it be said that drivers, without which horses and carts and waggons would be worse than useless—positively injurious—are not?

³ 14 Rettie, 621. Cp. *Fraser v. Hood*, 15 Rettie, 178.

⁴ The subject was much discussed during the passage of the Bill through the House of Commons, and an amendment was unsuccessfully proposed on the Report to exclude horses from the definition of plant.

⁵ 23 V. L. R. 230.

⁶ *Martin v. Connak’s Quay Alkali Co.*, 33 W. R. 216.

⁷ *Harris v. Pinn*, 5 Times L. R. 221; *M’Manus v. Hay*, 9 Rettie, 425; *Welch v. Grace*, 167 Mass. 590.

⁸ *McLean v. Cole*, 175 Mass. 5. A scaffold swung so violently as to swing a workman out, through a gutter wrenched from a building coming off unexpectedly easily.

fellow servant negligently setting machinery in motion while plaintiff was about the work.¹

*Perry v. Brass*² has been cited for the proposition that the workman cannot recover in respect of defective plant unless the plant belongs to the employer. The case does not go so far as this, but even to the length that it does, it is scarcely (as reported) in accord with good sense. Defendants were employed by Government to do repairs to Government buildings. Plaintiff was in their employ under a foreman, to whom he applied for a ladder and was referred by his foreman to the Government foreman of the works. He told plaintiff he might have one which he indicated, and which plaintiff fetched. It was defective, broke as soon as used, and caused injury to plaintiff. The Divisional Court held that "the ladder was not the defendants' so that the accident did not arise from any defect in plant of theirs," and as to "their duty to see that it was safe there was no evidence of negligence." The question of the title to the plant actually used with the sanction of the employer would appear irrelevant. When the foreman authorises the workman to apply in a certain quarter for the plant necessary for the work, and which the employer is bound to supply, and the plant supplied breaks in using in a way it ought not if the employer had done his duty, a case of *res ipsa loquitur* appears to present itself.³ The principle at the bottom of *Jones v. Burford*⁴ is very different. A ladder was borrowed and used without the knowledge or authority of the employer or his foreman, and proved defective and caused injury. The ownership of the defective instrument is in itself immaterial. The user in the business with the sanction of the employer is what is to be looked at. This seems to be the correct principle to refer to. *Carter v. Clarke*,⁵ which holds that a ship belonging to a shipping company and carrying coals for coal merchants is the coal merchants' plant, appears to impose a non-natural strain on the word "plant," which but slightly extended would seem to cover the vehicle of the carrier where goods are delivered at the risk of the consignor.

Holmes, J.,⁶ in discussing what is a "defect in the condition," &c., says that the words imply that "the defect must be one which the employer has a right to remedy if he discovers it, and of a kind which it is possible to charge a servant with the duty of setting right;" that is, the master is not to be put to inquire as to things not under his own control.⁷ Thus the defective condition of a way used in connection with the employer's business, but not under his control—an unfenced road at the top of a steep hill leading to the employer's premises—carries with it no liability.⁸ In this case *Boyd, C.*, held that the meaning of the words of the Act he was construing—defect in the condition of a way used in the business—"means some defect on his premises, or on a

Perry v. Brass.
Employer plant.

Jones v. Burford.

Defect must be one that the employer has a right to remedy.

¹ *Mackay v. Watson*, 24 Rettie, 383; *Mulligan v. M'Alpine*, 15 Rettie, 780.

² 5 Times L. R., 253.

³ *Webb v. Rennie*, 4 F. & F. 608. *Marney v. Scott*, (1899) 1 Q. B. 986; as to the authority of this case on the duty of examination, *ante*, 60.

⁴ 1 Times L. R., 137.

⁵ 78 L. T. 76. Cp. *Simpson v. Paton*, 23 Rettie, 590; *M'Lachlan v. Steamship "Peveril" Co.*, 23 Rettie, 753. It is also inconsistent with *Allmarch v. Walker*, 78 Law Times newspaper, 391, that says broadly that a defect in a cart hired temporarily to carry a load is not a defect in plant, but which is wrong if the principle in the text holds good.

⁶ *Engel v. New York, Providence & Boston Ry. Co.*, 160 Mass. 260, 261.

⁷ *Hughes v. Malden, &c. Gas Light Co.*, 168 Mass. 395.

⁸ *Stride v. Diamond Glass Co.*, 26 Ont. R. 270.

*Thompson v.
City Glass
Bottle Co.*

place over which he had control, that could be made right by the employer"—adopting in substance Holmes, J.'s, construction.¹

Thompson v. City Glass Bottle Co.,² is a decision where the judgments of the Court of Appeal, however legally authoritative, seem to lack logical cogency. A machine broke down, an order was given that it should "not be used again," and a "new machine had been ordered." The day following the breakdown—a Sunday—the workmen were removing the machine to make ready apparently for the work next day, when the broken part fell on the plaintiff's toe and injured him. The county court judge found that the machine "had finally ceased to be used in the defendants' business," yet that it still remained "plant." The Divisional Court held that the words "plant connected with or used in the business of the employer" had no "reference to things which have ceased to be so connected or used." The Court of Appeal reversed this;³ Collins, M.R., saying: "In the first place he [the county court judge] decided that the machine was, though in a defective condition, plant connected with or used in the employer's business."⁴ "On the question whether there was any evidence on which the judge could find that the machine was plant, we have the fact that it was in such physical contiguity to the rest of the plant that it had to be removed out of the way under the orders of the foreman. There was no evidence so far as I can see of an absence of intention to mend the machine,⁵ and it could not be contended that the mere fact of its being out of repair caused it to cease to be plant.⁶ The words of the section 'used in the business of the employer' do not, in my opinion, mean that the plant must be in use at the moment when the injury occurs to the workman, and a machine does not cease to be plant in the interval between the giving an order that it shall be repaired and the completion of the repair."⁷ Stirling, L.J., observes: "The evidence seems to show that the machine had ceased to be used in the business." This seems inconsistent with Collins, M.R.'s remark. He adds: "The question arises whether it had ceased to be connected with the business." The evidence on which the Court of Appeal hold that it had not seems to be that it was physically where it might be expected to be, if it were plant.⁸

¹ *Robinson v. Watson*, 20 Rottie, 144, is on the same lines, and not apparently reconcilable with the doctrine of *Carter v. Clarke*, 78 L. T. 70. Cp. *Nelson v. Scott*, 19 Rottie, 425.

² (1901) 2 K. B. 483.

³ (1902) 1 K. B. 233.

⁴ At 234 the report states that the county court judge found that the machine "had finally ceased to be used in the defendants' business."

⁵ If there had been, the evidence would have been irrelevant, since the severing from the business was found by the County Court judge to be final. *Supra*.

⁶ No suggestion of so futile a contention anywhere appears in the report. The syllogism the M.R. appears eager to refute seems something as follows: Machinery out of repair (i.e., defective) is not defective plant. The injury was caused by machinery out of repair. Therefore the injury was not caused by defective plant. The actual contention that he does not touch is: machinery that had "finally ceased to be used in the business," and which causes injury while the business is not being carried on, is not machinery connected with the business. Is a partner who has finally severed his interest in his late firm still "connected with" it? The case really turns on the meaning attributable to this last phrase.

⁷ It should be noted that the circumstances assumed in this passage have a very distant, if any, resemblance to the facts of the case before the Court.

⁸ Mr. Labatt, Master and Servant, 1955-1963, after collecting the cases on the words "connected with or used in the business of," says of *Thompson v. City Glass Bottle Co.*: "It is manifest that this ruling throws considerable doubt upon many of the cases cited in the last two sub-sections." The converse proposition may also with probability be advanced.

In this connection we must take sub-section 3 of section 2, which provides that the workman shall not be entitled to recover where he knew of the defect¹ or negligence (for the sub-section is of general application and is to be read into all the provisions of the Act) which caused the injury, and did not within a reasonable time² give, or cause to be given, information, either to the employer or to some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the defect or negligence.

This has been described by Smith, J.,³ as a "statutory defence," which theretofore did not exist." Its effect is twofold: First, the workman who knows of a defect or negligence has a reasonable time in which to communicate it to the master or his representative under the section. If, before the "reasonable time" is elapsed, an injury happens, the workman has his right of action unaffected. If the "reasonable time" is elapsed, and no notice is given, then the presumption that the workman takes the risk is raised. This is probably no more than the expression of the workman's right at common law, on the assumption that the defect is not plain and patent at the time when he enters the service.⁴ Secondly, where the workman knows that the employer or the superior has already knowledge of the defect or negligence, he is not bound to renew information of it. At common law in this case his acquiescence will be evidence of an acceptance of the risk, unless he have, whether explicitly or implicitly, the master's assurance that the defect shall be remedied.⁵

Contributory negligence is not affected by this section,⁶ which must be construed as limiting and not as extending the employer's liability.⁷ Consequently, it does not affect the conditions in which the rule expressed by the maxim *Volenti non fit injuria* is invoked. It appears rather to specify certain requisites—viz., failure to communicate defects or negligence to the master, the proof of which will exonerate the master from liability, even though at common law similar proof would not be sufficient.

II. NEGLIGENCE IN SUPERINTENDENCE.

Secondly, the workman is to be in the same position as a licensee where he is injured "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence."⁸ The definition

H. Negligence of any who has superintendence entrusted to him.

¹ In *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130, it was said that mere knowledge of a defect does not bar the servant's claim. There must be knowledge of the danger consequent on the defect.

² "Reasonable time" is a matter dependent upon the particular facts, and variable according to circumstances: *Washburn, &c. Co. v. Patterson*, 29 Ch. D. 48. See Stroud Judicial Dictionary, *sub voce* Reasonable.

³ *Webbin v. Ballard*, 17 Q. B. D. 125.

⁴ *Eureka Co. v. Bass*, 60 Am. R. 152.

⁵ *Holmes v. Worthington*, 2 F. & F. 533.

⁶ *Stuart v. Evans*, 31 W. R. 706.

⁷ *Thomas v. Quartmaine*, 18 Q. B. D., per Bowen, L.J., 693; per Fry, L.J. 703; *Ayres v. Bull*, 5 Times L. R. 202.

⁸ Sec. 1, sub-sec. 2. In the Ontario, British Columbia, and Manitoba Acts the definition runs: "Superintendence shall be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour."

clause limits those having superintendence, which entails chargeability of the master, to persons whose sole or principal duty is that of superintendence, and who are not ordinarily engaged in manual labour.¹

Negligence of
a person in
superin-
tendence.
Kellard v.
Rooke.

The negligence must also be (1) that of a person whose principal duty is superintendence, and (2) must be negligence while in the exercise of the superintendence. Thus, as to the first requisite, in *Kellard v. Rooke*,² the injury was caused through the foreman of a gang of labourers, who was working with them, not giving sufficient warning of the coming of a hale of goods which the gang was engaged in packing, so that the plaintiff was injured. The plaintiff was held disentitled to recover, because a ganger, the foreman of a gang of labourers, who is working with his hands all the day, is ordinarily engaged in manual labour, and so not a superintendent within the Act.

Wright v.
Wallis

In this case *Wright v. Wallis*³ was mentioned, in which the Court of Appeal, apparently sitting as a Divisional Court, set aside a nonsuit by the county court judge where a plaintiff was injured by iron thrown into a harge by a person, according to the evidence of the plaintiff, "at work on the stage, and giving all orders at the time of the accident." The Court set aside the nonsuit without reference to the fact of the person giving the order being ordinarily engaged in manual labour or not; and possibly because the injury was by reason of the act of a person to whose orders the workman at the time of the injury was bound to conform and did conform and in consequence of which conformity the accident happened; since Lord Esher, M.R., said: An argument addressed to the Court was "that if you ordered a man to stand in a certain place, and then threw something at him and injured him, the injury was not caused by his conforming to the order, but solely by the subsequent act." Lindley, L.J., however, who was a member of the Court in *Wright v. Wallis*, in *Kellard v. Rooke*⁴ explains that decision to have been, that there was not sufficient evidence to show what was the real position of the person whose negligence caused the injury, and as the Court had not the materials to decide it, they sent the case down for further investigation.

Shaffers v.
General Steam
Navigation
Co.

On the second point, *Shaffers v. General Steam Navigation Co.*⁵ may be referred to. The plaintiff was employed with other workmen in loading corn on board a ship, and, at the time of the accident, was in the hold stowing away the sacks as they were lowered by means of a steam crane. To control the motions of the crane there was a "guy-rope" fastened to it, in charge of a man whose duty it was to stand by the hatchway and to warn the men working below to stand from under, to guide the beam of the crane by means of the guy-rope, and to tell the man who was actually working the crane when to lower and when to hoist. Through the negligence of this man, who neglected to check the movements of the crane by means of the guy-rope, an accident happened, and the plaintiff was injured. The Court said that, assuming the man whose negligence caused the accident to have been in superintendence, the accident did not occur whilst he was in the exercise of it. The accident arose from his negligence as a workman, and not as superintendent. However, in the Scotch case of *Sweeney v. McGilvray*⁶ the distinction between negligence in super-

Sweeney v.
McGilvray.

¹ Sec. 8.

² 19 Q. B. D. 585, 21 Q. B. D. 367.

³ 3 Times L. R. 779 (C. A.).

⁴ 21 Q. B. D. 370.

⁵ 10 Q. B. D. 356; *Harris v. Tinn*, 5 Times L. R. 221.

⁶ 24 Sc. L. R. 91.

intendence and negligence in manual labour did not commend itself to the judges, and, though urged in argument, is not alluded to in the judgment. *Shaffers's case* does not seem to have been cited. Their decision goes to establish that in Scotland no distinction will be drawn between negligent superintendence and negligence of a superintendent.

*Osborne v. Jackson*¹ has also been instanced as unfavourable to the distinction.² There the defendant's foreman handed a scaffold plank to a labourer, and called to him to take it, but, though he attempted to do so, it proved too heavy for him to hold, slipped and knocked down a shoring, which fell upon the plaintiff, who brought his action for the injury. The Court here held that the foreman was in the exercise of superintendence, and the order to take the plank, which it was impossible to do safely, was an order in the exercise of superintendence, and not mere manual negligence. The facts sufficiently discriminate the case from *Shaffers's case*, since the injury was a direct consequence of an improvident order—viz., an inability to execute it. In *Shaffers's case* the negligence was the result of no order, and was a mere want of attention on the part of a manual labourer in his sphere of work.³

Osborne v. Jackson and Tott.

Distinguished from *Shaffers's case*.

obvious danger.

It is not negligence for a person in superintendence to give an order for the execution of dangerous work where the nature of the work is obvious, though injury happens in the course of doing what is enjoined;⁴ nor is the employer liable, where an injury occurs through an accident arising from the unsafeness of premises, when the person in charge of the work has consulted an expert, and has been advised by him that they are safe—that is, where the actual danger is not self-evident—before ordering his workman to work upon them, even if, through the fault of the expert, they are not in fact safe.⁵

The Scotch case of *Cook v. Stark*,⁶ goes too far. There it was held by the Second Division of the Court of Session that, though the manager of a work may delegate to others the ordinary operations in use in the work, yet it is his duty to give his personal superintendence to an operation which is dangerous and unprecedented, and that his failure to do so will, in the event of an accident, amount to such *culpa* as will render his master liable in damages under the Act. The learned Lords who held this seem to have overlooked the consideration pointed out by Lord Cairns, C., in *Wilson v. Merry*:⁷ "The result of an obligation on the master personally to execute the work connected with his business in place of being beneficial might be disastrous to his servants, for the master might be incompetent personally to perform the work." In the case in point this view would appear to have special force, since it would not improbably be disastrous for a general manager personally to have the superintendence of blasting operations; which would much more efficiently be entrusted to an ordinary engineer, not to say to an eminent engineer. Still the case is in accord with the bulk of American authority.

To prove superintendence, the acts of one "in putting persons out

Superintendence, how proved.

¹ 11 Q. B. D. 619.

² Spens and Younger, Law of Employer and Employed, 220.

³ Cp. *Donnelly v. Spencer*, 1 Fraser, 1107, where the manual act which caused the injury was held to be done as superintendent.

⁴ *Booker v. Higgs*, 3 Times L. R. 618.

⁵ *Moore v. Gimson*, 5 Times L. R. 177; *Kettlewell v. Paterson*, 24 Sc. L. R. 95.

⁶ 14 Rettie, 1.

⁷ L. R. 2 Sc. App. 326, 332.

of the shop" and what he said while doing so may be given; ¹ and the question whether the principal duty was superintendence or not is for the jury.² The foreman of a "section gang" on a railway, who did not work himself but looked on to see that the work was done, and who gave warning of the approach of trains to the men working, has been held a person exercising superintendence.³ So has a "walking foreman" who interfered with work with which it was alleged he had nothing to do.⁴ But a workman who was assisting another in unloading a cart is only a fellow workman;⁵ and so is a ganger or gang-foreman ordinarily engaged in manual labour.⁶ The superintendence contemplated by the statute is that which is exercised over workmen, not that over machinery; so that an engineman engaged in hoisting the cage in a mine from the mid-working, who started the cage before the indicator showed that the gate of the shaft was shut, has been held not to be a person having superintendence intrusted to him,⁷ and so too it has been held in New South Wales that one in charge of the lever working a steam-hammer is not in superintendence;⁸ on the other hand, the contrary was held by Denman, J., in *Kearney v. Nicholls* at *Nisi Prius* and quite *obiter*. The Massachusetts Act, it must be remembered, is in the same words as the English Act; and it has been decided in that State that the employer is not made answerable "for acts of superintendence negligently performed in his service by an ordinary workman, or by one who is both workman and superintendent in making declarations which may be interpreted either as orders of a superintendent or as assurances of a fellow workman, if in fact they are merely such assurances"¹⁰

III. Where the workman is injured by reason of the negligence of some one to whose orders he was bound to conform.
Dolan v. Anderson.

III. INJURY THROUGH CONFORMING TO ORDERS.

Thirdly the workman is to be in the same position as a licensee¹¹ where he is injured "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where the injury resulted from his having so conformed."¹²

The scope of this provision is indicated in a judgment of Lord Craighill in the Scotch case of *Dolan v. Anderson*.¹³ He says: "I see in the terms of the enactment no foundation for any distinction of classes upon this subject. The question is not whether the person who gave the orders or directions occupied a high or a humble position in the works. It is simply whether, whatever was his position he was one to whose orders or directions at the time of the accident the workman injured was bound to conform. If he was, the words of the statute

¹ *McCabe v. Shields*, 175 Mass. 438.

² *Riou v. Rockport Granite Co.*, 171 Mass. 162.

³ *Davis v. New York, &c. Rd. Co.*, 159 Mass. 532.

⁴ *Ray v. Wallis*, 3 Times L. R. 777, *affd.* 51 J. P. 519.

⁵ *Allmarch v. Walker*, 78 Law Times newspaper, 391.

⁶ *Hall v. N. E. Ry. Co.*, 1 Times L. R. 359; *Kellard v. Rooke*, 19 Q. B. D. 585, 588.

⁷ *Farnham v. New Bank Coal Co.*, 23 Rettie, 722.

⁸ *Hannan v. Hudson*, 7 W. N. (N. S. W.) 105.

⁹ 76 Law Times newspaper, 63.

¹⁰ *Cavagnaro v. Clark*, 171 Mass. 359; *Joseph v. Whitney Co.*, 177 Mass. 176.

¹¹ *Ante*, 691.

¹² Sec. 1, sub-sec. 3. The Canadian and Australian Acts are in the same words.

¹³ 12 Rettie, 804, 808.

are satisfied, and a limitation of their operation for the purpose of restricting the benefit the statute was intended to confer would be, not an interpretation of the words of the clause, but a capricious interference with its application." To the same effect is Lord Young in *M'Manus v. Hay*.¹ "As I understand the expression in the statute, 'to whose orders or directions the workman at the time of the injury was bound to conform,' it means that the relative position of the parties was such that the one owed obedience to the other, and that the order was such that it could not be declined without contumacy."

Lord Young
in *M'Manus*
v. Hay.

In *Bunker v. Midland Ry. Co.*² the Court laid considerable stress on the provision that the injured person not only does conform to orders, but is bound so to do. The plaintiff in that case was van guard in the defendants' service, and under the age of fifteen. There was a rule of the company known to the plaintiff that no van guard under the age of fifteen should drive a van. The defendant's foreman promised plaintiff extra money to drive a van; the plaintiff consented, and whilst so engaged was injured. The Queen's Bench Division held that he had no right of action, since he was not bound to obey the order given to him.³ This ruling is identical with what has been decided in Scotland in *M'Manus v. Hay*,⁴ in the words of Lord Young just quoted:⁵ But the elements of the injured boy's youth, the constraint put upon him by the foreman's position, and the "allurement" to a young person in an opportunity to drive, which might have availed at common law, were not touched on. The "relative position of the parties" might perhaps have induced a different decision, if probably more had not appeared than the report discloses.

Bunker v.
Midland
Ry. Co.

Assuming, however, that the plaintiff is bound to obey an order, there is no need for the order to be by express words; it will be for the jury to say whether the order was to be implied from the circumstances.⁶ The facts in *Millward v. Midland Ry. Co.*⁷ showed that plaintiff, a boy, was engaged under a carman in unloading three frames from a van. The method that ought to have been adopted was that of untying the three frames, then tying two of them up again, and removing the third. The method actually adopted was to untie the three frames, then to remove the first, without waiting to see the two remaining frames secured. The boy, without express orders, assisted in this operation and was injured. The Court held there was evidence that he had conformed to the carman's orders, which, though not expressly given, were implied from the course adopted in co-operating with the carman.

Millward v.
Midland
Ry. Co.

¹ 9 Rottie, 429. Smith, J., in *Kellard v. Rooke*, 19 Q. B. D. 588, was of opinion that "a mere foreman of a gang of labourers will not do."

² 47 L. T. 476. Cp. *Snowden v. Baynes*, 25 Q. B. D. 193; *Murphy v. Smith*, 19 C. B. N. S. 361; and the American case, *Union Pacific Rd. Co. v. Fort*, 17 Wall (U. S.), 553.

³ In *Marley v. Osborn*, 10 Times L. R. 388, the jury found that the order given was one the plaintiff was bound to obey. The evidence on which they found this is by no means clear. Indeed, it would appear from the facts that in giving the order the foreman was transgressing rules binding on himself and the plaintiff. If so, *Bunker v. Midland Ry. Co.* appears directly in point, and no indication is given in the report of any assumption of overruling it. If, on the other hand, there was evidence to warrant the finding of the jury, there does not appear room for any difficulty in the decision.

⁴ 9 Rottie, 425.

⁵ *L.c.* 429.

⁶ *Millward v. Midland Ry. Co.*, 14 Q. B. D., per Day, J., 70; *Conanan v. John Green & Co.*, 8 Fraser, 275.

⁷ 14 Q. B. D. 68; approved *Wild v. Waygood*, (1892) 1 Q. B. 783; *Barber v. Burt*, 10 Times L. R. 383.

*Cox v.
Hamilton
Sewer Pipe
Co.*

This decision was generalised in the Canadian case of *Cox v. Hamilton Sewer Pipe Co.*¹ into the formula: "No specific order at the time of the injury is requisite—general prior orders suffice."

*Hooper v. Holme*² is in the same line of cases. A mason's labourer employed by contractors widening a railway line was killed by a passing train. Orders had been given that the work was not to be done without a look-out man being there; but there was none at the time of the accident. When the deceased arrived a mason was mixing cement for himself at the end of one of the sleepers. Deceased commenced mixing cement at the end of another. The jury found that the mason was foreman of the gang; that the deceased was bound to obey his orders; and that he ordered the deceased to commence work when there was no look-out. Mathew, J., however, directed judgment to be entered for the defendants: Was the deceased man "given an order to which he was bound to conform? The men were bound not to work unless a proper look-out was kept; special orders had been given to that effect. To make the employer liable under sub-sec. 3 there must be some one who had authority to give orders—who had a mandate from the employer—and the workman must be a man who by the terms of his contract was bound to obey the man put over him. There was no evidence that Cross [the mason] had a mandate to give such an order as the one that caused Hooper's death, or that Hooper was bound to obey. Further, there was no evidence that Cross did order the deceased to do his work in this particular way." The last case was relied on by the defendants in *Reynolds v. Holloway*,³ where plaintiff's husband was killed while taking down a partition in a house under orders from the foreman. There was evidence that the order was negligent. Rigby, L.J., pointed out that *Hooper v. Holme* was not applicable, because in *Hooper v. Holme* "there was no order at all given to the deceased man to go into the dangerous place where he was killed, and so he might have chosen a safe place for mixing the cement." In the present case the order was definite to do a particular piece of work.

*Sweeney v.
M'Gilvray.*

To this sub-section may more appropriately be referred the case of *Sweeney v. M'Gilvray*,⁴ before alluded to. Evidence was given that if the workmen had refused to do what was required of them they would have been told to "look for another job." This evidence, in the opinion of the majority of the Court, concluded the case; though, as has before been noticed, there remained the point that the injury resulted through negligent co-operation in the execution of an order not negligently given, and not from conformity to an order which in itself was reasonable and which could be safely carried out. *Shaffers v. General Steam Navigation Co.*⁵ does not appear to have been cited to the Court, though *Osborne v. Jackson*⁶ was.

*M'Manus v.
Hay.*

In *M'Manus v. Hay*⁷ the sheriff held that if the order is a proper one, then subsequent negligence is not actionable merely because it occurs in carrying it out. That view has been disputed.⁸ "It seems that that construction is not correct, and that the wording of the sub-section

¹ 14 Ont. R., per Boyd, C., 311. *Medway v. Greenwich Inland Linoleum Co.*, 14 Times L. R. 291; *Grand Trunk Ry. Co. v. Weegar*, 23 Can. S. C. 422.

² 12 Times L. R. 537, affirmed in C. A. 13 Times L. R. 6.

³ 14 Times L. R. 551.

⁴ 10 Q. B. D. 356.

⁵ 11 Q. B. D. 619.

⁶ 24 Sc. L. R. 91.

⁷ 9 Rettie, 425.

⁸ Roberts and Wallace, *Employers' Liability* (3rd ed.), 276.

is wide enough to include *some* injuries resulting from obedience to an order not itself negligent, where the injury has been caused by the negligence of the person who gave the order." The justness of this criticism is contingent on the closeness of the connection established between the giving of the order and the negligence that follows it. The liability of the master is to be dependent on conformity of the workman to orders "where the injury resulted from his having so conformed." In law the injury must be the ordinary natural sequence from the neglect which produces it;¹ and it would seem, unless some special rule of interpretation is to be applied, that the injury must be the natural sequence of conformity. To produce the injury in the case suggested another cause must be introduced—negligence; and it is of this that the injury is the consequence and not of having conformed to a proper order. The fact that the workman conformed to an order not in itself negligent is only the condition, and not the cause, of the injury, and which in ordinary case would not give a cause of action against the person responsible for the order; while, so far from the action being given by the Act, it in terms provides that the injury must have resulted from having conformed to the orders; and this, except in a perverted and non-natural sense, which is nowhere imposed on the words, is not the case.

This argument derives countenance from *Martin v. Connah's Quay* Martin v. Connah's Quay Alkali Co. The plaintiff was engaged upon a defective waggon. The foreman called to him to be quick; whereupon, in order to save time, he gave a signal for the engine to which the waggon was attached to move. The effect was that, having started the engine, he tripped over loose bricks, lost his footing, and was injured. The Court drew a distinction between "the immediate cause" and the "remote cause" of the accident; and held that the plaintiff could not recover, as the accident was not "caused" by the defect, though it appears that had there been no "defect" there would have been no accident; since the condition of things from which the accident arose would not have existed.³

In *Wild v. Waygood*,⁴ however, the defendant's argument was that the accident in respect of which the action was brought was not caused by conformity to the orders of the man whose negligence caused the injury, in the sense of conformity being the *causa causans*, but only in the sense of its being the *causa sine qua non*, and that the section did not include responsibility for such remote consequences. The plaintiff stood on a plank in conformity to orders when the man who gave the orders was guilty of an act of negligence, which caused the injury by upsetting the plank. This argument was unsuccessful, Lord Herschell⁵ Judgment of Lord Herschell. saying: "It is not necessary to endeavour in the present case to determine or lay down any general rule as to the construction of this section beyond this, that I am quite clear it is not limited to an injury arising from an order, which order is negligent in itself. That is one contention put before us. I think the words used in the Act of Parliament are conclusive against any such construction. It would be limiting it far beyond what the words either require or will admit of. That is all I lay down as regards the construction of the section,

¹ See Wharton, Negligence, § 97 *et seq.*

² 33 W. R. 216.

³ *Cp. Coyne v. Union Pacific Ry. Co.*, 133 U. S. (26 Davis) 370. The facts are set out, *ante*, 679.

⁴ (1892) 1 Q. B. 783.

⁵ (1892) 1 Q. B. 789.

Judgment of
Kay, L.J.

beyond this : that I do not think it essential to show that the conformity to the order was what has been called the *causa causans* of the injury. The negligence must be proved, and if you prove the negligence then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, hut from the negligence and the conforming to the order." Kay, L.J., considered ¹ the three possible constructions of the sub-section ; first, that the negligence from which the injury arises must be in the order itself ; secondly, that any negligence is aimed at that may occur while conforming to an order ; or thirdly, that the only negligence within the section is that which is "closely connected with the order that is given." He concluded that the third construction was the correct one. Of this close connection, a phrase the Lord Justice subsequently varies by speaking of an "intimate connection," he refrains "from attempting to give any general definition that might govern other cases,"² and is content with holding that the case before him "does come within the true meaning and intent of the third sub-section, and that is one of the very cases which it was intended to meet." Lindley, L.J., points out³ that under the section "five things must be proved. First, injury to the plaintiff ; secondly, negligence of some person in the service of the defendant ; thirdly, that the person was one to whose orders the plaintiff was bound to conform ; fourthly, that the plaintiff did conform to those orders ; fifthly, that the injury resulted in his conforming thereto" ; and he suggests the test "that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders. It will not do to prove one of these things only ; the injury must be the result of the two, and if the two are so connected together as to cause the injury, then it appears to me that the case comes within this section."

Judgment of
Lindley, L.J.

Considered.

It is observable that nowhere is it said that where conformity is merely the *sine quâ non* of the accident, that liability attaches. For instance, a workman says to workmen who are bound to conform to his orders, "You stand here, you here, you here," and in course of the work the one next to him is injured t'rough his negligence in doing his part of the work ; it is not said in *Wild v. Waygood* that the master would be liable. The utmost extent the case goes is to include, in the words of Lindley, L.J.,⁴ those cases where "it is impossible to say that the injury was not caused by those two things, viz., negligence of the person giving the order, and conformity with the order," where, that is, probably, the conformity to the order is an element in the injury and not the mere antecedent of it—a co-operating cause in the actual result and not a mere step toward the result. The master is liable for a complex result, hut not for a simple result posterior to conformity to orders.

Howard v.
Bennett.

This seems the conclusion from what Lord Herschell says in *Wild v. Waygood*,⁵ dissenting from the remarks of Lord Coleridge, C.J., in *Howard v. Bennett*.⁶ In that case two men were working a machine ; one had to start it, the other to co-operate in working it. An order was given and conformed to, immediately on which, and negligently, the machine was started and the person conforming was injured. Lord Coleridge, C.J., held that : "The injury resulted, not from the

¹ L. c. 795.

² L. c. 796.

³ L. c. 793.

⁴ L. c. 794.

⁵ L. c. 791.

⁶ 60 L. T. 153 ; 58 L. J. (Q. B.) 120.

directions given, but from the machine being set off too soon and at too great a speed." Lord Herschell, commenting on this, says: "I cannot agree that in that case the injury which is caused by the negligent starting of the machine in such circumstances is not an injury which results from conforming to the order given. The order given was to put his hand in a certain part of the machine, which is a part where his hand will be in immediate danger if the machine is started; and his hand being there, the negligence consists in starting the machine whilst his hand is there. Under such circumstances as those, there seems to me the most immediate and intimate connection that one can conceive between the negligence which caused the injury and the conforming to the order, because it is in truth one element of the negligence that he was conforming to the order at the time." If, then, the conforming to the order is an ingredient in the wrongful act, as distinguished from a mere antecedent of it, the liability of the master does not end with the *causa causans*, but is referred back so as even to include the *causa sine qua non*. Thus, while it is tolerably plain that the master would not be liable where a proper order is given, by one in superintendence, to which the workman conforms and, in the subsequent course of working, is injured by an independent negligent act; and, on the other hand, it is equally plain that he would be liable where a proper order is given which concurs with a negligent act so that the joint effect produces injury; there is a third class of cases where the relation between the proper order and the negligent surroundings is too indeterminate to be more definitely formulated than it is by Kay, L.J.'s, use of the phrase "intimate connection" between the order and the negligence producing the injury. Of this last class of cases *Wild v. Waygood* is a type, where the result is dependent more on the effect produced on the Court by the particular facts proved, as they may appear to approximate either to the first or second class above designated, than by reference to any general rule whatever.

Lord
Herschell's
view.

Both in Scotland² and in England³ it has been held that where workmen are in the employ of "butty-men," who enter into a contract with the owners of the mine to get coal, and are injured by others engaged in the same system of work, they are within the provisions of the Act. When, however, two workmen are working together, for example, in cleaning and working a machine, and the one too hastily starts the machine, so that the other is injured, this is no more than the negligence of a fellow workman, to which the Act does not apply;⁴ of course this is on the assumption that one is not subordinate to the other.

Workmen in
the employ of
"butty-
men."

The case of *Kettlewell v. Paterson*⁵ comes under this sub-section. A working glazier, who had been supplied by his employer with suitable scaffolding for doing the glazier work at a building, was directed by the foreman to make use of another scaffold, which had been erected by persons who had the contract at the same building for joinery work. This scaffold gave way in consequence of the joiner having carelessly constructed it of defective materials, and the glazier was injured. The scaffolding was the work of a competent workman; and it was not

*Kettlewell v.
Paterson.*

¹ (1892) 1 Q. B. 792.

² *Morrison v. Baird*, 10 Rettie, 280.

³ *Brown v. Butterley Coal Co.*, 2 Times L. R. 154. Cp. *Marrow v. Flimby and Broughton, &c. Co.*, (1898) 2 Q. B. 588.

⁴ *Howard v. Bennett*, 58 L. J. (Q. B.) 123, considered and explained, *Wild v. Waygood*, (1892) 1 Q. B. 701.

⁵ 24 Sc. L. R. 95.

shown that the defect could have been observed by such examination as the foreman glazier was bound to make. The Court held that there was no negligence, since the foreman of the glazier was justified in making use of a scaffold erected by a competent tradesman. This same ground would have protected the employer had the negligence alleged been a defect in the condition of ways, works, &c., under the first section.

Negligent order.

An order to "go on" with the work in a manner which had not been usual—that is, with one workman instead of two, as has been the accustomed manner—is a negligent order.¹

In *Marley v. Osborn*² plaintiff was injured through cleaning a machine while in motion, by the order of one to whose order he was bound to conform. A written notice was posted up in the workshop that machines were not to be cleaned while in motion; and this the plaintiff admitted he had seen. Nevertheless, the defendant was held liable, because "the ordinary course taken in these works was followed." The employer has been held not liable where one workman taking advantage of greater length of service or skill directs his fellow workman to do work in a way that is unsafe and injury results.³

The order to conform must be one that indicates where the work is to be done and at what time. Power to tell a workman what work he is to do is not enough to bring the informant within the section.⁴

IV. Workman injured by act or omission of person acting under bye-laws, &c.

IV. OBEDIENCE TO RULES OR BYE-LAWS CAUSING INJURY.

Fourthly, the workman is to be in the same position as a licensee⁵ where he is injured "by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf," "unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned." "Where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of her Majesty's Principal Secretaries of State or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or bye-law."⁶

By the common law⁷ if a business is carried on in obedience to rules or bye-laws, such rules and bye-laws are part of the conditions of employment, and accidents thence arising are risks which both the contracting parties are held to contemplate as incidental to the employment.⁸ This principle is subject to two limitations:

Two limitations:
(1) Where workmen not equal means of knowing.

(1) Where the employer is cognisant of a latent defect of which the workman has not knowledge or not equal means of knowledge, the employer is liable for injury received through the risk;⁹ and,

¹ *Barber v. Burt*, 10 Times L. R. 383.

² 10 Times L. R. 388.

³ *Garland v. City of Toronto*, 23 Ont. A. R. 238.

⁴ *Snowden v. Baynes*, 25 Q. B. D. 193.

⁵ *Ante*, 691.

⁶ Sec. 2, sub-sec. 2. This provision is in the Colonial statutes, but not in that of Massachusetts.

⁷ As to the effect of defective rules at common law, *Vose v. Lanca. & Y. Ry. Co.*, 2 H. & N. 728.

⁸ *Clarke v. Holmes*, 7 H. & N., per Cockburn, C.J., 944. *Weems v. Mathieson*, 4 Macq. (H. L. Sc.) 215. ⁹ *Bartonshill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 206.

(2) The employer is bound to see that the dangers attendant on the system of working are not necessarily increased by the absence of due care and reasonable means of prevention.¹

(2) Where dangers unnecessarily increased.

The section works a change in the law by providing that where anything is done under a rule or bye-law regulating an establishment, the natural result of which is to work injury to a workman the employer is liable. The same principle applies where, under a rule or bye-law, some act is omitted which would otherwise have been done, and injury is caused. In other words, if the working of a rule or bye-law results in injury, inefficiency of the rule or bye-law is to be presumed; and this is so, though at common law the working might be said to be under the conditions imposed by the rule or bye-law. The meaning is pointed more clearly by the proviso that where the rule or bye-law is approved or sanctioned by the Government authorities therein specified, the employer shall not be liable, even though in its working the rule or bye-law shall have brought injury to a workman.

This inquiry is next suggested, What is the effect of this upon the defence involved in the maxim *Volenti non fit injuria*? The decisions² say that this defence remains to the employer. The Act says that the workman is to be in the position of a licensee where the injury occurs through the injurious operation of bye-laws, &c., which form part of the system under which the workman is employed, unless in certain excepted cases.

Effect of this provision on the application of the maxim *Volenti non fit injuria*.

Effect would be given to the words of the Act, and to the law as laid down by the decisions by considering that before the Act the fact of working on a system governed by rules might imply a voluntary undertaking of the risks involved in them; while by the provisions of the sub-section a change is made in the *onus*; on proof that injury has resulted from bye-laws a presumption is raised that the employer is liable for their ill operation, which may be rebutted by showing that their working was known and might have been anticipated by both parties.

Again, the rules may have been imposed subsequently to the workman entering the employment. Then, at common law, the rights of the workman are greater than when he enters upon an employment under conditions prescribed and manifest.³ It may well be that the effect of this sub-section is to place a workman, in the particulars enumerated, in the same position under the statute as he would have been in at common law, where he went on working after discovering a risk, without a full and conscious acceptance of its danger.

It is pretty obvious that the act or omission must be under the rules or bye-laws, and that an act or an omission not contemplated by the bye-laws cannot be brought under the section.

Particular instructions probably indicate orders given through a person without authority acting as the mouthpiece of a person with authority.

Particular instructions.

In *Clacton v. Moulem*⁴ a banksman's duty was to give a signal to the driver of a crane to raise or lower hockets. During the work the signal to lower was given to the banksman, who called out to the driver of the crane, "Lower away." The driver acted on the call to him and

¹ *Williams v. Clough*, 3 H. & N. 258.

² *Thomas v. Quartermaine*, 18 Q. B. D. 885.

³ *Clarke v. Holmes*, 7 H. & N. 937; *Holmes v. Worthington*, 2 F. & F. 533.

⁴ Times L. R. 750.

the plaintiff was injured. A question ultimately came before the Court of Appeal whether this call was a particular instruction given by a person delegated with the authority of the employer. It was held not to be. "The banksman . . . gave no instructions to any one; he merely gave notice. But assuming that he did give orders, a person who was told to do a particular thing was not 'delegated with the authority of the employer.' Those words referred to a manager or a person in the position of a manager, who was put into the position of his employer, to do or to abstain from doing what the employer would do or abstain from doing."

A distinction has been taken between definite instructions given by the employer to a person, and instructions afterwards to be particularly formulated and delivered by the delegate. It seems useless to canvass the origin of the instructions, since the Act merely requires that they should be particular instructions when promulgated to the workman, as distinguished and apart from rules and bye-laws which are in the nature of general instructions; so that, however they emanate, they would seem to affect the employer with liability if they are issued by his authority, are improper or defective, and injury has resulted therefrom.¹

V. Workman may recover where injured by the negligence of any person in the service of the employer who has the charge or control of any signal, points, &c., on a railway.

V. CHARGE OR CONTROL OF ANY SIGNAL, POINTS, &C., ON A RAILWAY.

Fifthly, the workman is to be in the same position as a licensee where he is injured "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway."²

"I cannot help thinking," says Lord Halsbury, C.,³ "that the Legislature meant in a very wide way to protect workmen who are engaged in such dangerous employments, and they said, as an exception to the ordinary rule of law, that if the person in charge of a locomotive or of a train shall be guilty of negligence, then, quite apart from any question of superiority of employment, and quite apart from the necessity of superintendence, the employer may be liable."

The definition clause of the Act,⁴ which we shall consider more minutely presently, provides that the expression "workman" means, amongst other things, "a railway servant." The present sub-section appears to have been introduced for their benefit.

The decisions upon this section have placed the natural, as distinguished from a technical, meaning on the terms used. Thus, in *Doughty v. Firbank*⁵ it is held that railways used by colliery owners and others upon which trains run are within the section, which is not to be limited in its applications to railways used by railway companies; it applies where there is "a way upon which trains pass by means of

Doughty v. Firbank.

¹ *Whalley v. Holloway*, 6 Tinn., L. R. 353 (C. A.), where an instruction to do a certain thing was held not to imply the instruction to do it unreasonably or without the ordinary precautions requisite to do it safely.

² Sec. 1, sub-sec. 5. All the Employers' Liability Acts, Colonial and American, contain provisions for the protection of railway servants, but there is considerable diversity in their language.

³ *McCord v. Cammell & Co.*, (1896) A. C. 63.

⁴ Sec. 8.

⁵ 10 Q. B. D. 358. In Massachusetts, a short railway track intended for temporary use by a city in transporting gravel has been held a railway: *Coughlan v. Cambridge*, 164 Mass. 268.

rails." In *Cox v. G. W. Ry. Co.*¹ trucks coupled together in the usual way, though with no locomotive engine attached, and only a stationary hydraulic engine and a capstan by which they were moved, were held to be a train. In *Murphy v. Wilson*² an attempt to comprehend under the term "locomotive engine" a steam crane so fixed on a trolley that, by means of shifting gear working on the axles of the trolley, the crane and trolley could be moved from one place to another along rails, was unsuccessful. Pollock, B., thus expressed his view: "The term 'locomotive engine' has a well-known significance, and is used generally for an engine to draw a train of trucks or cars along a permanent or temporary set of rails. There is also a well-known class of engines, such as traction engines, which, though they are capable of being moved from place to place, are never spoken of as locomotive engines."³ . . . If the Legislature had intended to include any such machine, they would have used proper terms. I can see no reason why the defendants in this case should be held liable under this section any more than if it were a case of a steam printing machine or a punching machine."

In *McCord v. Cammell*,⁴ Lord Halsbury, C., doubted very much whether the Legislature intended the words "a train," as used in the sub-section now being considered, to be narrowly used. "The Legislature meant that a locomotive engine by itself, or anything that was drawn along a railway, or was in course of being drawn along a railway by that locomotive engine, should be included in a train." "I doubt very much whether it would depend upon the number of carriages or the number of vehicles going upon wheels which the locomotive was taking along the railway. I should think the Legislature intended a very wide scope to be given to the use of these words."⁵ And Lord Watson said: "The words 'any person having charge or control of the train' do not, in my opinion, necessarily point to one person who is in charge of the whole train. Different duties in connection with different parts of the train may be assigned to different persons, and, in that case, each and all of those persons are charged with the conduct of the train; and, if any one of them be negligent in his own department, that will constitute 'negligence,' bringing the case within the terms of sec. 1, sub-sec. 5." The consideration which had weight with one of the judges in the Court of Appeal, that the duty having been committed to a great many people, any one of whom might have performed it, therefore the person actually performing it was not "in charge," was in the House of Lords regarded as "very immaterial." The statute points directly to the person having "the charge or control of the train" as being that person who at the time when the negligent act is committed has the duty cast upon him of performing that act with reasonable care."

By the interpretation clause "workman" means a railway servant amongst others; therefore any person who can bring himself within the meaning of the term is entitled to recover, not, indeed, for the negligence of any other railway servant, but for the negligence of those classes of railway servants who are specified in the sub-section—that is, those "in charge or control of any signal, points, locomotive engine, or train upon a railway."

¹ 9 Q. B. D. 106.

² But see *Powell v. Fall*, 5 Q. B. D. 597.

³ Cp. *Caron v. Boston, &c. Rd. Co.*, 164 Mass. 523.

² 52 L. J. Q. B. 524.

⁴ (1896) A. C. 64.

⁵ In Massachusetts a locomotive and a single car connected and run together has been held to be a train: *Shea v. New York, &c. Rd. Co.*, 173 Mass. 177.

⁶ L. c. 65.

Cox v. G. W. Ry. Co.
Murphy v. Wilson
Pollock, B.

"A train."

Scope of the sub-section.

"Charge or control."
Gibbs v. G. W. Ry. Co.

On the meaning of the words "charge or control" in this connection, *Gibbs v. G. W. Ry. Co.*,¹ is to be looked at. The decision is an earlier one than that just noticed. A workman in the signal department of the defendants' railway had to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of their line; for this purpose he was subject to an inspector, who was responsible for the points and locking gear, which were moved and worked by men in the signal-boxes. This workman took the cover off some points and locking gear in order to oil them, and negligently left it projecting over the metals of the line, and so caused injury to a fellow workman. The attempt to render the company liable for the neglect as that of a person in the service of the employer who has the charge or control of points failed both in the Divisional Court and in the Court of Appeal. In the Divisional Court, Field, J., discussing the meaning of "charge or control," doubted "whether the words 'charge or control' are intended to mean different things"; Mathew, J., thought that the Legislature had in contemplation "the negligence of some person having charge or control of the points for the purposes of traffic and of movement." In the Court of Appeal, Brett, M.R.,² draws a distinction between charge and control. His words are: "I cannot think that there is any colour for saying he [the plaintiff] had the control of the points, and the only question is whether he is a person who had the charge of them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has charge of them at some particular moment." Lord Coleridge, C.J., too, discussing whether the workman whose fault was alleged had charge or control said:³ "He certainly had to do something from time to time to the machinery connected with the points, but he himself said he worked under the direction of Saunders [the inspector], and Saunders was called and he proved, I think, that he was the person who had apparently both the charge and the control of the points, and that Fisher [the workman] was only a workman under him, and was not a person who had either the charge or the control of any points connected with the railway."

Judgment of Brett, M.R.

Judgment of Lord Coleridge, C.J.

Is a tramway a railway?

A good deal of ingenuity has been (extra-judicially) expended on the question whether a tramway is a railway within the section. Originally, doubtless, and in general usage the terms may have been convertible. Now, however, a distinction is drawn,⁴ and the principle avails in this case also, that was at the root of the decision in *Murphy v. Wilson*⁵—that words expressing well-known objects are to be confined in their ordinary usage to the designation of them.

Compensation.

Where the workman establishes his right to compensation under the Act, the amount he may recover is limited to "such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment and in the district in which the workman is employed at the time of the injury."⁶

Bortick v. Head.

In *Bortick v. Head*⁷ a Divisional Court, overruling the county court judge, decided that the act did not lay down a measure of damages,

¹ 11 Q. B. D. 22, 12 Q. B. D. 208.

² 12 Q. B. D. 212.

³ L. c. 210. Cp. *Caron v. Boston, &c. Rd. Co.*, 164 Mass. 523.

⁴ The Tramways Act, 1870 (33 & 34 Vict. c. 78). *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority*, (1892) 1 Q. B. 367. Notice of Accidents Act, 1894, (57 & 58 Vict. c. 28) sch. "railway, tramroad, and tramway."

⁵ 52 L. J. Q. B. 524.

⁶ Sec. 3.

⁷ 53 L. T. 909.

but merely imposed a limit beyond which damages should not be recovered; so that when a jury estimated a sum for overtime work which the plaintiff had earned for another employer than the one in whose service the plaintiff was injured, the plaintiff was allowed to recover the sum so assessed. Overtime earnings how calculated.

Noel v. Redruth Foundry Co.,¹ deals with the earnings of an apprentice with a salary of 1s. a week which progressed yearly. In his fifth year, when he was injured, he was getting 5s. a week. At the end of the year his apprenticeship would have ended and his rate of wages as a workman might amount to 18s. a week. The county court judge awarded £80. The defendants appealed, but conceded damages for three years at 5s. a week, i.e., £39. In view of the concession the Court did not conceive that it was bound to cut down this sum, but were not "satisfied that on the true construction of the section, the standard of the actual earnings during the last three years preceding the injury can be left out of consideration, and that only the words 'estimated earnings of a person in the same grade employed in the like employment, and in the district in which the workman is employed,' are to be taken into account, the suggestion being that the only standard of calculation is the rate of wages earned by persons of a similar class at the time of the accident; a proposition to which I am not, as at present advised, prepared to assent." In the same case it was contended that the expression "earnings" could be construed to include the value of an apprentice's tuition. The Court would not admit this, though willing to concede that "food or clothing which could be estimated at a money value might be taken into account."

In Scotland,² in the Sheriff Courts, damages awarded for the death of a man who has left a widow and a child or children have been apportioned, the widow being allowed half, "the other half being reserved for the children when they came to sue." Damages awarded. In Scotland.

In England the matter is regulated by sec. 2 of Lord Campbell's Act,³ whereby the damages may be apportioned amongst those entitled "in such shares as the jury by their verdict shall find and direct."⁴ Where the action is brought in the Chancery Division, it has been decided that the Court has power to apportion in such manner as a jury could have done.⁵

Notice that injury has been sustained must be given within six weeks⁶ from the occurrence of the accident causing the injury, and the action must be commenced within six months⁷ from the same date. In the case of death resulting the time to bring an action is extended to twelve months. The want of notice is no bar to the maintenance of the action "if the judge shall be of opinion that there was reasonable excuse for such want of notice."⁸ Time for giving notice and bringing action.

¹ (1896) 1 Q. B. 453.

² *Wills, J.*

³ *Spens and Younger, Law of Employer and Employed, 317. Cp. Sanderson v. Sanderson, 36 L. T. 847.*

⁴ 9 & 10 Vict. c. 93; amended by 27 & 28 Vict. c. 95. This Act does not apply to Scotland. *Ante, 180.*

⁵ 9 & 10 Vict. c. 93, s. 2.

⁶ *Bulmer v. Bulmer, 25 Ch. D. 409.*

⁷ In *M'Donagh v. MacLellan, 13 Rettie, 1000*, the injury was suffered on the 7th of May, and the notice was sent by post, so that the employers could not receive it before the 19th of June. Held, too late.

⁸ By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, the expression month is to mean calendar month in every Act passed after the year 1850. *Cp. Bruner v. Moore, (1904) 1 Ch. 305.*

⁹ 43 & 44 Vict. c. 42, s. 4. See *Previsi v. Gatti, 4 Times L. R. 487; M'Leod v. Pirie, 20 Rettie, 381*. In New South Wales this provision has been held to apply only

Johnston v. Shaw.

In the Scotch case of *Johnston v. Shaw*,¹ the plaintiff sought to excuse non-compliance with the provision for the bringing of action within six months, alleging that, between the time of giving the notice and the expiration of the six months, he was confined in a lunatic asylum in consequence of his faculties having become impaired by reason of the accident. The provision was, however, held obligatory, and it was ruled that, beyond the time mentioned, no action under the Act could be maintained.

Clark v. Adams.

Clark v. Adams,² another Scotch action under this section, raised a somewhat peculiar point. An action was brought at common law, and was decided against the pursuer, who appealed to the Court of Session. At the hearing of the appeal it was stated that the pursuer had become aware that he had given notice under the Employers' Liability Act, 1880, and he sought to treat his common law action as if it had been brought under the statute. The Court seem to have considered that this might be done within the six months,³ but held that since the time specified in the Act was elapsed it was not possible in the particular case before them.

Conroy v. Peacock.
Erroneous decision.

Cave and Lawrance, JJ., decided in *Conroy v. Peacock*,⁴ regarding or at least treating the point as too clear for argument, that in an action under the Employers' Liability Act, 1880, the defendant cannot rely upon the defence that the notice of injury required by sec. 4 of the Act has not been given, unless he has given notice that he intends to rely upon it as a statutory defence pursuant to Order x. rr. 10, 18, of the County Court Rules, 1886.⁵ Want of notice of injury, says Cave, J., "is clearly a 'statutory defence,' because but for the statute no notice of injury would be necessary." The words of the section on which the learned judge was deciding show that an action under the Act "shall not be maintainable unless notice . . . is given."⁶ In the absence of notice of injury and notice by the defendant of statutory defence, the defendant must wait (outside the Court would probably be preferable)⁷ while the judge is eliciting the want of that notice which the statute makes an integral portion of the plaintiff's cause of action; and if judgment is then given ignoring the requisites of the statute, on an appeal to a competent Court, *Conroy v. Peacock* must be formally overruled. Ignorance of the need of a notice has been held not to be a "reasonable excuse" for the absence of it.⁸

where due notice has not been given, and not where no notice at all has been given: *Thompson v. Southern Coal Co.*, 15 N. S. W. L. R. (L.) 162.

¹ 21 Sc. L. R. 246.

² 12 Rettie, 1092.

³ *Morrison v. Baird*, 10 Rettie, 271; *Murray v. Steel*, 12 Rettie, 945; this seems to have been a sort of informal procedure under sec. 6. In Scotland it has been held that the question whether the omission to send notice of injury to the employer is reasonable may be decided either at the adjustment of issues, or at the trial, in the discretion of the judge: *Trail v. Kelman*, 15 Rettie, 4.

⁴ (1897) 2 Q. B. 6.

⁵ Now Rr. 10, 18, of Order X of County Court Rules, 1903.

⁶ *Keen v. Millwall Dock Co.*, 8 Q. B. D., per Lord Coleridge, 484; per Brett, L.J., 485. *Clarkson v. Muirgrave*, 9 Q. B. D., per Field, J., 390: "It is clear that the notice is a condition precedent to the right to sue."

⁷ *Edwards v. G. W. Ry. Co.*, 11 C. B. 588, 650; *Park Gate Iron Co. v. Coates*, L. R. 5 C. P. 634.

⁸ *Ex parte Hannan*, 18 N. S. W. L. R. (L.) 422. Want of notice has been excused on the ground that the widow of the deceased man was in an advanced stage of pregnancy and so excited that the doctor forbade her being spoken to on the subject: *Bromley v. Oldham*, cited Ruegg, *Employers' Liability* (6th ed.) 63. In New South Wales the excuse that the plaintiff had been for a long time in hospital, and was not in a fit state to go on with the action, has availed: *Miller v. Dalgely*, (1884, N. S. W.) 1 W. N. 164, 2 W. N. 17. So has an explanation that negotiations between the widow

The Scottish Courts have been a bit exigent in this matter of the notice. Thus in *M'Fadyen v. Dalmeington Iron Co.*¹ they refused to dispense with the notice though the pursuer alleged that he was an old man and illiterate, and that during the six months it was not known whether the deceased would survive and take proceedings himself. And in *Connolly v. Young's Paraffin Light and Mineral Oil Co.*² they refused a dispensation where the action was brought by the widow, who claimed indulgence on the ground of her forgetfulness caused by her grief. But in *Beckett v. Manchester Corporation*,³ Field, J., said: "It matters not how defective the notice was, if it can be shown that it has not injured the defendants, that is to say, if the defendants are not at the trial taken by surprise in consequence of the defect"—in that case the omission of the address and the date.

Scottish decisions on notice.

Any penalty which is paid to the injured workman in pursuance of any Act of Parliament is to be deducted from the compensation payable in respect of a cause of action under this Act, and when the action has been brought previously to the payment of any penalty, the workman is not to be entitled to receive any such penalty and in respect of the same cause of action.⁴

The class of Acts in which provision is made for a penalty payable in part to the workman comprehends such Acts as the Coal Mines Regulation Act, 1887,⁵ the Metalliferous Mines Regulation Act, 1872,⁶ the Metalliferous Mines Act, 1875,⁷ and the Factory and Workshop Act, 1901.⁸

Actions⁹ under the Employers' Liability Act, 1880, are to be brought in a County Court,¹⁰ but may be removed into a superior Court in the same mode and for the same causes that other actions may be removed.¹¹ Where an action is tried in a County Court, before a judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.¹² Regulations may be made as to procedure and the consolidation of actions in the same manner as they are made with regard to other actions in County Courts.¹³

Actions to be brought in a County Court.

and the employer were begun within the six weeks, but letters of administration were not granted till nearly eight months after. *Hulman v. Robertson*, (1887, N. S. W.) 4 W. N. 131.

¹ 24 Rottie, 327.

³ 22 Rottie, 80.

² 52 J. P. 346. There is an instructive Massachusetts case, *Ledwidge v. Hathaway*, 176 Mass. 348.

⁴ Sec. 5.

⁵ 50 & 51 Vict. c. 58, ss. 59-76. See Guthrie Smith, *Law of Damages* (2nd ed.), 368, for a general account of these Acts.

⁶ 35 & 36 Vict. c. 77, ss. 31-38. See also Quarries Act, 1894 (57 & 58 Vict. c. 42).

⁷ 38 & 39 Vict. c. 39.

⁸ 1 Edw. VII. c. 22, s. 136. In *Blenkinsopp v. Ogden*, (1898) 1 Q. B. 783, the contributory negligence of the injured person was held to be no answer to proceedings for the penalty.

⁹ Sec. 6, sub-sec. 1. *The Queen v. Judge of City of London Court*, 14 Q. B. D. 903, decided on 19 & 20 Vict. c. 108, s. 39, repealed and re-enacted as sec. 62 of County Courts Act, 1888 (51 & 52 Vict. c. 43).

¹⁰ In Scotland this means the Sheriff Court, and in Ireland the Civil Bill Court. ¹¹ By *certiorari*, or order under ss. 126, 129, 130, 132 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which supersede 9 & 10 Vict. c. 95, s. 90, and 19 & 20 Vict. c. 108, s. 38, and now regulate the removal of cases from a County Court. The application for removal is ordinarily made to a master (R. S. C. 1883, O. liv. r. 12), or judge at chambers. Under the repealed Acts it could only be made to a judge at chambers: *Robertson v. Womack*, 19 L. J. Q. B. 367; *Staples v. Accidental Death Insurance Co.*, 10 W. R. 59. As to refusal to order removal, see *Munday v. Thames Ironworks and Shipbuilding Co.*, 19 Q. B. D. 59. As to removal on ground of prejudice, *Bates v. Warner*, 5 Times L. R. 582 (C. A.); generally *Putter v. Great Western Colliery Co.*, 10 Times L. R. 355.

¹² Sec. 6, sub-sec. 2.

¹³ Sec. 6, sub-sec. 3. See County Court Rules, 1903, Order xlv.

Rule respecting removal of actions from County Courts.

The rule that should govern in England in deciding applications to remove actions under the Act from the County Court to the Superior Court is that they are only to be allowed "if some new question of law is raised, or some very difficult question in the particular case, for instance, as to the way in which the machinery caused the injury. The removal is in the discretion of the judge, and I should think that in his discretion he would, except in very peculiar circumstances, leave the case in the County Court."¹

Munday v. Thames Ironworks and Shipbuilding Co.

This rule is identical with that laid down in the earlier case of *Munday v. Thames Ironworks and Shipbuilding Co.*,² where Manisty, J., doubted whether an action at common law could be consolidated with one under the Act; since "the ordinary principle is that if there is a statutory proceeding for a particular cause of action and compensation is recovered, although limited in amount, an action at common law for large³ damages shall not be maintained. If proceedings have been taken before a magistrate and a penalty or damages recovered, an action for the same cause cannot afterwards be brought."⁴ This may be explained by considering *Morrison v. Baird*⁵ in the Court of Session, where a distinction is pointed out between cumulative and mutually exclusive remedies. "I cannot conceive," says the Lord Justice-Clerk (Moncreiff), "that the Legislature ever intended that there should be both a common law and a statutory action. . . . The ground upon which the action is brought—the ground of liability—is a common law liability; and the only effect of the statute is, in the case of fellow workmen, to take away a plea which might exclude such an action based upon the common law in the event of the wrong complained of having been done by a fellow workman." Lord Young, added:⁶ "I agree with your Lordship that it is not incompetent to combine the common law and the provisions of the Employers' Liability Act in the same action."⁷

Morrison v. Baird.

Difference between the Scotch and the English systems.

This manifestly means no more than that a workman is not to recover damages twice over for the same injury, though he may claim in the alternative. This, under the Scotch system, in which the Sheriff Courts have unlimited jurisdiction, may readily be done. In England the County Court would not have jurisdiction beyond the £100 limit except under the Act; so that claims in the alternative would be to that extent hampered; though that does not constitute a reason why they should not be pursued so far as they may avail. Manisty, J., was probably thinking of the case of a plaintiff recovering under the Act, and then, with a view to secure larger damages, bringing his action at common law; in which case he would plainly be disentitled.⁸ If, however, he is to be understood as affirming that a

¹ Per Brett, M.R., *The Queen v. Judge of City of London Court*, 14 Q. B. D. 907. The principles regulating the practice in Scotland are investigated in *M'Avoy v. Young's Paraffin Light and Mineral Oil Co.*, 9 Rettie, 100.

² 10 Q. B. D. 59.

³ Cp. *Midland Ry. Co. v. Martin*, (1893) 2 Q. B. 172.

⁴ 10 Rettie, 271, 277.

⁵ L.c. 278.

⁶ "The jury should be told by the presiding judge that their verdict should be as to one cause of action or the other, and that they cannot give judgment under both": per Madden, C.J., *Stephens v. Austral Otis Engineering Co.*, 27 V. L. R. 724, 728. The wording of this proposition wants modification to make it a correct statement of English law.

⁷ See *Neddon v. Tutop*, 6 T. R., per Grose, J., 609. "The only inquiry is whether the same cause of action has been litigated and considered in the former action." Cp. *Brunsdon v. Humphrey*, 14 Q. B. D. 141.

workman may not frame his action in the alternative either under the Act or at common law, then the Act does not say so; and the general rule of law in the case of the existence of two remedies is otherwise.¹ Does, then, the fact that simultaneous actions are brought in different courts make a difference? If it does, either or both of the actions would not be maintainable. A stay would be obtained with regard to the part common to the two actions.²

Again: if an action under the Act is brought and fails, can the plaintiff proceed anew at common law? For instance, an action against an employer fails through want of notice of action, and the plaintiff commences a common law action. Such action could be maintained on the principle laid down by Willes, J., in *Langmead v. Maple*:³ "The conditions for the exclusion of jurisdiction on the ground of *res judicata* are that the same identical matter shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided. . . . It is not sufficient to constitute *res judicata* that the matter has been determined on; it must appear that it was controverted as well as determined upon."⁴ If an action is brought under the Act for the negligence of the master, and the plaintiff fails by the negligence alleged being disproved, on the same principle a common law action cannot be brought. If not proved, the ordinary rules relating to nonsuits would apply. There remains the case of an action brought at common law and failing, and subsequently an action commenced under the Act. This, too, seems referable to the ordinary principles relating to *res judicata*.

Action at common law after failure of proceeding under the Act.

Notice of action⁵ in respect of injury shall give:

- (a) The name and address of the person injured.
- (b) Shall state in ordinary language—(1) the cause of the injury; (2) the date at which it was sustained.
- (c) Shall be served:

Notice of action.

- (a) If the employer is a private person, on him; or, if there is more than one, on one of them; and either (1) by delivering the same to the person on whom it is to be served, (2) by delivering it at his residence or place of business, (3) by posting it in a registered letter addressed to the person on whom it is to be served at his last-known place of residence or place of business;

¹ *Bagot v. Easton*, 7 Ch. D. 1; *Masters v. Jones*, 10 Times L. R. 403; *Larbey v. Greenwood*, Times newspaper, July 23, 1885, is a County Court action under the Employers' Liability Act, 1880, removed into the High Court by *certiorari* to add a common law claim. *Marrow v. Flimby & Broughton Moor Coal and Fire Brick Co.*, (1898) 2 Q. B. 538, contained a common law claim as well as the claim under the Employers' Liability Act, 1880; per Rigby, L.J., *l.c.* 600. In Scotland the practice is to schedule alternatively in the issue the sums claimed respectively at common law and under the Act: *Goudie v. Paul*, 22 Rottie, 1. In *Duthie v. Caledonian Ry. Co.*, 25 Rottie, 934, damages were recovered against one of two defendants under the Employers' Liability Act, 1880, and against the other at common law. Judgment was entered jointly and severally for £158, the limit under the Act, and against the other for the balance.

² *Morton v. Quick*, 26 W. R. 441.

³ 18 C. B. N. S. 270.

⁴ "Although a declaration contains counts under which the plaintiff's whole demand might be recovered, yet, if no attempt has been made to give evidence of some of the claims, they may be recovered in another action. This was decided in *Seddon v. Tulop*, 6 T. R. 807, and that decision has been confirmed by subsequent cases in the King's Bench and Common Pleas": *Thorpe v. Cooper*, 5 Bing. 116, per Best, C.J., 129.

⁵ Sec. 7. *M'Leod v. Pirie*, 20 Rottie, 381.

- (j) If the employer is a body of persons corporate or unincorporate—(1) by delivering the notice at the office or any one of the offices of the body, (2) by sending it by post in a registered letter to the office or any one of the offices of the body.

A notice is not to be deemed invalid "by reason of any defect or inaccuracy,"¹ unless the defect or inaccuracy, in the opinion of the judge who tries the action, (1) prejudices the defendant in his defence, and (2) "was for the purpose of misleading."

Moyle v. Jenkins.

Written notice essential.

In *Moyle v. Jenkins*² the contention was that the requirements of sec. 4 were satisfied by verbal notice; but the Court held that, supposing that to be so if sec. 4 stood alone, yet it was so far affected by the terms of sec. 7 as to make a written notice necessary. This view was sustained by the Court of Appeal in the case of *Keen v. Millwall Dock Co.*³ Plaintiff's solicitor's letter referred to particulars "which have already been communicated to your superintendent." A verbal report had been made to the defendants' inspector, who took down the particulars. This was held insufficient. In this case Lord Coleridge, C.J., also expressed an opinion that a notice, to satisfy the Act, must be contained in one document. "If," he said,⁴ "the letter relied on in this case had referred to some written document in which the nature and particulars of the injury were given, it would not, I should have thought, have been a compliance with the words of this enactment, which describes the notice as one and single, containing in it the incidents which the statute has required it to contain as a condition precedent to maintaining any action." The better opinion seems to be that this is not essential. "I agree," said Brett, L.J.,⁵ "that, as a general rule, the notice must be given in one notice, but I am not prepared to say it would be fatal if it were contained in more than one notice." Holker, L.J., concurred in this opinion.

Lamley v. Mayor, &c. of East Retford.

In another case,⁶ under sec. 264 of the Public Health Act, 1875, Lord Esher, M.R., with whom Bowen and Fry, L.J.J., concurred, definitely laid down that "it is not necessary that the whole of a notice of action be set out in one document." So that unless some distinction can be taken between the notice required under the

¹ In *Carter v. Drysdale*, 12 Q. B. D. 91, the omission of the date was held a "defect or inaccuracy" that did not render the notice invalid; and in *Stone v. Hyde*, 9 Q. B. D. 76, a letter from plaintiff's solicitor giving the date of injury, and stating that the plaintiff for some time past had been at a hospital under treatment "for injury to his leg," was held a mere "defect or inaccuracy," and not such an omission as to make the document "no notice at all." This was followed in *Cox v. Hamilton Sever Pipe Co.*, 14 Ont. R. 300; but subsequently the notice sections in the Ontario Act were altered: *Cavanagh v. Park*, 23 Ont. A. R. 715. In *Thomson v. Robertson*, 12 Rettie, 121, a letter from the wife of the injured man in these terms was held sufficient: "I find I will need some more money and will you please oblige me with ten shillings. It is now five weeks since Adam got his accident. His jaw has been so badly smashed that he will never be the same man again. Adam has been advised to get damages from you." In *Hearn v. Phillips*, 1 Times L. R. 475, notice of injury was served on the employer's son instead of on the employer. At the trial the judge, knowing that the father was in Court, made the amendment, and his order was upheld. The Divisional Court, however, intimated that had the objection been to the proper service of the notice they might have been constrained to a different decision. The notice need not refer to proposed litigation: *Hughes v. Blunt*, (1888, N. S. W.) 5 W. N. 17. Notice addressed to a deceased employer is sufficient if it is shown that the notice has come to the hands of the trustee carrying on the business of the deceased: *Rathbone v. Ross*, 35 S. J. 208.

² 8 Q. B. D. 482.

³ L. C. 484.

⁴ 8 Q. B. D. 116.

⁵ L. C. 485.

⁶ *Lamley v. Mayor, &c. of East Retford*, 55 J. P. 133.

Employers' Liability Act, 1880, and that formerly required under the Public Health Act, 1875, it may be concluded that a valid notice of action can be collected from two or more documents.

In the notice it is not necessary to state the cause of action, but only that which will enable the employer to have substantial notice of what has occurred, so that he may make proper inquiries, and may come to trial prepared to meet the plaintiff's case. The provision that he shall state the "cause of injury" is not to be construed as a requirement that he shall state the "cause of action."¹

With regard to the method of serving notice, there is an important decision of the First Division of the Court of Session,² on the point whether a notice sent by letter is good if the letter is not registered. Evidence was given that a letter not registered was posted and forwarded to the defenders, who, in answer to a further letter sent after the expiration of the six weeks, admitted its receipt, and stated that they had forwarded it to the secretary of an insurance company. The Lord President (Inglis) said it was quite indispensable under the Act "that notice of an action should be served within six weeks, and, if it is not so served, the action is not maintainable. This is plain enough, but the point now to be considered is regarding the manner of serving the notice. The statute provides two modes in which it may be done, first, by 'delivering the same to or at the residence or place of business of the person on whom it is to be served.' That is plainly a notice by a 'delivered' letter, as distinguished from a posted letter. The second mode is 'by post by a registered letter'—that is to say, the pursuer may avail himself of the Post Office as a means of service, and that by means of a registered letter. The reason why the letter is to be registered is that the pursuer is not to be entitled to avail himself of the presumption of ordinary correspondence, that a letter, when posted, is presumed to have reached its destination unless it is returned from the Dead Letter Office. But if, in addition to posting the letter, the pursuer registers it, that, under the statute, creates a presumption that the letter will reach its destination. This is expressed by the last clause of the third paragraph of sec. 7 of the Act, which says, 'And in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.' That clause will not preclude the defender proving, as matter of fact, that the letter did not reach him; just as little will it preclude the pursuer from proving that though the letter was not registered, it did, as matter of fact, reach the defender. Now, that has been proved as matter of fact here."³

Service of notice.

Judgment of the Lord President (Inglis).

An employer under the Act includes a body of persons corporate or unincorporate.⁴ Employer includes corporation.

Workman⁵ is defined to mean "a railway servant and any person to whom the Employers and Workmen Act, 1875,⁶ applies."

¹ *Clarkson v. Musgrave*, 9 Q. B. D. 386, 390.

² *McGowan v. Tancred*, 13 Rettie, 1033.

³ Where service by post is dealt with in any Act subsequent to 1889, see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26.

⁴ Sec. 8. Under the existing Act no action can be maintained against the representatives of a deceased employer. *Gillet v. Fairbank*, 3 Times L. R. 618. Cp. a curious American case, *King v. Henkie*, 60 Am. R. 119. As to the operation of the maxim *Actio personalis moritur cum persona*, *ante*, 181; also see *Martin v. Baltimore Rd. Co.*, 151 U. S. (44 Davis) 673.

⁵ 38 & 39 Vict. c. 90.

⁶ Sec. 8.

It has been suggested¹ that the term "railway servant" comprehends every servant of a railway. It is at least doubtful whether in an Act whose object is "to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service," and in which "railway servant" is used in collocation with workmen, that those servants of a railway would be included to whom its provisions are not otherwise applicable.² The spirit of an Act of Parliament is not to be sacrificed to the pedantry of verbal logic: *Qui hæret in literâ hæret in cortice.*³

Employers
and Workmen
Act, 1875.

By sec. 10 of the Employers and Workmen Act, 1875,⁴ "the expression workman does not include a domestic or menial servant, but . . . means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour,⁵ whether under the age of twenty-one or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Seamen.

By sec. 13 "this Act shall not apply to seamen or to apprentices to the sea service."⁶

Women
included.

By the Interpretation Act, 1889,⁷ words importing the masculine gender shall include females, unless a contrary intention appears.

Domestic
servants not
within the
Act.

Domestic and menial servants are not within the Act.

A "domestic servant" is one who in ordinary circumstances resides in the master's house; but this test is not conclusive.⁸ The determination of whether a servant is a menial servant or not is a question of the facts in each particular case.⁹

Menial
servant.

A menial servant is a somewhat more extensive term. Thus, a head gardener, living outside the house, but upon the property, has been held to be a menial, though not a domestic servant.¹⁰ Domestic servants are those occupied in the service of the master's house; menial¹¹ servants those engaged on the establishment. Servants in either of these classes are, by the exception in the definition, taken out of the operation of the Act; were this not so, they would come within it as labourers.

¹ Roberts and Wallace, *Employers' Liability* (3rd ed.) 231.

² *Gordon v. Jennings*, 9 Q. B. D. 45.

³ *Eyton v. Studd*, Plowd. 467.

⁴ 38 & 39 Vict. c. 90.

⁵ As to manual labour, *M'Leod v. Pirie*, 20 Rettie, 381. "Forewoman of a laundry" was held not a description such as to convey to the Court knowledge one way or another as to the scale or proportion of manual labour in the vocation: *Moore v. Ross*, 17 Rettie, 796.

⁶ In *Oakes v. Monkland Iron Co.*, 11 Rettie, 579, a servant employed on board a vessel solely used on a canal was held not to be a seaman. In *Froy v. Balmain Steam Ferry Co.*, 7 N. S. W. R. (Law) 146, an engineer of a steam ferry-boat was held not within the Act as not ordinarily engaged in manual labour. In *Corbett v. Pearce*, [1904] 2 K. B. 422, a man engaged navigating a barge on the Thames which might be used for coasting purposes was held a seaman. "Seaman" is defined by Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742. Cp. *The Ruby* (No. 2), (1898) P. 59.

⁷ 52 & 53 Vict. c. 63, s. 1, sub-sec. 2.

⁸ *Graham v. Thomson*, 1 Shaw, 309.

⁹ *Lauder v. Linden*, Ir. R. 10 C. L. 188.

¹⁰ *Noulan v. Ablett*, 2 C. M. & R. 54. In Ireland a steward and gardener was held not to be "a menial servant": *Foryun v. Burke*, 12 Ir. C. L. R. 498. In *Nicoll v. Greaves*, 33 L. J. C. P. 259, a huntsman was held a menial servant. Cp. *Ogle v. Morgan*, 1 De G. M. & G. 359; *Vaughan v. Booth*, 16 Jer. 808.

¹¹ Saxon *meibe* or *meanie*—one of a household; Skeat, *Etym. Dict.*, sub voca. menial.

In *Wilson v. Glasgow Tramway Co.*,¹ under the Employers and Workmen Act, 1875, a decision previously to the passing of the Employers' Liability Act, a tramway conductor was held "not other than a labourer employed to attend on the tramway cars as much so as a miner employed to work a windlass or the gearing of a pit, or a man engaged to drive the horses of a trackboat on a canal."² This is inconsistent with *Morgan v. London General Omnibus Co.*,³ in the English Court of Appeal, where an omnibus conductor was held not to be a labourer within the definition; since "his real and substantial business is to invite persons to enter the omnibus and to take and keep for his employers the money paid by the passengers as their fares; in fact, he earns the wages becoming due to him through the confidence reposed in his honesty."⁴ In *Cook v. North Metropolitan Tramways Co.*,⁵ the driver of a tramcar was held to be excluded from the benefit of the Act because the expression used is "manual labour" and not "manual work"—that is, work apart from the necessity of thought and skill. On the other hand, the plaintiff in *Farmouth v. France*⁶ was held to be within the definition of "workman" in the Employers and Workmen Act, 1875. "He is," said Lord Esher, M.R.,⁷ "a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He has to load and unload the trolley. That is manual labour. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the horse and trolley and the navigating of the lighter form the easiest part of the work; his real labour, that which tests his muscles and his sinews, is the loading and unloading of the trolley or the lighter."

Tramway and omnibus conductors.
Wilson v. Glasgow Tramway Co.

Morgan v. London General Omnibus Co.

Cook v. North Metropolitan Tramways Co.

The inquiry in these cases is mainly one of fact, that is, whether the duties in any case performed are mainly manual or mainly mental. The question was again brought before the Court of Appeal in *Bound v. Lawrence*,⁸ in the case of a grocer's assistant, when the test applicable was determined to be an inquiry what is "the nature of the substantial employment" unaffected by consideration of "matters that are incidental and accessory."⁹

Test applicable

In *Hunt v. G. N. Ry. Co.*¹⁰ Pollock, B., excluded an occasional resort to manual labour as sufficient to make a "person engaged in manual labour"; for such a man's "primary duty was to use his intelligence, not his hands." In *Regina v. Louth Justices*,¹¹ a hairdresser was held not a workman engaged in manual labour. But in *Maynard v. Peter Robinson*¹² a worker with a sewing machine who also ironed materials was held to be engaged in manual labour.

The term labourer, under 20 Geo. II. c. 19, has been held to extend to labourers of all descriptions; as, for instance, to a labourer who had contracted to dig and stem a well for cattle, to be paid for, by the foot,¹³

Labourer.

¹ 5 Rettie, 981. ² *L.c.*, per Lord Justice-Clerk Moncreiff, 988.
³ 12 Q. B. D. 201, 13 Q. B. D. 832. ⁴ *L.c.*, per Brett, M.R., 834.
⁵ 18 Q. B. D. 683; but in *Smith v. Associated Omnibus Co.* (1907), 1 K. B. 916, the driver of a motor omnibus was held to be a person "otherwise engaged in manual labour," and entitled to the benefit of the Act.
⁶ 19 Q. B. D. 647. See *Leech v. Garside*, 1 Times L. R. 391.
⁷ 19 Q. B. D., per Lord Esher, M.R., 651.
⁸ (1892) 1 Q. B. 226; *Jackson v. Hill*, 13 Q. B. D. 618, is to the same effect.
⁹ (1892) 1 Q. B., per Fry, L.J., 229.
¹⁰ (1891) 1 Q. B. 601. The workman in question happened to be a railway servant, so that the case is not directly an authority under the Employers' Liability Act, 1880;
Lamb v. G. N. Ry. Co. (1891) 2 Q. B. 281, note at 282.
¹¹ (1900) 2 Ir. R. 714. ¹² 19 Times L. R. 492.
¹³ *Louchter v. Earl of Radnor*, 8 East, 113.

and who employed another to assist him in the work, though not to a caretaker¹ of goods seized under a *f. fa.* It does not apply to "a carpenter, a bailiff, nor the clerk of a parish."²

Servant in husbandry.

A dairymaid who, besides cooking and making beds, assisted in harvest work, has been held not necessarily excluded from the definition of "servant in husbandry."³ But a waggoner who worked at harvesting is a servant in husbandry.⁴ So is "a man employed to dig the ground"⁵ but a person engaged by the owner of a farm to keep the general accounts of the farm, to weigh out the food for the cattle, to set the men to work, to lend a hand in anything if wanted, and in all things to carry out the orders given to him is not; because "his chief duty was to keep the general accounts belonging to the farm. From that, it should seem that his position was rather that of a steward than of a servant."⁶

Journeyman.

As to journeymen. "Etymologically considered," says Day, J.,⁷ "a journeyman is one who is employed by the day; but that is not the sense in which the term is ordinarily used, for in most trades where journeymen are employed—hutehers, hakers, and tailors, for instance—they are hired and paid by the week." And in the same case, in the Court of Appeal, Brett, M.R., says: "A 'journeyman' is a man who is working for a master, such as a carpenter."⁸

Artificer and handcraftsman.

Miner.

Quarryman.

An "artificer,"⁹ says the same learned judge, in the same place, is a skilled workman, and a "handicraftsman" is the same. The term "miner" would include all persons employed in underground working in search of minerals.¹⁰ A quarry is distinguished from a mine as being "a place upon or above and not underground."¹¹ Quarrymen, if not held to be miners within the contemplation of the Act,¹² would yet be within it as "otherwise engaged in manual labour"; which has been expounded by Brett, M.R.,¹³ to mean "any person engaged in the same way as all the others are engaged, although they do not go by the same names."¹⁴

A county court judge having ruled that an engineer engaged in looking after electric lighting plant was not a workman, the case was sent back for a new trial.¹⁵

A lunatic employer is liable, unless he can prove not only his incapacity to make the contract out of which the claim against him arises, but in addition the plaintiff's knowledge of his incapacity.¹⁶

¹ *Branwell v. Penneck*, 7 B. & C. 536.

² *Morgan v. London General Omnibus Co.*, 13 Q. B. D., per Brett, M.R., 833.

³ *Ex parte Hughes*, 23 L. J. M. C. 138; see, too, *Clark v. J'Naight*, Arkley (Sc.), 33, where it was held that a servant engaged by a farmer to act as "kitchen-woman and byre-woman" came within the class of "servants in husbandry."

⁴ *Lilley v. Elwin*, 11 Q. B. 742.

⁵ *Morgan v. London General Omnibus Co.*, 13 Q. B. D., per Brett, M.R., 834.

⁶ *Davies v. Lord Berwick*, 3 E. & E., per Crompton, J., 553.

⁷ *Morgan v. London General Omnibus Co.*, 12 Q. B. D. 206.

⁸ 53 L. J. Q. B. 353. The passage is not in the Law Reports.

⁹ This includes a stoker or fireman: *Wilson v. Zulucta*, 14 Q. B. 405; a calico pattern designer: *Ex parte Ormrod*, 1 D. & L. 825; a superintendent of looms: *Leech v. Gartside*, 1 Times L. R. 391; and the overseer of a printing-office: *Bishop v. Letts*, 1 F. & F. 401.

¹⁰ *Brown v. Butterley Coal Co.*, 2 Times L. R. 159; *Morrison v. Baird*, 10 Kettie, 271, 280. Cp. *Marrow v. Flimby & Broughton Moor Coal and Fire Brick Co.*, (1899) 2 Q. B. 588; *Fitzpatrick v. Evans*, (1902) 1 K. B. 505.

¹¹ Per Turner, L.J., *Bell v. Wilson*, L. R. 1 Ch. 303.

¹² *Devonshire v. Rawlinson*, 26 J. P. 72.

¹³ *Morgan v. London General Omnibus Co.*, 53 L. J. Q. B. 353.

¹⁴ As to "a contract personally to execute any work or labour," see *Sadler v. Henlock*, 4 E. & B. 570.

¹⁵ *Isaacson v. New Grand Clapham Junction*, 19 Times L. R. 150.

¹⁶ *Imperial Loan Co. v. Stone*, (1892) 1 Q. B. 599.

In a New South Wales case¹ plaintiff, being the owner of a couple of carts, went, when it suited him, to the brick-kiln of the defendants and took bricks away to the places on the defendant's works where they were required; for which he received a specified sum of money. He was not bound to do the work, though, if he thought fit to do it, he was paid. While the plaintiff was loading, the roof of the kiln fell in, and he was injured; for which injuries he sued under the Act, claiming under the words a "contract of service or a contract personally to execute any work or labour"; the Supreme Court held him disentitled to recover, because a contract to be within the words must be a contract to personally serve or to serve for some period or to do some particular work. "It seems to me that the contract must be for the personal doing of the work by the plaintiff who brings an action of this sort."²

Although *prima facie* an infant is incapable of contracting, there is "an exception which is based on the desirableness of infants employing themselves in labour; therefore, where you get a contract for labour and you have a remuneration of wages, that contract, I³ think, must be taken to be *prima facie* binding upon an infant."⁴ If viewed as a whole the contract is an unfair one, it is void as against the infant.⁵

The definition of workman does not include those who are working in Government departments; and for two reasons: Government workmen not included in the Act.

First, the rights of the Crown are not affected by any Act in which the Crown is not specially named.⁶

Secondly, the Crown is not liable for torts committed by its servants.⁷

Under the Employers' Liability Act, 1880, an express contract by which the workman engages to forego the benefits of the Act in the event of injury is valid;⁸ since *sec. 1* of the Act only negatives the Workmen may contract themselves out of the Act.

¹ *Lobb v. Amos*, 7 N. S. W. R. (Law) 92.

² *L.c.* per Sir James Martin, C.J., 92.

³ *De Francesco v. Barnum*, 45 Ch. D. 439.

⁴ *Corn v. Matthews*, (1893) 1 Q. B. 310, explained by Channell, J., *Green v. Thompson*, (1899) 2 Q. B. 8, and illustrated by *Flower v. L. & N. W. Ry. Co.*, (1894) 2 Q. B. 65;

Clements v. L. & N. W. Ry. Co., (1894) 2 Q. B. 482.

⁵ *Bac. Abr. Prerog.* (E) 5.

⁶ *Johnstone v. Sutton*, 1 T. R. 493; *Buron v. Denman*, 2 Ex. 167. *Ante*, 221.

⁷ *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357. Messrs. Roberts and Wallace, *Liability of Employers* (3rd ed.), 465-466, suggest that the provisions of the Truck Act, 1831 (1 & 2 Will. IV. c. 37), were applicable to the agreement in *Griffiths v. Earl of Dudley*. But if the wages of a workman + risk are 30s. a week, can wages at 25s. - risk (in respect of which the employer undertakes to pay 5s. to an insurance fund) be wages of which any part is "made payable otherwise than in current coin." Assuming they are, see *Hewlett v. Allen*, (1892) 2 Q. B. 662, affirmed in *H. L.* (1894) A. C. 383; also *Chowner v. Cummings*, 8 Q. B. 311; *Archer v. James*, 2 B. & S. 61, where the Ex. Ch. were equally divided.

The rule of law as to contracting out of a liability imposed by statute has been the subject of so much discussion that it may be well to summarise the authorities. The maxim of law is *Quisvis renunciare potest juri pro se introducto*: *Bovill v. Wood*, 2 M. & S., per Bayley, J., 25; or as it appears in *Cod.* 2, 3, 29: *Omnes licentiam habere, his, quae pro se introducta sunt, renunciare*. Cp. *Wilson v. McIntosh*, (1894) A. C. 133; 4 Bl. Comm. 317; *Great Eastern Ry. Co. v. Goldmid*, 9 App. Cas., per Lord Selborne, C., 936, where the form is, *unusquisque potest renunciare juri pro se introducto*; and *Enshin v. Wylie*, 16 H. L. C., per Lord Westbury, C., 15, where the form is, *Cuique competit renunciare juri pro se introducto*.

In *Renobotham v. Wilson*, 8 E. & B. 151. Martin, J., says: "I cannot perceive any reason, either at law or otherwise, why parties should not be at liberty by apt words, either to add to, or qualify, or make more or less extensive, the right which the law of itself provides and imposes, or, if they think fit, declare that such rights shall not exist at all. *Quilibet potest renunciare juri pro se introducto*." Again, in *Rumsey v. N. E. Ry. Co.*, 14 C. B. (N. S.), Erie, C.J., 649, says: "It is undoubtedly competent

implication of an agreement by the workman to bear the risks of the employment, but does not forbid the constitution of an express agreement.

Expiration of
the Act.

The Employers' Liability Act, 1880, which would have expired at the end of the session in 1888, was continued by 51 & 52 Vict. c. 58, until the December 31, 1889, and has since been continued annually by the Expiring Laws Continuance Act.

to any man to renounce a privilege which is given to him by a statute." Lord Westbury, C., draws attention to the words *pro se* in the maxim, which he says have been introduced to show that "no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of": *Hunt v. Hunt*, 31 L. J. Ch. 175. See also *Markham v. Stanford*, 14 C. B. N. S., per Byles, J., 363; *Morton v. Marshall*, 2 H. & C. 305. The maxim as to this is, *paucis privatorum publico furi derogari nequit*: *Swan v. Blair*, 3 Cl. & F. 621, or, as it elsewhere appears, *non derogatur*.

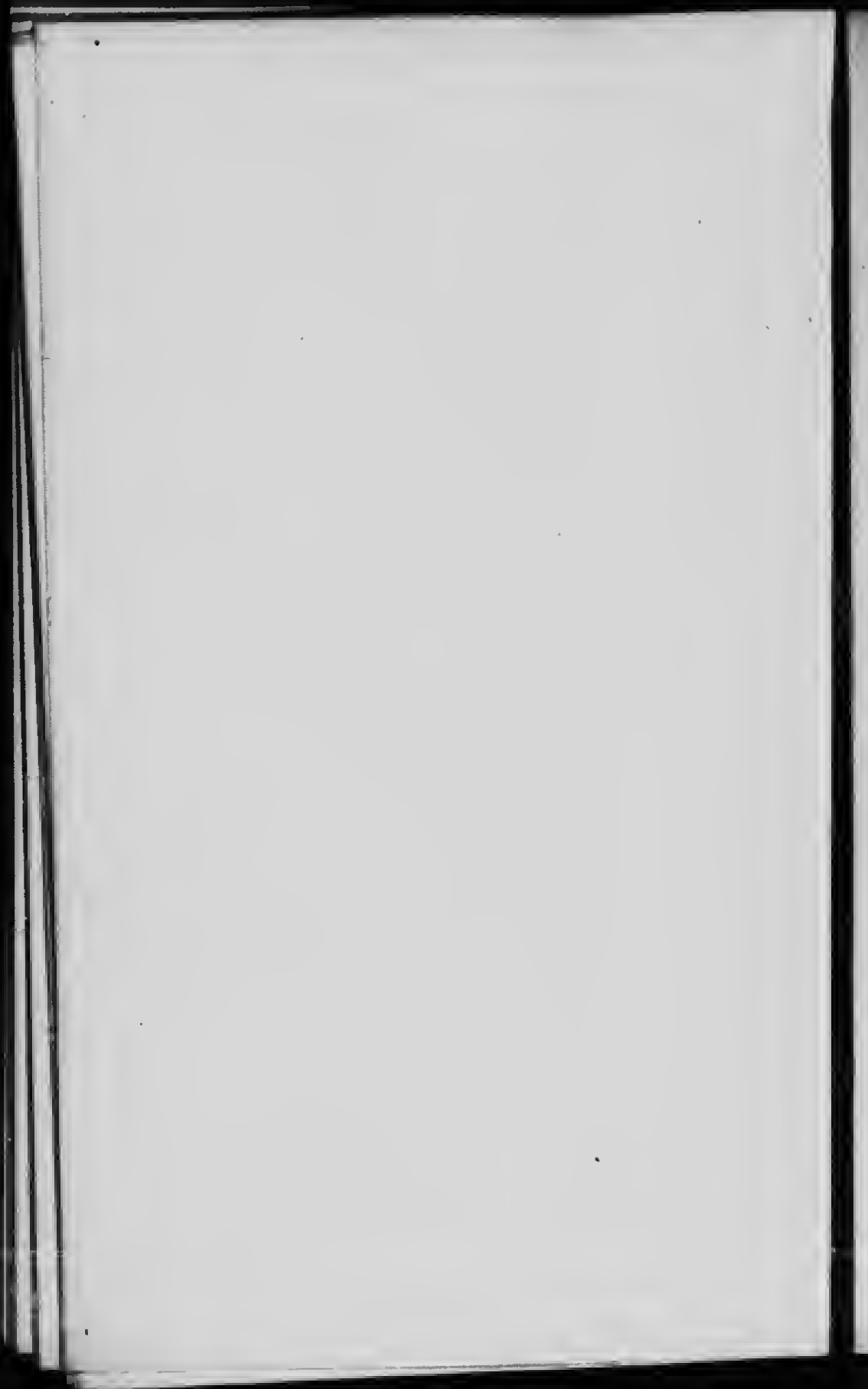
In *Printing and Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 465, Jessel, M.R., says: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." This passage is cited and approved by Fry, L.J., *Rouillon v. Rouillon*, 14 Ch. D. 365, and by Chitty, J., *Tallis v. Jackson*, (1892) 3 Ch. 445. Holmes, The Common Law, 205. See also *Wallis v. Smith*, 21 Ch. D., per Jessel, M.R., 266. As to the argument of "public policy," Burrough, J., says, *Richardson v. Mellish*, 2 Bing. 252: "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." Even more forcible are the words of Mr. Pierpont *arguendo*, the passage is too long to extract, in *The King v. Hampden*, 3 How. St. Tr. 1293; see also Lord Mansfield, C.J., *Wilkes's case*, 19 How. St. Tr. 1112.

"Public policy," as a ground of legal decision, is exhaustively treated in the leading case of *Egerton v. Earl Brownlow*, 4 H. C. L. 1. Pollock, C.B., in advising the Lords, summarises the cases as establishing the distinction, "that where a contract is directly opposed to public welfare it is void, though the parties may have a real interest in the matter, and an apparent right to deal with it." See also per Bowen, L.J., in *Maxim Nordenfelt, & Co. v. Nordenfelt*, (1893) 1 Ch. 665, affirmed in *H. L.* (1894) A. C. 535; and per Lord Halsbury, C., *Janson v. Driefsteijn Consolidated Mines*, (1902) A. C. 491, citing *Marshall, Marine Insurance*. In *re Fitzgerald*, (1904) 1 Ch. 373.

Invito beneficium non datur D. 50, 17, 69; and *Pacta quæ contra leges constitutioneque vel contra bonos mores sunt nullam vim habere, indubitati juris est*, Cod. 2, 3, 6, are the maxims of the Roman law.

END OF VOL. I.









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