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The war seems to be disturbing things in England in judicial as well as in other circles. The Bar Council objects to the appointment of Lord Justice Collins to inquire into the adminstration of the Patriotic fund and speaks of the "increasing practice of appointing Judges to perform duties outside, and often inconsistent with, those attaching to their judicial position, as contrary to the public interest." The *Law Journal* refers to this in a skit entitled: "The New Zealander at the Law Courts," which he finds devoid of Judges, and is told by the "ancient attendant" that some of them have gone to settle disputes in the Cornwall Herring Fishery, another to help the Speaker add up a column of figures in the House of Commons, and the rest to South Africa, to charge Grand Juries on war subjects, and to clear the jails filled by Kitchener; whilst the *Law Times* formulates what it believes to be the voice of the profession in England on the subject as follows:

"1. It is desirable that judges should be absolutely independent of the Executive. (a) To keep them free from possible political entanglements. (b) To keep them free from invidious advantages by placing the Executive under an obligation to the individual judge

2. That a judge's time is already bought by the nation on behalf of suitors in the courts, and that additional labours ought not to be imposed upon him even though capable of being carried on when the courts are not sitting.

3. That if a judge is, under any circumstances, to be asked to assist the Executive, those circumstences ought to be such as to leave the Executive no alternative but to require the services of a judge. This means that the inquiry involved shall be one for which a president is required of high judicial training—indeed, in which a president so qualified is absolutely indispensable."

It seems to us that it would be a pity that the services of men occupying judicial positions should not under some circumstances be available for matters outside their judicial duties, but if they are so called away it is clear that their places should be so filled that the public should not suffer by causes being left unheard and undisposed of.

NEGLIGENCE IN RELATION TO PRIVITY OF CONTRACT.

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I. It is sufficiently obvious that, from a purely logical standpoint, the natural and probable consequences which the common law declares to be the measure of a man's liability for a negligent act include the likelihood that a certain individual will be injured as well as the likelihood that he will be injured in a certain manner. If therefore the courts had carried out that doctrine consistently, the question whether the plaintiff was one of those persons to whom the duty of exercising reasonable care was owed by the defendant would be decided by the same standard as the question whether there is a causal connection between the given breach of that duty and the physical changes which constituted the injury in suit. That is to say, the issue proposed would be, whether the defendant ought, as a man of ordinary sense and intelligence, to have seen that, if he should be careless in respect to the given subject matter, persons coming within the same category as the plaintiff would probably suffer damage.

In the countries where the common law is administered, however, the course suggested by these obvious considerations has not been pursued. It is true that the courts, in dealing with one large class of cases, viz., those in which the injury was the direct result of the use of an agency which was under the immediate control of the defendant at the time when the plaintiff was damaged by it, have naturally and perforce worked out a theory of liability which confers a right of action upon the same classes of persons as would have that right if the test of reasonable anticipation had been consciously applied. Under no conceivable scheme of juridical responsibility could a defendant be heard to allege that a person who was, as a matter of fact, injured by reason of his contact with or proximity to real or personal property which the defendant then controlled, was not one of those persons whom a reasonable man would have expected to suffer injury from such contact or proximity (*a*). The applicability of the fundamental

(*a*) See *Elliott* v. *Hall* (1885) 15 Q.B.D. 315, where this point is clearly brought out. It was laid down in a recent case by Lord Justice Rowen that, "if the owner of premises knows that his premises are in a dangerous condition, and that people are coming there to work upon them by his own permission and

principle, Sic utere tuo, ut alienum non laedas, is here so manifest that there is no room for controversy as to the extent of responsibility (*b*). But in the cases where this element of control cannot be treated as a determinative factor—the cases, that is to say, whose common distinctive feature is the circumstance that the plaintiff has been injured through the negligence of other parties in respect to a transaction to which he was a stranger—it is only very recently, and to a very limited extent, that judges have shewn any willingness to determine the question whether the plaintiff was one of those persons to whom the defendant owed a duty to use care upon a theory which would ascribe a proper weight to the doctrine of probable consequences. (See XII. post.) This disregard of a fundamental principle has borne its natural fruit in a series of decisions which furnish as deplorable illustration as can be mentioned of the characteristic defects of what the late Poet Laureate aptly described as "the lawless science of our law."

II. The obscurities which beset the subject have been greatly aggravated by the very unpraiseworthy ingenuity which judges have commonly exerted to confine their discussions and their rulings within the narrowest possible boundaries. Even the House of Lords, which, as a general rule, is not lacking in a due appreciation of the obligations incumbent upon it as a court of last resort in a country where most of the codification of the law must for the present be carried on by the collation of earlier decisions, has in this instance chosen the worse part. In the recent case of *Mulholland* v. *Caledonia R. Co.* (*a*) it has had for the first time an opportunity of expressing its views as to the theory upon which the limits of liability for negligence should, as respects persons, be fixed; but it has failed entirely to rise to the occasion. When it is remembered how much trouble questions of the type

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invitation, of course he must take reasonable care that these premises do not injure those who are coming there;" that "it is because he has the conduct and control of premises which may injure persons whom he knows are going to use them and who have a right to do so, that he is bound to take care to protect those persons who will thus be brought into connection with him," and that a similar obligation and for a similar reason arises where the thing so controlled is a chattel. *Le Lievre* v. *Gould* (1893) 1 Q.B. 491. Compare *Heaven* v. *Pender* (1882) 9 Q.B.D. 302, per Cave, J.; *Smith* v. *Steele* (1875) 10 Q.B. 125, per Blackburn, J.; *Collis* v. *Selden* (1868) L.R. 3 C.P. 495, per Bovill, C. J.; *Scholes* v. *Brook* (1891) 63 L.T.N.S. 837, per Romer, J.

(*b*) "Where is the duty of care? I answer that duty exists in all men not to injure the property of others." *Hayn* v. *Culliford* (1879) 4 C.P.D. 182, 185, per Bramwell, B.

(*a*) (1898) A.C. 216.

involved have given the courts since the ruling in *Langridge* v. *Levy* (*b*), the contracted scope of the arguments seems to amount to a sort of dereliction of duty.

Unsatisfactory as this case is, however, it marks the completion of an important stage in the development of this branch of law. As a deliberate judgment of the highest court of the Empire, it will not only operate as a final settlement of such questions as actually fall within its scope, but will have a considerable influence in determining the trend of judicial opinion with respect to points upon which it does not directly touch. The time seems not inopportune, therefore, for a survey of the whole subject which is dealt with in one of its phases by this decision. It will be convenient to assume, for the sake of simplicity, that we always have to do with persons whose exposure to the dangerous conditions which caused their injury occurred while they were in the exercise of some right which it is permissible, in the present connection, to describe as perfect. Such modifications as these principles may demand in any particular case, where the plaintiff's rights are of the inferior grade, denoted by the terms "mere licensee" and "volunteer," or "trespasser," can be readily supplied. It would be still more out of place in a general investigation, like the present, to take any account of the theory elaborated by Bowen, L.J., in *Thomas* v. *Quartermaine* (*c*), that the maxim, Volenti non fit injuria, operates by negativing the existence of a duty in regard to the persons who bring themselves within its terms.

III. The only available starting-point for an investigation which the decisions suggest seems to be the principle that an action for injuries resulting from negligence in respect to a subject-matter which is covered by a contract cannot, as a general rule, be maintained by one who is a stranger to that contract. The discussion upon which we are entering may, therefore, be appropriately opened with the statement that this principle has been recognized

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(*b*) 2 M. & W. (1837) 519.

(*c*) (1887) 18 Q.B.D. 625. The observations of Lord Esher in *Yarmouth* v. *France* (1887) 19 Q.B.D. 647 (pp. 652, 657) and of Lord Halsbury and Lord Herschell in *Smith* v. *Baker* (1891) A.C. 325 (pp. 336, 366) shew that this theory has by no means found such universal acceptance that it can be placed on the same footing as the doctrines respecting the position of one who is and of one who is not invited to enter on the premises or use a chattel.

in cases where the contract was one of sale (*a*), of bailment (*b*), for the manufacture of a specific article (*c*), for work and labor with reference to a chattel (*d*), for professional services (*e*), and for the transmission of telegrams (*f*).

IV. It can scarcely be doubted that this arbitrary doctrine is, to some extent at least, one of the inconvenient legacies bequeathed to modern English law by the old technicalities as to form of action. The standpoint of the judges by whose decisions it was established in its present form is indicated unmistakably by the remark of Lord Abinger in *Winterbottom* v. *Wright* (*a*), that the cases in which the law permits a contract to be turned into a tort,

(*a*) *Langridge* v. *Levy* (1837) 2 M. & W. 519, 4 M. & W. 337; *Winterbottom* v. *Wright* (1842) 10 M. & W. 109; *Longmoid* v. *Halliday* (1851) 6 Exch. 761; *George* v. *Skivington* (1869) L.R. 5 Exch. 1, per Cleasby B. "The general principle," remarks a distinguished American judge, "applicable to this class of cases is that a vendor takes on himself no duty or obligation other than that which results from his contract. For a breach of this he is liable only to those with whom he contracted. All others are strangers. The law fastens on him no general or public duty arising out of his contract, for a breach of which he can be held liable to those not in privity with him:" *Davidson* v. *Nichols* (1866) 11 Allen 514, per Bigelow, C.J.

(*b*) *Caledonia R. Co.* v. *Mulholland* (1898) A.C. 216; *Heaven* v. *Pender* (1883) 11 Q.B.D. 503.

(*c*) *Francis* v. *Cockrell* (1870) L.R. 5 Q.B. 184, per Hannen, J., arguendo.

(*d*) *Collis* v. *Selden* (1868) L.R. 3 C.P. 495, where a declaration was held demurrable which alleged that the defendant negligently hung a chandelier in a public house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier unless properly hung, was likely to fall upon and injure them, and that the plaintiff being lawfully in the public house, the chandelier fell upon and injured him. In *Elliott* v. *Hall* (1888) 15 Q.B.D. 315, Grove, J. (p. 321) said that he would have found some difficulty in arriving at the same conclusion as the court came to in this case, but his remark, as the context shews, had no reference to the general principle stated in the text, but merely to the strictness with which the pleadings were construed.

(*e*) *Robertson* v. *Fleming* (1861) 4 Macq. 167, the House of Lords explicitly rejected the doctrine that where A. employs B., a professional man, to do some act professionally, under which, when done, C. would derive a benefit, the negligence of B. in carrying out the instructions of his employer, by reason of which C. loses the contemplated benefit, will render him answerable to C. A recent decision on very similar lines is that a surveyor appointed by a landowner who has procured from another person a loan of money for a purchaser of the land who is under covenant to erect a building thereon, the understanding of the parties being that the money is to be advanced in instalments as the work progresses, owes no duty to the lender to use care in making out the certificates which were to shew that certain stages in the work had been reached, although the advances are made in a reliance on the correctness of those certificates. *Le Lievre* v. *Gould* (1893) 1 Q.B. (C.A.) 493, overruling *Cann* v. *Wilson* (1888) 39 Ch.D. 39, a case of valuation of property with a view to raising money on it.

(*f*) *Dickson* v. *Renter's Tel. Co.* (1877) 2 C.P.D. 62, 3 C.P.D. 1; *Playford* v. *United Kingdom Tel. Co.* (1869) L.R. 4, Q.B. 706; *Feaver* v. *Montreal Tel. Co.* (1873) 23 Upper Can. C.P. 150. The American cases holding a telegraph company liable to a lessee are not based on any denial of the correctness of the general principle relied on in these cases, but merely override it for special reasons. See V. note (*e*), post.

(*a*) 10 M. & W. (1842) 109.

except those in which some public duty has been undertaken or public naisance committed, are all cases in which an action might have been maintained on the contract. It was considered, therefore, that the combined effect of this principle and of the rule that no one but a party to a contract can sue on it, was that in no case whatsoever create any right of action arise in favour of a stranger to the contract as a result of the non-performance.

That there is an obvious petitio principii involved in the argument seems evident. It does not by any means follow that, because a party to a contract can recover in tort only when the rights acquired by his contract are sufficient to enable him to maintain an action, a person who had nothing to do with the contract, but who subsequently finds himself damaged by what the parties to it have done or left undone, should be told that he has no remedy at all. To declare such a person unable to sue on the contract itself is one thing (*b*). It is quite another thing to argue that the principle by which a party to the contract, whatever the form of his action, can recover only where he could have recovered in a suit directly upon the contract, involves the corollary that a stranger to the contract, being unable to sue upon it, is precluded from redress altogether. In the one case, as the parties have chosen to define their relations by an agreement between themselves as to the subject matter, it is reasonable enough to say that the agreement shall be the measure of their rights in regard to the same subject matter. But the reasoning which would make this principle controlling with respect to a stranger to the contract, a person who has not assented to it and has no means of securing its proper performance, seems to savour strongly of that scholasticism which has so often led the English Courts to emphasize the shadow

(*b*) It is an interesting example of the conservatism of English jurisprudence that, even after the supremacy of equity over law is supposed to have become an accomplished fact, the rule that a stranger to a contract cannot sue on it, even when it was made for its express benefit, should subsist side by side with the doctrine that such a contract will create a right of action in favour of the stranger to it when it amounts to a declaration of trust: *Re d'Angebau* (1880) 15 Ch. D. 57; *Re Flavell* (1883) 25 Ch. D. 93; *Gandy* v. *Gandy* (1885) 30 Ch. D. 57. The theory upon which, according to Crompton, J., in *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393, the common law rule is based, viz.: that it would be a "monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued," would, if admitted as valid by equity courts, prove fatal to most declarations of trust. The obvious inference seems to be that, unless some reasonable way of differentiating declarations of trust in favour of a designated person from other contracts for the benefit of a third party, the equitable and common law rules cannot logically co-exist in the same system of jurisprudence.

and ignore the substance of a juridical situation. It has been attempted to justify the accepted rule on broader grounds, but these will be more conveniently treated in another place. (See XIII. post).

The hardship of the general rule is, in practice, a good deal mitigated by the various qualifications to which it is subject. These we shall now proceed to discuss.

V. The first two doctrines to be noticed are based on considerations which only affect a small proportion of the community.

(A). Any person who is injured by negligence in the performance of a public duty may recover damages from the person subject to that duty, although the contract which led to his being in the situation which exposed him to the risk of injury from such negligence may have been entered into by other parties.

The familiar principle 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*), would, as respects duties which are public in the sense that they are undertaken by State functionaries, plainly involve the consequences indicated by this proposition, if such duties could legitimately be referred to an antecedent contract. But as this element is wanting in such cases, the rule as to public duties concerns us in the present connection only in so far as it relates to duties which are deemed public, because they arise out of the pursuit of a few occupations, the essential characteristic of which is that they imply a standing offer to perform certain services for any member of the community who may demand them. All the reported decisions seem to have reference to common carriers, whose liability for injury to persons or property who have once been received on the transporting vehicle, is, as is well settled, independent of contract (*b*), but the rule would presumably be applied in an action brought against an innkeeper or a farrier (*c*). A notary-public, however, whose

(*a*) Best, C.J., in *Henly* v. *Mayor, etc.*, 5 Bing. 91 (p. 107). See also Lord Holt's remarks in *Lane* v. *Cotton*, 1 Ld. Raym. 646 (p. 654) as the right of action against sheriffs.

(*b*) *Winterbottom* v. *Wright* (1842) 10 M. & W. 109; *Longmeid* v. *Holliday* (1851) 6 Exch. 761; *Foulkes* v. *Metropolitan R. Co.* (1880) 5 C.P.D. 157; *Marshall* v. *York, etc. R. Co.* (1851) 11 C.B 655; *Martin* v. *G.I.P.R. Co.* (1867) L.R. 3 Exch. 9; *Austin* v. *Great Western R. Co.* (1867) L.R. 2 Q.B. 442; *Dalyell* v. *Tyrer* (1858) El. Bl. & El. 899.

(*c*) See the opinion of Lord Holt in *Lane* v. *Cotton*, ubi supra.

functions would seem naturally to place th m in a similar category, is held not to be liable to a person whom his negligence may collate.ily injure (*d*). Whether any other occupations are public within the meaning of the rule is doubtful, as the books suggest no diagnostic mark by which they can be identified (*e*).

It would seem that this doctrine as to public duties, though depending historically upon considerations of social expediency, might also be referred to the principle of an invitation implied from the nature of the occupations of which such duties are an incident (*f*). But any speculations in this direction would be purely theoretical.

(B). Apothecaries or surgeons are liable for the unskillful treatment of their patients, although they were employed by other parties (*g*).

The conceptions which underlie this rule would seem to be analogous in some respects to those which are apparent in (A), but the foundation actually assigned for it by the courts, is that, under any other doc rine, the defendant would virtually evade all liability, since, in the nature of the case, only the patient could prove actual damage—at all events where no loss of services is involved. This reason is interesting, as it dimly suggests the existence of a great principle, which, if admitted as a determinative factor in this class of cases, would plainly aid us greatly in putting the limits of responsibility upon a more rational basis. If such inconsistencies were not so common in English law, one might well feel some surprise that a doctor should be held responsible in this ground to a person not privy to the contract of employment, while, in other cases of professional services rendered under precisely similar conditions, the immunity of the defendant being equally inevitable unless the stranger to the contract for whose benefit it was made is permitted to sue, this consideration is not only not allowed the

(*d*) *Simpson* v. *Thomson*, 3 App. Cas. 279 (p. 289).

(*e*) One of the grounds assigned in the United States for holding telegraph companies (see IV. ante), is that by the statutes which authorize them to do business they are required to send messages for anyone who may apply and without any und preference, are therefore virtually public agents or servants in the same sense carriers. *Ellis* v. *American Tel. Co.*, 95 Mass. 231. Another view is that they are actually common carriers: Shearm & Redf. on Negl. (5th ed.) secs. 534, 535.

(*f*) See such cases as *Marshall* v. *York, &c., Ry. Co.*, *Austin* v. *Great Western R. Co*, and *Dalyell* v. *Tyrer*, cited in note (*b*), supra.

(*g*) *Pippin* v. *Shephard* (1822), 11 Price 400; *Gladwell* v. *Steggall* (1839) 8 Scott 60; 5 N.C. 733.

same weight, but, so far as the present writer is aware, has not even been discussed (*h*).

VI. The next two propositions exhibit the effect of doctrines which operate by carrying us altogether outside the characteristic principles of the law of negligence.

(C). **The operation of the general rule that a person who creates a public nuisance is liable to anyone who, being in the exercise of his lawful rights, sustains special damage therefrom, is not restricted by the fact that the nuisance resulted from the negligent performance of a contract with a third person (*a*).**

This rule amounts simply to a statement that, if the actual consequences of a person's negligence is the creation of a nuisance, his liability is measured by the standards appropriate to that offence, and is therefore really determined without any regard to the question whether he was or was not negligent. The lower offence, being, as it were, merged in the higher, it becomes quite immaterial whether the plaintiff was a stranger to the contract in the performance of which the nuisance was created. The circumstance that the material substances which constituted the injurious agency had passed out of the control of the negligent person at the time they inflicted the injury in suit also ceases to be defence under such circumstances, as is shown by the cases where a landlord is held liable for a nuisance which existed on the leased premises when they were demised (*b*).

The essential result of the rule, therefore, is that a negligent act which produces precisely the same physical conditions may render a person liable to a much wider range of persons in one case than in another, merely because the locality in which those conditions happen to be produced renders them a public nuisance,—a predicament which obviously cannot be justified on logical grounds.

(D). If A, in carrying a contract with B, is not merely negligent, but is also guilty of a fraudulent misrepresentation in respect to the subject-matter, a stranger to the contract, C, who is injured by his reliance upon

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(*h*) See V. ante.

(*a*) *Longmeid* v. *Holliday* (1851) 6 Exch. 761, where Parke B. instanced the case where a defective bridge is erected by a contractor on a public highway. To the same effect see *Collis* v. *Selden* (1868) L.R. 3 C.P. 495; *Winterbottom* v. *Wright* (1842) 10 M. & W. 109.

(*b*) *Rosewell* v. *Prior*, case 6, 2 Salk. 460, approved in *Cheetham* v. *Hampson*, 4 T.R. 318, per Buller, J., p. 320; *Rich* v. *Basterfield*, 4 C.B. 783, 16 L.J.C.P. 273; *Gandy* v. *Jubber*, 5 B. & S. 78, 9 B. & S. 15.

that misrepresentation may recover damages from A, provided he falls within the category of those persons who are permitted to claim an indemnity for fraud from one with whom they have not directly dealt (*c*).

The application of the above doctrine to cases of this type seems to have been originally due to the desire of the judges who decided *Langridge* v. *Levy* to turn the flank of a troublesome problem. But before long its influence was manifested in a more positive form. In two cases (*d*) where no such evasion of the fundamental issue was possible, these judges committed themselves without reservation to the theory that, where the nature of the facts is such as to exclude the conceptions of a nuisance and of an inherently dangerous thing, fraud is not merely a possible ground, but the only ground upon which a stranger to a contract of sale could recover damages for injuries traceable to its non-performance. Whether there can be a recovery under this doctrine is obviously a mere question of fact,—was the defendant guilty of a fraudulent representation, and was the plaintiff one of those persons who have a right to be indemnified for injuries caused by reliance on that representation? Here again, as in (*C.*) ante, the doctrine operates so as to make the defendant's negligence, though in a different

(*c*) *Langridge* v. *Levy* (1837) 2 M & W. 519; 4 M. & W. (Exch. Ch.) 337 The rationale of this case is clearly shewn by the following passage of the opinion of Baron Parke: "As there is 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 person injured." In a later case the principle of the decision was said to be, "that 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." Alderson, B. in *Winterbottom* v. *Wright* (1842) 10 M. & W. 109 (p. 115). Compare the remarks of Parke, B. in *Longmeid* v. *Holliday* (1851) 6 Exch. 761; and of Page-Wood, V C. in *Barry* v. *Croskey* (1861) 1 John. & H. 1. It was also expressly stated in *Blakemore* v. *Bristol, &c. R. Co.* (1858) 8 El. & Bl. 1035 that wilful deceit was the ground of the decision (p. 1050).

(*d*) *Winterbottom* v. *Wright* (1842) 10 M. & W. 109; *Longmeid* v. *Holliday* (1851) 6 Exch. 761. The opinion of Cave, J. in *Heaven* v. *Pender* (1883) 9 Q.B.D. 302, shews that he regarded the law as being settled in this sense, and although the actual judgment of the Queen's Bench Division was reversed by the Court of Appeal (11 Q.B.D. 503), the reversal had no reference to this theory. The comment of Brett, M.R. on *Langridge* v. *Levy*, supra, that, "taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son, and acted upon by him, such a decision upon such a ground in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud," (*Heaven* v. *Pender*, L.R. 11 Q.B.D. 503, 512) seems to be shaped by a wish to minimize the effect of the case as one adverse to his own theory, to be noticed hereafter. (XII.) The later decisions by the same Court, as just cited, leave no doubt as to the intention of the judges to negative the plaintiff's right to recover, if his action had sounded in negligence alone. In *Collis* v. *Selden* (1868) L.R. 3 C.P. 495 (see III. ante), all the judges conceded that the plaintiff might have recovered, if he had established fraud.

way, an immaterial factor, except in those cases where it is of that reckless and wilful character which is assimilated to fraud for reasons fully explained in *Le Lievre* v. *Gould* (*e*) and other cases. What persons are entitled to recover damages for fraud is a question which falls outside the scope of the present article (*f*).

VII. The next doctrine to be noticed is one which is referable to the conception that specially stringent obligations are incurred by those who undertake to deal with material substances of certain classes.

(E). A person who uses or leaves about in such a way as to cause danger an instrument which is dangerous in itself is liable independently of contract, to anyone who is injured thereby.

This proposition closely follows the words of Romer J. in *Scholes* v. *Brook* (*a*), expressly approved by Lord Justice Bowen in *Le Lievre* v. *Gould* (*b*). The doctrine which it embodies is apparently traceable to *Dixon* v. *Bell* (*c*), 198, where the injury was caused by the carelessness of the defendant's messenger in handling a loaded gun. Yet it seems very dubious whether the court which decided that case intended to do more than apply the principle that consummate care is obligatory in dealing with specially dangerous articles The gist of the ruling is merely that the jury was justified in finding that the defendant did not take the precautions which a prudent man would have taken in a case where a young and thoughtless girl was sent to fetch a gun known to be loaded, the view of Lord Ellenborough being that the message to the person in charge of the weapon should at least have instructed him to draw the charge instead of the priming merely. The defendant being delinquent in this respect, the case becomes simply one of an agent's negligent execution of negligent instructions, the result of which would of course be to fasten a joint and several liability both upon the principal and upon the agent. In view of the subsequent development of the law on this subject, however, the correct construction of this

(*e*) (1893) 1 Q.B. 493.

(*f*) It may, however, be noted that in *Barry* v. *Croskey* (1861) 1 John & H. 1 Vice-Chancellor Page-Wood considered that the plaintiff in *Langridge* v. *Levy*, supra could not have recovered, if he had been a stranger who had found the gun lying about in some public place, and relying on the name which he saw imprinted on it, had fired it off.

(*a*) 61 L.T.N.S. (1891) 837.

(*b*) (1893) 1 Q.B. 493.

(*c*) 5 M. & S. (1816) 198.

case has become immaterial. It is now well settled that the range of responsibility, in respect to persons, is wider where the injurious agency is a thing "dangerous in itself" or "imminently dangerous" than where it does not come under that category. For aught that appears the duty to deal with such things carefully seems like the duty to avoid creating a nuisance, to be owed to all the world. The existence of a duty, of this extent is not, at all events, negatived by any of the considerations which have been deemed fatal to the plaintiff's right of action in cases where the injurious agency was not of this character (*d*).

VIII. The most serious practical difficulty involved in the application of this doctrine is that no really adequate scientific test has ever been, or perhaps can be suggested, by which it can be determined whether an injurious agency does or does not belong to the category of things dangerous in themselves As a sober matter of fact, considered without reference to the subtleties of legal construction, it is impossible to deny that, under certain circumstances, things which are normally quite safe to persons who handle or come into proximity to them, change their character so completely as to be fraught with fully as much peril to such persons as the loaded gun in *Dixon* v. *Bell*, supra, supposing, that is to say, that the dangerous conditions are, as in that case, not apparent. Shall we say, then, that as has been declared by the New York Court of Appeals, that the distinguishing characteristic of things which are imminently dangerous in themselves, is that "se. .s injury" to any persons using them is a natural and probable consequence of such use? (*a*) The acceptance of this test would necessitate the adoption of the theory of that court in the case cited, that a defective scaffold is a thing essentially dangerous, and the same reasoning would be equally applicable to many other industrial agencies and articles of commerce. Even in New York, however, the courts have shrunk from the conclusion to which their own logic points (*b*), and such a theory enunciated would, of course,

(*d*) See *Longmeid* v. *Holliday* (1851) 5 Exch. 761, per Parke, B.; *Collis* v. *Selden* (1868) L.R. 3 C.P. 495, per Willes, J.; *Heaven* v. *Pender* (1883) 11 Q.B.D. 503, per Cotton, L.J.; *Caledonia R. Co.* v. *Mulholland* (1898) A.C. 216, per Lord Shand. See, however, the remarks of Baron Parke in *Langridge* v. *Levy* (1837) 2 M. & W. 519, referred to in X, post.

(*a*) *Devlin* v. *Smith* (1882) 89 N.Y. 470.

(*b*) *Losee* v. *Clute* (1873) 51 N.Y. 494 (steam boiler not a dangerous instrument; *Loop* v. *Litchfield* (1870) 42 N.Y. 351 (same decision as to fly-wheel which burst); *Burke* v. *De Castro* (1877) 11 Hun. 354 (same decision as to defective hoisting

be quite irreconcilable with the series of English cases which begins with *Langridge* v. *Levy* (*c*). So far as the actual decisions go, it would seem that the rule as to things dangerous is in England restricted to explosives (*d*), though it is not improbable that, if the question were actually presented, the judges might follow the American decisions which extend it to poisonous drugs (*e*).

In its present shape, therefore, this rule seems to be of a very slender juridical value, its operation being confined to a small class of articles, the boundaries of which it is difficult, if not impossible, to establish on any logical grounds. The law of the subject, however, might be placed upon a more rational foundation if cases of this type were referred, as they might well be, to the principles upon which a duty is in some cases predicated to impart information as to the dangerous qualities of substances which a person allows to pass out of his immediate control. [See (H.) post. and the cases cited in note (*g*), below]. On the one hand, it would be difficult to suggest any sound reason why the things which are regarded as "dangerous in themselves," should not, for the purposes of legal liability, be held to be removed from that category by proof that the person injured by them was aware of their true character. At

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rope). It should be noted however, that all these rulings preceded that in *Devlin* v. *Smith*, supr., and that the last one has been formally overruled in *Davies* v. *Pelham* (1892) 65 Hun. 573, aff'd (without opinion) in 146 N. Y. 363 (derrick for hoisting heavy stones). Other American courts seem to have uniformly refused to extend the liability of manufacturers and vendors on this ground beyond their immediate transferee. See *Ziemann* v. *Kieckhofer* (1895) 90 Wisconsin Rep. 497 (goods elevator); *Heizer* v. *Kingland, &c., Co.* (1892) 110 Missouri Rep. 105 (threshing machine); *Roddy* v. *Missouri Pac. R. Co.* (1891) 104 Missouri Rep. 234; 12 Lawy. Rep. Ann. 746 (defective brakes—compare Lord Shand's opinion in the *Mulholland Case* [1898] A.C. 216); *Goodlander Mill Co.* v. *Standard Oil Co.* (Circ. Ct. of App. 1894) 63 Fed. Rep. 400 (crude petroleum); *Bright* v. *Barnett* (1894) 88 Wis. 299, 26 Lawy. Rep. Ann. 524 (defective scaffold). S.P. *Smith* v. *Onderdonk* (1898) 25 Ont. App. 171 (defective locomotive).

(*c*) See especially the remarks of the judges in the cases cited in the notes (to VII) supra, and compare the remark of Lord Justice Bowen that the law of England "does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly." *Le Lievre* v. *Gould* (1893) 1 Q.B. 493 (p. 502), approving a dictum of Romer, J., in *Scholes* v. *Brook* (1891) 63 L.T.N.S. 837.

(*d*) See the cases cited in VII. supra. Compare *Purry* v. *Smith* (1879), 4 C.P.D. 325, (gas-fitter held liable, as for "a misfeasance independent of contract," to a servant of the proprietor of the building for an explosion of gas resulting from his carelessness in leaving an imperfectly connected tube); *Wellington* v. *Downer, &c. Co.* (1870), 104 Mass. 64 (manufacturer of inflammable oil, selling it without giving notice of its dangerous properties, liable to any person who may subsequently purchase it of a retail dealer).

(*e*) *Thomas* v. *Winchester* (1852) 6 N.Y. 397; *Norton* v. *Sewall* (1870) 106 Mass. 143.

all events, it is clear that, under such circumstances, the maxim, Volenti non fit injuria, would in most instances furnish a perfect protection to a defendant. On the other hand, it seems undeniable that the courts, in establishing the doctrine imposing a more than usually stringent rule of responsibility upon those who deal with things of this kind, have been much influenced by the fact that the persons who will handle or come into proximity to them, after they have left the possession of the original transferor, are commonly, in the very nature of the case, ignorant of the dangers to which contact or proximity will expose them (*f*).

In some cases the special duty alleged to have been violated in regard to articles exceptionally dangerous was that of notifying the transferee of their properties (*g*), and although the language used by the judges seems to shew that they viewed the injurious agency merely as things which required more care and caution than ordinary merchandise (*h*), rather than as things inherently dangerous in the sense with which we are now concerned, the analogy is sufficiently close to justify vouching these decisions in aid of our position that a rule, essentially identical in its practical results with that formulated in (E) above, and far more precise and rational, would be secured if the courts were simply to lay it down that one who transfers an exceptionally dangerous thing does not exercise the measure of care which the circumstances demand, unless, at the time of the transfer, he sees that the transferee is not under any misapprehension as to its properties, and that for an omission to discharge this duty he must respond in damages to anyone, whether a remote transferee or not, whom the article injures while its properties remain undisclosed and undiscovered by the persons through whose hands it passes. (See also XI., post.).

IX. A rule expressed in this form would place the liability for injuries caused by articles of this class on the same basis as that to which a person who has created a trap is subject. In fact it

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(*f*) In the American cases as to the sale of poisonous drugs see the last note. Much emphasis was laid on the fact that the plaintiff did not know and had no reasonable means of knowing that the drug was dangerous.

(*g*) *Brass* v. *Maitland*, 6 El. & Bl. 470; *Farrant* v. *Barnes* (1862), 11 C.B. N.S. 553; *Lyell* v. *Ganga Dai* (1875), Indian L. Rep. 1 All. 60, where the persons injured were the servants of a carrier to whom the dangerous article had been delivered for transportation. *S. P. Standard Oil Co.* v. *Tierney* (1891) 92 Kentucky Rep. 367; 14 Lawy. Rep. Ann. 677.

(*h*) See especially the opinion of Willes, J. in *Farrant* v. *Barnes*, supra.

would seem that the only essential difference between a trap and a thing dangerous in itself is that the former expression refers to the condition of real property or of chattels affixed more or less permanently to real property while the latter suggests a chattel of an essentially movable character considered without any relation to locality (*a*)

That there is, apart from contractual relations, a duty incumbent on the owner of premises to inform persons who rightfully enter thereon of anything in the nature of a trap, is well settled (*b*), the theory being, as the word itself shows that they may, in the absence of notification, be led by a feeling of false security to do something which, if they had understood the conditions, they would have left undone. As the situation thus predicated is obviously the same in all essential respects as that which arises when a person "uses or leaves about" one of those things which are dangerous in themselves it would seem that the liability in both instances might not unjustifiably be referred to the same considerations. The recognition of this analogy between traps and things dangerous in themselves would logically involve the result that the extent of responsibility, as respects persons, would be identical in each case, but whether this is the effect of the actual decisions is a matter of doubt. The language of Mr. Justice Willes in note (*a*) indicates that the liability for a trap is at all events wide enough

(*a*) The following remarks of Willes, J., in *Collis* v. *Selden* (1868) 3 C.P. 495, show the close affinity between the two classes of cases: "The chandelier is to be regarded as movable property, and the declaration should have shown either that it was a thing dangerous in itself, and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house. If that averment had been made and proved, the case might fall within the class to which *Sullivan* v. *Waters*, 14 Jr. C.L.R. 460, belongs,—as a trap to persons using or likely to use the way whether public or not." So in a case in the Court of Appeal, we find it declared in one passage that the danger arising from want of a cover for the hatchway of a lighter being perfectly obvious to everyone, the servant of a stevedore who falls through the hatchway, while working for a sub-contractor who has been placed in possession of it, cannot hold the owner of the lighter liable for the injuries so received on the theory that it was delivered to the sub-contractor in an "inherently dangerous condition," and that the danger was concealed from those who might be rightfully on board, while elsewhere the language used is to the effect that the plaintiff could not recover on the theory that the hatchway was a trap. *O'Neil* v. *Everest* (1891), 61 L.J.Q.B. 451. The same blending of the two conceptions is traceable in *Coughtry* v. *Woollen Co.*, 56 N.Y. 124 and *Devlin* v. *Smith* (1882) 89 N.Y. 470.

(*b*) *Membery* v. *Great Western R. Co.* (1889) 14 App. Cas. 179 per Lord Halsbury (p. 184). See also *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274 (p. 289); *Smith* v. *London etc. Docks Co.* (1868) L.R. 3 C.P. 326. This duty is owed even to mere licensees. *Gautret* v. *Egerton* (1867) L.R. 2 C.P. 375; *Bolch* v. *Smith* (1862) 7 H. & N. 736.

to include all those who may reasonably be expected to come within the sphere of danger created by it, and, in spite of the very general expressions used in speaking of things dangerous in themselves, it is not certain that the range of liability in this instance is more extensive (*c*). In both classes of cases, it will be remarked, there are intimations more or less distinct of a comprehensive principle towards which the law may possibly be advancing, and which would create a right of action in favour of any member of the community who might be injured by handling or coming into proximity to property in which there is a latent danger, which the defendant, although he had become aware of its existence before the property had passed out of his custody, had failed to disclose to his immediate transferee. The obvious exception to which this principle must always be subject where the plaintiff was injured after the property had passed through several hands and one of the holders had, after discovering the same dangerous conditions, neglected to communicate his knowledge to his next succeeding transferee, depends upon considerations which carry us into another section of the principles defining the limits of legal causation and demands a merely passing notice (*d*).

X. In the next proposition the principle of an invitation emerges once more into prominence.

(F). If it is agreed, as an incident to a contract between A. and B., for the performance of work on A.'s premises, that A. shall furnish certain appliances to facilitate the work, and it is contemplated that Z. and the other persons employed by B. to do the work will put these appliances to immediate use, A. remains responsible, during a reasonable period after the appliances are placed at the disposal of Z.'s master, for injuries caused by defects in the appliances which might have been discovered by a proper inspection.

This seems to be the actual effect of the much discussed case of *Heaven* v. *Pender* (*a*), though it is sometimes cited as an authority

(*c*) See VII., note (*d*) ante.

(*d*) Attention may be drawn, however, to the remarks of Brett, M. R., in *Cunnington* v. *Great Northern R. Co.* (1883) 49 L. T. N. S. 392 as to the difference between the position of transferors who are and who are not entitled to assume that the object transferred will be examined before being used. See also the comments on *Heaven* v. *Pender* in *Hopkins* v. *Great Eastern R. Co.* (C. A. 1896) 60 J.P. 86.

(*a*) 11 Q.B.D. (C.A. 1883) 503, reversing the decision of the Queen's Bench Division (9 Q.B.D. 302) which turned upon the theory that the fact of the scaffold's having passed out of the defendants' control at the time of the accident was a conclusive bar to the action. Some years previously the same conclusion as to similar facts had been arrived at in Massachusetts. *Mulchey* v. *Methodist, etc. Soc.* (1878) 125 Mass. 487.

for much wider propositions. Construed in this manner it simply means that the doctrine of *Indermaur* v. *Dames*, (*b*) which obliges the owner of premises to use care to keep them in safe condition for the use of workmen who enter therein to do something in which he is interested, even though they are not directly employed by him, is also the measure of his duty with regard to any chattels which he may furnish them to facilitate their work (*c*).

The decision shews that it is less easy to divest oneself of responsibility for the condition of a chattel where it is transferred by way of bailment than where it is transferred by sale (*d*). How long that responsibility remains with a bailor under the circumstances shown is a point left in uncertainty by the opinion of Cotton, L.J., but from the stress which he lays on the fact that the appliance was furnished for "immediate use," as well as from the language used by the Lords Justices in *Hopkins* v. *Great Eastern R. Co.*, (*e*) it seems a legitimate inference, that the bailor would be held answerable until the bailee discovered that the appliance was defective or, failing such discovery, until such time as duty arose on his part, to subject it to a reasonably careful examination.

The essential grounds of distinction between *Heaven* v. *Pender* and the recent ruling in *Caledonia R. Co.* v. *Mulholland* (*f*) are not easy to define. It was held in the latter case that an arrangement by which one carrier, A., after transporting goods to the point specified in his agreement with the shipper, allows a connecting carrier, B., for his own convenience, to draw the vehicles with their loads to a place designated by the party to

(*b*) L.R. 1 C.P. 274.

(*c*) In a recent case Lord Herschell made the following remarks with regard to this decision: "The plaintiff was there upon the invitation of the dock company; and, although it is true that this staging was used for painting a ship, it was part of the appliances supplied by the dock company for purposes connected with the carrying on of their business. It was one of their facilities given by which they induced vessels to use their docks that they did supply these appliances." *Caledonia R. Co.* v. *Mulholland* (1898) A.C. 216 (p. 227). See also *Membery* v. *Great Western R. Co.* (1889) 14 App. Cas. 179, where, however, the decision went off on other points. In a passage of his opinion in *Schcles* v. *Brook* (1891) 63 L.T.N.S. 837, Romer, J. took occasion to remark that an invitation to advance money to take shares on a valuation does not fall under the same principle as an invitation to enter premises.

(*d*) See the cases cited in the notes to III. which all assume that, as regards strangers, the vendor's liability ceases, when the transfer of the chattel is complete, unless he can be held for one of the special reasons afterwards commented on in sections IV., et seq.

(*e*) 60 J.P. (1896) 86.

(*f*) (1898) A.C. 216.

whom B. has contracted to deliver the goods does not create in favour of the servants of B. who are to handle the vehicles an obligation on A.'s part to examine the vehicles in order to ascertain whether they are in a safe condition for the additional journey. If we could suppose that the controlling factor was that there was a gratuitous loan of the vehicles, we should at once have an intelligible basis of differentiation, for, upon the principle to be noticed below (IX.), the first carrier could not be held liable to the servants of the second except for such injuries as resulted from defects in the wagons which were actually known at the time of the transfer and not disclosed to the transferee. This view of the situation is not distinctly negatived by anything said on the opinions (*g*), nor are the prior decisions establishing the principle in question even referred to; but it seems to supply the simplest solution of the issues raised by the evidence. Another possible standpoint would be to regard the two cases as illustrating the antithesis between the positions of one who is invited and of one who is not invited to use a chattel (*h*). The rule which this construction would suggest is that the bailor of chattels is liable, independently of contract for injuries caused by discoverable defects in such chattels, where the injured person is one who used them on the bailor's premises to execute work in which he had an interest, but not where such person was using them merely by the bailor's permission for the accomplishment of some object in which he had no interest—especially where the loan involves the removal of the chattels from the bailor's premises. But as their Lordships have not thought fit to explain what they consider to be the true relation of this most unsatisfactory decision to those with which it comes in contact, both these theories as to its meaning must remain mere matters of surmise.

XI. In the doctrines so far noticed the consideration which, as was pointed out at the beginning of the article, furnishes the only

(*g*) Lord Shand considered that it was immaterial whether the vehicles were lent gratuitously or for a valuable consideration, as in either case the contract would be res inter alias acta, and could not be taken advantage of by strangers, such as the servants of the second carrier. But this remark seems to be merely a reaffirmation of the well established doctrine that the servants of the second carrier could not sue on the contract of their master with the defendant. See IV. ante.

(*h*) That a person who merely gives a contractor permission to use certain machinery, does not, by reason of such permission, incur any obligation to see that it may be safely used by the contractor's servants, has been expressly held in Massachusetts. *Pingree* v. *Leyland* (1883) 135 Mass. 398.

test by which it can be determined on logical grounds whether the plaintiff was a person to whom the defendant owed a duty to use care, is only inferentially involved. It is evident, however, that the general rule itself which we have been discussing and the rationale of some of the exceptions to it require us to assume the existence of a principle which may be formulated thus:—The mere fact that the defendant, if he had thought at all about the possible consequences of his negligence, must have seen that the dangerous conditions created by such negligence were likely to produce injury to persons coming within categories susceptible of ready ascertainment, will not render him liable for injuries which one of those persons may suffer by reason of the existence of those dangerous conditions (*a*). Some individual judges have undertaken to construct a theory of liability upon lines which would make this likelihood of injury to a particular person the controlling factor in every case (*b*). But the actual decisions cut down the above principle no further than appears in the two next propositions.

(G). Where a chattel is supplied for a specific purpose, whether by a bailment for a valuable consideration or by a sale, a person who is injured by reason of its being unfit for that purpose may, although not privy to the transaction, recover damages from the transferor, if he was informed that

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(*a*) See *Winterbottom* v. *Wright* (1842) 10 M. & W. 109, where the likelihood of injury to any person driving the defective vehicle was manifest; *Langridge* v. *Levy* (1837) 2 M. & W. 519, where the risk of injury to the purchaser's son for whom the gun was bought was obvious to the seller; *Collis* v. *Selden* (1868) L.R. 3 C.P. 495, where the defendant must have seen that any customer of the public house would be endangered by the fall of the chandelier; *Longmeid* v. *Holliday* (1851) 174 6 Exch. 761, where it was clear that, if the lamp exploded it would probably injure some member of the purchaser's household; *Caledonia R. Co.* v. *Mulholland* (1898) A.C. 216, where the servants of the second railway company who would handle the cars were evidently the persons most likely to suffer if the cars were defective.

(*b*) See the formulæ suggested in XII., post. In *Cunnington* v. *Great Northern R. Co.* (1883) 49 L.T.N.S. 392, Brett M.R. defended the decision in *Dickson* v. *Reuter's Tel. Co.*, L.R. 2, C.P.D. 62, 3. C.P.D. 1 on the ground that it would be idle to argue that a telegraph company were bound to come to the conclusion that, whatever telegram they misreported, there must be an injury to the person to whom it was misreported. This comment is not very easy to reconcile with the learned judge's general statement of principles in *Heaven* v. *Pender*, 11 Q.B.D. 503 (see XII., post), which he reiterated in Cunnington's case. That some damage should result is surely a natural consequence of an error in a message. In *Cann* v. *Wilson* (1888) 39 Ch. D. 39, Chitty, J. said that the rationale of *Heaven* v. *Pender* supra, was that the dock-owner had undertaken an obligation towards the plaintiff as being "one of the persons likely to come and do the work." But this is certainly not the theory relied on by the majority of the court. (See F. ante). The remark is therefore merely the expression of an individual opinion, which is still further discredited that the decision in which it was given has been overruled by *Le Lievre* v. *Gould* (1893) Q.B. 493.

such person was to use the chattel (*c*), or it was apparent that, in the nature of the case, he would use it (*d*).

(H). It seems that one who lends gratuitously a chattel to be used for a specific purpose is liable for injuries received by the bailee's servants, where it is in an unfit condition for use owing to defects which the lender was aware of and failed to disclose to the bailee (*e*). But in any event the lender does not owe such servants the duty of examining the chattel in order to ascertain whether it is defective (*f*).

The second of these propositions is not stated in positive terms, for the reason that the plaintiff in the three cases cited was, as a matter of fact, denied recovery on the ground that the defendant

(*c*) *George* v. *Skivington* (1869) L.R. 5 Exch. 1, where a hairwash which proved deleterious was bought for the plaintiff by her husband. In the case next cited Lord Esher stated the effect of the case as follows: If a tradesman supplies an article under such circumstances that he must or ought to have known, if he had thought about it, that the article would be used by other persons besides the purchaser, he owes a duty to those other persons, by reason of his knowledge that they will probably use it.

(*d*) *Hopkins* v. *Great Eastern R. Co.* (C.A. 1896) 60 J.P. 86, where the servant of one who had hired a coal-shoot was injured by using it. All the judges argued upon the assumption that it was their duty to use care in seeing that the shoot was in good condition at the time it was transferred to the hirer, inasmuch as its use by the workmen must have been contemplated. Lord Esher expressly assimilates the situation to that presented in *George* v. *Skivington* supra. Kay, L.J. thought the case came under the principle of *Heaven* v. *Pender*, (see X, ante), the effect of which he conceived to be "that, where a dock-owner supplies a ship-owner with staging which, in the nature of things, will be used by third persons, there is a duty on the part of the person who supplies the staging towards such persons to see that the staging is, at the time it was supplied, fit for the purpose for which it was intended, but not that it shall remain in that condition." This comment indicates clearly enough the standpoint of the court, though it seems to ascribe a much greater importance to the defendant's contemplation of the plaintiff's use of the scaffold, as a probable event, than the opinion of Cotton, L.J. warrants. It is, however, interesting to note, in view of the direction which this judge's reasoning took in his opinion, that according to the report of the case in 52 L.J. Q.B. p. 704, he put this question during the argument of counsel: "Does not the principle by which a man is liable to a person who is injured by a public nuisance apply to cases in which an improperly constructed article causes damage to a limited class of persons to whom it is supplied?" Compare also *Elliott* v. *Hall*, 15 Q.B.D. 315. The statement recently made by a member of the Ontario Court of Appeal in *Smith* v. *Onderdonk* (1893) 25 Ont. App. 17, that the only grounds on which the bailor could be made liable in a case of this type were misrepresentation or fraudulent suppression is clearly quite inconsistent not only with the *Hopkins Case* which they did not cite, but with *Heaven* v. *Pender* which was discussed. The decision itself, refusing to allow the servant of a sub-contractor to recover damages from the principal contractor for an injury caused by a defective locomotive supplied to the plaintiff's master for construction work, can scarcely be justified, in view of the fact that the accident happened on the same day as the locomotive was transferred to the bailee. It is somewhat unfortunate that the *Hopkins Case* was not called to the attention of the court.

(*e*) *Blakemore* v. *Bristol &c. R. Co.* (1858) 8 El. & Bl. 1035 J, followed in *MacCarth* v. *Young* (1861) 6 H. & N. 329, and in *Coughlin* v. *Gillison* (1899) 1 Q.B. (C.A.) 145.

(*f*) *Coughlin* v. *Gillison*, ubi cit. *Caledonian R. Co.* v. *Mulholland* (1898) A. C. 216, referred to in X, ante, seems to be another case in which this principle, though not relied upon, is necessarily implied.

had no knowledge of the defects in the chattels lent. But the reasoning in *Blakemore's Case* seems to imply that the plaintiff would have been allowed to maintain the action, if he had been, instead of a mere volunteer, a servant regularly employed by the bailee. Supposing this to be a justifiable inference, the principle, underlying this ruling and those in which it has been followed would be that the duty to warn the bailee as to defects in the chattels lent enures to the benefit of any person besides the bailee, who is morally certain to use them. A servant of the bailee would obviously belong to this category, where the chattel lent was an industrial appliance which is either customarily operated by servants, or which must be so operated, for the reason that the bailee cannot manage it without assistance.

It would seem from the cases cited under (G) and (H) that the courts, although they have not formulated such a principle in express terms, have proceeded on the theory that as regards persons whom the transferor of a chattel is bound to take into his calculations as being likely to use it, the essential difference between the obligations resulting from a gratuitous transfer and from a transfer upon valuable consideration, is that in the former case his duty is limited to informing the transferee as to defects of which he has actual knowledge, while in the latter case his duty extends to examining the chattel with reasonable care before it leaves his possession.

It will be observed that the facts presented the cases under this head, which involve a bailment, are closely analogous to those in which an implied invitation is treated as the controlling factor. But the principle upon which they are based is of wider scope than that of an invitation, which, as the authorities now stand, can scarcely be considered to cover more than the predicaments which imply either actual control or, as in *Heaven* v. *Pender*, supra, what may be termed the constructive control which is supposed to have continued for a period, varying in length according to circumstances, after the injurious agency has left the possession of the party charged with culpability.

XII. The attempts which have been made to introduce some order into the chaos which, as the foregoing digest of the decisions only too clearly shews, has resulted from undertaking to solve, by means of a number of isolated doctrines between which there is little or no correlation, a class of problems which are identical as respects one essential element will next claim our consideration.

In one of the earliest of the cases upon which we have commented above, plaintiff's counsel endeavoured to procure the acceptance of the doctrine that, wherever a duty is imposed by contract or otherwise, and that duty is violated, anyone who is injured by such violation may recover damages from the wrongdoer (*a*). Parke, B., declined to discuss this argument, preferring to rest his decision on the grounds already mentioned (VI. ante), but said that he would hesitate to concede the correctness of the proposed doctrine even in the case of things dangerous in themselves. The same argument was again rejected in *Winterbottom* v. *Wright*, (*b*) and is impliedly negatived in all the later decisions cited above (*c*). For practical lawyers, therefore, the suggested theory possesses a mere historical interest, representing one of the abortive endeavours which have at various times been made to broaden and rationalize the foundations of our law. If the right of contracting is a form of property, which will scarcely be denied, the rejected doctrine is clearly nothing more than an application in a liberal sense, of the maxim Sic utere tuo, ut alienum non laedas, and upon this basis it would find a place in any scientific system of jurisprudence (*d*).

A theory of responsibility which has a much better chance of ultimately obtaining a foothold in our law is that formulated in the following well known passage of Lord Esher's opinion in *Heaven* v. *Pender* (*e*):

"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 recognize 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."

In another case decided a few months later we find the learned judge reiterating the same theory in somewhat different terms:

(*a*) *Langridge* v. *Levy* (1837) 2 M. & W. 519.

(*b*) 10 M. & W. (1842) 109.

(*c*) See also *Alton* v. *Midland R. Co.* (1865) 19 C.B.N.S. 213. In the unqualified form in which it was couched it obviously could not prevail even as to statutory duties since the decision in *Atkinson* v. *Newcastle, &c., Works*, 2 Exch. D. 44.

(*d*) It is by reasoning on the lines here suggested that an American writer of repute has undertaken to justify the decisions by the courts of the United States to the effect that a telegraph company owes a duty to the receiver of a telegram. Bigelow's Leading Cases on Torts, p. 626.

(*e*) 11 Q.B.D. (1883) 503.

"Wherever the circumstances disclosed are such that, if the person charged with negligence thought of what he was about to do, or to omit to do, he must see that, unless he used reasonable care, there must be at least a great probability of injury to the person charging negligence against him, either as to his person or his property, then there is a duty shewn to use reasonable care (*f*)

In the same case Lord Justice Fry furnished a third formulary:

"One may lay down with some safety that, where a man without contract does something to another man, and the first man knows that, if he does the act negligently, that negligence will in all probability produce injury to the person or property of the second man, there the first man owes the second a duty to do the act without negligence."

These propositions, it will be observed, bring out with reasonable clearness the fundamental fact noticed at the beginning of this article that the likelihood of a certain person's being injured is as much within the scope of the natural and probable consequences for which a negligent person is liable as the likelihood that the physical event which constitutes the injury will occur. At present, however, it must be admitted that, logically unexceptionable as they appear to be, the opinion of the majority of the Court of Appeal in *Heaven* v. *Pender*, supra, as well as the reasoning in the case of *Caledonia R. Co.* v. *Mulholland*, (*g*) must be taken to shew that they are not yet accepted as correct statements of the law. That they could not be accepted without overruling at least a part of the cases cited above is manifest. In subsequent cases even Lord Esher seems somewhat to restrict the scope of his doctrine by declaring that the duty upon the breach of which an action for negligence is founded is that a man is bound not to do anything negligently so as to hurt a person near him, and that the whole duty arises from the knowledge of that proximity (*h*). Whether he really intended to recede from his original views it is not easy to determine, but evidently it would be necessary to strain this later language very considerably to make it cover the cases which are really the most troublesome of all, viz., those in which the injurious agency was not under the defendant's control at the time of the accident.

(*f*) *Cunnington* v. *Great Eastern R. Co.* (1883) 49 L.T.N.S. 392.

(*g*) (1898) A.C. 216.

(*h*) *Thomas* v. *Quartermaine* (1887) 18 Q.B.D. 685 (p. 688); *Le Lievre* v. *Gould* (1893) 1 Q.B. 491. Compare also the language used by Smith, L.J. in the latter case (p. 504).

XIII. Our article may be appropriately concluded by some brief criticisms on the argumenta ab inconvenienti by which certain judges have undertaken to justify the present limitations of the range of responsibility. In that class of cases in which a person loses a benefit intended for him owing to the negligence of a professional man in carrying out the instructions of another party, the doctrine that the loser of the benefit cannot claim damages for such negligence has been defended on the ground that to allow such an action would lead to the result that a disappointed legatee might sue the testator's solicitor for negligence in not causing the will to be duly signed and attested, though he might be an entire stranger both to the solicitor and the testator (*a*). Here under the circumstances supposed, the solicitor could not be called to account by his employer, who, by hypothesis, would be dead when the delinquency bore its fruits, nor by the representatives of the decedent, who would obviously be profited rather than damaged by the negligence which invalided the legacy. The argument, therefore, was simply an attempt to justify the refusal of a right of action to the only person who could shew actual damage by adducing a similar case in which the professional man would also escape scot-free if he could not be sued by the person injured. Surely a very neat and convincing piece of logic! The reasoning here employed is, as we have already pointed out, wholly inconsistent with that which is used to sustain the right of a patient to sue a medical man not retained by him (VII. ante).

In another class of cases great reliance has been placed upon an argument of a similar stamp, viz., that it would be unjust, after a contractor for the supply of some article of commerce has done everything to the satisfaction of his employer, to allow the transaction to be reopened by one not privy to it. The credit, such as it is, of first promulgating this theory is apparently due to the judge whose fertile imagination clinched the doctrine of the servant's assumption of the risks of his employment by reasoning of a like sort (*b*) In *Winterbottom* v. *Wright* (*c*) where it was held that a manufacturer who had furnished the Postmaster-General with a coach, for which another person supplied the drivers and

(*a*) *Robertson* v. *Fleming* (1861) 4 Macq. 167.

(*b*) See *Priestley* v. *Fowler* (1837) 3 M. & W. 1.

(*c*) 10 M. & W. (1842) 109.

horses, was not liable to one of those drivers for an injury caused by the breaking of a defective axle, Lord Abinger was strongly influenced by these considerations: "If the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." The same kind of language constantly makes its appearance in later cases (*d*).

The argument seems to amount, broadly speaking, to this,—that to compel a negligent workman to indemnify each and every person who might be injured by his negligence would be inexpedient and unjust, for the reason that it would widen unduly the circle of liability, thus producing excessive intricacy of actions, and creating conditions of responsibility which would deter prudent men from engaging in certain occupations. As to the first of the results, here held out in terrorem, it seems sufficient to say that even if the practical difficulties involved in the task of fixing responsibility upon the proper party were in some cases as grave as the argument assumes, it does not by any means follow that the courts should decline the task altogether. With regard to the suggested discouragement of enterprise, the ground might be taken reasonably enough that, until the matter has been brought to the test of experience, the burden of proving that this would be the consequence of widening the circle of responsibility, lies upon those who make the assertion, and that this burden is not discharged by the mere ipse dixit of any judge, however eminent he may be. Indeed, one might go still further and say that, as this argument emanated originally from a judge whose arguments of a very similar type in support of the doctrine of common employment have been sig-

(*d*) It will be sufficient to instance the following remarks by Willes, J. in *Collis* v. *Selden* (1868) L. R. 3 C.P. 495, where a visitor to a public-house was injured by the fall of a chandelier: "There would be no end of actions if it were held that a person having once done a piece of work carelessly, should, independently of honesty of purpose, be fixed with liability in this way by reason of bad materials or insufficient fastening." The varia lectio in the Law Journal Reports is interesting: "To hold that the mere fact of a man having once done some negligent work is to fix him at any future time with the consequent damage to a stranger, because by accident bad materials were used, or there was momentary carelessness, would be going beyond what has been decided." 37 L.J.C.P. 233. The same theme has been worked out with still greater elaboration and amplitude by American judges. See *Kahl* v. *Love* (1874) 37 N.J.L. 5; *Curtin* v. *Somerset* (1891) 140 Pa. St. 70, 12 Lawy. Rep. Ann. 322.

nally confuted by the logic of events since the abolition of that doctrine by the Employers' Liability Act of 1880, his reasoning is rather more likely than not to be unsound. The plain truth, of course, is that the opinion of a lawyer upon the probable operation of economic forces is of just as great or as little value as that of a layman of equal intelligence and with the same knowledge of the subject.

Nor is this all. It is, we think, by no means difficult to shew that the inconveniences to which it is declared that manufacturers and vendors of chattels would be subjected by holding them liable to strangers, are much less serious than the courts would have us suppose. To read the passages in which judges have expatiated upon the withering effects of an extension of liability, one would imagine that a single defect in a chattel might be pregnant with peril to a limitless number of people. Yet a little consideration will shew that a long succession of accidents from any particular imperfection in the same article, though theoretically possible, would be quite inconsistent with the ordinary experien e of everyday life. Such a defect almost invariably exhausts its potential capacity for mischief when it has produced its first injury after the article has left the possession of the manufacturer or seller, for, in the normal course of business, the occurrence of a single accident suggests and brings about the disuse of the article or its restoration to a state of good repair. And in any event, after the existence of the defect has been revealed by the infliction of an injury or otherwise, the responsibility for the future condition of the article will upon the undisputed principles of legal causation be shifted to the person in possession. The e is no apparent reason, therefore, why the responsibility should not in any event remain with the manufacturer or seller until the defect has been actually brought to light by an accident, or until a duty falls on the person in possession to examine the article for the purpose of ascertaining whether its quality has deteriorated, and there is at least one good reason why this doctrine should prevail. Evidently the present rule will not infrequently so operate that no one at all can be brought to account for injuries caused by a dangerously defective chattel—a situation much more "outrageous" than any of those which have suggested themselves to Lord Abinger and other judges. Such a case arises where the inspection which would have led to a disclosure of the defect is one which it was the duty of the seller to make but which it would be unreasonable to require the purchaser to make, as

where the defect could not have been discovered without special skill and knowledge, which the seller possesses and the purchaser lacks. Transactions presenting this feature occur whenever a manufacturer sells machinery or a chemist sells drugs. As a general rule, the customers would be justified in assuming that the articles bought were in such a condition that they may be safely used, although they might have latent defects of which the vendors should have been aware (*e*). Whenever that assumption is justified, it is clear that, if a stranger, such as a servant of the purchaser, suffers injury from the defective quality of the article purchased, the effect of the present rule will be that he cannot claim an indemnity from the manufacturer because there is no contract between them, nor from the purchaser because he has not been wanting in due care. The injustice of denying a remedy under these circumstances against the only person who has been guilty of negligence is not disguised by the use of the convenient expression, damnum absque injuria (*f*). The supposed situation, in fact, whatever gratification it may afford to a connoisseur of disagreeable logical dilemmas, is simply shocking to common sense. That modern judges, with a few exceptions, should still refuse to admit that there is anything incongruous or unsatisfactory in the doctrines which lead up to it, shews how far even the most robust intellects may, under our system of case law, be carried away from a scientific theory of liability by following precedents which, when analysed, seem to rest ultimately on no more solid basis than doubtful inferences from the mere technicalities of pleading and equally doubtful considerations of social and economic expediency. Additional support for these doctrines, it may be, can be found in some of those secondary principles with which the accidents of historical development have so richly endowed our law. But it is difficult to admit that these can furnish an adequate warrant for a situation so repugnant to elementary physical and

(*e*) See the comments of Brett, M. R., in *Cunnington* v. *The Eastern R. Co.* (1883) 49 L. T. N. S. 392, on *George* v. *Skivington* (1869) L.R. 5 Exch. 1. The doctrine stated in the text is clearly a necessary corollary from the principles which define the relations between an independent contractor and his employer, and is so treated by the American courts in the cases which have established the right of a purchaser to rely to a very great extent on the quality of an article bought from a reputable manufacturer. See *Carlson* v. *Phoenix Bridge Co.* (1892) 132 N.Y. 273; *Reynolds* v. *Merchants Woollen Co.* (1897) 168 Mass. 501.

(*f*) See the opinion of Rolfe, B., in *Winterbottom* v. *Wright* (1842) 10 M. & W. 109.

metaphysical standards as that which results from allowing a few individuals to create by contract a sphere of responsibility within which, except in the instances noted above, they are accountable only to one another. Unexceptionable grounds of public policy might justify what virtually amounts to a license to disregard with impunity, up to a certain point, the safety and welfare of the members of the community outside this artificial circle. But it is not easy to see what arguments derived from this source can be of any avail, when it is not apparent that the prevailing doctrines are in any case necessary for the reasonable protection of the contracting parties, and it is certain that they must at least be productive of injustice to the extent of frequently leaving those who suffer in their persons or property, through a breach of the contract, entirely without a remedy.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

BILL OF SALE—DESCRIPTION OF PROPERTY—BILLS OF SALE ACT, 1882 (45 & 46 VICT., C. 43), S. 4—(R.S.O. C. 148, S. 32).

Davies v. *Jenkins* (1900) 1 Q.B. 133, turns partly on the sufficiency of a description of property in a bill of sale, and that is the only point for which it is necessary here to refer to the case. The property, purported to be covered by the bill of sale in question, consisted of farm stock and implements. In the schedule the farm stock was described as "stock: 2, horses, 4 cows," and this was held to be an insufficient description. The English Act, 45 & 46 Vict., c. 43, s. 4, requires the property intended to be affected to be "specifically described." The Ont. Act, R.S.O. c. 148, s. 32, requires such sufficient and full description of the chattels that the same may be thereby readily and easily known and distinguished, and it would seem that at least as specific a description is necessary under this Act as under the English Act. On this point *Boldrick* v. *Ryan*, 17 Ont App. 253, and *Corneill* v. *Abell*, 31 C.P. 107, may be referred to.

VENDOR AND PURCHASER—AGREEMENT BY VENDOR TO PAY SECRET COMMISSION TO AGENT OF PURCHASER—RIGHT OF PUCHASER TO RECOVER COMMISSION AGREED TO BE PAID BY VENDOR.

In *Grant* v. *The Gold Exploration Syndicate* (1900) 1 Q.B. 233, the plaintiff sought to recover from the defendants the amount of a promissory note given by the defendants as part payment of the purchase money for certain mining property sold by the plaintiff to the defendant company. The sale was negotiated by one Govan, who was then a director of the defendant syndicate, and to whom the plaintiff privately agreed to pay a commission of ten per cent. on the total purchase money received. After the price was fixed, and before payment, the plaintiff became aware that Govan was a director of the syndicate, but the agreement to pay the commission was not disclosed by the plaintiff to the defendants. Part of the purchase money was paid in money and shares, and the plaintiff paid ten per cent. of the sum received, and assigned to the nominee of Govan ten per cent. of the shares. Before the balance became due the plaintiffs asked Govan to get the defendants to pay part in cash, and give the note now sued on for the balance. This Govan did, and at the same time agreed to forego £500 of the commission he was entitled to. Before the note matured the defendants discovered that Govan had received the shares and money in part payment of his commission, and on demand he paid over the money and transferred the shares to the syndicate in full satisfaction of their claim against him. The defendants now claimed that they were also entitled to recover from the plaintiff the £500 which Govan had agreed to forego. Bigham, J. was of opinion that the defendants knowing all the facts had elected to treat their right as barred by the second agreement reducing the commission, and were therefore not entitled to recover the £500; but the Court of Appeal (Smith, Collins, and Williams, L.JJ.) were unanimously of opinion that the agreement by Govan made after the plaintiffs knew his fiduciary position was not binding on the defendants and that they were entitled to the £500 in question.

CROWN—PREROGATIVE OF CROWN—ACTION BETWEEN SUBJECTS AFFECTING RIGHTS OF CROWN—INFORMATION—STAY OF PROCEEDINGS.

In *Stanley* v. *Wild* (1900) 1 Q.B. 256, the plaintiff had brought an action of trespass in the County Court against tenants of the Crown, and recovered judgment therein for damages, and an injunction to restrain future trespasses, thereupon the Attorney-

General, being of opinion that the rights of the Crown were affected, filed an information in the High Court asking a declaration as to the rights of the Crown in the premises, and he then applied to remove the County Court action into the High Court and stay the proceedings therein until after the hearing of the information. The Divisional Court (Darling and Ridley, JJ.) granted the application, and the Court of Appeal (Smith and Williams, L.JJ.) upheld this decision, notwithstanding judgment had been obtained in the County Court action, the court being of opinion that the Crown had a prerogative right to have the action removed at any stage of the proceedings.

BANKRUPTCY—"EXECUTION COMPLETELY EXECUTED"—(R.S.O. c. 147, s. 11).

In re Ford (1900) 1 Q.B. 264, discusses the provisions of the English Bankruptcy Act, which are somewhat similar in effect to R.S.O. c. 147, s. 11. The contest was between the official receiver and certain execution creditors of the bankrupt as to the right to certain moneys received by the execution creditors on account. The facts were shortly as follows:—On 31st Dec., 1898, the sheriff levied under an execution for £80 and costs; on the 5th January, 1899, the debtor paid the execution creditors £40 on account and agreed that the sheriff might re-enter in case of non-payment of the balance by instalments; the sheriff then withdrew and on 14th January, 1899, a receiving order was made. The Divisional Court (Wright and Channell, JJ.), held that under the circumstances the execution had not been "completely executed" even pro tanto as to the £40 paid, and that the official receiver was entitled to recover that sum from the execution creditors.

TROVER—ORDER FOR PAYMENT OF MONEY—CONVERSION OF NON-NEGOTIABLE INSTRUMENT—MONEY HAD AND RECEIVED—DAMAGES.

In *Bavins* v. *London and S. W. Bank* (1900) 1 Q.B. 270, the plaintiffs sued for damages for the conversion of an order for payment of money, the proceeds of which had been collected by the defendants under the following circumstances, or in the alternative for money paid and received. The order in question was received by the plaintiffs from a company and was directed to the company's bankers, and directed the payment of a certain sum, subject to the condition that the plaintiffs should sign a receipt annexed. The order and receipt were stolen from the plaintiffs, and were subsequently paid in by a customer of the defendants bearing an indorsement not signed by the plaintiffs, and a forged

signature to the receipt. The defendants credited the customer with the amount of the order, and subsequently collected the amount of it from the bankers on whom it was drawn. Kennedy, J. held that the plaintiffs were entitled to recover the full amount received by the defendants, and his judgment was affirmed by the Court of Appeal (Smith, Collins and Williams, L.JJ.). It was contended on the appeal, that as the instrument was not a negotiable instrument it was only evidence of a debt, and therefore only nominal damages were recoverable for its conversion, but the Court of Appeal considered that even if the measure of damages for the conversion of a non-negotiable instrument be nominal, the plaintiffs were nevertheless entitled to recover the full amount claimed by them, as money had and received.

COPYRIGHT—MUSIC—INFRINGEMENT OF COPYRIGHT—PERFORATED MUSIC SHEET FOR MECHANICAL ORGAN—MUSICAL DIRECTIONS ON PERFORATED SHEET—COPYRIGHT ACT 1842 (5 & 6 VICT., C. 45) SS. 2, 15—(R.S.C. C. 62, S. 32).

Boosey v. *Wright* (1900) 1 Ch. 122, is the case in which Stirling, J. decided (1899) 1 Ch. 836 (noted ante vol. 35 p. 628), that a perforated sheet of paper for use in a mechanical organ called an Eolian, was not an infringement of the copyright of the plaintiff in the musical compositions intended to be produced by such perforations, when passing through the instrument, but that the directions to the performer for regulating the time and expression of the music, were an infringement. The Court of Appeal (Lindley, M.R., Jeune, P.P.D. and Romer, L.J.) have now affirmed the judgment of Stirling, J. that the perforated sheet was not an infringement, but they have also held that neither are the directions for regulating the time and expression, etc., and on this point they have reversed his judgment, and dismissed the action with costs.

LANDLORD AND TENANT—COVENANT BY TENANT TO PAY "ALL TAXES, RATES, DUTIES AND ASSESSMENTS PAYABLE IN RESPECT OF THE DEMISED PREMISES"—COSTS OF COMPLETING DRAINAGE WORKS REQUIRED BY MUNICIPALITY UNDER STATUTE.

In *Farlow* v. *Stevenson* (1900) 1 Ch. 128, the action was brought by a landlord against his tenant on a covenant in the lease whereby the tenant covenanted to pay "all taxes, rates, duties and assessments, whatsoever which now are, or hereafter shall become payable for in respect of the premises hereby demised, or any part thereof, whether parliamentary, parochial or otherwise, except the landlord's property tax." In pursuance of statutory authority in

that behalf, the parochial authorities served notice requiring the drains on the premises to be reconstructed; by arrangement between the plaintiff and defendant the works were carried out by the plaintiff at an expense of £143 without prejudice to the rights of either party. Byrne, J. following *Brett* v. *Rogers* (1897) 1 Q.B. 525 (noted ante vol. 33 p. 424), held that the tenant was liable, and his decision was affirmed by the Court of Appeal (Lindley, M.R., Jeune, P.P.D. and Romer, L.J.) The word "duties" appears to have been the crucial word, and was held to be wider in its effect than "impositions," which in *Tidswell* v. *Whitworth*, L.R. 2 C P. 326, was held not to cover claims of the kind in question in the present case.

CHARGE ON LAND—EXPRESS TRUST—TWO SUMS SECURED BY SAME TERM—STATUTE OF LIMITATIONS—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT. C. 57), SS. 8, 10—(R.S.O. C. 133, SS. 23, 24)—POWER OF APPOINTMENT—EXERCISE OF POWER BY GENERAL BEQUEST, EFFECT OF—WILLS ACT, 1837 (7 W. 4 & 1 VICT. C. 26), S. 27—(R.S.O. C. 128, S. 29.)

In Williams v. *Williams* (1900) 1 Ch. 152, two questions are involved, the first as to the effect of the Statute of Limitations (37 & 38 Vict. c. 37, ss. 8-10 on the right to recover moneys secured upon land by a term vested in trustees, under a settlement; and the second as to the effect of the exercise of a power of appointment by general bequest upon the fund appointed. As regards the first point, the facts were briefly as follows:—By a settlement, an estate was conveyed to trustees for a term of 500 years upon trust to raise £2,000 on the death of Anne Hartley, and £2,000 on the death of Griffith Williams. Griffith Williams died in 1860 and no proceedings were taken to raise the money until the present action, which was commenced in 1898. Anne Hartley died in 1886 and this action was commenced within 12 years of her death. It was contended that the trust to raise these sums was not an express trust and therefore the £2,000 raisable on Williams' death was not affected by the Real Property Limitation Act, s. 10, (R.S.O. c. 133, s. 24), and it was also contended that as the action was brought in time as to the £2,000 raisable on Anne Hartley's death the trustees were entitled to possession for the purpose of raising that sum, and, being in possession, they might then raise the other £2,000 also. But North, J. overruled both these contentions and held that the money was payable under an "express trust" within the meaning of s. 10, and therefore as to the

£2,000 raisable on Williams' death the right of the trustees was barred by the Statute, and that the two sums of £2,000 were separate and distinct, and the fact that the trustees had the right to raise one of them did not carry with it any right to raise the other as to which their right was barred by the statute. With regard to the second point, North, J. held that where a general power of appointment is executed by virtue of a general bequest, under the Wills Act, s. 27, (R.S.O. c. 128, s. 29), the effect of such an execution of the power is to place the property subject to the power, in precisely the same position as the testator's personal estate, and equally liable therewith for the payment of his debts and legacies. See R.S.O. c. 163, s. 8.

LEASEHOLD—TENANT FOR LIFE—PERMISSIVE WASTE.

In re Parry and Hopkin (1900) 1 Ch. 160, a testator bequeathed to his wife for her life certain leaseholds. The leases under which the testator held contained covenants on his part to repair. The testator's widow entered and enjoyed the premises till her death, but omitted to observe the covenants to repair, and the present proceedings were brought by the person entitled in remainder to compel her estate to pay for the alleged dilapidations to the property suffered during her life, and the claim having been referred to arbitration, a case was stated by the arbitrator. North, J. following *Re Cartwright* (1889) 41 Ch. D. 532, held that the estate of the tenant for life was not liable: see *Patterson* v. *The Central Canada L. & S. Co.*, 29 O.R. 134, where a similar conclusion was reached by a Divisional Court.

ADMINISTRATION—INSOLVENT ESTATE—ANNUITY—APPROPRIATION OF CAPITAL SUM TO PURCHASE OF ANNUITY—MARRIED WOMAN—RESTRAINT ON ANTICIPATION—DEATH OF ANNUITANT—REPRESENTATIVES, RIGHT OF, TO UNEXPENDED SUM APPROPRIATED TO PURCHASE OF ANNUITY.

In re Ross, Ashton v. *Ross* (1900) 1 Ch. 162, the suit was for administration of a testator's estate, which proved to be insolvent, and the dividend on the capital value of an annuity bequeathed by the testator to a married woman for life, without power to anticipate the growing payments thereof, was ordered to be laid out in the purchase of an annuity for her. Before the purchase was made the annuitant died and the annuitant's personal representative claimed to be entitled to the money. Those interested in the testator's estate claimed, on the other hand, that the money should go back to the testator's estate. North, J. decided in favour of the

annuitant's representative, on the ground that the only reason why the money was directed to be laid out in the purchase of an annuity instead of being paid to the deceased annuitant in her lifetime, was because of the restraint on anticipation; and that if her husband had predeceased her she would have been entitled to have the money at once paid to her, he therefore thought that she had acquired such an absolute interest in the fund, that on her death it was part of her estate, and passed to her personal representative.

TRUSTEE—BREACH OF TRUST—SALE BY LIQUIDATOR TO HIMSELF—FIDUCIARY RELATION—CONCEALMENT—SETTING ASIDE SALE—ACCOUNT OF PROFITS—INTEREST ON PROFITS.

Silkstone & H. M. Coal Co. v. *Edey* (1900) 1 Ch. 167, was an action brought by the plaintiff company which was being wound up under the supervision of the court, against Edey, one of the liquidators, and a company to which he had purported to sell the assets and undertaking of the plaintiff company, on the ground that Edey himself was really the purchaser, and that the defendant company was a mere trustee for him. Judgment was given for the plaintiffs setting aside the sale, and directing an account of the profits received by the defendants since the sale. A question arose in settling the minutes of the judgment as to whether the defendants were also chargeable with interest on such profits from the date of the withdrawal thereof from the business of the defendant company. Stirling, J. was of opinion that the claim to interest on the profits should not be allowed, on the ground that the settled practice of the court appeared to be that where a sale is set aside under such circumstances, the trustee or purchaser is chargeable with the profits received, but not with interest thereon.

MARRIED WOMAN—ADMINISTRATRIX—DEFAULT BY MARRIED WOMAN IN PAYMENT OF TRUST FUND—ATTACHMENT—ORDER FOR PAYMENT AGAINST MARRIED WOMAN, FORM OF—MARRIED WOMAN'S PROPERTY ACT, 1892 (45 & 46 VICT. c. 75), s. 1, sub-s. 2; ss. 18, 24—(R.S.O. c. 163, s. 2, s. 3, sub-s. 2; s. 20).

In re Turnbull, Turnbull v. *Nicholas* (1900) 1 Ch. 180, the defendant, a married woman, was the legal representative of a deceased person for whose estate she was, by orders made in the action, required to account. As the result of the account a sum of money was found to be in her hands, and she was ordered to pay the amount into court, and having failed to comply with the order, a motion was made for an attachment against her. On the hearing of the motion it was agreed that the defendant should be at liberty

to object to the form of the order, and it was contended on her behalf that it was erroneous, and instead of being a personal order for payment against her, it should have been framed in the form of a judgment as settled in *Scott* v. *Morley*, 20 Q.B.D. 120, but Stirling, J. considered the order was in proper form as it did not appear that she had committed a devastavit, and that on non-compliance with it she was liable to attachment, which he granted, but subsequently on an affidavit being produced that she had committed a devastavit in respect of the fund, and medical testimony being given that imprisonment would seriously endanger her life, the Court, upon the latter ground, directed all proceedings to be stayed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] HANDLEY *v.* ARCHIBALD. [NOV. 29, 1899.

Partition of land—Tenants in common—Statute of limitations—Possession.

Under the Nova Scotia Statute of Limitations (R.S.N.S. 5 ser. c. 112) a possession of land in order to ripen into a title and oust the real owner must be uninterrupted during the whole statutory period. If abandoned at any time during such period the law will attribute it to the person having title.

Possession by a series of persons during the period will bar the title though some of such persons were not in privity with their predecessors.

Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both and interrupted the prescription accruing in favour of the tenant in possession.

Judgment of the Supreme Court of Nova Scotia (32 N.S. Rep. 1) affirmed. Appeal dismissed with costs.

Harrington, Q.C., for appellant. *Newcombe*, Q.C., and *Kenney*, for respondent.

N.B.] JONES *v.* CITY OF ST. JOHN. [Nov. 29.

Municipal assessment — Domicile — Change of domicile — Intention — 59 Vict., c. 61 (N.B.).

By the St. John City Assessment Act, 59 Vict., c. 61 s. 2, "for the purposes of assessment any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment or profession, within the City of St. John shall be deemed . . . an inhabitant and resident of the said city." J. carried on business in St. John as a brewer up to 1893 when he sold the brewery to three of his sons and conveyed his house and furniture to his adult children in trust for them all. He then went to New York where he carried on the business of buying and selling stocks and other securities, having offices for such business, and living at a hotel, paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John visiting his children and taking recreation. He had no business interests there, but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John he appealed against the assessment unsuccessfully and then applied for a writ of certiorari with a view to having it quashed.

Held, reversing the judgment of the Supreme Court of New Brunswick, that as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment he had avowed his bona fide intention of making it his home permanently, or at least for an indefinite time and his determination not to return to St. John to reside, he had acquired a new home or domicile and that in St. John had been abandoned within the meaning of the Act. Appeal allowed with costs.

Currey, Q.C., for appellant. *C. J. Coster*, for respondent.

N.B.] HESSE v. ST. JOHN RAILWAY CO. [Nov. 29.

Negligence — Action for damages — Improper evidence — Misdirection.

By 60 Vict., c. 24, s. 370 (N.B.) "a new trial is not to be granted on the ground of misdirection or of the improper admission or rejection of evidence unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." On the trial of an action against an electric Street Railway Company for damages on account of personal injuries, the vice-president of the company, called on plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company was making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures, and on re-examination plaintiff's counsel interrogated him at length as to the selling price of the stock on the

Montreal exchange and proved that they sold at about fifty per cent. premium. The judge in charging the jury directed them to assess the damages "upon the extent of the injury plaintiff received independent of what these people may be or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages.

Held, that on the cross-examination of the witness by defendant's counsel the door was not opened for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the judge in his charge did not remove its effect on the jury as to the financial ability of the Company to respond well in damages.

The injury for which plaintiff sued was his foot being crushed, and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation. Dr. W., who thought the limb might be saved, was, four days later, appointed by the Company at the suggestion of plaintiff's attorney, to co-operate with plaintiff's physician. Eventually the foot was amputated and plaintiff made a good recovery. On the trial plaintiff's physician swore to a conversation with Dr. W., four days after the first consultation and three days before the amputation, when Dr. W. stated that if he could induce plaintiff's attorney to view it from a surgeon's standpoint and not use it to work on the sympathies of the jury he might consider more fully the question of amputation. The judge in his charge referred to this conversation and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible.

Held, STRONG, C.J., and GWYNNE, J., dissenting, that as Dr. W. did not represent the Company at the first consultation when he opposed amputation; as others of the staff took the same view and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the judge's remarks as bearing on the contention made on plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict.

To tell a jury to ask themselves, "If I were plaintiff how much ought I to be paid if the Company did me an injury?" is not a proper direction.

A party to an action who procures a commission for taking evidence abroad has no right to prevent its return. Appeal allowed without costs, and new trial ordered limited to amount of damages. (The case was settled without a second trial.)

Quigley, Q.C., and *Stockton*, Q.C., for appellant. *Pugsley*, Q.C., and *McLean*, Q.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Trial of Action. MacMahon, J.] [Feb. 19.

KELLY *v.* DAVIDSON.

Employer's liability—Master and servant—Negligence—Evidence.

The plaintiff, while working for some contractors who were building a house, was injured through a fall caused by the giving way of part of the scaffolding of the house. The scaffold he was standing on consisted of a single plank about fifteen feet long, one end of which rested on a trestle and the other on a stay formed of a plank nailed to two upright posts forming a part of the main structure. The stay as originally fastened to the posts was perfectly secure, as the plank forming the stay rested on its edge on a cleat securely fastened to the posts by spikes, the stay itself being securely fastened to the posts by large spikes. The general superintendant of the defendants' works had been very explicit in directing the workmen that the stays should be put up and secured as this one had been. Two workmen, however, removed the stay for purposes of their own convenience about three o'clock on September 7, and raised it about a foot above the cleat and nailed it to the posts in a manner which rendered it dangerous. On the following morning, between eight and nine o'clock, the plaintiff and another being directed by the foreman to cut off the ends of two beams at the top of the third storey, the plank referred to was thrown across from the trestle to the stay, and the plaintiff mounting it, the stay gave way and the injury happened.

Held, that there was no evidence of negligence on the part of the foreman, so short a time having elapsed between the removal of the stay and the accident, such removal of the stay, upon which so much trouble had been taken to make it secure, being the last thing a foreman would expect, nor was the fact that after such change was made the plank was up higher at one end than the other sufficient to indicate to him that there had been a change, nor had it caused any comment on the part of the plaintiff who saw the plank placed in position before mounting it.

H. E. Irwin and *Harris*, for plaintiff. *Clute*, Q.C., and *A. R. Clute*, for defendants.

FRASER v. DREW. [Feb. 20.

New trial—Verdict—Finding of jury—Question of fact—Misapprehension.

Where a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict.

Drysdale, Q.C., for appellant. *Harris*, Q.C., for respondent.

Boyd, C., and Robertson, J.] [Feb. 10.

IANSON *v.* CLYDE.

Executor and administrator—Judgment against executors—Evidence of testator's debt—Endorsement of note by executors—"without recourse"—Devolution of Estates Act—Caution—After twelve months—Effect of—"In the hands" of executors—Estate—Devise.

A judgment against executors of an estate is only prima facie evidence of its being for a debt due by the testator, and the parties interested in the real estate are at liberty to disprove it.

In an action by a judgment creditor on a judgment recovered on a note discounted by him, which note was received by the executors for the sale of personal property of the testator and endorsed "without recourse" to the plaintiff,

Held, that the endorsement of the note by the executors would not make it a debt of the testator in the hands of the endorsee.

Held also, that the effect of the Devolution of Estates Act and amendments, acted upon by the registration of a caution under the sanction of a County Judge after the twelve months has expired, is to place lands of a testator again under the power of his executors so that they can sell them to satisfy debts, and that the expression, "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control or saleable at their instance, and that the operation of a devise of lands is only postponed for the purposes of administration, and that the estate does not pass this through the medium of the executors but by the operation of the devise.

Aylesworth, Q.C., and *S. H. Bradford*, for appeal. *Clute*, Q.C., and *Yarnold*, for defendants other than executors. *Ormiston*, for John Clyde, an executor. *Slaght*, for Thomas Allin, the other executor.

MacMahon, J.] Feb. 14

TRUSTS AND GUARANTEE COMPANY *v.* TRUSTS CORPORATION OF ONTARIO.

Limitation of action—Annuity by will—Charge on lands—Arrears—Disability.

A testator by his will devised land to two of his sons, their heirs and assigns forever, subject to the payment of $200 per annum for the benefit of another son (a lunatic) for his life, payable "to the person who may be his guardian," and died in 1872. The son lived with his mother, and payments were made to her for his support from 1880 to 1889, the last payment being made in February, 1889. The plaintiffs were appointed committee for the son in December, 1898.

Held, following *Hughes* v. *Cole* (1884) 27 Ch.D. 231, that the annuity was charged on the land, and that the right to recover was not barred as to future payments of the annuity out of the land; that the payments made to the mother were discharges pro tanto of the annuity; that as the son was

under a disability until the plaintiffs' appointment, and as twenty years are allowed within which to bring an action in such a case, they were entitled to recover the annuity from February, 1890, and as the annuity was an express charge on the land, it might be sold to satisfy the arrears.

Claude Macdonell and *J. T. C. Thompson*, for plaintiffs. *Aylesworth*, Q.C., and *C. A. Moss*, for defendants.

Boyd, C., Ferguson, J., Robertson, J.] [March 2.

RICKETTS *v.* VILLAGE OF MARKDALE.

Municipal corporations — Negligence — Children playing on highway — Traffic and passage—Repair—Lord Campbell's Act—Loss of child—Damages—Reasonable expectation of pecuniary benefit.

Children are entitled to play upon highways where there is no prohibitory local law and where their presence is not prejudicial to their ordinary user for traffic and passage, and municipal corporations are bound to keep them in repair, and are responsible for damages sustained by any person by reason of default in so doing. Constitution and characteristics of highways and streets in England and Canada compared.

In an action under Lord Campbell's Act by a parent for the death of his child by the negligence of the defendant, it is not necessary to shew that any pecuniary benefit had been actually received, but such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money and so become the subject of damages is sufficient. Judgment of FALCONBRIDGE, J., reversed.

W. H. Blake, for the appeal. *J. B. Lucas* and *W. H. Wright*, contra. *W. J. Hatton*, for third party.