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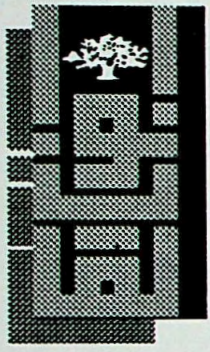

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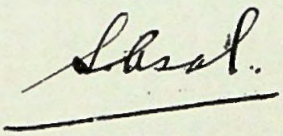
ILLUSTRATIVE OF

THE ENGLISH LAW OF TORT



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SELECTION OF CASES

ILLUSTRATIVE OF

THE ENGLISH LAW OF TORT

BY

COURTNEY STANHOPE KENNY, LL.D.

EMERITUS PROFESSOR OF THE LAWS OF ENGLAND IN THE UNIVERSITY OF CAMBRIDGE;

LATE M.P. FOR BARNSLEY.

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PREFACE TO THE FIRST EDITION.

THE favourable reception given to my volume of cases on the Law of Crime leads me to offer to the public a similar volume upon the Law of Tort.

On this subject I have, for upwards of ten years past, delivered an annual course of lectures at Cambridge to men entering on the study of English Law. To arouse in their minds, from the outset, an intelligent interest in so difficult a subject as Tort and in the unfamiliar art of interpreting judiciary law, I have found it necessary to make constant reference to actual cases. For the purpose of such references, I have sought far and wide for cases that—from the nature of their facts or from the excellence of the judgments—were likely to impress the student's memory with a vivid illustration, or a terse exposition, of any important principle. Such decisions I have not hesitated to take from America or India, if they laid down English doctrine. And I have sometimes found it useful to supplement even the reports of our own English cases by adding details from the contemporary newspapers.

But experience has shewn me that difficulties in obtaining ready access to law-books frequently hamper the student in utilizing his references to Reports, and make it highly desirable for him to have on his own shelves some compact collection of suitable cases. My present book aims at giving him, within the

compass of a portable volume, two hundred decisions upon noteworthy points in the Law of Tort. The longer cases I have usually abridged; but (I hope) in such a manner that the reader will still possess a complete statement of the essential facts, and also of the salient arguments not only for but also against the judgment.

The compilation of the collection would have been impossible had not the Incorporated Council of Law Reporting generously given me leave to make use of their Reports—a permission for which I must return my most cordial acknowledgments. My thanks are also due to my friend and former pupil, Mr R. W. Kittle, LL.B., of Lincoln's Inn, for the ready kindness with which he gave me valuable aid in preparing the book for press.

COURTNEY S. KENNY.

Downing College, Cambridge,
August, 1904.

PREFACE TO THE THIRD EDITION.

In again offering this volume to the public, I have introduced many additions; some in order to keep up with the current of new cases, and others in order to give the reader a clearer grasp of various topics discussed in the book.

August, 1920.

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SELECT CASES ON THE LAW OF TORTS.

PART I.

GENERAL PRINCIPLES.

SECTION I.

THE LIABILITY FOR TORT.

[*An act otherwise lawful is usually* not *rendered a Tort by its causing* damage.]

HOLMES *v.* MATHER.

COURT OF EXCHEQUER. 1875. L.R. 10 Ex. 261.

THE first count of the declaration alleged that the female plaintiff was passing along a highway, and the defendant so negligently drove a carriage and horses in the highway that they ran against her and threw her down, whereby she and the male plaintiff were damnified.

The second count alleged that the defendant drove a carriage with great force and violence against the female plaintiff and wounded her, whereby, &c.

Plea, not guilty, and issue thereon.

At the trial before FIELD, J., at the Spring Assizes for Durham, 1875, the following facts were proved:—In July, 1874, the defendant kept two horses at a livery stable in North Shields, and wishing to try them for the first time in double harness, had them harnessed together in his carriage. At his request a groom drove, the defendant sitting on the box beside him. After driving for a short time, the horses being startled by a dog which suddenly rushed out and barked at them, ran away and became so unmanageable that the groom could not stop them, though he could to some extent guide them. The groom begged the defendant to leave the management to him, and the defendant accordingly did not interfere. The groom succeeded in turning the horses safely round several corners, and at last guided them into Spring

Terrace, at the end of which and at right angles runs Albion Street, a shop in Albion Street being opposite the end of Spring Terrace. When they arrived at the end of Spring Terrace the horses made a sudden swerve to the right, and the groom then pulled them more to the right, thinking that was the best course, and tried to guide them safely round the corner. He was unable to accomplish this, and the horses were going so fast that the carriage was dashed against the palisades in front of the shop; one of the horses fell, and at the same time the female plaintiff, who was on the pavement near the shop, was knocked down by the horses and severely injured. The jury stopped the case before the close of the evidence offered on the defendant's part, and said that in their opinion there was no negligence in any one. The plaintiff's counsel contended that since the groom had given the horses the direction which guided them against the female plaintiff, that was a trespass which entitled the plaintiffs to a verdict on the second count.

The verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter it for them for £50 on the second count, the Court to be at liberty to draw inferences of fact, and to make any amendment in the pleadings necessary to enable the defendant to raise any defence that ought to be raised.

Herschell, Q.C., having obtained a rule nisi to enter the verdict for the plaintiffs for £50, pursuant to leave reserved, on the ground that, upon the facts proved, the plaintiffs were entitled to a verdict on the trespass count,

C. Russell, Q.C., and *Crompton*, for the defendant, shewed cause. The plaintiff's contention is, that the driver gave that direction to the horses which turned them on to the plaintiff; but that is not clear upon the evidence. The horses swerved to the right, and the driver then pulled them further to the right, thinking he could turn them completely round, and so stop them. The horses struck the plaintiff while the driver was trying to pull them away from her. Therefore the injury was not caused by the immediate act of the driver. The jury having found that there was no negligence, the action is not maintainable in any form. This principle is laid down in the judgment of the Exchequer Chamber, in *Fletcher* v. *Rylands*[1]:—"But it was further said by Martin, B., than when damage is done to personal property, or even to the person by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and, as was pointed out by Mr Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: *Hammack*

[1] Law Rep. 1 Ex. 265, 286. *Infra*, p. 600.

v. *White*[1]: or where a person in a dock is struck by the falling of a bale of cotton which the defendants' servants are lowering: *Scott* v. *London Dock Co.*[2]; and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident."

True, there are dicta in *Leame* v. *Bray*[3] that negligence is immaterial, but there is no such decision. In that case and *M'Laughlin* v. *Pryor*[4] there was evidence for negligence for the jury. So in *Wakeman* v. *Robinson*[5], where Dallas, C.J., said: "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie"; and see *Gibbons* v. *Pepper*[6]. But assuming that the driver is liable in trespass, the defendant took no part in the management of the horses, and was not a participator in the trespass. Assuming, for the sake of argument, that the relation of master and servant existed between the defendant and the groom, the mere presence of the master on the box is not enough to fix him with liability for the trespass of the servant, though it might in an action on the case for negligence[7]. The groom had no implied authority from his master to commit this trespass; the groom expressly took on himself the responsibility of management. Trespass lies where the injury sued for is caused by the immediate and wilful force of the defendant; or by his immediate force without wilfulness. But whether the act of the groom in guiding the horses on to the plaintiff be considered immediate and wilful or not, in no sense was it the immediate force of the defendant, and this is essential in trespass, *Sharrod* v. *London and North Western Ry. Co.*[8], where Parke, B., delivering the judgment of the Court, said: "When the act is that of the servant in performing his duty to his master, the rule of law we

[1] 11 C. B. (N.S.) 588. *Infra*, p. 551.
[2] 3 H. & C. 596; 34 L. J. (Ex.) 17, 220.
[3] 3 East, 593, 599. See p. 144 *infra*.
[4] 4 Man. & G. 48.
[5] 1 Bing. 213, 215.
[6] 1 Lord Raym. 38. See p. 143 *infra*.
[7] See per Bayley, B., in *Moreton* v. *Hardern*, 4 B. & C. 226, citing *Huggett* v. *Montgomery*, 2 N. R. 446.
[8] 4 Ex. 580, 586.

consider to be that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master." There the plaintiff's sheep got upon the defendants' railway through defect of fences, and were run over by a locomotive driven by the defendants' servants. Held, that, whether the facts would or would not support an action on the case, trespass would not lie. *Chandler* v. *Broughton*[1] is the only case where a defendant has been held liable in trespass in consequence of his mere presence at the time, and there negligence in putting the horse into a gig was proved, for which he was as much responsible as the driver. In the words of Manley Smith's Master and Servant, 2nd ed. p. 209, citing *M'Manus* v. *Crickett*[2]: "Unless there be evidence of the concurrence of the master's will in the act of the servant, a master can in no case be treated as a trespasser for the act of his servant."

Herschell, Q.C., and *Gainsford Bruce*, in support of the rule. But for the act of the groom in directing the horses on to the plaintiff, they would have run into the shop, and the plaintiff would have escaped. The groom may have been doing better for himself and the defendant in avoiding the shop, but that does not justify him in guiding the horse on to the plaintiff. That direction having been given by the immediate act of the driver, an action of trespass lies: *Leame* v. *Bray*[3]. There the defendant accidentally, and not wilfully, drove his carriage against the plaintiff's carriage, and the question being whether the proper remedy was trespass or case, it was held that the plaintiff had rightly brought trespass. Grose, J., said: "Looking into all the cases from the Year Book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." And Lord Ellenborough says: "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass vi et armis, by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." This was followed and approved in *M'Laughlin* v. *Pryor*[4]. It was not disputed that the groom was doing all he could to stop the horses, but as he still retained some control over them, the injury was the immediate result of his act. Herein lies the distinction between the present case and *Hammack* v. *White*[5], where the defendant

[1] 1 C. & M. 29. [2] 1 East, 106. [3] 3 East, 593, 599.
[4] 4 Man. & G. 48. [5] 11 C. B. (N.S.) 588; *infra*, p. 551.

had no control whatever over the horse, and did all in his power to prevent him going where he did. Here the driver exercised control so far as to pull them away from one direction into another, which took them on to the plaintiff.

[BRAMWELL, B. He was trying to divert them from that direction, but failed. It is not as if he had said, "I must either drive into the shop or on to the plaintiff, and I'll do the latter."]

In *Hammack* v. *White*[1] there was no count in trespass, and the present point was not taken. It only remains, then, to shew that the defendant is as much responsible as if he had himself driven, and this is conclusively established by *Chandler* v. *Broughton*[2], which was trespass for driving a gig against the church in Langham Place. The defendant was sitting by his servant, who drove, and the horse ran away, and did the mischief. The plaintiff having obtained a verdict, Bayley, B., reserved the point whether the action should have been in case, but a rule nisi to enter a nonsuit was afterwards refused. Bayley, B., in giving judgment, said: "The rule is this: if master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the trespass of the servant is the trespass of the master....I think that where the master is sitting by the side of his servant, and the servant does an act immediately injurious to the plaintiff, an action of trespass is the proper remedy." This decision and that of *Leame* v. *Bray*[3] were followed and approved in *M'Laughlin* v. *Pryor*[4]. There the defendant hired for the day a carriage and horses, which were driven by postillions in the service of the owner of the horses, the defendant sitting on the box. The postillions drove against the plaintiff's gig and injured it: held, that the defendant was liable in trespass, though the postillions were not his servants. It is immaterial that in all these cases there was negligence in the drivers; for, in considering whether trespass will lie, negligence is not regarded. It is not an element in the question of trespass to land—why should it be in trespass to the person? In *Read* v. *Edwards*[5] it was discussed whether the owner of a dog is not answerable in trespass for every unauthorized entry of the animal on to the land of another; and though the point was left undecided, the only doubt entertained was one arising from the nature of the dog as distinguished from oxen or horses. Willes, J., there referred to a case in the Year Book, 20 Edw. 4, Mich. Term, pl. 10, where the judges held that trespass lay against the defendant, whose beasts having been turned out on an uninclosed place where the defendant had common, entered the adjoining land of the plaintiff, and

[1] 11 C. B. (N.S.) 588; *infra*, p. 551.
[2] 1 C. & M. 29.
[3] 3 East, 593, 599.
[4] 4 Man. & G. 48.
[5] 17 C. B. (N.S.) 245; 34 L. J. (C.P.) 31.

depastured his herbage, without the defendant's knowledge. This case was also cited by Blackburn, J., in *Fletcher* v. *Rylands*[1]. The defendant by his own volition set the carriage and horses in motion; and if the result is that he can only save himself by injuring the plaintiff, there is no justification for the injury. If somebody must suffer, why should it be the innocent plaintiff, instead of the defendant, who chose to exercise his horses in the public streets?

[BRAMWELL, B., referred to *Mouse's Case*[2].]

BRAMWELL, B. I am inclined to think, upon the authorities, that the defendant is in the same situation as the man driving; but, without deciding that question, I assume, for the purposes of the opinion I am about to express, that he is as much liable as if he had been driving.

Now, what do we find to be the facts? The driver is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavours to do what is the best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant, who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye and so injured it. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable.

That is the general view of the case. Now I will put it a little more specifically, and address myself to the argument of Mr Herschell. Here, he says, if the driver had done nothing, there is no reason to suppose this mischief would have happened to the woman; but he did give the horses a pull, or inclination, in the direction of the plaintiff—he drove them there. It is true that he endeavoured to drive them further away from the place by getting them to turn to the right, but he did not succeed in doing that. The argument, therefore, is, if he had not given that impulse or direction to them, they would not have come where the plaintiff was. Now, it seems to me that argument is not tenable, and I think one can deal with it in this way. Here, as in almost all cases, you must look at the immediate act that did the mischief, at what the driver was doing before the mischief happened, and not to what he was doing next before what he was then doing. If you looked to the last act but one, you might as well argue

[1] Law Rep. 1 Ex. 280. [2] 12 Co. Rep. 63.

that if the driver had not started on that morning, or had not turned down that particular street, this mischief would not have happened.

I think the proper answer is, You cannot complain of me unless I was immediately doing the act which did the mischief to you. Now the driver was not doing that. What I take to be the case is this: he did not guide the horses upon the plaintiff; he guided them away from her, in another direction; but they ran away with him, upon her, in spite of his effort to take them away from where she was. It is not the case where a person has to make a choice of two evils, and singles the plaintiff out, and drives to the spot where she is standing. That is not the case at all. The driver was endeavouring to guide them indeed, but he was taken there in spite of himself. I think the observation made by my Brother Pollock during the argument is irresistible, that if Mr Herschell's contention is right, it would come to this: if I am being run away with, and I sit quiet and let the horses run wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible.

As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions. In *Sharrod* v. *London and North Western Ry. Co.*[1] the master was not present. In *M'Laughlin* v. *Pryor*[2] the defendant was present, and was supposed to be taking part in the control of the animals. In *Leame* v. *Bray*[3] there was an act of direct force vi et armis, and there was negligence. I think, therefore, that our judgment should be for the defendant.

I think I could distinguish the case cited from the Year Book, but I will only say that there the defendant let out animals, liable to stray, whether frightened or not, in a place not inclosed, and without anybody to keep them in bounds.

* * * * * * *

Rule discharged.

[1] 4 Ex. 580. [2] 4 Man. & G. 48. [3] 3 East, 593, 599.

[*And an act otherwise lawful is usually* not *rendered a Tort by its being committed from a* malicious motive.]

MAYOR, ETC. OF BRADFORD *v.* PICKLES.

HOUSE OF LORDS. L.R. [1895], A.C. 587.

THE following statement of the facts is taken from the judgment of Lord Watson:—

The appellants have purchased under statutory powers, and are now vested with the whole undertaking of the Bradford Waterworks Company incorporated by an Act passed in 1854 (17 & 18 Vict. c. xxiv.), which transferred to that company the undertaking of a corporation, having the same name, created by statute in 1842 (5 Vict. Sess. 2, c. vi.), together with all rights and privileges thereto belonging. The older of these companies acquired, for the purposes of their undertaking, a parcel of land known as Trooper Farm, and also certain springs and streams arising in or flowing through the farm. From these springs and streams the appellants and their predecessors have hitherto obtained a valuable supply of water for the domestic use of the inhabitants of Bradford.

Trooper Farm is bounded on the west and north by lands belonging to the respondent which are about 140 acres in extent. The first of these boundaries, on the west, which is alone of importance in the present case, is a public highway called Doll Lane. The respondent's land to the west of that boundary is on a higher level than Trooper Farm, and has a steep slope downwards to the lane. Its substrata are intersected by two faults running from east to west, one from each end of the boundary, which prevent the escape of percolating water either to the north or south; and the nature and the inclination of the strata are such that the subterranean water which they contain must, by the natural force of gravitation, eventually find its way to Trooper Farm.

The sources from which the appellants derive a supply of water near to the western boundary of Trooper Farm are two in number. The first of these is a large spring, known as Many Wells, which issues from their ground twenty or thirty yards to the east of Doll Lane. The second is a stream to the south of Many Wells, which has its origin in a smaller spring on the respondent's land, close to Doll Lane, at a point known as the Watering Spot, from which the water runs in a definite channel into Trooper Farm.

It is an admitted fact that neither the appellants nor either of the companies whose undertaking is now vested in them ever acquired from the respondent or his predecessors in title any part of their legal

right to or interest in the water in their land, whether above or below the ground; and also that the statutes, to the benefit of whose provisions the appellants are now entitled, make no provision for compensating the respondent, in the event of such right or interest being prejudicially affected by the appellants' undertaking.

In the year 1892 the respondent began to sink a shaft on his land adjoining the lane, and to the west of the Many Wells Spring, and also to drive a level through his land for the professed purpose of draining the strata, with a view to the working of his minerals. These operations had the effect of occasionally discolouring the water in the Many Wells Spring, and also of diminishing to some extent the amount of water in that spring, and in the stream coming from the Watering Spot; and it became apparent that, if persevered in, they would result in a considerable and permanent diminution of the water supply obtainable from these sources. The appellants then brought the present suit, in which they crave an injunction to restrain the respondent from continuing to sink the shaft or drive the level, and from doing anything whereby the waters of the spring and stream might be drawn off or diminished in quantity, or polluted, or injuriously affected.

The appellants alleged in their statement of claim that the respondent had not a bonâ fide intention to work his minerals, and that his intention was to injure the appellants and so to endeavour to induce them either to purchase his land or to give him some other compensation.

North, J., being of opinion that the respondent's acts were prohibited by statute granted an injunction[1]. The Court of Appeal (Lord Herschell, L.C., Lindley and A. L. Smith, L.JJ.) reversed this decision and declared that the appellants were not entitled to any of the relief claimed in the action[2].

The Act of 1854 incorporated among others sect. 14 of the Waterworks Clauses Act 1847.

Sect. 49 of the Act of 1854 was almost identical in terms with sect. 234 of the Act of 1842 and ran as follows:—

"It shall not be lawful for any person other than the company to divert alter or appropriate in any other manner than by law they may be legally entitled any of the waters supplying or flowing from certain streams and springs called 'Many Wells,' arising or flowing in and through a certain farm called 'Trooper' or Many Wells Farm in the township of Wilsden in the parish of Bradford, or to sink any well or pit or do any act matter or thing whereby the waters of the said springs might be drawn off or diminished in quantity; and if any person shall illegally divert alter or appropriate the said waters or

[1] [1894] 3 Ch. 53. [2] [1895] 1 Ch. 145.

any part thereof or sink any such well or pit or shall do any such act matter or thing whereby the said waters may be drawn off or diminished in quantity, and shall not immediately on being required so to do by the company repair the injury done by him, so as to restore the said springs and the waters thereof to the state in which they were before such illegal act as aforesaid, he shall forfeit to the company any sum not exceeding five pounds for every day during which the said supply of water shall be diverted or diminished by reason of any work done or act performed by or by the authority of such person, in addition to the damage which the company may sustain by reason of their supply of water being diminished."

May 9. *Cozens-Hardy, Q.C.*, and *B. Eyre* for the appellants:—The respondent in diverting this water is not making a reasonable use of the land. He is acting maliciously, and the cases shew that a user which would otherwise be justifiable ceases to be so when the object is to injure another. This principle was applied in the early case of *Keeble* v. *Hickeringill*[1], in which a decoy was disturbed by shooting. In *Acton* v. *Blundell*[2], in which the right to intercept underground water was established, this limitation is expressed. Tindall, C.J., at p. 353 quotes Marcellus: "Si non animo vicini nocendi, sed suum agrum meliorem faciendi"; and the same passage is quoted by Lord Wensleydale in *Chasemore* v. *Richards*[3]. Lord Wensleydale says: "Every man has a right to the natural advantages of his soil....But according to the rule of reason and law 'Sic utere tuo ut alienum non laedas,' it seems right to hold that he ought to exercise his right in a reasonable manner with as little injury to his neighbour's rights as may be." In *Smith* v. *Kenrick*[4] the same limitation on freedom of action is imposed; and Maule, J., says that if a man in the legitimate use of his own land "acts negligently or capriciously and injury results, no doubt he is liable." In *Mogul Steamship Co.* v. *Macgregor, Gow & Co.*[5] Bowen, L.J., after saying that a man is legally justified in the bonâ fide use of his property or the exercise of his trade, even if what he does seems selfish or unreasonable, adds: "But such legal justification would not exist where the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain or the lawful enjoyment of one's own rights." The respondent's conduct comes distinctly within the exceptions there expressed.

[They also contended that the respondent's conduct was forbidden by the Bradford Waterworks Act 1854 s. 49.]

Everitt, Q.C., Tindal Atkinson, Q.C., Butcher and *A. P. Longstaffe* for the respondent were not heard.

[1] 11 Mod. 74, 131; 11 East, 574, n. [2] 12 M. & W. 324.
[3] 7 H. L. C. 349, 387. [4] 7 C. B. 515, 559. [5] 23 Q. B. D. 598, 618.

The House took time for consideration.

July 29. LORD HALSBURY, L.C. :—

My Lords, in this action the plaintiffs seek to restrain the defendant from doing certain acts which they allege will interfere with the supply of water which they want, and which they are incorporated to collect for the purpose of better supplying the town of Bradford. North, J., ordered the injunction to issue, but the Court of Appeal, consisting of Lord Herschell, Lindley, L.J., and A. L. Smith, L.J., reversed his judgment.

The facts that are material to the decision of this question seem to me to lie in a very narrow compass. The acts done, or sought to be done, by the defendant were all done upon his own land, and the interference, whatever it is, with the flow of water is an interference with water, which is underground and not shewn to be water flowing in any defined stream, but is percolating water, which, but for such interference, would undoubtedly reach the plaintiffs' works, and in that sense does deprive them of the water which they would otherwise get. But although it does deprive them of water which they would otherwise get, it is necessary for the plaintiffs to establish that they have a right to the flow of water, and that the defendant has no right to do what he is doing.

My Lords, I am of opinion that neither of those propositions can be established. Apart from the consideration of the particular Act of Parliament incorporating the plaintiffs, which requires separate treatment, the question whether the plaintiffs have a right to the flow of such water appears to me to be covered by authority. In the case of *Chasemore* v. *Richards*[1], it became necessary for this House to decide whether an owner of land had a right to sink a well upon his own premises, and thereby abstract the subterranean water percolating through his own soil, which would otherwise, by the natural force of gravity, have found its way into springs which fed the River Wandle, the flow of which the plaintiff in that action had enjoyed for upwards of sixty years.

The very question was then determined by this House, and it was held that the landowner had a right to do what he had done whatever his object or purpose might be, and although the purpose might be wholly unconnected with the enjoyment of his own estate.

It therefore appears to me that, treating this question apart from the particular Act of Parliament, and, indeed, apart from the 49th section of the Act of Parliament upon which the whole question turns, it would be absolutely hopeless to contend that this case is not governed by the authority of *Chasemore* v. *Richards*[1].

[1] 7 H. L. C. 349; *infra*, p. 170.

This brings me to the 49th section of the statute 17 & 18 Vict. c. cxxiv., upon which reliance has been placed. [His Lordship read it.]

Whatever may be said of the drafting of this section, two things are clear: first, that the section in its terms contemplates that persons other than the company may be legally entitled to divert, alter, or appropriate the waters supplying or flowing from the streams and springs; and, secondly, that the acts against which the section is directed must be illegal diversion, alteration, or appropriation of the said waters.

The natural interpretation of such language seems to me to be this: that whereas the generality of the language of the section might apply to any alteration or appropriation of waters supplying or flowing from the streams and springs called "Many Wells," the section only intended to protect such streams and springs and supplies as the company should have acquired a right to by purchase, compensation, or otherwise, but in suchwise as should vest in them the proprietorship of the waters, streams, springs, &c. And lest the generality of the language should give them more than that to which they had acquired the proprietary right, the legal rights of all other persons were expressly saved; and upon this assumption the latter part of the section makes penal the illegal diversion, alteration, or appropriation of any streams, &c., of which, by the hypothesis, the company had become the proprietor.

I do not think that North, J., does justice to the language of the section when he says that "the section enacts that a man is not to do certain specified things except so far as he may lawfully do them." The fallacy of that observation (with all respect to North, J.) resides in the phrase "certain specified things." If my reading of the section be correct, the thing that is prohibited is taking or diverting water which has been appropriated and paid for by the company; but the thing which is not prohibited is taking water which has not reached the company's premises, to the property in which no title is given by the section, and which, by the very act complained of, never can reach the company's premises at all. To use popular language, therefore, what is prohibited is taking what belongs to the company, and what is not prohibited is taking what does not belong to the company.

My Lords, I have used popular language because I have no doubt that the draftsman who drew the section was encountered with the proposition in his own mind that you could not absolutely assert property of percolating water at all. You may have a right to the flow of water; you may have a property in the water when it is collected and appropriated and reduced into possession; but, in view of the particular subject-matter with which the draftsman was dealing,

it seems to me intelligible enough why he adopted the phraseology now under construction.

It appears to me that this is the true construction of the section from the language itself. But I confess I can entertain no doubt that the mere fact that the section, as construed by the plaintiffs, affords no right to compensation to those whose rights might be affected, is conclusive against the construction contended for by the plaintiffs.

The only remaining point is the question of fact alleged by the plaintiffs, that the acts done by the defendant are done, not with any view which deals with the use of his own land or the percolating water through it, but done, in the language of the pleader, "maliciously." I am not certain that I can understand or give any intelligible construction to the word so used. Upon the supposition on which I am now arguing, it comes to an allegation that the defendant did maliciously something that he had a right to do. If this question were to have been tried in old times as an injury to the right in an action on the case, the plaintiffs would have had to allege, and to prove, if traversed, that they were entitled to the flow of the water, which, as I have already said, was an allegation they would have failed to establish.

This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant. But I am not prepared to adopt Lindley, L.J.'s, view of the moral obliquity of the person insisting on his right when that right is challenged. It is not an uncommon thing to stop up a path which may be a convenience to everybody else, and the use of which may be no inconvenience to the owner of the land over which the path goes. But when the use of it is insisted upon as a right, it is a familiar mode of testing that right to stop the permissive use, which the owner of the land would contend it to be, although the use may form no inconvenience to the owner.

So, here, if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which would otherwise go into the possession of this trading company, I see no reason why he should not insist on their purchasing his interest from which this trading company desires to make profit.

For these reasons, my Lords, I am of opinion that this appeal ought to be dismissed with costs, and that the plaintiffs should pay to the defendant the costs both here and below.

LORD WATSON....The second plea argued by the appellants, which was rejected by both Courts below, was founded upon the text of the Roman law[1] (Dig. lib. 39, tit. 3, art. 1, s. 12), and also, somewhat to my surprise, upon the law of Scotland. I venture to doubt whether the doctrine of Marcellus would assist the appellants' contention in this case; but it is unnecessary to consider the point, because the noble and learned Lords who took part in the decision of *Chasemore* v. *Richards*[2] held that the doctrine had no place in the law of England.

I desire, however, to say that I cannot assent to the law of Scotland as laid down by Lord Wensleydale in *Chasemore* v. *Richards*[3]. The noble and learned lord appears to have accepted a passage in Mr Bell's Principles (s. 966). I am aware that the phrase "in aemulationem vicini" was at one time frequently, and is even now occasionally, very loosely used by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained as being in aemulationem, where it was not attended with offence or injury to the legal rights of his neighbour. In cases of nuisance a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a land-owner proceeded to burn limestone close to his march so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal or greater convenience to himself and without giving cause of offence, the Court would probably grant an interdict. But the principle of aemulatio has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same with the law of England. No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.

* * * * * * *

Appeal dismissed with costs; action dismissed.

[EDITOR'S NOTE. In the curious American *Suffolk Bank Case* (27 Vermont 505), one bank was sued by another for habitually presenting for immediate payment any notes of the latter bank that came into its hands (instead of paying them away again to the general public), and thus abbreviating their circulation "with wicked motives and with an intent to injure the plaintiffs in their business." The Court held that this was merely the ordinary case of a creditor asking for a payment which it was the legal duty of the debtor to be at all times ready to make. If the defendants' demand for unusually prompt payments had caused damage, it was *damnum absque injuriâ*; and even malicious motive would not suffice to render them liable for doing acts which they had a right to do.]

[1] *Supra*, p. 10. [2] *Infra*, p. 170. [3] 7 H. L. C. at p. 388.

[*If a statutory duty be imposed solely in order to prevent damage of one particular kind, no action will lie for such a breach of it as only causes damage of a* different *kind.*]

GORRIS *v.* SCOTT.

COURT OF EXCHEQUER. 1874. L.R. 9 Ex. 125.

DECLARATION, first count: that after the passing of the Contagious Diseases (Animals) Act, 1869, the Privy Council, in exercise of the powers and authorities vested in them by the Act (s. 75), made an order (called the Animals Order of 1871) with reference to animals brought by sea to ports in Great Britain, and to the places used and occupied by such animals on board any vessel in which the same should be so brought to such ports; and thereby, amongst other things, ordered (1) that every such place should be divided into pens by substantial divisions; (2) that each such pen should not exceed nine feet in breadth and fifteen feet in length; that afterwards and whilst the order was in force the plaintiffs delivered on board a vessel called the *Hastings*, to the defendant as owner of the vessel, certain sheep of the plaintiffs', to be carried by the defendant for reward on board the said vessel from Hamburg to Newcastle, and there delivered to the plaintiffs; and the defendant, as such owner, received and started on the said voyage with the sheep for the purposes and on the terms aforesaid; that all conditions were fulfilled, &c., yet the place in and on board the said vessel which was used and occupied by the sheep during the voyage was not, during the said voyage or any part thereof, divided into pens by substantial or other divisions, by reason whereof divers of the sheep were washed and swept away by the sea from off the said ship, and were drowned and wholly lost to the plaintiffs.

Second count, similar to the first, but setting out a third regulation: "that the floor of each such pen should have proper battens or other foot-hold thereon," and alleging the loss of the sheep as aforesaid to have been caused by the want of such battens.

Demurrer and joinder.

Shield, in support of the demurrer. The statute was made for the furtherance of a public purpose, and not to secure any private benefit, and the observance of its provisions is enforced by a penalty: 32 & 33 Vict. c. 70, s. 103, and *Cullen* v. *Trimble*[1]. Its infringement, therefore, gives no ground for an action.

[1] L. R. 7 Q. B. 416.

The preamble of the Act, as well as its whole structure, and s. 75 in particular, under which this order is made[1], shew that the Act is entirely directed to the prevention of contagious diseases among cattle; and if, under s. 75, the Privy Council had made orders directed to some other purpose, they would have exceeded their powers. The order, then, must be construed with reference to the language of s. 75 and the purpose of the Act, and, so understood, its object is not to secure the owners of sheep and cattle from loss by the perils of the sea, but to protect the country against the introduction and the spread of murrain. This circumstance brings the case within the authority of *Stevens* v. *Jeacocke*[2], and distinguishes it from *Couch* v. *Steel*[3] and *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*[4]

Herschell, Q.C. (*J. W. Mellor* with him), contrà. *Stevens* v. *Jeacocke*[2] is distinguishable on the ground that a specific remedy was given by the statute; the present case falls within *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*[4], where it was held that the imposition of a penalty which was not intended as a compensation did not exclude the right of action. These precautions must be considered as enacted generally, at least to this extent, that all persons engaged in the importation of animals must be taken to know of the existence of the regulations, and to contract with reference to them.

[1] 32 & 33 Vict. c. 70: "Whereas it is expedient to confer on Her Majesty's most honourable Privy Council powers to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, and other animals, by prohibiting or regulating the importation of foreign animals; and it is further expedient to provide against the spreading of such diseases in Great Britain, and to consolidate and make perpetual the Acts relating thereto, and to make such other provisions as are contained in this Act." Part I. (ss. 1—8) is headed "Preliminary"; part II. (ss. 9—14), "Local Authorities"; part III. (ss. 15—30), "Foreign Animals"; part IV. (ss. 31—64), "Discovery and Prevention of Disease"; part V. (ss. 65—74), "Slaughter in Cattle Plague; Compensation"; part VI. (ss. 75—85), "Orders of Council and Local Authorities"; and the rest of the Act relates to the taking of lands, to expenses, and to offences and penalties.

Sect. 75: "The Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes:—

"For insuring for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing:

"For protecting such animals from unnecessary suffering during the passage and on landing:

[Then follow certain inland purposes.]

"And generally any orders whatsoever which they think it expedient to make for the better execution of this Act, or for the purpose of in any manner preventing the introduction or spreading of contagious or infectious disease among animals in Great Britain."

[2] 11 Q. B. 731; 17 L. J. (Q.B.) 163.

[3] 3 E. & B. 402; 23 L. J. (Q.B.) 121.

[4] Law Rep. 6 Ex. 404.

The plaintiffs were entitled to assume that the defendant would perform all the duties cast upon him by the law, including compliance with these orders; and that being so, the defendant has impliedly contracted with the plaintiffs that he would perform them.

KELLY, C.B. This is an action to recover damages for the loss of a number of sheep which the defendant, a shipowner, had contracted to carry, and which were washed overboard and lost by reason (as we must take it to be truly alleged) of the neglect to comply with a certain order made by the Privy Council, in pursuance of the Contagious Diseases (Animals) Act, 1869. The Act was passed merely for sanitary purposes, in order to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact. Under the authority of that Act, certain orders were made; amongst others, an order by which any ship bringing sheep or cattle from any foreign port to ports in Great Britain is to have the place occupied by such animals divided into pens of certain dimensions, and the floor of such pens furnished with battens or foot-holds. The object of this order is to prevent animals from being overcrowded, and so brought into a condition in which the disease guarded against would be likely to be developed. This regulation has been neglected, and the question is, whether the loss, which we must assume to have been caused by that neglect, entitles the plaintiffs to maintain an action.

The argument of the defendant is, that the Act has imposed penalties to secure the observance of its provisions, and that, according to the general rule, the remedy prescribed by the statute must be pursued; that although, when penalties are imposed for the violation of a statutory duty, a person aggrieved by its violation may sometimes maintain an action for the damage so caused, that must be in cases where the object of the statute is to confer a benefit on individuals, and to protect them against the evil consequences which the statute was designed to prevent, and which have in fact ensued; but that if the object is not to protect individuals against the consequences which have in fact ensued, it is otherwise; that if, therefore, by reason of the precautions in question not having been taken, the plaintiffs had sustained that damage against which it was intended to secure them, an action would lie, but that when the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs, they cannot maintain an action founded on the neglect. The principle may be well illustrated by the case put in argument of a breach by a railway company of its duty to erect a gate on a level crossing, and to keep the gate closed except when the crossing is being actually and properly used. The object of the precaution is to prevent injury

from being sustained through animals or vehicles being upon the line at unseasonable times; and if by reason of such a breach of duty, either in not erecting the gate, or in not keeping it closed, a person attempts to cross with a carriage at an improper time, and injury ensues to a passenger, no doubt an action would lie against the railway company, because the intention of the legislature was that, by the erection of the gates and by their being kept closed individuals should be protected against accidents of this description. And if we could see that it was the object, or among the objects of this Act, that the owners of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being washed overboard, or lost by the perils of the sea, the present action would be within the principle.

But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but, as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on their way to this country. The preamble recites that "it is expedient to confer on Her Majesty's most honourable Privy Council power to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, or other animals, by prohibiting or regulating the importation of foreign animals," and also to provide against the "spreading" of such diseases in Great Britain. Then follow numerous sections directed entirely to this object. Then comes s. 75, which enacts that "the Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes." What, then, are these purposes? They are "for securing for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing," "for protecting such animals from unnecessary suffering during the passage and on landing," and so forth; all the purposes enumerated being calculated and directed to the prevention of disease, and none of them having any relation whatever to the danger of loss by the perils of the sea. That being so, if by reason of the default in question the plaintiffs' sheep had been overcrowded, or had been caused unnecessary suffering, and so had arrived in this country in a state of disease, I do not say that they might not have maintained this action. But the damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable.

* * * * * * *

Judgment for the defendant.

[*A tortfeasor is liable for all the natural and probable consequences of his tort, even for those produced through the subsequent lawful intervention of some other person.*]

SCOTT *v.* SHEPHERD.

COURT OF COMMON PLEAS. 1773. 2 WM. BLACKSTONE, 892.

TRESPASS and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, &c. On Not Guilty pleaded, the cause came on to be tried before NARES, J., last Summer Assizes, at Bridgwater, when the jury found a verdict for the plaintiff with £100 damages, subject to the opinion of the Court on this case:—On the evening of the fair-day at Milborne Port, 28th October, 1770, the defendant threw a *lighted squib*, made of gunpowder, &c. from the street into the market-house, which is a covered building, supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it *across* the said market-house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and, in so throwing it, struck the plaintiff then in the said market-house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes. *Qu.* If this action be maintainable?

This case was argued last Term by *Glyn*, for the plaintiff, and *Burland*, for the defendant: and this Term, the Court, being divided in their judgment, delivered their opinions *seriatim*.

NARES, J., was of opinion, that trespass would well lie in the present case. The natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has by statute W. 3[1], been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury

[1] 9 & 10 W. 3, c. 7. A schoolmaster, who permits an infant pupil under his care to make use of fire-works, is liable, in *assumpsit*, for a breach of his duty and undertaking to the parent of such infant, for any mischief which ensues to the infant from being so permitted to make use of them; *King* v. *Ford*, 1 Stark. R. 421.

mediate or *immediate*. 21 Hen. 7, 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 596; Hob. 134; T. Jones, 205; 6 Edw. 4, 7, 8; Fitzh. *Trespass*, 110. The principle I go upon is what is laid down in *Reynolds* and *Clark*, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever therefore an act is unlawful at first, trespass will lie for the consequences of it. So, in 12 Hen. 4, trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. 8, 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60; Reg. 108, 95; 6 Edw. 4, 7, 8; 1 Ld. Raym. 272; Hob. 180; Cro. Jac. 122, 43; F. N B. 202, [91, G]. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient.—*Qui facit per aliud facit per se.* He is the person, who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do[1]. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the *King* and *Huggins*, 2 Lord Raym 1574; *Parkhurst* and *Foster*, 1 Lord Raym. 480; *Rosewell* and *Prior*, 12 Mod. 639. And it was declared by this Court, in *Slater* and *Baker*, M. 8 Geo. 3, 2 Wils. 359, that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case: but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.....

De Grey, C. J This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my Brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real

[1] S. P. *per* Ld. *Ellenborough*, 3 East, 595. "If a man hath an unruly horse in his stable, and leaves open the stable door, whereby the horse goes forth and does mischief; an action lies against the master"; *per Wild*, J., 1 Ventr. 295. "If one hath kept a tame fox, which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature"; *per Twisden*, C. J., Ibid.

question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c.—They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, &c.—But the true question is, whether the injury is the direct and immediate act of the defendant; and I am of opinion, that in this case it is. The throwing the squib was an act unlawful and tending to affright the bystanders. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it; —*egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter; Fost. 261. So too, in 1 Ventr. 295, a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay: and, 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable[1]; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95 *a*, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shews that the immediate act need not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged, that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers GOULD and NARES, that the present action is maintainable.

[EDITOR'S NOTE. Blackstone, J., differed from the other three judges who decided this case, but only as to the form of action under which defendant was liable—action of trespass or action on the case. All four judges were unanimous in holding that Shepherd was liable for the injury done.]

[1] [But see p. 169 *infra*, where this very broad principle is limited to cases in which the source of danger has never come into the actual possession of this intermediate "innocent person."]

[*Or even through that other person's* unlawful *intervention.*]

McDOWALL *v.* GREAT WESTERN RAILWAY COMPANY.

KING'S BENCH DIVISION. L.R. [1902] 1 K.B. 618.

FURTHER CONSIDERATION before Kennedy, J.

The action was brought by the plaintiff, an infant, suing by her next friend, to recover damages from the defendants in respect of injuries sustained by her through the alleged negligence of the defendants or their servants. It was tried before Kennedy, J., and a jury at the Haverfordwest Assizes, and, the jury having answered specific questions put to them by the judge and assessed the damages at £175, the case was adjourned for further consideration.

The following statement of facts is taken from the written judgment of Kennedy, J.:—

"The claim is for damages for serious injury inflicted on the plaintiff, a girl of nineteen years of age, in July, 1900, by a brake-van belonging to the defendants and under the management of their servants at Pembroke.

"The defendants, as part of their railway system at Pembroke, have a branch called the Hobbs Point Branch, which is an offshoot of the main line and is chiefly used as a siding. The Hobbs Point Branch line crosses on the level a highway with a gate on either side across the line of railway. For some distance from the highway to the eastward there is a steepish gradient in the railway line of about one in fifty-five, descending to the point where the line crosses the highway. In the course of the gradient is what is termed a 'catch-point,' which would arrest and divert any railway trucks or carriages which from any cause happened to run down the incline towards the highway, and would prevent them, as the defendants' witnesses phrased it, from 'running wild.' On the day before the accident a servant of the company had taken an engine with five trucks and a brake-van along the Hobbs Point Branch from the railway station, intending to leave them there as on a siding until they were required. He drew them beyond and to the westward of the catch-point, that is to say, to a position on the incline between the catch-point and the highway, and there left them, after putting on the brake in the van and properly spragging, as the operation is called, that is, securing by means of pieces of wood, the wheels of the trucks. The van was attached to the trucks by the screw coupling, which was not screwed up tight, but sufficiently tight, if not interfered with, to hold the van in connection with the trucks. The position would not have been a safe one in regard to the highway if these precautions had not been taken, but

with the sprags on the trucks and the brake on the van it would have been safe, as the jury have found by their verdict, if things had remained as they were when the trucks and the van were left in this condition. The defendants' evidence shewed that the reason why the trucks and the van were not left to the eastward of the catch-point was that they wished by going further to the westward to have an extra space of line for shunting other carriages to be brought afterwards on to the branch from the main line. The Hobbs Point Branch was separated on the one side from some open ground belonging to the defendants by a wire fence, and on the other side it was bounded by a field which was separated from the high road by a garden. For years the defendants had been troubled by boys trespassing on this part of the line and playing in and about the vehicles left standing upon it.

"The day after the shunting operations some boys appear to have come on the line where the trucks and van were, and to have amused themselves by playing with the vehicles and their fastenings. They were seen doing this, or, at all events, they were seen on and close to the van, and they seem carelessly to have unfastened the screw coupling of the van, and partially to have released the brake. In consequence of this the van, loosed from the trucks, ran down the incline, smashed the gate which separated the railway from the highway, as well as a gate higher up, and knocked down and seriously injured the plaintiff, who was passing along the highway. It was to recover damages for the negligence of the defendants, which, as the plaintiff alleged, caused these injuries, that the action was brought. It was tried before me, sitting with a jury at the last assizes at Haverfordwest. The jury assessed the damages at £175, and returned answers to specific questions which I left to them. The questions and answers were as follows: 'Was the van, in regard to the persons using the highway where the plaintiff was, in a safe position, as and where it was left by the defendants' servants on the 20th of July, unless interfered with afterwards?' The jury said, 'Yes.' Secondly: 'Would the accident to the plaintiff have happened if the van had not been interfered with?' Answer: 'No.' Thirdly: 'Was the interference the act of trespassers, and, if so, was the interference with the wilful intent of causing the van to descend the incline, or merely negligent?' Answer: 'Yes; the act of trespassers with negligence.' Fourthly: 'Was the danger of such interference causing injury to persons using the highway known to the defendants at the time the van was left and kept where it was, and might it have been sufficiently guarded against by the exercise of reasonable care and skill on the part of the defendants?' Answer: 'Yes; it was known and could have been guarded against by the exercise of reasonable care on the part

of the defendants.' Fifthly: 'Was the occurrence of the injury to the plaintiff materially and effectively caused by want of reasonable care and skill on the part of the defendants' servants in placing and keeping the van as and where it was placed by them, either (1) in regard to its position, apart from interference by trespassers; or (2) in regard to its danger if interfered with; or (3) in any other way?' To that the jury answer, 'Yes, the company were negligent in not placing the van to the east of the catch-point'; and then they assess the damages as I have stated."

Feb. 11. *Arthur Lewis* (*E. M. Samson* with him), for the plaintiff. On the findings of the jury the plaintiff is entitled to judgment. The defendants knew of the danger to persons using the highway, and they could have guarded against it by the exercise of reasonable care and skill. The fact that the immediate cause of the accident was the intervening act of a third party is immaterial: *Clark* v. *Chambers*[1]. Where injury is caused by the negligence of two independent parties, the person injured can maintain an action against either of them: *The Bernina*[2], where this is laid down by Lord Esher, M.R.[3] This is really an a fortiori case, since it is plain that if one of the boys had himself been injured the defendants would have been liable although the boy was a trespasser: *Lynch* v. *Nurdin*[4]. The jury have found that the neglect of the defendants to guard against the mischievous acts of the boys was the effective cause of the accident, and they are therefore liable: *Engelhart* v. *Farrant*[5]; *Harrold* v. *Watney*[6].

Francis Williams, K.C. (*Denman Benson* with him), for the defendants. The defendants are not liable. In all the cases where a defendant has been made liable for an act of a third party he has himself been guilty of some act which was in itself negligent In *Ilott* v. *Wilkes*[7] the defendant had set spring-guns, and in *Jordin* v. *Crump*[8] dog-spears, both of which were dangerous if not illegal things to do. So, in *Illidge* v. *Goodwin*[9] and *Lynch* v. *Nurdin*[4], horses and carts were left unattended in a highway; and in *Daniels* v. *Potter*[10] and *Hughes* v. *Macfie*[11] cellar-flaps in the street were improperly fastened. In all the other cases reviewed in the judgment of the Court in *Clark* v. *Chambers*[1] the same will be found to be the case: *Bird* v. *Holbrook*[12]; *Hill* v. *New River Co.*[13]; *Burrows* v. *March Gas Co.*[14]; *Collins* v. *Middle Level Commissioners*[15]; *Harrison* v. *Great Northern Ry. Co.*[16]; *Greenland*

[1] (1878) 3 Q. B. D. 327.
[2] (1887) *infra*, p. 581.
[3] 12 P. D. at p. 61.
[4] (1841) 1 Q. B. 29; *infra*, p. 27.
[5] [1897] 1 Q. B. 240.
[6] [1898] 2 Q. B. 320.
[7] (1820) 3 B. & Ald. 304; 22 R. R. 400.
[8] (1841) 8 M. & W. 782.
[9] (1831) 5 C. & P. 190; 38 R. R. 798.
[10] (1830) 4 C. & P. 262; 34 R. R. 793.
[11] (1863) 2 H. & C. 744.
[12] (1828) 4 Bing. 628; 29 R. R. 657.
[13] (1868) 9 B. & S. 303.
[14] (1872) L. R. 7 Ex. 96.
[15] (1869) L. R. 4 C. P. 279.
[16] (1864) 3 H. & C. 231.

v. *Chaplin*[1]. In all those cases the defendant was guilty of some initial negligence. Here the only negligence which the jury have attributed to the defendants is that they did not anticipate the unlawful acts of trespassers. A person is not bound to assume that others will commit wrongful acts. In *Smith* v. *London and South Western Ry. Co.*[2], where the defendants were held liable for a fire caused by leaving dry hedge cuttings which became ignited by sparks from an engine, it was held that, as it was common knowledge that engines did emit sparks, the defendants ought to have anticipated the danger; but there is no obligation on any reasonable person to anticipate that others will act unlawfully: *Daniel* v. *Metropolitan Ry. Co.*[3]; *Latch* v. *Rumner Ry. Co.*[4]; *Parker* v. *City of Cohoes*[5].

Samson replied.

Cur. adv. vult.

Feb. 20. KENNEDY, J., read the following judgment:—In this case the material facts may be shortly stated. [The learned judge stated the facts as above set out, and continued:—]

I did not give judgment at the time, but reserved the case, which is in some respects peculiar, for further consideration; and the questions of law arising upon the case have been fully argued before me. The defendants' contention, put shortly, is that, as the placing of the van and trucks where they were placed was, as they were left, safe and without danger to others, there was no negligence in any act of the defendants; and that they cannot be held legally responsible for an occurrence which was immediately and directly due to the subsequent act of trespassers. The plaintiff, on the other hand, relying especially on the fourth finding of the jury, contends that the principles laid down by the Queen's Bench Division in the considered judgment in *Clark* v. *Chambers*[6], and in the earlier case of *Lynch* v. *Nurdin*[7], and other cases which were fully reviewed in that judgment, and also in the later decision of the Court of Appeal in *Engelhart* v. *Farrant*[8], are applicable here. They contend that the jury were warranted in finding as they did, in answer to the fourth and fifth questions, that the defendants were in the circumstances guilty of negligence in leaving and keeping the trucks and van in the place in which they left and kept them, and that such negligence was the material and effective cause of the injury to the plaintiff.

I have upon the whole come to the conclusion that the plaintiff's contention is right. The finding of the jury in answer to the fourth question, namely, that the defendants, at the time of placing and

[1] (1850) 5 Ex. 243.
[2] (1870). *Infra*, p. 541.
[3] (1871) L. R. 5 H. L. 45.
[4] (1858) 27 L. J. (Ex.) 155.
[5] (1878) 10 Hun. (N.Y.) 531; 74 N.Y. 610.
[6] 3 Q. B. D. 327.
[7] 1 Q. B. 29; *infra*, p. 27.
[8] [1897] 1 Q. B. 240.

keeping the van where they did, knew of the danger to those on the highway of such interference as caused the plaintiff's hurt, appears to me to be conclusive. The position in which, with this knowledge, they placed and kept the van was one of danger, because, if the interference happened so as to set the vehicles in motion, there was nothing there to stop the van running down the incline and crashing through the intervening gates and over the highway. There was a catch-point which had been placed to prevent, and which would in fact have prevented, such a disaster. With the knowledge of the danger the defendants, for the convenience of their traffic arrangements, preferred not to use this obvious and effective safeguard. There was, I think, quite sufficient evidence to justify the finding of the jury of the defendants' knowledge of the existence of the danger which the defendants' servants thus needlessly imposed upon persons using the highway[1]...If, as the jury have found, the risk of interference by trespassers with trucks and vans in this locality was a risk known to the defendants, and if the consequent danger of their movement down the incline to the highway was also a known risk, and if, further, this danger might have been guarded against by the exercise by the defendants of reasonable care, as the jury have also found, I can see no legal reasons upon which the defendants can claim immunity merely because the boys were trespassers. I may point out that in *Engelhart* v. *Farrant*[2] the act which immediately caused the plaintiff's hurt was an unauthorized and improper act on the part of the person who did it; and in *Lynch* v. *Nurdin*[3] Lord Denman said[4]: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." In this case the van as placed was not a cause of danger, but the defendants knew in effect that it might become a cause of

[1] [EDITOR'S NOTE. But the Court of Appeal (72 L. J. R., K. B. D. 652; 88 L. T. 825; W. N., June 1902) unanimously held that there was *not* sufficient evidence that the defendants had knowledge of the existence of this danger Consequently there was not sufficient evidence of the defendants being under any duty to guard against the danger; and, therefore, not sufficient evidence of negligence (see p. 541 *infra*). At least one member of the Court of Appeal (Vaughan Williams L.J.) was moreover of opinion that, even if the omission to place the vans to eastward of the catch-point had amounted to negligence, the plaintiff would still be unable to recover; for that precaution would not have sufficed to defeat such efforts as the boys showed themselves willing to make, and consequently the omission of that precaution was not the "effective cause" of the accident (see p. 554, *infra*).]

[2] [1897] 1 Q. B. 240. [3] *Infra*, p. 27. [4] 1 Q. B. 29; 55 R. R. 191.

danger, for they knew the risk of the interference which would create danger, and yet they omitted to take a reasonable precaution to prevent its consequences. Therefore, as it seems to me, the principle of liability, as stated in the passage which I have read from Lord Denman's judgment, applies.

I give judgment for the plaintiff for the amount found by the jury by their verdict.

[EDITOR'S NOTE. The judgment thus given for the plaintiff was reversed in the Court of Appeal (see references on p. 26 n., *supra*); but only upon the particular facts of the case, leaving unimpugned the principle which it is here cited to support. The Court of Appeal, in reversing it, expressly accepted the rule laid down by Lord Esher, in *Engelhart* v. *Farrant*, that "It does *not* follow, because a stranger interferes, that the defendant is not liable; if the negligence of a servant of defendant's is an effective cause of the accident."

The student may refer to *Devlin* v. *Corporation of Belfast*, Irish L. R. [1907], 2 K. B. D. 437.]

[*And even though this other person were* the plaintiff *himself.*]

LYNCH *v.* NURDIN.

QUEEN'S BENCH. 1841. 1 A. and E. (N.S.) 29.

CASE. The declaration stated that defendant, on &c., was possessed of a cart, and of a horse then harnessed to the same. That defendant carelessly behaved and conducted himself in and about the management of the said cart and horse, and carelessly, negligently, and improperly left the said cart and horse in a certain common highway without anybody to take care of the same; and the said cart and horse of defendant, by and through his carelessness, negligence, and improper conduct in that behalf, then ran and struck with great force and violence against plaintiff, then lawfully being in the said highway, and then with great force &c.: various injuries were then stated, by means of which plaintiff became and was sick, lame, &c. Pleas, Not Guilty, and that defendant was not possessed of the cart and horse. Issues thereon.

On the trial, before Williams, J., at the sittings in Middlesex, in Easter term, 1839, it appeared that on the day in question defendant's cart was in Compton Street, Soho, under the charge of his carman; that the carman went into a house, and left the horse and cart standing at the door, without any person to take care of them, for about half-an-hour; that the plaintiff, who was a boy under seven years of age, and several other children, were about the cart, and plaintiff, during the carman's absence, got upon it; that another boy led the horse on; and that plaintiff, who, at the time, was getting off the shaft, fell, and was

run over by the wheel, and his leg was broken[1]. The defendant's counsel contended that the learned Judge ought to direct the jury that there was no evidence in support of the plaintiff's case, his own negligence having brought the mischief upon him. Williams, J., refused to withdraw the facts from the consideration of the jury, and left it to them to say, first, whether it was negligence in the defendant's servant to leave the horse and cart for half-an-hour, in the manner described; and, secondly, whether that negligence occasioned the accident. Verdict for the plaintiff. In the same term (May 8th), a rule nisi was obtained for a new trial, on the grounds of misdirection, and that the verdict was against evidence. In Michaelmas term, 1840,

Shee, Serjt., shewed cause[2]. The doctrine that in actions for negligence the plaintiff shall not recover if he might, by ordinary caution, have avoided the injury, is recognised in *Bridge* v. *The Grand Junction Railway Company*[3], and has been acted upon in many other cases; but never where the plaintiff has been an infant of tender years. The question, whether or not the plaintiff contributed to his own misfortune, was not put to the jury in this case; and the learned Judge was not requested to put it. Nor was that question left to the jury by Tindal, C.J., in *Daniels* v. *Potter*[4], where the plaintiff was an infant, and the case, in other respects, like the present. It would be impossible for the Court to say what is want of "ordinary caution" in a child seven years old. A person of that age cannot be responsible for negligence, and therefore cannot, like an adult, be held contributory to the misfortune in an action of this kind. Even in cases of felony, where the person charged with the act is under fourteen, "the presumption of law is, that he or she has not sufficient capacity to know that it is wrong": per Littledale, J., in *Rex* v. *Owen*[5]. This case, in principle, resembles *Dixon* v. *Bell*[6], where defendant sent a child for a loaded gun, desiring that the person who was to deliver it should take out the priming, which he did; the gun, after being delivered, went off by the imprudent act of the child, and wounded plaintiff's son; and the defendant was held liable. It may be contended here that the boy who led the horse on was in fault, and not the defendant. But in *Illidge* v. *Goodwin*[7] the defendant's cart and horse were left in the street unattended, and a person going by whipped the horse, and caused him to back the cart against the plaintiff's window; it was suggested that the passer-by, and not the defendant, was liable: and an attempt was also made to prove that the bad management of

[1] They had then been playing with the cart some fifteen minutes.

[2] November 18th. Before Lord Denman, C.J., Littledale, Williams, and Coleridge, JJ.

[3] 3 M. & W. 244. [4] 4 Car. & P. 262. [5] 4 Car. & P. 236.

[6] 5 M. & S. 198. *Infra*, p. 587. [7] 5 Car. & P. 190.

plaintiff's shopman contributed to the accident. But Tindal, C.J., said that, supposing this case to be believed, it did not amount to a defence: adding, "if a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." Here the substantial cause of injury was a gross negligence in the defendant's carman.

Kelly, contrà. The learned Judge was not desired, in this case, to ask the jury whether the plaintiff himself contributed to the accident; for the question on that point was directly raised by the evidence. The defence lay in that fact. Three causes contributed to this accident; negligence in the defendaut's servant; the act of a boy who led on the horse; and the plaintiff's own fault. *Bridge* v. *The Grand Junction Railway Company*[1], *Daniels* v. *Potter*[2], and *Illidge* v. *Goodwin*[3], lay down rules which the defendant here does not contest: but in none of those cases did the circumstance arise, which is most material in this, that an act of the plaintiff, not only negligent but wrongful, was an immediate cause of the accident. *Illidge* v. *Goodwin*[3] would be applicable if the plaintiff here had been innocently on the highway. In *Dixon* v. *Bell*[4] the plaintiff's son was an innocent by-stander. A distinction has been drawn between the acts of an adult and those of a child; and it is true that, in cases of this kind, an infant is not responsible: but, although his wrongful or incautious act may not subject him to criminal or civil liability, it does not follow that he may sue as plaintiff for a damage arising from such act. It has been held, in many actions for injury by negligence, that if misconduct in the plaintiff partly caused the accident he cannot recover; *Butterfield* v. *Forrester*[5] and *Luxford* v. *Large*[6] are instances. There may be a difference in the degree of blame attributable to a child and to an adult in such cases; but the question is, whether the difference be such as to render a defendant answerable in one case who would not be so in the other. Here the infant was not merely blameable in some degree, but a trespasser on the defendant's property, and caused the mischief by that trespass. The case, so considered, resembles *Ilott* v. *Wilkes*[7]. [Coleridge, J. Suppose the plaintiff had been an idiot.] If he, by his own act of trespass, consciously or unconsciously, occasioned the misfortune, he could not sue for the consequent injury.

Cur. adv. vult.

Lord Denman, C.J., in this term (January 18th), delivered the judgment of the Court.

[1] 3 M. & W. 244. [2] 4 Car. & P. 262. [3] 5 Car. & P. 190.
[4] 5 M. & S. 198. [5] 11 East, 60. [6] 5 Car. & P. 421.
[7] 3 B. & Ald. 304.

[After setting out the facts, he continued:—]

It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and so committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell at any length. For if I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the play-ground of school-boys whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a school-fellow and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded party. This might possibly be assumed as clear in principle: but there is also the authority of the present Chief Justice of the Common Pleas in its support, *Illidge* v. *Goodwin*[1]. But in the present case an additional fact appears. The plaintiff himself has done wrong: he had no right to enter the cart, and, abstaining from doing so, would have escaped the mischief. Certainly he was a cooperating cause of his own misfortune by doing an unlawful act: and the question arises, whether that fact alone must deprive the child of his remedy. The legal proposition, that one who has by his own negligence contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications. Indeed Lord Ellenborough's doctrine in *Butterfield* v. *Forrester*[2], which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim for redress: ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation: and this would evidently be very small indeed in so young a child. But this case presents more than the want of care: we find in it the positive misconduct of the plaintiff an active instrument towards the effect. We have here express authorities for our guidance. In *Ilott* v. *Wilkes*[3], a decision which excited great attention both in Westminster Hall and beyond it, this Court indeed held that a trespasser in a wood, where he well knew spring guns to be placed, could not sue for the injury received by him

[1] 5 Car. & P. 190. [2] 11 East, 60. [3] 3 B. & Ald. 304.

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from the explosion of one of them. But Lord Tenterden and his three brethren cautiously and repeatedly declared that their opinion was founded on the plaintiff's knowing of the danger, and voluntarily incurring it. Best, J., who was supposed to carry to the greatest extent the right of protecting property against invaders by placing dangerous instruments, took infinite pains, when Chief Justice of the Common Pleas, to explain that his opinion in *Ilott* v. *Wilkes*[1] rested exclusively on the notice. In *Bird* v. *Holbrook*[2] his expressions are most remarkable. And so far is his Lordship from avowing the doctrine that the plaintiff's concurrence in producing the evil debars him from his remedy, that he considers *Ilott* v. *Wilkes*[1] an authority in favour of the action. He also expresses an inclination to agree with the two learned Judges who held the action maintainable in *Deane* v. *Clayton*[3]. There the plaintiff's dog had been killed by a spike placed on the defendant's land for the protection of his preserves, while in pursuit of a hare. Park and Burrough, JJ., gave judgment in favour of the plaintiff: Gibbs, C.J., and Dallas, J., for the defendant. The present argument does not require any particular discussion of that case, because *Bird* v. *Holbrook*[2] is a decisive authority against the general proposition that misconduct, even wilful and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue. I remember being present at a trial at Warwick before Lord Chief Baron Richards, where the same law prevailed. The case[4] is mentioned in *Bird* v. *Holbrook*[2]: a boy, having received serious injury from a spring-gun placed in a garden where he was trespassing, recovered a verdict for £120 damages, which was much considered and never disturbed.

A distinction may here be taken between the wilful act done by the defendant in those cases, in deliberately planting a dangerous weapon in his ground with the design of deterring trespassers, and the mere negligence of the defendant's servant in leaving his cart in the open street. But between wilful mischief and gross negligence the boundary line is hard to trace: I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice. It is then a matter strictly within the province of a jury deciding on the circumstances of each case. They would naturally enquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse: whether the street was at that hour

[1] 3 B. & Ald. 304. [2] 4 Bing. 628.
[3] 7 Taunton, 489.
[4] *Jay* v. *Whitfield*, cited, 4 Bing. 644, 3 B. & Ald. 308.

likely to be clear or thronged with a noisy multitude: especially whether large parties of young children might be reasonably expected to resort to the spot. If this last mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established.

But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care: the child, acting without prudence or thought, has, however, shewn these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it.

For these reasons, we think that nothing appears in the case which can prevent the action from being maintained. It was properly left to the jury, with whose opinion we fully concur.

Rule discharged.

[EDITOR'S NOTE. This horse and cart, "left unattended in the highway, constituted a danger to those using the highway:—that is, it constituted a Nuisance"; *per* Farwell L.J., L. R. [1913] 1 K. B. at p. 403. *Cf. per* Hamilton L.J., L. R. [1913] 1 K. B. at p. 413.

In *Harrold* v. *Watney* (L. R. [1898] 2 Q. B. 320) a fence abutting on a highway was so rotten as to be a Nuisance to passers by. A child of four years old put his foot on it; it fell and injured him. The owner of the fence was held liable. Vaughan Williams L.J. said, "When asking if the nuisance was the cause of the accident, one gets a test in this way—ought what the child did to have been present to the mind of the person, who created the nuisance, as a probable result of his act?" If so, he is liable although "the act of the child, in touching the fence...was one which probably would not be done by a grown-up person."]

[*But consequences that are* not *natural and probable are too remote to create liability.*]

[*E.g., it is* not *probable that a person, on being forcibly removed from a railway-carriage, will leave his race-glasses behind him.*]

GLOVER *v.* LONDON AND S.W. RAILWAY COMPANY.

COURT OF QUEEN'S BENCH. 1867. L.R. 3 Q.B. 25.

FIRST count. That the defendants assaulted, beat, and otherwise ill-treated the plaintiff, and forced him out of a railway-carriage of the defendants, in which he then lawfully was a passenger to be carried by the defendants on a certain journey for reward to the defendants, by means of which the plaintiff suffered pain, &c., and was put to expense for medical assistance, and for excess of fare, and lost in the scuffle a pair of race-glasses belonging to him.

Second count. That the defendants seized and took a pair of opera-glasses of the plaintiff, and converted them to their own use, and deprived the plaintiff of them[1].

Pleas: to the first count, 1. Not guilty. 2. That, at the time of the alleged trespasses, the plaintiff was travelling, and attempting to travel, in the railway-carriage on the journey without having previously paid his fare, and with intent to avoid payment of it, whereupon the defendants, by their officers and servants, requested the plaintiff to pay the fare or leave the carriage, both of which the plaintiff refused to do, whereupon the defendants, by their officers and servants, gently laid hands on the plaintiff, in order to remove him, and removed him from the carriage, doing no more than was necessary for that purpose, which are the alleged trespasses pleaded to, and were committed after the passing of the Railway Clauses Act, 1845[2]. 3. To the second count, not guilty.

At the trial before COCKBURN, C.J., at the sittings in Middlesex, after Hilary Term, it appeared that, on the 29th of May, 1866, the plaintiff was travelling, with other persons, in a second-class carriage on the defendants' railway, from Ascot to London, and at Clapham junction, where the tickets are collected, the collector, finding that there was one ticket short, charged the plaintiff with not having a ticket, and on his refusing to pay the fare or leave the carriage, he

[1] There was a third count for not carrying the plaintiff from London to Ascot and back, but the point reserved only applied to the first two counts.

[2] Relying on ss. 103 and 104 of 8 Vict. c. 20, which authorize the officers and servants of a railway company to detain any person who attempts to travel in any carriage of the company without having paid his fare, and with intent to avoid payment of it.

was forcibly removed by the defendants' servants. The plaintiff swore that he had taken a ticket from London to Ascot and back, but he admitted that he had retained the whole ticket at Ascot; and the defendants' evidence at the trial went to shew that he had, by giving one half to a friend, and keeping the other half himself, endeavoured to enable the friend to travel without paying his fare.

The plaintiff alleged that he had been treated with great violence; and that he was dragged from the carriage, and left a pair of race-glasses, which he valued at seven guineas, behind him in the carriage. The defendants' witnesses negatived any more force or violence than was actually necessary having been used; and the plaintiff was allowed to proceed by a subsequent train on paying his fare from Ascot.

The plaintiff sought in the action to recover, in addition to damages for the assault, the value of the glasses.

The Lord Chief Justice told the jury that, as it now appeared that the plaintiff had taken and paid for a ticket (for his evidence was uncontradicted as to that), the justification in the special plea was not proved[1], and they must, therefore, find a verdict for the plaintiff; but if they came to the conclusion that the plaintiff was endeavouring to enable his friend to perpetrate the fraud alleged, and if they believed the defendants' witnesses that there was no extra violence, they would probably think nominal damages quite sufficient to meet the justice of the case. As to the race-glasses, they might be put out of consideration, unless the jury were satisfied that the glasses came into the possession of some of the defendants' servants; and the Chief Justice was of opinion that the damage from their loss was too remote if some one else took them.

The jury returned a verdict for the plaintiff for 20*s*., leave being reserved to increase it by £7. 7*s*., the value of the glasses.

A rule was obtained accordingly, on the ground, first, that the loss of the glasses by the plaintiff was the direct consequence of the illegal conduct of the defendants as stated in the first count; secondly, that the plaintiff was also entitled to recover the value of the glasses under the second count.

Ballantine, Serjt., and *C. W. Wood*, shewed cause. It must now be conceded that the defendants were not justified in what they did; but the loss of the glasses is too remote to be treated as damage consequent on the defendants' wrongful act. The plaintiff was the only person to blame for having negligently left the glasses behind on the seat of the carriage.

[LUSH, J. The plaintiff was forcibly taken from the carriage. If a watch or purse had been shaken from the person of a passenger in

[1] See *ante*, p. 33.

wrongfully removing him, might not the loss be treated as the natural consequence of the wrongful act?]

Perhaps so; but that is not the present case. The jury, by their verdict, must be taken to have negatived all violence beyond the forcible persuasion necessary to induce the plaintiff to leave the carriage; and he might have got the glasses, if he had them really with him, and had only asked for them. There was also no evidence that the glasses were ever in the defendants' possession, either as carriers or otherwise: *Le Conteur* v. *London and South Western Railway Company*[1].

M. Chambers, Q.C., in support of the rule. It is too late now to raise any doubt whether the plaintiff had the glasses. The defendants are wrongdoers, and are liable for all the consequences of their illegal act. The plaintiff can also recover under the second count. The evidence of the plaintiff, which was not materially contradicted, was, that he left them in the defendants' carriage.

[COCKBURN, C.J. The jury must be taken to have negatived that the glasses came to the possession of the company's servants.]

At all events the first count is sustained. It was the natural consequence of the plaintiff being forcibly removed that the glasses were left behind, and so lost.

COCKBURN, C.J. I am of opinion that the rule should be discharged. The facts, as they must be taken to have been found by the jury, are simply these. The plaintiff, by giving half of his own ticket to his friend, was endeavouring to enable the latter to travel without paying his fare; on its being discovered that there was but one ticket between the two, the plaintiff was desired to pay the fare or leave the carriage, and on his refusing he was removed from the carriage. It turned out, unfortunately, that the plaintiff had taken and paid for a ticket, and that it was his friend who ought to have been treated as the defaulter. Consequently, the justification pleaded by the defendants failed. With regard to this part of the case the jury gave the plaintiff 20*s.*, and the question remains whether the plaintiff is entitled to recover as damages the value of the race-glasses. He said he left the pair of glasses in the carriage. There was no cross-examination, and no serious intention to dispute the fact that he had them with him; it must, therefore, be taken that he had them with him, and that he left them behind when he was removed from the carriage. It must also be taken that the jury have found that the glasses did not come into the possession of any of the defendants' servants. The glasses were simply left behind in the carriage. The case would be very different, in my judgment, if the glasses had fallen

[1] Law Rep. 1 Q. B. 54.

from the plaintiff's person as the immediate result of any violence offered to him. But the jury must be taken to have negatived—and rightly, as it seemed to me—any violence beyond that necessary to remove the plaintiff from the carriage. So that it was not the case of a man being dragged out of a carriage under circumstances which rendered it impossible for him to take the property with him, which he had under his own personal protection. The plaintiff, being called upon to leave the carriage, refused, and he was forced by the defendants' servants to leave, but not with the excessive violence he alleged, for the jury believed, as I did, the defendants' witnesses. No doubt if he had applied to be allowed to get the glasses, or asked one of the passengers to hand them to him, this would have been done. He has, therefore, only himself to blame that the glasses were left in the carriage; and the loss, therefore, was not the necessary consequence of the defendants' act, but owing to the plaintiff's own negligence or carelessness. This head of damage, therefore, is too remote, and the plaintiff cannot recover it.

Lush, J. I am of the same opinion. There was no evidence to charge the defendants, as carriers, with the loss of the glass. The plaintiff kept it under his own care, just as much as a watch or purse in his pocket, and it was never intrusted to the defendants to carry. Can, then, the loss be treated as damage resulting from the wrongful act of the defendants? The question is, is the loss the direct and immediate result of the unlawful act? The evidence does not go the length of shewing this. All the plaintiff says is: "I was dragged out of the carriage, and left the glasses in the carriage." The witnesses for the defendants deny violence having been used; and the Lord Chief Justice says the jury were fully justified in believing them. So that it cannot be said that the plaintiff was prevented from taking the glasses from the carriage with him; he might have got them had he asked for them. He left them, therefore, either voluntarily, or through negligence; and whether one or the other, it is clear that the loss was not the immediate result of the defendants' wrongful act.

Rule discharged.

[*And, similarly, it is* not *probable that an ordinary horse will kick a human being.*]

COX *v.* BURBIDGE.

COURT OF COMMON PLEAS. 1863. 13 C.B., N.S., 430.

THIS was an action for negligence. The plaintiff, an infant, sued by his next friend. The declaration stated that the defendant was possessed of a horse, and that he took so little and such bad care of the said horse, and so carelessly, negligently, and improperly kept the same, that, by and through the mere carelessness, negligence, and wrongful and improper conduct of the defendant in that behalf, the said horse kicked the plaintiff, then lawfully being on a certain highway, and by means of the premises the plaintiff became and was and is greatly and permanently injured, &c. Plea, not guilty.

The cause was tried before Willes, J., at the last sitting at Westminster in Michaelmas Term last. The facts which appeared in evidence were as follows:—On the 11th of June, 1861, a horse belonging to the defendant was grazing on a newly-made road which led to some houses, and which had for some time been used as a road, but not adopted by the parish. The plaintiff, a little boy about five years of age, was playing in the road, when the horse, which was on the foot-path, struck out and kicked him in the face, injuring him very severely. There was no evidence to shew how the horse got to the spot, or that the defendant knew he was there, or that the animal was at all vicious, or that the child had done anything to irritate it.

Under these circumstances, it was submitted on the part of the defendant that there was no case to go to the jury. The learned judge, however, did not like to withdraw the case; but he reserved the question of liability: and the jury returned a verdict for the plaintiff for £20.

Shaw, in Michaelmas Term last, accordingly obtained a rule nisi to enter a nonsuit.

V Williams now shewed cause. The fact of the horse being loose on a highway (where he could not lawfully be,—6 & 7 W. 4, c. 50, s. 74) unattended, is primâ facie evidence of negligence and want of proper care on the part of his owner. The horse was wrongfully where he was: it was a common nuisance, unless he was there using the road for passage: whereas, the child was lawfully there. This was enough to call upon the defendant for an answer. [Willes, J. Suppose I have a dog, and he is out on the street, and there bites a child who pulls his tail or his ear,—am I liable to an action, without more?] In *Mason* v. *Keeling*, 1 Ld. Raym. 606, Holt, C.J., and Turton, J., say "There is a great difference between horses and oxen, in which

a man has a valuable property, and which are not so familiar to mankind, and dogs: the former the owner ought to confine, and take all reasonable caution that they do no mischief, otherwise an action will lie against him: but otherwise of dogs, before he has notice of some mischievous quality." In *Illidge* v. *Goodwin*, 5 C. & P. 190, it was held, that if a horse and cart are left standing in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer by, in striking the horse. Tindal, C.J., there says: "If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." So, here, it is submitted, the defendant having chosen to permit his horse to be upon a highway unattended, he must take the risk of any mischief that may be done by him. In *Lynch* v. *Nurdin*, 1 Q. B. 29 (*supra*, p. 27), the defendant negligently left his horse and cart unattended in the street: the plaintiff, a child seven years old, got upon the cart in play: another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt: and it was held that the defendant was liable, though the plaintiff was a trespasser, and contributed to the mischief by his own act. Lord Denman, in giving judgment, there says: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. In *Quarman* v. *Burnett* (*infra*, p. 98), where a coachman (not being the servant of the defendants) left his horses unattended, and they ran away and injured the plaintiff, Parke, B., in delivering the judgment of the court, says: "The immediate cause of the injury is the personal neglect of the coachman in leaving the horses, which were at the time in his immediate care. The question of law is, whether any one but the coachman is liable to the party injured; for, *the coachman certainly is.*" If the coachman would be liable, the owner of the horses would clearly be liable also. *May* v. *Burdett*, 9 Q. B. 101 (*infra*, p. 593), also supports this view. In *Hammack* v. *White*, 11 C.B., N.S., 588 (*infra*, p. 551), where this subject was considered, Keating, J., says: "If the evidence had shewn that this horse was a quiet and manageable horse, and that the deceased at the time he met with the injury which resulted in his death was walking on the foot-pavement, I must own I should have thought that there was primâ facie enough to call upon the defendant to shew that he had used due care and skill, because then it would have been more consistent to assume that the accident arose from his want of care and skill."

Shaw, in support of the rule. The animal in question not being one of a ferocious nature, the defendant can only be liable for negligence, and for such damage as may fairly be considered as the immediate consequences of his negligence: and here it is submitted there was no evidence at all of negligence which ought to have been submitted to the jury. None of the cases cited on the part of the plaintiff have any considerable bearing upon this case except *Hammack* v. *White*[1], 11 C.B., N.S., 588, and that is strongly in favour of the defendant. The owner of an animal of a ferocious nature keeps it at his peril, and is responsible for any injury resulting from the absence of due restraint[2]. But the case of a horse is very different. The Highway Act is out of the question. If this was proved to be a highway, the defendant might have been liable to a penalty for allowing the horse to be there: but that is all. In *Fawcett* v. *The York and North Midland Ry. Co.*, 16 Q. B. 610, where in an action against a railway company for the negligence of their servants in leaving unclosed gates where the line crossed a highway on a level, whereby the plaintiff's horses got upon the line and were killed, the defendants sought to defend themselves on the ground that the horses were straying on the highway and consequently were not *lawfully* there, Coleridge, J., said: "An issue is joined on the question whether the horses were lawfully on the road. In one sense, perhaps, the horses were not lawfully there; for, it is possible that the surveyors of the highway might have seized them as being wrongfully there: but, supposing that the surveyors could do so, the issue is to be construed as meaning 'lawfully' as between these two parties, the owner of the cattle and the railway company. The railway company cannot insist on an unlawfulness as regards a third person who does not interfere." [Erle, C.J. The question here is, whether the owner of an animal mansuetæ naturæ is liable for an unexplained kick.] In *Assop* v. *Yates*, 2 Hurlst. & N. 768, a declaration against a master alleged that he knowingly, carelessly, and negligently erected a hoarding in a street, and left a certain machine in a position in which it was likely to cause danger to the workmen, and that a cart accidently ran against the hoarding and knocked down the machine against the plaintiff. It appeared that a hoarding had been erected by the defendant, a builder, which projected too far into the street; but sufficient room was left for carts to pass: a heavy machine was placed inside the hoarding, and close to it: a cart in passing struck against the hoarding, and knocked down the machine against the plaintiff, a workman employed by the defendant. The plaintiff had previously made some complaint of the position of the machine to his

[1] *Infra*, p. 551.

[2] See authorities collected in *Card* v. *Case*, 5 C. B. 622.

master, but voluntarily continued to work, though the machine was not moved: and it was held that there was no evidence to go to the jury of the master's liability. In *Cotton* v. *Wood*, 8 C.B., N.S., 568, it was held, that, in an action for negligent driving, the judge will not be justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. Here, the facts are quite consistent with the absence of negligence on the defendant's part. And in *Hammack* v. *White*, Erle, C.J., says: "I am of opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant." At all events, there is no sufficiently proximate connection between the alleged negligence of the defendant and the damage to the plaintiff, to render the former liable: *Hoey* v. *Felton*, 11 C.B., N.S., 142 (see p. 52, *infra*).

ERLE, C.J. I am of opinion that this rule must be made absolute, on the ground that there was a total absence of evidence to support the cause of action alleged. The facts I take to be these,—The plaintiff, a child of tender age, was lawfully upon the highway, and a horse, the property of the defendant, was straying on the highway. As between the owner of the horse and the owner of the soil of the highway or of the herbage growing thereon, we may assume that the horse was trespassing: and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed, that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff. I am also of opinion that so much of the argument which has been addressed to us on the part of the plaintiff as assumes the action to be founded upon the negligence of the owner of the horse in allowing it to be upon the road unattended, is not tenable. To entitle the plaintiff to maintain the action, it is necessary to shew a breach of some legal duty due from the defendant to the plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. The simple fact found, is, that the horse was on the highway. He may have been there without any negligence of the owner: he might have been put there by a stranger, or might have escaped from some inclosed place without the owner's knowledge. To entitle the plaintiff to recover,

there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible; but the party injured has no remedy unless the scienter can be proved. This is very familiar doctrine; and it seems to me that there is much stronger reason for applying that rule in respect of the damage done here. The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbour's corn or pasture. For a trespass of that kind, the owner is of course responsible. But, if the horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has: and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway.

* * * * * * *

WILLES, J....The distinction is clear between animals of a fierce nature, and animals of a mild nature which do not ordinarily do mischief like that in question. As to the former, if a man chooses to keep them, he must take care to keep them under proper control, and, if he fails to do so, he is taken to know their propensities, and is held answerable for any damage that may be done by them before they escape from him and return to their natural state of liberty. As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them, unless they are shewn to have acquired some vicious or mischievous habit or propensity, and the owner is shewn to have been aware of the fact. If the animal has such vicious propensity, and the owner knows of it, he is bound to take such care as he would of an animal which is feræ naturæ, because it forms an exception to its class. In some of the books I find expressions falling from judges which I am at a loss to appreciate. Holt, C.J., says in *Mason* v. *Keeling*, 1 Lord Raym. 608, that there is a "great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs: the former the owner ought to confine, and take all reasonable caution that they do no mischief,

otherwise an action will lie against him; but otherwise of dogs, before he has notice of some mischievous quality." I cannot see what difference it can make whether the animal is or is not one in which a man may have a valuable property. I cannot help thinking that that expression has reference to what is found in the Institutes, Book 4, tit. 9, "Si ursus fugerit à domino, et sic nocuerit, non potest quondam dominus conveniri, quia desiit dominus esse, ubi fera evasit." I do not think that can well apply to dogs, after the astonishment expressed by the court in M. 20 E. 4, fo. 11, at a plea which spoke of dogs as "wild," and the case in the Year Book, T. 12 H. 8, fo. 3 a, where an action lay for taking away a bloodhound. It clearly established that a property may be acquired in animals which are tame, although such animals might not have been titheable. Some curious reasons are given in that case in H. 8th's time why dogs are not the subject of larceny; but unquestionably they have effect at the present day[1]. I can quite understand the expression used by Lord Holt as applied to control. I can quite understand a distinction being drawn between animals which from their natural tendency to stray, and thereby to do real damage, require to be and usually are restrained, and a dog, which is not usually kept confined: and there may be good reason besides "de minimis non curat lex" why an action should not lie[2] against a man whose dog without the will of its master enters another's land, though it is different in the case of horse or ox. Lord Holt goes on to put this very case of a horse as one where the owner is not liable unless he knows of the vice. The important circumstance in this case is, that the act was not in accordance with the ordinary instinct of the animal, which was not shewn to be of a mischievous disposition. Does, then, the fact of the horse being on the highway make any difference? No doubt, if the horse was trespassing there, the owner of the highway might have an action against the owner of the horse. So, possibly the owner of the horse might be liable to an indictment for obstructing the highway, or to a fine. But that was not the cause of the mischief here. Rule absolute for nonsuit.

[EDITOR'S NOTE. Even if the owner do not actually *know* of the animal's vice, he will nevertheless be liable if he has the means of knowledge and, had he taken ordinary care to avail himself of them, would have known; see *White* v. *Steadman*, L. R. [1913], 3 K. B. at p. 348.]

[1] See *Regina* v. *Robinson*, Bell 34; Kenny's "Cases in Criminal Law," p. 357.

[2] On the harmless straying of dogs or cats, see *Brown* v. *Giles* (1 C. and P. 118), and *Read* v. *Edwards* (17 C. B., N.S. 245).

[*But it is probable that a stallion will kick a mare.*]

ELLIS *v.* LOFTUS IRON COMPANY.

COURT OF COMMON PLEAS. 1874. L.R. 10 C.P. 10.

APPEAL from the county court judge of Glamorganshire.

The case as stated on appeal was as follows:—

The action was brought to recover £50 for injuries to the plaintiff's mare caused by the defendants' negligence.

The plaintiff was the occupier of a farm in the parish of Llansarran, and by arrangements between the plaintiff's landlord, the plaintiff, and the defendants, a portion of a field of the plaintiff's farm was let to the defendants for the execution of certain works, and a plot was fenced in by the defendants by means of a wire fencing.

The plaintiff's land, which adjoined the part taken by defendants, was used by him as grazing land for horses and cattle to the knowledge of the defendants.

The defendants were possessed of an entire horse, used by them as a draught cart-horse, and on Sunday, the 18th of August, this horse was turned into the plot occupied by the defendants. The plaintiff had full knowledge of the condition of the fence surrounding it. The mare grazed in the remaining portion of the field adjoining that portion occupied by the defendants. The defendants' horse had been turned out on former occasions on the same plot and had always been watched. The horse of the defendants and one of the plaintiff's mares got close together on either side of the wire fence, and the horse by biting and kicking the mare through the fence committed the injury complained of, the damage being taken at £15.

It was proved that the defendants' horse did not trespass on the land of the plaintiff by crossing the fence. Both animals were close to the fence when the injury happened. There was no evidence that the horse was of a vicious temper, or had bitten or kicked any animal before; on the contrary, it was stated that the horse was of as quiet a temper as you would ever wish a horse.

The plaintiff had warned the defendants to keep the horse away from his mares.

The judge being of opinion there was no trespass, and that the damage was too remote, held there was no case for the jury.

The question for the Court was, whether the plaintiff was entitled to recover from the defendants for the injuries caused as aforesaid, the horse being a stallion.

Field, Q.C. (with him *B. Francis Williams*), for the plaintiff. There was certainly a trespass in this case, and the damages were not

too remote. It is clear that some portion of the horse's body passed over the boundary line between the plaintiff's and the defendants' land when the injury was inflicted. The law is well established that the owner of an animal is responsible if the animal does that which if done by the owner himself would have been a trespass apart from any question of negligence. [He cited *Lee* v *Riley*[1]; *Cox* v. *Burbidge*[2]; *Read* v. *Edwards*[3]; Com. Dig. title Trespass, C.; Chitty on Pleading, 7th ed. vol. I. p. 93.]

Grantham (with him *Charles Hall*), for the defendants. The authorities which appear to bear out the plaintiff's proposition are cases of acts done by animals in consequence of dangerous or vicious propensities, either natural to the animal or known by the defendant to exist; such cases are distinguishable from the present. In such cases it is negligence on the part of the defendant not to insure, by the necessary precautions, against the animal's doing the act. It is natural to an animal to stray, therefore the owner must keep him in. It is contended that negligence is necessary to render the owner of the animal liable for the animal's act. Here there is no evidence of negligence on the defendants' part. The plaintiff was equally guilty of negligence if there were any on either side. [He cited *Star* v. *Rookesby*[4]; *Blackman* v. *Simmons*[5]; *Erskine* v. *Adeane*[6]; *Jenkins* v. *Turner*[7].]

Field, Q.C., in reply.

Lord Coleridge, C.J. The judgment of the county court judge must, I think, be reversed, on the ground that there was evidence of a trespass, and the damages were not too remote. I cannot say I entertain any doubt in the matter. It is clear that, in determining the question of trespass or no trespass, the Court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. It has, moreover, been held, again and again, that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small. In this case it is found that there was an iron fence on the plaintiff's land, and that the horse of the defendants did damage to that of the plaintiff through the fence. It seems to me sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass...

Judgment for plaintiff.

[1] 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.
[2] 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89; *supra*, p. 37.
[3] 17 C. B. (N.S.) 245; 34 L. J. (C.P.) 31.
[4] 1 Salk. 335.
[5] 3 C. & P. 138.
[6] Law Rep. 8 Ch. App. 756.
[7] 1 Ld. Raym. 109.

[EDITOR'S NOTE. *Halestrap* v. *Gregory* [1895], 1 Q. B. 561, is a recent case on nearness or remoteness of consequences. Owing, it was alleged, to the negligence of defendant's servant, in leaving open a gate, plaintiff's mare, which was being agisted by the defendant, escaped into an adjoining cricket-field; and in being driven back by the cricketers, in a careful and proper manner, was injured by running against defendant's wire fence. Wills, J., thought it one of those cases on the border-line, in which it is not easy to say whether the damage is too remote or not; but came to the conclusion that if defendant's servant did leave the gate open, as alleged, "the injury to the mare was the natural consequence of his doing so."

In *Heath's Garage Ltd.* v. *Hodges* (L. R. [1916], 1 K. B. 206), a motor-car was upset in daylight by sheep straying from land where they ought to have been fenced in. The damage to the car was held *not* a natural consequence of allowing them to stray.]

[*It is for the judge to say whether the evidence legally* can *prove liability; and for the jury to say whether it* does.]

METROPOLITAN RAILWAY COMPANY *v.* JACKSON.

HOUSE OF LORDS. 1877. L.R. 3 App. Ca. 193.

THIS was an appeal against a decision of the Court of Appeal, affirming a decision of the Court of Common Pleas.

The facts, which are fully detailed in the judgments, were, in substance, these:—Mr Jackson was, on the 18th of July, 1872, a passenger by the Metropolitan Railway, going from the City westwards. At King's Cross Station the carriage in which he rode was full. At Gower Street Station (there being a great demand for seats) three persons forced themselves in, but, there being no seats vacant, were obliged to stand. At the Portland Road Station there was a rush of fresh passengers. The door of the carriage in which Jackson sat was opened by some persons, who looked into the carriage, saw it full, and shut the door. Then others came, opened the door again, and some persons tried to get into the carriage. Mr Jackson rose from his seat to prevent them. While standing with his hands and arms extended, the train moved forward, a railway porter turned away the persons who had tried to get in, and, as the train moved forward and was entering the tunnel, hastily shut the door. Mr Jackson, feeling the train begin to move, had put his hand on the lintel of the door to save himself from falling, and it was just at that moment that the porter slammed the door, and Mr Jackson's thumb was caught by the door, and crushed. That was the cause of action.

The directors by their pleas denied their liability. At the trial before Mr Justice Brett, in December, 1873, there was no evidence given to shew that at Gower Street or at the Portland Road Station any complaint had been made to the officials of the three extra persons in the carriage, though there was evidence that Mr Jackson had remonstrated with the persons themselves. A witness named Underwood stated that he did not see a guard or porter at the Gower Street Station. The learned judge ruled that there was evidence of negligence to be submitted to the jury, and the jury found a verdict for the plaintiff, with £50 damages.

A rule was obtained to set aside the verdict and enter a nonsuit or a verdict for the defendants, on the ground that there was no evidence of negligence proper to be left to the jury. On the 13th of November, 1874, this rule was discharged[1]. The case was taken to the Court of Appeal, where Lord Chief Justice Cockburn and Lord Justice of Appeal Amphlett were for affirming the judgment, and Lord Chief Baron Kelly and Lord Justice of Appeal Bramwell were for reversing it.

As the Court was thus equally divided, the judgment of the Court below stood as affirmed[2].

Mr McIntyre, Q.C., and *Mr Kemp, Q.C.*, for the appellants:—

The question whether the facts proved in evidence constitute what the law recognises as negligence, is a question of law for the judge, and must not be submitted to the jurors for them to draw the inference of negligence. Here there was no evidence of actual negligence, and the judge ought to have directed the jury that no act of negligence, which could be treated as occasioning the injury complained of, had been proved. *Bridges* v. *The North London Railway Company*[3] had been misunderstood. There the acts done by the company's servants were directly connected with the happening of the mischief—here they were not. It was the plaintiff's own act that occasioned the injury; and that brought the case within *Siner* v. *The Great Western Railway Company*[4]. *Robson* v. *The North Eastern Railway Company*[5], and *Rose* v. *The North Eastern Railway Company*[6], were also cited.

Mr Mellor, Q.C., *Mr Macrae Moir* (*Mr Lewis E. Glen* with them), for the respondent:—

The appellants' own evidence shewed that the appellants had been guilty of negligence; they were not prepared with a proper staff of officers to meet the demand of a crowd of persons coming to obtain places. Of course the result was an unchecked rush to the carriages, and then mischiefs were sure to follow. That had been the cause of

[1] Law Rep. 10 C. P. 49.
[2] 2 C. P. D. 125.
[3] Law Rep. 7 H. L. 213.
[4] Law Rep. 3 Ex. 150; 4 Ex. 117.
[5] 2 Q. B. D. 85.
[6] 2 Ex. D. 248.

the mischief here, and that established the right of the plaintiff to a verdict. The whole case had been properly laid before the jurors, and they had come to the clear conclusion that there was negligence here, and they had therefore awarded substantial damages. In all these cases the question was whether the facts proved did not establish negligence. The jurymen thought that they did, and that was a matter, negligence or no negligence, which could not be withdrawn from the cognisance of the jury. That was the course followed in *Bridges* v. *The North London Railway Company*[1], and it had been properly followed here. *Cockle* v. *The London and North Eastern Railway Company*[2] shewed that negligence of the sort shewn in this case would make the company liable.

Mr McIntyre replied.

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LORD BLACKBURN. My Lords, I also am of opinion that in this case the judgment should be reversed, and a nonsuit entered. On a trial by jury it is, I conceive, undoubted that the facts are for the jury, and the law for the judge. It is not, however, in many cases practicable completely to sever the law from the facts.

But I think it has always been considered a question of law to be determined by the judge, subject, of course, to review, whether there is evidence which, if it is believed, and the counter-evidence, if any, not believed, would establish the facts in controversy. It is for the jury to say whether and how far the evidence is to be believed. And if the facts, as to which evidence is given, are such that from them a farther inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the judge to determine, subject to review, as a matter of law whether from those facts that farther inference may legitimately be drawn.

My Lords, in delivering the considered judgment of the Exchequer Chamber in *Ryder* v. *Wombwell*[3], Willes, J., says: "Such a question is one of mixed law and fact; in so far as it is a question of fact, it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict, and submit the question to the decision of another jury; but there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the verdict for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the

[1] Law Rep. 7 H. L. 213. [2] Law Rep. 7 C. P. 321.
[3] Law Rep. 4 Ex. 38.

defendant. It was formerly considered necessary in all cases to leave the question to the jury, if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject, of course, to review), is, as is stated by Maule, J., in *Jewell* v. *Parr*[1], "not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established."

He afterwards observes[2], very truly in my opinion, "There is no doubt a possibility in all cases where the judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the judges may differ in opinion, and it is possible that the majority may be wrong, Indeed, whenever a decision of the Court below on such a point is reversed, the majority must have been so either in the Court above or the Court below. This is an infirmity which must affect all tribunals."

I quite agree that this is so, and it is an evil. But I think it a far slighter evil than it would be to leave in the hands of the jury a power which might be exercised in the most arbitrary manner. On this I perfectly agree with the remarks already made by the Lord Chancellor, and I do not repeat them.

My Lords, in all cases of actions to recover damages for a personal injury against railway companies the plaintiff has to prove, first, that there was on the part of the defendants a neglect of that duty cast upon them under the circumstances; and, second, that the damage he has sustained was the consequence of that neglect of duty. A third question, viz., whether the plaintiff is himself to blame, comes more properly by way of defence.

Now, in applying the rule of law laid down in *Ryder* v. *Wombwell*[3] to such cases, there had been much difference of opinion among judges. In some of the cases it was imputed to the judges who had decided in favour of the companies that they had acted as if a judge whenever he thought a verdict for the defendant would be unsatisfactory was entitled to withdraw the case from the jury. I do not pause to inquire whether this imputation was just or not. If they did so act, I agree that it was a wrong principle, and I agree also that *Bridges* v. *The North London Railway Company*[4] is an authority, if one were wanted, to shew that it was a wrong principle.

But since the decision of your Lordships' House in *Bridges* v. *The North London Railway Company*[4] it has been more than once said in the Courts below that your Lordships had not, perhaps, overruled the law laid down in *Ryder* v. *Wombwell*[3], but at least laid down this

[1] 13 C. B. 916.
[2] Law Rep. 4 Ex. 42.
[3] Law Rep. 4 Ex. 32.
[4] Law Rep. 7 H. L. 213.

exception to it, that in cases of railway accidents the jurors were to decide. In *Robson* v. *The North Eastern Railway Company*[1] Lord Justice Brett says: "The House of Lords held that as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury ought to decide." My Lords, I quite agree that this consideration ought never to be lost sight of, but I cannot think it decisive. Lord Justice Amphlett, in the present case, says: "In considering this question we must bear in mind that it is now settled by the case of *Bridges* v. *The North London Railway Company*[2] (though previously doubted by many eminent judges) that the question whether, in cases of this sort, negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding judge"; and Chief Justice Cockburn indicates, I think, at least a partial agreement in this view of that decision.

My Lords, if that was the decision of your Lordships, there would be an end of this case. For I apprehend that after a position of law has been laid down judicially in this House, it is no more competent for your Lordships to depart from it than it would be for an inferior tribunal to do so.

But I own myself unable to see anything in *Bridges* v. *The North London Railway Company*[2] which justifies the conclusion that your Lordships either laid down, or meant to lay down, any new rule on the subject. I think the utmost extent to which your Lordships' decision in that case can be fairly pressed is, that in such cases the judges should be cautious before they say that the jury could not legitimately draw the inference which in fact they did draw; and to this I agree.

My Lords, as to the facts of the present case I have little to say. I think that the plaintiff was entitled to be carried in a carriage with reasonable accommodation, and that there is evidence that at Gower Street, either from there being too few officials, or from these officials neglecting their duty, too many passengers were put in the same carriage with him, and for any damage resulting therefrom he had a case to go to the jury. But I can see no evidence from which the inference could be legitimately drawn that the plaintiff's thumb was crushed at Portland Road because of this neglect of duty at Gower Street. The reasoning by which it is sought to say that the jury might legitimately connect the fact that the plaintiff's thumb was in the hinge of the door at Portland Road with the negligence at Gower Street, seems to me a good example of what Lord Bacon means in his Maxims, when he says, "It were infinite for the law to consider the causes of causes, and their impulsion one of the other." Nor do I see

[1] 2 Q. B. D. 89. [2] Law Rep. 7 H. L. 213.

any evidence of negligence at Portland Road. The company, I think, ought to take reasonable steps to prevent people getting into carriages already full, and this the defendants' porter did; but it would be going much farther than I think is reasonable to say that the duty of the railway company was to prevent any one from opening the door in order to look into the carriage and see if there was room. The company's servant did quite right in preventing the persons who did this from entering, and in shutting the door; the misfortune was, that, at the moment he did so, the plaintiff's thumb was in the hinge of the door, but that the porter could not anticipate.

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Judgment for plaintiff reversed.

[*A wrong-doer is not liable for injury he cannot reasonably be expected to foresee.*]

SHARP *v.* POWELL.

COURT OF COMMON PLEAS. 1872. L.R. 7 C.P. 253.

THE declaration stated that the defendant wrongfully caused a van of his to be washed in a public highway, in &c., and thereby caused a public nuisance, and caused large quantities of water to be collected together, whereby the water became frozen and dangerous to the traffic of the highway; and the plaintiff's horse, whilst lawfully passing along the highway, slipped upon the ice, and fell and broke its knee, and was necessarily killed, &c. Plea, not guilty. Issue thereon.

The cause was tried before Keating, J., at the sittings at Westminster after last Michaelmas Term. The plaintiff is a job-master, and the defendant a corn-merchant carrying on business at High Street, Hoxton, having a stable and coach-house abutting upon a public street called Felton Street. On the morning of the 21st of November, 1871, the defendant's van had been washed in the street opposite his coach-house. The water used in the operation flowed into the channel or gutter at the side of the street, and thence under ordinary circumstances would have found its way to a sink or grating at the corner of the street about twenty-five yards from the spot where the van was washed, and so into the sewer. It happened, however, that the weather was and had been for about a fortnight extremely severe, and that, the grating being frozen over, the water had spread three or four feet over the paving, which was much out of repair, and so formed a

sheet of ice. A servant of the plaintiff was taking two horses to be rough-shod, riding one and leading the other, when the led-horse slipped upon the ice and fell, receiving the injury complained of.

For the plaintiff it was contended that the defendant was responsible for the injury, as being the consequence of his wrongful act, viz. causing his van to be washed in a public highway in breach of an Act of Parliament[1]. For the defendant, it was contended that the damage was too remote, and not the natural, necessary, or probable consequence of the defendant's act.

The learned judge non-suited the plaintiff, reserving leave to him to move to enter a verdict for £25, if the Court (who were to be at liberty to draw inferences of fact) should be of opinion that the damage was not too remote: all powers of amendment being also reserved.

A rule nisi having been obtained,

April 22. *H. James, Q.C.*, and *Lanyon*, shewed cause. The ruling of the learned judge was correct. Assuming that the act of the defendant's servant in washing the van in a public place was an unlawful act, in the sense of its rendering him liable to a penalty, the damage to the plaintiff was not the natural or likely consequence to result from it in the ordinary course of things. If the grating had not been foul or frozen, the water which the defendant's servant used in the operation of washing the van would have flowed in its natural channel, and reached the sewer without injury to any one. The defendant is not to be held responsible for the stoppage of the drain, or the defective state of the pavement, which allowed the water to accumulate and expand over the roadway: nor has he been guilty of any wilful or malicious act, to make him a wrong-doer in the ordinary sense. In general, a man is only liable for such consequences of his tortious or negligent act as might reasonably be anticipated as its result. In Addison on Torts, 3rd ed. 5, it is said: "The general rule of law is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provided their acts causing the damage were the necessary or legal and natural consequence of the original wrongful act"; for which proposition the squib case, *Scott* v. *Shepherd*[2], is referred to. In Sedgwick on Damages, 4th ed. 90, the rule, adopted from the judgment

[1] Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 54, sub-s. 1, which imposes a penalty not exceeding 40*s.* upon any person who shall, in any thoroughfare or public place, "clean any cart or carriage."

[2] 3 Wils. 403; 2 W. Bl. 892; *supra*, p. 19.

of the Supreme Court of New York in *Clark* v. *Brown*[1], is thus stated: "The rule of law is well established, that, in cases of torts, it is necessary for the party complaining to shew that the particular damages in respect to which he proceeds are the *legal* and *natural* consequences of the wrongful act imputed to the defendant." And in Mayne on Damages, 15, the general principle is given in these words: "The first, and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act: it will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act, or, in cases of contract, if it appears to have been contemplated by both parties. Where neither of these elements exists, the damage is said to be too remote." In *Hoey* v. *Felton*[2], the plaintiff had been apprehended at the instance of the defendant upon an unfounded charge: having been discharged after about an hour's detention he went home, instead of presenting himself at once at a place where he would have obtained employment: and it was held that the loss of the engagement was too remote a damage. Erle, C.J., there says[3]: "The damage does not immediately and according to the common course of events follow from the defendant's wrong: they are not known by common experience to be usually in sequence. The wrong would not have been followed by the damage, if some facts had not intervened for which the defendant was not responsible." Suppose in the present case a stranger had dammed back the water in the gutter, and so caused it to accumulate and to flow over the roadway, and it afterwards froze, would the defendant have been responsible for that? In *Greenland* v. *Chaplin*[4], Pollock, C.B., says: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." In *Cox* v. *Burbidge*[5], the defendant's horse strayed on to a highway, and kicked the plaintiff, a child, who was playing on the footpath; and it was held that, although the horse was wrongfully on the highway, the injury complained of was not such a consequence

[1] 18 Wendell, 213, 229.
[2] 11 C. B. (N.S.) 142; 31 L. J. (C.P.) 105.
[3] 11 C. B. (N.S.) at p. 146.
[4] 5 Ex. 243, at p. 248.
[5] 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89; *supra*, p. 37.

of the wrong as the owner of the horse was liable for. In *Burrows* v. *March Gas Co.*[1], as well as in *Smith* v. *London and South Western Ry. Co.*[2], the damage was the natural and necessary consequence of the negligence of the defendants.

[BOVILL, C.J. Was there any evidence that the defendant knew of the stoppage of the drain?]

None whatever. If there had been, it might possibly have brought the case within *Harrison* v. *Great Western Ry. Co.*[3]

Metcalfe, in support of the rule. If the plaintiff's horse had met with the injury at the spot where the washing of the van took place, no one could have doubted the defendant's liability; and *Brown* v. *Bussell*[4] is an authority to shew that the fact of its having occurred a short distance off can make no difference. The accident was the result of the defendant's negligent and wrongful act; and the damage was not too remote. In *Romney Marsh* (*Bailiff*) v. *Trinity House Corporation*[5] the defendants' vessel, owing to the negligence of their servants, struck on a sand-bank, and, becoming from that cause unmanageable, was driven by the wind and tide upon a sea-wall of the plaintiff's, and damaged it; and it was held that the defendants were liable for the damage so caused. It was contended there that the damage was too remote; but Kelly, C.B., said: "The rule of law is, that negligence, to render the defendants liable, must be the causa causans, or the proximate cause of the injury, and not merely a causa sine quâ non. I think that it was so in the present case." *Scott* v. *Shepherd*[6] and *Smith* v. *London and South Western Ry. Co.*[2] are distinct authorities in favour of the plaintiff. Wherever the consequences of the negligent or wrongful act complained of are the probable or likely result of such an act, the guilty party is responsible for them; as in *Vaughan* v. *Menlove*[7], where it was held that an action lay against the defendant for so negligently constructing a hay-rick on the extremity of his land that in consequence of its spontaneous ignition his neighbour's house was burnt. Tindal, C.J., there refers to *Tubervil* v. *Stamp*[8], where it was decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbour, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee. In *Reynolds* v. *Clarke*[9], it is laid down as clear law that, "if one lays a log of wood in the highway, and

[1] Law Rep. 5 Ex. 65; in error, Law Rep. 7 Ex. 96.
[2] Law Rep. 5 C. P. 98; in error, Law Rep. 6 C. P. 14. *Infra*, p. 541.
[3] 3 H. & C. 231; 33 L. J. (Ex.) 266. [4] Law Rep. 3 Q. B. 251.
[5] Law Rep. 5 Ex. 204; in error, Law Rep. 7 Ex. 241.
[6] 3 Wils. 403; 2 W. Bl. 892; *supra*, p. 19.
[7] 3 Bing. N. C. 468. *Infra*, p. 538.
[8] 1 Salk. 13. [9] 2 Ld. Raym. 1399.

another receives hurt by it, the latter may maintain an action." That principle was acted upon by the Court of Exchequer in a recent case, *Shepherd* v. *Midland Ry. Co.*[1], where water, which had trickled from a waste pipe at a railway station on to the platform, had become frozen into ice, and the plaintiff a passenger stepped upon it, fell, and was injured; the Court held the defendants liable for negligence in not removing the ice. In *Cox* v. *Burbidge*[2] the action failed, not because the damage was too remote, but because there was no scienter. Applying the principle of these cases to the facts proved here, there can be no doubt that the jury were warranted in finding that the defendant was guilty of negligence in permitting water to flow over the causeway during so severe a frost; and the damage to the plaintiff was sufficiently proximate. If there was any evidence for a jury, the verdict must stand.

[BOVILL, C.J. Was not the plaintiff himself negligent in sending out his horses unroughed in such weather?]

The horses were being sent to the blacksmith's for the very purpose of being roughed. Besides, the question of contributory negligence was not suggested at the trial; neither has it been upon the argument of this rule.

* * * * * * *

GROVE, J. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression, the "natural" consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant: "probable" would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted. But there must be some limit to the liability of a man for the consequences of a wrongful act; and it does not by any means follow that, though the act of allowing the water to flow over the street in the first instance was wrongful, the defendant is liable for a stoppage occurring after the water had got back into its proper and accustomed channel. The defendant was not bound to go down the street and see whether or not any obstacle existed at the drain. I cannot therefore see that the damage to the

[1] Before Martin and Pigott, BB., on Jan. 23, 1872, not reported.
[2] 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89. *Supra*, p. 37.

plaintiff's horse was the proximate or the probable result of the washing of the defendant's van in the street rather than in his own stable or coach-house. I think Mr Lanyon put the case upon the true ground. The damage complained of was not proximately caused by the original wrongful act of the defendant.

* * * * * * *

Rule discharged.

[EDITOR'S NOTE. On the question of Remoteness of Consequences, in the case of negligence, it will be instructive to read *Regina* v. *Hilton* (2 Lewin 214), and *Regina* v. *Rees* (104 C. C. C. Sessions Papers)—which are reprinted in Kenny's "Cases in Criminal Law," pp. 133, 34—and to refer to the chapter on Homicide (ch. XXIII.) in Sir James Stephen's Digest of the Criminal Law.]

[*For the traceable, but* not *natural and probable, results of a slander there is no liability.*]

VICARS *v.* WILCOCKS.

COURT OF KING'S BENCH 1807. 8 EAST 1.

IN an action on the case for slander, the plaintiff declared, that whereas he was retained and employed by one J. O., as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by J. O. and others, that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of J. O., and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one J. M. concerning the plaintiff, and concerning certain flocking-cord of the defendant alleged to have been before then cut, said that he (the defendant) had last night some flocking-cord cut into six yards lengths, but he knew who did it; for it was William Vicars; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse *with other third persons*, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard. By reason whereof the said J. O. believing the plaintiff to have been guilty of unlawfully cutting the said flocking-cord, &c., discharged him from his service and employment, and has always since refused to employ him; and also one R. P., to whom the plaintiff applied to be employed after his discharge from J. O., on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and still is out of employ and damnified, &c.

It appeared at the trial before Lawrence, J., at Stafford, that the plaintiff had been retained by J. O. as a journeyman for a year, at certain wages, and that before the expiration of the year his master had discharged him in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to R. P. for employment, who refused to employ him, in consequence of the words, *and because his former master had discharged him for the offence imputed to him.* The plaintiff was thereupon non-suited; it being admitted that the words in themselves were not actionable without special damage; and the learned judge being of opinion, that the plaintiff having been retained by his master under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff; that the supposed special damage was the loss of those advantages which the plaintiff was entitled to under his contract with his master; which he could not in law be considered as having lost, as he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. Secondly, with respect to the subsequent refusal of R. P. to employ the plaintiff, that it did not appear to be merely on account of the words spoken, but rather on account of his former master having discharged him in consequence of the accusation; without which he might not have regarded the words.

Jervis now moved to set aside the non-suit, and urged that it was always deemed sufficient proof of special damage in these cases, to shew that the injury arose in fact from the slander of the defendant, and it was not less a consequence of it because the act so induced was wrongful on the part of the master. He said, that he could find no case where such a distinction was laid down, and that the practice of Nisi Prius was understood to be otherwise. Secondly, that the refusal of R. P. to employ the plaintiff was clear of that objection; and that such refusal had proceeded upon the alleged cause of discharge by the first master, and not upon the bare act itself of discharge.

LORD ELLENBOROUGH, C.J., said that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence; a mere wrongful act of the master, for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression. And his lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, *non*

liquet that the refusal by R. P. to employ the plaintiff was in consequence of the words spoken, as it is alleged to be: there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ: which was more likely to weigh with R. P. than the mere words themselves of the defendant.

The other Judges concurring,

Rule refused.

[EDITOR'S NOTE. The damage here was too remote. But the *general* doctrine here laid down by Lord Ellenborough (that in case of damage by a wrongful act of one person, done in consequence of the wrongful act of another, the damage is *necessarily* too remote a consequence of this latter person's act to justify an award of compensation) is now discredited. See *Lumley* v. *Gye*, *infra*, p. 520. In *Lynch* v. *Knight* (1861), 9 H. L. C. 577, Lord Wensleydale, criticising *Vicars* v. *Wilcocks*, said "Lord Ellenborough puts it as absurd that a plaintiff should recover damages for being thrown into a horsepond in consequence of a slander. But I can conceive that, when the public mind was greatly excited on the subject of some disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result; and a compensation might be given." See p. 285, *infra*.]

[*Compensation* cannot *be recovered for an injury that is purely* mental; *but* can *for a* physical *injury even though it were produced through a mental shock.*]

DULIEU *v.* WHITE AND SONS.

KING'S BENCH DIVISION. L.R. [1901] 2 K.B. 669.

[POINT of law raised by the pleadings. The statement of claim alleged that on the 20th of July, 1900, the plaintiff, then being in a state of pregnancy, was behind the bar of her husband's public-house, and that the defendants, by their servant, so negligently drove a pair-horse van as to drive it into the public-house. It went on to allege, in paragraph 4, that the plaintiff in consequence sustained a severe shock and became seriously ill, and on the 29th of September following gave premature birth to a child. In paragraph 5, it alleged that in consequence of the shock sustained by the plaintiff this child was born an idiot. Then followed a claim for damages. The defendants pleaded, as a matter of law, that the damages sought to be recovered were too remote and that the statement of claim disclosed upon its face no cause of action.]

KENNEDY, J. The matter we have to decide is whether, if it be proved at the trial that the defendants' servant did negligently manage a pair-horse van, and by reason of his negligence drove it into the

public-house, and did thereby cause the plaintiff such a nervous shock as to make her ill in body and suffer bodily pain, the plaintiff has a good cause of action for damages under paragraph 4. The head of damage under paragraph 5 was rightly treated by the plaintiff's counsel as untenable....In order to succeed, the plaintiff has to prove resulting damage to herself, and "a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect[1]." The driver of a van and horses in a highway owes a duty to use reasonable and proper care and skill so as not to injure either persons lawfully using the highway, or property adjoining the highway, or persons who, like the plaintiff, are lawfully occupying that property....The legal obligations of the driver are the same, I think, towards the man indoors or the man out of doors. The only question here is whether there is an actionable breach of those obligations if the man in either case is made ill in body by such negligent driving as does not break his ribs but shocks his nerves....That fright, where physical injury is directly produced by it, cannot be a ground of action (merely because of the absence of any accompanying impact), appears to me to be a contention both unreasonable and contrary to the weight of authority. We have, as reported decisions which in my judgment go far to negative the correctness of any such contention, *Jones* v. *Boyce* (1 Starkie, 493; p. 565, *infra*), *Harris* v. *Mobbs* (3 Ex. D. 268), *Wilkins* v *Day* (12 Q. B. D. 110)....Further, we have, directly in point, the decision of the Common Pleas Division in Ireland in the unreported case of *Byrne* v. *The Great Southern and Western Ry. Co. of Ireland*; and the approval of this decision in 1890 by the Exchequer Division in *Bell* v. *The Great Northern Ry. Co. of Ireland* (L. R. Ir. 26 C. L. 428).... In the *Victorian Railway Commissioners* v. *Coultas* (13 App. Cas. 222) the Privy Council expressly declined to decide that "impact" was necessary....There is, I am inclined to think, one important limitation. The shock, where it operates through the mind, must arise from a reasonable fear of immediate personal injuries to oneself....

It may be admitted that the plaintiff would not have suffered exactly as she did, if she had not been pregnant at the time; and, no doubt, the driver of the defendants' horses could not anticipate that she was in that condition. But what does that fact matter? If a man is negligently run over,...it is no answer to the sufferer's claim of damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart[2].

PHILLIMORE, J....I think there may be cases in which *A* owes a duty to *B* not to inflict a mental shock on him or her, and that in

[1] Shearman and Redfield, "Negligence," p. 7.

[2] [EDITOR'S NOTE. Contrast the case where there is *no* negligence, and the man is run over solely through his being blind or lame.]

such a case, if *A* does inflict such a shock upon *B*—as by terrifying *B*—and physical damage thereby ensues, *B* may have an action for the physical damage, though the medium through which it has been inflicted is the mind.... I think there is some assistance to be got from the cases where fear of impending danger has induced a passenger to take means of escape which have, in the result, proved injurious to him, and where the carrier has been held liable for these injuries, as in *Jones* v *Boyce*. The limit of the application of this principle is shewn in *Adams* v *Lancashire Ry. Co* (L. R. 4 C. P 739). These principles and cases seem to establish that terror wrongfully induced and inducing physical mischief gives a cause of action....It may be (I do not say that it is so) that a person venturing into the streets takes his chance of terror. If not fit for the streets at hours of crowded traffic, he or she should not go there. But if a person, being so unfit either permanently or temporarily, stays at home, he or she may well have a right to his or her personal safety;...and wilfully or negligently to invade this right, and so induce physical damage, may give rise to an action. In the case before us the plaintiff, a pregnant woman, was in her house. It is said that she was not the tenant in possession, and could not maintain trespass *quare clausum fregit* if this had been a direct act of the defendant and not (as it was) of his servant. This is true; her husband was in possession. But none the less it was her home, where she had a right, and on some occasions a duty, to be; and it seems to me that, if the tenant himself could maintain an action, his wife or child could do likewise. It is averred that, by the careless driving of the defendants' servant, a pair-horse van came some way into the room, and so frightened her that serious physical consequences thereby befell her. If these averments be proved, I think there was a breach of duty to her for which she can have damages....Once get the duty, and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being only mental, makes no difference.

[EDITOR'S NOTE. In this case, all parties were agreed that the mother could not sue for damages on account of her child's having been born an idiot. But could even the child itself have sued for them? Both in Ireland (*Walker* v. *G. N. R. Co.*, *infra*, p. 105, 28 Law Rep. Ir. 69), and in three of the United States, this question has been answered in the negative. For (1) the child unborn has not yet become a legal *persona*, and he who does not exist cannot be wronged; and (2) even were it a *persona*, the carriers did not know of its presence in their vehicle, and so were under no duty towards it; and (3) such claims would involve the reception of medical evidence too conjectural to be trustworthy. Were such actions allowed, a child might sue its mother for having impaired its health by being careless of her own. Cf. however *The George and Richard*, L. R. 3 Ad. & Ec. 466, where an English court favoured the right of a child to sue, after birth, for the damage then accruing to it through its father's having been killed before its birth by a tort against *him*.

Dulieu's case was followed in *Janvier* v. *Sweeney*, L. R. [1919], 2 K. B. 316.]

SECTION II.

LIABILITY AS AFFECTED BY STATUS.

(A) INFANCY.

[*An infant is not liable for any tort that is substantially a mere* breach of contract.]

JOHNSON *v.* PIE.

COURT OF KING'S BENCH. 1665. 1 Keble 905, 913.

IN Action upon the Case against an Infant, who being 20 and ½ and appearing to the Plaintiff to be of full age, did falsely and fraudulently affirm himself to be of full age; and as of full age seal'd a Deed of Mortgage to the Plaintiff, which he after avoided for Infancy, to his Damage. On Not guilty pleaded, and Verdict for the Plaintiff, and 300 l. Damages, and Judgment ex motione Jones stayd, *Winnington* prayed Judgment; but *Windham* absente, the Court would do nothing: But by KEELING, the Judgment will stay for ever, else the whole Foundation of the Common Law will be shaken, for this was but a slip, and he might have pleaded his Minority here.

[*Winnington* moved again, on a subsequent day.] The case of *Grove* v. *Nevill* in this Court is the nearest to this, on a deceitful affirmance of a Stone (that was but Bristow[1]) to be a Diamond, and his own. There, on demurrer, Judgment was against the Plaintiff, because it was matter of contract. But this is a cheat and a tort. KEELING said, Such torts that must punish an Infant, must be Vi & armis, or notoriously against the publick; but here the Plaintiff's own credulity hath betrayed him. Also by *Windham*, the commands of an Infant are void; and for such he shall never be attainted a disseisor, much less shall he be punished for a bare affirmation. Which TWISDEN agreed; and that there must be a fact joyned to it, as cheating with false Dice, &c. Also by this means all the Pleas of Infancy would be taken away, for such affirmations are in every contract. *Windham* said, That had any other person affirmed the Infant of age, an Action would lye; (the Case of *Grove* and *Nevill*, the Defendant pleaded Infancy, to which the Plaintiff demurr'd, in an Action upon the Case for falsly affirming a Jewel to be his own which was another mans). The Court awarded, on the Plaintiffs prayer, a Nil Capit per Billam.

[1] I.e., a "Bristol-stone," a Somersetshire quartz crystal.

[*The tort of over-riding a* hired *horse is an instance of this.*]

JENNINGS *v.* RUNDALL.

COURT OF KING'S BENCH. 1799. 8 TERM REP. 335.

THE first count in this declaration stated, that the plaintiff on, &c. at the instance and request of the defendant, delivered to the defendant a certain mare of the plaintiff, to be moderately ridden by the defendant; yet that the defendant, contriving and maliciously intending to injure the plaintiff, whilst the mare was in the defendant's custody under such delivery, and before the same was returned to the plaintiff on, &c. wrongfully and injuriously rode, used, and worked the said mare in so immoderate, excessive, and improper a manner, and took so little and such bad care thereof, that, by reason of such immoderate, &c. riding, &c. the said mare became, and was greatly strained, damaged, &c. In the second count it was alleged, that the plaintiff, at the instance and request of the defendant, let to hire, and delivered to the defendant, a cerain other mare, to go and perform a certain reasonable and moderate journey, &c. yet that the defendant contriving, &c. wrongfully and injuriously rode and worked the said mare a much longer journey, &c. There was also a count in trover for two mares.

The defendant pleaded his infancy to the first two counts; to which plea the plaintiff demurred.

Marryat, in support of the demurrer (after observing that it was immaterial whether or not infancy could be pleaded to the second count, because, it being pleaded to both counts, if it were a bad plea as to either count, the whole plea was bad) contended that, as the first count was not founded on a contract but on a tort, the defendant could not plead infancy to it. That that count did not state any consideration for the delivery of the mare by the plaintiff to the defendant, or any promise by the defendant to take care of her, or to re-deliver her: but that it appears to be a delivery on bail to the defendant, who had abused the plaintiff's property. That the tort here did not consist in mere neglect or omission, but in a tortious act done by the defendant. That the *dictum* in the books, That if the action arise out of the contract, the plaintiff shall not, by declaring in tort, prevent the defendant pleading infancy, must be confined to cases where the wrong complained of consists in omission, or in some act which is a tort only by construction of law. That such was the ground of decision in *Grove* v. *Nevill*, *supra*, p. 60 (said in 1 Keb. 914, to have been decided), where, in an action upon the case in nature of a deceit on sale by the defendant, of goods as his own, when in truth

they belonged to another, the Court said, "This is no *actual* tort, or any thing *ex delicto*, but only *ex contractu*." That in *Johnson* v. *Pie*[1] where the defendant had falsely and fraudulently asserted himself to be of full age, and had, as such, executed a mortgage to the plaintiff, and where it was holden that the defendant, an infant, was not answerable, the action was founded on the very contract in which the defendant had cheated the plaintiff: whereas here is a tortious act done by the defendant, and that too subsequent to the time when any supposed contract could have been entered into respecting the hire of the mare. He observed, that an infant is answerable in an action for slander, Noy 129; because there an act is done by the defendant; and in that case it was said that *malitia supplet aetatem*; so here malice is laid. That in trover an infant is also responsible on account of the wrongful conversion subsequent to the bailment; though in most instances in trover the act is only a breach of trust, or violation of some duty; and that, even in an action of trespass for mesne profits, he cannot plead infancy, though there he becomes a trespasser by construction of law. That if an infant wilfully destroyed any thing that had been bailed to him, there is no doubt but that he would be liable in an action for the tort; and that this was in effect the same, because here he rendered a mare, that had been bailed to him, less valuable by his wrongful and injurious act.

Wood, contrà, was stopped by the Court.

Lord Kenyon, C.J. The law of England has very wisely protected infants against their liability in cases of contract; and the present case is a strong instance to shew the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey; the plaintiff let him the mare to hire; and in the course of the journey an accident happened, the mare being strained: and the question is, Whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on a contract. If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants. Lord Mansfield, indeed, frequently said, that this protection was to be used as a shield, and not as a sword; therefore if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract. And the words "wrongfully, injuriously, and maliciously," introduced into this declaration, cannot vary the case.

Judgment for defendant.

[1] 1 Keb. 905, 913; and 1 Lev. 169; *supra*, p. 60.

[*But not the tort of injuring the hired horse by using it for a purpose wholly* outside the contract.]

BURNARD *v.* HAGGIS.

COURT OF COMMON PLEAS. 1863. 14 C.B., N.S., 45.

THIS was an appeal against a decision of the County Court of Cambridge in a plaint in which William Haggis, a livery-stable keeper, was plaintiff, and John Chichester Burnard, an undergraduate of Trinity College, was defendant. The action was for causing the death of the plaintiff's horse. The defendant pleaded infancy. A verdict for £30 was given against him.

The defendant, accompanied by a friend named Bonner, who was also an undergraduate of Trinity College, Cambridge, but was not examined as a witness, went into the yard of the plaintiff, to whom both of them were strangers, and the defendant stated to the plaintiff's servant, and afterwards to the plaintiff, that the defendant wanted a horse for a ride. A mare was shewn to him, and he asked if she could jump. The plaintiff said he had no doubt she would, but he did not let her out for jumping or larking, and that, if he the defendant wanted a horse for jumping, plaintiff could shew him a horse for that purpose. The defendant replied that he did not want a horse for jumping, but merely for a ride; and he said he would have the mare, and he directed it to be sent for him to a house No. 7, Green Street, Cambridge.

The plaintiff stated that the usual charge for a ride is 7*s.* 6*d.*, and that he had charged that sum against the defendant, who however had not paid it, and that the usual charge for a horse for jumping or larking is a guinea.

The defendant and Bonner rode together from Cambridge; and the defendant stated that between Cambridge and the adjoining village of Grantchester they left the highway and rode together across the fields to the adjoining village of Barton, being a distance of about three miles, and, in doing so, they jumped their horses over several hedges and ditches, and that, as Mr Bonner was endeavouring to jump the plaintiff's mare over a fence, it fell, and a stake entered its body.

* * * * * * *

Wills, for the appellant, after contending, at some length, that horse-exercise is not a necessary for an undergraduate, and that the hiring was therefore invalid, proceeded....This being an action founded on a contract, it was not competent to the plaintiff to convert it into a tort, so as to charge the infant: *Jennings* v. *Rundall* (*supra*, p. 61). In that case the plaintiff declared that at the defendant's request he

had delivered a mare to the defendant, to be moderately ridden, and that the defendant, maliciously intending, &c., wrongfully and injuriously rode the mare, so that she was damaged, &c.: and it was held that the defendant might plead his infancy in bar, the action being founded on a contract. [BYLES, J. In that case, the mare was ridden along the road: but here, she was put at a fence in defiance of the caution of the livery-stable keeper that she was not a jumper and was not let for that purpose. To use the mare as he did, was an act of tort just as distinct from the contract as if the defendant had run a knife into her and killed her. WILLES, J., referred to *Wright* v. *Leonard*, 11 C.B., N.S.] Where a livery-stable keeper lets a horse, he lets it subject to all the ordinary risks to which horses are liable.

Tozer, Serjt., contrà. This case is essentially distinguishable from *Harrison* v. *Fane*, 1 Scott N.R. 287, 1 M. and G. 550. The only contract here was, that the defendant should have the mare for a ride along the road. There was no intention either that she should be taken off the road in the manner she was, or that she should be ridden by a third person.

ERLE, C.J., stopping *Tozer*. The question is whether, under the circumstances stated by the judge of the County Court, the plaintiff or the defendant is entitled to judgment. It appears that the defendant went to the stables of the plaintiff and contracted for the hire of a mare for a ride on the road, being told specifically that it was not let for jumping,—the charge for a horse for that purpose being a guinea, whereas the sum to be charged for a ride was only seven shillings. The defendant having obtained the mare, lent her to his friend, who so conducted himself that the animal, being forced to a leap she was not equal to, fell and was transfixed by a hedge-stake. This was an absolute wrong on the part of the defendant, for which he is unquestionably liable, quite independently of the question of necessary or no necessary.

WILLES, J. I am of the same opinion. It appears to me that the act of riding the mare into the place where she received her death-wound was as much a trespass, notwithstanding the hiring for another purpose, as if, without any hiring at all, the defendant had gone into a field and taken the mare out and hunted her and killed her. It was a bare trespass, not within the object and purpose of the hiring. It was not even an excess. It was doing an act towards the mare which was altogether forbidden by the owner.

BYLES, J. I am of the same opinion. The rule is plain, both as to married women and infants, that you cannot by suing *ex delicto* change the nature and extent of their liability. Here, however, the mare was let for the specific purpose of a ride along the road, and for the purpose of being ridden only by the defendant. The defendant not only allows

his friend to mount, but allows him to put the mare to a fence for which he was told she was unfit. Quite independently, therefore, of necessaries, the defendant is clearly responsible for the wrong done[1].

(B) Corporate Bodies.

[*A corporation may be liable for tort*[2].]

[*Even one incorporated for* public *duties, from the discharge of which it derives no profit, is so liable.*]

THE MERSEY DOCKS AND HARBOUR BOARD TRUSTEES *v.* GIBBS.

House of Lords. 1864. L.R. 1 H.L. 93.

[This appeal and that of the same trustees against Penhallow came before the House of Lords in 1864. It was there argued at great length, and a joint opinion of the judges was delivered by Blackburn, J.

Messrs Gibbs and Co., the owners of the cargo of the *Sierra Nevada*, and Messrs Penhallow and Co., the owners of the vessel itself, were the plaintiffs in the actions, but became respondents in error in the House of Lords. The facts are sufficiently set out by Lord Blackburn.]

[1] For American actions of Tort against infants of twelve, of ten, and of six, see "Annotated Cases" 1912 C. p. 179.

[2] [Editor's Note. In an important American case, where one corporate body sued another for a tort, the rule was stated thus clearly:—"The right of the plaintiff corporation to recover for annoyance to its members in the use of its property, and the liability of the defendant corporation to answer in damages, are not affected by their respective corporate characters. A private corporation is but an association of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the use of its property, for the purposes of its formation, is as much the subject of complaint as if its members were united by some other tie than a corporate one. And the liability of the defendant corporation, for the annoyance caused, is the same as that of individuals for a similar wrong. The doctrine which formerly was sometimes asserted, that an action of tort will not lie against a corporation, is exploded. The same rule, in that respect, now applies to corporations as to individuals; they are equally responsible for injuries done, in the course of their business, by their servants." Per Field, J., in *Baltimore and Potomac Ry. Co.* v. *Fifth Baptist Church* (108 U.S. 317).

After some doubt, it now is settled law that a Corporation's liability for torts extends even to torts of malice or fraud; e.g. to malicious libel (*Citizens' Life Assurance Co.* v. *Brown*, L. R. [1904], A. C. 423), malicious prosecution (*Bank of New South Wales* v. *Owston*, L. R., 4 App. Ca. 270), and any other head of Tort of which Actual Malice is an ingredient (L. R. [1919], 1 K. B. 281).]

Mr Justice BLACKBURN:—My Lords, I have the honour to deliver the joint opinion of all the judges who heard the argument.

The two actions before your Lordships, though arising out of the same transaction, do not come before your Lordships' House in precisely the same manner In *Gibbs* v. *The Mersey Board* (the action by the owner of the cargo) the question is raised by a demurrer to the declaration, on which all the material averments must be considered as admitted to be true. The damages are assessed on the second count, and it is to the averments on that count that your Lordships' attention should be directed. On this record it is admitted by the demurrer that the defendants, the trustees of the docks, *knowing* that the dock and its entrance was, by reason of accumulations of mud, unfit to be used by ships, did not take due and reasonable, or any care, to put it in a fit state, but *negligently suffered* the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damage arose in consequence.

In the action of *Penhallow* v. *The Mersey Board* (the action by the shipowner), the averments in the second count are similar to those in the first action; but they are not admitted by a demurrer The question was raised at *nisi prius* on the plea of not guilty, which the jury found for the plaintiffs; but the charge of the Lord Chief Baron is brought before your Lordships by a bill of exceptions, by which it appears that he told the jurors that if, in their opinion, the cause of the misfortune was a bank of mud, "and the defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, then, in his opinion, the defendants were liable"; obviously meaning that if the jurors so thought they ought to find the issue for the plaintiffs. The exception taken to this summing-up was, that even if the jury thought the cause of the misfortune was a bank of mud, the defendants were not liable unless they *knew* that the dock and entrance were, by reason of the said mud bank or otherwise, unfit for navigation. That is the only exception.

* * * * * * *

But Mr Mellish argued that the whole scheme of the legislature shewed that the intention of the legislature was to give to the committee an uncontrolled discretionary power to compensate such persons as, in their opinion, ought to be compensated, and no others. He did not say the committee was to exercise this power capriciously, but *quasi* judicially, though without appeal; and he argued that the change of the constitution of the committee, by which one-half was to be elected by the ratepayers (though only introduced by the later Acts), rendered this less unlikely. But we do not think that such is the fair construction to be put on the enactments.

It is contrary to the general rule of law, not only in this country,

but in every other, to make a person judge in his own cause; and though the legislature can, and, no doubt, in a proper case would, depart from that general rule, an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes.

We have gone through these enactments, and we think your Lordships will hardly be inclined to dispose of this important case on any of the special provisions peculiar to these Acts. As we have already intimated, in our opinion the proper rule of construction of such statutes is that, in the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things. This rule of construction was not admitted by the trustees. They did not rest their case exclusively, or even mainly, on any special provisions peculiar to their own private legislation, but upon two broader grounds.

They said that by the general law of this country, bodies such as the present are trustees for public purposes; and that being such, they are not in their corporate capacity liable to make compensation for damages sustained by individuals from the neglect of their servants and agents to perform the duties imposed on the corporation; or, at all events, that the duty of such corporations was limited to that of exercising due care in the choice of their officers, and that if they had properly selected their officers, any evil which ensued must be the fault of the officer, and redress must be sought against him alone.

A great many cases were cited at your Lordships' bar as supporting this position, many of which are really not applicable to such a case as the present. *Lane* v. *Cotton*[1], and *Whitfield* v. *Le Despencer*[2] (the cases of the Postmaster-General); and *Nicholson* v. *Mounsey*[3] (the case of the captain of the man-of-war); are authorities that where a person is a public officer in the sense that he is a servant of the government, and as such has the management of some branch of the government business, he is not responsible for any negligence or default of those in the same employment as himself.

But these cases were decided upon the ground that the government was the principal, and the defendant merely the servant. If an action were brought by the owner of goods against the manager of the goods traffic of a railway company for some injury sustained on the line, it would fail unless it could be shewn that the particular acts which occasioned the damage were done by his orders or directions; for the action must be brought either against the principal, or against the

[1] 1 Ld. Raym. 646. [2] Cowp. 754.
[3] 15 East, 384.

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immediate actors in the wrong[1]. And all that is decided by this class of cases is, that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal, the public, cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of the parish. But the defendants in the present action are not servants of the public in that sense. For this we need do no more than refer to the recent decision of your Lordships' House in *Jones* v. *Mersey Board*, where they were held to be rateable as occupiers of the docks on the very ground that they did not occupy as servants of the public or government.

Another class of cases, also cited, depends upon the following principle. If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuriâ*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its Acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their Acts; though the one road is made for the profit of the shareholders in the company and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature: *Rex* v. *Pease*[2]. This, we think, is the point decided in *The Governors of the British Cast Plate Manufacturers* v. *Meredith*[3], *Sutton* v. *Clarke*[4], and several other cases, as is well explained in *Whitehouse* v. *Fellowes*[5].

But though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done. In *Brine* v. *The Great Western Railway Company*[6], Mr Justice Crompton says, "the distinction is now clearly established between damage from works authorized by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains."

[1] Story on Agency, s. 313. [2] 4 B. & Ad. 30. [3] 4 T. R. 794.
[4] 6 Taunt. 29. [5] 10 C. B. (N.S.) 779. [6] 2 B. & S. 402.

This distinction is as applicable to works executed for one purpose as for another. This principle seems to have been that acted upon in *Leader* v. *Moxon*[1], and it is to some extent recognized in *Sutton* v. *Clarke*[2], by Chief Justice Gibbs, who puts the judgment on the ground that the defendant, in the execution of a duty imposed on him by the legislature, had exercised his best skill, diligence, and caution in the execution of it. "We are of opinion," says Chief Justice Gibbs, "that he is not liable for an injury which he did not only not foresee, but could not foresee. He has done all that is incumbent on him, having used his best skill and diligence." This certainly implies that, in the opinion of those who concurred in that judgment, the defendant would have been liable if he had neglected to use his best skill and diligence.

In the subsequent case of *Jones* v. *Bird*[3], Justice Bayley laid down a stricter rule. He said that the defendants, who in that case were the persons actually executing a sewer, authorized by statute, were not protected merely because acting *bonâ fide* and to the best of their skill and judgment: "That," says he, "is not enough, they are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case." And there is a considerable number of cases, to which we shall afterwards refer, in which, on this principle, actions have been held to lie against bodies executing works under the authority of statutes for the improper mode in which their powers have been executed, though the defendants did not derive any profit from the execution of the works.

There are, however, authorities that bear the other way upon this part of the case; and it is necessary to examine these authorities in order to contrast them with the others. It will be for your Lordships then to decide on which side the preponderance of authority lies. Those in favour of the defendant are *Hall* v. *Smith*[4], *Duncan* v. *Findlater*[5], *Holliday* v. *St Leonard's*[6], and *Metcalfe* v. *Hetherington*[7]. It is necessary, in considering them, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work.

This distinction is well stated in *Pickard* v. *Smith*[8], by Mr Justice Williams, who says, "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Con-

[1] 3 Wils. 461; Sir W. Bl. 924.
[2] 6 Taunt. 29.
[3] 5 B. & A. 837.
[4] 2 Bing. 156.
[5] 6 Cl. & F. 894.
[6] 11 C. B. (N.S.) 192.
[7] 11 Ex. 257.
[8] 10 C. B. (N.S.) 480.

sequently, if an independent contractor is employed to do a lawful act, and in the course of the work, he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned....If the performance of the duty be omitted, the fact of his having entrusted it to a person who also neglected it, furnishes no excuse either in good sense or law."

* * * * * * *

Judgment[1] for the defendants in error.

(C) Principal and Agent.

[*A principal is liable for torts committed by his agents in the course of his business, though he had not* expressly *authorized the torts; and even though they be torts of* Fraud.]

HERN *v.* NICHOLS.

Nisi Prius. 17—. 1 Salkeld 289.

In an action on the case, for a Deceit, the plaintiff set forth that he bought several parcels of silk for [a certain kind of] silk, whereas it was another kind of silk; and that the defendant, well knowing this deceit, sold it him for [the first-named kind of] silk. On trial, upon Not Guilty, it appeared that there was no actual deceit in the defendant (who was the merchant); but that it was in his factor beyond sea. And the doubt was, if this deceit could charge the merchant.

And Holt, C.J., was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*. For seeing somebody must be a loser by this deceit, it is more reason that he that employs (and puts a trust and confidence in) the deceiver should be a loser, than a stranger.

And upon this opinion the plaintiff had a verdict.

[1] By the Public Authorities Protection Act 1893 every action for wrongful conduct in execution, or intended execution, of any statutory or other public duty or authority must be brought within six months of the doing of the wrong. But a profit-earning company is not within this statute: though a municipal body taking over from it its enterprise would be.

[*The course of a principal's business.*]

BARWICK *v.* ENGLISH JOINT STOCK BANK.

EXCHEQUER CHAMBER. 1867. L.R. 2 Ex. 259.

[THE facts are stated, in the judgment of the Court, as follows:—

It was an action brought for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which the plaintiff alleged to have been committed by the manager of the bank in the course of conducting their business. At the trial, two witnesses were called, first, Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; and that he had done so upon a guarantee given to him by the bank, through their manager, the effect of which probably was, that the drafts of the plaintiff upon Davis were to be paid, subject to the debt of the bank. What were the precise terms of the guarantee did not appear, but it seems that the plaintiff became dissatisfied with it, and refused to supply more oats without getting a more satisfactory one; that he applied to the manager of the bank, and that after some conversation between them, a guarantee was given, which was:—

"Dear Sir,—Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase for, J. Davis and Son not exceeding 1000 quarters of oats for the use of their contract, I will honour the cheque of Messrs J. Davis and Son in your favour in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payment, except to this bank; and provided, as I explained to you, that they, J. Davis and Son, are able to continue their contract, and are not made bankrupts.

(Signed) "Don. M. Dewar, Manager."

The plaintiff stated that in the course of conversation as to the guarantee, the manager told him that whatever time he received the government cheque, the plaintiff should receive the money.]

The cause was tried before Martin, B., at Westminster, on the 15th of June, 1866; and on the evidence given for the plaintiff, the learned Baron ruled that there was no evidence to go to the jury in support of the plaintiff's case, and accordingly directed a non-suit, but signed a bill of exceptions setting out the evidence.

Feb. 8. *Brown, Q.C.* (*Huddleston, Q.C.*, and *Griffits*, with him), for the plaintiff, contended that his case rested on the ground on which in equity a second mortgagee has priority over a first mortgagee, whose negligence has enabled and induced him to advance money

without knowledge of the first incumbrance. Story on Equity, s. 384, et seq.; *Mocatta* v. *Murgatroyd*[1]; *Berrisford* v. *Milward*[2]; a doctrine applied to the case of a guarantee in *Lee* v. *Jones*[3], and open here to the plaintiff under his equitable replication; that as to the existence of an intention in the manager that the plaintiff should be induced by his representation to advance the money, which must be admitted to be an essential circumstance under the last count, there was ample evidence on which the jury might find it: *Swan* v. *North British Australasian Company*[4].

He was stopped.

Mellish, Q.C. (*Watkin Williams* with him), for the defendants, contended that they clearly could not be liable on the guarantee declared upon in the first count, since they had satisfied its terms; that, further, there was no evidence of fraud, for that the transaction itself was abundant notice of the indebtedness of Davis; and it might be inferred from the guarantee itself, which was the termination and embodiment of the conversation, that there was knowledge or the means of knowledge in the plaintiff; that at least the want of knowledge in the plaintiff was owing to his negligence, since it was his business to inquire, and not the manager's voluntarily to disclose: *Hamilton* v. *Watson*[5]; that even supposing there was a false representation by the agent, still the principal was not liable to an action: *Cornfoot* v. *Fowke*[6], *Udell* v. *Atherton*[7], *Wilde* v. *Gibson*[8]; and that at least the fraud could not be stated as the fraud of the bank.

[WILLES, J. I should be sorry to have it supposed that *Cornfoot* v *Fowke*[6] turned upon anything but a point of pleading. (The learned judge referred to Com. Dig., Action on the Case for Deceit, B.)]

Brown, Q.C., in reply, contended that in *Udell* v. *Atherton*[7] the general question of the liability of a principal for the acts of his agent, acting in the course of his agency, did not arise, but the decision turned on the facts of the case; and that *Hamilton* v. *Watson*[5] was no authority against the plaintiff when taken as explained by Blackburn, J., in *Lee* v. *Jones*[9]; the defendants were therefore liable on all the counts, and in particular as to the first, upon the ground that they were bound by way of estoppel by their agent's representation.

Cur. adv. vult.

[1] 1 P. Wms. 393. [2] 2 Atk. 49.

[3] 17 C. B. (N.S.) 482; 34 L. J. (C.P.) 131.

[4] 2 H. & C. 175; 32 L. J. (Ex.) 273: see per Cockburn, C.J., and Blackburn, J., 2 H. & C. at pp. 182, 188.

[5] 12 Cl. & F. 109. [6] 6 M. & W. 358.

[7] 7 H. & N. 172; 30 L. J. (Ex.) 337: see the judgments of Martin and Bramwell, BB., 7 H. & N. at pp. 187, 193.

[8] 1 H. L. C. 605. [9] 17 C. B. (N.S.) at pp. 503, 504; 34 L. J. (C.P.) 131.

May 18. The judgment of the Court (Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J....Upon the evidence of the plaintiff, it is obvious that there was a case on which the jury might conclude, if they thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably, or might probably, be paid, and that the plaintiff took the guarantee, supposing that it was of some value, and that the cheque would probably, or might probably, be paid. But if the manager at the time, from his knowledge of the accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended that it should not be paid, and kept back from the plaintiff the fact which made the payment of it improbable to the extent of being as a matter of business impossible, the jury might well have thought (and it was a matter within their province to decide upon) that he had been guilty of a fraud upon the plaintiff.

Now, was there evidence that such knowledge was in the mind of the manager? The plaintiff had no knowledge of the state of the accounts, and the manager made no communication to him with respect to it. But the evidence of Davis was given for the purpose of supplying that part of the case; and he stated that, immediately before the guarantee had been given, he went to the manager, and told him it was impossible for him to go on unless he got further supplies, and that the government were buying in against him; to which the manager replied, that Davis must go and try his friends; on which Davis informed the manager that the plaintiff would go no further unless he had a further guarantee. Upon that the manager acted; and Davis added, "I owed the bank above £12,000." The result was that oats were supplied by the plaintiff to Davis to the amount of £1227, that Davis carried out his contract with the government, and that the commissariat paid him the sum of £2676, which was paid by him into the bank. He thereupon handed a cheque to the plaintiff, who presented it to the bank, and without further explanation the cheque was refused.

This is the plain state of the facts; and it was contended on behalf of the bank that, inasmuch as the guarantee contains a stipulation that the plaintiff's debt should be paid subsequent to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I speak sparingly, because we desire not to anticipate the judgment which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion, that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the government cheque, by keeping back from the plaintiff the state of

Davis's account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of.

If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my Brothers Martin and Bramwell in *Udell* v. *Atherton*[1], the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time[2]—but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved[3]. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo[4]. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of bye laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye laws[5]. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong[6]. In all these cases it may be said, as it was said here, that the master

[1] 7 H. & N. 172; 30 L. J. (Ex.) 337. [2] *Hern* v. *Nichols*, *supra*, p. 70.

[3] See *Laugher* v. *Pointer*, 5 B. & C. 547, at p. 554.

[4] *Ewbank* v. *Nutting*, 7 C. B. 797.

[5] *Goff* v. *Great Northern Railway Company*, 3 E. & E. 672; 30 L. J. (Q.B.) 148, explaining (at 3 E. & E. p. 683) *Roe* v. *Birkenhead Railway Company*, 7 Ex. 36; and see *Barry* v. *Midland Railway Company*, Ir. L. Rep. 1 C. L. 130.

[6] *Huzzey* v. *Field*, 2 C. M. & R. 432, at p. 440.

has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

The only other point which was made, and it had at first a somewhat plausible aspect, was this:—It is said, if it be established that the bank are answerable for this fraud, it is the fraud of the manager, and ought not to have been described, as here, as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in case for fraud, or whether, under the circumstances, money having been actually procured for and paid into the bank, which ought to have got into the plaintiff's hands, the count for money had and received is not applicable to the case. I do not discuss that question, because in common law pleading no such difficulty as is here suggested is recognized. If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in the case of *Raphael* v. *Goodman*[1]. The sheriff sued upon a bond; plea, that the bond was obtained by the sheriff and others by fraud; proof, that it was obtained by the fraud of the officer; held, the plea was sufficiently proved.

Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, especially considering that the whole case may not have been before them, we think this is a matter proper for their determination, and there ought therefore to be a venire de novo.

Venire de novo.

[EDITOR'S NOTE. See *Cheshire* v. *Bailey*, L. R. [1905] 1 K. B. 237.]

[1] 8 A. & E. 565.

[*An agent's authority may be conferred on him even* after *he has done the act authorized.*]

DEAN AND CHAPTER OF EXETER *v.* SERLE.

CORNWALL ASSIZES. 1302. Y.B. 30 EDW. I. 126.

THE Dean and Chapter of Exeter brought an assise of "novel disseisin" against Serle de Lanlazaron, and complained that they were disseised of a hundred shillings of rent in N. Serle and the others came not, and the assise was awarded by reason of their default.—THE ASSISE being sworn, said that Serle and the Dean had made an exchange of certain tenements; and that Serle had charged the tenements which the Dean had put in his view, with a hundred shillings yearly, and had granted that whenever the rent should be in arrear the Dean should be at liberty to distrain; that the Dean came within the period of summons of the Eyre and distrained for the rent; and that all those named in the writ, except Serle and two others, rescued, &c.—BRUMPTON. Was he assenting in any manner to the rescue which the others made?—THE ASSISE. The Dean and Chapter and Serle appointed a day for a compromise, but could not agree; and so it seems that he was assenting to the rescue.—BRUMPTON. Inasmuch as the rescue was made in Serle's name, and he assented to the act, we consider him as a principal disseisor. (The reason is, as BRUMPTON then said, that a confirmation relates back, and is equivalent to a command[1].) And so the Court adjudges that the Dean do recover his seisin and his arrears (amounting to so much), and his damages of a hundred shillings; and that Serle and the others be taken, &c., and that the Dean &c., be in mercy for their false plaint in respect of the two others.

[*See also* BURON *v.* DENMAN; *infra*, Pt. I., sec. iii. (A).]

[1] [EDITOR'S NOTE. In the original Yearbook, "Quia ratihabitio retro trahitur, et mandato comparatur";—a doctrine established in Roman Law by the Sabinian jurists, Dig. 43. 16. 1. 14.]

[*But only if the act was done on* the Principal's *behalf.*]

WILSON *v.* TUMMAN.

COURT OF COMMON PLEAS. 1843. 6 MANNING & G. 236.

* * * * * * *

TINDAL, C.J., now delivered the judgment of the Court. This case comes before us on a rule obtained by the plaintiffs, by leave of the learned judge at the trial, to enter a verdict for them against the defendant Tumman, for £2. 16*s.* if the court should think that his subsequent ratification made him liable, as a trespasser, for the original seizure.

The seizure of the plaintiffs' goods was made by some officers of the sheriff, without any precedent authority from Tumman, who appeared upon the evidence at the trial to be a plaintiff in some suit, the nature of which did not transpire, but who is found by the jury, not to have given any precedent authority to take the goods of the plaintiffs, but to have ratified the taking after it was made. The question, therefore, is a dry question of law, whether the subsequent ratification by this defendant, of a taking under such circumstances, is the same, in its consequences, as a precedent command of the defendant. And we think, under the authorities, and upon the reason of the thing itself, that it is not.

That an act done, *for another*, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority. Such was the precise distinction taken in the Yearbook, 7 *Hen.* 4. fo. 35 [1]— that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority, as bailiff at the time; but if he took it, at the time, as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by Anderson, C.J., in Godbolt's Reports, 109 [2]. "If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant

[1] I.e., H. 7 H. 4, fo. 24, pl. 1. *Vide antè*, 239 (*a*).

[2] P. 110. There *Shuttleworth*, Serjt., said, "What, if he distrain generally, not shewing his intent, nor the cause wherefore he distrained, &c.? *Ad hoc non fuit responsum.*" *Ib.*

or authority given him by the other, takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? can he also father his misdemeanour upon another? He cannot; for once he was a trespasser, and his intent was manifest."

In the present case the sheriff's officers, who were the original trespassers by taking the goods of the plaintiffs, were not servants or agents of the defendant Tumman, but the agents of a public officer or minister, obeying the mandate of a court of justice. They did not assume to act, at the time, as agents or bailiffs of the then plaintiff Tumman, but they acted as the servants of another, viz., the sheriff, by virtue of the process directed to him by the court. And this forms the distinction between the present case and that of *Parsons* v. *Lloyd* relied upon in the argument. In the present case the sheriff, or the sheriff's officers, seized under process, which is not suggested to have been void or irregular, but must be taken to be valid process. In the case in *Wilson*, the writ had been set aside as irregular; and, consequently, the arrest had been made without any authority. In that case, therefore, the sheriff had acted, not under any authority of the court, but under the direction of the plaintiff in the original action, who, by suing out void process, was in the same situation as if he had orally desired the sheriff or his officer to make the arrest.

Rule discharged.

[*The principal's liability extends to every act done by his agents in the course of his business and for his interest, even though the act be one which he has* forbidden.]

LIMPUS *v.* LONDON GENERAL OMNIBUS CO.

EXCHEQUER CHAMBER. 1862. 1 HURLSTONE AND COLTMAN 526.

THE cause was tried, before Martin, B., at the Middlesex Sittings after Michaelmas Term, 1861. The bill of exceptions set out the Judge's note of the evidence, which was (in substance) as follows:—

The driver of the plaintiff's omnibus stated that on the 27th August he left the Bank for Hounslow. After he had passed Sloane Street and was going towards Kensington, he stopped, about the barracks at Knightsbridge, to take up two passengers. The defendants' omnibus then passed him, and got ahead, eighty to a hundred yards. In passing, the driver eased his pace, and witness went on at his regular pace and overtook him. There was room in the road for five or six omnibuses. When witness got up to the defendants' omnibus, it was on the off-side of the road rather than the near; but there was plenty of room to pass. As witness was going to pass, the driver of the defendants' omnibus pulled across the road, and one of the hind wheels touched the shoulder of witness's near horse. Witness called out and tried to pull up, but could not. There was a bank there, and the defendants' driver forced the witness's off-horse on to the bank. The wheels of plaintiff's omnibus went on the bank and threw the omnibus over. On cross-examination the witness stated that the defendants' driver pulled his horses towards the witness's horses to prevent him passing.

Another witness stated that the defendants' driver drove across the road purposely to prevent the progress of the plaintiff's omnibus, and that he considered it a reckless piece of driving.

On behalf of the defendants, the driver of their omnibus stated that he passed the plaintiff's omnibus, when the driver pulled up on his near side to take up the two passengers. Afterwards the plaintiff's driver put his horses into a gallop to overtake the defendants' omnibus. The witness proceeded to say:—"I pulled across him to keep him from passing me, to serve him as he had served me. His omnibus ran upon the bank and turned over on its side. I pulled across on purpose."

The witness stated that he was furnished with the following card:—

"London General Omnibus Company (Limited).

"Attention is particularly directed to the following regulation of the Company, and the drivers are desired to act in accordance therewith.

"During the journey he must drive his horses at a steady pace, endeavouring as nearly as possible to work in conformity with the time list. He must not on any account race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof in his business whether such omnibus be one belonging to the Company or otherwise.

"By Order.—A. G. Church, Secretary,
31, Moorgate St."

Another witness, who was a passenger on the defendants' omnibus, stated that at Knightsbridge there was a contention between the conductors of the two omnibuses which should have three ladies, who got into the plaintiff's omnibus. The defendants' driver wished to go on; the plaintiff's drove him across the road, so that he could not go on. The defendants' driver said: "I will serve you out when I get on the road." The plaintiff's omnibus went on first, and stopped at the barracks to take up two passengers, when the defendants' omnibus passed it. When near Gore Lane, the defendants' driver maliciously and spitefully drove his horses suddenly to the footpath, not allowing the after omnibus any space at all.

MARTIN, B., directed the jury, "that, when the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service; and that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant: that if the act of the defendants' driver, in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers and so to interfere with the trade and business of the other omnibus, the defendants were responsible: that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment; and the instructions given to the defendants' driver, and read in evidence to the jury, were immaterial if the defendants' driver did not pursue them; but that if the true character of the act of the defendants' servant was, that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible."

The defendants' counsel excepted to the said ruling for that the said Baron misdirected the jury in telling and directing them as afore-

said; and, further, that the learned Baron ought to have told the jury that, if they believed that the defendants' driver wilfully drove across the road as aforesaid, even for the purpose of merely obstructing the plaintiff's omnibus, the defendants were not responsible, and he ought to have told and directed the jury that for an act wilfully done by the servant of the defendants against the orders of his employers contained in the said paper or card, even though at the time of doing it he was in the course of driving for his employers, the defendants were not responsible: that the learned Baron ought to have told the jury that there was no evidence to justify them in finding that the driver of the defendants' omnibus, in doing the act complained of, was acting in the course of his employment; and he ought to have told them that there was no evidence to warrant them in finding for the plaintiff, and ought to have directed them to find their verdict for the defendants. The jury gave a verdict for the plaintiff, with £35 damages.

Mellish (*Matthews* with him) now argued[1] for the plaintiffs in error (the defendants below). The direction of the learned Judge was erroneous. There was evidence that the defendants' driver wilfully and recklessly drove across the plaintiff's omnibus for the purpose of impeding its progress. It is not contended that the fact of the servant having committed a wilful trespass necessarily, of itself, absolves the matter from responsibility, but it is submitted that a master is not liable for a wilful trespass committed by his servant, unless it was done in obedience to the master's orders, or was within the scope of the servant's employment. Here the defendants' servant was employed to drive his omnibus, and if the wrongful act had been done in the course of that employment the defendants would be liable, but they are not if the act was done by the servant for some purpose of his own. The learned Judge made it an essential part of his direction, whether the defendants' driver was doing that which he believed to be for the interest of his employer; whereas the real question was whether the driver thought the act necessary for carrying out his masters' orders. The true rule is laid down in *Croft* v. *Alison*[2]: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." [WILLIAMS, J. If a driver

[1] Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

[2] 4 B. & Ald. 590.

in a moment of passion vindictively strikes a horse with a whip, that would not be an act done in the course of his employment; but in this case the servant was pursuing the purpose for which he was employed, viz., to drive the defendants' omnibus. Suppose a master told his coachman not to drive when he was drunk, but he nevertheless did so, would not the master be responsible?] Here the defendants' driver recklessly and purposely obstructed the plaintiff's omnibus. That was not an act within the scope of his employment, and was contrary to the orders given to him by his master. If the action had been against the servant, it must have been in trespass, not case. [BLACKBURN, J. If the defendants' driver did the act to effect some purpose of his own, the case would fall within the latter part of the direction.] The doctrine laid down in *Croft* v. *Alison* was recognised and adopted in *Seymour* v. *Greenwood*[1]. [CROMPTON, J. Was not the driver carrying out his masters' purposes in attempting to get before the other omnibus and pick up passengers?] He states that he drove across the plaintiff's omnibus to prevent it from passing him, and to serve the plaintiff's driver as the plaintiff's driver had served him. [WIGHTMAN, J. Would the master have been responsible if the servant had thought it for his master's interest to drive against the other omnibus and overturn it?] *Lyons* v. *Martin*[2] decided that a master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service; but not so if the act is in itself unlawful and is not proved to have been authorized by the master. Here the servant wilfully did an act which he knew he had no right to do, and which he was instructed by his master not to do; and it can make no difference that he believed it to be for the benefit of his master, since it was not within the scope of his employment.

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[Five of the six judges who sat (WIGHTMAN, J., being the dissentient), held that the judgment should be affirmed. CROMPTON, J., declared the true criterion to be "whether the injury resulted from an act done by the driver in the course of his service *and* for his masters' purposes." Both conditions are necessary: for, as BLACKBURN, J., added, "It is not universally true that every act done for the *interest* of the master is done in the course of the *employment*. A footman might think it for the interest of his master to drive the coach, but no one can say that it was within the scope of the footman's employment[3] and that the master would be liable for damage resulting."]

WILLES, J. The direction of my brother Martin was in accordance with principle and sanctioned by authority. It is well known that

[1] 7 H. & N. 355. [2] 8 A. & E. 512.

[3] [Cf. conductor officiously driving an omnibus; L. R. [1900], 2 Q. B. 530.]

there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible; for there ought to be a remedy against some person capable of paying damages to those injured by improper driving. This was treated by my brother Martin as a case of improper driving, not a case where the servant did anything inconsistent with the discharge of his duty to his master, and out of the course of his employment. The defendants' omnibus was driven before the omnibus of the plaintiff, in order to obstruct it. It may be said that it was no part of the duty of the defendants' servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever. In my opinion those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master by giving secret instructions to his servant, to discharge himself from liability. Therefore, I consider it immaterial that the defendants directed their servant not to do the act. Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by his servant in the course of his employment?

But there is another construction to be put upon the act of the servant in driving across the other omnibus; he wanted to get before it. That was an act done in the course of his employment. He was employed not only to drive the omnibus, which alone would not support this summing up, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with his employment, when explained by his desire to get before the other omnibus. I do not speak without authority when I treat that as the proper test. Take the ordinary case of a master of a vessel, who it must be assumed is instructed not to do what is unlawful but what is lawful, if he has distinct instructions not to sell a cargo under any circumstances, but he does so under circumstances consistent with his duty to his master, the master is liable in damages to the person whose goods are sold.

BYLES, J., said:—I am also of opinion that the direction of my brother Martin was correct. He used the words "in the course of his service and employment," which, as my brother Willes has pointed out, are justified by the decisions. The direction amounts to this, that if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant.

It is said that what was done was contrary to the master's instruc-

tions; but that might be said in ninety-nine out of a hundred cases in which actions are brought for reckless driving. It is also said that the act was illegal. So, in almost every action for negligent driving, an illegal act is imputed to the servant. If we were to hold this direction wrong, in almost every case a driver would come forward and exaggerate his own misconduct, so that the master would be absolved. Looking at what is a reasonable direction, as well as at what has been already decided, I think this summing up perfectly correct.

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Judgment affirmed.

[EDITOR'S NOTE. The result would have been different had the driver obstructed the omnibus for mere mischief or merely to win a bet about his own superiority. For when an agent does a wrongful act not for the benefit of his principal but for his own private ends, that act is *not* "within the scope of his employment," and the principal is not liable for it. Thus in the *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* L. R. 18 Q. B. D. 714, the secretary of a company, in answering questions about certain debenture stock of the company, made false representations for his own private purpose; and it was held by the Court of Appeal that although the secretary was held out by the company to answer such inquiries (as the jury had found), still the company were not liable for these self-interested representations. Similarly in *Joseph Rank Ltd.* v. *Craig* (35 T. L. R. 8) men were employed to cart rubbish with express orders to deposit it upon a particular place. But some of them, entirely for their own convenience, took the rubbish to the land of the plaintiff which lay nearer than did the place above mentioned. As they took their loads there not in the course of their employment but altogether outside it, their employer was held not to be liable to the plaintiff for this Trespass. (Yet "a very little additional evidence" of the employer's having acquiesced in their conduct would have entitled the jury to give, if they thought fit, a verdict against him.)

A more complex case is that of *Irwin* v. *Waterloo Taxicab Co.* (L. R. [1912] 3 K. B. 588). Here the general manager of the defendant company, wishing for his own private purposes to visit a place, improperly and without authority ordered the driver of one of the company's taxi-cabs to take him there. In the course of the journey the plaintiff was injured by this driver's negligence. The manager's order, though unauthorised, was not known by the driver to be so; and it was the driver's duty to the company to obey all directions of the manager (unless he had reasonable grounds for supposing them to be unauthorised). The company was therefore held liable; although the journey was not in fact for the purposes of the company.

As regards even criminal illegality Lord Esher said, in a case of Assault, "the master is [civilly] responsible for acts done by the servant, in the course of his employment, even although the particular act has been done illegally, and against the express direction of the master"; *Smith* v. *N. M. T. Co.*, 55 J. P. 630.]

[*But acts done by the servant during the* time *he is serving are not necessarily done in the* course *of the serving.*]

STOREY *v.* ASHTON.

COURT OF QUEEN'S BENCH. 1869. L.R. 4 Q.B. 476.

DECLARATION. That the defendant was possessed of a horse and cart then being driven under the control of a servant of the defendant, and, by the servant's negligence in driving, the horse and cart were driven over the plaintiff, who was crossing a certain highway, to wit, the City Road. Pleas: 1. Not guilty. 2. That the horse and cart were not under the control of the defendant's servant.

At the trial before Hannen, J., at the sittings in Middlesex, during Trinity Term, 1868, it appeared that the plaintiff, a child of six years old, was on the 23rd of February, 1867, run over in the City Road by a horse and cart of the defendant, driven by his servant.

The defendant was a wine merchant having offices in Vine Street, Minories. On the day in question, which was a Saturday, the defendant sent a clerk and a carman with a horse and cart to deliver wine at Blackheath. They delivered the wine and received some empty bottles, and it was then the duty of the carman to have driven back direct to the defendant's offices, left the empties there, and taken the horse and cart round to the stables in the neighbourhood; instead of doing this, it being after business hours (3 p.m.) on Saturday, the carman, after he had crossed London Bridge, when about a quarter of a mile from home, instead of turning at the statue in King William Street to the east toward the Minories, at the persuasion of the clerk drove northward to the clerk's house, near the City Road, and thence to fetch a cask (which the clerk had sold to a cooper in the city), from the house of the clerk's brother-in-law at Barnsbury; and it was while they were driving along the City Road towards Barnsbury that the accident happened to the plaintiff.

There was contradictory evidence as to who was in fault; but by consent the only question left to the jury was the amount of damages; and a verdict was directed for the defendant, with leave to move to enter it for the plaintiff for £80, the amount found by the jury, if the Court should be of opinion, on the evidence, that the defendant was liable for the negligence of his servant.

Digby Seymour and *Finlay* in support of the motion. *Mitchell* v. *Crasweller*[1] is distinguishable. There, the servant had reached home and then made a fresh start. Here the carman was at least a quarter of a mile from home, and he had still the empty bottles to

[1] 13 C. B. 237; 22 L. J. (C.P.) 100.

take home, so that he can only be said to have been making a deviation from his way home, and he was acting therefore in the defendant's employment. In *Joel* v. *Morison*[1], Parke, B., laid down the law to the jury thus, "If the servants, being on their master's business, took a détour to call upon a friend, the master will be responsible....The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." Again, in *Sleath* v. *Wilson*[2], the facts were, that the servant after putting his master down in Great Stamford Street, was directed to drive to the Red Lion stables in Castle Street, Leicester Square, instead of which he drove to Old Street Road to deliver a parcel of his own, and on returning thence to Leicester Square drove over and injured a person. And Erskine, J., told the jury, "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law: the master in such a case will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage by intrusting him with it. And in this case I am of opinion that the servant was acting in the course of his employment, and till he had deposited the carriage in the Red Lion stables, in Castle Street, Leicester Square, the defendant (his master) was liable for any injury which might be committed through his negligence." *Whatman* v. *Pearson*[3] also shews that until the master's business is finished, the servant, however much he may disobey the order of his master, is acting in the master's employment so as to make the master liable for his negligence.

COCKBURN, C.J. I am of opinion that the rule must be discharged. I think the judgments of Maule and Cresswell, JJ., in *Mitchell* v. *Crasweller*[4] express the true view of the law, and the view which we ought to abide by; and that we cannot adopt the view of Erskine, J., in *Sleath* v. *Wilson*[5], that it is because the master has intrusted the

[1] 6 C. & P. at p. 503. [2] 9 C. & P. 607, 612. [3] L. R. 3 C. P. 422.
[4] 13 C. B. 237; 22 L. J. (C.P.) 100. [5] 9 C. & P. 607, 612.

servant with the control of the horse and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment. It is true that in *Mitchell* v. *Crassweller* the servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going a great deal too far to say that under such circumstances the master was liable.

MELLOR, J. I am of the same opinion. Generally speaking, the master is answerable for the negligent doing of what he employs his servant to do; and it is not, as Cresswell, J., says, because the servant in executing his master's orders, does so in a roundabout way, that the master is to be exonerated from liability. But here, though the carman started on his master's business, and had delivered the wine and collected the empty bottles, when he had got within a quarter of a mile from the defendant's office, he proceeded in a directly opposite direction, and as soon as he started in that direction he was doing nothing for his master; on the contrary, every step he drove was away from his duty.

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[EDITOR'S NOTE. With this may be contrasted a recent Irish case, where two grooms, whilst riding their master's horses to a forge to be shod, amused themselves, on their way, by racing with each other; and, in so doing, hurt a passer-by. This injury was held to have been inflicted in the course of the employment; (*Gracey* v. *Belfast Tramway Co.* L. R. Ir. 1901, Q. B. 322).

In some cases where a question of this kind arises as to whether the negligence occurred in the course of the master's employment, there has been some subsequent act of a third party which led up to the damage. It has therefore to be decided whether the original negligence formed any part of the "effective cause" of the damage done. This is in each case a question of fact for the jury to determine. Cf. *Engelhart* v. *Farrant* (L. R. [1897] 1 Q. B. 240); MCDOWELL *v.* G. W. RY. CO. (*supra*, p. 22); LYNCH *v.* NURDIN (*supra*, p. 27).]

[*The liability of the employer does not extend to torts which his servants commit against their* fellow-servants *in the course of an employment wherein they are occupied* in common *with each other.*

For, by his contract of service, a servant impliedly consents to run the risks of his service; including the risk of having negligent fellow-servants.]

PRIESTLEY *v.* FOWLER.

COURT OF EXCHEQUER. 1837. 3 M. AND W. 1.

CASE. The declaration stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant's, in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding *and being carried and conveyed by the said van,* with the said goods; and it became the duty of the defendant, on that occasion, to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby: nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried thereby, in consequence of the neglect of all and each of which duties the van gave way and broke down, and the plaintiff was thrown with violence to the ground, and his thigh was thereby fractured, &c. Plea, not guilty.

At the trial before Park, J., at the Lincolnshire Summer Assizes, 1836, the plaintiff, having given evidence to shew that the injury arose from the overloading of the van, and that it was so loaded with the defendant's knowledge, had a verdict for £100. In the following Michaelmas Term, Adams, Serjt., obtained a rule to shew cause why the judgment should not be arrested, on the ground that the defendant was not liable in law, under the circumstances stated in the declaration.

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The judgment of the Court was delivered by

LORD ABINGER, C.B. This was a motion in arrest of judgment, after verdict for the plaintiff, upon the insufficiency of the declaration. [His lordship stated the declaration.] It has been objected to this declaration, that it contains no premises from which the duty of the

defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it. For, as the declaration contains no charge that the defendant knew any of the defects mentioned, the Court is not called upon to decide how far such knowledge on his part of a defect unknown to the servant, would make him liable.

It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen: of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

The inconvenience, not to say the absurdity of these consequences, affords sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment,

information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

The judgment ought to be arrested.

[EDITOR'S NOTE. This case is important in legal history as the starting-point of the Anglo-American doctrine of "Common Employment," which makes a master's responsibility (for the conduct of his servants) less in the case of injuries sustained by servants of his own than in that of injuries sustained by strangers. This doctrine has not been accepted by the jurists of any continental country. In England, "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase." Experience of its working gradually aroused a bitter hostility against it amongst the English working-classes; and Parliament ultimately restricted it by the complicated statutory qualifications imposed in the Employers' Liability Act 1880 (43 & 44 Vict. c. 42). But its main principle still remains law; although (as Lord Esher, M.R., said), "So long as the general rule holds, that a master should be liable to everybody for his servant's act or negligence, there is no just or logical reason why he should not be so liable to a fellow-servant of that servant."

For the doctrine to apply, the two servants must have not merely a common Employer but also a common Employment. As Sir F. H. Jeune has said, "If a person carried on both the occupation of a banker and that of a brewer, in different localities, and his bill-clerk was run over by his drayman," the defence could not be set up by him; (*The Petrel*, L. R. [1893] P. D. 320). But it is not necessary that they should be working for the same *immediate* purpose, or in the same place. "If there be a common master, the signalman at one end of a rifle range is clearly in common employment with the marker at the other; and, to give a stronger instance, a servant who unskilfully packs dynamite in a factory, and another who unpacks it at a distant warehouse and is injured by its explosion, are clearly in common employment"; *per* Lord Herschell, in *Johnson* v. *Lindsay*, L. R. [1891] App. Ca. 371.]

[See also CAMERON *v.* NYSTROM, *infra*, p. 94.]

[*Where a person contracts to do a piece of work for another, the liability (as Principal) for any torts committed by this contractor's servants, in doing it, will fall only on* him, *and not on that* other *for whom the work is to be done.*]

MURRAY *v.* CURRIE.

COURT OF COMMON PLEAS. 1870. L.R. 6 C.P. 24.

THE declaration stated that the defendant, by his servants and workmen, being engaged in the unloading of a vessel in or near a public dock in Liverpool, by his said servants and workmen so negligently and improperly conducted himself about the premises that by means thereof certain machinery or cog-wheels were set in motion, whereby the hand of the plaintiff, who was lawfully upon the ship, was drawn in between the said cog-wheels and crushed and injured, &c.

Pleas, first, not guilty; secondly, a denial that the defendant by his servants and workmen was engaged in unloading the ship.

The cause was tried before the assessor of the Passage Court, Liverpool, on the 20th of July last. The defendant, it appeared, was the owner of the steam-ship *Sutherland*, which at the time of the accident in question was alongside a quay in the Nelson Dock. For the purpose of facilitating the loading and unloading of cargo the vessel was provided with a winch at each of her four hatchways, worked by a donkey-engine. On the 15th of January last, whilst the plaintiff, who was a dock-labourer, was engaged together with one Davis, one of the *Sutherland's* crew, in unloading the vessel by means of one of the winches, his hand was, through the negligence of Davis, jammed between the cog-wheel and pinion, and much injured. The work of unloading the vessel was being done by one Kennedy, a master stevedore[1]; the men engaged in it were under his direction and control.

Kennedy, who was called for the defendant, stated that he supplied the labour for the unloading and the working of the steam-engine; that Davis worked the winch, and was fully competent: that the office [i.e. the defendant] paid him, but deducted the sum paid from his (Kennedy's) bills; that all the unloading was under his control and that of his foreman; that he would have had to get labour elsewhere, if the ship had not found men; that the ship-owner selected those of the crew who were employed in unloading, but he (Kennedy) selected the work for them, and had control over it; and that he could have refused to employ Davis or any man whom he thought incompetent.

[1] [EDITOR'S NOTE. Stevedore = one who stows, or unstows, the cargoes of ships; (from the Spanish *estivador*).]

The verdict was by consent entered for the plaintiff, damages £50, with leave to the defendant to move to enter a verdict for him if the Court should be of opinion that the defendant was not under the circumstances liable for the negligence of Davis,—the Court to be at liberty to draw inferences of fact.

C. Russell obtained a rule nisi, citing *Murphey* v. *Caralli*[1].

Herschell shewed cause. Davis was the servant of the defendant, and not of Kennedy, the stevedore, and the defendant was therefore responsible for his negligence. The fact that Davis was at the time of the accident acting under the direction of the stevedore makes no difference.

[BOVILL, C.J. The question is, who was working the winch,—the defendant or Kennedy?

BRETT, J. If Davis by his negligence had damaged part of the cargo, would not Kennedy have been liable to the owner?]

It is submitted that he would not. The true test is, whose servant was Davis, not under whose immediate orders he was working; or, as Crompton, J., says in *Sadler* v. *Henlock*[2], "The test is, whether the defendant retained the power of controlling the work."

[BRETT, J. How do you meet the case of *Murphey* v. *Caralli*[1] cited by Mr Russell on moving?]

There the work was being done under the control and superintendence of the warehousekeeper, and for his benefit; the persons through whose negligence the injury was caused were not in any sense acting as the servants or in pursuance of orders of the defendant. The case is so put by Bramwell, B., in his judgment.

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WILLES, J. This is not a question arising between shipowner and charterer. The employment of stevedores has grown out of the duties of the owner to load and unload the ship. This duty used formerly to be executed by the crew; but, in dealing with large cargoes, the exigencies of modern commerce have created a necessity for the employment of persons skilled in the particular work of stowing cargo. The stevedores, however, are not the servants of the owner of the ship; but they are persons having a special employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. They are not put in his place to do an act which he intended to do for himself. I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself or to the first person in the ascending line who is

[1] 3 H. & C. 462; 34 L. J. (Ex.) 14.
[2] 4 E. & B. 570, 578; 24 L. J. (Q.B.) 138, 141.

the employer and has control over the work. You cannot go further back, and make the employer of that person liable. The question here is, whether Davis, who caused the accident, was employed at the time in doing Kennedy's work or the shipowner's. It is possible that he might have been the servant of both; but the facts here seem to me to negative that. The rule, out of which this case forms an exception, that a servant or workman has no remedy against his employer for an injury sustained in his employ through the negligence of a fellow-servant or workman, is subordinate to another rule, and does not come into operation until a preliminary condition is fulfilled: it must be shewn that, if the injury had been done to a stranger, he would have had a remedy against the person who employed the wrong-doer. Here, I apprehend, the defendant would not have been liable to the charterer if the wrongful act of Davis had caused damage to any part of the cargo; and for this simple reason, that the person doing the work in the performance of which the damage was done was not doing it as his servant. He was acting altogether independent of his control. The defendant could not have taken him away from the work. It was Kennedy's work that he was employed upon, and under Kennedy's control. The liability of a master for the acts of his servant extends only to such acts of the servant as are done by him in the course of the master's service. The master is not liable for acts done by the servant out of the scope of his duty, even though the master may have entered into a bargain that his servant should be employed by another, and is paid for such service, as was done here. It seems to me to be quite plain that the defendant incurred no liability for the act of Davis.

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BRETT, J. The ordinary contract and liability of a stevedore is well established; and the only question here is whether there was anything in the evidence to take the case out of the ordinary rule. The only circumstance relied on for that purpose is that the defendant placed the services of Davis at the disposal of the stevedore. But I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor.

Rule absolute.

[EDITOR'S NOTE. See also a terse summary by Williams, J., cited at p. 69 *supra*.]

[*And if a tort so committed by the* contractor's *servant should injure a servant of the* ulterior employer, *the contractor cannot set up, against the injured servant, the defence of Common Employment.*]

CAMERON *v.* NYSTROM.

PRIVY COUNCIL. L.R. [1893], A.C. 308.

APPEAL from a decree of the New Zealand Court of Appeal, confirming a verdict whereby the appellants were ordered to pay to the respondent £750 damages with costs

The action was in respect of injuries sustained by the respondent through the negligence of the appellants under the circumstances disclosed in the judgment of their Lordships. The defence was threefold: (1) a general denial; (2) negligence of the respondent; (3) that he and the appellants' workmen were engaged in a common employment at the time of the injury.

WILLIAMS and DENNISTON, JJ., held that the appellants were separate and independent contractors, and subject to no control of the captain of the ship; and also that there was no contributory negligence on the part of the plaintiff.

The CHIEF JUSTICE and EDWARDS, J. (who as junior judge withdrew his judgment, the Court being equally divided), held that the appellants were under the control of the captain, and that they and the respondent were engaged in a common employment.

Bigham, Q.C., and *Sharpe*, for the appellants, contended that the Chief Justice's view was right, and that both the appellants and their servants were on the evidence under the orders of the captain. The appellants were, therefore, in a common employment with the respondent If, on the other hand, the appellants were not under the orders of the captain, but acting with independent authority, then it must be considered that on the evidence the person who did the injury was not so much in their employ as in that of the captain. In either view the respondent was not entitled to succeed, and moreover the evidence shewed that he was guilty of contributory negligence. Reference was made to *Johnson* v. *Lindsay*[1] and to *Murray* v. *Currie*[2].

Ollivier, for the respondent, was not heard.

The judgment of their Lordships was delivered by

The LORD CHANCELLOR:—

The respondent, the plaintiff in this action, was a seaman employed on board the vessel *Brahmin*. He was at work upon that vessel at the time when he received the injury in respect of which the action was brought. The injury was caused by the fall of some coils of wire, owing to the breaking of part of the gear which was being used in the

[1] [1891] A. C. 371. [2] Law Rep. 6 C. P. 24; *supra*, p. 91.

discharging of the cargo. The discharging gear was, as the jury have found, fixed in an improper and negligent manner, and its being so fixed was the cause of the injury to the plaintiff.

The defendants were a firm of stevedores employed in discharging the vessel. They were engaged as stevedores by the master of the vessel to discharge her at the rate of so much a ton. The vessel was to find the gear, but the stevedores brought their own men, foremen and workmen, to effect the discharge. The person guilty of the negligence was the foremen of the defendants, a man named Gellatly, who rigged up the gear.

The question raised in the action was whether, in those circumstances, the defendants were responsible to the plaintiff for the injury he received.

At the trial, apart from a subsidiary question of contributory negligence, to which their Lordships will call attention presently, the only defence raised, beyond the defence that there was no negligence—a defence which has been negatived by the jury—was that the plaintiff could not maintain an action against the defendants, even assuming that the foreman was their servant, and that it was by his negligence the injury was occasioned, because the plaintiff was engaged in a common employment with the stevedores' men, and that their being thus engaged in a common employment precluded the plaintiff in point of law from any right of action.

At the time when the question was argued before the Court below, the case of *Johnson* v. *Lindsay*, in which there was a difference of opinion in the Court of Appeal, had been decided in the Court of Appeal [1], but not in the House of Lords [2]. The majority of the Court of Appeal had held, Fry, L.J., dissenting, that it was not necessary to the defence of common employment that the plaintiff should be in the employment of the master whose servant's negligence caused him injury. The majority of the Court came to the conclusion that the sub-contractor and his servants might all be regarded as in the employment of the contractor, whose servant the plaintiff was, and that this sufficed to establish the defence of common employment. In the House of Lords the decision was reversed, and it was held that in order to make this defence available there must not only be common employment, but common employment under the master whose servant was guilty of negligence.

It is to be observed that the question of common employment only arises as a defence, on the assumption that the person who did the injury was the servant of the person sued. Unless this be the case the person sued is under no liability, because he is sued in respect of an injury not caused by himself or by anyone for whom he is responsible.

[1] 23 Q. B. D. 508. [2] [1891] A. C. 371.

And therefore common employment only becomes necessary as a defence, and is only relevant when the person doing the injury is a servant of the person sued. In their Lordships' opinion the House of Lords has determined that where the person sued has committed negligence by one of his servants the defence of common employment is only available to him where he can shew that the person suing was also his servant at the time of the occurrence of the injury. In the judgment delivered by one of their Lordships in the case of *Johnson* v. *Lindsay*[1] the law was thus stated: "These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant can shew that the person so seeking to make him liable was himself in his service, the defence of common employment is not open to him." It is clear, therefore, that in the present case the defence of common employment can only arise and be successful if the defendants can shew, admitting that the negligence of their foreman Gellatly caused the injury, that the plaintiff was in their service. Otherwise the doctrine of common employment has no application. When that was once found to be the law, and the learned counsel who appeared for the defendants was pressed with it, he admitted that it was impossible for him, after the decision of the House of Lords in *Johnson* v. *Lindsay*[1], to maintain that the defendants were free from liability by reason of the doctrine of common employment.

But he then contended that the defendants were not liable, inasmuch as the person who caused the injury was not at the time really acting in the service of the defendants, but as the servant of the shipowner. No doubt if that could be established it would afford a defence to the action. This appears to be the only question open on this appeal, after the decision in *Johnson* v. *Lindsay*[1].

When the evidence is examined the contention appears to their Lordships to be utterly untenable. Gellatly was employed and paid by the stevedores. At the time when he was doing the work in question he was doing it for the stevedores, inasmuch as the stevedores were to be paid a lump sum for discharging the vessel; and it was to enable them to earn the sum so contracted to be paid to them that Gellatly was working at the time he did the act complained of. There was thus present every element necessary to establish that he was the servant of the stevedores. The case for the defendants must go this length, that the stevedores would not have been liable, but that the shipowner would, to any person injured by the negligence of one of the stevedores' men. It seems to their Lordships only necessary to state the length to which the proposition of the defendants must go to shew that it cannot be sustained.

[1] [1891] A. C. 371.

Reliance was placed upon expressions used in the evidence, with regard to the extent to which the mate and master had the right to direct and control the acts of the stevedores' servants. That does not seem to their Lordships in the least inconsistent with their being the servants of the stevedores, and not the servants of the shipowner. There was no express agreement with regard to the extent to which the master and mate should have control over them. That control is only to be implied from the circumstances in which they were employed. The relation of stevedore to shipowner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged, and various other incidents of the discharge, but in no way putting the servants of the stevedore so completely under the control and at the disposition of the master as to make them the servants of the shipowner, who neither pays them, nor selects them, nor could discharge them, nor stands in any other relation to them than this, that they are the servants of a contractor employed on behalf of the ship to do a particular work.

For these reasons their Lordships think that the main question raised in this action must be decided in favour of the plaintiff.

Another question was raised at the trial: whether the defendants are exempt from responsibility, because the plaintiff was in a position in which he would be likely to be injured if any accident happened to the discharging gear. The jury found that placing the defendant where he was working at the time of the accident was in the circumstances an act of negligence. It was admitted by the learned counsel for the defendants that unless that involved, and it clearly does not involve, a finding of personal negligence on the part of the plaintiff, it was impossible to argue that it was a defence to the action.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from should be affirmed, and the appeal dismissed with costs.

[EDITOR'S NOTE. The student must bear in mind that the doctrine of Common Employment has been deprived of much of its *practical* importance by the liability imposed on employers by the Workmen's Compensation Act of 1897, and continued under the Workmen's Compensation Act, 1906 (6 Edw. 7 c. 58). This liability, however, forms no part of the law of Tort; for it arises from the mere fact of a personal injury by "accident" (arising out of, and in the course of, a workman's employment), whether due to wrong doing or not. It is compulsorily attached by law to all contracts of Service; except the few excluded by the Statute.]

[*Thus, if a livery-stable keeper let out a coachman and horses for use in a customer's own carriage,* he, *and not the* customer, *will be liable for damage done to strangers by this coachman whilst driving the carriage.*]

QUARMAN *v.* BURNETT.

COURT OF EXCHEQUER. 1840. 6 M. & W. 499.

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PARKE, B. The declaration was in case. It stated, that the plaintiff was possessed of a chaise and horse which he was driving; that the defendants were possessed of a chariot, to which two horses were harnessed, which *said carriage and horses were then under the care of the defendants*; and that the defendants so carelessly conducted themselves, that through the carelessness and negligence, want of proper caution, and improper conduct, of the defendants, the horses so harnessed started off with the carriage, without a driver or other person to manage, govern, or direct the same, whereby the defendants' carriage was struck against the plaintiff's carriage, and the plaintiff sustained personal injury.

There were two pleas—first, not guilty; secondly, that the carriage and horses were not under the care of the defendants.

On the trial, it appeared that the defendants were two old ladies, who had been in the habit of employing a person of the name of Mortlock, and his daughter, who succeeded him in the business of a job-master, to supply them, originally with a fly and horse and driver, by the day, at a certain sum for the whole; but about three years ago they became possessed of a carriage of their own, since which they had been furnished by Miss Mortlock occasionally with a pair of horses and a driver, by the day or drive, for which she charged and received a certain sum. She paid the driver by the week, and the defendants besides gave him a gratuity for each day's service. For the last three years, the same coachman constantly drove the defendants' carriage, and they had purchased a livery hat and coat for him, which, it appeared, were usually hung up in the passage of the defendants' house, and the coachman, before he drove, was in the habit of going in and putting on the coat and hat, and when he had finished the drive, of returning and replacing them. On the day in question, he wore the hat only, and when he had returned home with the ladies, and after they had got out of the carriage, the coachman went in to replace the hat, and left the horses without any one to hold them, and they set off whilst the coachman was so occupied, and ran against the plaintiff's carriage, overturned it, and inflicted serious personal injury

on the plaintiff, besides doing damage to the carriage itself. It appeared that there was no other regular coachman in the job-mistress's yard, but when he was otherwise employed, some other person in the yard acted as coachman, but never for the defendants since they had their own carriage, though occasionally before.

It was objected, that the defendants were not liable, because the damage was caused by the neglect of the coachman, who was not their servant, but the servant of his mistress, Miss Mortlock.

For the plaintiff, it was contended, that they were liable for the coachman's neglect, independently of the special circumstances of the case; and that there were besides two peculiar grounds, on which the defendants ought to be held responsible. First, that there was evidence to go to a jury of selection and choice by the defendants of the particular coachman, so as to make him their servant; and secondly, that when the coachman went in to leave his hat, he was, in so doing, acting as the servants of the defendants, and therefore his neglect was theirs. The jury found for the plaintiff, with £198. 9*s.* damages, and my brother Maule reserved liberty to move to enter a nonsuit.

On the argument, in the course of which the principal authorities were referred to, we intimated our opinion that we should be called upon to decide the point which arose in the case of *Laugher* v. *Pointer*[1], and upon which not only the Court of King's Bench, but the twelve Judges differed; as the special circumstances above mentioned did not seem to us to make any difference: and we are still of opinion that they did not. It is undoubtedly true, that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like. As to the supposed choice of a particular servant, my brother Maule thought there was *some* evidence to go to the jury, of the horses being under the defendants' care, in respect of their choosing this particular coachman. We feel a difficulty in saying that there was any evidence of choice, for the servant was the *only* regular coachman of the job-mistress's yard; when he was not at home, the defendants had occasionally been driven by another man, and it did not appear that at any time since they had their own carriage, the regular coachman was engaged, and they had refused to be driven by another; and the circumstance of their having a livery, for which he was measured, is at once explained by the fact, that he was the only servant of Miss Mortlock ever likely to drive them.

[1] 5 B. & C. 547.

Without, however, pronouncing any opinion upon a point of so much nicety, and so little defined, as the question whether there is *some* evidence to go to a jury, of any fact, it seems to us, that if the defendants had asked for this particular servant, amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglects. If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference. Nor do we think that there is any distinction in this case, occasioned by the fact that the coachman went into the house to leave his hat, and might therefore be considered as acting by their directions, and in their service. There is no evidence of any special order in this case, or of any general order to do so, at all times, *without leaving any one at the horses' heads.* If there had been any evidence of that kind, the defendants might have been well considered as having taken the care of the horses upon themselves in the meantime.

Besides these two circumstances, the fact of the coachman wearing the defendants' livery with their consent, whereby they were the means of inducing third persons to believe that he was their servant, was mentioned in the course of the argument as a ground of liability, but cannot affect our decision. If the defendants had told the plaintiff that he might sell goods to their livery servant, and had induced him to contract with the coachman, on the footing of his really being such servant, they would have been liable on such contract; but this representation can only conclude the defendants with respect to those who have altered their condition on the faith of its being true. In the present case, it is matter of evidence only of the man being their servant, which the fact at once answers.

We are therefore compelled to decide upon the question left unsettled by the case of *Laugher* v. *Pointer,* in which the able judgments on both sides have, as is observed by Mr Justice Story in his book on Agency, page 406, "exhausted the whole learning of the subject, and should on that account attentively be studied." We have considered them fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord Tenterden and Mr Justice Littledale.

The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his

immediate care. The question of law is, whether any one but the coachman is liable to the party injured; for the coachman certainly is.

Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer —he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference.

But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice Eyre says in the case of *Bush* v. *Steinman*[1], and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, "shock the common sense of all men": not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street. It is true that there are cases—for instance, that of *Bush* v. *Steinman*, *Sly* v. *Edgley*[2], and others, and perhaps amongst them may be classed the recent case of *Randleson* v. *Murray*—in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But these cases are well distinguished by my brother Littledale, in his very able judgment in *Laugher* v. *Pointer*.

The rule of law may be, that where a man is in possession of fixed property, he must take care that his property is so used or managed,

[1] 1 Bos. & P. 404. [2] 6 Esp. 6.

that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances: but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels, which, in the ordinary conduct of the affairs of life, are intrusted to the care and management of others, who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to intrust them with them. It is unnecessary to repeat at length the reasons given by my brother Littledale for this distinction, which appear to us to be quite satisfactory; and the general proposition above referred to, upon which only can the defendants be liable for the acts of persons who are not their servants, seems to us to be untenable. We are therefore of opinion that the defendants were not liable in this case, and the rule must be made absolute to enter a verdict for the defendants on the second issue.

[EDITOR'S NOTE. In the case of *Donovan* v. *Laing* (L. R. [1893] 1 Q. B. 625) Bowen, L.J., said:—"By 'the employer' is meant the person who has a right, at the moment, to control the doing of the act....There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servant and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work. It is clear here that the defendants, in the case now before the Court, placed their man [with a crane which he was in charge of] at the disposal of Jones & Co., and did not have any control over the work he was to do. The argument for the plaintiff was founded on *Quarman* v. *Burnett*; but it really has nothing to do with the point presented in this appeal. If a man lets out a carriage, on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving and injury occurs to any one, the hirer may be liable, not as a master, but as the procurer and cause of the wrongful act complained of. But in the present case the defendants parted, for a time, with control over the work of the man in charge of the crane; and their responsibility for his acts ceased for a time."]

[*But if the act which the independent contractor is employed to do be* in itself *tortious, the ultimate employer will be liable for damage done by the contractor's servants in the course of it.*]

ELLIS *v.* THE SHEFFIELD GAS CONSUMERS' COMPANY.

COURT OF QUEEN'S BENCH. 1853. 2 ELLIS & BLACKBURN 767.

COUNT for unlawfully digging a trench in a public street and highway, and heaping up stones and earth, excavated from the said trench, upon the said street and highway, so as to obstruct it, and to be a common public nuisance; whereby plaintiff, lawfully passing along the said public street and highway, fell over the said stones and earth, so heaped up as aforesaid, and broke her arm.

Plea: Not guilty. Issue thereon.

On the trial, before Wightman, J., at the last York Assizes, it appeared that the defendants had made a contract with persons trading under the firm of Watson Brothers, of Sheffield, by which Watson Brothers contracted to open trenches along the streets of Sheffield in order that the defendants might lay gas pipes there, and afterwards to fill up the trenches and make good the surface and flagging. Watson Brothers did accordingly, by their servants, open the trenches along one of the streets in question, and, after the pipes were laid, proceeded to fill up the trench and restore the flagging. In doing so, the servants of Watson Brothers carelessly left a heap of stones and earth upon the footway; and the plaintiff, passing along the street, fell over them and broke her arm. Neither the defendants nor Watson Brothers had any legal excuse for breaking open the street in the manner described, which was a public nuisance. It was objected, for the defendants, that the cause of the accident was the negligence of the servants of the contractors, Watson Brothers, for which the defendants were not responsible. It was answered that the contract was to do an illegal act, viz. to commit a nuisance; and, that being so, that the defendants were responsible. The learned Judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendants.

T. Jones now moved accordingly. The defendants cannot be responsible for the act of the servants of their contractors; *Overton* v. *Freeman*[1]. [LORD CAMPBELL, C.J. In that case the parties made a contract to do a lawful act; for they were authorized to pave the streets: and the nuisance arose from the negligence of the sub-contractor, who, when he was negligent, was not doing what he was

[1] 11 Com. B. 867.

employed to do. But here Watson Brothers by the contract bound themselves to the defendants to commit a public nuisance. Do you say that a person who employs another to do an illegal act is not responsible for that act, unless the relation of master and servant exists between him and the actual tortfeasor?] Yes; a man is in no case answerable for the act of a contractor's servants; *Knight* v. *Fox*[1]. [ERLE, J. In that case the wrong complained of was negligence; and the defendant had not employed the contractor to be negligent. But it seems to me that, if trespass were brought for breaking a man's close, and the facts were that the plaintiff's fields had been ploughed up by persons who had contracted with the defendant to plough it at so much an acre, the verdict on Not guilty should pass for the plaintiff, inasmuch as the defendant had employed the men to commit the trespass. I should however like to know exactly how the facts were here. I suppose the contract was made as if the defendants had a right to open the street. Was the cause of the accident the opening of the street which the defendants had employed Watson Brothers to do? Or was it some act of negligence which would have been a nuisance even supposing the defendants had a right to open the street? If it was the latter, it may be a question whether the defendants can be said to have employed Watson Brothers to do the act which has been the cause of the damage.] There is no ground for the distinction between a contractor employed for one purpose or another. In *Peachey* v. *Rowland*[2] such a distinction seems to be hinted at; but there is no authority for it. In no case are the servants of the contractor the servants of the contractee; and a man is not liable for the acts of another person's servants.

LORD CAMPBELL, C.J. I am of opinion that there should be no rule in this case. Mr Jones argues for a proposition absolutely untenable, namely, that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. I perfectly approve of the cases which have been cited. In those cases the contractor was employed to do a thing perfectly lawful: the relation of master and servant did not subsist between the employer and those actually doing the work: and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do, and, that being lawful, he was not liable at all. But in the present case the defendants had no right to break up the streets at all; they employed Watson Brothers to break up the streets, and in so doing to heap up earth and stones so as to be a public nuisance: and it was in consequence of this being done by their orders

[1] 5 Exch. 721. [2] 22 L. J. N. S. C. P. 81. Hilary Term 1853.

that the plaintiff sustained damage. It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done.

COLERIDGE, J., concurred.

WIGHTMAN, J. It seems to me, as it did at the trial, that the fact of the defendants having employed the contractors to do a thing illegal in itself made a distinction between this and the cases which have been cited. But for the direction to break up the streets, the accident could not have happened: and, though it may be that if the workmen employed had been careful in the way in which they heaped up the earth and stones the plaintiff would have avoided them, still I think the nuisance which the defendants employed the contractors to commit was the primary cause of the accident.

Rule refused.

(D) THE UNBORN CHILD.

[*A child cannot sue, even after birth, for damage done to it before birth.*]

WALKER *v.* GREAT NORTHERN RY. CO. OF IRELAND.

IRISH QUEEN'S BENCH DIVISION. 1890. 28 L.R. (IR.) 69.

[ACTION for personal injuries. Demurrer.

The plaintiff's statement of claim set out that Mrs Annie Walker (the mother of the plaintiff) was, on June 12th, 1889, a passenger upon the defendants' railway; she being then quick with child, namely, with the plaintiff, to whom she subsequently gave birth. But by the defendants' negligence in carrying the said Annie Walker and the plaintiff (then being *en ventre sa mere*), on the journey aforesaid, the plaintiff was permanently injured and crippled and deformed. He claimed £1000 damages.]

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O'BRIEN, J....A woman who is with child is in a railway accident, and the infant when born is found to be deformed. Can the infant maintain an action against the company for negligence?

It is admitted that such a thing was never heard of before. And yet the circumstances which would give rise to such a claim must at one time or another have existed.

But as there was a germ of life *in esse* at the time of the occurrence, so (it was thought) there might be found, in the principles of the law, the germs of that legal creation which, for the first time, professional ingenuity has now produced....An innocent infant comes into the world with the cruel seal upon it of another's fault, and has to bear a burthen of infirmity throughout the whole of life. It is no wonder, therefore, that sympathy for undeserved misfortune has led to a kind of creative boldness in litigation. I should not myself see any abstract injustice in such an action being held to lie; or in the risks of a carrier being extended to the necessary incidents of nature. And possibly the consideration from the mother could be construed to include the child also, with but a slight further stretch beyond the analogy of the case of a servant and others that have been cited. But there are instances in the law where rules of right are founded upon the inherent and inevitable difficulty of proof. And it is easy to see on what a boundless field of speculation in evidence this new idea would launch us, and what a field would be open to extravagance of testimony (already great enough) if Science should carry her lamp—not over certain in its light where people have their eyes—into the unseen laboratory of nature....The law may see such danger in the evidence, may have such a suspicion of human ignorance and presumption, that it will not allow any such question to be entered into at all.

We have, however, to see if the right claimed exists in the English legal system; or even flows out of any admitted principles in that system. The law is, in some respects, a stream that gathers accretions with time from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered, if new rights and engagements are to be created, that is the province of legislation and not of judicial decision....

The criminal law has been referred to for the purpose of shewing that an unborn infant is a person in law; because Murder may be committed if the infant be afterwards born and die from the effect of violence. But the criminal law is conversant with wrongs, and not with rights. It regards not the individual person but society. It results, not in a benefit to the party injured, but, in a satisfaction to the community. In the instance put, the violence is a continuing act, which takes away the life after birth. It would come nearer to the case for the plaintiff if it could be shewn that a prosecution for an Assault had ever been maintained in the case of an unborn infant. As to the cases cited in reference to property, that a child in the womb could take a gift by will—could be named executor—could be vouched in a recovery—could have waste restrained; these and others are all cases of relations which are cast upon the infant by law, or by the

act of others, and which must be fulfilled in some way. The rule of the Roman law that made the infant a distinct person, when it was for his benefit, is alleged to include, in the extent of its principle, compensation for negligence. In reference to property[1] that rule has been adopted into English law; of which we have perhaps the most extreme instance in the case of *Blasson* v. *Blasson* (2 De G. J. & S. 665); where it was held that a gift to children "born and living" vested in those who were unborn, and were not "living" except in the sense that they were not dead. Justinian's Digest says: "Qui in utero sunt, in toto pæne jure civili intelliguntur in rerum natura esse." Yet the examples given in the Digest relate wholly to personal status, the right of return, captivity in war, or patronage—relations and institutions unknown except to the Roman law. That law did not include personal compensation for negligence; (railway stock was not as yet). The question remains, What has a carrier to say to this invisible *persona* of the civil law? Railway liability is a branch of the general law of carriers. The stage-coach was the predecessor of the railway....The contract of carriage is founded on consideration; to the railway company, as to the stage-coach manager, a 'person' is—some one who can pay the fare. The carrier saw the person he was going to carry. His duty was to that person. The carrier would be surprised to hear, while he was paid for one, that he was carrying two.

At the bar, the case was put, of a child born during the journey, and hurt. Whether the liability could be enlarged to comprehend a case of that kind—in which there was no consideration and no contract—may involve much difficulty. There one element would be wanting; but here two are wanting—the right, as well as the consideration. There is no person; and so no duty....

Demurrer allowed.

[Editor's Note. See the remarks already made, *supra*, p. 59.]

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[1] In the argument at the bar, the railway company's counsel distinguished the decision, in favour of the unborn child, in *The George and Richard* (*supra*, p. 59) as being based on a claim in the nature of a right of property or succession.

(E) The Effect of Death.

[*According to the old Common Law, the Death either of the person who had committed, or of the person who had been injured by, a Tort put an end to the liability.*

But if the wrong-doer's assets have been traceably increased by the Tort, an action (not for the Tort *but for the value of the* Increase) *will lie against his executor.*]

HAMBLY *v.* TROTT, administrator.

Court of King's Bench. 1775. 1 Cowper 371.

In trover against an administrator *cum testamento annexo*, the declaration laid the conversion [as having been effected] by the testator in his lifetime. Verdict for the plaintiff.

Kerby moved in arrest of judgment, upon the ground of this being a personal tort, which dies with the person.

Buller. The objection is founded upon the old maxim of law which says 'actio personalis moritur cum personâ.' But that objection does not hold here; nor is the maxim applicable to all personal actions; if it were, neither debt or assumpsit would lie against an executor or administrator. If it is not applicable to all personal actions, there must be some restriction; and the true distinction is this: Where the action is founded merely upon an injury done to the person, and no property is in question; there, the action dies with the person: as in assault and battery, and the like. But where property is concerned, as in this case, the action remains notwithstanding the death of the party.

Where the damages are merely vindictive and uncertain, an action will not lie against an executor; but where the action is to recover property, there the damages are certain, and the rule does not hold. This is an action for sheep, goats, pigs, oats, and cyder converted by injustice to the use of the person deceased: Therefore, this action does not die with the person.

Kerby contra, for the defendant, cited Palm. 330, where Jones, J., said, "that when the act of the testator includes a tort, it does not extend to the executor; but being personal dies with him; as trover and conversion does not lie against an executor for trover fait par luy."

Here, the goods came to the hands of the testator, and he converted them to his own use. Trover is an action of tort; and conversion is the gift of the action: No one is answerable for a tort, but he

who commits it; consequently this action can only be maintained against the person guilty of such conversion. But here the conversion is laid to be by the testator. Therefore the judgment must be arrested.

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Lord Mansfield. Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour, or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises ex delicto (as is said in Sir T. Raym. 57, *Hole* v. *Blandford*), supposed to be by force and against the King's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many other cases of the like kind....

But in the case of Sir Henry Sherrington (who had cut down trees upon the Queen's land, and converted them to his own use in his life-time), upon an information against his widow, after his decease, Manwood, J., said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there, the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

There are express authorities, that trover and conversion does not lie against the executor: I mean, where the conversion is by the testator. Sir William Jones, 173—4; Palmer, 330. There is no saying that it does.

The form of the plea is decisive, viz. that the testator was not guilty; and the issue is to try the guilt of the testator. And no

mischief is done; for so far as the cause of action does not arise ex delicto, or ex maleficio of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an action for money had and received. Therefore, we are all of opinion that the judgment must be arrested.

[EDITOR'S NOTE. Along with this case, it is well to read and consider the elaborate discussion of it in *Phillips* v. *Homfray*, L. R. 24 Ch. Div. 439; and also *Peek* v. *Gurney*, *infra*, p. 480.

The action against the executor for "money had and received," of which Lord Mansfield speaks, would be based, not on a Tort, but on an implied contract arising out of the Tort.

On the ancient rule see Reeves' History of English Law (Finlason's ed.), III. 403.

It is important that the student should notice the statutory enactments which have largely removed these ancient common-law immunities by giving remedies—(*a*) for wrongs committed *by* a person, since deceased, "in respect of property, real or personal," 3 & 4 Wm. 4, c. 42, s. 2; (*b*) for wrongs committed *against* a person, since deceased, "in respect of goods and chattels," 4 Ed. 3, c. 7, and in respect of "real estate," 3 & 4 Wm. 4, c. 42, s. 2. But the remedies under the Act of William 4 are available only during a very brief period after the death. And it will be seen that none of these enactments affect the common-law rule so far as torts to the Person are concerned, e.g. assault or libel or deceit.]

SECTION III.

GENERAL EXCEPTIONS TO LIABILITY.

(A) Acts of the State.

[*No action can be brought by an* alien, *if he be neither permanently nor even temporarily under allegiance to the English Crown, for any damage inflicted on him by the authority of the Crown.*]

THE SECRETARY OF STATE IN COUNCIL OF INDIA *v.* KAMACHEE BOYEE SAHABA.

Privy Council. 1859. 13 Moore, P. C. 22.

* * * * * * *

Lord Kingsdown. This is an appeal from a decree of the equity side of the Supreme Court of Judicature at Madras, by which it was declared that the respondent (the plaintiff in the suit below), as the eldest widow of Sevajee, late Rajah of Tanjore, who had died intestate, was entitled to inherit and possess, as his heir and legal representative, his private and particular estate and effects, real and personal....The Court further declared that the defendants, the East India Company, were trustees for the plaintiff for and in respect of the private and particular estate and effects, real and personal, left by Sevajee at the time of his death, and possessed by them, their officers, servants and agents, as in the Bill mentioned.

In the very able argument addressed to us at the bar, many objections were made by the appellant's counsel to this decree. But the main point taken, and that on which their Lordships think that the case must be decided, was this,—that the East India Company, as trustees for the Crown, and under certain restrictions, are empowered to act as a Sovereign State in transactions with other Sovereign States in India; that the Rajah of Tanjore was an independent Sovereign in India; that on his death in the year 1855, the East India Company, in the exercise of their sovereign power, thought fit, from motives of state, to seize the Raj of Tanjore and the whole of the property the subject of this suit, and did seize it accordingly; and that over an act so done, whether rightfully or wrongfully, no municipal court has any jurisdiction.

The general principle of law was not, as indeed it could not with any colour of reason be, disputed. The transactions of independent

States between each other are governed by other laws than those which municipal courts administer. Such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.

But it was contended, on the part of the respondent, that this case did not fall within the principle, for the following reasons. Firstly, it was said that the East India Company did not stand in the position of an independent Sovereign; for such powers of sovereignty as were exercised on behalf of the Company were vested, not in the Company, but in the Governor-General and Council, who are protected by legislative enactments for what they may do in that character. Secondly, that the seizure in this case did not take place by the exercise of a sovereign power against another independent Sovereign; but was a mere succession, by (an asserted) legal title, to property alleged to have lapsed to the Company. And, thirdly, that there is a distinction between the public and private property of the Rajah; and that the Company never intended to exercise their sovereign powers as to the latter, whatever they might do with respect to the former; so that the Company, therefore, are in possession, by the unauthorized act of their officers, of property for which no protection can be claimed on the grounds which would protect the public property from the jurisdiction of the Court.

On the first point their Lordships are unable to discover any room for doubt....The law, as it stood in the year 1839, is accurately stated in the judgment of Tindal, C.J., in the case of *Gibson* v. *The East India Company* (5 Bingham N. C. 273). After referring to various legislative enactments, he observes that from these—"it is manifest that the East India Company have been invested with powers and privileges of a two-fold nature, perfectly distinct from each other: namely, powers to carry on trade as merchants, and powers (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India) to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native Powers of India."

That acts done in the execution of these sovereign powers were not subject to the control of the municipal courts, either of India or Great Britain, was sufficiently established by the cases of *The Nabob of Arcot* v. *The East India Company* (2 Ves. jun. 56), in Chancery, in 1793; and *The East India Company* v. *Syed Ally*, before the Privy Council in 1827. The subsequent Statute, 3rd and 4th Will. IV., c. 85., in no degree diminishes the authority of the East India Company, to exercise (on behalf of the Crown of Great Britain and subject to the control thereby provided) these delegated powers of Sovereignty.

The next question is, what is the real character of the act done in

this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law? Or was it, in whole or in part, a possession of the property of the late Rajah of Tanjore, taken by the Crown under colour of legal title, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation.

It is extremely difficult to discover in these papers any ground of legal right on the part of the East India Company, or of the Crown of Great Britain, to the possession of this Raj or of any part of the property of the Rajah on his death; and indeed, the seizure was denounced by the Attorney-General (who appeared as counsel for the respondent, and not in his official character) as a most violent and unjustifiable measure. The Rajah was an independent Sovereign; though of territories undoubtedly small, and bound to a powerful neighbour by treaties which left him, practically, little power of free action. But he did not hold his territory, such as it was, as a fief of the British Crown, or of the East India Company; nor does there appear to have been any pretence for claiming it, on the death of the Rajah without a son, by any legal title; either as an escheat or as *bona vacantia*. It would seem therefore, that the possession could hardly have been taken upon any such grounds.

Accordingly, the defendants, in their answer, allege that on the death of the late Rajah, "it was determined, as an act of State, by the defendants and the British Government," that the Raj and dignity of Rajah of Tanjore was extinct, and that the State of Tanjore had thereupon lapsed to the defendants in trust for Her Majesty. And it was thereupon also determined by the defendants, as an act of State and Government, that the whole dominions and sovereignty of the State of Tanjore, together with the property belonging thereto, should be assumed by the defendants in trust for Her Majesty the Queen, and should become part of the British territories and dominions in India. They then allege that the whole of the property which they have seized has been seized by virtue of their sovereign rights on behalf of Her Majesty; and insist that the Court has no jurisdiction to inquire into the circumstances of the seizure or its justice, with respect either to the whole or any part of the seizure.

The facts, as they appear in the evidence, are these:—In November, 1855, the Rajah died. The government of Madras, within which Presidency Tanjore is situated, communicated the fact of his death to the Governor-General of India. And that fact, with the views of the government of Madras, and of the Governor-General in Council, as to the steps which ought to be taken upon the Rajah's death in regard

to his dominion and property, was communicated to the Court of Directors, in England. The letters in which these views were communicated are not found amongst the papers before us. But it appears, from the answer of the Court of Directors dated the 16th of April, 1856, that these governments were of opinion that the dignity of Rajah of Tanjore was extinct; and that they had taken possession (or were about to take possession) of the dominions and property of the Rajah, and intended to deal with them in such manner as appeared to them to be just. For the answer of the East India Company's Directors is to the following effect. After adverting to a suggestion which had been made, to recognize one of the daughters of the deceased Rajah as his successor, they say:—"3. By no law or usage, however, has the daughter of a Hindoo Rajah any right of succession to the Raj; and it is entirely out of the question that we should create such a right for the sole purpose of perpetuating a titular Principality, at a great cost to the public revenue. 4. We agree in the unanimous opinion of your government, and the government of Madras, that the dignity of Rajah of Tanjore is extinct. 5. It only remains to express our cordial approbation of the intentions you express of treating the widow, daughters, and dependants of the late Rajah with kindness and liberality....6. The Resident was very properly directed to continue all existing allowances until he could report fully on them to Government; but to inform the recipients that Government were not to be considered as pledged to their continuance."

It seems obvious from this letter that the East India Company intended to take possession of the dominions and property of the Rajah, as absolute lords and owners; and to treat any claims of his widows and relations and dependants, not as rights to be dealt with upon legal principles, but as appeals to the consideration and liberality of the Company.

Even if there had been any doubt upon the original intention of the Government, it has clearly ratified and adopted the acts of its agent; which, according to the principle of the decision in *Buron* v. *Denman*[1], is equivalent to a previous authority.

* * * * * * *

The result, in their Lordships' opinion, is, that the property now claimed by the respondent has been seized by the British Government, acting as a sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State, over which the Supreme Court of Madras has no jurisdiction.

Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming—or the right of expressing if they had formed—any opinion. It may have been

[1] *Infra*, p. 115.

just or unjust, politic or impolitic, beneficial or injurious (taken as a whole) to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy.

[EDITOR'S NOTE. Cf. *Salaman* v. *Secretary of State*, L. R. [1906] 1 K. B. 613.]

[*Even though this authority were not given until* after *the damage had been done.*]

BURON *v.* DENMAN.

COURT OF EXCHEQUER. 1848. 2 Ex. 167.

[CAPTAIN the Hon. Joseph Denman, of H.M.S. *Wanderer*, was in 1840 the senior officer in charge of a part of the West coast of Africa, with instructions to suppress the slave-trade *at sea* there. He was requested by the Governor of Sierra Leone to obtain the liberation of two British subjects detained as slaves at the Gallinas by the son of the king of that country; and in effecting that object to use force, if necessary. He accordingly sailed to the Gallinas with three armed vessels, landed at Dombocorro, and took military possession of a barracoon belonging to the plaintiff; who was a Spaniard, carrying on the slave-trade at the Gallinas. He then communicated with the king of the country; and the two British subjects having been released, he concluded a treaty with him for the abolition of the slave-trade in that country. In execution of this treaty, the defendant fired the barracoons of the plaintiff, and carried away three hundred of his slaves (worth about £10 each), with many others, to Sierra Leone, where they were liberated. Some of the plaintiff's goods, used in the slave traffic, were claimed by Siacca, the local king, as forfeited to him; other goods were destroyed. These proceedings having been communicated to the Secretaries of State for the foreign and colonial departments (Lord Palmerston and Lord John Russell), they sent to the Admiralty official letters directing that Captain Denman should be informed that he had acted rightly, in the "spirited and able conduct" by which he had destroyed eight slave factories and liberated 841 slaves; and that similar operations ought to be executed against slave-trade establishments on all the other parts of the West African coast not belonging to any civilized power. The Admiralty made him

a grant of £4000 as a reward for his conduct—"the most conclusive ratification in English naval history."

But in September, 1841, a change of ministry took place, and Lord Palmerston's place as Foreign Secretary was taken by Lord Aberdeen. The Denman papers were then laid before the Queen's Advocate, who gave an opinion to the effect that he "could not take upon himself to advise that all the proceedings, described as having taken place at Gallinas, New Cestos, and Sea Bar, are strictly justifiable; or that the instructions of her Majesty's naval officers, as referred to in these papers, are such as can with perfect legality be carried into execution. The Queen's Advocate is of opinion, that the blockading rivers, landing, and destroying buildings, and carrying off persons held in slavery, in countries with which Great Britain is not at war, cannot be considered as sanctioned by the law of nations or by the provisions of any existing treaties; and that, however desirable it may be to put an end to the slave-trade, a good, however eminent, should not be obtained otherwise than by lawful means."

In 1842, Buron brought this action of trespass, claiming £100,000 for the loss of his slaves and other effects. He could not sue in England for the destruction of the barracoons themselves, that being a trespass to real estate; see *British South African Co.* v. *Companhia de Mocambique*, L.R. [1893] A. C. 602.

Captain Denman pleaded that he had acted "as the servant of Queen Victoria and by her command"; and also that he had acted under the authority of King Siacca. The defence of "Act of State" was thus set up from two points of view; the African authorization being antecedent to some of the torts, the British being subsequent to them all. A ratification could only confirm what the defendant had done when acting, not from private personal feelings, but on behalf of the Crown; but the Governor of Sierra Leone's orders to make the expedition afforded evidence that Captain Denman had regarded himself throughout as acting for the Crown. The case did not come to trial until 1848. It was tried at bar, before all the four Barons of the Court.]

The *Attorney-General*....The approval by the Secretaries of State is equivalent to the Queen's command. It is not necessary that the command should be antecedent to the act done. In the case of *The Rolla*[1], where an American ship and cargo were proceeded against for a breach of the blockade of Monte Video imposed by the British commander Sir Home Popham without any communication with his government, Lord Stowell, in delivering judgment, says: "However irregularly he may have acted towards his own government, the subsequent conduct of Government, in adopting that enterprise, by

[1] 6 Rob. 364.

directing a further extension of that conquest, will have the effect of legitimating the acts done by him, so far at least as the subjects of other countries are concerned." In Best on Presumptions of Law and Fact[1], it is stated to be "a fixed principle, that every ratification has relation back to the time of the act done—Omnis ratihabitio retrotrahitur et mandato æquiparatur."...The effect of this ratification by the Crown was to render the defendant's act an act of state, in respect of which no action can be maintained: *Elphinstone* v. *Bedreechund*[2].

M. D. Hill, for defendant. Even if there was a ratification, it will not support the plea of the Queen's command. The principle on which the "ratihabitio" has proceeded is, that it is part of the law of principal and agent, and it has never been used for the protection or justification of the agent, but where the act done is founded on a right existing in the principal, and not in the agent except as authorised by the principal. The fiction which carries back the ratification, and gives it the force and operation of a prior command, is, like other legal fictions, in favour of justice. The question between the parties is not whether the agent has a right to do the act, but whether it ought to have been done at all; and, therefore, if the principal had a right to do it, the agent is empowered to vouch his subsequent ratification. That principle is now attempted to be used in a manner which neither reason, justice, nor analogy drawn from authority can justify. It is not for the purpose of shewing that the act was justifiable, but for the purpose of protecting the party committing it against examination as to whether it was right or wrong. It is said that this is an act of state, for which the Crown is alone responsible, and not a matter to be tried by the municipal law. But there has been no publication of the act in the Gazette, by which the Queen of Spain could be informed of the proper mode of seeking redress for this injury to one of her subjects....

PARKE, B. (in summing up to the jury)....The principal question is, whether the conduct of the defendant can be justified as an act of state, done by authority of the Crown. It is not contended that there was any previous authority....The defendant's instructions only extended to the stopping of ships on the high seas. Therefore the justification depends upon the subsequent ratification....My learned brethren are decidedly of opinion that the ratification of the Crown, communicated as it has been in the present case, is equivalent to a prior command. I do not say that I dissent; but I express my concurrence in their opinion with some doubt, because, on reflection, there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority

[1] P. 28. [2] 1 Knapp, 316.

between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy (except by appeal to the justice of the state which inflicts it, or by application of the individual suffering to the government of his country, to insist upon compensation from the government of this)—in either view, the wrong is no longer actionable. The direction of the Court is, that if the Crown, with knowledge of what has been done, ratified the defendant's act by the Secretaries of State or the Lords of the Admiralty, this action cannot be maintained.

Although the ratification was not known before this action was commenced, that makes no difference. A previous command, if given verbally, would be unknown.

It is argued, on the part of the plaintiff, that the Crown can only speak by an authentic instrument under the Great Seal....But we are clearly of opinion, that, as the original act would have been an act of the Crown, if communicated by a written or parol direction from the Board of Admiralty, so this ratification, communicated in the way it has been, is equally good.

[The jury found that the Crown had ratified the defendant's conduct, and with a full knowledge of what he had done. The defendant withdrew from the jury the question as to his having acted under King Siacca's authority; preferring "to put the case on the higher ground" of a British approbation.]

[EDITOR'S NOTE. The Crown's power of ratification extends even to acts that were done in defiance of its actual prohibition (9 Bombay H. C. 314).

But the student should carefully note that the defence of "Act of State," can never be raised, even by fully authorised agents of the Crown, for any wrongs committed against a person who was, at the time of their commission, a British subject. This rule constitutes one of the peculiar excellences of English law, as compared with the laws of Continental Europe. But the rights of a British subject are not possessed by subjects of the native Protected States in India. And the Supreme Court of Natal has held that during the Boer War, in 1900, even after the annexation of the Orange Free State, the defence of "Act of State" could be set up for torts committed against any of its ex-burghers who were still acting as belligerents, or were prisoners of war even though on parole.]

(B) Judicial Acts.

[*No action lies against a judge for any act done in his* judicial capacity, *even though done* maliciously.]

SCOTT *v.* STANSFIELD.

Court of Exchequer. 1868. L.R. 3 Ex. 220.

Declaration, for that the plaintiff carried on the business of an accountant and scrivener, and the defendant falsely and maliciously, and without reasonable or justifiable cause, and not on any justifiable occasion, spoke and published of the plaintiff, of and concerning him in relation to his said business and the carrying on and conducting thereof, the words following, that is to say: "You," meaning the plaintiff, "are a harpy, preying on the vitals of the poor."

Plea: that before and at the time when the alleged grievance was committed, the defendant was the judge of a certain court of record, being the County Court of Yorkshire, holden at Huddersfield, and at the time when he did what was complained of, the defendant was sitting in the said court, and acting in his capacity as such judge as aforesaid, and was as such judge hearing and trying a cause in which the now plaintiff was defendant, the hearing and determination of which was within the jurisdiction of the said court; and during the said trial the now defendant, in his capacity as such judge, did, as such judge sitting as aforesaid, speak and publish the said words of which the plaintiff complains, which is the supposed grievance above complained of.

Replication to the said plea: that the said words so spoken and published by the defendant as aforesaid, were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not bonâ fide in discharge of his duty as judge as aforesaid, and were wholly uncalled for, immaterial, irrelevant, and impertinent, in reference to, or in respect of, the matters before him, and were wholly unwarranted on the said occasion, of all which premises the defendant had notice before and at the time of the committing of the said grievance, and then well knew.

Demurrer and joinder.

Quain, Q.C. (*Kemplay* with him), in support of the demurrer. The plea and replication taken together raise the question whether the defendant is liable to an action in respect of the words mentioned in the declaration, such words having been spoken by him in his

capacity of judge, but spoken falsely, maliciously and irrelevantly. There is no authority for the position that an action will lie against a judge for anything done by him while acting in the exercise of his jurisdiction. The remedy for any official misconduct on the part of the defendant is by application to the Lord Chancellor for his removal. In the case of *Thomas* v. *Churton*[1] it was held, that a coroner holding an inquest is not liable to an action for words falsely and maliciously spoken by him in his address to the jury; but Cockburn, C.J., there said[2]: "I am reluctant to decide, and will not do so until the question comes before me that if a judge abuses his judicial office by using slanderous words, maliciously and without reasonable and probable cause, he is not to be liable to an action." The present replication is probably founded upon that dictum....

Manisty, Q.C., contrà. The decisions cited are inapplicable to the present case. For it was not alleged in any of those cases, that the judge had said, maliciously and without reasonable cause, what was altogether irrelevant to the matter before him. In Addison on Torts, 2nd ed., p. 547, the law is thus laid down: "A judge, therefore, is not answerable for slander spoken by him in the exercise of his judicial functions in reference to a matter before him; but, if he goes out of his way to make slanderous attacks on the character of private persons in respect of matters not before him, and into which he has no jurisdiction to inquire, he will be responsible, like any other individual, for the consequences." The cases cited in support of that proposition are *Lewis* v. *Levi*[3], and *MacGregor* v. *Thwaites*[4], but, it must be admitted, they do not go far enough to support the plaintiff's contention. It is, however, clear, that the fact of a judge's having jurisdiction to try a particular case will not justify his going out of his way, and, with reference to a subject wholly irrelevant, making falsely and maliciously slanderous statements affecting private character. It is then just as if he were not acting in his judicial character at all. He cannot abuse his office for the purpose of doing with impunity, under colour of it, that which has no connection with it and which in a private individual would be actionable. In the case of *Houlden* v. *Smith*[5], it was held, that a judge of a county court is answerable for an act done by his command, when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends.

KELLY, C.B. I am of opinion that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character and in the exercise of his functions as judge in the court over which he presides,

[1] 2 B. & S. 475. [2] 2 B. & S. at p. 479. [3] 27 L. J. (Q.B.) 282.
[4] 3 B. & C. 24. [5] 14 Q. B. 841.

where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the bona fides of the judge it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable.

Judgment for defendant.

[Editor's Note. The rule here laid down was followed in the case of *Anderson* v. *Gorrie* (L. R. [1895], 1 Q. B. 668), an action for false imprisonment, in which the jury found that the defendant—a judge of the Supreme Court of Trinidad—had "purposely, and with malice, overstrained his judicial powers to the prejudice of the plaintiff." There is a well-known case (30 Howell's *State Trials* 749) in which General Picton, governor of Trinidad, was indicted for putting a woman to the torture. But had he done this in the exercise—not of an executive but—a *judicial* office, he would have been entitled to an acquittal; (see *per* Lord Ellenborough, at p. 869).]

(C) Executive Officers.

[*The orders of a civil (perhaps also a military)* public authority, *if* apparently valid (*even though not really so*), *afford a good defence for any tort committed by its officer in direct obedience to them.*]

HILL *v.* BATEMAN AND ANOTHER.

Nisi Prius. 17—. 2 Strange 710.

The defendant Bateman, being a justice of peace, had convicted the plaintiff for destroying game. And though (as it was proved) the plaintiff had effects of his own which might have been distrained, which were sufficient to answer the penalty he had incurred, yet the defendant sent him immediately to Bridewell, without endeavouring to levy the penalty upon his goods. An action of trespass and false imprisonment being brought against Bateman for this commitment, and heard at Westminster, Raymond, C.J., was of opinion that the action well lay.

The other defendant was the constable who had executed this warrant of commitment. And as to him, it was agreed that the warrant was a sufficient justification, it being in a matter within the jurisdiction of the justice of peace. But if a justice of peace makes a warrant in a case which is plainly out of his jurisdiction, such warrant is no justification to a constable. See 24 *Geo.* 2. *c.* 44.

[Editor's Note. The degree of immunity (both civil and criminal) thus conferred on inferiors, for obeying the order of a *civil* public superior, is probably (though not certainly) also conferred, so far as regards criminal punishment, on soldiers obeying the order of a *military* superior. But it is somewhat less probable whether soldiers have this immunity as regards paying damages, for wrongs committed in military obedience by them against ordinary persons not under military law; see L. R. [1898] 1 Q. B. D. at p. 400.

As to actions *by* a soldier against his military superior, see *Heddon* v. *Evans* (35 T. L. R. 642). If the injury complained of was done to the soldier in the course of military discipline and was within the superior's jurisdiction, no action will lie for it in civil courts, even though it were done causelessly and maliciously: redress must be sought in a military tribunal.]

[*E.g., the orders of a Court of Justice.*]

DEWS *v.* RILEY.

COURT OF COMMON PLEAS. 1851. 11 C.B. 434.

THIS was an action of trespass and false imprisonment against the clerk of the Whitechapel County Court of Middlesex. The defendant pleaded "not guilty, by statute." The cause was tried before Maule, J., at the sittings for Middlesex. The facts which appeared in evidence were as follows.

On the 23rd of July, 1850, one Davis recovered a judgment in the Whitechapel County Court of Middlesex, against the now plaintiff, for £3. 17*s.* debt, and 14*s.* 4*d.* costs; which he was ordered to pay by monthly instalments of 5*s.*, the first instalment to be paid on the 23rd of August. The now plaintiff failing to make these payments, a judgment summons was issued against him under 9 and 10 Vict. c. 95 s. 98, requiring him to appear in Court on the 10th of October. The now plaintiff having failed to appear on the appointed day, the judge made an order, which was proved from the minute-book of the court kept by the clerk. This book, after stating the particulars, the amount claimed, and the judgment, contained (under the word "Order") the following entry:—"On the 17th[1] of October instant, or thirty days' imprisonment for not attending." Payment not having been made in obedience to this last-mentioned order, the now plaintiff was arrested on the 5th of November, by one of the bailiffs of the court, upon a warrant under the seal of the county court, and signed by the defendant as clerk of the court. This warrant recited the judgment and the judgment summons, and then proceeded to state that "It was ordered by the judge of the said court, that the said defendant (the now plaintiff) should pay the said debt and costs, together with the costs of the above-recited summons and the hearing thereon (amounting together to the sum of £5. 2*s.* 8*d.*), on the 17th of October, then instant; or be committed to Her Majesty's common gaol for debtors for the county of Middlesex, in Whitecross Street, for the term of thirty days," &c. It concluded, in the usual form, with a direction to the gaoler to keep him "for the term of thirty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law."

[1] [EDITOR'S NOTE. The day *really* ordered by the judge had been, not the 17th, but the 10th, the very day of making the order. The error of date is a fatal one; inasmuch as the judge had power to make a peremptory order for *immediate* commitment only; and not for a postponed one, since some matter of excuse might arise before the future day when a postponed order would take effect.]

The judge of the county court was called as a witness on behalf of the defendant; and he proved, from a private memorandum, that he had intended the order to be for a commitment *forthwith* [i.e. on Oct. 10th], with an understanding that the warrant should not issue for a week.

For the defendant, it was submitted, that, being a mere ministerial officer, and bound to carry into effect the orders of the judge, he was not liable in trespass.

On the other hand, it was insisted that the defendant could not protect himself by an order which the judge had no power to make....

Maule, J., doubted whether there was sufficient evidence to fix the defendant; but he directed the jury to assess the damages for the plaintiff, reserving to the defendant leave to move to enter a nonsuit, if the court should be of opinion that the defendant was not liable, and that the defence was admissible under Not Guilty.

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Humfrey shewed cause. The cases of *Ex parte Kinning*[1], *Kinning* v. *Buchanan*[2], and *Abley* v. *Dale*[3], shew that the warrant in question was illegal and bad. The memorandum of the judge shewed that he meant to make a legal order, and that the illegality was the act of the defendant, whose duty it was, under the 111th section[4] of the statute, to enter the proceedings of the court....The defendant has availed himself of the machinery of his office to issue a bad warrant which is not justified by any previous order of the court. *Bryant* v. *Clutton*[5] is also an authority in favour of the maintenance of this action. [JERVIS, C.J. Why should not the clerk, who is *bound* to issue the warrant, be in the same situation as a sheriff[6]?] In issuing this bad warrant, the defendant was not obeying the direction of the judge.

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JERVIS, C.J., delivered the judgment of the court:—Upon the trial of this cause, my brother Maule doubted whether there was sufficient evidence to fix the defendant. But he directed the jury to assess the damages for the plaintiff; and gave the defendant leave to enter a

[1] 5 C. B. 507. [2] 8 C. B. 271. [3] 10 C. B. 62.

[4] Which enacts "that the clerk of every court holden under this act, shall cause a note of all...proceedings of the court to be fairly entered, from time to time, in a book belonging to the court which shall be kept at the office of the court; and such entries in the said book...shall at all times be admitted in all courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof."

[5] 1 M. & W. 408.

[6] [EDITOR'S NOTE. As to a sheriff's immunity see the note appended to the present case, *infra*, p. 125.]

nonsuit, if upon consideration, the court should be of opinion that the defendant was not liable.

The only evidence against the defendant was the warrant, sealed and signed by him as clerk of the court. The defendant produced a minute of the proceedings at the court held on the 10th of October; which, after stating the particulars, the amount claimed, and the judgment, contained under the word "order" the following entry:—"On the 17th Oct. instant, or thirty days' imprisonment for not attending." The judge of the court proved, from a private memorandum, that he intended the order to be for a commitment *forthwith*, with an understanding that it should not be enforced till after the 17th of October.

By the statute 9 & 10 Vict. c. 95, s. 111, the clerk is directed to cause a note of all orders and proceedings of the court to be fairly entered in a book, and a copy of such entry, duly authenticated, is at all times to be admitted as evidence of such entry, and of the proceedings referred to by such entry, and of the regularity thereof. We are bound, therefore, by the copy of the entry so produced, and must assume—contrary to the evidence given by the judge—that the order was that the present plaintiff should be imprisoned for thirty days, for not attending, unless he paid the debt and costs on or before the *seventeenth* of October.

According to the decisions of this court, confirmed in this respect by the court of error, this would be a bad order. But it is correctly stated in the warrant; and the question is, whether the clerk of the court is liable in trespass. We are of opinion that he is not.

By the 102nd section of the County Courts Act, "where any order of committal shall have been made as aforesaid, the clerk of the court *shall* issue under the seal of the court, a warrant of commitment."

It is suggested that the words "as aforesaid," by reference to the preceding sections, require that the order should be in compliance with the terms of the Act; and that therefore this section is not obligatory upon the clerk where the order is bad and cannot be sustained. This, however, is not, in our opinion, the correct construction of the Act. It would throw upon the clerk the duty of reviewing the decision of the judge—his superior officer. The clerk is a mere ministerial officer to carry into effect the order of the judge; and cannot be liable in trespass for the mere performance of a duty cast upon him by the express language of the Act of Parliament.

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Plaintiff nonsuited.

[EDITOR'S NOTE. In *Tarlton* v. *Fisher* (2 Douglas 671), Ashurst, J., states the rule thus:—"A sheriff is bound to execute process issuing out of a court of competent jurisdiction; and though there be no cause of action, or the process be

erroneous, he is not responsible....It would be extremely hard indeed upon a sheriff and his officers if they were bound to inquire into the truth of a defendant's exemption and determine upon it at their peril." The principle was recognised three hundred years ago, in the *Countess of Rutland's Case* (6 Coke 52 *b*) where an information was brought against a sheriff for arresting that lady on a *capias ad satisfaciendum* (under a judgment recovered against her in an action of debt), in disregard of her privilege as the wife of a peer of the realm. But it was held by the whole Court of Star-chamber that, though this *capias* was quite irregular, yet as it had nevertheless been issued by a Court (the Court of Common Pleas), "the sheriff, or (by his warranty) his officer, might execute it without any offence. For they ought not to dispute the authority of the court, but execute the writs directed to them; and to this they are sworn. And although it appears in the *capias* that she was a countess (against whom, by the law, no *capias* in such case lies), and *ignorantia juris non excusat* (especially in sheriffs and other ministers of law and justice), yet the sheriff and his officers ought not to examine the judicial act of the court but execute the writ." For, as was said in a modern case by Williams, J., "It would be wild work if an officer were entitled to scan the warrant delivered to him, for the purpose of ascertaining whether, under the circumstances of the case, it was regular or not" (3 A. & E. 449). Hence, provided the suit be of a class which is within the jurisdiction of the court (even though in the *particular* case jurisdiction be wanting), an officer who executes a process, fair upon its face, is protected by the law. But it is otherwise if the process itself is not fair and regular upon its face, or if its recitals or commands shew a want of jurisdiction in the court issuing it; for then the officer will be legally responsible for any tort he may commit by executing it.

It is instructive to contrast with *Dews* v. *Riley* the earlier case of *Andrews* v. *Marris* (1 A. and E., N. S., 3); where the clerk's conduct was *not* merely ministerial.]

(D) Special Legal Authorization.

[*No action lies for the damage necessarily produced by acts the doing of which has been* specially authorized by Statute.]

ATTORNEY-GENERAL AND HARE *v.* METROPOLITAN RAILWAY CO.

Court of Appeal. L.R. [1894] 1 Q.B. 384.

[This was an action upon an award of compensation to the plaintiff Hare for damage done to his dwelling-house by the defendants' railway. At the trial, Wright, J., had held that the plaintiff was entitled to compensation under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. The defendants appealed.

The facts sufficiently appear in the judgment.]

A. L. Smith, L.J. No one can approach this case without feeling a desire to assist the plaintiff, Mr Hare; for it is admitted that his house has been injured to the amount of £450 by what the defendant company have done and are doing.

The first and most important question is whether he is entitled to recover under the Lands and Railways Clauses Consolidation Acts compensation from the defendant company in respect of the injuries he has sustained.

Mr Hare is lessee for a term of years of No. 3, Park Crescent, Regent's Park, and at the rear of his premises the Portland Road station upon the defendants' railway is situated. When the railway was originally constructed about the year 1861, the defendants opened up upon their own lands an air-hole of some 150 feet in extent at the rear of the plaintiff's house, and in the year 1889 they uncovered a portion of their tunnel on the Park Crescent side of their station, making thereby an air space of some 1500 feet in the place of what had theretofore existed. The result of this has been to largely increase the emission of vapours from their tunnel at the back of the plaintiff's house, which has caused the injury he has sustained. These works were executed by the defendants without negligence, and were for the purpose of giving better ventilation to their tunnel and station with a view, as they expressed it, "of ensuring additional comfort and benefit to the millions of the travelling public using their railway." The defendant company, by their special Acts, were authorized to make and maintain an underground railway, with a station in Portland Road, on the lands which they acquired. They were thereby empowered to make and maintain their works at the locus in quo either in tunnel or in open cutting, and no fetter was imposed upon them as

to how as regards this matter their line was to be there constructed. No action could have been maintained against them for either not putting their line into tunnel or for putting it into open cutting, or part in tunnel and part in open cutting, at the place in question, for they were empowered by their special Acts to do what they thought fit as to this. The company, in my judgment, were also in like manner authorized from time to time at the place in question, as incidental to the efficient working of their line, to either open up that part which might have been originally constructed in tunnel, or to have closed up that which might have been originally constructed in open cutting, without being liable to an action for damages for so doing, unless it could be established that when so opening or closing up this part of their line they had acted negligently. The cases of *Hammersmith Ry. Co.* v. *Brand*[1] and *London, Brighton and South Coast Ry. Co.* v. *Truman*[2], both in the House of Lords, decide this.

It was expressly held in the House of Lords, in *Hammersmith Ry. Co.* v. *Brand*[1], that if by the execution of the works authorized (no land being taken) a company have injured the lands of another, compensation is recoverable by the person injured under the Lands and Railways Clauses Consolidation Acts; and it was there also held that if the injury is occasioned by reason of the user and working of the railway, it is not recoverable; or, in other words, where land is not taken compensation can only be recovered if damage arises to the land of another from the making of the railway, and not if it arises from its user.

Wright, J., when considering this question of compensation, directed himself as follows. He said: "Ought the injury to the land to be regarded as the effect of the construction or execution of the works, or as the effect of the working or user of the railway?"

This direction is good law, and the point is, Did Wright, J., accurately apply the facts of the case to this law? Do the facts shew that the plaintiff's injury arose from the making of the railway or from its use? It appears to me that the answer to the following question shews how this is. If the railway ran no trains—that is, if the railway was not worked—would the plaintiff's house have been damaged by the building of the 1500 feet of opening? My answer is, No. If this be correct, it follows that the damage to the plaintiff must arise from the user, and not from the making of the railway. Wright, J., however, held as follows: "With much doubt I have come to the conclusion that it ought not to be regarded merely as the effect of the working of the railway. It must be taken for settled law (speaking always of a person no part of whose land is taken) that no compensation can be got in respect of effects of the working of the railway which are ordinary, and which affect indifferently all adjoining lands,

[1] Law Rep. 4 H. L. 171. [2] 11 App. Cas. 45.

even though the complainant's land may happen, from its situation or otherwise, to be affected in a greater degree than others. But it seems to me that there may be works which, although not injurious in themselves unless the railway is worked, are so specially and necessarily injurious to particular land if the railway is worked at all, whether much or little, that the construction of them under powers which enable them to be used in conjunction with the working of the railway may of itself be regarded as injurious to the land, with the use of which it unquestionably interferes. There is here not a mere difference of amount of noise, smoke, and foul air, but a work specifically designed for the purpose of concentrating the vapours of an underground station, which would otherwise have diffused themselves in various directions, and of discharging the collected volume under the plaintiff's windows in such a way that the house is made materially less fit for habitation. Even if the railway were not being worked, the construction of such a work for such a purpose, with such powers, would diminish the value of the house."

It is upon this question of fact that I am able to agree with Wright, J. No evidence was given that, if the railway were not worked, any damage would be done, nor that the construction of the enlarged opening would have diminished the value of the plaintiff's house; but, on the contrary, the evidence was that the plaintiff's house was injured by being rendered less fit for habitation by reason of the increased smoke, vapour, noise, steam, and vibration which daily escaped from the larger air space, and it was for this damage that the £450 was assessed.

It is only the working and user of the railway which brings into existence the vapours which cause the injury. Without such working and user no vapours and, consequently, no injury would exist. The building of the larger air space inflicted no damage, and could not be complained of. It is the vapours which are complained of, not the building.

I would point out that, if upon the facts of this case a claim for compensation could be supported, the smoke, vapour, noise, steam, and vibration, which daily occur at the mouth of every tunnel, would, as it appears to me, give ground for such a claim at the instance of all persons whose houses were injured thereby. This of itself shews the importance of this present, and, I think, novel, claim put forward by the plaintiff. Mr Robson, for him, when faced with this difficulty, boldly stated that they did; but *Brand's Case*[1], in my judgment, is an express authority that they do not.

Take the case of the air space being built by *A*, and the fumes produced by *B*, and take it that the law was that *A* was only to be

[1] L. R. 4 H. L. 171.

liable for damage he might create by erecting his building. Can it be said, because he subsequently allowed *B* to pass his fumes through the air space, that this was a damage caused by the erection of the building? I think not. The real truth is, that the sole injury is caused by the noxious fumes which come from the user of the line. It is true that they are let out through the building, but the building does not cause them. The damage, in my judgment, is occasioned by reason of the user of the line, and, as above pointed out, for this there is no claim for compensation.

DAVEY, L.J....It has been decided by the House of Lords in *Hammersmith Ry. Co.* v. *Brand*[1] that there is no right of action for damage sustained by the working of a railway, without negligence, under statutory powers; and also that the Railway Acts give no right to compensation for any injury so sustained....It is argued that the object and effect of the work in question has been to collect and concentrate upon the plaintiff's house the smoke of the locomotives, and that the injury is not the necessary consequence of the working or use of the work, but arises from its construction. And the learned judge has decided in the plaintiff's favour on this point. In my opinion, this reasoning is fallacious. The emission of smoke is the necessary consequence of the use of locomotives. The injury suffered by the plaintiff and his family is ejusdem generis with that which any other person (say) passing along the Marylebone Road might experience, though accruing to the plaintiff more frequently than to others; i.e. it is a personal injury only to the plaintiff. The argument that the plaintiff's injury is caused by the work because it would not have arisen if the work had not been constructed, is answered by Lord Chelmsford's observation in *Brand's Case*[2]. What the company has done is to make an opening in their tunnel on their own land, or (in other words) to convert that portion of their line into an open cutting. And the company, keeping within their powers, were, it appears to me, as free to select this mode of ventilating their railway and station as the company were to select the particular site for their cattle pens in *Truman's Case*[3]. Applying the test suggested by Lord Chelmsford, and adopted by Mellish, L.J., in *Hopkins* v. *Great Northern Ry. Co.*[4], it is plain that the construction of the work would not have injured the plaintiff if the railway were not used; and it is the user of the railway with this opening in the tunnel, and not the construction of the opening and walls, of which the plaintiff complains. On this point, therefore, I am of opinion that the case is covered by *Brand's Case*[1], and that the appeal is successful.

Appeal allowed.

[*See also* MERSEY DOCKS TRUSTEES *v.* GIBBS, *supra*, p. 65.]

[1] L. R. 4 H. L. 171.
[2] L. R. 4 H. L. at p. 104.
[3] 11 App. Cas. 45.
[4] 2 Q. B. D. 224.

[EDITOR'S NOTE. Since every sovereign legislature has full authority to make and to alter the law, it can confer on any person any powers it may see fit to give him, even a power to interfere with other people's rights. If it do so, his exercise of this power cannot be an unlawful act. Hence, should he by exercising it—*without* any unreasonable carelessness—cause damage to other persons, they will have no legal remedy against him.

In modern times it often happens that a municipal or a commercial undertaking is so extensive in scale as to require the passing of a private Act of Parliament for its effectual organisation. Hence the doctrine now under discussion has of late come into very frequent application. But more than a century ago it was already obvious that, if this doctrine had not been established, "every Turnpike Act, Paving Act, or Canal Act, would have given rise to an infinity of law-suits"; (see 4 T. R. 794).]

[*Or specially authorized by* customary *law.*]

THE MADRAS RAILWAY COMPANY *v.* THE ZEMINDAR OF CARVATENAGARUM.

PRIVY COUNCIL. 1874. L. R. 1 IND. APP. 364.

* * * * * * *

THE RIGHT HON. SIR ROBERT P. COLLIER:—The Madras Railway Company claimed in this suit damages against the defendant, the Zemindar of Carvatenagarum, for injuries occasioned to their railway and works by the bursting of two tanks upon his land....The tanks were ancient tanks (the date of their origin not appearing). They were constructed in the usual manner; the banks were properly attended to and kept in repair; sluices and outlets for the water were provided, of the kind usually employed both in private and in Government tanks and usually found sufficient. They, indeed, had proved sufficient to prevent any overflow or bursting, of the tanks in question, for twenty years. But an improved description of sluice, of recent introduction, would have been still more efficacious. Some days before the accident there had been an unusual and almost unprecedented fall of rain; described by the deputy-inspector of the railway as the heaviest he had ever seen during his residence of thirteen years in the locality, and by witnesses for the defendant as exceeding any fall of rain for twenty years. This extraordinary flood (which caused the river to overflow),...proved more than the sluices could carry off. The banks of the tanks were overflowed, and finally carried away....

The case mainly relied upon by the plaintiffs is *Fletcher* v. *Rylands* (L. R. 3 H. L. 330; *infra*, p. 600)....But its principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to

rights conferred by statute. This distinction was acted upon in *Vaughan* v. *Taff Vale Railway Company* (5 H. & N. 679), where it was held by the Exchequer Chamber that a railway company were not responsible for damage from a fire kindled by sparks from their locomotive engine, in the absence of negligence; because they were authorized by statute to use locomotives.

...These tanks are ancient, and form part of what may be termed a national system of irrigation recognized—by Hindu and Mohammedan law, by regulations of the East India Company, and by experience older than history—as essential to the welfare, and indeed to the existence, of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India; and upon the settlement of the country has, in many instances, devolved on zemindars (of whom the defendant is one). The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested; but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this, it becomes apparent that the defendant in this case is in a very different position from the defendants in *Fletcher* v. *Rylands*. In that case the defendants, for their own purposes, brought upon their land, and there accumulated, a large quantity of water; by what is termed by Lord Cairns "a non-natural use" of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons; and they could have removed it if they had thought fit. The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons, or corporations, on whom statutory powers have been conferred and statutory duties imposed. The duty of the defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the railway company to maintain its railway. They are of opinion that, if the banks of his tank are washed away by an extraordinary flood, without negligence on his part, he is no more liable for damage occasioned thereby than the plaintiffs would be for damage to a passenger on their line (or to the lands of an adjoining proprietor) occasioned by the banks of their railway being washed away in similar circumstances.

[*But, in construing the provisions of a Statute, the presumption is against its creating any such power to interfere with ordinary rights; especially if the interference would amount to a Nuisance.*]

MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT *v.* HILL AND OTHERS.

HOUSE OF LORDS. 1881. L.R. 6 APP. CA. 193.

THE appellants were persons who had been incorporated by the Metropolitan Poor Act, 1867 (30 Vict. c. 6), for the purpose of providing hospitals for the reception of the sick poor of the metropolis. Sir Rowland Hill (whose executors were the first of the respondents), Mr Lund, and Mr Fripp, resided at Hampstead and had property there. The action, the subject of the present appeal, was brought by them against the appellants, alleging that the appellants had erected a certain hospital near their properties, for the reception of persons suffering from small-pox and other infectious and contagious disorders, which was a nuisance, and had carried on the said hospital so as to be a nuisance. The appellants traversed these allegations.

The cause came on for trial before Mr Baron Pollock and a special jury on the 18th of November, 1878. The learned Judge left certain questions to the jury which, with their answers, were in the following form: "(1) Was the hospital a nuisance occasioning damage to the plaintiffs, or either and which of them, *per se*; or (2) was it a nuisance to them by reason of the patients coming to or going from the hospital?—*Ans.* (to the two questions). The hospital was a nuisance occasioning damage to the plaintiffs, and each of them, *per se*; and also by reason of the patients coming to or going from the hospital. (3) Assuming that the defendants were, by law, entitled to erect and carry on *an* hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?—*Ans.* No. (4) Assuming them by law entitled to erect and carry on *this* hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?—*Ans.* No. (5) Did the defendants use proper care and skill with reference to the ambulances?—*Ans.* The ambulances ought to have been disinfected before leaving the hospital." As to everything done in the hospital itself the jurors gave great praise to everybody concerned. The verdict was on these answers ordered to be entered for the plaintiffs; and on further consideration judgment was entered for them.

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Sir J. Holker, Q.C. and *Mr Willis, Q.C.* for the appellants.... What the appellants have done was done under statutory authority, and

therefore they are, in law, completely protected from liability. They were constituted a public body by virtue of a statute—they had duties specially assigned to them—those duties were of a public nature—the appellants were required to perform them, being thereto commanded by the Local Government Board. They had obeyed the orders of that Board, and as everything that had been done had been so done under statutory authority, any private individuals who thereby suffered inconvenience must bear it, for such was the intention of the Legislature, which, in passing the statutes relating to this matter, must be assumed to have contemplated the possibility of the private inconvenience, and to have determined that that inconvenience must be submitted to, in consideration of the great public benefit that was to result from it. The case of *Rex* v. *Pease*[1] laid down that doctrine, which had received its complete and authoritative confirmation in *The Hammersmith Railway Company* v. *Brand*[2].

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Lord Blackburn....I think that the case of *The Hammersmith Railway* v. *Brand*[2], in your Lordships' House, settles, beyond controversy, that where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle any one to an action, the right of action is taken away. It is enough to say that such was the unanimous decision of this House; but the reason briefly given by Lord Cairns[3], seems indisputable. "It is a *reductio ad absurdum*" to suppose it left in the power of the person who had the cause of complaint, to obtain an injunction, and so prevent the doing of that which the Legislature intended to be done at all events. The Legislature has very often interfered with the rights of private persons. But in modern times it has generally given compensation to those injured; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others. What was the intention of the Legislature in any particular Act is a question of the construction of the Act.

Before considering the terms of the Metropolitan Poor Act, 1867, it may be as well to consider what was the state of the law before it was passed. The successive Poor Law Acts had given powers for the relief of the poor chargeable, and power to raise money for those purposes; and a series of enactments had given powers to purchase sites for workhouses, and to lodge and maintain the chargeable poor in those workhouses, and to raise money for that purpose. Those who had the management of such workhouses had thus the charge of a

[1] 4 B. & Ad. 30. [2] L. R. 4 H. L. 171. [3] L. R. 4 H. L. at p. 215.

number of persons assembled together under circumstances that made it very likely that there should be sickness, and often contagious sickness, among them. I can, however, find no words in any of the Acts prior to 1844 alluding to that likelihood. There are a few words in the Poor Law Amendment Act, 1844, in the preamble to sect. 4, that shew that the attention of those who framed that Act had been called to the likelihood of infectious disorders being communicated to the inmates of a workhouse; but there was no provision before the passing of the Metropolitan Poor Act, 1867, casting on the managers of a workhouse any special duties as to the management of the sick poor, nor any power to raise funds for any expenditure incurred for such an object, farther than it was involved in the maintenance of the persons chargeable. It seems that the Legislature left the managers of a workhouse subject to the duties which the common law cast upon those having the charge of others, and did not see any necessity for providing them with extraordinary powers, or with the means of raising funds for extraordinary expenses. Those who have the charge of a sick person, if he is helpless (whether the disease be infectious or not) are, at common law, under a legal obligation to do, to the best of their ability, what is necessary for the preservation of the sick person. And the sick person, if not helpless, is bound to do so for his own sake. When the disease is infectious, there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything that can be avoided which shall tend to spread the infection; and if either do so, as by bringing the infected person into a public thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shewn that there was a sufficient cause to excuse what is *primâ facie* wrong: *Rex* v. *Burnett*[1].

To take an extreme case, if a house in which a person ill of an infectious disorder lay bedridden, took fire, and it was necessary to choose whether the sick person was to be left to perish in the flames, or to be carried out through the crowd at the risk, or even the certainty, of infecting some of them, no one could suppose that those who carried out the sick person could be punishable; and probably a much less degree of necessity might form an excuse; but still some excuse is required. It is not necessary here to determine what constitutes a sufficient excuse.

Where those who have the custody of the person sick of an infectious disorder have not the means of isolating him from the other inmates, which is very commonly the case with the poor, and consequently those other inmates and the neighbours are exposed to the risk of infection, I think that the inability to isolate him would form a sufficient excuse to be a defence to any indictment; and I think also,

[1] 4 Mau. & S. 272.

though I am not aware of any authority on the subject, that the neighbours could not maintain any action for the damage which they would in such a case sustain from the proximity of the infected person, it being a necessary incident to the use of property for habitations in town, that contagious sickness may befall their neighbours. If those who have the charge of the infected person have the means of isolating him on the spot, they certainly do well to use them; and if it cannot be done on the spot, and they can, either by their own means or by the aid of charitable persons who have erected an hospital, find a place where he can be isolated so as to avoid the risk of infection, they will do well to use these means. I do not mean to express any opinion as to whether, at common law, they would or would not be responsible for not doing so. But there is no authority, and I think no principle, for saying that they are justified in removing him to a place where the neighbours would be exposed to contagion, though it may be that those neighbours would be fewer in number than the neighbours of the spot where the infection broke out; nor for saying that if that was done, and the contagion was such as to amount to a real nuisance, those neighbours might not maintain an action, and obtain an injunction to protect themselves against the importation of foreign infection. For though, as I have already said, I think it an incident to the use of a habitation in a town that the occupier must bear the necessary risks of the inmates of a neighbouring habitation falling ill of a contagious disease, I do not think it an incident that he is to submit to his neighbour's wilfully, though for very laudable motives and not maliciously, bringing in contagion where it did not previously exist, if the effect is not merely to alarm him, but to injure him. This, I think, is borne out by the decisions on the subject of inoculation....

If this be a correct view of the law, it is obvious that, however desirable it might be to erect and maintain asylums for the reception of the sick poor, sick of infectious disorders, it could not be done by any parochial authorities unless the authority of Parliament was obtained, for raising funds for the purpose and authorizing a public body to obtain a site for the asylum. And the Metropolitan Poor Act, 1867, certainly created such a body and gave it powers to raise money; and without farther powers this body could erect an asylum, provided it was done in such a manner as neither to endanger the public health, nor to form a nuisance to private property. It is, for the reason given by Lord Hardwicke, necessary that the site of such an asylum should be not far from the places where the patients fall sick, and consequently, in the case of the metropolis, be in an inhabited district.

I wish to express myself without prejudice to what I suppose will be one of the points to be decided in the Appeal No. 1. If it be the fact

that such an asylum must be a nuisance, unless on a site so extensive as to keep all habitations at a considerable distance, it may be that such a site cannot be obtained at all in the neighbourhood of the metropolis, or only at a cost so enormous as to make it practically impossible. If that is the case it might be for the consideration of the Legislature whether the certain danger of infection, from leaving the infectious sick paupers where they fell ill, exceeded that which would arise from a well-regulated hospital erected in another place, to such an extent that it was for the public benefit that this latter risk should be run; and whether the rights of owners of property there should stand in the way of such a public benefit, or should be made to give way, with or without compensation.

In the Metropolitan Poor Act, 1867, there are provisions, sects. 15, 16, 17, 18, 21, 28, putting everything under the control of the Poor Law Board, and thus affording a considerable, and probably a sufficient, security that any asylum made under that Act should be a well-regulated asylum, and should not be made in any place unless the Poor Law Board thought it a fit place. But the question, as I think, is whether there is an intention shewn on the part of the Legislature to authorize the erection of an asylum where it is a nuisance to owners of the adjoining property if the Poor Law Board thought it a fit place, either mistakenly thinking the asylum would be no nuisance there, or, perhaps rightly, thinking that there was no other place in which it could be erected without being a greater nuisance than if erected there.

It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears. There are no express words in this Act, and I think the weight of argument is rather against than in favour of such an implication. There is no power given to take land for a site otherwise than by agreement. For, though the Lands Clauses Acts are incorporated by sect. 52, yet by sect. 53 so much of the Lands Clauses Acts as relates to the purchase of lands otherwise than by agreement, shall not be put in force except for the purpose of enlarging an existing workhouse.

The asylum under this Act must therefore be either made by (under sect. 18) converting a workhouse into an asylum, which is not the present case, or by erecting one on land purchased or hired by agreement. In *Clowes* v. *Staffordshire Potteries Waterworks Company*[1], Lord Justice Mellish says[2]: "If no compulsory powers were given for the purpose of purchasing lands upon which the works were to be built, it certainly seems extraordinary that compulsory powers

[1] L. R. 8 Ch. Ap. 125.

[2] L. R. 8 Ch. at p. 139.

should be given to take away the rights of other persons, who have rights in the nature of easements over the lands so purchased."

He was discussing the question whether the party grieved retained his right to an injunction, or was compelled to seek for compensation. In the Metropolitan Poor Act, 1867, there is no compensation given, and the question is whether the purchase, by agreement, of the site for the asylum, gave the defendants power without compensation to do, what would have been a wrong to the plaintiffs if done by the former owners; which thus gives additional force to the argument of Lord Justice Mellish when applied to the construction of this Act.

It is true that in sect. 7 it is said that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time directs." But the construction of that is, I think, only that the managers shall make such asylums in obedience to the order of the Poor Law Board, if they can do so by exercise of the powers given them; and not to say that they must make them at all events, so as to give them additional powers to make the asylums by taking lands, or injuriously affecting lands, otherwise than by agreement. I am sensible of the great difficulty that there may be in finding sites for asylums under this Act, or hospitals under the Public Health Act, 1875, s. 131, unless farther powers be given, but that must be for the consideration of the Legislature.

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Lord Watson....The judgment of this House in *The Hammersmith Railway Company* v. *Brand*[1] determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications, upon a particular site, and for a specific purpose, the use of these works or buildings, in the manner contemplated and sanctioned by the Act, cannot, except in so far as negligent, be restrained by injunction, although such use may constitute a nuisance at common law; and that no compensation is due in respect of injury to private rights, unless the Act provides for such compensation being made. Accordingly the respondents did not dispute that if the appellants or the Local Government Board had been, by the Metropolitan Poor Act, 1867, expressly empowered to build the identical hospital which they have erected at Hampstead, upon the very site which it now occupies, and that with a view to its being used for the treatment of patients suffering from small-pox, the respondents would not be entitled to the judgment which they have obtained. The appellants do not assert that express power or authority to that effect has been given by the Act either to themselves or to the Board; but they contend that, having regard to the nature of the public

[1] L. R. 4 H. L. 171.

duties laid upon them, and the necessities of the case, it must, on a fair construction of the Act, be held that the Legislature did intend them to exercise, and authorize them to exercise, such power and authority under the direction and control of the Poor Law Board.

I see no reason to doubt that, wherever it can be shewn to be matter of plain and necessary implication from the language of a statute, that the Legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed.

On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where (the particular plan or locality not being prescribed) it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights. If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to shew that the Legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that

discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose.

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Appeal dismissed with costs.

[EDITOR'S NOTE. The student will do well to contrast with this case that of *The London, Brighton and South Coast Ry. Co.* v. *Truman* (L. R. 11 App. Ca. 45), which affords an instance of the statutes that are to be construed as authorizing conduct (e.g., there, the maintenance of a large yard for cattle) which would otherwise be an actionable Nuisance. At p. 57, Lord Selborne states vividly the points which distinguish the case from that of *The Metropolitan Asylum District* v. *Hill*.]

(E) INEVITABLE ACCIDENT.

[*No action lies for damage which, through some* "unavoidable[1]" accident, *ensues from a lawful act, done with all due care.*]

STANLEY *v.* POWELL.

KENT ASSIZES. 1891 L.R. [1891] 1 Q.B. 86.

[THIS was an action of trespass. The plaintiff was a beater, and lost an eye when out shooting, by means of a pellet of shot fired from the defendant's gun. At the trial, at Maidstone Assizes, the jury found that the defendant had not been negligent; and the case was reserved for further consideration. The arguments took place in London; and his Lordship reserved judgment.]

DENMAN, J. In the statement of claim the plaintiff alleged that the defendant had negligently, wrongfully, and unskilfully fired his gun and wounded the plaintiff in the eye; and that the plaintiff in consequence had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides (which was conflicting) had been heard, I left the three following questions to the jury:—1. Was plaintiff injured by a shot from defendant's gun? 2. Was the defendant guilty of negligence in firing the charge, to which that shot belonged, as he did? 3. Damages?

The undisputed facts were that on November 29, 1888, the defendant and several others were out pheasant shooting in a party; some being outside and others inside of a wood which the beaters were then

[1] Unavoidable, that is, by such a degree of care as an ordinary reasonable man would take; though possibly avoidable by some still greater degree.

beating up. The plaintiff was employed by one Greenwood (who was the owner of the shooting, and one of the party) to carry cartridges and any game that might be shot. Several beaters were driving the game along a plantation of saplings towards an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation at the end of the drive. The defendant was walking along in that field, a few yards from the hedge which bounded the plantation. As he was going forward, a pheasant rose inside the plantation. The defendant fired one barrel at the bird, and (according to the evidence for the defendant) struck it with his first shot. There was a considerable conflict of evidence as to details; but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back towards the beaters; whereupon the defendant fired his second barrel and killed the bird. But a shot glancing from the bough of an oak (which was in or close to the hedge), and striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second shot was fired. But it was not in a line with the plaintiff; but, on the contrary, so much out of that line that, to hit the plaintiff, the shot must have been diverted to a considerable extent from the direction in which the gun was pointed. The distance between the plaintiff and the defendant in a direct line, when the second barrel was fired, was about 30 yards. The case for the plaintiff was entirely different, but I think it must be held that the jury took the defendant's account of the matter; for they found the second question left to them in the negative. Before summing up the case to the jury I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases that, even in the absence of negligence, an action of trespass might lie. It was agreed that I should leave the question of negligence to the jury, (but if necessary the pleadings were to be deemed to be amended so as to raise any case or defence upon the facts, with liberty to the Court to draw inferences of fact); and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the Court for judgment. But it was afterwards agreed that the case should be argued before myself on further consideration, and that I should give judgment (notwithstanding that I had left the parties to move the Court), as though I had originally reserved it for further consideration before myself.

Having heard the arguments, I am of opinion that by no amendment that could be made, consistently with the finding of the jury, could I properly give judgment for the plaintiff. It was contended on his behalf that this was a case in which an action for trespass would

have lain before the Judicature Acts. This contention was mainly founded on certain *dicta* which, until considered with reference to the cases in which they were uttered, seem to support that contention. But no decision was cited (nor do I think that any can be found) going so far as to hold that if *A* is injured by a shot from a gun, fired at a bird by *B*, an action for trespass will necessarily lie, even though *B* is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction. The jury having found that there was no negligence on the part of the defendant, the most favourable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass; and to consider that the defendant has put upon the record a defence denying negligence, and specifically alleging the facts sworn to by his witnesses, which the jury must be considered to have found proved; and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the Year-book (21 Hen. VII, fo. 28a), where one shot an arrow at a mark which glanced from it and struck another; it was holden to be a trespass. On turning to the case in the Year-book it appears that the passage in question was a mere *dictum* of Rede, who was at the time (1506) a Judge; in a case of a very different kind from that now in question. It only amounts to a statement that an action of trespass may lie even where the act done by the defendant is unintentional. The words relied on are, "Mes ou on tire a les buts et blesse un homme, coment que est incontre sa volonte; il sera dit un trespassor incontre son entent." But in that very passage Rede makes observations which shew that he has in his mind cases in which that which would be *primâ facie* a trespass may be excused. The next case relied upon for the plaintiff was *Weaver* v. *Ward*, decided in 1607 (Hob. 134). There is no doubt that that case contains *dicta* which *per se* would be in favour of the plaintiff. But it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *primâ facie* trespasses:—"Therefore, no man shall be excused of a trespass except it may be judged utterly without his fault"—(shewing clearly that there may be such cases). That case, after all, only decided that when plaintiff and defendant were skirmishing as soldiers of the trainband, and the one "casualiter et per infortunium et contra voluntatem suam" (which must be translated "accidentally and involuntarily") shot the other, an action of trespass would lie unless he could shew that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed, in which there would be no two opinions

about the matter. But other cases may—as the present case did—involve considerable conflicts of evidence and opinion which, until recently, only a jury could dispose of. The case of *Gibbons* v. *Pepper* (1 Lord Raymond, 38), decided in 1695, merely decided that a plea shewing that an accident caused by a runaway horse was inevitable, was a bad plea in action of trespass—because if inevitable that was a defence under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The case of *Gibbons* v. *Pepper* is also reported in 4 Mod. 405, and the concluding words of the judgment, which shew clearly the *ratio decidendi* of that case, are these:—"He should have pleaded the general issue, for if the horse run away against his will he would have been found not guilty; because in such a case it cannot be said, with any colour of reason, to be a battery in the rider." The more modern cases of *Wakeman* v. *Robinson* (1 Bing. 213) and *Hall* v. *Fearnley* (3 Q. B. 919) lay down the same rule as regards the pleading point, though the former case was also relied upon as an authority by way of *dictum* in favour of the plaintiff. And the latter may fairly be relied upon by the defendant, for Wightman, J., in his judgment explains *Wakeman* v. *Robinson* thus:—"The act of the defendant"—viz. driving a cart at the very edge of a narrow pavement, on which the plaintiff was walking, so as to knock him down—"was *primâ facie* unjustifiable, and required an excuse to be shewn. When the motion was first made I had in my recollection the case of *Wakeman* v. *Robinson*. It was there agreed that an involuntary act might be a defence on the general issue. The decision, indeed, turned on a different point, but the general proposition is laid down. I think the omission to plead the defence has deprived the defendant of the benefit of it and entitled the plaintiff to recover." But in truth neither case decided whether, where an act such as discharging a gun is voluntary, and the result injurious, but without negligence, an action of trespass can, nevertheless, be supported as against a plea pleaded and proved, which the jury find to be established, to the effect that there was no negligence on the part of the defendant.

The case of *Underwood* v. *Hewson* (1 Strange, 596), decided in 1724, was relied on for the plaintiff. The report is very short:—"The defendant was uncocking a gun; and, the plaintiff standing to see it, it went off and wounded him. At the trial, it was held that the plaintiff might maintain trespass. Strange *pro defendente*." The marginal note in Nolan's edition of 1795—not necessarily Strange's own composition—is this, "Trespass lies for an accidental hurt," and in that edition there is a reference to Buller's N.P. On referring to Buller (p. 16), where he is dealing with *Weaver* v. *Ward*, he writes as follows:—"So it is no battery if one soldier hurts another in

exercise. But, if he plead it, he must set forth the circumstances so as to make it appear to the Court that it was inevitable and that he committed no negligence to give occasion to the hurt; for it is not enough to say that he did it *casualiter et per infortunium et contra voluntatem suam*, for no man shall be excused of a trespass unless it be justified entirely without his default. And therefore it has been holden that an action lay where the plaintiff, standing by to see the defendant uncock his gun, was accidentally wounded; Strange, 596."

On referring back to *Weaver* v. *Ward* I can find nothing in the report to shew that the Court held that in order to constitute a defence in the case of a trespass it is necessary to shew that the act was inevitable. If inevitable, it would seem that that was a defence under the general issue, but a distinction is drawn between an act which is inevitable and an act which is excusable; and what *Weaver* v *Ward* really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault."...

But the case on which most reliance was placed by plaintiff's counsel was *Leame* v. *Bray* (3 East, 593). That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise, which he was driving on the highway, against the plaintiff's curricle, which plaintiff's servant was driving; by means whereof the servant was thrown out and the horses ran away, and the plaintiff, who jumped off to save his life, was injured. The facts stated in the report include a statement that "the accident happened owing to the defendant, on a dark night, driving his carriage on the wrong side of the road and the parties not being able to see each other; and if the defendant had kept his right side there was ample room for the carriages to have passed without injury." The report goes on to state:—"But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was, therefore, objected for the defendant that, the injury having happened from negligence and not wilfully, the proper remedy was by an action on the case, and not of trespass *vi et armis*. The plaintiff was thereupon nonsuited." On the argument of the rule to set aside the nonsuit, the whole discussion turned upon the question whether the injury was "immediate from defendant's act, or consequential only from it"; and in the result the nonsuit was set aside. But it clearly appears from the report that there was evidence upon which the jury might find negligence; and, indeed, the defendant's counsel assume it in the very objection which prevailed with Lord Ellenborough when he nonsuited the plaintiff. There is nothing in any of the judgments to shew that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that

the accident happened wholly through the darkness of the night rendering it impossible to distinguish one side of the road from the other, and without negligence in either party, the Court would have held that the defendant would have been liable (either in trespass or in case). All the cases to which I have referred were before the Court of Exchequer in 1875 in the case of *Holmes* v. *Mather* (L. R. 10 Ex. 261; *supra*, p. 1), and Mr Baron Bramwell, in giving judgment, dealt with them thus:—"As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough. If the act that does an injury is an act of force *vi et armis* trespass is the proper remedy (if there is any remedy) where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons no action is maintainable; though trespass would be the proper form of action if it were wrongful." That is in accordance with a passage cited by Mr Dickens from Bacon's Abridgement (Trespass, 706), where the word "inevitable" does not find a place. "If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful" (by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury—as, for instance, in a case of self-defence), "and only make it excusable, it is proper to plead this in excuse, and it is in this case necessary for the defendant to shew not only that the act complained of was accidental" (by which I understand, that the injury was *unintentional*), "but likewise that it was not owing to neglect or want of due caution." In the present case, the plaintiff sued in respect of an injury owing to defendant's negligence—there was no pretence for saying that it was intentional so far as any injury to the plaintiff was concerned—and the jury negatived this negligence. It was argued that, nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, this was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so; and that, against any statement of claim which the plaintiff could suggest, the defendant must succeed, if the defendant pleaded the facts sworn to by the witnesses for the defendant in this case, and the jury, believing those facts, found the verdict which they have found as regards negligence. In other words, I am of opinion that, if the case is regarded as an action on the case for an injury by negligence, the plaintiff has failed to establish that which is the very gist of such an action. If, on the other hand, it is turned into an action of trespass, and the defendant is supposed to have pleaded a plea denying negligence and establishing that the injury was (in the sense above explained) "accidental," the verdict of the jury is equally fatal to the action.

Judgment for defendant.

[EDITOR'S NOTE. The foregoing decision took so broad a ground as to render it needless to discuss the defendant's *further* contention that, even if a purely accidental trespass could be actionable, this particular plaintiff had debarred himself from suing, for by voluntarily joining the shooting party he had impliedly consented to accept its risks; (cf. L. R. 1 Ex. 286—7).

This judgment in *Stanley* v. *Powell* affords elaborate illustration of the change which has passed over the English conception of the legal liability for Tort (see Mr Justice O. W. Holmes' *The Common Law*, Lecture III). The older decisions paid more regard to the fact that the plaintiff had sustained a loss through the defendant's conduct, than to the question whether there was anything in that conduct so blameworthy as to justify them in shifting this loss from the one man's shoulders to the other man's. But, at the present day, the idea of Culpability has become judicially associated with that of Liability for Torts, (though the Workmen's Compensation Act indicates a reversion on the part of the legislature to the older and cruder view). This more scientific view is approved by American courts; as the following case will shew.]

[*An American instance of the same rule.*]

BROWN *v.* KENDALL.

SUPREME COURT OF MASSACHUSETTS, U.S.A. 1850. 6 CUSHING 292.

[THIS was an action of trespass for assault and battery.

Evidence was given, at the trial, that two dogs, belonging respectively to the plaintiff and the defendant, were fighting. The defendant took a stick about four feet long, and commenced beating the dogs in order to separate them. The plaintiff was looking on, only half-a-dozen yards away. In their struggle, the dogs approached the defendant; who retreated backwards from before the dogs, striking them as he retreated. As he approached the plaintiff (with his back towards him), in raising his stick over his shoulder in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting harm.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion,—were subjects of controversy.

The defendant requested the judge to instruct the jury, that "If both the plaintiff and defendant at the time of the blow were using ordinary care—or if at that time the defendant was using ordinary care and the plaintiff was not—or if at that time both plaintiff and defendant were not using ordinary care—then the plaintiff cannot

recover." And the defendant further requested the judge to instruct the jury that, "Under the circumstances, even if the plaintiff was using ordinary care and the defendant was not, the plaintiff cannot recover"; and that "The burden of proof, on all these propositions, is on the plaintiff."

The judge declined to give these instructions. He left the case to the jury with the following instructions: "If the defendant, in beating the dogs, was doing a necessary act (or one which it was his duty under the circumstances of the case to do), and was doing it in a proper way, then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act (i.e. if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose), the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable (using the word 'inevitable' not in a strict but a popular sense). If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover; and this rule applies, whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on defendant."

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant tendered a bill of exceptions.]

* * * * * * *

Shaw, C.J., for the Court....The facts set forth in the bill of exceptions preclude the supposition that the blow inflicted by the defendant was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and thus involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. (We use the term "unintentional" rather than "involuntary," because in some of the cases it is stated that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a "voluntary" act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.)

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of

the common law, whether a party's remedy, where he has one, should be sought in an action on the case, or in an action of trespass. (This is very distinguishable from the question, whether in a given instance, *any* action will lie.) The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, Trespass lies; if consequential only, and not immediate, Case is the proper remedy; *Leame* v. *Bray* (3 East, 593), *Hugget* v. *Montgomery* (2 N. R. 446).

In these discussions it is frequently stated by judges that, when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such that some action will lie. These dicta are no authority, we think, for holding, that damage received by a direct act of force for another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, nor careless. In the principal case cited, *Leame* v. *Bray*, the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent if not unlawful. In the course of the argument of that case (p. 595), Lawrence, J., said: "There certainly are cases in the books, where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the proposition may be true, because though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597), "No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not." But he immediately adds, "Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? And if so, it must be trespass; for every manslaughter includes trespass"; shewing what he understood by a case "not wilful."

We think, as the result of all the authorities, that the plaintiff must come prepared with evidence to shew either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable; *Wakeman* v. *Robinson* (1 Bing. 213). If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. Com. Dig. Battery, A. In applying these rules to the present case, we can perceive no reason why instructions (asked for by the defendant)

ought not to have been given to the effect that if both plaintiff and defendant at the time of the blow were using ordinary care—or if at that time the defendant was using ordinary care, and the plaintiff was not—or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man who should have occasion to discharge a gun on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances, in this case, requiring a distinction between acts which it was lawful to do, and acts of legal *duty*. (There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, —and perhaps some others—in which this distinction would be important.) We can have no doubt that the act of the defendant in attempting to part the fighting dogs, (one of which was his own, for the injurious acts of which he might be responsible), was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye and wounded him, this was the result of pure accident, or was involuntary and unavoidable; and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without shewing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that

if the jury believed that the act of interference in the fight was unnecessary, (that is, as before explained, not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant. The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case; and therefore such want of due care became part of the plaintiff's case; and the burden of proof was on the plaintiff to establish it.

Perhaps the learned judge, by the use of the term "extraordinary care," in the above charge, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof. But the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

(F) Leave and Licence.

[*A person cannot bring an action for damage if he* consented *to let it be done, or to run the risk of its being done; (at any rate if the damage is merely tortious and not criminal).*]

PRIESTLEY *v.* FOWLER.

Court of Exchequer. 1837. 3 M. and W. 1.

[Editor's Note. This case (reported *supra*, p. 88) established the doctrine of Common Employment, which is one of the most familiar instances of this defence of leave and licence—a defence that is based on the maxim *Volenti non fit injuria.* ("Quod quis ex culpa suâ damnum sentit, non intelligitur damnum sentire," says Pomponius; Dig. 50. 17. 203, cf. 13. 6. 23.) That doctrine, as we have seen (pp. 88—90, 94—97), proceeds on the assumption that a man, by voluntarily entering the employment of another, consents to run all the ordinary risks incident to the services he is to render; and that amongst these risks must be reckoned all such as arise from the negligence of the fellow-servants working with him in this employment which is common to them all. Similarly, as an American judge has tersely said, an employé "may expressly contract to take the obvious risks of danger from defective machinery. If he does so, his employer owes him no duty in respect to such risks; and if he is hurt, from a cause included in the contract, the maxim *Volenti non fit injuria* applies, and he cannot recover. Whether he knows the particulars of the danger is immaterial, if he knows there is danger, and expressly contracts in regard to it without caring to know the particulars....And in such a case he absolves his employer from what otherwise might be his duty of making the machinery safer. The reason applies equally where without any express stipulation in regard to risks, he enters a service which, by reason of the obvious condition of the ways, works, and machinery, involves peculiar dangers. Such a contract as ought to be implied from the situation and dealings of the parties is implied; and it has the same effect as if expressly made." (*Per* Knowlton, J. 158, Mass. 139.)]

[*But, to constitute consent, there must be both* knowledge *of the risk of damage and also* acquiescence.]

SMITH *v.* BAKER AND SONS.

HOUSE OF LORDS. L.R. [1891] APP. CA. 325.

THIS appeal arose in an action brought by the appellant in the County Court of Yorkshire, held at Halifax, to recover damages against the respondents (who were railway contractors) for injuries sustained by him whilst in their employment. The appellant had been working for the respondents on the Halifax High Level Railway for some months prior to the day on which he received his injuries. The duties assigned to him when he first entered their employment were to fill skips or crates with stones, which were to be lifted by a steam crane, in order to be put into waggons. He was next engaged in slinging stones on to the crane, and about two months before the accident he was set to work a hammer and drill with two other servants of the respondents, he working the drill whilst they worked the hammer. On the day of the accident he was sent with two others to drill a hole in the rock in a cutting. Whilst they were thus employed, stones were being lifted from the cutting, which was seventeen or eighteen feet deep. The crane was on the top of the cutting, near the edge. In slinging a stone a chain was put round it and a hook hitched into one of the links. To this chain the chain from the crane was fastened. When the stones were clear of the bank the arm of the crane was jibbed in the one or the other direction, according to the position of the waggons into which the stone was to be loaded. If it was jibbed in one direction it passed over the place where the appellant was working. Whilst he was working the drill, a stone in the course of being lifted fell upon him, and caused serious injuries. No warning was given that the stone was to be jibbed in that direction. The plaintiff in his evidence stated that the men were jibbing over his head, that whenever he saw them he got out of the way, but at the time that the stone fell upon him he was working the drill and so did not see the stone above. One of his fellow-workmen had in the plaintiff's hearing previously complained to the ganger of the danger of slinging stones over their heads, and the plaintiff himself had told the crane-driver that it was not safe. In cross-examination the plaintiff stated that he was a navvy, and accustomed to this particular work for six or seven years. He had been at it long enough to know that the work was dangerous; he had been at the same class of work in the same cutting when they were jibbing overhead every day; he

was doing that safely for four or five months. Sometimes he could see the stones being craned up above him; when he saw them he got out of the way. At the close of the plaintiff's case the defendants' counsel submitted that the plaintiff must be non-suited on his own admission as to his knowledge of the risk, citing *Thomas* v. *Quartermaine*[1]. The learned judge (Judge Snagge), however, refused to non-suit. The only witness called for the defendants was Hanson, the ganger, who was superintending the work on the day of the accident, and under whose orders the plaintiff was. Hanson stated that they had put the sling-chain on to the stone in the ordinary way, but no explanation was given or suggestion made as to what was the cause of the disaster. He said the rule at the works was that every one should look out for himself; it was part of the plaintiff's employment to look out; the men ought to have stopped work while the stone was being jibbed round; that would be the safe way; he told the men to get out of the way. After the defendants' case closed the learned judge left several questions to the jury, which were answered by them as follows:

1.—*Q.* Was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied?—*A.* No.

2.—*Q.* Was the omission to supply special means of warning when the stones were being jibbed a defect in the ways, works, machinery and plant?—*A.* Yes.

3.—*Q.* If so, were the employers (or some person engaged by them to look after the condition of the works, etc.) guilty of negligence in not remedying that defect?—*A.* Yes.

4.—*Q.* Was the plaintiff guilty of contributory negligence?—*A.* No.

5.—*Q.* Did the plaintiff voluntarily undertake a risky employment with the knowledge of its risks?—*A.* No.

6.—*Q.* Amount of damages (if any)?—*A.* £100.

Application was made on behalf of the defendants to have judgment entered for them, notwithstanding the findings of the jury, on the ground that the case ought not to have been allowed to go to them, the plaintiff having admitted that he knew of the risk and voluntarily incurred it. The learned judge directed judgment to be entered for the plaintiff for £100, the amount of damage assessed by the jury....

The Court of Appeal afterwards reversed this judgment, and entered judgment for the defendants, mainly, or it may be said exclusively, on the ground that there was no evidence of negligence on the part of the defendants; although the Lord Chief Justice expressed an opinion that the judgment of the county court judge ought to be set aside on another ground also, namely, that the

[1] 18 Q. B. D. 685.

plaintiff had been engaged to perform a dangerous operation and took the risk of the operation he was so called upon to perform.

* * * * * * *

E. Tindal Atkinson, Q.C., and *W S. Robson* for the respondents.... The plaintiff admitted he knew he could not watch the crane. The only defect found by the jury was the omission to give warning, and that defect (if it was one) the plaintiff knew of, and voluntarily undertook to run the risk. No evidence was given of any other defect or of any negligence in slinging the stone or working the crane or otherwise. The jury probably meant that the machinery, that is the system, was defective unless warning was given; but that gives the plaintiff no advantage. He either originally contracted to run the risk or continued in his employment after knowledge that there was no one to give warning. The maxim "Volenti non fit injuria" applies as much to cases outside a contract—visitors at a house for instance—as to contracts. Here it is a case of contracting to run the risk. A man who with knowledge contracts to work under a defective system—e.g. a shaky roof—cannot complain if the roof falls.

* * * * * * *

LORD HERSCHELL....It was said that the maxim, "Volenti non fit injuria," applied, and effectually precluded the plaintiff from recovering. The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. The maxim has no special application to the case of employer and employed, though its application may well be invoked in such a case. The principle embodied in the maxim has sometimes, in relation to cases of employer and employed, been stated thus:—A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the proposition thus stated there is no difficulty in giving an assent, provided that what is meant by engaging to perform a dangerous operation, and by the risks incident thereto, be properly defined. The neglect of such definition may lead to error. Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a right of action. For example, one who has agreed to take part in an operation necessitating the production of fumes injurious to health, would have no cause of action in respect of bodily suffering or inconvenience resulting therefrom, though another person residing near to the seat of these operations might well maintain an action if he sustained such injuries from the same cause.

But the argument for the respondents went far beyond this. The learned counsel contended that, even though there had been negligence on the part of the defendants, yet the risk created by it was known to the plaintiff; and inasmuch as he continued in the defendants' employment, doing their work under conditions, the risk of which he appreciated, the maxim, "Volenti non fit injuria," applied, and he could not recover; that his proper course, if he wished to avoid the risk of his employers' negligence, was to refuse to perform the work under such conditions. Their argument necessarily went this length, for the facts on which it was grounded were simply these: that the plaintiff had admitted that he knew the work was dangerous. I am not quite sure that he was not referring in his answer to the character of the work generally, rather than to the special danger arising from jibbing the stones overhead; but in a subsequent answer he stated that he had heard a fellow-workman say to the ganger that it was dangerous to jib stones and skips over their heads, and that he thought so too.

It is obvious that the degree in which the work was dangerous depended entirely on the conditions under which it was carried on and the amount of care exercised. It would be practically unimportant or very great according to the character of the appliances used, the mode in which the stone was slung, and the presence or absence of warning at the critical time. In the present case it must be taken on the finding of the jury that the danger was at least enhanced and the catastrophe caused by the negligence of the defendants; and the question for your Lordships' consideration is whether, under such circumstances, the fact of the plaintiff having continued to perform the duties of his service precludes his recovery in respect of this breach of duty because the acts or defaults which constituted it were done "volenti."

There may be cases in which a workman would be precluded from recovering even though the risk which led to the disaster resulted from the employer's negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that, if with this knowledge he continued to perform his work and thus sustained the foreseen injury, he could not maintain an action to recover damages in respect of it. Suppose, to take an illustration, that owing to a defect in the machinery at which he was employed the workman could not perform the required operation without the certain loss of a limb. It may be that if he, notwithstanding this, performed the operation, he could not recover damages in respect of such a loss; but that is not the sort of case with which we have to deal here. It was a mere question of risk which might never eventuate in disaster. The plaintiff

evidently did not contemplate injury as inevitable, not even, I should judge, as probable. Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim, "Volenti non fit injuria," applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong.

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim, "Volenti non fit injuria," becomes applicable.

It was suggested in the course of the argument that the employed might, on account of special risk in his employment, receive higher wages, and that it would be unjust that in such a case he should seek to make the employer liable for the result of the accident. I think that this might be so. If the employed agreed, in consideration of special remuneration, or otherwise, to work under conditions in which the care which the employer ought to bestow, by providing proper machinery or otherwise, to secure the safety of the employed, was wanting, and to take the risk of their absence, he would no doubt be held to his contract, and this whether such contract were made at the inception of the service or during its continuance. But no such case is in question here. There is no evidence that any such contract was entered into at the time when the plaintiff was first engaged, and the fact that he continued work notwithstanding the employer's breach of duty affords no evidence of such special contract as that suggested.

It is to be observed that the jury found that the plaintiff did not voluntarily undertake a risky employment with knowledge of its risks, and the judgment of the county court, founded on the verdict of the jury, could only be disturbed if it were conclusively established upon

the undisputed facts that the plaintiff did agree to undertake the risks arising from the alleged breach of duty. I must say, for my part, that in any case in which it was alleged that such a special contract as that suggested had been entered into I should require to have it clearly shewn that the employed had brought home to his mind the nature of the risk he was undertaking and that the accident to him arose from a danger both foreseen and appreciated.

* * * * * * *

Order of the Court of Appeal reversed, with costs to plaintiff.

[EDITOR'S NOTE. It will be seen that in *Smith* v. *Baker* the risk was not one which had been obvious to the injured man at the time he entered into the contract of service; and therefore it could not be said that he had accepted it in the first instance, but only that after it had been brought to his notice he still continued in the employment.

Where the tort is of so extreme a character as to amount to a crime, Leave and Licence would afford no defence to a criminal prosecution; (see Kenny's *Outlines of Criminal Law*, p. 110). But the interesting question whether it would be equally unavailing in an action of Tort—e.g. whether a person injured in a prize-fight or duel, or other voluntary but criminal contest, might not recover damages for the injury so sustained—has never been settled in England. Against his claim it might be urged that to allow it would contravene the maxims, *Ex turpi causâ non oritur actio*, and *In pari delicto potior est conditio defendentis*. And see what is said by Hawkins, J., in L. R. 8 Q. B. D. at p. 353. Sir Frederick Pollock, however, inclines to think that, if the point should arise, English judges would permit the person so injured to sue. And in several of the United States it has been established that such a civil action does lie; yet, although the Consent is of no effect as a bar to the action, it is allowed in those States, somewhat illogically, to be taken into account as diminishing the amount of damages to be recovered.

To the words on p. 156, "It is quite clear...engendered," a corollary was added in *Monaghan* v. *Rhodes* (L. R. [1920] 1 K. B. at p. 497); viz. that the nature of the employment may be "such that the appliances, or part of them, are provided by some person other than the employer. *That* does not relieve the employer of his common-law duty. Though it may very well be that he will not be responsible for a defect in the plant which may have arisen by the negligence of the actual owners of the appliances, without *his* negligence." See also *Biddle* v. *Hart*, L. R. [1907] 1 K. B. 649.]

(G) Self-defence against Wrongs.

[*No action lies for damage necessarily inflicted in defending your person or your property against an imminent* unlawful *harm* (*unless the damage be disproportionately great*).]

WRIGHT *v.* RAMSCOT.

Court of King's Bench. 1667. 1 Saunders 84.

Trespass.—The plaintiff declared that the defendant, on the 1st of April, in the 17th year of the now king, at Castleton, in the county of Derby, did beat, strike, and with a certain knife did stab a mastiff of the plaintiff, so that by reason thereof the mastiff died; and other wrongs, &c. The defendant pleaded in bar, that the plaintiff, on the same day and year, at the parish of Chapel in the Frith, in the same county, suffered his mastiff to go unmuzzled in the street, by reason whereof the mastiff ran violently upon a dog of one Ellen Bagshaw, and did then and there bite the said dog (which dog the said Ellen kept in her house for the preservation thereof); wherefore the defendant, being the servant of the said Ellen, then and there killed the mastiff that he might not do any further mischief. And this, &c.; wherefore, &c. Upon which plea the plaintiff demurred in law.

And Saunders of counsel with the plaintiff argued that the plea was bad, because the law takes notice of a mastiff as a valuable thing; and there is an original writ for killing a mastiff in the Register. And in Cro. Eliz. 125 it is said that the law takes notice of a mastiff, hound, spaniel, and tumbler; and a man may justify a battery in defence of his dog, as appears in Rastal's Entries. And in Cro. Jac. 44, trespass was brought for killing a mastiff; and there it is not doubted but the action well lies; but there the defendant justified, because the mastiff infested a warren, and could not be restrained doing damage there; but here the defendant hath done an injury to the plaintiff by making him lose a valuable thing without any cause; for the plaintiff is not bound by law to muzzle his mastiff, so long as he does no damage; and it is natural for one dog to bite or worry another; and therefore he ought not to be killed, unless it cannot be otherwise prevented. And here the defendant has not said that he

could not otherwise part or take off the mastiff from worrying the other dog; and if he had said so, it would have altered the case: and he might have justified the beating of the mastiff to preserve his dog, but not the killing of him, unless it could not be otherwise prevented. But in this case he says nothing more but that he killed the mastiff to prevent the other dog from being killed; whereas, for anything that appears to the contrary, he might have saved the other dog without killing the mastiff: and so he has killed the mastiff without any necessity or cause, which is not justifiable; and he has not in any way excused that injury. And therefore he concluded that the plea was bad. And of that opinion was the whole court; and judgment was given for the plaintiff.

[*But* necessity *must be proved.*]

JANSON *v.* BROWN.

Nisi Prius. 1807. 1 Campbell 44.

Trespass for shooting the plaintiff's dog. Pleas, 1. *not guilty*; and 2. a justification, that the dog was worrying and attempting to kill a fowl of the defendant's, and could not otherwise be prevented from so doing. Replication to the last plea, *de injuriâ suâ propria absque tali causâ.*

The case being made out on the part of the plaintiff, Garrow for the defendant said, he should prove that just before the dog was shot, being accustomed to chase the defendant's poultry, he was worrying the fowl in question, and that he had not dropped it from his mouth above an instant when the piece was fired. But,

Lord Ellenborough said, this would not make out the justification; to which it was necessary that when the dog was shot, he should have been in the very act of killing the fowl, and could not be prevented from effecting his purpose by any other means.

Verdict for plaintiff, with 1*s.* damages.

[See also Scott *v.* Shepherd, *supra*, p. 19; and "Assault," *infra*, p. 246.]

[*Absence of Necessity.*]

WELLS *v.* HEAD.

BUCKINGHAM ASSIZES. 1831. 4 CARRINGTON AND P. 568.

ACTION for shooting the plaintiff's dog. It was proved that the dog had worried some sheep belonging to the defendant. But it appeared that it had left the field in which the sheep were, and had crossed an adjoining close, and was in a third field when the defendant shot it.

ALDERSON, J., said that, whatever the provocation to shoot the dog might be, yet the verdict must pass for the plaintiff. For it was clear that the dog was not shot in protection of the defendant's property—as he was shot after he had left the field in which the sheep were. But though there could not be a verdict for the defendant, the habits of the dog might be considered in mitigation of damages.

Verdict for plaintiff; damages, one guinea.

[EDITOR'S NOTE. The person threatened with the unlawful harm must not only make sure, as these cases shew, that the damage he inflicts was indispensable for warding off that harm, but further must make sure that the prospective harm was so great as to justify warding it off by this amount of damage. E.g. if other people's hens are scratching up his seeds he must not only consider whether he cannot chase them out, instead of shooting them, but also whether the damage they do to the seed-bed must not be less than the damage that would be done by shooting them. It is one thing to kill a mongrel cur which is worrying your prize-poultry, and another to kill a well-bred retriever which is chasing your barndoor fowls.

A vivid case of actual Necessity is given in Bacon's Abridgment (Trespass, F):—"If a man, who is assaulted and in danger of his life, run through the close of another without keeping in a footpath, an action of Trespass does not lie. Because the doing of this—it being necessary for the preservation of his life—is lawful."]

(H) PUBLIC NECESSITY.

[*No action lies for damage necessarily inflicted in warding off an imminent harm which concerns the* public weal, *even though it be not an unlawful harm; (unless the damage be disproportionately great).*]

THE LUNATIC'S CASE.

SURREY ASSIZES. 1348. 22 LIB. ASS. 56.

BILL of Trespass for beating, wounding, maiming, and imprisoning the plaintiff.

Finch. As to the wounding and mayhem, we plead Not Guilty. And as to the battery and imprisonment, we say that the plaintiff, at the time alleged, was in a fit of madness and did great harm; and that the defendant (with the other relations of the plaintiff) took him and bound him and put him into a house, and chained him there and beat him with a rod[1]. And in no other way did we beat or imprison him. And I do not understand that he can treat such an imprisonment and battery as being any tort on our part.

Rich. You did it of your own wilfulness, without any such cause.

And they denied this.

Note that, in another action of false imprisonment, a defendant justified the imprisonment; on the ground that the plaintiff with other wrongdoers came into the township of C., with swords and shields, and beat and wounded J. de F. almost to death; and that a hue and cry was raised thereon, and the defendant came as steward of the township, and took and arrested the plaintiff until they should know whether J. de F. would live or not. And he said that such doing could not be alleged against him as a tort. The plaintiff replied that it was done wilfully. And the others denied this.

So, in an action of Trespass for beating and wounding, the defendant justified his act, on the ground that W. de M. had assailed the defendant, with a knife drawn in his hand, and had sought to strike the defendant, whereon the defendant had seized the haft of the knife with his hand, and on this the plaintiff came to the aid of W. de M. and clutched the blade of the knife from defendant's grasp, and thereby hurt his own hand with it, without the defendant's wounding or beating him.

Scrope. You did beat and wound us, as we allege. And the others deny it.

[1] "And in 10 Elizabeth (which case I have heard in this court [King's Bench]) a constable took a madman and put him in prison, where he died; and the constable was indicted of this, but was discharged, for the act was legal"; (Owen, 98).

[*But this immunity does not extend to the protection of mere* private *interests; still less to the* officious *protection of them by a stranger.*]

MALEVERER *v.* SPINKE.

COURT OF COMMON PLEAS. 1537. DYER 36*b*.

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Mountague [Serjeant]....We admit that in some cases a man may justify committing a tort. But it is only in cases that regard the public weal. Thus in time of war a man may justify erecting bulwarks in another's land, without licence[1]. Similarly, one may justify pulling down the house of another when it is on fire, to protect the neighbours' houses. For these are cases of the common weal....

Even when the thing tends to a man's profit and not to his harm, it still remains unlawful to commit a tort against him. Thus if one saw his neighbour's beasts doing damage in another neighbour's land, it would not be lawful for him to chase them out; and, if he do chase them, their owner can bring an action of trespass against him, though he was doing him a kind turn and saving him from having to pay damages for what the cattle might have eaten. A like ruling was given in 21 Hen. 7; when a man brought an action of trespass for the carrying away of his corn, and the defendant pleaded that most of the corn lay cut and was in jeopardy from cattle, and that he accordingly carried it to the plaintiff's own barn and stored it there. For this was adjudged to be no defence....So, again, if a drain is cut in the soil by a man who has only a right of common in the land, though the drain improves the land, yet he will be liable to an action for cutting it.

[1] [EDITOR'S NOTE. See *per* Buller, J., in 4 T. R. 797. The same principle, that *Salus populi suprema est lex*, may be applied to other urgent necessities of national defence. Thus in *Mitchell* v. *Harmony* (13 Howard 115)—an action against a colonel in the United States army, for seizing wagons and their teams in time of war—the Supreme Court of the United States said in its judgment, "There are without doubt occasions on which private property may lawfully be taken possession of, or even destroyed, to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property for public use. In such cases the officer is not a trespasser....But the law does not permit private property to be taken, to insure the success of *every* enterprise against the public enemy which the commanding officer may deem it advisable to undertake." For it is only in cases of "existing, immediate, and overwhelming public necessity," that any such right arises.]

[*A* highway *is sufficiently of public interest; but a private* way *is not.*]

TAYLOR *v.* WHITEHEAD.

COURT OF KING'S BENCH. 1781. 2 DOUGLAS 745.

TRESPASS for breaking and entering the close of the plaintiff, at the parish of Otley, in Yorkshire. The defendant pleaded: 1. The general issue: 2. A right of way, by prescription, through a lane of the plaintiff's contiguous to the locus in quo, to Otley bridge on the river Wharfe; that the tenants and occupiers of the locus in quo were, from time whereof, &c. by reason of their tenure, bound to repair the lane, and the banks thereof next to the river; that, at the several times when, &c. the lane was out of repair and overflowed with water, so that the defendant could not use the way without imminent danger of the loss of his life, and goods; and that he necessarily went into, through, and over, the locus in quo, as near to his said way as he possibly could, as it was lawful for him to do for the cause aforesaid: 3. That the locus, &c. lay contiguous to a lane of the plaintiff's, and that the said lane was adjoining to the river Wharfe; that the defendant had a right of way, by prescription, through and over the lane; and, that, because the lane and way were overflowed with water from the said river so much that the defendant could not at the several times, &c. pass or repass, he did necessarily go out of the said way as near to the said way as he possibly could, into, through, and over, &c.

The plaintiff having traversed the prescription to repair laid in the first special plea, and the right of way laid in the last, the cause came on to be tried, before Lord Loughborough, at the summer assizes for Yorkshire, 1780; and the jury found for the plaintiff, on the general issue and the first special plea, and for the defendant on the last.

Afterwards, *Fearnley* obtained a rule to shew cause, why the plaintiff should not be at liberty to enter up judgment on that issue, as well as the others, notwithstanding the finding of the jury, on the ground, that, in point of law, although the defendant had the right of way through the plaintiff's close, he was not entitled to go upon the adjoining land of the plaintiff, when the way was out of repair.

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Lee, for defendant. It is clear law, established by a number of cases, particularly that of *Absor* v. *French*, in Shower[1], and Henn's Case[2], that, where a common highway is out of repair, by the overflowing of a river, or any other cause, passengers have a right to go

[1] B. R., M. 30 Car. 2; 2 Show. 28, Lev. 234.
[2] 8 Car. 1. Sir W. Jones, 296.

upon the adjacent ground. So, if the water impairs the banks of a navigable river, which, indeed, is considered as a highway, it is justifiable to go upon the nearest part of the field next adjoining[1]. No cases are to be found upon the question as to private ways; but there are determinations, the principle of which is, that, where it becomes impossible for a person to exercise his right without a trespass on the soil of another, the law will excuse the trespass. Thus, in Dike and Dunston's[2] case[3], it is stated[4], from the Year-book of 6 Edw. 4, "That, if a man is to lop his tree, and he cannot do it unless it fall upon the land of another, then he may well justify the felling it upon the other's land, because, otherwise, he could not lop it at all." So, in the case of *Miller* v. *Fandrye*, reported in Popham[5], "a man may justify chasing sheep with a dog upon another man's ground, if he cannot otherwise drive them off his own." And, in that case, there is one cited from 22 Edw. 4. 8, where it was held, "That, for necessity, a man who plows may turn his plow on the land of another." [BULLER, J., There a custom was laid.] And another from 8 Edw 4, where it was laid down, "That, if a tree grow in a hedge, and the fruit fall into another's land, the owner may go upon the land and fetch it." These are all trespasses occasioned, as in the present case, by the unavoidable interruption of the exercise of private rights in the regular way. It is of no consequence, upon this issue, who is bound to repair the road, because the justification is not, that the road was out of repair and ought to be repaired by the plaintiff, but that, by the overflowing of the river, it was impossible for the defendant to pass along the way, and, therefore, he necessarily went out of it.

Walker, for the plaintiff, insisted that the grantee of a private way is bound to repair, unless there is an express stipulation for the

[1] *Young* v. ——, N. Pr. before Lord Holt, 1 Ld. Raym. 725.

[2] B. R., M. 28 and 29 El. God. 4. 52.

[3] The decision in that case goes a considerable length towards determining the present in favour of the plaintiff. It was there held, that the defendant, being entitled to a private way over the plaintiff's land, which was cut up with cart wheels, so that he could not so well use his way as before, could not justify filling up the ruts, and cutting a trench to let the water off. And though, on defendant demanding "what remedy he should have," Gawdy, J., observed, that he ought to have pleaded, that he could not use the way *at all* (from whence it might be inferred, that a justification like that which was pleaded in the present case, might be supported), yet Suit, J., gave an answer which seems to leave the defendant in much the same situation in which he is placed by the present case. For, said that learned judge, in answer to the enquiry of the defendant's counsel (as the words are given in this reporter) "if he went that way before in his shoes, let him now pluck on his boots!"

[4] By counsel.

[5] B. R., E. 2 Car. 1. Poph. 161. But that part of the Reports is not by Popham.

grantor to do it....The defendant, therefore, must be considered as bound to repair in this case; and, if the road had become impassable, by his neglecting to guard against the overflowing of the river by keeping up the banks, it was his own fault, and he could not, on that account, be entitled to trespass on the neighbouring ground.

The court stopped Fearnley, who was to have argued on the same side.

LORD MANSFIELD. The question is upon the grant of this way. Now it is not laid to be a grant of a way, generally, over the land; but of a precise specific way. The grantor says, You may go in this particular line, but I do not give you a right to go either on the right or left. I entirely agree with my brother Walker, that, by common law, he who has the use of a thing ought to repair it. The grantor may bind himself; but here he has not done it. He has not undertaken to provide against the overflowing of the river; and, for ought that appears, that may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line.

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Rule made absolute.

[EDITOR'S NOTE. In the severities of the American climate, this application of the principle has assumed still greater practical prominence than in England. "It is a maxim of the common law, that where public necessity comes into conflict with private life, the latter must yield. A person travelling on a highway is in the exercise of a public and not a private right. This rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that other maxim which makes public necessity paramount. If by unexpected occurrences—such as a sudden flood, heavy drifts of snow, or the falling of a tree—a traveller on a highway is shut out from the travelled paths so that he cannot reach his destination without passing upon adjacent lands, he is clearly under a necessity so to do....Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilised community is subject....The limitations of this right can be readily inferred. Having its origin in necessity, it must be limited by that necessity; *cessante ratione, cessat ipsa lex.* Such a right is not to be exercised from convenience merely; nor when other ways may be selected. It is to be confined to cases of inevitable necessity arising from sudden and recent causes which have occasioned impassable obstructions. The nature of the obstruction, the length of time during which it has existed, the vicinity or distance of other public ways, are some of the many considerations which enter into the inquiry." *Per* Bigelow, J., in *Campbell* v. *Race* (7 Cushing 408).

[*As this immunity does not extend to the protection of mere* private *interests, the necessity of protecting your property from harm may not justify your turning the source of harm out of your own land* into *your neighbour's property.*]

WHALLEY *v.* LANCASHIRE AND YORKSHIRE RY. CO.

COURT OF APPEAL. 1884. L.R. 13 Q.B.D. 131.

THE defendants were proprietors of a railway which ran from Brecon Station to Southport, and also for some distance from east to west over a flat country on a low embankment by which it was carried a little higher than the adjoining lands, and on each side of which was a ditch for the purpose of draining the railway. The surrounding land declined or sloped from the south-east to the north-west, so that land on the north-west side of the railway embankment at that part was on a lower level than that on the south-east side of it. The plaintiff was a farmer in the occupation of lands on the north-west side of the railway, but separated from it by lands belonging to other persons.

On the 30th of August, 1881, there was an unprecedented storm and rainfall, which blocked up and over-flooded the drains, so that a large quantity of water became dammed up against the south-east side of the railway embankment. This water having afterwards risen so as to expose the embankment to danger, the defendants caused trenches to be made in the embankment, by which the water was enabled to escape to the north-west side of the railway, and from thence to flow into the adjoining land, and ultimately to that of the plaintiff, where it damaged his crops.

The action was brought for the injury which the plaintiff had sustained by the defendants so causing the water to come on his land. It was tried at the Liverpool Summer Assizes of 1882, before Day, J., when the jury found that the defendants cut the trenches and caused the flood-water to flow over the land of the plaintiff, but that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently. They also found that the land of the plaintiff was injured by the water that so came through the trenches to the extent of £130 beyond what it would have been injured if the trenches had not been cut. On these findings the learned judge gave judgment for the plaintiff for £130.

The defendants appealed.

C. Russell, Q.C., and *Henn Collins, Q.C.*, for the defendants. What the defendants did was not an actionable wrong, but what they were entitled to do in order to protect their railway embankment which they had erected under the powers of their Railway Act, and which they were authorized by such statute to maintain. The water had not come on their land by any act of theirs, and the defendants, therefore, were not in the position of persons who had brought water or any dangerous thing on their own land and were bound to take care it did not escape and injure their neighbour. They were entitled to deal with their embankment, which was their property, in the ordinary way of user, and to do what was required to keep it as a railway embankment....

In *Scott* v. *Shepherd*[1], in which the question was whether trespass would lie against the person who originally threw a squib, which, after having been thrown about in self-defence by other persons, ultimately struck the plaintiff, Gould, J., said, "had the squib been thrown into a coach full of company the person throwing it out again would not have been answerable for the consequences." That is an authority that the first receiver of what may be called a common enemy is not bound to bear the misfortune alone, but may pass it on to others. It was a question of fact for the jury whether the mode used by the defendants for passing this mischief on was a reasonable one to use or not....

BRETT, M.R....The proposition before us comes to this: when the water by an extraordinary misfortune had come to rest against the defendants' property, had they a right, in order to save their own property, to do that, the necessary effect of which was to injure their neighbour's property?

Several cases have been cited. In some it was where one has property in such a position with regard to his neighbour that it must be injured if the neighbour use his property at all in a natural way; if the neighbour were not to be allowed to use his property in a natural way one would be putting a burden upon him by reason of the defect in one's own property, and would be transferring that defect to his. That is the case of mines; where the person who has the lower mine has it in such a defective position that it must suffer unless he can prevent his neighbour from using his mine in the ordinary way. That I take it the law will not allow; so that if the neighbour only uses his property in the ordinary and natural way he is not liable for the damage the other may have suffered from what was really a defect in his own property.

Then we come to the case of having property which is subject to this defect, that unless you can prevent the injury which the

[1] 1 Sm. L. C. 8th Ed. 466; *supra*, p. 19.

ordinary course of nature will bring upon it by transferring that injury to your neighbour's property, your property must suffer as the natural consequence of its position. That is the case of *Menzies* v. *Earl of Breadalbane*[1], where property was so situated with regard to a river that if the river was left alone with its ordinary flow of water, it must in the course of nature eat away the property or occasionally overflow it. If the owner of such property, in order to cure that defect, were to do something to his land which by turning the stream out of its ordinary course would throw that defect on his neighbour's land, he would, I think, according to ordinary principles of law, become liable to pay the damages this would occasion.

There are two other cases which have been decided. An extraordinary danger threatens you; you have a right to defend yourself against it before it has occurred to you[2]. To protect yourself, and only for the purpose of so protecting yourself, you prevent the danger from happening to you, but the danger is so far common that the necessary consequence of its being prevented from happening to you is that it will happen to your neighbour. In so acting in defence of yourself, or of your property, you have done nothing by any act intended to injure your neighbour, and you are not answerable because the danger which has been diverted from you has done mischief to somebody else.

But now we come to a case of this kind—There is something existing which is injurious to your property, and the question is whether, by any active act of yours in order to get rid of that mischief, you are entitled to do something which would cause a misfortune to your neighbour. Now it has been held that if a person brings something on to his own land, which if he does not take precaution may produce danger to his neighbour, he is liable though he does not do any second act whatever, because he did the act which brought about the danger, and he failed to guard against it. One of these cases is where a man brings water on to his own land, and dams it up, so that if it breaks away it must be a danger to his neighbour, and must do him injury: there such man is liable though he does nothing to let the water out—but it bursts away without any act of his.

But then it is suggested that if a person has not brought the danger on his land it makes a difference. So it does. If he has not brought the danger there, and without any act of his it breaks through his land on to his neighbour's land, I take it he is not liable. In that case both have suffered from a common extraordinary danger, but one has suffered before the other; that is all.

But now comes this question, the danger has not been brought by a person on his own land, but it has come there—an extraordinary danger, which, if left standing there, will injure his property, but not

[1] 3 Bli. (N.S.) 414. [2] E.g. locusts approaching; L. R. [1911] A. C. 355.

that of his neighbour. Can he then, in order to get rid of and cure the misfortune which has so happened to himself, do something which will transfer that misfortune to his neighbour? That seems contrary to the maxim that you must not, when you have the choice, elect to use your property so as to cause injury to your neighbour.

The present case is a little more complicated than that. In this case the water endangered the embankment, and moreover it would have gone on to the plaintiff's land in any event, but then if it had been left alone and allowed simply to percolate through the embankment, even though all of it would have gone on the plaintiff's land, it would have gone without doing the injury which was done by reason of its passing through the cuttings which the defendants made. The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and therefore it seems to me that they are liable. But then it is said that the defendants are not, because they have only used the railway in the ordinary course a railway would be used, and therefore the case comes within the principle that I endeavoured first to state, namely, that the plaintiff had land which had a defect in it by reason of its neighbourhood to a railway which had to be used in the ordinary way of railways. It is true that the owner of land next to a railway cannot recover, because smoke, which has come from the engines of trains without any negligence on the part of the railway company, has destroyed or injured such owner's fruit or trees, because that arises from using the railway according to the ordinary nature of railways. But it is impossible to my mind to say that to cut holes through a railway embankment is the ordinary use of it, on the contrary, the more holes are cut through it, the less fit is it for use as an embankment. An extraordinary misfortune happened, it fell upon the defendants, and if they had allowed things to remain as they were, they would have been the sufferers; but in order to get rid of the misfortune which had happened to them, and which, rebus sic stantibus, would not have injured the plaintiff, they did something which brought an injury upon the plaintiff. Under those circumstances it seems to me the defendants are liable....

And I should like to say with regard to the squib case put by Gould, J., in *Scott* v. *Shepherd*[1], that the squib was a danger to all, and was never in the possession of the person who was in the coach, but was flying about; and by his throwing it out of the coach where he was he only prevented it from coming into his possession just as much as if he struck it with a bat.

Appeal dismissed.

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[1] Cited in argument, *supra*, p. 167.

(I) Exercise of Unqualified Rights.

[*Some legal rights are so Unqualified that no action lies for damage which ensues,* even directly, *from their exercise, however negligent or malicious that exercise may be*[1].

One such right is the right to disturb the soil of your own land, and all subterranean *water that percolates through that soil without a known channel.*]

CHASEMORE *v.* RICHARDS.

House of Lords. 1859. 7 Clark's H.L.C. 349.

[The plaintiff was a millowner near Croydon; the defendant was the clerk to the Local Board of Health of that town, and was sued as their representative. The plaintiff occupied an ancient water-mill on the river Wandle; and claimed damages against the defendants for having intercepted the water which ought to have flowed into that river and helped to turn his mill.

It appeared that for more than sixty years the occupiers of the mill had used and enjoyed, as of right, the flow of the river for the purpose of working their mill. It also appears that the river Wandle is, and always has been, supplied, above the plaintiff's mill, in part, by the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of Croydon and its vicinity. The water of the rainfall sinks into the ground to various depths, and then flows and percolates through the strata to the river Wandle, part rising to the surface, and part finding its way underground in courses which continually vary. The defendant represents the members of the Local Board of Health of Croydon who, for the purpose of supplying the town of Croydon with water, and for other sanitary purposes, sank a well in their own land in the town of Croydon, and near the river Wandle, and pumped up large quantities of water from their well; and by means of the well and the pumping the Local Board of Health did divert, abstract, and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the river Wandle, and so to the plaintiff's mill;

[1] [Editor's Note. The student should bear in mind that these extreme rights (though some of them are in very constant exercise) are of an *exceptional* nature. For the rule with regard to the exercise of the majority of legal rights is that what a man does must be done with the degree of care usually taken, in similar circumstances, by reasonable people; and, therefore, that he will be liable for any damage caused to other persons by his not taking this amount of care. See p. 538, *infra*.]

and the quantity so intercepted was sufficient to be of sensible value towards the working of the plaintiff's mill.

At the trial at Kingston Assizes, the jury found a verdict for the plaintiff, subject to a special case being submitted for the opinion of the Court of Exchequer. That court gave judgment for the defendant, which was confirmed on appeal by the Court of Exchequer Chamber.]

Bovill....On the facts found in the special case, the plaintiff has a clear right to this water; the burden of shewing a justification for interference with this right rests, therefore, on the defendant. The ordinary right to water is the same as the right to light and air, *Blackstone*[1]; and any additional right must be established by grant or prescription. Here the plaintiff's title is perfect, both as respects ownership of land and length of enjoyment. He is the owner of the land over which flows an ancient mill-stream, and he has been in possession of the right to use the water of that stream for above 60 years. His enjoyment of this right has been invaded by the defendant, who takes the water, not only from land which he occupies, but from a large extent around, and entirely diverts it; so that the plaintiff no longer has the use of it. This is an excess for which the defendant is answerable. Each owner may have the reasonable use of water coming to his land, but the use must be confined within reasonable limits.... [Lord Brougham. If a man sank an artesian well for his use, and got an ample supply of water, he must obtain part at least of it from what would otherwise find its way into neighbouring streams. Suppose it was like the artesian well at Grenelle, which affects streams for forty or fifty miles around; would every proprietor and millowner within such a circle have a right of action?] It is not necessary in this case to consider such speculative instances; here the injury and the cause of it are undoubted.

* * * * * * *

Lord Chelmsford....The distinction between water flowing in a definite channel, and water whether above or underground not flowing in a stream at all, but either draining off the surface of the land, or oozing through the underground soil in varying quantities and in uncertain directions, depending upon the variations of the atmosphere, appears to be well settled by the cases cited in argument. In *Rawstron* v. *Taylor*[2], it was held that, in the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, the landowner was entitled to get rid of it in any way he pleased, although it contributed to the supply of the plaintiff's mill. And in *Broadbent* v. *Ramsbotham*[3], it was decided that a landowner has a right to appropriate surface water which flows over his land

[1] Comm. vol. II. p. 14. [2] 11 Exch. Rep. 369, 382. [3] 11 Exch. 602.

in no definite channel, although the water is thereby prevented from reaching a brook, the stream of which had for more than 50 years worked the plaintiff's mill. Baron Alderson, in delivering the judgment of the Court in that case, says[1], "No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel."

These cases apply to the right to surface water not flowing in any defined natural watercourse. But, of course, the principles they establish are equally, if not more strongly, applicable to subterranean water of the same casual, undefined, and varying description. This appears clearly to have been the opinion of Lord Chief Justice *Tindal* and the Court of Exchequer Chamber, in the case of *Acton* v. *Blundell*[2]; for, although the Court abstained from intimating any opinion as to what might have been the rule of law if there had been an uninterrupted user for twenty years of the well of the plaintiff, which had been laid dry by the mining operations of the defendant, yet the Chief Justice having prefaced his judgment by stating, that "the question argued had been in substance this, whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to and regulates a watercourse flowing on the surface," he concludes with these words[3]: "We think that the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action."

Lord Wensleydale....This case is of the greatest importance. No question that has occurred in my time has been so worthy of the most careful examination....

[1] 11 Exch. 615. [2] 12 M. & W. 324, 348. [3] 12 Mee. & Wels. 353.

With respect to underground waters percolating the strata, two considerations arise which make a material difference between them and the right to superficial streams. In the first place, these subterraneous waters cannot be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used, and some mode of reducing into possession must be permitted by law. If there be no such right, underground water is comparatively useless. A man may therefore dig for his own supply, or make a well for his own use and that of his family, and, in so doing, he may deprive his neighbour's land of moisture, and even tap a copious spring, and prevent it from flowing to his neighbour's close. It can rarely happen that in excavating, in order to obtain the use of the water, some injury will not be caused to the subterraneous supplies of a neighbour, especially as the precise course and direction of such water can seldom be known accurately beforehand.

In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and, in so doing, he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbour's land....

Judgment for defendant affirmed.

[See also MAYOR OF BRADFORD *v.* PICKLES, *supra*, p. 8.]

[EDITOR'S NOTE. In *Chasemore* v. *Richards* six judges were consulted by the House of Lords, and were unanimous in favour of the defendant. They put the matter thus vividly:—"If the water, which has fallen as rain, may not be intercepted whilst percolating through the soil, a man would have no right to intercept its fall—before it reached the soil—by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of that water which, before these erections, reached the ground and flowed to a mill" (p. 372).

This case, as the student will have noticed, was one of subterranean water that not only had no known channel but no definite channel at all; it merely 'percolated.' On the other hand, it already was settled law (see *Wood* v. *Waud*, 3 Exch. Rep. 748) that an opposite rule (i.e. one recognizing the mill-owner's right of action) would apply when the subterranean water flowed in a channel that was both definite *and* known. In the intermediate case—i.e. where the subterranean water has a definite channel but one which is not known, and cannot be ascertained without excavation—it has since been decided, in *The Mayor &c. of Bradford* v. *Ferrand* (L. R. [1902] 2 Ch. 655) and also in Ireland (*Ewart* v. *Belfast P.G.*, 9 L. R. Ir. 171), that the landowner is entitled to intercept the water, and the mill-owner has no right of action against him for doing so.

In the petroleum-producing districts of the United States, a like principle has been applied in the case of the mineral oils, and the 'natural gas' associated with them, that percolate through the sand-rocks in the sub-soil. Thus where a landowner drilled a shaft through which he allowed the gas to ascend and waste itself in

the open air, with a flow which was alleged to be so great that it would, if permitted to continue, irreparably drain off the gas that lay under the land of the adjoining owners, these owners applied in vain for an injunction restraining this waste. The Pennsylvanian court answered that "The owner of the surface is an owner downward to the centre. What is found within the boundaries of his tract belongs to him; according to its nature. The air and the water he may use. The coal and iron and other solid minerals he may mine and carry away. The oil and gas he may bring to the surface in like manner, to be carried away and consumed. True, he cannot estimate the quantity of gas or of oil, as he might of the solid minerals; nor prevent its moving away from him, towards an outlet on some other person's land, through which it may escape from the pressure to which it is subject. This is one of the contingencies to which this species of property is subject. But so long as he can reach the gas and bring it to the surface, it is his absolutely; to sell, to use, to give away, or to squander, as in the case of his other property." (*Hague* v. *Wheeler*, 157 Pa. 324.)]

[*Another of these Unqualified Rights is that of* employing yourself *in your calling. Accordingly no action lies for the damage caused to your rivals by such ordinary*[1] *competition.*]

THE GLOUCESTER GRAMMAR SCHOOLS.

COURT OF COMMON PLEAS. 1411. Y.B. 11 HEN. 4. fo. 27. pl. 23.

Two masters of a grammar school bring an action of trespass against another master.

They state that from time immemorial the right to appoint the masters of the grammar school at Gloucester has belonged to the Prior of Lantone[2] near Gloucester. The said Prior appointed the said plaintiffs to have the government of the scholars of this school and to teach children and others there. But the defendant set up another school in the midst of the town. And thereby the plaintiffs, who had been used to obtain either forty pence or two shillings, for the quarter's schooling of a pupil, could now obtain only twelve pence.

Horton made full defence.

HILL, J. There is no case at all.

Skrene. It is good as an action on the case; for the plaintiffs have now shewn enough cause of action, inasmuch as they have suffered damage.

HANKFORD, J. But *damnum* may be *absque injuriâ.* Thus, if I have a mill, and my neighbour sets up another mill, and thereby the

[1] As to *extraordinary* competition, see the *Mogul Case*, *infra*, p. 195. For Lord Holt's remark on the Gloucester case, see p. 526 *infra*.

[2] [EDITOR'S NOTE. Sir F. Pollock identifies this with Llanthony Abbey, in Monmouthshire.]

profits of my mill fall off, I cannot bring an action against him; and yet I have suffered damage.

THIRNING, C.J., agreed to this. And he added that teaching children is a spiritual office. And also (said he) if a man should receive a tutor into his house to teach his children there, it would cause damage to the ordinary schoolmaster of the town, yet I do not think that any action would lie.

Skrene. But the masters of St Paul's School claim that in all the City of London there shall be no other schoolmasters but themselves.

Horton prayed judgment, if the Court would give it.

Skrene. You are too late.

Then *Horton* demurred, saying that the action is not maintainable.

Skrene. We allege, as aforesaid, the Prior's right of presentation; and the damage which we have sustained by his drawing away our scholars so that now, instead of receiving from each scholar every quarter either forty pence or two shillings, we receive only twelve pence. We crave judgment and ask for damages.

HILL, J. In this case there is no ground of action. The plaintiffs have not a permanent interest, but only a temporary service. What if some one else, as well taught in learning as the plaintiffs themselves, does come down for the purpose of teaching children? It is a thing virtuous and charitable, and a public advantage; and he cannot, by our law, be mulcted for it.

THIRNING, C.J. Whether the Prior have this right of patronage or not, this Court can take no cognisance of it. For the teaching and training of children is a matter of spiritual jurisdiction. And the plaintiffs claim their scholars under an appointment by the Prior, and, thereon base their right of action. That right is merely an accessory, depending on the Prior's right; which is the principal one. And as the Prior's right is a matter spiritual, this action cannot be tried in this Court.

Skrene. If a market be set up, to the injury of my market, I can bring an action of nuisance. And, to take a more common case, if people coming to my market be disturbed or beaten, so that I lose the tolls they would have paid, I have a good action of trespass on the case. So the same here.

HANKFORD, J. I do not think so. For, in the case you put, you have a freehold, and an inheritance, in your market. Here, however, the plaintiffs have no estate in the schoolmastership, but hold it only for a time uncertain. And it would be against reason that a master should be prevented from keeping school wherever he likes—unless it be when he does so where a University has been incorporated or a school has been founded from ancient times. And in the case of a mill (as I said before), if my neighbour sets up a mill, and thereupon

people who used to grind at my mill go to the new one instead, and so I lose my tolls, I shall not have any right of action on that account. But if a miller hinders the water from running to my mill, or causes any other like nuisance, I shall have such action as the law giveth.

And THE COURT was of opinion that the action did not lie.

[*A like Unqualified Right is that of* refusing *to accept, or to give, employment in your calling;*
And, similarly, that of commanding your employés *to make a similar refusal.*]

ROGERS *v.* RAJENDRO DUTT.

PRIVY COUNCIL. 1860. 8 MOORE IND. APP. 103.

THIS was an action brought in the Supreme Court at Calcutta, by the respondents against the appellant.

The appellant was the Superintendent of Marine at Calcutta, an official under the East India Company. In that capacity, he had the control of the whole of the Marine department under Government, including the superintendence and control of the Bengal pilots employed by the Government; who were the only pilots that are engaged in piloting vessels on the river Hooghly. There was no legal obligation to employ a pilot; but, from the dangerous nature of the river, no ship could be safely navigated up or down unless in charge of a pilot. Tugs were required for bringing vessels up the river. The respondents were the owners, or part owners of a steam tug called the *Underwriter*, which was employed in towing vessels on that river. It appeared that there were two rates of payment for the steam tugs employed: the first (called "the Government certificate") according to a tariff, for the time employed; and the second, by special contract.

On the 20th of September, 1857, whilst the Indian mutiny was raging in full force, and every exertion of the Indian Government and its officers was being made to face the difficulties in which they were placed, H.M.S. *Belleisle*, with troops on board destined for Calcutta, arrived at the mouth of the river Hooghly. On the 19th, the captain of the *Underwriter*, having understood that she wanted steam, went on board the *Belleisle*, and entered into a negotiation with the captain of that ship as to the terms upon which she should be taken in tow. The captain of the *Underwriter* required at first Rs. 3000, and then Rs. 2500; and produced a contract ready prepared for the captain of the *Belleisle* to sign. This, however, he refused to

agree to....The captain of the *Underwriter* refused to tow "upon certificate," at a fixed rate per day....The appellant, on being consulted, considered the charge exorbitant. He thought that it was an attempt to make a market of the necessities of the Government, at so critical a period; and that it was of great importance that steps should be taken to prevent the recurrence of similar attempts. He accordingly went to Mr Beadon, the Secretary to the Government of India, and expressed this to him, as his opinion; adding that he thought the better course was to inform the agents of the *Underwriter*, that if they declined to take the *Belleisle* in tow, an order would be issued, prohibiting all pilots of the port, who should be in charge of any vessel, from taking steam of the *Underwriter*. Mr Beadon approved of this course, and made a communication to that effect to the agent of the *Underwriter* at Calcutta. The captain of the *Belleisle*, in these circumstances, refused to take steam of the *Underwriter*, except under Government certificate.

On the 22nd of September, 1857, the appellant in his official capacity, directed an order to be issued in the terms following:

"Steamer *Underwriter*, No. 2,629.—For general information. Officers of the Pilot service are, under orders of the Superintendent of Marine, prohibited from allowing the steamer *Underwriter* to take in tow any ship of which they have pilotage charge.

(Signed) J. S."

Upon the issuing of this order, the respondents applied to the Government upon the subject, complaining of the order. After some correspondence, the Government, on October 19, directed the order to be withdrawn. On November 13, 1857, an action was brought by the respondents in the Supreme Court at Calcutta against the appellant.

The plaint was in form, an action on the case, and pleaded in substance, the facts above stated, charging the appellant with wrongfully and injuriously issuing the order in question. It did not contain any averment of malice. Damages were claimed for the alleged non-employment of the *Underwriter*, during the period the order was in force. The appellant pleaded not guilty, and other pleas not material to mention. The cause came on for trial in the Supreme Court at Calcutta, before Sir James W. Colville, C.J., and Sir Charles M. Jackson, J. The above facts were in substance proved; all malice on the part of the appellant being negatived. Evidence was given that during the period the order was in force, the *Underwriter* had not been engaged in towing vessels in the course of her ordinary business; but, on the occasion of the refusal to tow the *Belleisle*, she had taken in tow a private ship, drawing nine inches less water than that ship, for Rs. 1600. At the close of the respondents' case, the appellant's Counsel applied for a nonsuit, on the ground that no cause

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of action was disclosed. The Court found a verdict for the respondents on all the issues; with Rs. 6624 damages; leave being reserved to the appellant to move to enter a nonsuit, on the ground that no action was maintainable, or to reduce the damages to a nominal sum. A rule nisi was afterwards granted. But when the questions reserved came on for argument, the rule was discharged with costs; the Court holding that the plaint was established by the evidence, and that it disclosed a good cause of action.

On appeal, the case came before the Judicial Committee of the Privy Council.

The judgment of their Lordships, prepared by Sir John T. Coleridge, was delivered (in July 1860) by

The Right Hon. Dr LUSHINGTON....The foundation of every act of tort, apart from the question of malice, is some wrongful act which may be qualified legally as an 'injury.' This position is not contravened in the very able and learned judgment of the Court below; indeed, it is assumed as the principle of decision. And the wrongful act relied on is stated to be, the invasion of "the right of the plaintiffs to employ their vessels in towage; in other words, the right of exercising their lawful trade or calling without undue hindrance or obstruction from others." No doubt an act which, primâ facie would appear to be innocent and rightful, may become tortious if it invades the right of a third person. A familiar instance is the erection, on one's own land, of anything which obstructs the light of a neighbour's house. Primâ facie, it is lawful to erect what one pleases on one's own land; but if by twenty years' enjoyment, the neighbour has acquired the right to the unobstructed transmission of the light across that land, the erection of any building which substantially obstructs it, is an invasion of the right; and so not only does damage, but is unlawful and injurious. The question then is, whether, in this sense, the defendant has been guilty of a wrongful act....

If the prohibition complained of had been limited to pilots in charge of vessels in the public service, we suppose no one would have imagined for a moment that there was anything wrongful in it, or that any action could be maintained on account of it, however prejudicial its consequences might have been to the plaintiffs' business. Nor could it have made any difference if there were no vessels to be towed up but those in the service of the Government; although the consequence would have been directly a total loss of employment by the plaintiffs. For their right to exercise their calling must be understood only as co-extensive with (and not as overriding) the right of the public or of individuals to deal with them, or not, at their pleasure. The right to buy, or to refuse to buy, is as much to be regarded as the right to sell or to refuse to sell.

But the prohibition certainly goes beyond this. It forbids the officers of the pilot service from allowing the *Underwriter* to take in tow *any* ship of which they have pilotage charge. And the question is, whether this difference in extent makes it, as against the plaintiffs, wrongful.

Their Lordships are of opinion that it does not. For the interests of the community, and without any legal obligation, the Government has organized a body of pilots. It does not appear that any law forbids the employment of a pilot who is not of that body; and, indeed, it was proved that there were other pilots, exercising their calling in the port of Calcutta, on whom the Government prohibition would have had no effect. The Government certainly, as any other master, may lawfully restrict its own servants as to those whom they shall employ under them (or co-operate with) in performing the services for the due performance of which they are enrolled and taken into its service. Supposing it had been believed that the *Underwriter* was an ill-found vessel, or in any way unfit for the service, might not the pilots have been lawfully forbidden to employ her until these objections were removed? Would it not, indeed, have been the duty of the Government to do so? And is it not equally lawful and right when it is honestly believed that her owners will only render their services on exorbitant terms? As regards individual owners of vessels—all vessels but those employed on its own account—the Government, by its pilots, co-operates with the plaintiffs in the service of bringing their vessels safely into port. May it not refuse that co-operation so long as it believes the demand made by them unreasonable, and likely to be prejudicial to its own interests, that is, to the interests of the public? Their Lordships think this question can admit of only one answer. And, if so, the prohibition issued by the defendant was in its whole extent a lawful act, and did not interfere injuriously with any right of the plaintiffs....

This case was disposed of in the Court below in a very learned and elaborate judgment; to which their Lordships have given the full consideration it deserves, though they cannot accede to all the conclusions of that judgment. The appeal has been very ably argued at the bar; but their Lordships have not thought it necessary to review and distinguish the many cases cited. It seems to them that when the legal principles to which they have adverted are applied to the facts of this case, its decision turns on a very plain and elementary point. It is essential to an action in tort that the act complained of should under the circumstances be legally wrongful as regards the party complaining. That is, it must prejudicially affect him in some legal right. Merely that it will, however directly, do him harm in his interests, is not enough. Cases are of daily occurrence, in

which the lawful exercise of a right operates to the detriment of another, necessarily and directly, yet without being actionable. The present case appears to their Lordships to be no more.

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It will be observed that their Lordships are only dealing with a case in which no malice (in the most general sense of the term) is imputed or proved against the defendant. It is unnecessary to consider what would have been their judgment in a case in which the defendant had given the same advice to the Government, and done the same act towards the plaintiffs, from any indirect motive, or with direct malice against them. The decision of such a case would turn on totally different principles from the present[1].

* * * * * * *

Judgment reversed.

[1] [EDITOR'S NOTE. As to the question thus left undecided, see the next two cases, ALLEN *v.* FLOOD and QUINN *v.* LEATHEM; also BRADFORD *v.* PICKLES, *supra*, p. 8.]

[*There is a similar right to* advise *any one, even a stranger, to make a similar refusal of employment, even though you know that the refusal will cause damage; (at any rate*[1] *if your advice be given for the sake, not of causing that damage but, of benefiting yourself or the person advised).*]

ALLEN *v.* FLOOD AND TAYLOR.

HOUSE OF LORDS. 1897. L.R. [1898] APP. CA. 1.

THE facts material to this appeal (omitting matters not now in question) were as follows: In April 1894 about forty boiler-makers, or "iron-men," were employed by the Glengall Iron Company in repairing a ship at the company's Regent Dock in Millwall. They were members of the boiler-makers' society, a trade union, which objected to the employment of shipwrights on ironwork. On April 12 the respondents Flood and Taylor, who were shipwrights, were engaged by the company in repairing the woodwork of the same ship, but were not doing ironwork. The boiler-makers, on discovering that the respondents had shortly before been employed by another firm (Mills and Knight) on the Thames in doing ironwork on a ship, became much excited. One of them telegraphed for Allen, the London delegate of the

[1] See note on p. 194 *infra*.

boiler-makers' society. Allen came up on the 13th, and being told by Elliott that the iron-men, or some of them, would leave at dinner-time, replied that if they took the law into their own hands he would use his influence with the council of the society that they should be deprived of all benefit from the society and be fined, and that they must wait and see how things settled. Allen then had an interview with Halkett, the Glengall Company's manager, and Edmonds the foreman, and the result was that the respondents were discharged at the end of the day by Halkett. An action was then brought by the respondents against Allen for maliciously and wrongfully and with intent to injure the plaintiffs procuring and inducing the Glengall Company to break their contract with the plaintiffs and not to enter into new contracts with them, and also maliciously, &c., intimidating and coercing the plaintiffs to break, &c., and also unlawfully and maliciously conspiring with others to do the above acts.

At the trial before Kennedy, J., and a common jury Halkett and Edmonds were called for the plaintiffs, and gave their account of the interview with Allen. In substance it was this: Allen told them that he had been sent for because Flood and Taylor were known to have done ironwork in Mills and Knight's yard, and that unless Flood and Taylor were discharged all the members of the boiler-makers' society would be "called out" or "knock off" work that day: they could not be sure which expression was used; that Halkett had no option; that the iron-men were doing their best to put an end to the practice of shipwrights doing ironwork, and wherever these men were employed, or other shipwrights who had done ironwork, the boiler-makers would cease work—in every yard on the Thames. Halkett said that if the boiler-makers (about 100 in all were employed) had been called out it would have stopped the company's business, and that in fear of the threat being carried out he told Edmonds to discharge Flood and Taylor that day, and that if he knew of any shipwrights having worked on ironwork elsewhere, when he was engaging men, for the sake of peace and quietness for themselves he was not to employ them. Allen was called for the defence. His account of the interview is discussed in the judgment of Lord Halsbury, L.C.

Kennedy, J., ruled that there was no evidence of conspiracy, or of intimidation or coercion, or of breach of contract, Flood and Taylor having been engaged on the terms that they might be discharged at any time. In the ordinary course their employment would have continued till the repairs were finished or the work slackened.

In reply to questions put by Kennedy, J., the jury found that Allen maliciously induced the Glengall Company (1) to discharge Flood and Taylor from their employment; (2) not to engage them; that each

plaintiff had suffered £20 damages; and that the settlement of the dispute was a matter within Allen's discretion. After consideration Kennedy, J., entered judgment for the plaintiffs for £40. This decision was affirmed by the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.)[1]. Against these decisions Allen brought the present appeal. It was argued first before Lord Halsbury, L.C., and Lords Watson, Herschell, Macnaghten, Morris, Shand, and Davey on December 10, 12, 16, 17, 1895, and again (the following judges having been summoned to attend—Hawkins, Mathew, Cave, North, Wills, Grantham, Lawrance and Wright, JJ.) on March 25, 26, 29, 30, April 1, 2, 1897, before the same noble and learned Lords, with the addition of Lords Ashbourne, and James of Hereford.

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Lawson Walton, Q.C., and *Rufus Isaacs* for the respondents. The decision of the Court of Appeal may be supported on two grounds. First, the appellant obstructed and interfered with the respondents' trade and means of livelihood. That is in itself an unlawful act. But, secondly, if it were lawful it would be made unlawful if done from a desire to punish the respondents or from any motive which imports malice. There was abundant evidence of this bad motive not only in the evidence given by Halkett and Edmonds but in the appellant's own shuffling and prevaricating account of himself and his interview with them. The respondents had a clear right to the employment: the Glengall Company desired to employ them. Wherever a right is infringed, and damage results, an action will lie unless the defendant can shew that he was exercising a right or discharging a duty. In *Bradford Corporation* v. *Pickles*[2] no right was infringed. This principle, which is of universal application, is illustrated in the case of libel, and of malicious prosecution. In both cases motive is of the essence; as, for instance, where the criminal law is put in motion wrongfully for an indirect purpose, such as obtaining payment of a debt.

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[At the close of the arguments, the House asked those judges who had heard them, whether or not there had been sufficient evidence of a cause of action to be left to the jury. Opinions were delivered in favour of the plaintiffs (the respondents) by Hawkins, J., Cave, J., North, J., Wills, J., Grantham, J., and Lawrance, J.; and in favour of the defendant (the appellant) by Mathew, J., and Wright, J. The great majority of the eight judges were thus in favour of the view which had been unanimously taken in the Court of Appeal. That view was, however, rejected by the House of Lords; Lord Watson, Lord Herschell, Lord Macnaghten, Lord Shand, Lord Davey, and

[1] [1895] 2 Q. B. 21. [2] [1895] A. C. 587. *Supra*, p. 8.

Lord James of Hereford delivering judgments in favour of the defendant; but only Lord Halsbury, L.C., Lord Ashbourne and Lord Morris in favour of the plaintiffs.]

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Lord Herschell....It is certainly a general rule of our law that an act primâ facie lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect.

It has recently been held in this House, in the case of *Bradford Corporation* v. *Pickles*[1], that acts done by the defendant upon his own land were not actionable when they were within his legal rights, even though his motive were to prejudice his neighbour. The language of the noble and learned Lords was distinct. The Lord Chancellor said: "This is not a case where the state of mind of the person doing the act can affect the right. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good the motive might be, he would have no right to do it." The statement was confined to the class of cases then before the House; but I apprehend that what was said is not applicable only to rights of property, but is equally applicable to the exercise by an individual of his other rights.

The common law on the subject was emphatically expressed by Parke, B., in delivering the judgment of the Court in *Stevenson* v. *Newnham*[2]. In that case the question was whether a declaration was good which averred that the defendant "maliciously" distrained for more rent than was due. It was held that the allegation of malice did not make it good. Parke, B., said: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

More than one of the learned judges who were summoned refers with approval to the definition of malice by Bayley, J., in the case of *Bromage* v. *Prosser*[3]: "Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." It will be observed that this definition eliminates motive altogether. It includes only "*wrongful*" acts intentionally done. I may remark in passing that I am quite unable to see how the definition assists the respondents. It seems to me to tell the other way. In the present case the contention is that the malicious motive makes "wrongful" an act that otherwise would not be so....

Great stress was laid at the bar on the circumstance that in an action for maliciously and without reasonable and probable cause putting in motion legal process an evil motive is an essential ingredient.

[1] *Supra*, p. 8. 13 C. B. 285, 297. [3] *Infra*, p. 306.

I have always understood, and I think that has been the general understanding, that this was an exceptional case. The person against whom proceedings have been initiated without reasonable and probable cause is primâ facie wronged. It might well have been held that an action always lay for thus putting the law in motion. But I apprehend that the person taking proceedings was saved from liability if he acted in good faith, because it was thought that men might otherwise be too much deterred from enforcing the law, and that this would be disadvantageous to the public. Some of the learned judges cite actions of libel and slander as instances in which the legal liability depends on the presence or absence of malice. I think this a mistake. The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made. It is true that in a limited class of cases the law, under certain circumstances, regards the occasion as privileged, and exonerates the person who has made false defamatory statements from liability if he has made them in good faith. But if there be not that duty or interest which in law creates the privilege, then, though the person making the statements may have acted from the best of motives, and felt it his duty to make them, he is none the less liable. The gist of the action is that the statement was false and defamatory. Because in a strictly limited class of cases the law allows the defence that the statements were made in good faith, it seems to me, with all deference, illogical to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander. But even if it could be established that in cases falling within certain well-defined categories, it is settled law that an evil motive renders actionable acts otherwise innocent, that is surely far from shewing that such a motive always makes actionable acts prejudicial to another which are otherwise lawful, or that it does so in cases like the present utterly dissimilar from those within the categories referred to.

The question raised by the decision under appeal is one of vast importance and wide-reaching consequences. In *Temperton* v. *Russell*[1] it was held that the principle of *Lumley* v. *Gye*[2], and *Bowen* v. *Hall*[3], was not confined to breaches of contract of service, but applied to breaches of any contract. The law laid down in *Bowen* v. *Hall*[3] in terms applies to all contracts, and I quite agree that the nature of the contract can make no difference.

If the judgment under appeal is to stand, and the fact that the act procured was unlawful as being a breach of contract be immaterial, it follows that every person who persuades another not to enter into any contract with a third person may be sued by that third person if the object were to benefit himself at the expense of such person.

[1] [1893] 1 Q. B. 715. [2] *Infra*, p. 520. [3] 6 Q. B. D. 333.

Such a case is within the very words employed in *Bowen* v. *Hall*[1] as applied in the present judgment. I do not think it possible to maintain such a proposition. It would obviously apply where one trader induced another not to contract with a third person with whom he was in negotiation, but to make the contract with himself instead, a proceeding which occurs every day, and the legitimacy of which no one would question. Yet it is within the very language used in *Bowen* v. *Hall*[1]. He induces a person not to enter into a contract with a third person, and his object is to benefit himself at the expense of the person who would otherwise have obtained the contract, and thus necessarily to injure him by depriving him of it. It was said at the bar by the learned counsel for the respondents, in answer to this difficulty, that there was an exception in favour of trade competition. I know of no ground for saying that such an exercise of individual right is treated with exceptional favour by the law. I shall revert to this point presently in connection with another branch of the respondents' argument. But it is possible to give many illustrations to which no such answer would apply. I give one: a landowner persuades another to sell him a piece of land for which a neighbour is negotiating. It is so situated that it will improve the value of the property of whichever of them obtains it. His motive is to benefit himself at his neighbour's expense; he induces the owner of the land not to contract with his neighbour. The case is within the terms of the judgment in *Bowen* v. *Hall*[1]. Would it be possible to contend that an action lay in such a case? If the fact be that malice is the gist of the action for inducing or procuring an act to be done to the prejudice of another, and not that the act induced or procured is an unlawful one as being a breach of contract or otherwise, I can see no possible ground for confining the action to cases in which the thing induced is the not entering into a contract. It seems to me that it must equally lie in the case of every lawful act which one man induces another to do where his purpose is to injure his neighbour or to benefit himself at his expense. I cannot hold that such a proposition is tenable in principle, and no authority is to be found for it. I should be the last to suggest that there was no precedent was in all cases conclusive against the right to maintain an action. It is the function of the Courts to apply established legal principles to the changing circumstances and conditions of human life. But the motive of injuring one's neighbour or of benefiting oneself at his expense is as old as human nature. It must for centuries have moved men in countless instances to persuade others to do or to refrain from doing particular acts. The fact that under such circumstances no authority for an action founded on these elements has been discovered does go far to

[1] 6 Q. B. D. 333.

shew that such an action cannot be maintained. I think these considerations (subject to a point which I will presently discuss) are sufficient to shew that the present action cannot be maintained.

LORD DAVEY....An employer may discharge a workman (with whom he has no contract), or may refuse to employ one from the most mistaken, capricious, malicious, or morally reprehensible motives that can be conceived, but the workman has no right of action against him. It seems to me strange to say that the principal who does the act is under no liability, but the accessory who has advised him to do so without any otherwise wrongful act is under liability.

To persuade a person to do or abstain from doing what that person is entitled at his own will to do or abstain from doing is lawful and in some cases meritorious, although the result of the advice may be damage to another. This, I will remind your Lordships, is not a case of conspiracy. I do not say whether, if it were, it would or would not make an essential difference. But I do say that I am not aware of any authority binding on this House for holding, and it humbly appears to me to be against sound principle to hold, that the additional ingredient of malicious motive should give a right of action against an individual for an act which if done without malice would not be wrongful, although it results in damage to a third person. The case of libel on a privileged occasion is, of course, altogether different. A libel is held to be excused if the words complained of were used on a privileged occasion. But that excuse may be rebutted by proof of express malice and abuse of the privilege.

In my opinion the somewhat anomalous action for malicious prosecution is based on the same principle. From motives of public policy the law gives protection to persons prosecuting, even where there is no reasonable or probable cause for the prosecution. But if the person abuses his privilege for the indulgence of his personal spite he loses the protection, and is liable to an action, not for the malice but for the wrong done in subjecting another to the annoyance, expense and possible loss of reputation of a causeless prosecution.

It was, however, argued that the act of the appellant in the present case was a violation of the right which every man has to pursue a lawful trade and calling, and that the violation of this right is actionable. I remark in passing that, if this be so, the right of action must be independent of the question of malice, except in the legal sense. The right which a man has to pursue his trade or calling is qualified by the equal right of others to do the same and compete with him, though to his damage. And it is obvious that a general abstract right of this character stands on a different footing from such a private particular right as the right to performance of a contract into which one has entered. A man has no right to be employed by any par-

ticular employer, and has no right to any particular employment if it depends on the will of another.

But is there any such general cause of action irrespective of the means employed or mode of interference? I think it unnecessary to comment on all the cases which have been cited by counsel, and are referred to by the learned judges. I have read them carefully, and I am satisfied that in no one of them was anything decided which is an authority for the abstract proposition maintained. In every one of them you find there was either violence or the threat of violence, obstruction of the highway, or the access to the plaintiff's premises, nuisance, or other unlawful acts done to the damage of the plaintiff. Nor does it appear to me that the gist of the action in those cases was that the plaintiff was a trader or exercised a profitable calling. That circumstance, no doubt, afforded evidence of the damage. But I suppose that if a person obstructed the access to my house or to my vessel by molesting and firing guns at persons resorting thither on their lawful occasions, I may have my action against him, though I do not keep a school, or I am not a trader, but sailing in my yacht for my own pleasure.

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Judgment for the appellant, with costs.

[EDITOR'S NOTE. The student must be careful to observe that the advice here declared to be lawful was not advice to break an *existing* contract, (which it would be illegal to break), but only to abstain from creating a new contract, (an abstinence which would involve no illegality).

It should also be noticed that this decision of the majority of the House of Lords in *Allen* v. *Flood* (1) was opposed, even in the particular case, by a great body of dissentient judicial opinion, and (2) might, if construed broadly, be regarded as laying down doctrines which the House of Lords, on a subsequent occasion, unanimously disapproved, (in QUINN *v.* LEATHEM, *infra* p. 188). It is, therefore, a decision which cannot safely be pressed to any wider scope than that of its own actual circumstances. It is, said Lord Lindley, "a valuable decision, but one that may easily be misunderstood and carried too far"; (in *Quinn* v. *Leathem*, L. R. [1901] A. C. at p. 542. Cf. Lord Halsbury's similar opinion at p. 507.

It was a case of mere Advice; there was no evidence of coercion, intimidation, or threat. Nor was there even Combination. Cf. the concluding lines of p. 191 *infra*.]

[*But a tort will be committed if persons are induced to make a similar refusal by a* combination of advisers, *who use* coercion, *and whose dominant motive is* malice.]

QUINN *v.* LEATHEM.

HOUSE OF LORDS. L.R. [1901] APP. CA. 495.

CRAIG was president, Quinn treasurer, and Davey secretary of a trade union registered as the Belfast Journeymen Butchers and Assistants' Association. By rule 11 of the association it was the duty of all members to assist their fellow unionists to obtain employment in preference to non-society men.

The plaintiff, a flesher at Lisburn for more than twenty years, in July, 1895, was employing Dickie and other assistants who were not members of the union. At a meeting of the association at which Craig, Quinn, Dornan and Shaw were present, and which the plaintiff attended by Davey's invitation, the plaintiff offered to pay all fines, debts and demands against his men, and asked to have them admitted to the society. This was refused, and a resolution was passed that the plaintiff's assistants should be called out. Craig told the plaintiff that his meat would be stopped at Munce's if he did not comply with their wishes. Munce, a butcher, had been getting about £30 worth weekly of meat from the plaintiff for twenty years.

The plaintiff in his evidence said: "For the last four years Munce has had an agreement with me to take my fine meat at so much a pound. He expected me to send it to him every week, and there was no week he did not get it. I had no written agreement with him. Whenever I killed I sent it, but I was not bound—only by word of mouth. It was only that if I sent it he would take it." What this meant did not clearly appear, but Munce's clerk who was called said, "Munce had no contract with the plaintiff: if he wanted his meat he could take it or reject it if he chose; it came weekly and was never refused. Neither was bound either to take or supply it."

In September Davey wrote to the plaintiff that if he continued to employ non-union labour the society would be obliged to adopt extreme measures. After some negotiations with Munce Davey wrote to him that having failed to make a satisfactory arrangement with the plaintiff, they had no other alternative but to instruct Munce's employees to cease work immediately the plaintiff's beef arrived. On September 20 Munce sent a telegram to the plaintiff, "Unless you arrange with society you need not send any beef this week as men are ordered to quit work," and Munce ceased to deal with the plaintiff.

The plaintiff said that in consequence of this he was put to great loss, a quantity of fine meat having been killed for Munce.

Dickie, who had been ten years in the plaintiff's employ, was called and said that he was employed by the week, that he was called out by the society, that he gave the plaintiff no notice when he left, that he left in the middle of the week, and that the plaintiff did not pay him for the broken week. There was no evidence of damage to the plaintiff, pecuniary or otherwise, caused by Dickie's breach of contract.

Evidence was given that "black lists" were issued by the society, containing (inter alia) the names of tradesmen who had dealings with the plaintiff, and one of whom was induced not to deal with him, but there was no evidence connecting Quinn with these lists.

[The action was tried at Belfast before Fitzgibbon, L.J., whose notes say:] "I charged the jury, leaving them the following questions, to which I append their findings: (1) Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?—Answer: Yes. (2) Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence or any of them not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not so to do?—Answer: Yes. (3) Did the defendants Davey, Dornan and Shaw, or any of them, publish the 'black list' with intent to injure the plaintiff in his business, and if so did the publication so injure him?—Answer: Yes.

"The jury found for the plaintiff, with £250 damages, of which £50 was for damages on the cause of action relating to the 'black lists,' and £200 was for damages on the other causes of action. I directed the jury that there was no evidence against the defendants Craig and Quinn upon the cause of action relating to the 'black lists,' and I directed them to assess the damages (if any) on that cause of action separately. On the above findings, on the application of Serjeant Dodd, I gave judgment for the plaintiff upon the other causes of action against all the defendants, with £200 damages, and against the defendants Davey, Dornan and Shaw upon the cause of action relating to the 'black lists' for the further sum of £50 damages."

On appeal by the defendants, the judgment was affirmed by the Divisional Court (Palles, C.B., dissenting, on the ground that *Allen* v. *Flood* seemed to him to legalize what the defendants had done); and afterwards, omitting the part as to the £50, by the (Irish) Court of Appeal[1].

Quinn then (without Craig) appealed to the House of Lords.

[1] *Leathem* v. *Craig*, Irish L. R. [1899] 2 Q. B. D. 667.

McGrath for appellant. To justify the verdict and judgment for the plaintiff it must be shewn that there was a violation of a legal right: some conduct which would have been actionable whatever the motive, and without conspiracy or combination. An act which is not in itself actionable does not become so because the motive is malicious or bad: *Allen* v. *Flood*[1], nor because it is done in combination by two or more, or by the conspiracy of several, unless the conspiracy be criminal. There is no question of criminality here. These latter propositions are not decided by *Allen* v. *Flood*[1], for they were left open in the judgments, but they follow from the reasoning in that case and are the natural sequence of previous decisions.

...With regard to inducing persons not to make contracts or deal with the plaintiff, or continue in his employment, the law is settled by the *Mogul Case*[2]. No matter whether the effect or the intention be to injure another, it is lawful to do these things in order to secure a monopoly, or benefit oneself, and in the absence of criminality what is lawful in one is not unlawful in several. To promote the interests of a trade union is as legitimate as to struggle for the monopoly of a particular business. There was here no threat of violence, obstruction, intimidation, or nuisance, nothing but the advancement of trade unionism by lawful means.

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LORD SHAND....As to the vital distinction between *Allen* v. *Flood*[1] and the present case, it may be stated in a single sentence. In *Allen* v. *Flood*[1] the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests."

...Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen* v. *Flood*[1], as a case of legitimate competition in the labour market, is essentially different, and gives no ground for the defendants' argument.

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LORD BRAMPTON....It has often been debated whether, assuming the existence of a conspiracy to do a wrongful and harmful act towards

[1] [1898] A. C. 1. *Supra*, p. 180. [2] [1892] A. C. 25. *Infra*, p. 195.

another and to carry it out by a number of overt acts, no one of which taken singly and alone would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, and if by those acts substantial damage was caused to the person against whom the conspiracy was directed: my own opinion is that they would.

In dealing with the question it must be borne in mind that a conspiracy to do harm to another is, from the moment of its formation, unlawful and criminal, though not actionable unless damage is the result.

The overt acts which follow a conspiracy form of themselves no part of the conspiracy: they are only things done to carry out the illicit agreement already formed, and if they are sufficient to accomplish the wrongful object of it, it is immaterial whether singly those acts would have been innocent or wrongful, for they have in their combination brought about the intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished.

Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison.

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Lord Lindley....In the case of *Allen* v. *Flood* what the jury found that Allen had done was, that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble Lords who formed the majority of your Lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs[1]. There being no question of conspiracy, intimidation, coercion, or breach of contract for consideration by the House, and the majority

[1] [1898] A. C. p. 19, Lord Watson; p. 115 Lord Herschell; pp. 147—150 Lord Macnaghten; pp. 161, 165 Lord Shand; p. 175 Lord Davey; p. 178 Lord James.

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of their Lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he had acted maliciously and with intent to injure the plaintiffs did not, without more, entitle the plaintiffs to maintain the action....

If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiffs is perfectly intelligible, and indeed unavoidable. Truly to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention of the informant may have been.

...I pass on to consider what the present defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen* v. *Flood*[1]. In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them.

...It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man

[1] [1898] A. C. 1. *Supra*, p. 180.

without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen* v. *Flood*[1] Lord Herschell[2] expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen* v. *Flood*[1] there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is primâ facie unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce.

...Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty

[1] *Supra*, p. 180.

[2] [1898] A. C. at pp. 128, 138.

of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings: it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock-out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is primâ facie, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded.

...The appellant seeks, by means of *Allen* v. *Flood*, to drive your Lordships to hold that boycotting by trades unions in one of its most objectionable forms is lawful, and gives no cause of action to its victims although they may be pecuniarily ruined thereby. My Lords, so to hold would, in my opinion, be contrary to well-settled principles of English law.

Appeal dismissed.

[EDITOR'S NOTE. The student will find it an invaluable (though difficult) exercise to contrast the two foregoing decisions of the House of Lords, which at first sight may appear to him to be in conflict; and to endeavour to determine their mutual bearings. Very similar though the facts of both cases were, he will detect three points in which they differed. In *Quinn* v. *Leathem* (1) there was not merely a single adviser, but several, and they acted in concert; moreover, (2) they did not limit themselves to mere advice or prediction, but enforced their wishes by acts of molestation which produced actual pecuniary loss; and finally (3) the primary and dominant motive of their molestation was not that of affording any direct protection to their own or their society's interests, but that of inflicting punitive injury on a man who had displeased them. To ascertain whether the *essential* distinction between the cases—the distinction which accounts for the difference in their results—lay in the combined effect of all these three points, or in two, or only in a single one of them, and (if it be so) in which single one, the student must read both cases in full.

Subsequent judicial dicta place the stress on (2), as sufficient without either (1) or (3). If so, it is a tort for even a single individual to inflict on another man pecuniary damage by interfering intentionally with his trade by any illegal means (e.g., threats, fraud, deceit, nuisance); even though there be no "actual malice." Cf. *Tarleton* v. *McGawley* (*infra*, p. 524); and *Pratt* v. *British Medical Association* (L. R. [1919] 1 K. B. 244) where a threat to induce other medical practitioners not to meet the plaintiff in consultation was held sufficient. Thus the 'illegal' means need not be in itself, apart from its actual results, an actionable wrong. It will often be difficult for a jury to distinguish between an illegal Threat and an innocent Warning; for not only the words used, but also the manner and the surrounding circumstances, must be considered. Cf. L. R. [1920] 2 Ch. at p. 87.

Neither (1) alone, nor (3) alone, would render conduct actionable that otherwise is innocent. As to (1) and (3) combined, see p. 528 *infra*. And see on p. 523 the exception introduced by the Trade Disputes Act.]

[*The right of Competition* (*supra, p.* 174) *exists even when you conduct the competition by means so* unusual *as to render it* "unfair"; (*at any rate if your ultimate motive is that of benefiting yourself, and not that of injuring the rival*).]

MOGUL STEAMSHIP CO. *v.* McGREGOR, GOW & CO., AND OTHERS.

HOUSE OF LORDS. 1892. L.R. APP. CA. 25.

[THIS was an appeal from a judgment of the Court of Appeal (L.R. 23 Q.B.D. 598), affirming a judgment which Lord Coleridge, C.J., had given in favour of the defendants (L.R. 21 Q.B.D. 544). Both the plaintiffs and the various defendants were shipowners engaged in the tea-carrying trade between China and England. The plaintiffs alleged that the defendants had injured them by entering into a conspiracy to prevent the vessels of the plaintiffs from being employed by shippers in Chinese ports to carry their cargoes of tea to London. The conspiracy was alleged to have been put into effect by bribes, coercion, and threats. It was proved, amongst other instances of this, that the defendants had offered a special discount to those exporters who employed them alone; and also had organised a plan for sending steamers of their own to meet any vessel sent to Hankow by the plaintiffs and to underbid it, even by accepting rates of freight so low as to be actually unremunerative; and, further, had forbidden their agents, on pain of dismissal, to act as agents for the plaintiffs.

For this the plaintiffs claimed damages and an injunction.

Sir Hy. James, Q.C., and *Gorell Barnes, Q.C.* We have a right of action against the respondents individually for wrongfully interfering with our right to trade freely. This interference has gone beyond fair competition; and has had as its primary object the ruin of the plaintiffs as traders; and is against public policy. Many things, which would not be actionable when done by an individual, become so when done by a combination of persons.]

LORD HALSBURY, L.C. Notwithstanding the elaborate examination which this case has undergone, I believe the facts may be stated very summarily; and when they are so stated the law seems to me not to be open to doubt.

An associated body of traders endeavour to get the whole of a limited trade into their own hands by offering exceptional and very favourable terms to customers who will deal exclusively with them; (so favourable that but for the object of keeping the trade to themselves they would not give such terms, and if their trading were confined to

one particular period they would be trading at a loss); but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves. I do not think that I have omitted a single fact upon which the appellants rely to shew that this course of dealing is unlawful and constitutes an indictable conspiracy.

Now it is not denied and cannot be even argued that *primâ facie* a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice." This is the language of Baron Alderson in delivering the judgment of the Exchequer Chamber (*Hilton* v. *Eckersley*, 6 E. & B. at pp. 74, 75), and no authority, indeed no argument, has been directed to qualify that leading proposition. It is necessary, therefore, for the appellants here to shew that what I have described as the course pursued by the associated traders is a "matter contrary to law."

Now, after a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them; and if this is unlawful it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful.

There are doubtless to be found phrases in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals. But when one analyses what is the real meaning of such phrases it is manifest that all that is intended to be implied by them is that any rival trading which shall be started against the association will be rendered unprofitable by the more favourable terms—that is to say, the reduced freights, discounts, and the like—which will be given to customers who will exclusively trade with the associated body. And, upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders; except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade yourself. If such an injury, and the motive of its infliction, is examined and tested upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and consequently unlawful; a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness.

The learned counsel who argued the case for the appellants with their usual force and ability, were pressed from time to time by some of your Lordships to point out what act of unlawful obstruction,

violence, molestation, or interference was proved against the associated body of traders; and, as I have said, the only wrongful thing upon which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful.

The sending up of ships to Hankow, which in itself, and to the knowledge of the associated traders, would be unprofitable, (but was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition), is the one fact which appears to be pointed to as out of the ordinary course of trade. My Lords, after all, what can be meant by "out of the ordinary course of trade"? I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival, in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

I entirely adopt and make my own what was said by Lord Justice Bowen in the court below:—"All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future. And until the present argument at the Bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect to their competitive tariffs, 'Thus far shalt thou go, and no further.'"

Excluding all I have excluded upon my view of the facts, it is very difficult indeed to formulate the proposition. What is the wrong done? What legal right is interfered with? What coercion of the mind or will, or of the person, is effected? All are free to trade upon what terms they will; and nothing has been done, except in rival trading, which can be supposed to interfere with the appellants' interests.

I think this question is the first to be determined: What injury, if any, has been done? What legal right has been interfered with? Because if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons. My Lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice's criticism[1] on the observations made by my noble

[1] L. R. 21 Q. B. D. 551.

and learned friend Lord Bramwell in *Reg.* v. *Druitt*[1], if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanour, and I cannot think the Chief Justice meant to throw any doubt upon such a proposition.

But in this case the thing done, the trading by a number of persons together, effects no more, and is no more, so to speak, a combined operation, than that of a single person. If the thing done is rendered unlawful by combination, the course of trade by a person who singly trades for his own benefit and apart from partnership or sharing profits with others, but nevertheless avails himself of combined action, would be open to the same objections. The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors (if they might be supposed to have knowledge of the transaction), would be acting in combination for the general result, and would, whether for the benefit of the individual or for an associated body of traders, make it not the less combined action than if the combination were to share profits with the independent traders. And if a combination to effect that object would be unlawful, the sharers in the combined action could, in a charge of criminal conspiracy, make no defence that they were captain, agent, or sailors, respectively, if they were knowingly rendering their aid to what, by the hypothesis, would be unlawful if done in combination.

A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word "unlawful" is not uncommonly (though, I think, somewhat inaccurately) used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow these to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy, as, for example, in restraint of trade: and contracts so tainted, the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word "unlawful" (which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber), namely, as contrary to law, is not applicable to such contracts.

It has never been held that a contract in restraint of trade is contrary to law in the sense I have indicated. A judge in very early times expressed great indignation at such a contract; and Mr Justice

[1] 10 Cox, C. C. 592.

Crompton undoubtedly did say (in a case where such an observation was wholly unnecessary to the decision and therefore manifestly obiter) the parties to a contract in restraint of trade would be indictable. I am unable to assent to that dictum. It is opposed to the whole current of authority; it was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the Exchequer Chamber; and it seems to me contrary to principle.

In the result, I think that no case was made out of a conspiracy such as the appellants here undertook to establish; and it is not unimportant, for the reasons I have given, to see what is the conspiracy alleged in the statement of claim. The first paragraph alleges the conspiracy to be "to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs." The word "prevent" is sufficiently wide to comprehend both lawful means and unlawful, but (as I have already said) in proof there is nothing but the competition with which I have dealt. The second paragraph alleges that, in pursuance of the conspiracy, people were "bribed, coerced, and induced to agree to forbear and to forbear from shipping cargoes by the steamers of the plaintiffs." If the word "bribed" is satisfied by the offering lower freights and larger discounts, then that is proved; but then the word "bribed" is robbed of any legal significance. "Coerced" is not justified by any evidence in the case; and the word "induced" is absolutely neutral, and no unlawful inducement is proved. The third paragraph uses language such as "intention to injure the plaintiffs," "threats of stopping the shipment of homeward cargoes," and the like. But I ask myself whether, if the indictment had set out the facts without using the ambiguous language to which I have referred in the statement of claim, it would have disclosed an indictable offence? I am very clearly of opinion it would not.

I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade, is unlawful; and I am clearly of opinion that it is not.

I think, therefore, that the appeal ought to be dismissed with costs, and I so move your Lordships.

* * * * * * *

LORD WATSON....There is nothing in the evidence to suggest that the parties to the agreement had any other object in view than that of defending their carrying-trade during the tea season against the encroachments of the appellants and other competitors; and of attracting to themselves custom which might otherwise have been

carried off by these competitors. That is an object which is strenuously pursued by merchants, great and small, in every branch of commerce; and it is, in the eye of the law, perfectly legitimate. If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships. But no such case is presented by the facts disclosed in this appeal....

I cannot for a moment suppose that it is the proper function of English courts of law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages. Until that becomes the law of the land it is, in my opinion, idle to suggest that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment. The withdrawal of agency at first appeared to me to be a matter attended with difficulty; but, on consideration, I am satisfied that it cannot be regarded as an illegal act. It was impossible that any honest man could impartially discharge his duty, of finding freights, to parties who occupied the hostile position of the appellants and respondents....

LORD BRAMWELL....The Master of the Rolls says the lowering of the freight far beyond a lowering for any purpose of trade, was not an act done in the exercise of their free right of trade, but for the purpose of interfering with the plaintiffs' right to a free course of trade; therefore a wrongful act as against the plaintiffs' right; and, as injury to the plaintiffs followed, they had a right of action. I cannot agree. If there were two shopkeepers in a village, and one sold an article at cost price, not for profit therefrom but only to attract customers or cause his rival to leave off selling the article, it could not be said he was liable to an action. I cannot think that the defendants did more than they had a legal right to do. I adopt the vigorous language and opinion of Fry, L.J.: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts[1]."

LORD HANNEN....I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself. A different case would have arisen if the evidence had shewn that the object of the defendants was a malicious one; namely, to injure the plaintiffs, whether they, the defendants, should be benefited or not. This is a question on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had

[1] L. R. 23 Q. B. D. 625, 626.

no malicious or sinister intent as against the plaintiffs; and that the sole motive of their conduct was to secure certain advantages for themselves.

In considering the question, however, of what was the motive of the combination, whether it was for the purpose of injuring others or merely in order to benefit those combining, the fact of several agreeing to a common course of action may be important. There are some forms of injury which can only be effected by the combination of many. Thus, if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual. But it appears to me that, in the present case, there is nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals (the plaintiffs) were willing to offer.

LORD MORRIS....The rebate to customers and the lowering of freights are only a bonus to customers to come and deal exclusively with the defendants. The sending of ships to compete is only a competition. The dismissal of agents might, according to circumstances, be questionable; but, in the present case, the agents filled irreconcileable positions in being agents for the two rivals, and...dismissal became perhaps necessary. All the acts done and all the means used by the defendants were acts of competition. There was nothing in their acts to disturb any existing contract of the plaintiffs or induce anyone to break such a contract. The acts were aimed at making it unlikely that anyone would enter into new contracts with the plaintiffs; by offering such competitive inducements as would probably prevent this.

* * * * * * *

Appeal dismissed, with costs.

[EDITOR'S NOTE. The Lords differed (see pp. 42, 46, 58) as to whether the agreement, although not tortious, was nevertheless so much against public policy as to be unenforceable as a contract.

In the court below (23 Q. B. D. at p. 615) Bowen L.J. had vividly said:—"The instinct of Self-advancement is the very incentive to all trade. To say that a man is to trade freely but is to stop short at any act (designed to attract business to his own shop) which is calculated to harm other tradesmen, would be a strange and impossible counsel of perfection."

Thus the combination, here, differed from that in *Quinn* v. *Leatham*, because the latter had trade interest as only its ulterior aim (if indeed as an aim at all); whilst its immediate aim was to inflict vengeance without just cause.]

SECTION IV.

FORENSIC REMEDIES FOR TORTS.

[*For every legal wrong there is a legal remedy.*]

ASHBY *v.* WHITE AND OTHERS.

COURT OF KING'S BENCH. 1702. 2 LORD RAYMOND 938[1].

[THE defendants in this action were the constables of the borough of Aylesbury; and, as such, its returning officers at its Parliamentary election, in 1701. The plaintiff's declaration set forth that at such election, the plaintiff, being then a burgess and inhabitant of that borough, being duly qualified to give his vote at that election, was there ready and offered his vote to the defendants for the choice of Sir Thomas Lee, Baronet, and Simon Mayne, Esq., and the defendants were then required to receive and admit of his vote. The defendants being not ignorant of the premises, but contriving and *fraudulently and maliciously intending to damnify the plaintiff*, and to defeat him of that his privilege, did hinder him from giving his vote, and did refuse to permit him to give his vote, so that the two burgesses were elected without any vote given by the plaintiff, to his damage, &c.

Upon not guilty pleaded the cause went down to trial, and a verdict was given for the plaintiff, and five pounds damages and costs.

After this verdict given it was moved in the Court of Queen's Bench in arrest of judgment, That this action did not lie, and that point was argued by counsel, and afterwards by the Court.

Mr Justice POWELL, Mr Justice POWYS, and Mr Justice GOULD were of opinion that judgment in this case ought to be given for the defendants; but the Lord Chief Justice HOLT, being of a different opinion, gave his reasons for the same in the following argument.]

I am of opinion that judgment in this case ought to be given for the plaintiff. To maintain which I lay down three positions.

1. That the plaintiff, as a burgess of this borough, hath a legal right to give his vote for the election of parliament burgesses.

[1] [EDITOR'S NOTE. The extracts printed here are taken not from this source but from a fuller, but less accessible, report which was published in 1837 from Lord Holt's original MSS. The student will do well to refer to Lord Raymond's report as given in 1 Smith's Leading Cases 240; where a valuable dissertation is appended to it.]

2. That as a necessary consequence thereof, and an incident inseparable to that right, he must have a remedy to assert, vindicate, and maintain it.

3. This is the proper remedy which the plaintiff hath pursued, being supported by the grounds, reasons, and principles of the ancient common laws of England.

* * * * * * *

I have now explained this right of election, and shewed it to be a legal right. And first, that for electing knights of shires is belonging to and inherent in the freehold. The other, for electing burgesses, is belonging in some cities and towns to the real estate of the inhabitants; and in others, it is vested in the corporation for the benefit of the particular members that are the electors, the having of which is a great benefit and advantage to the people thereof, and will prevent great loss and damage that otherwise would ensue.

It follows now, in the second place, to shew that in consequence of this right, privilege, or franchise, the possessor thereof must have a legal remedy to assert, maintain, and vindicate it.

There is no such notion in the law as a right without a remedy.

If a man once loses or quits his remedy he loses his right.

If I have a bond given to me for the payment of one thousand pounds, I have no remedy to recover this but by an action; therefore, if I release all actions I have lost my right to my money, because I have given away the means to recover it.

Brediman's Case; 6 Rep. 58. If a man purchase an advowson, and at the next avoidance suffers an usurpation, and brings not his *quare impedit* in time, he hath lost all manner of remedy; and in consequence his right, to which neither he nor his heirs can ever be restored.

Would it not look very strange to the rational part of mankind, who do either know or ever heard of this ancient English Constitution (which is so founded that the Commons of England have an undoubted share in the legislative authority, which is to be managed and exercised by their representatives, chosen from and by themselves, in which every freeholder of forty shillings per annum hath a right to vote for the county, every citizen for a city, and every burgess for a borough), if notwithstanding this, when the sheriff or other officer that is to cause the election to be duly made, shall hinder, disturb, or deprive any of these electors of his right, the person injured shall have no remedy? Especially the injury being done to such a right, upon the security whereof the lives, liberty, and property of all the people of England do so much depend.

Have the defendants in this case, by hindering the plaintiff from voting, done well or ill? None can say the former, because they have excluded a man from his vote, though he had a right thereunto. Then

they have done ill by doing so great an injury; and if the law do not allow an action to the party injured, it tolerates injury, which is absurd to say is tolerable in any government, for any one subject to be permitted to do to another with impunity.

When any law requires one to do any act for the benefit of another, or to forbear the doing of that which may be to the injury of another, though no action be given in express terms by the law for the omission or commission, the general rule of law in all such cases is, that the party so injured shall have an action, 10 Coke Rep. 75, the case of the Marshalsea, 12 Rep. 100, 2 Inst. 118; which is a maxim allowed and approved of in all ages. To give but one instance among many, which is the action upon the statute of 2. R. II.; it is prohibited that none, under grievous pain, shall be so hardy as to utter and tell lies or false stories of the Peers and great men of the realm. Though the statute gives a particular penalty, yet in regard of the particular wrong done to the peer so slandered, he may have his action by consequence of law, though not given by the statute in express words. There is the same reason where the common law gives a right or prohibits the doing of wrong. But in this case an Act of Parliament is not wanting, for the Statute of Westminster I cap. 5, enacts that elections shall be free.

If he that hath a right to vote be hindered by him that is to receive his vote or to manage the election, that election is not free, but such an impediment is a manifest violation of that statute and an injury to the party whose vote is refused.

The Statute of Westminster I shews what opinion the King, Lords spiritual and temporal, and Commons in Parliament had of the great consequence it was to the whole realm that people should have their freedom in choice; and though the common law was the same before, as appears even by the statute itself, the words whereof are, "And because elections ought to be free," yet it was judged high time to add the sanction of an Act of Parliament thereunto,—

"The King commandeth, upon great forfeiture, that no great man or other, by force of arms, nor by malice or menaces, shall disturb any to make free election."

Indeed I do not find that the defendants did by force of arms drive the plaintiff away from the election, nor by menaces deter him, but I find they did maliciously hinder him; and so it is charged by the plaintiff in the declaration, and so found by the jury, that they did it by fraud and malice, and so the defendants are offenders within the very words of the Statute of Westminster I[1].

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[1] [EDITOR'S NOTE: Lord Holt here clearly recognises (what Lord Raymond's report makes him ignore) that *malice* is of the essence of the action against officials who have such wide and semi-judicial powers as the common law entrusted to

[Thirdly, to shew that this present action upon the case is the plaintiff's proper remedy.]

But some will say, as they have already said, that the plaintiff hath no damage, and that it is *injuria sine damno*. This was urged by one of my brethren, viz., Justice Gould, in express words. Justice Powell said that there was no such injury or damage as would support an action.

It is impossible to imagine any such thing as *injuria sine damno*; every injury imports damage in the nature of it[1]. If a man will pick my lock and come into my house without my consent, here is no pecuniary damage done to the value of a farthing, yet I shall have an action against him and recover damages for his invasion of my possession and property. Many cases of the same nature are in our books which have been determined upon this ground in Westminster Hall; e.g., *Turner* v. *Sterling*[2].

The case, in short, was that the plaintiff Turner stood to be one of the Bridgemasters of London Bridge, which officer is to be elected by a Common Hall of the City of London; and the plaintiff and others being candidates, the question was, which had the greatest number of votes? The plaintiff demanded the poll. The defendant, being the Lord Mayor of London, refused it. It was then determined that the action was maintainable for refusing the poll; which can be supported only upon this account, that the plaintiff had a right to have it, as every candidate hath, though if he had had it, it might have been against him; but the denial of the right was a good ground of action.

Y. B. 11 H. IV. 47, action upon the case, for that the plaintiff had a market in such a town, and used to have toll for all cattle sold within the market: that I. S. was going to his market with a horse to sell there, and the defendant hindered him from going. The plaintiff had good cause of action though possibly the horse might not

returning officers; and who therefore ought not to be held responsible for an honest mistake. (See Lord Kenyon's decision, in 1796, in *Williams* v. *Lewis*, Peake's N. C. 157.) But it may well be otherwise in the case of the plainer and simpler duty which they now discharge, since the provision for them of fixed Registers of voters. See the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18, ss. 82, 97).]

[1] [EDITOR'S NOTE. "Every injury imports a damage, though it does not cost the party one farthing. For a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right....So, if a man gives another a cuff on the ear,—though it cost him nothing, no, not so much as a little *diachylon* [plaster]—yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property"; (from Lord Raymond's report of Holt's words).]

[2] 2 Levinz 50.

have been sold; for the hindering the plaintiff from the possibility of having toll was such an injury as did import such damage for which the plaintiff ought to recover.

* * * * * * *

Another objection hath been against the novelty of the action; never any such action was ever brought.

For aught I know, this is the first occasion that ever was given; for I never heard that any man was so presumptuous as to proceed or act against apparent right as these defendants have done.

It is not the novelty of the action which can be urged against it, if it can be supported by the old grounds and principles of the law[1]. The ground of law is plain and certain, and indeed universal, that where any man is injured in his right, by being either hindered in, or deprived of, the enjoyment thereof, the law gives him an action to repair himself.

That case of *Hunt* v. *Dowman* which was 16 Jacobi, anno 1618, of an action by the landlord against the tenant, for hindering from searching his house to see whether it was in repair, was never brought before that time. And that of Turner and Sterling was not brought till 23 Ca. II.

The law of England is not confined to particular precedents and cases, but consists in the reason of them, which is much more extensive than the circumstance of this or that case. *Ratio legis est anima legis, et ubi eadem ratio ibi idem jus.*

An action of the case against a master of a ship, for that the ship, lying in the river of Thames, was robbed, was maintainable upon the same reason as against a common carrier; yet such an action was never known until 23 Ca. II[2]. In *Smith* v. *Cranshaw*, anno 1625, (Cro. Car. 15), an action on the case was brought for maliciously and without any probable cause indicting the plaintiff of high treason, which was the first that was ever brought in such a case; and yet resolved to lie upon the same reason as upon an indictment of felony.

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[The majority of the Court being of opinion, in opposition to Lord Holt, that the action was not maintainable, the judgment was arrested. But on appeal to the House of Lords, this decision was reversed, and judgment entered for the plaintiff, in accordance with Lord Holt's view. See 1 Brown's Parliamentary Cases, 45.]

[1] [EDITOR'S NOTE. Compare Lord Herschell's words, *supra*, p. 185.]

[2] [EDITOR'S NOTE. The annotator of Lord Holt's MS. says "This 23 Ca. II. appears erroneous." But, on the contrary, it is quite correct; the case being, doubtless, *Mors* v. *Sluce*, 1 Mod. 85.]

[*But the remedy extends only to such Damage as the wrong would* naturally and probably *produce. Such Damage as a wrong could not reasonably be expected to produce is* too remote *to be recovered for.*]

HADLEY *v.* BAXENDALE.

COURT OF EXCHEQUER. 1854. 9 EXCHEQUER REPORTS 341.

[ACTION against a carrier for delay in the delivery of goods.]

At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2. 4*s.* was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into Court.

Whateley, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection.

Keating, for plaintiffs. The damages are not too remote; for they are not only the natural and necessary consequence of the defendants' default, but are the only loss which the plaintiffs have actually sustained....

Whateley, for defendants....If the defendants should be held responsible for the damages awarded by the jury, they would be in a better position if they confined their business to the conveyance of gold. They cannot be responsible for results which, at the time the goods are delivered for carriage, are beyond all human foresight. Suppose a manufacturer were to contract with a coal merchant or mine owner for the delivery of a boat load of coals, no intimation being given that the coals were required for immediate use, the vendor in that case would not be liable for the stoppage of the vendee's business for want of the article which he had failed to deliver: for the vendor has no knowledge that the goods are not to go to the vendee's general stock. Where the contracting party is shewn to be acquainted with all the consequences that must of necessity follow from a breach on his part of the contract, it may be reasonable to say that he takes the risk of such consequences....

The judgment of the Court was delivered by

ALDERSON, B....We think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the

jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have

told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

[EDITOR'S NOTE. This case, it will be seen, was one of Contract; but the same rule as to Remoteness of Damage applies in actions of Tort.]

[*The assessment of damages falls within the functions of the* jury.]
[*What may justify their giving merely* nominal *damages.*]

KELLY *v.* SHERLOCK.

COURT OF QUEEN'S BENCH. 1866. L.R. 1 Q.B. 686.

THE declaration contained ten counts for libels on the plaintiff as incumbent of St George's Church, Liverpool, published between 21st November, 1863, and 13th August, 1864, in the *Liverpool Mail*, a weekly newspaper, of which the defendant was proprietor and editor.

The defendant pleaded not guilty; and gave notice, under 6 and 7 Vict. c. 96, of his intention to give in evidence, in mitigation of damages, that he offered an apology to the plaintiff before, and made an apology after action brought.

The cause was tried before Bramwell, B., at the Summer Assizes, 1865, at Manchester. The plaintiff conducted his own case: and was the only witness examined: but an immense mass of printed matter and voluminous correspondence were put in evidence.

The libel in the first count was as follows:

"Instead of at all sympathising with, we utterly loathe such rabid declamation as that of the immigrant Irish cleric, who strangely finds himself in possession of the pulpit of what was once the corporation place of worship, but bids fair to be so not much longer, who one Sunday dares presumptuously to arraign the whole imperial legislature for laudably providing Romish chaplains for his own unhappy fellow-countrymen, the bulk of all popish prisoners in English gaols, who next Sunday presumes not only to lecture and hector all town councillors who elected a Jewish mayor (under act of parliament made many years ago), but to charge the sham existence of a moral epidemic against all the municipal voters of Liverpool, and who is next said to meditate another Irish diatribe on the religious duties of

journalists. Hang the man's impudence, but Irish impudence is proverbial, so we will laugh it off with the passing observation that such ignorant and impertinent arraignments are far less suited to any English pulpit than to some such low publication as *Paddy Kelly's Budget.*"

This was published in the *Liverpool Mail* of 21st November, 1863; and it appeared in evidence that it originated in the fact that the plaintiff had preached, on the 8th of November, a sermon against the appointment of a Roman Catholic chaplain to the Liverpool borough gaol, and another sermon on the succeeding Sunday reflecting in strong terms on the conduct of the town council of Liverpool in electing a Jew their mayor, and had caused extracts from both sermons to be published in the local newspapers. Some letters, relative to the plaintiff and his church, were published in succeeding numbers of the defendant's paper, with comments by the editor of a similar nature to those charged as the libel in the first count; and amongst the letters was one signed Musicus, relating to a dispute between the plaintiff and his organist, published in the number for January 30, 1864. In the *Liverpool Courier* of 5th February, 1864, the plaintiff published an answer to this letter; the conclusion of the plaintiff's answer was as follows: "This communication, I feel, had properly been addressed to the *Liverpool Mail*, which inserted, with an accompaniment of abuse emphatically its own, the anonymous effusion to which I reply. But with that paper, the dregs, I consider, of provincial journalism—of which the town of Liverpool, especially any class of religionists in it, ought to be ashamed—I desire to have nothing to do, not even in the way of contradicting its misstatements. 'Answer not a fool according to his folly, lest thou also be like unto him.'"

The other nine counts were articles or portions of articles in the defendant's paper, of the 6th February, 1864, and subsequent dates, couched in the coarsest and most abusive terms, relating to charges brought against the plaintiff by one of the churchwardens, as to allowing the sale of hymn-books in the church during divine service, and the use made by the plaintiff of the vestry for cooking purposes[1]; and to the disagreement between the plaintiff and his organist, in which some of the parishioners took part with the organist, and which resulted in a charge of assault being brought against the plaintiff, for which the magistrates fined him 5*s.*; and in consequence the corporation withdrew the £140 which they had allowed towards the services of the church.

[1] See *Kelly* v. *Tinling*, L. R. 1 Q. B. 699; the explanation given by the plaintiff was, of course, the same in both cases.

[The jury found a verdict for the plaintiff, but with only a farthing damages. He therefore moved for a new trial on the ground that the damages were inadequate.]

* * * * * * *

BLACKBURN, J. I do not think that there is any inexorable rule of practice by which we are precluded from ever granting a new trial on account of the smallness of damages. In several cases alluded to by my Brother Shee, where the smallness of the damages shewed that the jury had made a compromise, and instead of deciding the issue submitted to them of guilty or not guilty, had agreed to find for the plaintiff without damages, the Court granted a new trial; but there the case is much as if the jury had held out and had been discharged without a verdict. But in the present case there could be no doubt that the publications were libels, and libels of a gross and offensive character, and if the question had been one of punishing the defendant, no one could have doubted that the verdict ought to have been heavy. But the question was not what fine ought to be imposed on the defendant, but what compensation ought the plaintiff to have for his injured feelings; for it is to be observed that there was no actual pecuniary damage; and that no one, who in these unhappy controversies was not already prejudiced against the plaintiff, would think worse of him in consequence of defendant's vulgar abuse.

Now, there can be no set-off of one libel or misconduct against another; but in estimating the compensation for the plaintiff's injured feelings, the jury might fairly consider the plaintiff's conduct and the degree of respect which the plaintiff himself had shewn for the feelings of others; and finding on the evidence, that he published in the local press sermons reflecting on the local authorities, that he published a statement (which I own I think borne out by the articles) that the defendant's paper was so conducted as to justify the epithet of "the dregs of provincial journalism"; and, above all, that he delivered from the pulpit, and published in the provincial papers, a statement to the effect that some of his opponents (no matter, in my opinion, whether including the defendant or not) had been guilty of subornation of perjury, and would, as he charitably hoped, repent on their death-beds and confess their guilt, I cannot say that I think the jury were bound to give him substantial damages, though I heartily wish that their verdict had not been such as to give an appearance of triumph to the defendant.

The rule must, in conformity with the opinion of the majority, be discharged.

Rule discharged.

[EDITOR'S NOTE. In contrast with this case, in which the Court, though regretting the inadequacy of the verdict for a farthing damages, nevertheless

refused to disturb it, the student may read *Phillips* v. *L. S. W. Ry. Co.* (L. R. 5 Q. B. D. 78), in which the Court of Appeal granted a new trial on account of the inadequacy of a verdict for £7000 damages. For in this latter case, the damages seemed to the Court not merely inadequate, but so inadequate as to shew that the jury could not have proceeded upon the proper legal principles when assessing them. In his judgment in this case James, L.J., said:—"We agree that judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less, still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject, to the supervision of a Court of first instance, and if necessary of a Court of Appeal in this way, that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small, then the Court is bound to send the matter for re-consideration by another jury. The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small, and for the reasons which were given by the Lord Chief Justice, pointing out certain topics which the jury could not have taken into consideration. I am of opinion, and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent of course we must not speculate, and have no business to say. We are, therefore, of opinion that the Queen's Bench Division was right in directing a new trial."]

[Ordinary *damages should only be an indemnity for the actual loss. Insult, however, will justify* exemplary *damages.*]

MEREST *v.* HARVEY.

COURT OF COMMON PLEAS. 1814. 5 TAUNTON 442.

TRESPASS for forcibly breaking and entering the plaintiff's close, called Brandon Road Breck, part of Longford Field, and with feet in walking, and with dogs, treading down and spoiling the plaintiff's grass, and with dogs and guns searching, hunting, and beating for game there, and doing other wrongs. The cause was tried before Heath, J., at the Norfolk Spring Assizes, 1814. The evidence was, that in September the plaintiff, a gentleman of fortune, was shooting on his own manor and estate, in a common field contiguous to the highway. The defendant (a banker, a magistrate, and a member of parliament), who had dined and drank freely after taking the same diversion of shooting, passed along the road in his carriage, and, quitting it, went up to the plaintiff and told him he would join his party; which the plaintiff positively declined, inquired his name, and gave him notice not to sport on the plaintiff's land. But the defendant declared with an oath that he would shoot, and accordingly fired

several times, upon the plaintiff's land, at the birds which the plaintiff found; proposed to borrow some shot of the plaintiff, when he had exhausted his own; and used very intemperate language, threatening, in his capacity of a magistrate, to commit the plaintiff, and defying him to bring any action. The witnesses described his conduct as being that of a drunken or insane person. The plaintiff conducted himself with the utmost coolness and propriety. A special jury found a verdict for the plaintiff for the whole damages in the declaration, £500; which verdict

Blosset, Serjt., now moved to set aside for excess; for, he said, the defendant's conduct must have proceeded from intoxication or insanity, as it was described by the witnesses. The jury seemed to have considered, not what they ought to give as a compensation for the injury sustained, but what they, as lords of manors in a sporting county, where the jealousy of preserving the game was carried to an excess, should like to receive in similar circumstances.

GIBBS, C.J. I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner. Is the trespasser to be permitted to say, "here is a halfpenny for you, which is the full extent of all the mischief I have done?" Would that be a compensation? I cannot say that it would be.

HEATH, J. I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the Court refused a new trial. There was not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages.

Rule refused.

[EDITOR'S NOTE. In a much more modern case, *Owners of Mediana* v. *Owners of Comet* (L. R. [1900] A. C. at p. 118), Lord Halsbury remarked that in cases of Trespass "a high-handed procedure, or insolent behaviour, has been held in law to be a subject of aggravated damages, and the jury might give what are called 'punitive' damages."]

[*Invasions of* constitutional law *also will justify exemplary damages.*]

HUCKLE *v.* MONEY.

COURT OF COMMON PLEAS. 1763. 2 WILSON 205.

TRESPASS, assault, and imprisonment; issue joined upon the general issue. Not guilty. Tried before the Lord Chief Justice when it was proved for the plaintiff that he is a journeyman printer, and was taken into custody by the defendant (a King's Messenger) upon suspicion of having printed the *North Briton*, number 45. The defendant kept him in custody about six hours, but used him very civilly by treating him with beef steaks and beer, so that he suffered very little or no damages. The defendant attempted to justify under a general warrant of a Secretary of State to apprehend the printers and publishers of the said *North Briton*, number 45, (which is before set forth at length in the case of the *King* v. *Wilkes*, Easter Term, 3 Geo. 3) by virtue of the statute of Jas. 1 and of 24 Geo. 2 cap. 44. He was overruled by the Lord Chief Justice; whereupon the King's counsel who were advocates for the defendant tendered a bill of exceptions, which has not yet been argued. The jury gave £300 damages.

It was now moved by Sergeant *Whitaker* that the verdict might be set aside and a new trial had; for that it appeared upon the evidence the plaintiff was only a journeyman printer to Leech the printer at the weekly wages of one guinea, that he was confined but a few hours, and very civilly and well treated by the defendant; so that £300 were most outrageous damages in that case, and a new trial he hoped would be granted. He cited *Chambers* v. *Robinson*, 1 Stra. 691, which was an action for a malicious prosecution upon an indictment; wherein the jury gave £1000 damages, and the court granted a new trial for the excessiveness of the damages. Several other similar cases were cited to induce the court to grant a new trial.

Sergeant *Burland*, for the plaintiff, insisted that in cases of Tort which sound merely in damages, and are not like *debt* or *assumpsit*, the court will never interpose in setting aside verdicts for excessive damages; that in the case of *Leeman* against *Allen* and others (constables), an action of trespass and imprisonment, the jury gave £300 damages; and this court [Common Pleas] refused to grant a new trial, though plaintiff had not been imprisoned above 24 hours. And in a late case in B. R. for criminal conversation, £500 damages were given against a man in very poor circumstances, as appeared to the court by affidavit, and yet they would not grant a new trial, but

said they could not interpose in cases of tort, unless the damages were very outrageous; but that the jury were the sole judges of the damages.

LORD CHIEF JUSTICE. In all motions for new trials, it is absolutely necessary for the court to enter into the nature of the cause, the evidence, facts and circumstances of the case, as for a jury. The law has not laid down what shall be the measure of the damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; torts or injuries which may be done by one man to another are infinite. In cases of criminal conversation, battery, imprisonment, slander, malicious prosecution, &c., the state, degree, quality, trade and profession of the party injured, as well as of the person who did the injury, must be and generally are considered by a jury in giving damages. The few cases to be found in the books of new trials for torts, shew that courts of justice have most commonly set their faces against them. And the courts interfering in these cases would be laying aside juries; before the time of granting new trials, there is no instance that the judges ever intermeddled with the damages.

I shall now state the nature of this case, as it appeared upon the evidence at the trial; a warrant was granted by Lord Halifax, Secretary of State, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the *North Briton*, number 45, without information or charge laid before the Secretary of State previous to the granting thereof, and without naming any persons whatsoever in the warrant; Carrington, the first of the messengers, to whom the warrant was directed, from some private intelligence he had got that Leech was the printer of the *North Briton*, number 45, directed the defendant to execute the warrant upon the plaintiff (one of Leech's journeymen), and took him into custody about six hours, and during that time treated him well. The personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life do not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial. They saw the magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's counsel, and saw the Solicitor of the Treasury, endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial, and

I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of Magna Charta, *Nullus liber homo capiatur vel imprisonetur, &c. nec super eum ibimus, &c., nisi per legale judicium parum suorum vel per legem terrae, &c.*, which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury, but I directed and told them they were not bound to any certain damages, against the Solicitor General's argument. Upon the whole I am of opinion the damages are not excessive; and that it is very dangerous for the judges to intermeddle in damages for torts. It must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

BATHURST, J. I am of my Lord's opinion, and particularly in the matter of damages wherein he directed the jury that they were not bound to certain damages. This is a motion to set aside 15 verdicts in effect; for all the other persons who have brought actions against these messengers, have had verdicts for £200 in each cause, by consent after two of the actions were fully heard and tried.

Per Curiam, new trial refused.

[EDITOR'S NOTE. The student should observe that Exemplary damages belong to the law of Tort, but not to that of Contract. The plaintiff in an action of contract (except in one for breach of promise of marriage), can recover compensation for nothing but his actual pecuniary loss. "In many cases of breach of contract, there may be malice, fraud, defamation, or violence, which would sustain an action of Tort as an alternative remedy. If one should select that form of redress, he may recover exemplary damages. But if he seek redress in the form of an action for breach of contract...he is paid adequate compensation in money for the loss of that which he would have received had his contract been kept; and no more"; (*per* Lord Atkinson, L. R. [1909], A. C. at p. 496).]

[Malice *will justify exemplary damages.*]

BELL *v.* MIDLAND RAILWAY COMPANY.

COURT OF COMMON PLEAS. 1861. 10 C.B., N.S. 287.

[ACTION to recover damages for an obstruction of the communication between the defendants' railway and the plaintiff's adjoining wharf and branch railway. The jury found that the defendants had intentionally obstructed the communication; and awarded the plaintiff £1000 damages. The defendants moved to have a nonsuit entered.]

WILLES, J. The plaintiff, under the 75th section of the company's act and the 76th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, had the benefit of a siding communicating with the defendants' railway adjoining a wharf, a portion of which he had let out to tenants, and for other portion of which he was desirous of getting a tenant, at a rent which would necessarily be much enhanced by the convenience of the siding. He had as much right to the use of that siding for the convenience of his wharf as the railway company themselves had to the use of any portion of their railway. If the parties had stood upon their strict rights at the outset, the plaintiff's strict right would have been to have the use of the railway by means of his own engine and waggons, subject to the approval of the company in the way pointed out by the 200th section of the company's act. By arrangement, however, the company did that which was found to be the most convenient; they supplied the locomotive power themselves, and brought the coals to the junction, and thence on to the siding of the plaintiff. This was the course of dealing down to the time of the quarrel between the parties in 1857. The cessor arose, not from any default on the part of the plaintiff or his tenants, but from this,—The company, having constructed a wharf of their own, were desirous of withdrawing the business from the plaintiff's wharf and diverting it to their own. That object they attempted to carry into effect in three ways,—first, by ceasing to give the impulse to the plaintiff's waggons so as to send them on to the siding,—secondly, by discontinuing the practice of stopping the waggons at the junction,—thirdly (and on this the whole question at the trial appeared to depend), by placing an obstruction on the siding, so as to block up the mouth, which obstruction was to remain and did remain there permanently: and this they did for the avowed purpose and with the avowed intention of preventing the plaintiff and his tenants from using the siding at all.

...As to the amount of damages. I must say, that, if ever there was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case. The defendants have committed a grievous wrong with a high hand and in plain violation of an act of parliament; and persisted in it for the purpose of destroying the plaintiff's business and securing gain to themselves.

[*If several persons join in committing a tort, the whole of the damages may be recovered from any* one *of them.*]

DE BODREUGAM *v.* LE ARCEDEKNE.

LAUNCESTON ASSIZES. 1302. Y.B. 30 EDW. I. *fo.* 106.

HENRY DE BODREUGAM complained by bill, that Thomas le Arcedekne tortiously and against the peace of our lord the King, came with force and arms at a certain day, year, and place, and assailed, beat, and wounded him, and his goods, &c.; and that tortiously and against the peace he took away William, son and heir of B., who was in his wardship, and to his damage, &c.—*Middleton* denied the tort and force, and as to its being against the peace of our lord the King, and the coming, &c.; and said that Thomas did nothing against the peace. So a jury was summoned. THE INQUEST said that Sir Ralph de Bloyon, on the same day as that complained of by Henry de Bodreugam, came to the inn of Thomas le Arcedekne, and there they had a long conversation; and afterwards Sir Ralph and Thomas and their followers went to the house of William Beyon, where Sir Henry was. Sir Ralph entered, together with all the others, except Thomas who did not enter, and requested Henry that he would deliver up to them an infant who was in ward to him; but Henry would not do so. Strife arose between them, and Henry was beaten and wounded, as he complains of having been.—BRUMPTON. What right had Sir Henry to the wardship?—THE INQUEST. None, save the wardship of the infant by virtue of his mother having delivered him (to Henry) in consequence of a disagreement between Sir Ralph and the mother.—BRUMPTON. After the fact, where did they go?—THE INQUEST. To the house of Thomas, and there the infant remained full three days afterwards.—*Middleton.* Sir, bear in mind that Sir Thomas did not beat or wound, as stated in the plaint.—SPIGONEL. If three thieves come to a man's house, and one forces and enters the house, and the other two stand outside in

the meantime, they shall all three be taken and convicted of this, whatever judgment you may think will be passed on the two.—*Middleton.* It is different in case of burglary or appeal of death of a man, from what it would be in trespass.—BRUMPTON. Go on now to the damages, and tell us if they carried away any goods or armour, &c.—THE INQUEST. They did not carry away any chattels, but we assess his damages at one hundred marks.—*Middleton.* Sir, there are others who committed the trespass, and against whom the plaintiff can recover; we entreat you to take this into consideration.—BRUMPTON. Know that none of the others shall ever take exception by reason of this judgment for he has his action against each one, and each one is liable to the whole, and he shall recover his damages against each one severally, if he choose to sue him. And forasmuch as he is convicted of having gone armed in company with Sir Ralph, and his followers entered the house as before-mentioned, thereby it well appears that he was an assenting party to what took-place, and we consider him altogether as a principal. The Court adjudges that Henry do recover his damages, which are assessed at a hundred marks, and that Sir Thomas do go to prison.

[*And when one joint tort-feasor thus pays the whole damages, he does not usually obtain a right to be compensated by the others.*]

MERRYWEATHER *v.* NIXON.

COURT OF KING'S BENCH. 1799. 8 TERM REP. 186.

ONE STARKEY brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover, for the machinery belonging to the mill; and having recovered £840, he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much paid to his use.

At the trial, before Mr Baron Thomson, at the last York assizes, the plaintiff was nonsuited, the learned judge being of opinion that no contribution could by law be claimed as between joint wrong-doers; and, consequently, this action, upon an implied assumpsit, could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending, that as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages: but

LORD KENYON, C.J., said, there could be no doubt but that the nonsuit was proper: that he had never before heard of such an action having been brought where the former recovery was for a tort: that the distinction was clear between this case, and that of a joint judgment against several defendants in an action of assumpsit: and that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

Rule refused.

[EDITOR'S NOTE. It is a necessary result of the rule *Ex turpi causâ non oritur actio* that the law should discourage mutual contribution amongst wilful tort-feasors, towards defraying the legal penalties of their wrongdoing. A man cannot legally contract to subscribe towards the commission of a tort. Any such proceeding between joint wrong-doers is too much akin to the famous case of *Everet* v. *Williams*, in 1725 (see the Law Quarterly Review, IX. 197), in which one highwayman sued another in Chancery to recover his share of the profits they had made in a partnership "for dealing together on Hounslow Heath and elsewhere, with gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, and other things." But the Court dismissed the suit, made the plaintiff's counsel pay the costs himself, and fined the plaintiff's solicitors £50. Yet the student, in familiarizing himself with

this doctrine, as to contributions in Tort, must beware of adopting it in the bald and unqualified form in which Lord Kenyon is here reported as stating it. The current of subsequent decisions has limited the rule to cases where the person who claims the contribution must have *known*, when he committed the tort, that what he was doing was tortious; (cf. Lord Herschell in L. R. [1894] App. Ca. at p. 324).]

[*But if he reasonably believed the circumstances to be such as would have made his tortious act a lawful one, he may enforce any contract, express or implied, made by those others to compensate him.*]

ADAMSON *v.* JARVIS.

COURT OF COMMON PLEAS. 1827. 4 BINGHAM 66.

[THE facts of this case are thus stated by Best, C.J., in his judgment. "The defendant, having property of great value in his possession, represented to the plaintiff that he had authority to dispose of such property; and followed this representation by a request, that the plaintiff would sell the property for him, the defendant. The plaintiff, believing the representation of the defendant as to his right to the property, and not knowing, either at the time the representation was made, or at any time after, that it was not his, as the agent of the defendant, sold the property; and after paying such sums out of the proceeds as he was bound to pay, and making such deductions as he had a right to make, and which the defendant appears to have allowed, paid the residue to the defendant.

The defendant, who had induced the plaintiff to make this sale by his false representation and request to sell, and who, after the sale, continued to assert his right to sell, and confirmed the agency of the plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been, that the plaintiff, supposing, from the defendant's false representations, he had an authority which he had not, and, acting as the defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods, and has been obliged to pay damages and costs."

The jury found that the defendant ought to reimburse the plaintiff. A motion was made in arrest of judgment.]

Taddy, for defendant. No contract between the plaintiff and defendant is stated on the record; they must, therefore, be both considered as joint tort-feasors, and the present action as nothing else but

an attempt by one tort-feasor to recover contribution from another, which the law does not permit. In all the cases cited there was a contract between the parties; as in *Crosse* v. *Gardner*, where the defendant sold the oxen to the plaintiff; in 1 *Roll. Abr.* 95 and *Cro. Jac.* 425, where an agent sold lands to the plaintiff under an express warranty. In the present case there is no contract between the plaintiff and defendant, but only a request made to the plaintiff by the defendant to commit a trespass. But the declaration ought to have shewn either a breach of contract, or a false affirmation made with intent to deceive. A declaration on a tort arising out of a contract ought always to shew that a contract existed between the parties, *Max* v. *Roberts*[1]. And a declaration on a false representation ought at least to allege a *scienter*; *Pasley* v. *Freeman*, *Haycraft* v. *Creasy*. If a declaration such as the present be held sufficient, every tort-feasor may recover compensation against his companion.

* * * * * * *

Best, C.J....It has been stated at the bar that this case is to be governed by the principles that regulate all laws of principal and agent:—agreed: every man who employs another to do an act which the employer appears to have a right to authorise him to do undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have. A contrary doctrine would create great alarm.

Auctioneers, brokers, factors, and agents, do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrong-doers, and could not recover compensation from him who had induced them to do the wrong.

It was certainly decided in *Merryweather* v. *Nixon*[2], that one wrong-doer could not sue another for contribution; Lord Kenyon, however, said, "that the decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." This is the only decided case on the subject that is intelligible.

There is a case of *Walton* v. *Hanbury and others*[3], but it is so imperfectly stated, that it is impossible to get at the principle of the judgment.

The case of *Philips* v. *Biggs*[4] was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.

[1] 12 East 89. [2] *Supra*, p. 221. [3] 2 Vern. 592. [4] Hardr. 164.

From the inclination of the Court on this last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixon*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

If a man buys the goods of another from a person who has no authority to sell them, he is a wrong-doer to the person whose goods he takes; yet he may recover compensation against the person who sold the goods to him, although the person who sold them did not undertake that he had a right to sell, and did not know that he had no right to sell. That is proved by *Medina* v. *Stoughton*[1], *Sanders* v. *Powel*[2], *Crosse* v. *Gardner*[3], and many other cases.

These cases rest on this principle, that if a man, having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action.

It has been said, that is because there is a breach of contract to rest the action on, and that there is no contract in this case. This is not the true principle: it is this; he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages.

But here is a contract: the plaintiff is hired by defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale.

The above-cited cases shew that a *scienter* is not necessary in this case, although it was necessary in the case of *Haycraft* v. *Creasy* and the cases of that class. In these cases, a party who had no interest was applied to for his opinion; if he gave an honest, although mistaken one, it was all that could be expected.

But it has been said, you have not shewn that the affirmation was false at the time it was made; for the breach is not, that plaintiff had not authority to sell at the time he said he had, but at the time of the sale, which was subsequent.

But the complaint is, that defendant affirmed he had power to sell, and followed that affirmation by a request to sell; which affirmation and request induced plaintiff to sell when defendant had no right to give him authority to make such sale. This affirmation and request caused the plaintiff to do an act which has been injurious to him and beneficial to the defendant.

For this injury plaintiff is entitled to compensation, whether the affirmation was false or true at the time it was made.

[1] 1 Salk. 210. [2] 1 Lev. 129. [3] Carth. 90. 1 Roll. Abr. 91, l. 5.

If defendant had authority to sell at the time he employed plaintiff, but ceased to have that authority at the time of the sale, he should have informed plaintiff of this change in his situation, and prevented him from doing what he ought not to have done; at all events, he should not have taken the proceeds of the sale.

If after verdict we can collect a cause of action, or infer that proof must have been given at the trial, that will support the action, and the judgment may be sustained.

...The Court might say, as the defendant has not shewn that he was authorized to sell at the time he affirmed he was, and as it is proved he was not authorized at the sale, we will presume that he never had authority at any time. But the main ground is, that he has created a belief in the plaintiff that he had authority when he clearly had no authority.

Max v. *Roberts*, which has been cited, does not apply: it did not appear that defendant had ever undertaken to carry the goods, and therefore he could not be answerable for taking them out of the due course of the voyage.

Rule discharged.

[*There is also a remedy by* Injunction, *whenever Damages would necessarily be an inadequate redress. And, without waiting for the trial of the action, an* interim injunction *may be granted forthwith, if the case be so unusually urgent that otherwise justice would be rendered impossible.*]

MOGUL STEAMSHIP CO. *v.* McGREGOR, GOW, & CO.

QUEEN'S BENCH DIVISION. 1885. L.R. 15 Q.B.D. 476.

[FOR the facts of this case, see the proceedings in it on the appeal to the House of Lords, *supra*, p. 195.

Immediately after delivering their statement of claim, the plaintiffs moved for an interim injunction to restrain the defendants from conspiring to prevent, by undue means, the plaintiffs from obtaining cargoes for their steamers at certain Chinese ports. The motion was referred to a Divisional Court.]

* * * * * * *

LORD COLERIDGE, C.J....We have come to the conclusion that this is not a case for the issuing of an interlocutory injunction.

Firstly, because it is a case in which the proof is extremely difficult...a matter to be decided by and bye before a jury. That being so, it would be a very strong thing for this Court to anticipate the decision of so doubtful a matter by the issuing of an interlocutory injunction.

In the next place, it is to be considered, that, even assuming that the plaintiffs are right in their contention, it will be competent to the jury at the trial to award, and I have no doubt they will award, the plaintiffs abundant damages to compensate them for the injury that they may have sustained at the hands of the defendants. I have always understood, and I am confirmed in that understanding by the larger experience of Lord Justice Fry, that that is almost of itself a reason for not issuing an injunction prior to the trial of the action. If the plaintiffs establish their case by the verdict of the jury or the decision of the judge, they will get all they are entitled to.

Next, this does not appear to me to be a case in which, as I was at one time inclined to think, the plaintiffs can sustain irreparable injury by our declining to grant the relief prayed. It may be that they will suffer some damage; it may be that they will for a time have a difficulty in carrying on their China trade, or may have to carry it on at a loss. But injury of that sort differs altogether from the injury which is called "irreparable," to prevent which injunctions have heretofore been granted in the Court of Chancery, and are now allowed to issue

from this Court. For instance, if a fine old ornamental tree in a nobleman's park be cut down, the injury is practically irreparable, and cannot be compensated in damages. It is in cases of that nature that an interim injunction issues. The injury here, if it be made out, obviously is not one of that character.

Then, further, there are circumstances in this case which appear to us to disentitle the plaintiffs to this extraordinary interference. In the first place, the state of things complained of has gone on since the year 1879: it has been known to exist for six years. The plaintiff company was not formed until 1883. To use an analogy derived from another branch of the law, the plaintiffs came to the nuisance. They were aware of the existence of the first circular, and well knew at the time of the inception of the company what the defendants proposed to do. Now, these are all circumstances which, as it seems to me, ought clearly to be taken into account in dealing with a matter of this sort.

Further, the plaintiff company is primarily speaking an Australian company, as we understand. It has added to itself and its adventure the running to China, and this after full notice of the state of things in China, and after notice of what this conference of traders had intended to do, and had so far back as 1879 intimated that they would do. Thus, it appears to me that there was delay in seeking this exceptional remedy. The injury complained of is not irreparable; there is no infringement of any right which affects the enjoyment of life; no restraint of freedom of personal action; none of those considerations which besides the head of irreparable injury have induced the Courts to interfere by injunction before the trial of the action.

Motion refused.

[*An action may be brought in England for a tort committed even in a* foreign country. *But only if it be tortious by English law as well as contrary to the foreign country's law.*]

THE "HALLEY."

PRIVY COUNCIL. 1868. L.R. 2 P.C. 193.

A CAUSE of damage promoted by the respondents, the owners of the Norwegian barque *Napoleon*, against a British steamship, the *Halley*, for the recovery of damages by reason of a collision which took place between the *Napoleon* and the *Halley*, on the 20th of December, 1866, in Flushing Roads, in Belgian territory.

The appellants, the owners of the *Halley*, by the eleventh article of their answer to the respondents' petition, averred that, by the Belgian law which prevailed at the time and place of the collision, the *Halley* was compulsorily in charge of a duly appointed pilot, whom the appellants did not select and had no power of selecting; and by the twelfth and thirteenth articles they further alleged, that all the pilot's orders were duly obeyed and complied with, and that if the collision was not the result of inevitable accident, it was exclusively occasioned by the negligence of the pilot.

The respondents, in their reply to the appellants' answer, pleaded, by the third article, as follows:—"By the Belgian or Dutch laws in force at the time and place of the collision, the owners of a ship which has done damage to another ship by collision are liable to pay and make good to the owners of such lastly-mentioned ship all losses occasioned to them by reason of such collision, notwithstanding that the ship which has done such damage was at the time of the doing thereof being navigated under the direction, and in charge of a pilot, duly appointed or licensed according to the said laws, and notwithstanding that such damage was solely occasioned by the negligence, default, or want of skill of such pilot, without any contributory negligence on the part of the master or crew of such lastly-mentioned ship; and notwithstanding that it was at the time and place of the collision by the said laws compulsory on such lastly-mentioned ship to be navigated under the direction and in charge of such pilot, and the defendants, the owners of the *Halley*, are by virtue of the said laws liable to pay and make good to the plaintiffs all losses occasioned to them by the said collision, even if the statements contained in the eleventh article of the said answer be true."

The appellants moved the Court to strike out this third article on the ground that, though the article be true, they were not liable in the Court of Admiralty in England, when the Judge (Sir Robert Phillimore), on the 26th of November, 1867, gave judgment in which he held[1], that the respondents were entitled to plead that the law of Belgium, within whose territorial waters their vessel received damage from the vessel of the appellants, rendered them, although compelled to take a pilot on board, liable to make reparation for the wrong she had done, and rejected the appellants' motion[2].

From this judgment the present appeal was brought.

The *Solicitor-General* (Sir *W. Baliol Brett*, Q.C.), and Mr *Cohen*, for the appellants:—

The effect of the judgment of the Court below amounts to this, that in an action of tort, the tort being committed in a foreign country in which a particular liability exists, an English court of law will enforce that liability, and administer the municipal law of a foreign country in a cause of action which would not lie here. Now, that is a proposition which we maintain is wholly untenable. The law by which liability is determined in an action of tort is the *lex fori*: *The Maria*[3]; *The Annapolis*[4]; *The Vernon*[5]; *The Ida*[6]; *The Agricola*[7]. No authority can be found to shew that there is a remedy here for a tort abroad which is not a tort here: Savigny, System des RR., vol. VIII. § 374. The remedy must be such as can be administered and enforced in the Court whose aid is invoked, and not the law and procedure of the foreign country where the trespass has been committed: *Scott* v. *Lord Seymour*[8]. An English court of law will not entertain a cause of action arising in a foreign country which would not lie here. Suppose that by the law of a foreign country an insulting gesture, or defamation of an official personage, is considered an assault, both of which are punished by fine or forfeiture, or again, until lately, by American law, in the Southern States, harbouring a slave; could an English court administer here such remedy as is given by the foreign law? It is absurd on the face of the proposition. It is true that an English court will take notice of foreign law in actions on contracts, the *lex loci contractus*, or the *lex loci solutionis*, being held to prevail solely with a view of carrying out the intention of the parties, and of putting a construction on the contract. But no such reason exists for applying the *lex loci delicti* in an action founded on tort or delict. There is no analogy between the cases.

Manisty, Q.C., for respondents. The real question is, whether the law of England or the law of Belgium governs the case. The learned

[1] L. R. 2 Ad. & E. 3. [2] Ibid. 23. [3] 1 W. Rob. 95. [4] Lush. 295.
[5] 1 W. Rob. 316. [6] Lush. 6. [7] 2 W. Rob. 10. [8] 1 H. & C. 219.

Judge of the High Court of Admiralty has decided, as we maintain rightly, that the Belgian law is alone applicable. The case, no doubt, is one of tort, or, in the language of the civil law, "*obligatio ex delicto*," and we contend must be determined by the law of Belgium, and not by the procedure of the Court here. Where the cause of action arises in a foreign country, the *lex loci* governs the right, the *lex fori* the procedure....If this action had been brought in Belgium, no question would have arisen, and the Court ought to administer the same remedy as is given in that country. By the civil law the respondents have a right to be placed in the same condition they were before the wrong was done them. In other words, they were entitled to what the civilians call "*restitutio in integrum*," and to have that reparation which the *lex loci commissi delicti* would have enforced: Story, Conflict of Laws, c. VIII. § 307, 14: *The Milford*[1]. The *lex fori* in this case would be insufficient, and afford no remedy at all against the wrongdoers. Here the pilotage is compulsory, but the owners are, in opposition[2] to English law, by the Belgian law, liable for the pilot's acts.

* * * * * * *

SELWYN, L.J....Assuming, as, for the purposes of this appeal, their Lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the common law and statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound to receive or obey their orders, was entitled to supersede, and had, in fact, at the time of the collision, superseded, the authority of the master appointed by them; and their Lordships think that the maxim, "*qui facit per alium, facit per se*," cannot by the law of England be applied, as against the appellants, to an injury occasioned under such circumstances[2]....

It follows, therefore, that the liability of the appellants, and the right of the respondents to recover damages from them, as the owners of the *Halley*, if such liability or right exists in the present case, must be the creature of the Belgian law; and the question is, whether an English Court of Justice is bound to apply and enforce that law in

[1] Swab. 367.

[2] [EDITOR'S NOTE. But *now* the Pilotage Act 1913 (2 and 3 Geo. 5 c. 31 s. 15), makes the liability of the owner or master of a vessel "navigating in circumstances in which Pilotage is compulsory" as extensive as if it were not compulsory.]

a case, when, according to its own principles, no wrong has been committed by the defendants, and no right of action against them exists.

The counsel for the respondents, when challenged to produce any instance in which such a course had been taken by any English Court of Justice, admitted his inability to do so, and the absence of any such precedent is the more important, since the right of all persons, whether British subjects or aliens, to sue in the English courts for damages in respect of torts committed in foreign countries has long since been established; and, as is observed in the note to *Mostyn* v. *Fabrigas*, in Smith's Leading Cases, vol. I. p. 656, there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which had prevailed to the contrary seems to be erroneous.

In the case of *The Amalia*[1], Lord Chelmsford, in delivering the opinion of the Judicial Committee, said: "Suppose the foreigner, instead of proceeding *in rem* against the vessel, chooses to bring an action for damages in a court of law against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law which the Court would be bound to administer."

As Mr Justice Story has observed in his Conflict of Laws, p. 32, "it is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations or to those of their subjects." And even in the case of a foreign judgment, which is usually conclusive *inter partes*, it is observed in the same work, at § 618A, that the Courts of England may disregard such judgment *inter partes* if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognised in England or other foreign countries, or is founded upon a misapprehension of what is the law of England: *Simson* v. *Fogo*[2].

It is true that in many cases the Courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where

[1] 1 Moore's P. C. Cases (N. S.) 484. [2] 1 H. & M. 195.

the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships' opinion, alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

Appeal allowed.

[*But though the act must be tortious by English law, it is sufficient that the foreign country treats it as* wrongful, *either tortiously or criminally.*]

MACHADO *v.* FONTES.

COURT OF APPEAL. L.R. [1897] 2 Q.B. 231.

THE plaintiff brought this action to recover damages from the defendant for an alleged libel upon the plaintiff contained in a pamphlet in the Portuguese language alleged to have been published by the [defendant[1]] in Brazil.

The defendant delivered a statement of defence (in which, amongst other defences, he denied the alleged libel), and he afterwards took out a summons for leave to amend his defence by adding the following plea: "Further the defendant will contend that if (contrary to the defendant's contention) the said pamphlet has been published in Brazil, by the Brazilian law the publication of the said pamphlet in Brazil cannot be the ground of legal proceedings against the defendant in Brazil in which damages can be recovered, or (alternatively) cannot be the ground of legal proceedings against the defendant in Brazil in which the plaintiff can recover general damages for any injury to his credit, character, or feelings."

[1] [EDITOR'S NOTE. The report, by an obvious error, says "plaintiff."]

The summons came before Kennedy, J., in chambers, who allowed the plea to be added, but expressed some doubt as to the propriety of so doing, and gave leave to plaintiff to bring the present appeal.

Joseph Walton, Q.C. The plea amounts to this:—That the publication of the alleged libel could not be made the subject of an action for damages in Brazil. The defendant contends that, if not actionable there, it is not actionable here. It is no answer to say that the State, there, might cause criminal proceedings to be instituted in respect of it....

* * * * * * *

LOPES, L.J....The principle applicable in the present case appears to me to be this: where the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful—I use the word "wrongful" deliberately—both by the law of this country, and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with.

In the case of *Phillips* v. *Eyre*[1] Willes, J., lays down very distinctly what the requisites are in order to found such an action. He says this[2]: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England....Secondly, the act must not have been justifiable by the law of the place where it was done." Then in *The M. Moxham*[3] James, L.J., in the course of his judgment, uses these words[4]: "It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this Court will take into consideration that state of the law—that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here."

Both those cases seem to me to go this length: that, in order to constitute a good defence to an action brought in this country in respect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed. In the present case there can be no doubt that the action lies, for it complies with both of the requirements which are laid down by Willes, J. The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed. Both those

[1] L. R. 6 Q. B. 1.
[2] L. R. 6 Q. B. 1, at p. 28.
[3] 1 P. D. 107.
[4] 1 P. D. 107, at p. 111.

conditions are complied with; and, therefore, the publication in Brazil is actionable here.

It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue.

Therefore, in this case, in my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country[1].

Appeal allowed.

[1] [EDITOR'S NOTE. In other words, the English Court would act according to the *lex fori*, and not the *lex loci delicti*, in determining the measure of damages: and thus might award "general" damages, without requiring any proof of loss having actually been caused, even though the Brazilian law would have given nothing but "special" damages, i.e. compensation for some particular instance of loss.

If the law of the country where the act was committed treats it as innocent, no proceedings can be taken on account of it in English courts, even though such acts are torts when committed in England. See *Phillips* v. *Eyre* (L. R. 6 Q. B. 1) and *Carr* v. *Fracis Times and Co.* (L. R. [1902] A. C. 176).

Nor can proceedings be taken in England for any tort, e.g. trespass, to *immoveable* property in a foreign country; *British South Africa Co.* v. *Companhia de Mocambique*, L. R. [1893] A. C. 602.]

PART II.

THE VARIOUS KINDS OF TORTS.

ANY students who may be using the present work, not to illustrate some text-book or course of lectures, but as an independent manual of the subject, will probably find it advantageous to proceed at once to the cases on "Negligence" (Part II. sect. IV. (3), *infra*). For it is well to become familiar with the wide-reaching principles laid down there, before studying the earlier sections of Part II., which embody rules of a narrower application.

PART II.

THE VARIOUS KINDS OF TORTS.

SECTION I.

BREACHES OF RIGHTS OVER THE PERSON.

(A) Assault and Battery.

[*For either an Assault or a Battery*, motion *is necessary.*]

INNES *v.* WYLIE AND OTHERS.

Nisi Prius. 1844. 1 Carrington & Kirwan 257.

[Action for assault. The plaintiff had been a member of "The Caledonian Society of London," but had been expelled from it. The defendants, being members of the society's committee, gave instructions to a policeman to prevent the plaintiff from entering the room in which were about to be held a general meeting and dinner of the members of the said society. The plaintiff, who denied the validity of his expulsion from the society, went to attend this dinner. The policeman prevented him from entering.]

Erle, for defendants. There is no assault here. The policeman who must best know what was done, says that the plaintiff tried to push into the room and he prevented him, and preventing a person from pushing into a room is no assault; the assault, if any, being rather on the other side. And even if there was an assault it was justifiable. The committee had come to a vote that the plaintiff should be no longer a member of the society, and that vote had been confirmed at the general meeting; and with respect to the votes of the eight persons who had not paid their subscriptions, I submit that by the rules they had the whole month of November to pay them, and they were not in default till after the 30th, and were therefore members of the society on the 9th.

Lord Denman, C.J. (in summing up). I am of opinion that where there is not any property in which all the members of a society have a joint interest, the majority may by resolution remove any one member. I think that in this instance the members of this society had that power, in case the plaintiff had misconducted himself. Then had he done so? On the facts of the case, as they appear in evidence, I think that he had, by using menacing language as to one of the other members.

Then what was done? There was a resolution of the committee declaring that he had ceased to be a member of the society; but by the regulations of the society no resolution of a committee is valid unless it has been confirmed by the general body. There was a meeting of the general body and this resolution of the committee was considered, and it was confirmed by a majority of nine to five; but it further appears that all the five had paid up their subscriptions before the time when that meeting took place, but that only one of the nine had paid up his subscription at the time of that meeting. It is therefore contended that the resolution of the committee cannot be considered as lawfully confirmed. However, it does not appear to me that that objection is well-founded. The subscriptions are nominally due on the 1st of November, but not payable till the 30th, and I think that they cannot be considered in arrear before the 30th. So far the resolution would be valid; but I think that it was rendered altogether invalid by the want of notice to Mr Innes of the intention to remove him from the society. It is true he was once required to apologize, which he refused to do; but no notice was given to him that the subject of his removal from the society was to be taken into consideration, nor was he called on to shew why such a course should not be pursued. The society was, in my opinion, wrong in removing him without giving him distinct and positive notice that he was to come and answer the charge that was made against him, and I hold that he should have been told what the charge was, and called on to answer it, and told that it was meant to remove him if he did not make his defence. No proceeding in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so. As no such notice was given here, I think that the removal is altogether a void act, and I am therefore of opinion that the plaintiff is still a member of the society.

Being so, it appears that he went to one of its meetings on the 30th of November, 1843, and was then prevented, by a policeman acting under the orders of the defendants, from entering the room. You will say, whether, on the evidence, you think that the policeman committed an assault on the plaintiff, or was merely passive. If the policeman was entirely passive like a door or a wall put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed on the plaintiff, and your verdict will be for the defendants. The question is, did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the door-way passive, and not move at all.

Verdict for the plaintiff, damages 40*s*.

[*But actual* contact *is not necessary in an Assault, though it is in a Battery.*]

STEPHENS *v.* MYERS.

NISI PRIUS. 1830. 4 CARRINGTON & PAYNE 349.

ASSAULT. The declaration stated, that the defendant threatened and attempted to assault the plaintiff. Plea—Not guilty.

It appeared, that the plaintiff was acting as chairman, at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion, which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made, that he should be turned out, which was carried by a very large majority. Upon this, the defendant said, he would rather pull the chairman out of the chair, than be turned out of the room; and immediately advanced with his fist clenched toward the chairman, but was stopped by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman; but the witnesses said, that it seemed to them that he was advancing with an intention to strike the chairman.

Spankie, Serjt., for the defendant, upon this evidence, contended, that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat—there was not a present ability—he had not the means of executing his intention at the time he was stopped.

TINDAL, C.J., in his summing up, said:—It is not every threat, when there is no actual personal violence, that constitutes an assault, there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped; then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing, that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages, as you think the nature of the case requires.

Verdict for the plaintiff, damages 1*s.*

[EDITOR'S NOTE. In the case of *Read* v. *Coker*, in the Court of Common Pleas in 1853 (13 C. B. 851), the plaintiff had come into defendant's premises, and refused to leave when ordered. Thereupon "the defendant collected together some of his workmen, who mustered round plaintiff, tucking up their sleeves and aprons, and threatened to break his neck if he did not go out; and, fearing that the men would strike him if he did not do so, the plaintiff went out." For this assault the plaintiff brought his action; and the jury found for him, but put the damages at one farthing. On a subsequent appeal to the Court of Common Pleas, Jervis, C.J., in giving judgment, said:—"If anything short of actual striking will in law constitute an assault, the facts here clearly shew that the defendant was guilty of an assault. There was a threat of violence, exhibiting an intention to assault; and there was a present ability to carry the threat into execution." The other three judges concurred in this opinion.]

[*Both in Assault and in Battery*, hostility *is necessary*.]

COLE *v.* TURNER.

NISI PRIUS. 1705. 6 MOD. 149.

LORD HOLT, C.J., upon evidence in trespass for assault and battery, declared:—

FIRSTLY. The least touching of another in anger is a battery.

SECONDLY. If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery.

THIRDLY. If either of them use violence against the other, to force his way in a rude inordinate manner, it will be a battery; or any struggle about the passage to that degree that may do hurt, will be a battery.

[EDITOR'S NOTE. There is no tortious battery in using reasonable force in defence either of your property (e.g. expelling a Trespasser) or of your person. Thus you may so maintain any legal right of precedence. The wife of a D.D. in a funeral procession at Plymouth was gently pushed aside by a lady whose husband was both an esquire and a justice of the peace. Yet the latter's defence to an action of battery failed; because a common-law court had no jurisdiction to decide on the legality of her doubtful claim to precedence; which only the Earl Marshal's Court of Honour (then active) could adjudicate upon; *Ashton* v. *Jennings*, 2 Levinz 133.]

[*And an* immediate *hostility.*]

TURBERVELL *v.* SAVADGE.

COURT OF KING'S BENCH. 1669. 2 KEBLE 545.

IN trespass of assault, battery and wounding, the defendant pleaded that the plaintiff began first, and that the stroke he received, whereby he lost his eye, was on his own assault, and in defence of the defendant.

In trial at bar, now, it appeared by the evidence that the plaintiff threatened the defendant, and said, "Were it not Assize time, he would tell more of his mind"; which was said bending his fist, and with his hand on his sword.

Yet, *per Curiam*, this is no assault; as it would be *without* that declaration.

But it was further sworn that the plaintiff with his elbow punched the defendant. Yet this, if done in earnest discourse and not with intent of violence, is no assault; nor, then, is it a justification of battery after retreat.

And the jury, not believing the defendant, found *pro* plaintiff, and £500 damages.

[EDITOR'S NOTE. The plaintiff's threatening acts with fist and sword would have constituted an assault, but that his words shewed that he had no immediate intention of striking. For, as the report of this case in 1 Modern Reports 3 (where it is called *Tuberville* v. *Savage*) states, Mind as well as Act is indispensable to an assault, "therefore if one strike another upon the hand, or arm, or breast, in discourse, it is no assault; there being no *intention* to assault. But if one, intending to assault, strike at another and miss him, this is an assault. So if he hold up his hand against another in a threatening manner, and say nothing, it is an assault."]

[*Hence touching a man, merely to attract his attention, is not a Battery.*]

COWARD *v.* BADDELEY.

COURT OF EXCHEQUER. 1859. 4 H. & N. 478.

DECLARATION. That the defendant assaulted and beat the plaintiff, gave him in custody to a policeman, and caused him to be imprisoned in a police station for twenty-four hours, and afterwards to be taken in custody along public streets before metropolitan police magistrates.

Pleas—First: Not guilty. Third: That the plaintiff, within the Metropolitan Police District, assaulted the defendant, and therefore the defendant gave the plaintiff into custody to a police officer, who had view of the assault, in order that he might be taken before magistrates and dealt with according to law, &c.

Whereupon issue was joined.

At the trial, before Bramwell, B., at the London Sittings in last Hilary Term, the plaintiff proved that, on the night of the 31st of October, he was passing through High Street, Islington, and stopped to look at a house which was on fire. The defendant was directing a stream of water from the hose of an engine on the fire. The plaintiff said, "Don't you see you are spreading the flames? Why don't you pump on the next house?" He went away, and then came back and repeated these words several times, but did not touch the defendant. The defendant charged the plaintiff with assaulting him, and gave him into the custody of a policeman who was standing near.

The defendant swore that, on being interrupted by the plaintiff, he told him to get out of the way and mind his own business: that the plaintiff came up to him again, seized him by the shoulder, violently turned him round, exposed him to danger, and turned the water off the fire.

The learned Judge told the jury that the question was whether an assault and battery had been committed, and he asked them, first, whether the plaintiff laid hands on the defendant; and, secondly, whether he did so hostilely. The jury found that the plaintiff did lay hands on the defendant, intending to attract his attention. Whereupon the learned Judge ordered the verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him if the Court should be of opinion that he had wrongly directed the jury in telling them that, to find the issue on the third plea for the defendant, they must find that the plaintiff laid his hands upon him with a hostile intention.

Shee, Serjt., in the same Term, having obtained a rule nisi accordingly,

Beasley now shewed cause. The question is, whether the intention of the plaintiff is material to be considered in order to determine whether there was an assault and battery. In *Rawlings* v. *Till*[1] Parke, B., referring to *Wiffin* v. *Kincard*[2], where it was held that a touch given by a constable's staff does not constitute a battery, pointed out, as the ground of that decision, that there the touch was merely to engage the plaintiff's attention. [MARTIN, B. Suppose two persons were walking near each other, and one turned round, and in so doing struck the other: surely that would not be a battery. POLLOCK, C.B. There may be a distinction for civil and criminal purposes[3]. CHANNELL, B. It was necessary to prove an indictable assault and battery in order to sustain the plea.]

POLLOCK, C.B. I am of opinion that the rule must be discharged. The jury found that what the plaintiff did was done with the intent to attract the attention of the defendant, not with violence to justify giving the plaintiff into custody for an assault. The defendant treated it as a criminal act and gave the plaintiff into custody. We are called on to set aside a verdict for the plaintiff, on the ground that he touched the defendant. There is no foundation for the application.

MARTIN, B. I am of the same opinion. The assault and battery which the defendant was bound to establish means such an assault as would justify the putting in force the criminal law for the purpose of bringing the plaintiff to justice. It is necessary to shew some act which justified the interference of the police officer. Touching a person so as merely to call his attention, whether the subject of a civil action or not, is not the ground of criminal proceeding[4].

* * * * * * *

Rule discharged.

[1] 3 M. & W. 28. [2] 2 N. & R. 471.

[3] [EDITOR'S NOTE. Negligence suffices to make an assault tortious, but only Intention can make it criminal; *Ackroyd* v. *Barett*, 11 T. L. R. 115.]

[4] [EDITOR'S NOTE. Nor even of a civil action; *Cole* v. *Turner*, *supra*, p. 240.]

[*And a* consent *to violence will prevent its being a Battery.*]

See above, Part I. sect. III. (F).

[*And* reasonable correction *by a parent or schoolmaster is not a Battery.*]

CLEARY *v.* BOOTH.

QUEEN'S BENCH DIVISION. L.R. [1893] 1 Q.B. 465.

CASE stated by justices for Southampton, under 20 & 21 Vict. c. 43, and 42 and 43 Vict. c. 49.

The respondent had preferred an information against the appellant, charging him with an assault. From the evidence given before the justices, which was set out in the case, it appeared that the appellant was the head master of a board school, and the respondent was a pupil of that school. On the day in question the respondent was on his way to school in the morning, in company with another pupil named Callaway, when they met a third pupil named Godding. Callaway assaulted Godding; but there was no evidence before the magistrates that the respondent had also assaulted him, the appellant, owing to the course which the case took, having called no evidence. Upon complaint being made to the appellant of the assault he caned both Callaway and the respondent on the hand and back. Upon the respondent's mother complaining to the appellant of his having caned her son, he said that he did it because the respondent struck another boy. After the witnesses for the prosecution had been examined, the appellant's solicitor said that, before calling witnesses for the defence, he would take the opinion of the bench on the question of law whether the appellant was entitled to punish a pupil under such circumstances; the act for which the punishment was inflicted being done on the way to school, but outside, and at a considerable distance from, the school premises.

The justices were of opinion that the appellant was not entitled to punish a pupil for anything done by such pupil, although against another pupil, each being on their way to school, the act being committed off the school premises and unconnected with the school.

The appellant's solicitor then informed the bench that he would not call witnesses, but would ask for a case on the point of law; and the justices convicted the appellant, but agreed to state a case.

The questions for the opinion of the Court were—

(1) Whether the appellant was justified, under the circumstances, in inflicting such punishment, and was, therefore, not liable to be convicted of a common assault.

(2) Whether, if appellant was so justified, the punishment inflicted was not excessive.

* * * * * * *

COLLINS, J. It is clear law that a father has the right to inflict reasonable personal chastisement on his son. It is equally the law, and it is in accordance with very ancient practice, that he may delegate this right to the schoolmaster. Such a right has always commended itself to the common sense of mankind. It is clear that the relation of master and pupil carries with it the right of reasonable corporal chastisement. As a matter of common sense, how far is this power delegated by the parent to the schoolmaster? Is it limited to the time during which the boy is within the four walls of the school, or does it extend in any sense beyond that limit? In my opinion the purpose with which the parental authority is delegated to the schoolmaster, who is entrusted with the bringing up and discipline of the child, must to some extent include an authority over the child while he is outside the four walls. It may be a question of fact in each case whether the conduct of the master in inflicting corporal punishment is right. Very grave consequences would result if it were held that the parent's authority was exclusive up to the door of the school, and that then, and only then, the master's authority commenced; it would be a most anomalous result to hold that in such a case as the present the boy who had been assaulted had no remedy by complaint to his master, who could punish the assailant by a thrashing, but must go before the magistrate to enforce a remedy between them as citizens. Not only would such a position be unworkable in itself, but the Code, which has the force of an Act of Parliament, clearly contemplates that the duties of the master to his pupils are not limited to teaching. A grant may be made for discipline and organization, and it is clear that he is entrusted with the moral training and conduct of his pupils. It cannot be that such a duty or power ceases the moment that the pupil leaves school for home; there is not much opportunity for a boy to exhibit his moral conduct while in school under the eye of the master: the opportunity is while he is at play or outside the school; and if the schoolmaster has no control over the boys in their relation to each other except when they are within the school walls, this object of the Code would be defeated. In such a case as the present, it is obvious that the desired impression is best brought about by a summary and immediate punishment. In my opinion parents do contemplate such an exercise of authority by the schoolmaster. I should be sorry if I felt myself driven to come to the opposite conclusion, and am glad to be able to say that the principle shews that the authority delegated to the schoolmaster is not limited to the four walls of the school. It is always a question of fact whether the act done was outside the

delegated authority; but in the present case I am satisfied, on the facts, that it was obviously within it. The question of excess is one for the magistrates.

[EDITOR'S NOTE. In deciding whether a child has done something really to deserve corporal punishment, the parent or teacher must use reasonable discretion. But "he is not required to be infallible in his judgment. He is the judge. And, like all others clothed with discretion, he cannot be made responsible for error in judgment, when he has acted in good faith and without malice"; (*Heritage* v. *Dodge*, 64 New Hampshire 297).]

[*And violence in* self-defence *is not a Battery, unless it be disproportionately great.*]

COCKCROFT *v.* SMITH.

COURT OF QUEEN'S BENCH. 1705. 11 MODERN 43.

COCKCROFT, in a scuffle[1], ran his finger towards Smith's eyes; who bit a joint off from the plaintiff's finger. The question was, Whether this was a proper defence for the defendant to justify in an action of Mayhem?

HOLT, C.J., said:—If a man strike another, who does not immediately after resent it, but takes his opportunity, and then—some time after—falls upon him and beats him, in this case *son assault* is no good plea. Neither ought a man, in case of a small assault, give a violent or an unsuitable return. But, in such cases, plead what is necessary for a man's defence; and not who struck first, though this, (he said), has been the common practice. But this, he wished, was altered; for hitting a man a little blow with a little stick on the shoulder, is not a reason for him to draw a sword and cut and hew the other.

[EDITOR'S NOTE. The rule has been well stated thus, in an important American case:—"If the defendant gave the first blow, this authorizes the plaintiff to resist force by force, and to disarm or disable his adversary. But it does not authorize an athletic and gigantic man to crush a feeble little old man almost to death"; *Elliott* v. *Brown* (2 Wendell 497).]

[1] [EDITOR'S NOTE. We learn elsewhere that the scuffle consisted in Cockcroft's "tilting the form upon which Smith sat, whereby Smith fell"; (1 Lord Raymond 177).]

[*For self-defence must not be disproportionately violent.*]

REECE *v.* TAYLOR AND ANOTHER.

COURT OF KING'S BENCH. 1835. 4 NEVILLE & MANNING 469.

TRESPASS for an assault and false imprisonment, and for carrying the plaintiff from a certain house and shop through the public streets to a police office. Pleas: first, not guilty; and secondly, by the defendant Taylor, that he was lawfully possessed of the house and shop, and that the plaintiff was unlawfully therein making a great disturbance against the will of Taylor; that Taylor requested him to depart, which he refused to do, whereupon Taylor gently laid hands upon him to remove him out of the house and shop; that thereupon the plaintiff, in the presence of a police officer, assaulted Taylor; upon which Taylor gave him into custody, and caused him to be carried from the house and shop along the public streets to the police office. Replication: *de injuriâ.*

At the trial before Lord Denman, C.J., it appeared that Taylor was in the possession of the house, and that the plaintiff was unlawfully there, and was asked to depart; that upon his refusing to do so, Taylor called in a policeman, who, under the directions of Taylor and upon a charge for an assault, conveyed the plaintiff to the police office. But it was not shewn that any assault had been in fact made by the plaintiff on the defendant. The learned judge thought that the defendant Taylor was justified in removing the plaintiff from his house; but that he had failed to shew a justification of the taking him through the streets to the police office, and that therefore the plaintiff was entitled to recover damages in respect thereof. The jury found a verdict for £50 damages.

Maule moved for a new trial. The learned Chief Justice was wrong in directing the jury that the plaintiff might recover in respect of the taking to the police office. That was matter of excess, and in order to enable the plaintiff to recover in respect of it, should have been replied by way of new assignment. Under a replication of *de injuriâ*, the plaintiff could not recover for this excess.

WILLIAMS, J.:—The general replication puts in issue all the facts of the plea. Now, in that plea, there is a statement of an assault by the plaintiff on the defendant, in the presence of a policeman; which statement is necessary to justify all the trespasses complained of in the declaration, except the mere removing out of the house. You failed in proving that. Was not this good ground for the plaintiff having damages?

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LORD DENMAN, C.J. :—I acted upon the ground which my brother mentioned.

Maule. It is not denied that the plaintiff shewed a right to recover damages—as far as the question depended upon the *evidence*—for the assault may not have been commensurate with the justification. But the argument now submitted to the Court is, that upon the *pleadings*, the plaintiff was debarred from recovering for this excess, for that it ought to have been replied.

LITTLEDALE, J. The observations of the judges in *Cockcroft* v. *Smith*[1] amount to this—that, under the plea of son assault demesne, the defendant must shew an assault by the plaintiff *commensurate* with the act complained of by the plaintiff. According to what is there said you cannot sustain your plea of son assault demesne, unless you shew a commensurate assault....You are bound to prove the whole of the allegations in your plea, or so much of them as constitutes a defence to the action. This you have failed to do.

WILLIAMS, J. *Spilsbury* v. *Micklethwaite*[2] decides, that where two facts are pleaded, which of themselves are equally defences to the action, proof of one is sufficient. But here, the assault, which you failed to prove, was a necessary part of the defence. You have not supported your plea.

LITTLEDALE, J. It was incumbent on you to prove the assault, in order to shew that you were warranted in imprisoning the plaintiff. Until you have proved the allegations in the plea, you cannot raise the question of excess.

Per curiam. The rule is refused.

[*By way of self-defence, a railway company may forcibly expel a passenger who* took no ticket.]

PRATÁB DAJI *v.* THE BOMBAY, BARODA, AND CENTRAL INDIA RY. CO.

HIGH COURT OF BOMBAY. 1875. I.L.R., 1 BOMBAY 52.

[DEFENDANT'S appeal from a judgment for the plaintiff in an action of assault, with 200 rupees damages.

[1] *Supra*, p. 246. [2] 1 Taunton 146.

The plaintiff (a sepoy in the service of Tyrrell Leith, Esq., Barrister-at-law) was with his master at Surat; from which station they started, on the defendants' railway, in a train for Bombay. No ticket had been taken for the plaintiff either by himself or by his master. This omission did not arise from any intention of evading the payment of the fare, but from mere misunderstanding; the plaintiff supposing that his master had obtained a ticket for him. It was not until the train reached the Nowsári station that the plaintiff learned that his master had no ticket for him. He immediately applied to the station master at Nowsári for a ticket to Bombay, but was refused, though he was permitted by the railway servants to proceed in the train without a ticket. When the train arrived at Bálsár, the plaintiff again applied for a ticket, but again in vain. On arrival at Dhándu the plaintiff again applied for a ticket; and his master explained to the station master how he happened to be without one, and offered to deposit any sum the station master might require. Mr Leith ordered the plaintiff to get into his carriage whilst he himself was arranging matters with the station master. The station master, however, refused to issue a ticket, ordered the plaintiff out of the train, and (on the plaintiff's not quitting the carriage) sent a sepoy who forcibly removed him from the train. The plaintiff, being thus unable to obtain a ticket, and not being allowed to re-enter the train without one, was consequently left behind at Dhándu, until the departure of the next train for Bombay; which involved a detention of twenty-four hours.]

Farran, for defendants....The plaintiff, not having a ticket, was a trespasser, and (as such) liable to be removed. There was no waiver of the trespass; for the servants who, at Nowsári and at Balsár suffered him to proceed, acted beyond the scope of their authority. And, at any rate, he became a trespasser at Dhándu, by refusing to leave when ordered.

Marriott, for plaintiff. The defendants were bound to convey the plaintiff; and therefore he was no trespasser even at Surat. Still less can he be held to be a trespasser after Nowsári, whence he proceeded with the leave and licence of the defendants....It is clear there was no intent to evade the payment of his fare. At Dhándu the tender of the fare imposed on the defendants the common-law obligation of carriers to carry the plaintiff.

* * * * * * *

SARGENT, J....The important question is, whether the plaintiff was in the train at Dhándu station under circumstances which constituted him a trespasser. If the Company was entitled to regard him as such, then, in exercise of the right which the law accords to every proprietor to remove a trespasser (using only such force as may be necessary for the purpose), the defendants were, we cannot doubt, justified in removing the plaintiff from the train....

It was urged that there was no fraudulent intention on the plaintiff's part. Now a fraudulent intention is doubtless, by Act XVIII. of 1854, essential before travelling on a railway without payment of the fare can be dealt with as a criminal offence. But the absence of such intention does not make the entry into the carriage less unlawful, or afford any ground for depriving the Company of their right of putting an end to such unlawful occupation. Having started, therefore, from Surat under circumstances which (we think) entitled the Company to treat the plaintiff as a trespasser, the question arises whether anything subsequently occurred which changed the character of his occupation of the carriage. At Nowsári, the plaintiff applied for a ticket; but was refused, though allowed to continue his journey. At Bálsár he repeated his attempt to obtain a ticket, but was again refused, though allowed to proceed with the train. This conduct on the part of the railway officials at intermediate stations, if indeed it did amount to leave and licence to the plaintiff to travel in the train without a ticket, could only operate as such until the train stopped at the next station. On arriving at Dhándu, both the plaintiff and his master made strenuous efforts to obtain a ticket. Not only, however, was this refused, but the plaintiff was forbidden by the station master to enter the carriage, and upon his doing so, was removed by his orders and not allowed to continue his journey to Bombay. The judge who tried the cause held that the station master was bound to give the plaintiff a ticket. If this were so, it might be that the station master would not have been justified in treating the plaintiff as a trespasser and removing him. We are, however, of opinion that there was no such legal obligation. The common-law right of a traveller to be conveyed by a carrier of passengers on his readiness to pay the usual fare is subject to the condition that he offer himself as a passenger at a reasonable time and place. It would, we think, be most inconvenient and unreasonable from a public point of view, were we to hold that on the arrival of a train at an intermediate station, a passenger by the train has a right to require the station master to leave the platform (where he has special duties connected with the train and passengers), and to return to his office for the purpose of procuring him a ticket. It is the general practice, at intermediate stations, for the station master to close the ticket-office on the arrival of the train. This practice has been adopted to enable the officials, and more especially the station master, to attend to the particular matters which arise during the stoppage of the train in the station. We can see no ground upon which a passenger by a train can claim to have the distribution of tickets resumed on his behalf, when it has been already closed for the public outside the station. In the present case, moreover, it would have been necessary, in the first place, for the

station master to have heard the plaintiff's story, decided upon its correctness, and determined what he was bound to pay as far as Dhándu, before he could (with due regard to the interests of the Company) have given him a ticket from Dhándu to Bombay. For otherwise it is plain that the fare from Surat to Dhándu might have been lost to the Company. We think, therefore, that there was no such legal obligation on the part of the Company to furnish the plaintiff with a ticket, as was contended for; and that the station master was, under the circumstances, justified in removing the plaintiff from the train.

Appeal allowed.

[*But not a passenger who has merely* lost his ticket.]

BUTLER *v.* MANCHESTER S. & L. RY. CO.

COURT OF APPEAL. 1888. L.R. 21 Q.B.D. 207.

APPEAL from the judgment of Manisty, J., at the trial of an action for assault.

The facts were, so far as material, as follows:—The plaintiff was a passenger by the defendants' railway. He had taken a return ticket for a journey by an excursion train from Sheffield to Manchester and back. The ticket issued to him had upon it the words "subject to the conditions contained in the company's time-tables and advertisements." In the time-tables issued by the defendants were published certain by-laws and regulations headed "By-laws and regulations made by the company with the approval of the Board of Trade for regulating the travelling upon and using the railways belonging to the said company," and which were stated to be made under the seal of the company and approved by the Board of Trade. One of such regulations was to the following effect: "No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall shew and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose; any passenger travelling without a ticket or failing or refusing to shew or deliver up his ticket as aforesaid shall be required to pay the fare from the station whence the train originally

started to the end of his journey." Certain of the other by-laws and regulations expressly provided for the removal of passengers from the company's carriages and premises, e.g., those with regard to persons intoxicated or using obscene and abusive language, or smoking in carriages not specially provided for that purpose.

The plaintiff gave up the outward half of his ticket at Manchester, and on his return journey was required at Wadsley Bridge station, a mile out of Sheffield, to produce his ticket, but was unable to do so, having lost the return-half of the ticket. The ticket collector required him to pay the ordinary third-class fare from Manchester, which he declined to do. The company's servants refused to allow him to proceed without paying such fare, although he offered his name and address; and, as he would not alight from the carriage, he was removed therefrom by force. He thereupon sued the company for assault. The jury found that no more force had been used in removing him than was necessary for the purpose, and assessed the damages at £25. It was agreed that the learned judge should decide all questions of fact other than the questions as to whether there had been an excess of force used and as to the amount of the damages. The learned judge gave judgment for the defendants, holding it to be an implied term of the contract that, if the passenger failed to produce his ticket, his right to be carried ceased, and that he might be removed from the carriage.

Waddy, Q.C., and *Lawson Walton*, for the plaintiff. The fact that a passenger has lost his ticket, which is merely a receipt for the fare, does not put an end to the contract of carriage entered into by the company or entitle the company to turn him out of the carriage in which he lawfully is by virtue of the contract. There is no ground for the implication that there was an agreement on the plaintiff's part to the effect that the company might remove him on his failing to produce his ticket. The regulations contained in the company's time-tables do not import any such agreement, and, if they did, such a condition being unreasonable, the passenger would not be bound by it.

Lockwood, Q.C., and *Cyril Dodd*, for the defendants. In order to arrive at the reasonable interpretation of the contract between the railway company and the passenger, regard must be had to the conditions under which the company carry on their business and the common knowledge of railway passengers of the practice as to tickets. It is obviously impossible for the company to ascertain whether the passenger is entitled to be carried in the absence of a ticket; and therefore it is a very reasonable condition, as between the company and the passenger, that the production of the ticket is to be the conclusive test as to his right to be carried. The regulations of the company are incorporated by the ticket, but, even apart from those

regulations, it is submitted that the reasonable implication would be that the contract is that the passenger shall produce his ticket or pay the fare, and, if he fails to do so, he shall have no further right to be carried. The contract only entitles the plaintiff to be on the company's premises on certain conditions. The purpose for which he is on the company's premises and in their carriage having come to an end, he has ceased to be lawfully there, and the company are entitled to remove him. It is clear that it is a necessary implication that, if the passenger could not produce a ticket, the company's servants might forcibly prevent him from going on the platform or into a carriage, even if he had paid his fare; if so, it seems to follow that it is equally a necessary implication that they might remove him from the carriage on failure to produce a ticket.

[They cited on this point *Saunders* v. *South-Eastern Ry. Co.*[1]; *Shelton* v. *Lake Shore Ry. Co.*[2]]

Secondly, it might be a breach of contract to remove the plaintiff from the carriage, but the plaintiff had no easement or right to be on the company's premises against their will in the sense that it would be an assault to remove him. There was a license to be on land coupled with a contract to carry, but the licence not being under seal was revocable, though it might be a breach of contract to revoke it: *Wood* v. *Leadbitter*[3].

* * * * * * *

LINDLEY, L.J. The question raised by this case is one of great importance both to the company and the passenger. One knows that railway companies may be placed in great difficulty by the unscrupulous attempts of fraudulent persons to cheat them; and I do not desire to express any opinion one way or the other on the question whether or not some condition might be made, which, if properly worded, would justify the company in future in taking the course they claimed to take in the present case. There does not seem to me to be any by-law or regulation in this case which authorized the company to remove from their carriage a passenger who failed to produce his ticket. That consideration seems to me to be the key to the whole case. How can the company justify laying hands on the plaintiff? The plaintiff had taken his ticket, and the effect was that there was a contract by the company to carry him to Manchester and back. There is no authority as yet to the effect that such a contract of carriage is a contract for an interest in land. It seems to me to be a totally different thing from a contract for an interest in land; and it seems to me absurd to treat the case as one of a revocable licence. It is a case of a contract for carriage. The doctrine of *Wood* v. *Leadbitter*[3] does not appear to me to be at all

[1] 5 Q. B. D. 456. [2] 29 Ohio, 214.
[3] 13 M. & W. 838, 845. *Infra*, p. 392.

applicable to the case of such a contract. Supposing that the contract of carriage involved a contract for production of the ticket or payment of another fare, and the plaintiff broke that part of the contract, does it follow as a matter of law that the defendants could turn him out of the carriage? The remedy is to take proceedings for the breach of contract on his part.

It is argued that having broken the contract he was no longer lawfully on the defendants' premises. I do not see that that consequence follows. It does not appear to me that the contract between the plaintiff and the defendants was cancelled by reason of the plaintiff's breach of contract. In my opinion the defendants failed to shew that the plaintiff was unlawfully upon their premises, and therefore they had no right to remove him therefrom by force.

Appeal allowed.

[EDITOR'S NOTE. Even where the man is a trespasser, and so may be forcibly removed, no unnecessary force must be used. Thus if he be stealing a ride in a train, he should not be ejected whilst the train is in motion; see *McKeon's Case* (183 Massachusetts 271).]

(B) FALSE IMPRISONMENT.

[*The imprisonment need not be in a* gaol.]

COURT OF KING'S BENCH. 1348. 22 LIB. ASS. fo. 104, pl. 85.

THORPE, C.J. There is an Imprisonment in every case where a man is detained forcibly and against his will; whether he be imprisoned in a house or in the open street or elsewhere.

[*Nor by any* actual *physical constraint.*]

CHINN *v.* MORRIS.

NISI PRIUS. 1826. 2 C. & P. 361.

TRESPASS and false imprisonment. Plea—General issue.

A constable proved, that the defendant, who was a butcher, gave the plaintiff, who was of the same business, into his custody, on a charge of stealing a quantity of fat; upon which he told the plaintiff that he must go to Union Hall; that the plaintiff made no resistance; and that in consequence no force was used. A charge of felony was preferred before the magistrate, and dismissed by him, because the defendant could not identify the fat as his property.

For the defendant, it was submitted, that the action would not lie, as there was no actual imprisonment, or assault; and as a malicious charge might be the ground of another and different form of action.

BEST, C.J. I am of opinion that this is an imprisonment. I should think it an imprisonment, if a constable told me that I must go to Union Hall; for I should know that if I refused, he would compel me. I think it amounts to a trespass.

BEST, C.J., allowed evidence of reasonable suspicion of felony to be given in mitigation of damages; and in summing up, his Lordship told the jury that a justification would have been of no use, because the defendant could not have proved that a felony had been committed, as he could not identify the stolen property as his own. If the defendant intended to injure the plaintiff, and to prevent his being a rival in trade, then the plaintiff would be entitled to large damages; but if he honestly took him before a magistrate, believing that a felony had been committed, and that he was doing his duty to the public, then small damages would be sufficient. The defendant, as a plain unlettered man, might imagine that there was sufficient evidence, when a magistrate, knowing the law, might be of a different opinion. His Lordship then left it to the jury to say, under what motives the defendant had acted; and they returned a

Verdict for the plaintiff, damages one farthing.

[EDITOR'S NOTE. The rule as to evidence of Motive is that in whatever actions of Tort it would be admissible to aggravate the damages (see above, pp. 215—219) it is also admissible to reduce them.]

[*There may be an imprisonment without* Contact.]

WARNER *v.* RIDDIFORD.

COURT OF COMMON PLEAS. 1858. 4 C.B., N.S. 180.

[ACTION for assault and false imprisonment. The defendant, the owner of a beer-house, placed the plaintiff therein to carry on the business as his servant at weekly wages, with an agreement for a *month's* notice to determine the service. Having given him a *week's* notice, the defendant made up the account and required the plaintiff to pay him the balance; and, on the plaintiff's refusal to accede to this request, on the ground that he had not received the stipulated month's notice, the defendant brought in a superintendent and a serjeant of police, one of whom, on the plaintiff's attempting to go upstairs, refused to permit him to do so, and ultimately only allowed him to go accompanied by an officer. After some further altercation about the money, and the plaintiff's again refusing to hand it over at the request of the superintendent, the latter asked the defendant if he should take him: it did not appear what answer the defendant made, but the officer took the plaintiff into custody, and entered a charge of embezzlement against him at the station-house, and afterwards carried him before the magistrates, by whom he was discharged.

In an action in the county-court for the false imprisonment, the judge told the jury that there were three questions for their consideration,—first, whether there was any imprisonment,—secondly, by whom it was committed,—thirdly, whether there was any legal ground for it. Upon the first point, he told them that "to constitute an imprisonment, it was not necessary that the person should be locked up within four walls, but that, if he was restrained in his freedom of action by another, that was an act of imprisonment, and that the way in which the plaintiff had been constrained *in his own house* and the restraint put upon his person by refusing him permission to leave the room and go upstairs *in his own house*, was in itself an imprisonment, independent of his being conveyed before a magistrate"; upon the second, "that, if they found the defendant was the moving party in causing the imprisonment, he was responsible for it"; and, upon the third, he directed them that there were two grounds upon which it was argued that the arrest and detention of the plaintiff was justifiable, and legal,—first, that he was merely the servant of the defendant, and that, refusing to deliver over the money of his employer, and to quit his house, it was lawful to eject him by force,—secondly, that he was

guilty of embezzlement, and lawfully taken and held in custody on that charge. Upon these points, the judge's observations were to the effect,—first, that the plaintiff, as tenant, or as lawful occupier (under an agreement not then terminated) of the premises, was not legally liable to be ejected by compulsion and without notice; and that, if he refused to leave the house, the defendant could only eject him by adopting the proper legal proceedings to obtain possession,—secondly, that, as to embezzlement, there was no evidence whatever to support or justify the charge.

A verdict having been given for the plaintiff for £50 damages, the defendant appealed, alleging that the judge had misdirected the jury.]

Kingdon, for the appellant....Firstly, the judge was clearly wrong in telling the jury that there was any evidence of an imprisonment of the plaintiff by the act or procurement of the defendant. [WILLIAMS, J. Was there not evidence that he set the police in motion?] It is true that the defendant brought the superintendent to the house; but that was for the purpose of obtaining possession of the house. [CROWDER, J. And of the money.] There was no evidence upon the plaintiff's case, that the act of Haynes in taking him into custody was authorized by the defendant, or that he was in any way party to it. [WILLIAMS, J. It appears upon the plaintiff's evidence that he was denied (by the police, in the defendant's presence) permission to go upstairs, when he refused to give up the balance claimed of him. Then, the plaintiff's wife afterwards hears the superintendent ask the defendant if he shall take the plaintiff into custody. She does not hear the answer: but the plaintiff is taken away and charged with embezzlement. Surely that was evidence for the jury.] That must be taken in conjunction with what the defendant himself swears, viz. that he did not authorize the superintendent to take him: and in this he is corroborated by the superintendent, who says that the defendant did not attend at the station or make any direct charge. [CROWDER, J. He brings the police: he sees all that is done, and is silent. It was a fair question for the jury who was the moving cause.]...Secondly, a matter that must materially have enhanced the damages, the jury were told that the plaintiff was imprisoned *in his own house* when prevented from going upstairs. [WILLIAMS, J. If your first point fails, surely there was a continuous imprisonment by the policeman throughout.] The plaintiff did not occupy the house as tenant: he was there merely as a servant, and might have been turned out at any moment. [WILLES, J. The judge did not mean to say that the relation of landlord and tenant subsisted between the parties: and, though it is true that the plaintiff might have been turned out of the house at any moment, the defendant by so doing would have been guilty of a breach of his contract, in an action for which the jury would cer-

tainly have given the same amount of damages as if he had really been tenant.]...

WILLES, J....The first statement of law which is objected to, is, as to whether or not there was an imprisonment of the plaintiff in his house,—whether the imprisonment commenced when he was told that he could not go upstairs. I cannot doubt that the imprisonment did commence at or immediately after the time of the refusal to permit the plaintiff to go upstairs. It appears that the defendant wished to obtain a settlement of accounts with the plaintiff; and that a disagreement arising between them as to the notice the plaintiff was entitled to, and the plaintiff refusing in consequence to hand over the balance claimed by the defendant, the latter went away, and shortly afterwards returned accompanied by two policemen. His object clearly was to intimidate the plaintiff. The superintendent demanded the money, and, upon the plaintiff refusing to part with it, on the ground that he had not received due notice, he is taken into custody and carried before a magistrate charged with embezzlement. It would be asking one to come to a conclusion quite contrary to one's common sense, to suppose that the police took upon themselves to arrest the plaintiff, and to enter such a charge against him, without being desired by the defendant to do so. Whilst in the house in a room with the two policemen, he was refused permission to go upstairs; and ultimately he seems to have been allowed to go, but accompanied by an officer. I think it is impossible that, upon these facts, anyone can doubt that it was meant to be conveyed to the mind of the plaintiff that he should not go out of the presence or control of the officers. That in my opinion clearly amounts to an imprisonment. There is a great deal of learning in the books as to whether or not there can be an arrest and imprisonment without actually touching the party....The facts of *Grainger* v. *Hill* (5 Scott 561) were, shortly, these:—In September, 1836, the plaintiff by deed mortgaged to the defendants for £80 a vessel of which he was owner as well as captain. The money was to be repaid in September, 1837; and the plaintiff was in the mean time to retain the register of the vessel, in order to pursue his voyages. In November, 1836, the defendants, under some apprehension as to the sufficiency of their security, resolved to possess themselves of the ship's register, and, for this purpose, after threatening to arrest the plaintiff unless he repaid the money lent, they made an affidavit of debt, sued out a capias indorsed for bail in the sum £95. 17*s.* 6*d.* in an action of assumpsit, and sent two sheriff's officers with the writ to the plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present perceiving he could not be removed, one of the defendants said to the sheriff's officers, "Don't take him away, leave the young man with him." The officers then told the plaintiff that they had not come

to take him, but to get the ship's register; but that, if he failed to deliver the register, or to find bail, they must either take him or leave one of the officers with him. The plaintiff being unable to procure bail, and being much alarmed, gave up the register: and the Court held that this amounted to an arrest. Tindal, C.J., there said:— "Without actual contact, the officer's insisting that the plaintiff should produce the register, or find bail, shews that the plaintiff was in a situation in which bail was to be procured; that was a sufficient restraint upon the plaintiff's person to amount to an arrest. The authority in Buller's Nisi Prius, p. 62, goes the full length. 'If the bailiff who has a process against one, says to him, when he is on horseback or in a coach, *You are my prisoner, I have a writ against you*; upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process.'" In the present case, if the door of the room had been locked, nobody could doubt that that would have been an imprisonment. The defendant coming to the house with two officers, the plaintiff being there, and submitting to their control, it was the same as if he had actually been locked up in the room. That being the proper view of the facts, the judge observes that "the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person, by refusing him permission to leave the room and go upstairs in his own house, was in itself an imprisonment, independent of his being conveyed before a magistrate." I think the judge must be considered as having here adopted the view of the case taken by the defendant's advocate: and, though it would have been more correct to have told the jury, that, if the substance of the transaction was that the plaintiff was restrained from leaving the room without permission or without the attendance of a constable, it amounted to an imprisonment, yet, giving a fair and reasonable construction to the summing-up, it seems to me that it is not open to exception. The judge does not profess to be laying down a principle, but rather to be discussing and explaining the law with reference to the facts of the case. The other exception to the summing-up is, that the judge was wrong in telling the jury that the plaintiff had such an interest in the premises that he could not be turned out without recourse being had to the proper legal proceedings. In this respect, I think the judge was mistaken. The plaintiff was not in any sense tenant to the defendant. He might have been put out at any time. But it does not follow, that, because a judge in the course of his summing-up lays down a wrong proposition, that there must necessarily be a new trial. This was not a matter by which the jury could have been misled, and therefore no ground for setting aside the verdict....

Appeal dismissed.

[EDITOR'S NOTE. Though the confinement, here, is not produced through physical detention but through the sufferer's own submission, that submission is not voluntary, and therefore is not such a Consent as would enable the imprisoner to set up the defence of Leave and Licence; (*supra*, p. 151).]

[*But there is no Imprisonment unless motion be impeded in* every *direction. A mere* partial Obstruction *does not suffice.*]

BIRD *v.* JONES.

COURT OF QUEEN'S BENCH. 1845. 7 Q.B. 742.

[ACTION for assault and false imprisonment. The defendant pleaded:—(1) as to the assault, son assault demesne; (2) as to the imprisonment, that, before the imprisonment, the plaintiff assaulted the defendant, and the defendant therefore gave him into custody. At the trial, before Lord Denman, C.J., the facts proved were these. There being a regatta on the Thames, the Hammersmith Bridge Company—in illegal violation of the public right of way over their bridge—put up seats to view the races; and charged 2*s.* 6*d.* for each seat. These seats were placed on the footway at one side of the bridge; and a temporary fence was erected to separate them from the carriage-way, which was left quite open for traffic. The plaintiff (a local solicitor) heard the gun fire as he was passing over the bridge; and got upon the fence to see the boats. The defendant, who was the secretary of the Bridge Company, seized his coat and tried to pull him back, but he succeeded in getting down inside the fence. The defendant then sent two policemen, who prevented the plaintiff from going further along the footway inside the enclosure, but told him he might go back into the open carriage-way. This the plaintiff refused to do, and remained for over half-an-hour where he was. Then, finding that the defendant still prevented his going forward, he tried to force his way, and, in so doing, assaulted the defendant. Upon this he was taken into custody on a charge of assault. That charge was afterwards heard before a magistrate, who dismissed it, on the ground that the defendant before him (i.e. the present plaintiff) had used no more violence than was necessary to assert his right to use the footway. Lord Denman told the jury that the plaintiff had a clear right to go along the foot-path; and, if obstructed in doing so, to use any necessary violence. They found for the plaintiff. The defendant moved for a new trial,

on the ground that Lord Denman had misdirected the jury in telling them that an "imprisonment" had taken place before the plaintiff assaulted the defendant.]

PATTESON, J....It is plain from the facts that the first assault was committed by the defendant when he tried to pull the plaintiff back as he was climbing over the fence: and, as the jury have found the whole transaction to have been continuous, the plaintiff would be entitled to retain the verdict which he has obtained on the issue as to the first plea. Again, if what passed *before* the plaintiff assaulted the defendant was in law an imprisonment of the plaintiff, that imprisonment was undoubtedly continuous, and the assault by the plaintiff would not have been *before* the imprisonment as alleged in the second plea, but during it, and in attempting to escape from it: and the plaintiff would, in that case, be entitled to retain the verdict which he has obtained on the issue as to the second plea. But, if what so passed was not in law an imprisonment, then the plaintiff ought to have replied the right of footway and the obstruction by the defendant, and that he necessarily assaulted him in the exercise of the right, and, not having so replied, is not entitled to the verdict. So that the case is reduced to the question, whether what passed before the assault by the plaintiff was or was not an imprisonment of the plaintiff in point of law.

I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room: and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the party persisting in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. The quality of the act cannot, however, depend on the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass.

A case was said to have been tried before Lord Chief Justice Tindal

involving this question[1]: but it appears that the plaintiff in that case was compelled to *stay* and hear a letter read to him against his will, which was doubtless a total restraint of his liberty whilst the letter was read.

* * * * * * *

Rule absolute for a new trial.

[EDITOR'S NOTE. Lord Denman delivered a judgment, dissenting from the other three judges, and insisting that "*any* restraint of the person by force" will suffice to constitute an Imprisonment. But his view has not obtained the approval of subsequent lawyers.]

[*A* suspicion of Felony *will justify arrest and detention, provided it be a reasonable suspicion.*]

HOGG *v.* WARD.

COURT OF EXCHEQUER. 1858. 3 H. & N. 417.

ACTION of trespass for false imprisonment. Plea, not guilty.

At the trial before Martin, B., at the Spring Assizes for the county of York, it appeared that on the 9th of June, 1857, the plaintiff, a butcher residing at South Cave, was arrested by the defendant, the superintendent of police for the district, for having in his possession some traces alleged to have been stolen from one Johnson, who was a person in the habit of attending fairs as an itinerant showman. The traces were on the horse in the plaintiff's cart, which was being driven by his servant at Cave fair. Johnson stopped the cart, and said to the defendant, "these are my traces which were stolen at the peace rejoicing in 1856." The defendant sent for the plaintiff who at once attended. The defendant asked the plaintiff how he accounted for the possession of the traces. The plaintiff stated that he had seen a stranger pick them up in the road, and that he had bought them of him for a shilling. The defendant then handcuffed the plaintiff and detained him in custody till the next morning, when he was taken before a magistrate who immediately discharged him. According to the evidence of the plaintiff and another witness, Johnson was not present when the defendant took the plaintiff into custody, but the defendant, who was called as a witness on his own behalf, stated that Johnson said to him, when the plaintiff arrived, "these are my traces,

[1] The case was alluded to in argument; but no name was mentioned, nor details given.

and I insist upon your taking him into custody." The defendant resided about three miles from South Cave, and had known the plaintiff for many years.

At the conclusion of the evidence the counsel for the defendant submitted to the learned Judge that, upon the facts admitted by the plaintiff to be true, the defendant was entitled to have the verdict entered for him. The learned Judge intimated that he rather thought there was a question for the jury; and the result was that it was agreed that the opinion of the jury should be taken upon the amount of damages, and the question reserved for the Court both upon the law and the fact.

Hugh Hill, in last Easter Term, obtained a rule to shew cause why the verdict should not be entered for the defendant pursuant to the leave reserved.

Temple and *W. S. Cross* now shewed cause. There was no reasonable ground for arresting or detaining the plaintiff. He had not been directly charged with felony by Johnson. A constable is not justified in arresting a person upon a charge which is not reasonable. The instructions issued to police constables are, that "The constable must arrest anyone whom he sees in the act of committing a felony, or one whom another positively charges with having committed a felony, or whom another suspects of having committed a felony, *if the suspicion appear to the constable to be well founded*, and providing the person so suspecting go with the constable." In *M'Cloughan* v. *Clayton*[1] Bayley, J., held that the constable was not bound in all events to take the alleged offender before a magistrate. He said: "if a felony be committed in the presence of the constable, he is bound to act; so, if a charge of felony be made with reasonable circumstances, it is his duty to act." *Isaacs* v. *Brand*[2] is a strong authority that the charge must be a reasonable one. In *Samuel* v. *Payne*[3] it was taken for granted that the charge was reasonable. In *Hedges* v. *Chapman*[4] BEST, C.J., did not advert to the reasonableness of the charge, but the mode in which the question arose rendered it unnecessary for him to do so. When an innocent person has been arrested by a constable, the question is whether the circumstances made it reasonable that the constable should arrest him at the time when the arrest was made. In the present case, the facts that the plaintiff was a householder, and that his residence was known to the constable, afford strong evidence that the arrest was not reasonable.

Hugh Hill and *Perronet Thompson*, in support of the rule. A constable is justified in arresting if a charge be made bonâ fide and not collusively, that is, if the constable does not make himself a party to the wrong. The charge must be taken to be reasonable if the constable

[1] Holt, N. P. C. 478. [2] 2 Stark Rep. 167. [3] 1 Doug. 359. [4] 2 Bing. 523.

had no means of knowing that it was not true. In *Samuel* v. *Payne*[1], Lord Mansfield said: "If a man charges another with felony, it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge." [POLLOCK, C.B. In a note by Mr Chitty, in Blackstone's Commentaries, vol. I. p. 292, it is said, "a constable may justify an imprisonment without warrant on a reasonable charge of felony made to him, though he afterwards discharge the prisoner without taking him before a magistrate."] In *White* v. *Taylor*[2], Le Blanc, J., held that the constable may, "if he please, exercise his own judgment on a charge made before him; but if the plaintiff cannot make out such a case as amounts to collusion, or that makes the constable a party to the wrong, if a regular charge be made before him he is warranted in committing the party charged." In *Hobbs* v. *Branscombe*[3], the fact of a charge having been made was held a sufficient justification to the constable. The charge in the present case was made under circumstances not inconsistent with its truth. [BRAMWELL, B., referred to Hale's Pleas of the Crown, p. 93.] In the case of a constable, the charge constitutes reasonable and probable cause; and moreover in this case there was evidence of reasonable and probable cause. The fact of non-recent possession is no ground of discharge. A constable may act on a reasonable charge; or he may act on circumstances within his own knowledge, or on the information of others, but in the two latter cases there must be reasonable and probable cause. When a charge is made the constable acts ministerially, and it is no part of his duty to inquire into the merits of the case. [POLLOCK, C.B. If upon a reasonable charge of felony, or other crime for which a constable may arrest without warrant, the constable refuse to arrest or make hue and cry, he may be indicted and fined: Burn's Justice, vol. I. p. 275, 29th ed.] If the circumstances afford reasonable ground of suspicion that the party charged has committed a felony, the constable is justified in arresting him: *Davis* v. *Russell*[4]; and if in resisting the constable is killed, he would be guilty of murder: *Rex* v. *Ford*[5], *Rex* v. *Woolmar*[6].

* * * * * * *

BRAMWELL, B. If a person comes to a constable and says of another, *simpliciter*, "I charge this man with felony," that is a reasonable ground; and the constable ought to take the person charged into custody. But if from the circumstances it appears to be an unfounded charge, not only is the constable not bound to act upon it, but he is responsible for so doing....Here the charge was most unreasonable. The plaintiff used the traces in the most open manner; and, when

[1] 1 Doug. 359. [2] 4 Esp. 80. [3] 3 Camp. 420.
[4] 5 Bing. 354. [5] Russ. & Ry. 329. [6] Moo. C. C. 334.

asked, he told how he got possession of them; and, moreover, the person who claimed them was a person not unlikely to have lost them.

WATSON, B. I am of the same opinion. There is no doubt about the law on the subject. So far as my experience goes, it has always been laid down by the Judges and in the text-books, that a constable may arrest without warrant where there is a reasonable charge of felony. The question here is whether there was a reasonable charge. I think there was not. The argument as to reasonable and probable cause has no application: the question is whether a reasonable charge was made. Now, every case must be governed by its own circumstances, and the charge must be reasonable as regards the subject-matter and the person making it If an idiot made a charge the constable ought not to take the person so charged into custody. In *Isaacs* v. *Brand*[1] Lord Ellenborough said that the declaration of the thief did not justify a constable in taking a person into custody upon a charge of receiving the stolen goods. I have attentively considered whether the charge in this case was reasonable, because it is of the utmost importance that the police throughout the country should be supported in the execution of their duty,—indeed it is absolutely essential for the prevention of crime; on the other hand, it is equally important that persons should not be arrested and brought before magistrates upon frivolous or untenable charges. Whether the question of reasonable charge is matter of law for the Judge, or matter of fact for the jury, I do not express an opinion, as that was left to us and I come to the conclusion that this was not a reasonable charge. It is not necessary to repeat the facts, but taking them strongly in the defendant's favour, I think that this was not a reasonable charge, and that the defendant acted contrary to his duty and contrary to law in arresting the plaintiff.

Rule discharged.

[1] 2 Stark, N. P. 167.

[*A person who merely lays a complaint before a competent Court does not thereby become responsible for an arrest illegally ordered by that Court.*]

WEST *v.* SMALLWOOD.

COURT OF EXCHEQUER. 1838. 3 M. & W. 418.

TRESPASS for assault and false imprisonment. Plea, the general issue.

At the trial before Lord Abinger, C.B., at the Middlesex Sittings after Hilary Term, it appeared that the plaintiff was a builder, and had been employed by the defendant to build some houses for him under a specific contract. Whilst the work was going on, a dispute arose between the plaintiff and defendant, and the plaintiff in consequence discontinued the work, upon which the defendant went before a magistrate, and laid an information against him under the Master and Servant's Act, 4 Geo. 4, c. 34, s. 3. The magistrate having granted a warrant, the defendant accompanied the constable who had the execution of it, and pointed out the plaintiff to him. Upon being brought before the magistrate, the complaint was heard and dismissed. Lord Abinger, C.B., was of opinion that the action was misconceived, and should have been in case; and thought that the evidence of interference in the arrest by the defendant was too slight to make him a trespasser; and the plaintiff's counsel not having pressed his lordship to lay that question before the jury, the plaintiff was nonsuited.

Kelly now moved to set that nonsuit aside, and for a new trial. It is conceded, that when an information is laid before a magistrate in a case over which he has jurisdiction, and the magistrate grants a valid and legal warrant, on which the party is apprehended, the party cannot bring trespass, but must sue in case. In such case the magistrate is bound to issue his warrant, and is not a trespasser, because he is acting within his jurisdiction; nor is the officer a trespasser, because he acts under the warrant. But that rule only applies to a case where the magistrate has jurisdiction. If a complaint be made, and the magistrate be put in motion by the party complaining, in a matter over which he has no jurisdiction, he is a trespasser, and all who act with or under him are trespassers also, because in trespass there is no distinction between principals and accessories. There is perhaps no decision in point on this particular statute, but the case of *Moravia* v. *Sloper*[1] may be applied by analogy. It was there held, that when a party pleads a justification under the process of an inferior Court, he

[1] Willes, 30.

must shew that the cause of action arose within the jurisdiction of that Court. In *Rafael* v. *Verelet*[1], where the defendant had made a complaint to a sovereign prince in India, who had in consequence imprisoned the plaintiff, it was held that trespass was maintainable. [LORD ABINGER, C.B. I do not see in what way the defendant can be a trespasser. He goes to a magistrate, and calls upon him to exercise his judgment, and though the magistrate, if he exceeds his authority, may be liable as a trespasser, the party who lays the complaint is not. ALDERSON, B. The complainant has nothing to do with the assumption of jurisdiction by the magistrate. LORD ABINGER, C.B. The party does no more than lay the facts before the magistrate, who exercises his discretion judicially in granting a warrant. This distinguishes it from the case of a sheriff, who is put in motion by the party, as he does not act judicially; but in this case the defendant does not put the magistrate in motion; he applies to a magistrate having a general jurisdiction over the subject-matter, and makes his complaint, and the magistrate acts upon it or not, at his discretion. ALDERSON, B. In *Rafael* v. *Verelet*, Lord Chief Justice De Grey says[2], "I consider the Nabob as not being the actor in this case; but the act to be done in point of law by those who procured or commanded it, and in them it doubtless is a trespass"; so that he considers the Nabob not as the actor.] There is another ground upon which the case ought to have gone to the jury, because here the defendant acted personally in the arrest, and pointed out the plaintiff to the constable. *Hardy* v. *Ryle*[3] and *Lancaster* v. *Greaves*[4] are authorities to shew that the statute 4 Geo. 4, c. 34, gives the magistrate authority only in cases where the relation of master and servant exists, and does not extend to such a case as the present. The magistrate, therefore, had no right to grant a warrant, unless he was clearly satisfied that the relation of master and servant existed. The onus of justifying the participation by the defendant in making the arrest lies on the defendant, and the plaintiff may maintain the action without producing the warrant: *Holroyd* v. *Doncaster*[5], *Elsee* v. *Smith*[6].

LORD ABINGER, C.B. I retain the opinion which I expressed at the trial. Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate acting without any jurisdiction at all is liable as a trespasser in many cases, but this liability does not extend to the constable, who acts under a warrant, and the statute

[1] Sir W. Black, 983, 1055. [2] Id. 1058. [3] 9 B. & Cr. 603. [4] Id. 628.
[5] 11 Moore, 441; 3 Bing. 492. [6] 1 Dowl. & Ry. 97; 2 Chit. 304.

24 Geo. 2, c. 44, was passed with this very object of protecting such officers. As to the other part of the case, I do not deny that the fact of the defendant's presence when the plaintiff was taken, and his pointing him out to the constable, might make it a case to go to the jury, but that was not pressed on the part of the plaintiff.

BOLLAND, B. I am of the same opinion, and for the same reasons. With regard to the case of the sheriff, that is clearly distinguishable from the present, because the party puts the sheriff in motion, and the latter acts in obedience to him. In the case of an act done by a magistrate, the complainant does no more than lay before a Court of competent jurisdiction the grounds on which he seeks redress, and the magistrate, erroneously thinking that he has authority, grants a warrant. As to the subsequent conduct of the defendant, all he does is to point the plaintiff out to the constable as the person named in the warrant, but this does not amount to any active interference. If any malice could be shewn, it might have formed the ground of an action on the case.

ALDERSON, B. As to the first point, the party must be taken to have merely laid his case before the magistrate, who thereupon granted a warrant adapted to the complaint. Then, what has been done by the defendant to make him liable as a trespasser? He would be liable only in case, if he was actuated in what he did by malice. Then comes the second question; and I agree in the doctrine, that if the defendant took an active part with the constable in apprehending the plaintiff, he must have failed on the state of these pleadings, because it would have been incumbent on him to shew that he had a right so to do, which he could only have done under a special plea, and could not do under the general issue. But all that the defendant did in this instance, was to point out to the constable the party who was to be arrested. And though undoubtedly that was evidence for the jury, yet where counsel submits to the view taken of the evidence by the Judge at Nisi Prius, and does not claim to have it left to the jury, I think we ought not to interfere.

Rule refused.

[EDITOR'S NOTE. As to the proper person to be held answerable for an arrest or imprisonment, see also WARNER *v.* RIDDIFORD and HOGG *v.* WARD, *supra*, pp. 256, 262.

The same right of punishment which will justify a beating will similarly justify an imprisonment. "The keeping-in of pupils for a short time after a school has closed, as a penalty for some shortcoming, is one of the recognised methods of enforcing discipline in schools. It is a mild method, and inflicts no disgrace on the pupil. However mistaken a teacher may be as to the justice of imposing such a penalty in any particular case, it is not a False Imprisonment, unless imposed from malicious motives. In the absence of such motives, such a mistake amounts only to an error of judgment in enforcing discipline; and, for this, an action will not lie"; (see *Fertich* v. *Michener*, 111 Indiana 472).]

(C) Breaches of Family Rights.

[*The head of a family has (as against strangers) a right to the services of his children, when they are members of his family.*

Hence he may recover compensation from anyone who commits a tort against the child which interrupts its performance of these services.]

JONES *v.* BROWN.

Nisi Prius. 1794. 1 Espinasse 217.

The declaration stated that the defendant made an assault on one Joshua Jones, the son and servant of the plaintiff...and then and there beat him; by reason whereof the said Joshua became unable to perform the business of the said plaintiff.

In the course of the cause, it became a question whether it was necessary for the plaintiff to shew in evidence that the son, in point of fact, did any service for his father in his business.

Lord Kenyon, C.J., ruled that it was sufficient to shew that the son lived in, and was part of, his father's family; and that this, alone, would raise a service by implication, which was sufficient...to maintain the action.

[*And if the services of a daughter be interrupted through her* Seduction, *he can recover not merely compensation but* exemplary *damages.*]

TERRY *v.* HUTCHINSON.

COURT OF QUEEN'S BENCH. 1868. L.R. 3 Q.B. 599

DECLARATION for debauching Jane Elizabeth Terry, the daughter and servant of the plaintiff, whereby she became pregnant, and was delivered of a child, in consequence of which the plaintiff lost her services, &c.

Pleas: Not guilty; and that the daughter was not the servant of the plaintiff as alleged.

At the trial before Hannen, J., at the sittings in Middlesex during Term, it appeared that the plaintiff was a builder, in a small way of business at Canterbury. On the 13th of March, 1867, his daughter, who was nineteen years of age, left his house and went into the service of a Mr Wakeman, a draper at Deal, as a milliner, at the wages of £20 a year, the service being terminable in the usual way by a month's notice. On the 11th of April Wakeman discovered that the daughter had been to a concert with tickets given by the defendant, one of the military officers quartered at Walmer; and Wakeman gave her notice to leave at once, and paid her a month's wages. On the next day she left Wakeman's house, and started from Deal by railway for her father's house at Canterbury; and on the journey the defendant, who was in the same train, induced her to get into a first class carriage with him, and then and there, as she alleged, seduced her. Her father readily received her when she arrived at home, but he did not expect her, not having at the time received notice that she had left her service. She was afterwards delivered of a child, of which she swore the defendant was the father.

A verdict was found for the plaintiff for £150, leave being reserved to enter it for the defendant, if the Court should be of opinion that there was not sufficient evidence of service to maintain the action.

M. Chambers, Q.C., moved pursuant to the leave reserved, and also for a new trial on the ground of excessive damages. The foundation of the action is the loss by the plaintiff of the service of the person seduced; the relation, therefore, of master and servant must exist at the time of the seduction, and the mere relation of parent and child, though the child be a minor, is not sufficient. It is true that when the daughter is residing with her father as part of his family, no proof of actual services rendered is necessary if she be a minor; nor need she be actually resident with the father on the very day of the

seduction, if she be only temporarily absent, as on a visit, or even for a few days' casual service with another. But in the present case there was a contract for a year's service with another master, and although the master had done all he could to determine the service, it was against the will of the girl that she left, and, indeed, her assent would be unimportant, as she could not, as a minor, terminate a service which must be taken primâ facie to be for her benefit. But assuming the service with Wakeman to have been terminated either rightfully or wrongfully, still till the girl had reached home, and again become a member of her father's family, no constructive service could arise. Secondly, the damages are excessive, considering the position of the plaintiff and his daughter. No doubt, as is said in Roscoe's Nisi Prius, 11th ed. p. 540, although the loss of service is the legal foundation of this action, and though it is difficult to reconcile with principle the giving of greater damages on another ground, the practice has become inveterate, and cannot now be shaken: per Lord Ellenborough, C.J., in *Irwin* v. *Dearman*[1]. But still some limit must be put, and the position of the plaintiff and the circumstances of this case render £150 damages excessive.

Cockburn, C.J. I am of opinion that there should be no rule. First, as to the point reserved. It is said that the daughter was not part of the plaintiff's family at the time of the seduction, that therefore there was no service, and that the foundation of the action, loss of service, is wanting. But I think the action will lie. It cannot be disputed that, if on the termination of the service at Deal, the daughter had returned home, and then the intercourse had taken place, there would have been sufficient evidence of service. But the intercourse took place during the transitus, while she was on her way to her father's house. Does that make any difference? It must be taken that when the daughter entered the service she had the intention to return to her father on the termination of the service; the master discharged her with what must be taken to be good cause, and she was received by her father as soon as she reached home. I think there was enough to amount to a constructive service. I take it, if the father had met her on her journey, there can be no doubt she would from that moment have been under his control; or if he had written to her, and had directed she should do some business for him on her way home, he had a perfect right to order a service which he was entitled to demand. But what is the difference, if the father had the right to the service, that he has not actually exercised the right? It seems to me, therefore, that there was, to all intents and purposes, a constructive service at the time of the seduction, when the girl was on her way back to resume her former position as a member of her father's

[1] 11 East, at p. 24.

family. The action, no doubt, is founded on the special ground of loss of service (this is not very creditable, perhaps, to our law), but the action is substantially for the aggravated injury that the father has sustained in the seduction of his child, and if we were to hold that the father, under the circumstances of the present case, was not entitled to the same redress as if the daughter had reached home, it would certainly involve very mischievous consequences; and I think we ought not to raise any doubt on the subject by granting a rule. On the other point, possibly the damages are higher than we should have given; but the jury must be assumed to have taken all the circumstances into account, and the expense the plaintiff must have been put to, as well as the injury to him as a parent, and I do not think we ought to disturb the verdict.

BLACKBURN, J. I am entirely of the same opinion. In form the action is by the master, having a right to the services of the servant, and having lost the benefit of those services by reason of the wrongful act of the defendant; but though in form this is the nature of the action, the damage by loss of service is in reality merely nominal; and so long ago as Lord Ellenborough's time, as he says, in *Irwin* v. *Dearman*[1], the practice had become inveterate of giving to the parent, or person standing in loco parentis, damages beyond the mere loss of service in respect of the loss aggravated by the injury to the person seduced. In effect, the damages are given to the plaintiff as standing in the relation of parent, and the action has at present no reference to the relation of master and servant beyond the mere technical point on which the action is founded: for in ninety-nine cases out of a hundred, the natural guardian is the master to whom the service is due at the time. In *Maunder* v. *Venn*[2], Littledale, J., a very cautious judge, said, "proof of any acts of service was unnecessary; it was sufficient that the daughter was living with her father, forming part of his family, and liable to his control and command. *The right to the service is sufficient*....If it were otherwise, no action could be maintained for this injury by a father in the higher ranks of life, where no actual services by the daughter are usual." The question therefore is, at the time of the seduction had the father a right to the services of his daughter? I think the facts place the plaintiff and his daughter in the position of master and servant, and that he is entitled to substantial damages as the natural guardian. The girl is under twenty-one, and is therefore primâ facie under the dominion of her natural guardian; and as soon as a girl under age ceases to be under the control of a real master, and intends to return to her father's house, he has a right to her services, and therefore there was a constructive service in the present case. As to the amount of

[1] 11 East, at p. 24. [2] Mood. & M. 323.

damages, I hold that now the jury are to consider the injury as done to the natural guardian, and all that can be referred to that relation; I do not say that they ought to calculate the actual cost of the maintenance of the grandchild, though they cannot well exclude that fact; but they may consider not only that the plaintiff has a daughter disgraced in the eyes of the neighbours, but that there is also a living memorial of the disgrace in a bastard grandchild. Considering this, are £150 damages too much? I cannot say that they are.

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Rule refused.

[EDITOR'S NOTE. See Lord Wensleydale's words, *infra*, p. 287.]

[*And his right may continue even though the child be in the service of* another person *for several hours of each day.*]

RIST *v.* FAUX.

EXCHEQUER CHAMBER. 1863. 4 BEST & SMITH 409.

[ACTION for seduction of Jane Rist, the daughter and servant of the plaintiff. Plea, that she was not the servant of the plaintiff. A verdict being found for the plaintiff, the defendant tendered a bill of exceptions. It stated that] the plaintiff gave in evidence &c. that the said Jane Rist, before and in and after the month of February, 1861, and thence during the time of her pregnancy and down to a short time before she was so delivered of a child as aforesaid, lived with the plaintiff as a member of his family, and was always at home at his house doing the work of the house, assisting in his domestic affairs and attending on his wife who was in ill health, from shortly after 6 o'clock in the evening of one day until 7 o'clock in the morning of the next day, that during all that time she slept in the house of the plaintiff. And that, from the said month of February down to the month of November in the same year, the said Jane Rist was in the service of the defendant, hired as a labourer in husbandry to do outdoor work on his farm, at the wages of 5*s.* per week during the usual hours of labour for such persons, that is to say, from 7 o'clock in the morning until 6 o'clock in the evening during the months of April, May, June, July, August and September, and from 8 o'clock in the morning to dusk during the other months. The Justice directed the jury that there was, in point of law, sufficient evidence of service to warrant them in finding a verdict for the plaintiff upon that issue; whereupon the counsel for the defendant requested the Justice to inform the jury that there was

not in point of law sufficient evidence of service to warrant the jury in finding a verdict for the plaintiff....

Keane, for the defendant. Here was no sufficient evidence that the plaintiff's daughter was his servant. In *Thompson* v. *Ross*[1], Bramwell, B., says, p. 18, "It is not impossible that one servant should have two masters: he might serve one by day and one by night." The present case raises the question there suggested; for the evidence shews that this girl was the servant of the defendant in the daytime, and of her father when the day was over. In *Grinnel* v. *Wells*[2], Tindall, C.J., says, p. 1041, "The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest." The form of the declaration and the language of Patteson, J., in *Davies* v. *Williams*[3], shew that the service must exist at the time of the wrong done. [POLLOCK, C.B. It need not at that particular hour or moment. BRAMWELL, B. Suppose the girl had been debauched by a third party, could neither her father nor the defendant have sued him?] They would be bound to sue jointly, and it would be a good plea to say that the act was done by the permission of either. Here, one of the two masters of a female servant has injured himself by debauching his own servant, since for all that appears this may have been done at some period of the day during which she was bound to serve him, and not during that when she was bound to serve her father. [BRAMWELL, B. According to that argument, if the daughter of the plaintiff in this case had made a bargain with the defendant to give her a holiday once a month, and he seduced her on one of those holidays, he would not be liable to her father.] She would still be his servant, for the holiday is part of the service. [POLLOCK, C.B. Agricultural labour is not performed on a Sunday; now the debauching may have taken place on a Sunday, during which time she was the servant of her father.] The onus of shewing matter of that kind lies on the other side. Suppose the girl here had three masters instead of two, could any one of them sue for debauching her during the time of her actual service with either of the others? A servant in husbandry who absents herself from her master's service is liable to be sent to prison, and it would be no answer to say that she absented herself by leave of her father; who would perhaps be liable for enticing her away. Suppose any other wrong done to the girl during the hours of service with the defendant, he, and not her father, should sue for it.

[1] 5 H. & N. 16. [2] 7 M & G. 1033. [3] 10 Q. B. 725, 728.

O'Malley, contrà, was not called on.

The Court said they were all of opinion that there was sufficient evidence to go to the jury. There must therefore be

Judgment for the plaintiff.

[*But not where that other person has a right to* the whole *of the services of the child.*]

HEDGES *v.* TAGG.

COURT OF EXCHEQUER. 1872. L.R. 7 Ex. 283.

DECLARATION for seduction of the plaintiff's daughter, then being the servant of the plaintiff, whereby, &c.

Pleas: 1, Not guilty; and 2, a denial that the daughter was the servant of the plaintiff. Issue.

At the trial before Kelly, C.B., at the Guildhall Sittings after Easter Term last, it was proved that the seduction took place on the 18th of August, 1870. The daughter was at that time in place as a governess, but was on a three days' visit to her mother, the plaintiff, with her employer's permission. One of the terms of her contract was, that she should be at liberty to return home for her holidays at certain times of the year; but the visit in question was not during the holiday time, but was an exceptional leave of absence granted for a particular purpose, to enable her to go to see some races at Oxford. Whilst she was at home for these three days she assisted in domestic duties. When her confinement took place, she was in the service of another employer, by whom she was dismissed. She then returned home to her mother.

A verdict was returned for the plaintiff for £175, with leave to move to enter a verdict for the defendant, if the Court should be of opinion that there was no evidence of service; and a rule was obtained accordingly.

Huddleston, Q.C., and *Philbrick*, shewed cause. The action of seduction is founded upon a loss of service; but, according to the authorities, the performance of almost any duties, however light, is evidence of service. Here the daughter was under the plaintiff's roof when seduced, and though only on a visit, made herself useful in the house. Moreover, where the relation of parent and child exists, the law does not require proof of actual service. In *Terry* v. *Hutchinson*[1] constructive service was held sufficient. There the daughter, when

[1] L. R. 3 Q. B. 599; *supra*, p. 270.

seduced, was on her way home from an employer who had dismissed her. Yet the action was held maintainable. This case is different in one respect, because here the service with the employer was not terminated, as it was there. But there is nothing inconsistent in the two services existing together. With regard to the confinement taking place away from home, that is immaterial. It is enough if the relation of master and servant existed at the time of the seduction. *Thompson* v. *Ross*[1] is distinguishable. There the daughter was merely at home accidentally. Here the visit was by her mistress's permission, and during the visit her contract of service with her mistress had, in fact, been suspended, so as to make a new contract possible. In *Manley* v. *Field*[2] the person seduced was the real head of the house, her father being her guest, and on that ground the action failed. [They also cited *Rist* v. *Faux*[3]; *Davies* v. *Williams*[4].]

Parry, Serjt., and *J. O. Griffits*, were not called on to support the rule.

KELLY, C.B. I regret to have to come to the conclusion that this rule must be made absolute. It has been truly said the action of seduction is founded on a fiction; but for that fiction there must be some foundation, however slender, in fact. In order to entitle a plaintiff to maintain the action, there must be in some shape or other the relation of master and servant existing between the plaintiff and the person seduced at the time when the seduction takes place. Now, in the cases cited the person seduced had been in the service of persons other than the plaintiff; but at the time of the seduction that relation had ceased. For example, in the case of *Terry* v. *Hutchinson*[5], the daughter of the plaintiff had quitted the service in which she had been; and it was held that the one service having ended, a fresh service with her father immediately began. But here, beyond all doubt, a relation of service existed, when the seduction took place, between the plaintiff's daughter and the lady in whose employment she was engaged. It is true that part of the contract was, that she was to go home for the holidays. But the seduction did not take place during the holidays. If it had, the case might have been different, and we might possibly have been justified in holding that the relation of service was temporarily constituted between the plaintiff and her daughter. Upon this point, however, I give no opinion. For it is quite unnecessary to decide it, as the plaintiff's daughter was only at home by her mistress's permission for a three days' visit, to attend the Oxford races.

Then it is contended that the two services may co-exist. So they

[1] 5 H. & N. 16; 29 L. J. (Ex.) 1.
[2] 7 C. B. (N.S.) 96; 29 L. J. (C.P.) 79.
[3] 4 B. & S. 409; *supra*, p. 273.
[4] 10 Q. B. 725; 16 L.J. (Q.B.) 369.
[5] L. R. 3 Q. B. 599; *supra*, p. 270.

may, but not unless by the contract the person employed is to be at the same time under the orders of two different people; and here there is no ground for such a contention.

Moreover, the consequences of the wrongful act did not manifest themselves while the plaintiff's daughter was at home. She was, at the time of her confinement, in a place again; so that, on this ground also, the action fails. There was no loss of service to her mother by reason of her inability to work. A nonsuit must, therefore, be entered.

MARTIN, B. I am of the same opinion. The action is not maintainable, in my judgment, on two grounds. First, the plaintiff's daughter was not in her service when the seduction took place; and, secondly, there has been no loss of service, for the daughter was confined whilst in the employment of another person.

BRAMWELL, B. I am entirely of the same opinion. There was no service at the time of the seduction; and, secondly, there was no loss of service to the plaintiff. When the daughter went home it was after her confinement, and she was received by the plaintiff with the knowledge that she had been confined. Any incapability she might then be suffering from was one which, before receiving her back, the plaintiff was aware of; and she has no more right to complain of it, or to bring an action against the seducer on account of it, than a person who employed a man disabled by a wound would have to complain of the wound, or to bring an action against the man who inflicted it. I quite concur with, and adopt, Lord Denman's view in *Davies* v. *Williams*, that no action can be brought under such circumstances. We have been pressed with *Terry* v. *Hutchinson*;... but there the Court may well have been warranted in assuming that the daughter's service with her parents began from the moment her other engagement terminated. I infer, too, from the report, that she did return in fact, and remained at home.

* * * * * * *

Rule absolute.

[EDITOR'S NOTE. It has been well said that, by basing its action of Seduction upon the narrow ground of a loss of services, the English law "affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent, unprotected, to earn her bread amongst strangers."]

SECTION II.

BREACHES OF RIGHTS TO REPUTATION.

[Oral *defamation is actionable only when it either* (1) *is of certain* gross *kinds*[1], *or else* (2) *has caused some* special damage.]

[*Slanders that impute such a* Crime *as is punishable corporally are gross enough to be actionable without proof of special damage.*]

WEBB *v.* BEAVAN.

QUEEN'S BENCH DIVISION. 1883. 11 Q.B.D. 609.

DEMURRER to a statement of claim which alleged that the defendant falsely and maliciously spoke and published of the plaintiff the word following: "I will lock you" (meaning the plaintiff) "up in Glouceste Gaol next week. I know enough to put you" (meaning the plaintiff, "there," meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences. The plaintiff claimed £500 damages.

Demurrer, on the ground that the statement of claim did not allege circumstances shewing that the defendant had spoken or published of the plaintiff any actionable language, and that no cause of action was disclosed. Joinder in demurrer.

W. H. Nash, in support of the demurrer, contended that, in order to make the words actionable, the innuendo should have alleged that they imputed an offence for which the plaintiff could have been indicted, and that it was not sufficient to allege that they imputed a criminal offence merely. He referred to Odgers on Libel and Slander, p. 54.

Hammond Chambers, contrà, contended that, according to the earlier authorities, the test, in ascertaining whether words were actionable per se, was whether the offence imputed was punishable corporally or by fine, and that it was not necessary to allege that the words imputed an indictable offence. He cited Com. Dig. tit. Action on the Case for Defamation, D. 5 and 9.

[1] The common law did not allow an action for oral defamation (i.e. "Slander"), where no special damage was proved, except where the defamation (1) imputed a criminal offence, or (2) imputed certain highly infectious diseases, or (3) affected the plaintiff in his calling. To these, there has been added by statute, though not until so recently as 1891, the case where the defamation (4) imputes to a woman unchastity; (54 & 55 Vict. c. 51, the Slander of Women Act).

As to slander by *silent* gesture, see p. 530 *infra*.

POLLOCK, B. I am of opinion that the demurrer should be overruled. The expression "indictable offence" seems to have crept into the text-books, but I think the passages in Comyns' Digest are conclusive to shew that words which impute any criminal offence are actionable per se. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

LOPES, J. I am of the same opinion. I think it is enough to allege that the words complained of impute a criminal offence. A great number of offences which were dealt with by indictment twenty years ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander.

Demurrer overruled.

[EDITOR'S NOTE. The language of the judges, as here reported, seems to leave it uncertain whether they regard the rule as extending to those petty offences, which, whilst they clearly are criminal, are nevertheless only punishable by a fine and not by imprisonment (e.g. trespassing in the daytime in pursuit of game). But the rule applies only to crimes which are punishable by imprisonment; and not to those punishable by a mere fine, even though imprisonment might be incurred by default in paying the fine, or though the offender might be liable to summary arrest. Hence, to accuse a man of having committed a certain offence, for which (in Baron Pollock's words) he could "be made to suffer corporally," is not an actionable slander unless that corporal suffering were by way of punishment for the offence itself. See *Hellwig* v. *Mitchell*, L. R. [1910] 1 K. B. 609.]

[*Slanders that affect a man in his Calling are similarly actionable without proof of special damage.*]

FOULGER *v.* NEWCOMB.

COURT OF EXCHEQUER. 1867. L.R. 2 Ex. 327.

[THE facts of this case sufficiently appear from the judgment of the Court.]

CHANNELL, B. These are demurrers to a declaration for slander containing two counts. The words complained of charge the plaintiff with trapping foxes. To say simply of a man that he trapped foxes would not, we think, be actionable. There are, however, various circumstances set out in this declaration, which it is asserted shew that there is a good cause of action.

The form of the declaration, and the somewhat peculiar circumstances of the case, gave rise to some little confusion on the argument of the case as to the principle on which an action for defamation is maintainable; and the apparent novelty of some of the points raised induced us to reserve our judgment. One essential ingredient of a good cause of action for defamation is damage. The rules as to the damage necessary to constitute a good cause of action, and as to the cases in which such damage is implied by law, are somewhat arbitrary; but the more important principles of them are now clearly defined. The two rules which we have to consider and apply to the facts of the present case are, first, that from spoken words which impute misconduct in an office, trade, profession, or business, the law implies actionable damage; secondly, that where words are spoken which are of a defamatory nature, yet such that the law will not imply damage from them, still they are actionable if they are shewn actually to cause (as their legal and natural consequence) damage of a character which the law will recognise. In order that the rule as to slander of a man in his business may apply, it is necessary that the words (being capable of having reference to the business) should in fact be spoken of him in respect of his business. This is alleged in the present case, and for the present purpose the allegation must be taken to be true. Next, it must appear that they tend to prejudice him in that business. This, as well as whether the words are capable of having reference to the business, must of course depend upon the nature of the business. Now, we think that the rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades, of the nature and duties of which the Court can take judicial notice. The only limitation of which we are aware is, that it does not apply to

illegal callings; as, for instance, to the keeping open rooms for pugilistic encounters, as in *Hunt* v. *Bell*[1]; see also *Morris* v. *Langdale*[2], a case relating to stock-jobbers, in which the decision proceeded on the ground that stock-jobbers were at that time of two classes, one honest, the other practising what the legislature by the statute then in force called "the infamous practice of stock-jobbing"; and that there was not in the declaration any averment of which business the plaintiff carried on, or whether the contracts he was unable, or said to be unable, to carry out, were legal or illegal contracts. On the same principle, that words having a particular meaning in a particular trade, or a particular locality, may be explained by averment and innuendo in the declaration, we think that the nature and duties of the trade or business may be explained by averment in the declaration, so as to shew how the words spoken affect the business.

In the present case we could not, we think, take judicial notice that it could be the duty of a gamekeeper not to trap foxes, or that it would be a disparaging thing to say of him that he trapped foxes. It is, however, alleged, not only that the plaintiff was a gamekeeper, but that it was his duty as such gamekeeper not to kill foxes; that he was employed on the terms of his not doing so; and that the defendant knew all this.

So far, then, it is clear that, this being the true nature of the plaintiff's business and employment, to hear that he trapped foxes would prejudice him with respect to his business, at all events, with all persons who knew the real nature of his employment. It is not, however, quite clear that, where the nature of the business would not be generally understood, it might not be necessary to shew that the hearers were aware of the facts necessary to give the words their defamatory sense. Here the declaration does not appear to contain a distinct allegation that the hearers knew that the plaintiff's duty was not to kill foxes. It does set forth something as to what the people of the neighbourhood knew and thought, but it does not state that the slander was uttered to people of the neighbourhood. It does, however, contain an innuendo that the words imputed a breach of duty. We think that this may be taken to be equivalent to an allegation that the words would convey that meaning to the hearers, and, taking it with the rest of the declaration, we think it is sufficient to make the declaration good without special damage.

In *Ayre* v. *Craven*[3], the physician's case, which was the principal authority relied on in support of the demurrers, the decision proceeded on the ground that the declaration did not set forth in what manner the misconduct was connected with the plaintiff's profession. Here

[1] 1 Bing. 1. [2] 2 B. & P. 284. [3] 2 Ad. & E. 2.

the declaration does set forth that it was the duty of the plaintiff, in his employment, not to do that which the words complained of charged him with doing. Therefore the objection which was successful there does not arise here. On the whole, therefore, we think that the present declaration shews a good cause of action, independently of special damage.

It is, however, clearly shewn on the declaration that the words are capable of bearing a defamatory sense, viz. the imputing a breach of duty to the plaintiff, and it is alleged that the defendant, knowing the circumstances that made the words defamatory, falsely and maliciously used them in the defamatory sense. That being so, even if the law will not imply damage under the circumstances, still the words are actionable, and the defendant is responsible if they cause, as their legal and natural consequence, actual damage. Here actual pecuniary damage in the plaintiff's business or employment generally is alleged, and we think that this allegation at all events makes the declaration good. Of course if the plaintiff should only prove damage in the horse slaughtering or grease manufacturing departments of his trade, that would not help his case; but, as it is alleged in his business as a whole, we must take it that he means to prove damage in the other branch of his business, in which case it may well be the legal and natural consequence of the words.

There is a second count alleging that the words imputed a trespass as well as a breach of duty; this does not appear to differ substantially from the other.

We therefore hold both counts good.

Judgment for the plaintiff.

[*But the connection between the Slander and the plaintiff's Calling must be made clear.*]

DOYLEY *v.* ROBERTS.

COURT OF COMMON PLEAS. 1837. 3 BINGHAM N.C. 835.

SLANDER. The plaintiff declared that he was an attorney, and that the defendant had falsely and maliciously spoken and published of the plaintiff, and of and concerning him in the way of his business or profession, that "he had defrauded his creditors, and had been horse-whipped off the course at Doncaster." Special damage, that one H. Gyde had, in consequence, declined to employ the plaintiff.

At the trial before Parke, B., last Worcester Assizes, the words were proved to have been spoken by the defendant, of the plaintiff, who was more engaged on the turf than in law, and had had creditors in sporting transactions; and the jury found, in answer to questions put to them by the learned baron,

That the words were spoken of and concerning the plaintiff:

That they were not spoken of him in his business of an attorney:

That they had a tendency to injure him morally and professionally. But,

That H. Gyde did not in consequence of them decline to employ the plaintiff.

A verdict was given for the plaintiff, with £50 damages; but the defendant had leave to move to enter a nonsuit instead, if the Court should be of opinion that the words were not actionable unless spoken of the plaintiff in the way of his business as an attorney.

* * * * * * *

Godson, for the defendant. According to the latest authorities it is not sufficient that the plaintiff was an attorney, or that the words were spoken of him, *being* an attorney, unless they were also spoken of him in his character of attorney; for though the plaintiff may be an attorney, it does not follow that he is practising as such, or liable to sustain any inconvenience. In *Ayre* v. *Craven*[1], the declaration for slander alleged that defendant used words imputing adultery to the plaintiff, a physician; and the words were laid to have been spoken "of him in his profession": no special damage was laid: and after verdict for the plaintiff, judgment was arrested, the Court holding, that such words, merely laid to be spoken of a physician, were not actionable without special damage; and that if they were so spoken

[1] 2 Ad. & E. 2.

as to convey an imputation upon his conduct in his profession, the declaration ought to have shewn how the speaker connected the imputation with the professional conduct. And Lord Denman, C.J., said, "Some of the cases have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery[1], and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution[2]. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay." Here the words were not spoken of the plaintiff with reference to his clients; and the fallacy on his part consists in treating the word 'creditors' as equivalent to 'clients.'

TINDALL, C.J....The case will stand thus: The plaintiff is an attorney, and carries on business as such, but appears to have had creditors in certain sporting transactions; the defendant says of him generally, that he has defrauded his creditors, and the jury find that these words were not spoken of him in his business of attorney. Now in Comyns's Digest, Action on the Case for Defamation, it is laid down, D. 27, that "words, not actionable in themselves, are not actionable when spoken of one in an office, profession, or trade, unless they touch him in his office": and these words, though spoken of an attorney, do not touch him in his profession, any more than they would touch a person in any other trade or profession. It is found, indeed, that the words have a tendency to injure him morally and professionally; and that is true; but it applies equally to all other professions, for a person cannot say anything disparagingly of another, that has not that tendency: upon that subject the authority of *Ayre* v. *Craven* is conclusive; and a rule for arresting judgment in this case must therefore be made absolute.

PARK, J. I am of the same opinion, and always considered that the principle as laid down in Comyns's Digest is correct. Here the jury have negatived the allegation, that the words were spoken of the plaintiff in his profession. That being the case, they are words of great abuse, but not so severe as many of the expressions which are pointed out in *Ayre* v. *Craven* as having been held not actionable. Lord Denman, C.J., says, "After full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession."...

Judgment arrested.

[1] See *Parratt* v. *Carpenter*, Noy. 64. S. C. Cro. Eliz. 502.
[2] Per Twisden, J., in *Wharton* v. *Brook*, 1 Ventr. 21.

[Special damage *renders* any *Slander actionable, provided it be damage of a kind which the slander was likely to produce.*]

LYNCH *v.* KNIGHT.

HOUSE OF LORDS. 1861. 9 H.L.C. 577.

IN this case an action had been brought in the Court of Queen's Bench in Ireland, in the names of Knight and his wife (the former being joined for conformity), to recover damages for slanderous words spoken of the wife. The words complained of were alleged to have been uttered to the husband, and were thus set forth in the first paragraph of the plaint: "Jane is a notorious liar, and she will do her best to annoy you, as she takes delight in creating disturbances wherever she goes, and I advise you not to introduce her into society. Any singularity of conduct which you may have observed in your wife must be attributed to a Dr Casserly of Roscommon, as she was all but seduced by him; and I advise you, if Casserly comes to Dublin, not to permit him to enter your place, as he is a libertine and a blackguard; I have no other object in view in telling you about her conduct, and in speaking to you as I have done, but your own welfare. She is an infamous wretch, and I am sorry that you had the misfortune to marry her; and if you had asked my advice on the subject, I would have advised you not to marry her."...

The second paragraph set forth the following words:

"He threatened to shoot me. I told him of his wife's misconduct. It was all owing to his wife. She had been insinuating to him that he had seduced her. She is a horrid young villain, and a notorious liar. Her brother, one Thomas Jones, is also a liar, but his lies are of the most harmless kind, whereas hers are of the most dangerous. In fact, she is such a dangerous character to have in the house, that I was obliged to have the back door in the yard nailed up."...

The averment of special damage was in these terms:

"And the plaintiffs aver that from the said false, scandalous, and malicious statements of the defendant, the plaintiff William was at first led to believe, and that he did in fact believe that his wife, the plaintiff Jane, had been guilty of improper and immoral conduct before her marriage, and that her character and conduct was such as represented as aforesaid by said defendant; that he, the plaintiff William, ought not any longer to live with the plaintiff Jane as his wife; and the plaintiff William, influenced solely by the defendant's said slanders, and then believing that the statements so made by the said defendant, who was the stepbrother of his wife, were true, shortly

after the speaking of said matter by the defendant, and in consequence thereof, was induced to refuse, and did in fact refuse to live any longer with the plaintiff Jane as his wife, and on the contrary, the plaintiff William required the father of the plaintiff Jane, who lived in the country, to take her home to his own house, which he accordingly did; and the plaintiff Jane, in fact, thereupon left Dublin and returned to her father's house, where she resided for a considerable time, separated from her said husband. And the plaintiffs aver that such separation was solely and entirely caused by and resulted from the acts of the defendant as aforesaid." And the plaintiffs aver that they have sustained damage.

The defendant demurred to the plaint upon the grounds, that the words not being actionable in themselves, the special damage assigned was too remote; also, that the damage, if taken to be damage to the wife alone, was not such a temporal loss as a court of common law could take cognizance of; also, that the damage complained of having resulted from the wrongful and illegal act of one of the plaintiffs, he could not maintain an action for it; also, that in any case the action being for words spoken of the wife, not actionable in themselves, the plaintiff Jane should not have been joined as plaintiff.

The defendant also, as a defence, denied the uttering of the words, and farther pleaded that they were not spoken in the sense imputed.

The issues settled by the Court were, first, whether the defendant spoke the words; secondly, whether they were spoken in the defamatory sense mentioned in the two paragraphs of the plaint.

The jury found a verdict for the plaintiffs, damages £150. The Court of Queen's Bench having overruled the demurrer, judgment was given for the plaintiffs on this finding. The case was then taken on error to the Exchequer Chamber, where the judges were divided in opinion, but the judgment was affirmed. The present proceeding in Error was then brought.

* * * * * * *

Lord Cranworth....The special damage, in order to afford a foundation for such an action, must appear to be the natural, I do not say the necessary, consequence of the words spoken; and in this case, I cannot come to the conclusion that the conduct pursued by the husband was that which was, or which the slanderer could have supposed likely to be, the consequence of his slander. The words uttered do not, it must be observed, impute to the wife actual criminality before marriage, but only that she had shewn herself false and deceptive, and that before her marriage she had been all but seduced by Dr Casserly.

I cannot say, judicially, that the natural result of such slander

would be to induce the husband to send his wife back to her parents, and to refuse any longer to live with her. Such conduct on the part of the husband could not have been justified; he might have been compelled to take back his wife.

If the slander had been that she had been guilty of a breach of her marriage vows, that she had, since her marriage, committed adultery,—then, indeed, the conduct of the husband in sending his wife to her friends, and refusing any longer to cohabit with her, would have been the natural result of the words spoken. It would not then lie in the mouth of the slanderer to say that they were false, or that the husband ought not to have acted on them; and supposing such an action to be maintainable at all, the special damage would have been well laid as being the natural consequence of the slander. But in the present case I should have thought that the natural result of the imputations would have been to lead the husband to watch his wife more carefully, to take care that she was never allowed to meet Dr Casserly, and to attempt, as far as possible, to reclaim her from the habits of deception and falsehood into which she was represented to have fallen before her marriage.

On the ground, therefore, that the plaint or declaration does not state any consequential damage to the wife as flowing naturally from the words spoken, I am of opinion that judgment ought to be given for the plaintiff in Error.

Lord Wensleydale....Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested. For instance, where a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose service is a material damage which a jury has to estimate; when juries estimate that, they usually cannot avoid considering the injured honour and wounded feelings of the parent.

...That the loss of the comfort of the society and attention of friends by a wrongful act does not support an action for slander is fully settled by the case of *Moore* v. *Meagher*[1]; and the wife can have no right of action for a loss of the same character, though of a much higher degree, for the loss of that of her husband. To the same effect is the case of *Medhurst* v. *Balams*[2].

For these reasons, I think the wife has no remedy in the supposed case of the wrongful imprisonment of the husband; and by parity of

[1] 1 Taunt. 39.

[2] Cited in 1 Siderf. 397.

reasoning, she can have none for being deprived of the society of her husband by the slander of another upon her character, causing him to desert her, especially when we consider that the damage in this case is immediately caused by the husband's own voluntary act.

This view of the case makes it unnecessary to consider whether the slander of the defendant has been proved to be the cause of the loss—the desertion by the husband—so as to make the words actionable, they not being so unless they have caused a special damage. Upon this question I am much influenced by the able reasoning of Mr Justice Christian. I strongly incline to agree with him, that to make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow.

I agree with the learned judges, that the husband was not justified in sending his wife away. I think he is to blame; but I think that such deliberate and continued accusations, of such a character, coming from such a quarter, might reasonably be expected so to operate, and to produce the result which they did....

Judgment reversed.

[EDITOR'S NOTE. This case was decided long before the passing of the Slander of Women Act, 1891 (*supra*, p. 278); but the slander here complained of is not gross enough to be rendered actionable even by that Statute.]

[*But* written *defamation is actionable whenever it exposes the libelled person* to hatred or contempt; (*even though there be no special damage*).]

CLEMENT *v.* CHIVIS.

COURT OF KING'S BENCH. 1829. 9 BARNEWALL & CRESSWELL 172.

[ACTION for libel. The first count of the declaration stated that the defendant published concerning the plaintiff "as the proprietor of a certain stage-coach" the following libel:—"Greenwich coachmen. The insolence of some of the Greenwich coachmen and their cads becomes intolerable. Our notice has been called to the gross misconduct of Thomas Chivis (the plaintiff) and his cad, on coach No. 7600, who, on Tuesday last, insulted two females and some gentlemen, who were outside passengers, in the most barefaced manner," &c. The second count omitted the statement of plaintiff's being the proprietor of a coach, and alleged the libel to be "of and concerning the plaintiff" only, and then set it out as before. It was averred as special damage, that by reason of the libel one John Davies, who would otherwise have gone by and been carried and conveyed by the plaintiff in his coach for hire and reward to the plaintiff in that behalf, had thence hitherto wholly neglected and refused so to do. Plea, the general issue. The jury found for the plaintiff, damages £5, but negatived the alleged special damage. Judgment was entered for the plaintiff; not on each count separately, but generally. A writ of error was then brought.]

Platt, for the defendant, contended that the supposed libel was not actionable if taken by itself, and without reference to the plaintiff's business, and without proof of some special damage. That the second count did not mention the plaintiff's occupation, and the jury had negatived the special damage; consequently, the judgment being general, was erroneous. The alleged libel was merely a charge that the plaintiff insulted somebody. The meaning of the word insulted is very indefinite: it imputes nothing actionable or indictable. [PARK, J. It states that the plaintiff was guilty of gross misconduct.] That is afterwards explained by the statement that he had insulted some passengers....

BAYLEY, J., delivered the judgment of the Court. The error assigned is that a general judgment had been entered for the plaintiff; whereas, the second count of the declaration did not set forth any sufficient cause of action. The introduction to that count stated only that the

libellous matter was published "of and concerning the plaintiff," without reference to his occupation. But it imputed to him gross misconduct, and that he had insulted two females in a barefaced manner. It was insisted that this did not constitute a libel, and that was the question reserved for consideration. There is a marked distinction in the books between oral and written slander. The latter is premeditated, and shews design; it is more permanent, and calculated to do a much greater injury than slander merely spoken. There is an early case upon the subject, in which this distinction was adverted to, *King* v. *Lake*[1], where the libel charged the plaintiff with having presented a petition to the House of Commons, "stuffed with illegal assertions, ineptitudes, imperfections; clogged with gross ignorances, absurdities, and solecisms." A special verdict was found; and upon argument, Hale, C.B., held, that "although such general words spoken once without writing or publishing them would not be actionable, yet, here they being writ and published, which contains more malice, they are actionable...." In *Cropp* v. *Tilney*[2], Holt, C.J., says, "Scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." In Hawk, P. C. ch. 73, s. 1, it is said, with reference to the criminal law, "It seemeth that a libel, in a strict sense, is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule."...Having, then, ascertained the rule, it is only necessary to enquire whether the publication in question does hold up the plaintiff to public hatred, contempt, or ridicule. It states that he was guilty of gross misconduct, and then describes in what that misconduct consisted; viz. in insulting two females, and some gentlemen in the most barefaced manner. That was a very serious and contumelious imputation, clearly calculated to bring the plaintiff into contempt by some persons, and hatred by others; and, therefore, according to the rule established by the cases referred to, we think that the publication was libellous, and sufficient to maintain the action. The judgment of the Court below must, therefore, be affirmed.

Judgment affirmed.

[EDITOR'S NOTE. A contrast is afforded by a case in which Darling, J., held (June 22, 1920) that the words "Mr Edwards goes to church on Sundays. I say that on Sundays Mr Edwards goes to church" could not reasonably be held to convey such an imputation as would give a cause of action for libel.]

[1] Hadr. 470. [2] 3 Salk. 225. Holt, 426.

[*Any false statement, whether written or oral, even though* not defamatory[1], *becomes actionable if it be made maliciously and produce special damage* (*of a kind which it was likely to produce*).]

RATCLIFFE *v.* EVANS.

COURT OF APPEAL. L.R. [1892] 2 Q.B. 524.

MOTION to enter judgment for the defendant, or for a new trial, by way of appeal from the judgment entered by Mr Commissioner Bompas, Q.C., in an action tried with a jury at the Chester Summer Assizes, 1891.

The statement of claim in the action alleged that the plaintiff had for many years carried on the business, at Hawarden in the county of Flint, of an engineer and boiler-maker under the name of "Ratcliffe and Sons," having become entitled to the goodwill of the business upon the death of his father, who, with others, had formerly carried on the business as "Ratcliffe and Sons"; that the defendant was the registered proprietor, publisher, and printer of a weekly newspaper called the *County Herald*, circulated in Flintshire and some of the adjoining counties, and that the plaintiff had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff in relation to his business, in the *County Herald*, certain words set forth which imported that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe and Sons did not then exist.

At the trial the learned commissioner allowed the statement of claim to be amended by adding that "by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business." The plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them by the commissioner, the jury found that the words did not reflect upon the plaintiff's character, and were not libellous; that the statement that the firm of Ratcliffe and Sons was extinct was not published bonâ fide; and that the plaintiff's business suffered injury to the extent of £120 from the publication of

[1] I.e., though not amounting in law to either a Slander or a Libel.

that statement. The commissioner, upon those findings, gave judgment for the plaintiff for £120, with costs.

The defendant appealed.

Bowen Rowlands, Q.C., and *E. H. Lloyd*, for the appellant. The learned commissioner ought to have entered judgment for the defendant. The evidence given by the plaintiff of a general loss of business ought not to have been admitted. In order to support the action, which is not an action for slander of the plaintiff in the way of his business, but an action on the case, special damage must have been alleged and proved. If the plaintiff had brought his action for slander, he must have proved special damage by calling witnesses to say that they had withdrawn their custom from him. He ought not to be in a better position by having brought an action on the case in the nature of an action for slander of title. In such an action there must, in order to support it, be an express allegation of some particular damage.

* * * * * * *

BOWEN, L.J., delivered the judgment of the Court....That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shewn, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that in such an action it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general and not special damage, and special damage, as often has been said, is the gist of such an action on the case. Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby* v. *White*[1]. In all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from

[1] 2 Ld. Raym. 938; 1 Sm. L. C. 9th ed. p. 268, per Holt, C.J.

the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denotes the actual and temporal loss which has, in fact, occurred. Such damage is called variously in old authorities, "express loss," "particular damage": *Cane* v. *Golding*[1]; "damage in fact," "special or particular cause of loss": *Law* v. *Harwood*[2]; *Tasburgh* v. *Day*[3].

The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action: see *Iveson* v. *Moore*[4]; *Rose* v. *Groves*[5]. In this judgment we shall endeavour to avoid a term which, intelligible enough in particular contexts, tends, when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance. In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself—is evidence to shew that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action?

In the case of a personal libel, such general loss of custom may unquestionably be alleged and proved. Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done. As is said by Gould, J., in *Iveson* v. *Moore*[4], in actions against a wrong-doer a more general mode of declaring is allowed. If, indeed, over and above this *general* damage, further *particular* damage is under the circumstances to be relied on by plaintiff, such particular damage must of course be alleged and shewn. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. "It is not special damage"—says Pollock, C.B., in *Harrison* v. *Pearce*[6]—"it is general damage resulting from the kind of injury the plaintiff has sustained." So in *Bluck* v. *Lovering*[7], under a general allegation of loss of credit

[1] Sty. 169. [2] Cro. Car. 140. [3] Cro. Jac. 484. [4] 1 Ld. Raym. 486.
[5] 5 M. & G. 613. [6] 32 L. T. (O.S.) 298. [7] 1 Times L. R. 497.

in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also *Ingram* v. *Lawson*[1].

Akin to, though distinguishable in a respect which will be mentioned from, actions of libel are those actions which are brought for oral slander, where such slander consists of words actionable in themselves and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorized repetition: *Ward* v. *Weeks*[2]; *Holwood* v. *Hopkins*[3]; *Dixon* v. *Smith*[4]. General loss of custom cannot properly be proved in respect of a slander of this kind when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered.

From libels and slanders actionable per se, we pass to the case of slanders not actionable per se, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty: *Law* v. *Harwood*[5].

...Slanders of title, written or oral, and actions such as the present, brought for damage done by falsehoods, written or oral, about a man's goods or business, are similar in many respects to the last-mentioned class of slanders not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference in this respect whether the falsehood is oral or in writing: *Malachy* v. *Soper*[6]. The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: *Lowe* v. *Harewood*[7]; *Cane* v. *Golding*[8]; *Tasburgh* v. *Day*[9]; *Evans* v.

[1] 6 Bing. N. C. 212. [2] 7 Bing. 211. [3] Cro. Eliz. 787.
[4] 5 H. & N. 450. [5] Cro. Car. 140. [6] 3 Bing. N. C. 382.
[7] W. Jones, 196. [8] Sty. 176. [9] Cro. Jac. 484.

Harlow[1]. But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: *Janson* v. *Stuart*[2]; *Lord Arlington* v. *Merricke*[3]; *Grey* v. *Friar*[4]; *Westwood* v. *Cowne*[5]; *Iveson* v. *Moore*[6]. In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done.

...In an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In *Hargrave* v. *Le Breton*[7] it was a falsehood openly promulgated at an auction. In the case before us to-day, it is a falsehood openly disseminated through the press—probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed....

Appeal dismissed.

[1] 5 Q. B. 624. [2] 1 T. R. 754. [3] 2 Saund. 412, n. 4.
[4] 15 Q. B. 907; see Co. Litt. 303 d. [5] 1 Stark. 172.
[6] 1 Ld. Raym. 486. [7] 4 Burr. 2422.

[*What constitutes the* Publication *of a defamatory statement.*]

PULLMAN AND ANOTHER *v.* HILL AND CO.

COURT OF APPEAL. L.R. [1891] 1 Q.B. 524.

MOTION by the plaintiffs for a new trial.

At the trial before Day, J., with a jury, it appeared that the plaintiffs were members of a partnership firm of R. and J. Pullman, in which there were three other partners. The place of business of the firm was No. 17, Greek Street, Soho. The plaintiffs were the owners of some property in the Borough Road, which they had contracted in 1887 to sell to Messrs Day and Martin. The plaintiffs remained in possession of the property for some time, and agreed to let a hoarding, which was erected upon the property, at a rent to the defendants, who were advertising agents, for the display of advertisements. In 1889 a dispute arose between the plaintiffs and Day and Martin, who were building upon the land, as to which of the two were entitled to the rent of the hoarding; and on September 14, 1889, the defendants, after some correspondence, wrote thus:—

"Messrs Pullman & Co., 17, Greek Street, Soho.
"*Re* Boro' Road.

"Dear Sirs,—We must call your serious attention to this matter. The builders state distinctly that you had no right to this money whatever; consequently it has been obtained from us under false pretences. We await your reply by return of post.

"Yours faithfully,
"(Signed) Walter Hill & Co., Limited."

This letter was dictated by the defendants' managing director to a shorthand clerk, who transcribed it by a type-writing machine. This type-written letter was then signed by the managing director, and, having been press-copied by an office-boy, was sent by post in an envelope addressed to Messrs Pullman and Co., 17, Greek Street, Soho. The defendants did not know that there were any other partners in the firm besides the plaintiffs. The letter was opened by a clerk of the firm in the ordinary course of business, and was read by two other clerks. The plaintiffs brought this action for libel. The defendants contended that there was no publication, and that, if there were, the occasion was privileged. The learned judge held that there was no publication, that the occasion was privileged, and that there was no evidence of malice. He therefore non-suited the plaintiffs.

* * * * * * *

Murphy, Q.C., and *R. M. Bray*, for the defendants. It is contended that there was no publication of the libel; and, if there were, the occasion was privileged. For the purposes of a civil action, publication to the party libelled will not suffice; and the defendants are not responsible for the opening of the letter by the plaintiffs' clerks. With regard to the alleged publication to defendants' own servants, it is obvious that a corporation cannot write a letter except through an agent. Employing their agents in the usual and proper course of business to write a letter to the plaintiffs, and to make a copy of such letter, would, in the absence of actual malice, be privileged: *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.*[1] Great inconvenience would be caused in business, if the ordinary mode of writing and copying letters could not be employed. If what was done amounted to publication, the occasion was privileged: *Toogood* v. *Spyring*[2]; *Jones* v. *Thomas*[3]; *Davies* v. *Snead*[4]. The defendants had a right to send the letter, and it was their duty to do so: *Wright* v. *Woodgate*[5]; *Lake* v. *King*[6]. The circumstances rebut any presumption of malice, and there is no evidence of express malice. If there is privilege as between the person who makes the communication and the person who receives it, it will not be destroyed by the mere presence of a third party.

Lord Esher, M.R. Two points were decided by the learned judge: (1) that there had been no publication of the letter which is alleged to be a libel; (2) that, if there had been publication, the occasion was privileged. The question whether the letter is or is not a libel is not for the jury, if it is capable of being considered an imputation on the character of the plaintiffs. If there is a new trial, it will be open to the jury to consider whether there is a libel, and what the damages are. The learned judge withdrew the case from the jury.

The first question is, whether, assuming the letter to contain defamatory matter, there has been a publication of it. What is the meaning of "publication"? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it. And, if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication. If the writer of a letter shews it to his own clerk in order that the clerk may copy it for him, is that a

[1] L. R. 4 Q. B. 262. [2] 1 C. M. & R. 181. [3] 34 W. R. 104.
[4] L. R. 5 Q. B. 608. [5] 2 C. M. & R. 573. [6] 1 Wms. Saund. p. 131 b.

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publication of the letter? Certainly it is shewing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shewn it to you and to no one else." I cannot, therefore, feel any doubt that, if the writer of a letter shews it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was, therefore, in this case a publication to the type-writer.

Then arises the question of privilege, and that is, whether the occasion on which the letter was published was a privileged occasion. An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving a character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore, the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libelled; it is not a question of privilege as between the person who makes and the person who receives the communication; the privilege is as against the person who is libelled. Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rule of privilege as against the plaintiffs—the persons libelled? What interest had the type-writer in hearing or seeing the communication? Clearly, she had none. Therefore, the case does not fall within the rule.

Then again, as to the publication at the other end—I mean when the letter was delivered. The letter was not directed to the plaintiffs in their individual capacity; it was directed to a firm of which they were members. The senders of the letter no doubt believed that it would go to the plaintiffs; but it was directed to a firm. When the letter arrived it was opened by a clerk in the employment of the plaintiffs' firm, and was seen by three of the clerks in their office. If the letter had been directed to the plaintiffs in their private capacity, in all probability it would not have been opened by a clerk. But mercantile firms and large tradesmen generally depute some clerk to open business letters addressed to them. The sender of the letter had put it out of his own control, and he had directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. I agree that under such circumstances there was a publication of the letter by the sender of it, and in this

case also the occasion was not privileged for the same reasons as in the former case. There were, therefore, two publications of the letter, and neither of them was privileged. And, there being no privilege, no evidence of express malice was required; the publication of itself implied malice. I think the learned judge was misled...

LOPES, L.J....The sender might have written "Private" outside it, in order to prevent its being opened by a clerk. The defendants placed the letter out of their own control, and took no means to prevent its being opened by the plaintiffs' clerks. Therefore there was a publication of the letter, not only to the type-writer, but also to the clerks of the plaintiffs' firm. The question arises, whether the occasion was privileged. A confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication was privileged; but the question whether an occasion was privileged is for the judge...

Order for new trial.

[EDITOR'S NOTE. Subsequent cases have shown that, so far as concerns the liability of the defendants for the publication to their clerks, the judgments in *Pullman* v. *Hill & Co.*, must not be construed as a general rule, but as dependent upon the particular circumstances of that case, in which no reasonable necessity arose for such a publication. *Sharp* v. *Skues* (25 T. L. R. 336) shows that where, from the ordinary course of the recipient's business, a letter is, *in fact*, likely to be opened by his clerk, but the sender has no knowledge of this likelihood, there is no publication to the clerk by the sender. Cf. *Huth* v. *Huth*, p. 335 *infra*. And even where, as in *Pullman* v. *Hill*, there is a publication to the clerks of the recipient, or of the sender, that publication, if it were only in the ordinary course of business, will be covered by any privilege attached to the occasion of the letter. See *Roff* v. *British F. C. M. Co. and Gibson* (L. R. [1918] 2 K. B. 677); and *Edmondson* v. *Birch & Co. Ld.* (L. R. [1907] 1 K. B. 371.]

In the latter case Collins M.R. said:—"The person exercising the privilege is entitled to take all reasonable means of so doing. Those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business; and if so, it will not destroy the privilege....In the case of *Boxsius* v. *Goblet Frères* Davey L.J. said that the decision at which the Court was arriving was justified by the earlier authorities. I think that the only one of those earlier authorities to which I need refer is the case of *Lawless* v. *Anglo-Egyptian Cotton Co.* (L. R. 4 Q. B. 262). In that case the directors of a company had caused a Report which was to be made to a meeting of shareholders, and which contained matter defamatory of the plaintiff, to be printed for circulation among all the shareholders. The question arose, whether the communication of that matter to the printer was privileged; and it was held that it was, because the printing of the report was the ordinary and reasonable mode of doing what the occasion entitled the company to do, namely, communicate the report to the shareholders. That seems to involve the decision of the very point raised in the present case; namely, that the use of the ordinary and reasonable means of giving effect to the privilege does not destroy it." To this Cozens-Hardy L.J. added, "If we were to accede to

the argument for the plaintiff, we should in effect be destroying the defence of Privilege in cases of this kind, in which limited companies and large mercantile firms are concerned. For it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business such a document must be copied, and find its way into the copy letter-book or telegram-book of the company or firm. The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business." And Fletcher Moulton L.J. thus summarized the settled rule:—"In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business."]

[Unconscious dissemination *of a libel is not a Publication of it unless there be* negligence.]

VIZETELLY *v.* MUDIE'S SELECT LIBRARY.

COURT OF APPEAL. L.R. [1900] 2 Q.B. 170.

APPLICATION for judgment or a new trial in an action tried before Grantham, J., with a jury.

The action was for a libel contained in a book, copies of which had been circulated and sold by the defendants, who were the proprietors of a circulating library with a very extensive business. The defendants in their defence stated that, if they sold or lent the book in question, they did so without negligence, and in the ordinary course of their business as a large circulating library; that they did not know, nor ought they to have known, that it contained the libel complained of; that they did not know and had no ground for supposing that it was likely to contain libellous matter; and that under the circumstances so stated they contended that they did not publish the libel.

The plaintiff had been employed by Mr Gordon Bennett of the *New York Herald* to proceed as the head of an expedition to Africa to search for Sir H. Stanley, who was then engaged in an expedition for the rescue of Emin Pasha, and to furnish news to the *New York Herald* on the subject. He met Stanley and Emin Pasha in Africa on their way down to the coast at a place called Msura; and subsequently sent off letters to Mr Gordon Bennett. Messrs Archibald Constable & Co., a well-known firm of publishers, in October, 1898,

published in this country a book called "Emin Pasha: his Life and Work," which was a slightly abridged English version of a work published in Germany that purported to be compiled from the journals, letters, and scientific notes of Emin Pasha and from official documents. It contained the following passage purporting to be an extract from Emin Pasha's diary: "Vizetelly sent off three messengers to-day to the coast, each with a bulky letter. However, as he is not yet sober, he cannot surely have written them himself, and the solution of the problem is, as Dr Parke tells us, simply that Stanley had the correspondence ready, and knocked it down to the highest bidder, Vizetelly, that is, Gordon Bennett, and quite right too." This was the libel complained of. It was not suggested that the statements contained in it were true.

The plaintiff on becoming aware of the libel brought an action for libel against Messrs Constable & Co., which was settled by their paying £100 damages, apologizing, and undertaking to withdraw the libel from circulation. In the issue of the *Publishers' Circular*, a recognised medium for trade advertisements of the kind, for November 12, 1898, a notice was inserted to the effect that Messrs Archibald Constable & Co. requested that all copies of Vol. I. of "The Life and Work of Emin Pasha" might be returned to them immediately, as they wished to cancel a page, and insert another one in its place, and stating that they would of course defray the carriage both ways, if desired. A similar notice was inserted on the same date in the *Athenæum* newspaper, a well-known medium of communication among literary people.

In March, 1899, it came to the plaintiff's knowledge that the defendants were lending copies of the work as originally published to subscribers, and also selling surplus copies of the same, and he thereupon commenced the action against them. It appeared that none of those engaged in the conduct of the defendants' business had seen the before-mentioned notices in the *Publishers' Circular* and *Athenæum*, though the defendants took in those papers. Mr A. O. Mudie, one of the defendants' two managing directors, who was called as a witness for the defendants, gave evidence to the effect that the defendants did not know when they circulated and sold the book in question that it contained the passage complained of. He stated that the books which they circulated were so numerous that it was impossible in the ordinary course of business to have them all read, and that they were guided in their selection of books by the reputation of the publishers, and the demand for the books. He said in cross-examination that there was no one else in the establishment besides himself and his co-director who exercised any kind of supervision over the books; that they did not keep a reader or anything of that sort;

that they had had books on one or two occasions which contained libels; that that would occur from time to time; that they had had no action brought against them for libel before the present action; and that it was cheaper for them to run an occasional risk of an action than to have a reader. The learned judge in summing up in substance directed the jury to consider whether, having regard to the above-mentioned evidence, the defendants had used due care in the management of their business. The jury found a verdict for the plaintiff, damages £100.

The defendants applied for judgment or a new trial on the ground that there was no evidence on which a verdict could be found or judgment entered for the plaintiff, and also on the grounds that the judge insufficiently directed the jury on the question what amounted in law to the publication of a libel, and on the question of the burden of proof as to publication and of the duty of the defendants and their alleged negligence, and that the verdict was against the weight of the evidence.

Asquith, *Q.C.*, and *Scrutton* (*McCall*, *Q.C.*, with them), for the defendants. It is not suggested that the defendants, when they circulated and sold copies of the work in question, knew that it contained a libel on the plaintiff. The question, therefore, is whether the proprietors of a library, such as the defendants', who in the ordinary course of business lend or sell a book which contains a libel, in ignorance that it contains a libel, can be said to publish the libel. The merely accidental circulation of a libel by the innocent transmission of a document containing it, as, for instance, by a carrier or messenger, does not amount to a publication of it. At any rate, it does not amount to publication, unless it can reasonably be said that the person so transmitting the document ought to have known or suspected that it contained a libel. In such a case it cannot be said that there is any malicious publication, for the malice implied by law from the publication of a libel is negatived: see *Emmens* v. *Pottle*[1]. That case is an authority in favour of the defendants. There was no evidence here of any negligence on the part of the defendants in not knowing that the book in question contained a libel on the plaintiff. There was nothing in the title or general nature of the book, or the reputation of the author or publishers, to suggest that the book was likely to contain libellous statements. It is not reasonable to suggest that a proprietor of a circulating library or a bookseller must always have every book which he lends out or sells in the ordinary course of business read through from cover to cover, in order to see whether it contains a libel. It is impossible for persons carrying on a business like the defendants', in which thousands of new books are yearly taken,

[1] 16 Q. B. D. 354.

and many of them have to be procured and circulated immediately in response to the urgent demand for them by the public, to have each book examined minutely to see whether it contains a libel: and, if there is no special circumstance to put them on inquiry, they are entitled to assume that it does not.

* * * * * * *

A. L. SMITH, L.J....I think that there were circumstances which justified the jury in saying that the defendants published the libel of which the plaintiff complains. The defendants having lent and sold copies of the book containing that libel, primâ facie they published it. What defence, then, have they? None, unless they can bring themselves within the doctrine of *Emmens* v. *Pottle*[1]. That was a case in which newsvendors had sold newspapers containing a libel on the plaintiff. The jury found (1) that the defendants did not know that the newspapers at the time they sold them contained libels on the plaintiff; (2) that it was not by negligence on the defendants' part that they did not know there was any libel in the newspapers; and (3) that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so. The learned judge who tried the case on those findings ordered judgment to be entered for the defendants. The plaintiff appealed to this Court. Lord Esher, M.R., in giving judgment dismissing the appeal said: "I agree that the defendants are primâ facie liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel. We must consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write it, or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel. If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That I think cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish

[1] 16 Q. B. D. 354.

the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and still more, that they ought not to have known this, which must mean that they ought not to have known it, having used reasonable care—the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel." Applying the law so laid down to the present case, where is there any such finding here, as there was in *Emmens* v. *Pottle*[1], to the effect that it was not by negligence on the defendants' part that they did not know that there was a libel in the book which they disseminated? What are the special circumstances of this case with regard to the question whether the defendants took due and reasonable care in the conduct of their business in this respect? It appears from the evidence of Mr Mudie, one of the defendants' directors, that there was no one in the establishment to exercise any supervision over the books besides himself and his co-director, and the books were too numerous for them to examine to see if they contained libels....Again, there was another matter for the consideration of the jury in connection with this question, namely, the notices published in the *Publishers' Circular* and the *Athenæum*. The former of these is a well-known trade organ in which notices of the kind are usually published. It appears that the defendants took it in, but it does not appear that any one on their behalf ever looked into it to see whether there was anything in it about this book. Might not a jury reasonably say that the defendants should have had some one whose duty it was to look into this circular to see whether it contained anything about the books which they circulated? The same consideration applies to the notice which appeared in the *Athenæum*. I think there was evidence for the jury of want of due care on the part of the defendants by reason of which they failed to find out that the book contained a libel, and I cannot say that their verdict was against the weight of the evidence. The defendants therefore failed to prove the plea which was proved in *Emmens* v. *Pottle*[1], namely, that they did not publish the libel....

Romer, L.J....The result of the cases is I think that—as regards a person who is not the printer (or the first or main publisher) of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it—in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at. And, if he succeeds

[1] 16 Q. B. D. 354.

in shewing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was primâ facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury. Applying this view of the law to the present case, it appears to me that the jury, looking at all the circumstances of the case, have in effect found that the defendants published the libel complained of, and therefore the defendants are liable, unless that verdict is disturbed. Looking at the special circumstances of the case which were brought to the attention of the jury, I cannot say that they could not reasonably find as they did....

Application dismissed.

[EDITOR'S NOTE. In the above cited case of *Emmens* v. *Pottle*, Lord Bowen put the point thus tersely:—"The defendants were innocent carriers of that which they did not know contained libellous matter, and which they had no reason to suppose was likely to contain libellous matter. A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it if he knows, *or ought to know*, that the paper is one which is likely to contain a libel."

In *Weldon* v. *The Times Book Co. Ld.* (28 T. L. R. 143) the defendants had sold in London two French books by eminent authors, published by a high-class firm in Paris. The jury found that the defendants had not been "negligent" in their omission to read the books and detect the libellous matter in them. Cozens-Hardy, M.R. said, "It is quite impossible that distributing-agents should be expected to read every book they have. There are some books as to which there may be a duty on distributing-agents to examine them carefully, because of their titles...or their authors. Beyond that the matter cannot go."]

[*It is only in a technical sense that* "Malice" *can be regarded as universally necessary to render Defamation actionable.*]

BROMAGE *v.* PROSSER.

KING'S BENCH. 1825. 4 BARNEWALL & CRESSWELL 247.

[THE facts of this case sufficiently appear in the judgment of the Court, which was delivered by Bayley, J., after the Court had taken time for consideration of the arguments.]

BAYLEY, J. This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was, that in answer to a question from one Lewis Watkins, whether he, the defendant, had said that the plaintiffs' bank had stopped, the defendant's answer was, "it was true, he had been told so." The evidence was, that Watkins met defendant and said, "I hear that you say the bank of Bromage and Snead, at Monmouth, has stopped. Is it true?" Defendant said, "Yes it is; I was told so." He added, "it was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr John Thomas of it." Defendant repeated, "I was told so." Defendant had been told at Crickhowell, there was a run upon plaintiffs' bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond what he had heard. The learned Judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but as the defendant did not appear to be actuated by any ill-will against the plaintiffs, he told the jury that if they thought the words were not spoken *maliciously*, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken *maliciously*, they should find for the plaintiffs: and the jury having found for the defendant, the question upon a motion for a new trial was upon the propriety of this direction.

If in an ordinary case of slander (not a case of privileged communication), want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law *implies* such malice as is necessary to maintain the action, it is the duty of the Judge to withdraw the question of malice from the consideration of the jury: and it appears to us that the direction in this case was

wrong. That *malice*, in some sense, is the gist of the action, and that therefore the *manner and occasion of speaking the words* is admissible in evidence to shew they were not spoken *with malice*, is said to have been agreed (either by all the Judges, or at least by the four who thought the truth might be given in evidence on the general issue), in *Smith* v. *Richardson*[1]; and it is laid down 1 Com. Dig. action upon the case for defamation G 5 that the declaration must shew a *malicious intent* in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action. But in what sense the word *malice* or *malicious intent* are here to be understood, whether in the *popular* sense, or in the sense the *law* puts upon those expressions, none of these authorities state. Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse[2]. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. This is so laid down in Styles 392, and was adjudged upon error in *Mercer* v. *Sparks*[3]. The objection there was, that the words were not charged to have been spoken maliciously, but the Court answered, that the words were themselves malicious and slanderous, and, therefore, the judgment was affirmed. But in actions for such slander as is primâ facie excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff....So in *Hargrave* v. *Le Breton*[4], Lord Mansfield states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary

[1] Willes, 24.
[2] 1 Russell on Crimes, 11 (*m*).
[3] Owen, 51.
[4] 3 Burr. 2425.

circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had heard before, but without naming the author), upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question, whether the defendant understood Watkins as asking for information for his own guidance, and that the defendant spoke what he did to Watkins, merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a *second* question to the jury, if their minds were in favour of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury....

Rule absolute for a new trial.

[EDITOR'S NOTE. The rule, here laid down, that in civil proceedings for defamation it is not necessary to make an express allegation of malice, was applied in *Regina* v. *Munslow* (L. R. [1895] 1 Q. B. 758) to criminal proceedings for libel. (*See* Kenny's *Select Cases in Criminal Law*, p. 432.)

For, from the mere fact that the defendant published the libel, there follows, by conclusive legal presumption, an inference that he did so with "malice in law" (the only malice that is *universally* essential in libels and slanders). Such malice must be carefully distinguished from malice in the current popular sense of Ill-will; which, for distinction's sake, has come to be styled "malice in fact," or "actual malice." The old aphorism that "Malice is the gist of every action for defamation" is not true, therefore, in the obvious sense of the words; but means at most that defamation, to be actionable, must be published with intention and without circumstances of legal excuse. Thus analysed, this ancient phrase, Malice, becomes—as Mr Bigelow vividly puts it (*Law of Torts*, ed. 1903, p. 18), "the mere name of a legal conclusion, a name of nothing that requires proof, a downright fiction." The fictitiousness is rendered obvious if we contrast with the tort of Defamation that of Malicious Prosecution; in which wrong, "malice in fact" is essential, and must be both alleged and proved. See, *infra*, at p. 361, in the case of *Capital and Counties Bank* v. *Henty*, Lord Blackburn's expression of preference for the modern and less fictitious way of regarding Defamation.]

[*No action lies for defamatory words that relate to a matter of* public interest *and are no more than a* Fair Comment *upon it.*]

CAMPBELL *v.* SPOTTISWOODE.

COURT OF QUEEN'S BENCH. 1863. 3 BEST & SMITH 769.

LIBEL. The declaration stated that the plaintiff was a Protestant dissenting minister, and minister of a congregation of Protestant dissenters, and the editor of a newspaper called *The British Ensign*, and had published the names or descriptions of divers persons as subscribers for and persons purchasing and promising to purchase copies of that newspaper; and the defendant falsely and maliciously printed and published of the plaintiff, to wit, in a periodical publication called *The Saturday Review of Politics, Science, Literature and Art*, a false, scandalous, malicious and defamatory libel; and in one part of which libel was contained the false, scandalous, malicious, defamatory and libellous matter following of and concerning the plaintiff, that is to say:—"The doctor" (meaning the plaintiff) "refers frequently to Mr Thompson as his authority—so frequently, that we must own to having had a transitory suspicion that Mr T. was nothing more than another Mrs Harris, and to believe, with Mrs Gamp's acquaintance, that there 'never was no such person.' But as Mr Thompson's name is down for 5000 copies of *The Ensign*, we must accept his identity as fully proved, and we hope the publisher of *The Ensign* is equally satisfied on the point." And in another part of which said libel was also contained the false &c. matter following of and concerning the plaintiff, that is to say:—"To spread the knowledge of the gospel in China would be a good and an excellent thing, and worthy of all praise and encouragement; but to make such a work a mere pretext for puffing an obscure newspaper into circulation is a most scandalous and flagitious act; and it is this act, we fear, we must charge against Dr Campbell." And in another part of which said libel was also contained the false &c. matter following of and concerning the plaintiff, that is to say:—"There have been many dodges tried to make a losing paper 'go,' but it remained for a leader in the Nonconformist body to represent the weekly subscription as an act of religious duty. Moreover, the well known device is resorted to of publishing lists of subscribers, the authenticity of which the public have, to say the least, no means of checking. 'R. G.' takes 240 copies, 'A London Minister' 120, 'An Old Soldier' 100, and so on. Few readers, we imagine, will have any doubt in their minds as to who is the 'Old Soldier,'" meaning thereby that the plaintiff had falsely and deceitfully

published, as the names or descriptions of subscribers for or purchasers of the said newspaper, divers fictitious names or descriptions which did not in fact represent any persons really being subscribers for or purchasers of the said newspaper. And in another part of which said libel is also contained the false &c. matter following of and concerning the plaintiff, that is to say:—"For, whatever may be the private views of the editor of *The Ensign*" (meaning the plaintiff), "there can be no question that his followers are sincere enough in the confidence they repose in his plan. It must be a very happy thing to be gifted with so large a stock of faith. It must take the sting out of many a sorrow, and smooth away many a trouble. The past cannot be very sad, nor the future very dreadful, to him who has the capacity for hoping all things and believing all things without hesitation. If this temper of mind should lay its possessor open occasionally to the beguilements of an impostor" (meaning the plaintiff), "more than an equivalent is provided in its freedom from doubts and suspicions, and the sense of security that it confers." And in another part of which libel was also contained the false &c. matter following of and concerning the plaintiff, that is to say:—"No doubt it is deplorable to find an ignorant credulity manifested among a class of the community entitled on many grounds to respect; but now and then this very credulity may be turned to good account. Dr Campbell" (meaning the plaintiff) "is just now making use of it for a very practical purpose, and to-morrow some other religious speculator will cry his wares in the name of Heaven, and the mob will hasten to deck him out in purple and fine linen. When Dr Campbell" (meaning the plaintiff) "has finished his Chinese letters, he will be a greater simpleton than we take him for if he does not force off another 100,000 copies of his paper by launching a fresh series of thunderbolts against the powers of darkness. In the meanwhile, there can be no doubt that he is making a very good thing indeed of the spiritual wants of the Chinese." And the plaintiff, by reason of the premises, has been greatly injured, scandalized and aggrieved. And the plaintiff claims £1000.

Plea: Not guilty.

On the trial, before Cockburn, C.J., at the Sittings at Guildhall after Hilary Term, it appeared that the defendant was the printer of a weekly newspaper or periodical called *The Saturday Review of Politics, Literature, Science and Art*, and that the libels complained of were published in an article headed "The Heathens' Best Friend," contained in the number for June 14th, 1862.

The plaintiff was a minister of a dissenting congregation, and the editor and part proprietor of *The British Ensign* and *The British Standard*, which were dissenting newspapers or periodicals. Extracts from the former were put in evidence, containing a proposal to publish

in it a series of letters to the Queen and persons of note on the subject and duty of evangelizing the Chinese, and to promote as widely as possible the circulation of the numbers of the paper in which those letters should appear, in order to call the attention of missionaries and others to the importance of this work of evangelization. A series of letters accordingly appeared in *The British Ensign*, the three first of which, headed "Christian Missions," were addressed to the Queen, and the rest headed "China—Conversion of the Chinese," were addressed to the Archbishop of Canterbury, the Earl of Shaftesbury, Viscount Palmerston, Thomas Thompson, Esq., of Prior Park, Bath, and other persons; and from time to time in the same numbers with the letters were published lists of subscribers for copies of the paper for distribution. In one of these lists were the following, "The Hon. Mrs Thompson, 5000 copies; An Old Soldier, 100; R. G., 240; M. S. D., 10; J. S., 240; A. J., 30."

The whole of the article in which the passages set forth in the declaration appeared was read to the jury.

It was contended, on the part of the plaintiff, that the passages set forth in the declaration imputed to him the charge of fabricating fictitious subscription lists, and of trying to procure subscriptions professedly for the conversion of the heathen, but in reality for the purpose of putting money into his own pocket. The plaintiff himself and some of the subscribers, among whom was Mr Thompson, were called as witnesses, to shew that such charges were without foundation, and to prove the reality of the subscriptions.

For the defendant it was contended that the article was such a comment as a public writer was entitled to make upon the scheme publicly put forward by the plaintiff; and that that scheme was such that the writer of the article was privileged in imputing improper motives to the plaintiff, provided he fairly and honestly believed such imputations to be well founded.

The Lord Chief Justice directed the jury that if they thought the effect of the article complained of was fairly to criticise and comment upon, though in a hostile spirit, the scheme publicly put forward by the plaintiff, they should find for the defendant. But if they thought that the article went beyond that, and imputed to the plaintiff base and sordid motives which the evidence had shewn to be without foundation, and that he asked for public subscriptions, not for the purpose of promoting the progress of Christianity in China, but for the purpose of private pecuniary gain, they should find a verdict for the plaintiff. Further that, in his opinion, it was no defence that the writer honestly believed the imputations made to be well founded. At the same time he asked them, at the suggestion of the defendant's counsel, if they returned a verdict for the plaintiff, and were of opinion

that the writer of the article made the imputations under a genuine and honest belief that they were well founded, or the plaintiff was fairly open to them, they should find the fact specially.

The jury found a verdict for the plaintiff, damages £50, and also found that the writer of the article in *The Saturday Review* believed the imputations in it to be well founded.

The Lord Chief Justice thereupon directed the verdict to be entered for the plaintiff, and reserved leave to move to enter the verdict for the defendant.

Bovill moved accordingly, or for a new trial on the ground of misdirection. He argued that a matter not only of public but universal interest, which was the subject of fair comment and criticism, was brought before the public by the plaintiff in his newspaper; that the editor or publisher of a newspaper or other periodical was privileged in making such comment or criticism and therefore the ordinary presumption of malice was rebutted; and that, in commenting upon public matters and the conduct of public men, there was permitted for the interests of society an unlimited right of discussion as to motives, if there were no attack on private character, provided the person making such comments honestly and bonâ fide believed them to be well founded.

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CROMPTON, J. It must be taken that the jury have found that the imputations made were not within the range of fair argument or criticism on the plaintiff's publication of his scheme. Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in Courts of justice or in Parliament, or the publication of a scheme or of a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think that, because he has a bonâ fide belief that he is publishing what is true, that is any answer to an action for libel. With respect to the publication of the plaintiff's scheme, the defendant might ridicule it and point out the improbability of its success; but that was all he had a right to do.

The first question is, whether the article on which this action is brought is a libel or no libel,—not whether it is privileged or not. It is no libel, if it is within the range of fair comment, that is, if a person might fairly and bonâ fide write the article; otherwise it is. It is said that there is a privilege, not to writers in newspapers only, but to the public in general, to comment on the public acts of public

men, provided the writer believes that what he writes is true; in other words, that this belongs to the class of privileged communications, in which the malice of the writer becomes a question for the jury; that is, where, from the particular circumstances or position in which a person is placed, there is a legal or social duty in the nature of a private or peculiar right, as opposed to the rights possessed by the community at large, to assert what he believes. In these cases of privilege there is an exemption from legal liability in the absence of malice; and it is necessary to prove actual malice. But there is no such privilege here. It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to be true. If this were so, a public man might have base motives imputed to him without having an opportunity of righting himself. Therefore it is necessary to confine privilege, as the law has always confined it, to cases of real necessity or duty, as that of a master giving a servant a character, or of a person who has been robbed charging another with robbing him. Though the word "privilege" is used loosely in some of the cases as applied to the right which every person has to comment on public matters, I think that in all the cases cited the real question was whether the alleged libel was a fair comment such as every person might make upon a public matter, and if not there was no privilege.

In the present case it is clear, as found by the jury, that the article is beyond the range of fair comment, and, this not being a case within the rule as to privilege, the only other available mode of defence was by proving the truth of the article....

BLACKBURN, J....The question of libel or no libel is for the jury; and, as the article published by the defendant obviously imputed base and sordid motives to the plaintiff, that question depended upon another,—whether the article exceeded the limits of a fair and proper comment on the plaintiff's prospectus; and this last question was therefore rightly left to the jury. Then Mr Bovill asked that a further question should be left to them, viz. whether the writer of the article honestly believed that it was true; and the jury have found that he did. We have to say whether that prevents an action being maintained. I think not. Bonâ fide belief in the truth of what is written is no defence to the action; it may mitigate the amount, but it cannot disentitle the plaintiff to damages. Moreover that honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel, that is, whether it exceeds the limits of a fair and proper comment; but it cannot in itself prevent the matter being libellous....

MELLOR, J....As far as I am aware this is the first time it has been

contended that a libel which imputes the obtaining of money under false pretences, and is not excused by being true, nor made on an occasion in which the exigencies of society required it, is excused by the fact that the person making it believed it to be true.

Rule refused.

[*The limits of Fair Comment in literary criticism.*]

MERIVALE *v.* CARSON.

COURT OF APPEAL. 1887. L.R. 20 Q.B.D. 275.

[ACTION for libel. The plaintiff and his wife were joint authors of a play called "The Whip Hand." It was produced successfully at Cambridge and Eastbourne; and in May 1886 was performed at Liverpool. The defendant was the editor of a theatrical newspaper called "The Stage." A criticism of the Liverpool performance was published in the defendant's newspaper.] The part of the article charged in the statement of claim as libellous was as follows:—

"'The Whip Hand,' the joint production of Mr and Mrs Herman Merivale, gives us nothing but a hash-up of ingredients which have been used ad nauseam, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only explicable on the ground, we suppose, that there is more or less of romance about such gentry. It is more in consonance with accepted notions that your Continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard-marker or stable-lout. And so the Marquis Colonna in 'The Whip Hand' is offered up by the authors upon the altar of tradition, and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier." The innuendo suggested was that the article implied that the play was of an immoral tendency. It was admitted that there was no adulterous wife in the play.

At the trial, Field, J., in the course of his summing-up to the jury, said: "The question is first, whether this criticism bears the

meaning which the plaintiffs put upon it. If it is a fair, temperate criticism, and does not bear that meaning, then your verdict will be for the defendant....It is not for a moment suggested by anyone that the defendant is animated by the smallest possible malice towards the plaintiffs. There is no ground for saying so; and no one has said so....The malice necessary in this action...if it existed at all, will be because the defendant has exceeded his right of criticism upon the play. You have the play before you; you must judge for yourselves. If it is no more than fair, honest, independent, bold, even exaggerated criticism, then your verdict will be for the defendant. It is for the plaintiffs to make out their case. They have to satisfy you that it is more than that; otherwise they cannot complain. If you are satisfied upon the evidence that it is more than that, then you will give your verdict for the plaintiffs."

The jury found a verdict for the plaintiffs with one shilling damages, and the judge entered judgment for the plaintiffs accordingly, and declined to deprive them of costs. The Divisional Court refused to grant a new trial. The defendant appealed.

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Lord Esher, M.R. The jury must look at the criticism, and say what in their opinion any reasonable man would understand by it. Two interpretations of the defendant's article were placed before them. One was that it meant that the play is founded upon adultery without containing any stigma on the fact that it is so founded. The defendant's article is alleged to be libellous in that it attributed to the plaintiffs that they had written a play founded upon adultery without any objection to it on their part; in other words, that they had written an immoral play. On behalf of the defendant it was said that the article had no such meaning, that the expression "naughty wife" does not mean "adulterous wife." It would not have that meaning in every case, but the question is whether, looking at the context of the article, it has that meaning. If the court should come to the conclusion that the expression could not by any reasonable man be thought to have that meaning, they could overrule the verdict of the jury; otherwise the question is for the jury.

What is the next question to be put to the jury? Are they to be told that the criticism of a play is a privileged occasion, within the well-settled meaning of the word "privilege," and that their verdict must go for the defendant unless the plaintiff can prove that the writer of the article was actuated by a malicious motive? I think it is clear that that is not the law; it was so decided in *Campbell* v. *Spottiswoode*[1], which has never been overruled. All the judges, both before and ever since that case, have acted upon the view there

[1] *Supra*, p. 309.

expressed, that a criticism upon a written published work is not a "privileged" occasion. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But in the case of a criticism upon a published work every person in the kingdom is entitled to do and is forbidden to do exactly the same things, and therefore the occasion is not "privileged." Therefore the second question to be put to the jury is...not whether the article is privileged, but whether it is a libel. Is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit....Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit.

I cannot doubt that the jury were justified in coming to the conclusion to which they did come, when once they had made up their minds as to the meaning of the words used in the article, viz., that the plaintiffs had written an obscene play. No fair man could have said that. There was therefore a complete misdescription of the plaintiffs' work; and the inevitable conclusion was that an imputation was cast upon the characters of the authors....

Another point which has been discussed is this: It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, yet it could be shewn that the defendant was not really criticising the work but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would; and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author.

BOWEN, L.J....We cannot find in any decided case an exact and rigid definition of the word "fair." This is because the judges have always preferred to leave the question what is "fair" to the jury....It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism.

In the case of literary criticism it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticising. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. *Campbell* v. *Spottiswoode* was a case of that kind. There is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism,—I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work and think it has an evil tendency, and saying that a work treats adultery cavalierly, when in fact there is no adultery at all in the story. A jury would have the right to consider the latter beyond the limits of fair criticism....Positive misdescription is a question not of opinion but of fact.

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Appeal dismissed.

[EDITOR'S NOTE. It is clear, then, that in matters of public interest a defamatory comment constitutes no libel, if it be "fair." But this adjective is ambiguous. In *Merivale* v. *Carson* the plaintiff's counsel contended that it means "reasonable, moderate": the defendant's counsel that it means "honest, bonâ fide." Again it has been suggested that it means what can fairly be called comment, i.e. "real, genuine." An authoritative interpretation has at last been given, which is not identical with any of these contentions. In *M'Quire* v. *Western Morning News Co.*, L. R. [1903] 2 K. B. 100, Collins, M.R., said: "I think 'fair' embraces the meaning of honest and also of relevant. The view expressed must be honest and must be such as can fairly be called criticism. I am aware that the word 'moderate' has been used in this connection—*Wason* v. *Walter*[1]—with reference to comment on the conduct of a public man; but I think it is only used to express the idea that invective is not criticism. It certainly cannot mean moderate in the sense that that which is deemed by a jury, in the case of a literary criticism, extravagant and the outcome of prejudice on the part of an honest writer, is necessarily beyond the limit of fair comment—see *Merivale* v. *Carson*. No doubt in most cases of this class there are expressions in the impugned document capable of being interpreted as falling outside the limit of honest criticism, and therefore it is proper to leave the question to the jury; and in all cases where there may be a doubt it may be convenient to take the opinion of a jury. But it is always for the judge to say whether the document is capable in law of being a libel. It is, however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to shew that it is a libel—i.e., that it travels beyond the limit of fair criticism; and therefore it must be for the judge to say whether it is reasonably capable of being so interpreted. If it is not, there is no question for the jury, and it would be competent for him to give judgment for the defendant."

When Mr Whistler sued Mr Ruskin for saying, in *Fors Clavigera*, that in one of Mr Whistler's pictures in the Grosvenor Gallery his "ill-educated conceit nearly

[1] L. R. 4 Q. B. 73; *infra*, p. 325.

approached the aspect of wilful imposture,"—and for describing him as "a coxcomb who asks two hundred guineas for flinging a pot of paint in the public's face"—Huddleston, B., warned the jury that it is not Fair Comment for a critic to "run into reckless attack merely from the love of exercising his power of denunciation." Hence the jury gave a verdict against Mr Ruskin, though they only put the damages at a farthing. (*The Times*, Nov. 27th, 1878.)

If the comment itself be (in the opinion of the jury) unfair, the fact that the writer honestly considered it fair will certainly afford him no defence. But the converse question was raised in *Merivale* v. *Carson*—whether a comment, which in itself is quite fair, can be rendered actionable by the spitefulness of the writer's motive. Since then, it has been held by the Court of Appeal (*Thomas* v. *Bradbury Agnew & Co. Ld.*, L. R. [1906], 2 K. B. 627) that this express malice will destroy the immunity enjoyed by fair criticism. "Proof of malice," it was said by Collins, M. R., in that case, "may take outside the right of fair comment a criticism primâ facie fair, just as it takes a communication, primâ facie privileged, outside the privilege."

The distinction between a mere Comment and a statement of Fact, though clear in abstract theory, is often difficult to apply in practice; and what, in words, is a positive assertion, may be shown by the context to be mere argumentative inference. Hence judges are in the habit of directing juries to interpret this defence liberally; and—in the words of Lord Russell, C.J.,—not to be too astute in seeing whether the critic has crossed his "t's" and dotted his "i's."]

[*There are occcasions when the publication of Defamation is protected by a* Privilege, *either absolute or qualified, that is enjoyed only by particular classes.*

[*E.g. a* Judge[1] *is protected by an absolute privilege.*]

SCOTT *v.* STANSFIELD.

COURT OF EXCHEQUER. 1868. L.R. 3 Ex. 220.

[THIS case has been already reported; *supra* p. 119.]

[1] [EDITOR'S NOTE. Even a local justice of the peace comes within this rule as to "judges"; *Law* v. *Llewellyn*, L. R. [1906], 1 K. B. 487.]

[*And so is an* Advocate.]

MUNSTER *v.* LAMB.

COURT OF APPEAL. 1883. L.R. 11 Q.B.D. 588.

ACTION for words spoken by an advocate in defending a client.... The cause was tried before Watkin Williams, J., at the Sittings for Middlesex, and the following is the substance of the facts proved at the trial.

On the 9th and 17th of June, 1881, at the petty sessions for the borough of Brighton, Ellen Hill was charged with administering drugs in order to enable a felony to be committed. The plaintiff in the present action was the prosecutor, and the defendant, Lamb, who was a solicitor, appeared for the defence of Ellen Hill. The prosecutor's house was feloniously broken into and entered at the end of February, 1878, and several articles were stolen. The prosecutor did not then reside at the house, but three women, namely Ellen Mockford, and two sisters named Cartwright, were staying at the house, and a man named Hatch called at the house in the evening preceding the burglary. The accused, Ellen Hill, was at the prosecutor's house upon the evening in question. Beer was drunk by the three women and the man, Hatch. At the hearing of the charge before the petty sessions they all were called, and in giving their evidence deposed that after drinking the beer they felt drowsy and sleepy. It was suggested on behalf of the prosecution that Ellen Hill had drawn the beer and had put some narcotic drug into it, in order to throw the inmates of the house into a deep sleep, and thereby to facilitate the commission of the burglary. In the course of the proceedings against Ellen Hill, the defendant Lamb, acting as her advocate, said: "I have my own opinion for what purpose all these young women may have been resident in the house of Mr Munster. I can believe that there may have been drugs in the house of Mr Munster, and I have my own opinion for what purpose they were there, and for what they may have been used." It was alleged on behalf of the plaintiff that the defendant by using these words meant that the plaintiff had kept and used and was accustomed to keep and use, drugs for the purpose of obtaining or of facilitating criminal connection, or for the purpose of procuring abortion, or for some other criminal and immoral purposes. The charge against Ellen Hill was dismissed by the court of petty sessions.

WATKIN WILLIAMS., J., was of opinion that the words above mentioned were privileged, having been used by the defendant as

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advocate for Ellen Hill before a court holding a judicial inquiry, and directed a nonsuit.

An order nisi was afterwards obtained for a new trial, on the ground of misdirection and that the verdict was against the weight of evidence.

[The Divisional Court after argument and taking time to consider discharged the rule The plaintiff thereupon appealed.]

BRETT, M.R....This action is brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as the advocate for a person charged in that court with an offence against the law. For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client: I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been.

It has been contended that as a person defamed has, primâ facie, a cause of action, the person defaming must produce either some statute or some previous decision directly in point which will justify his conduct. I cannot agree with that argument. The common law does not consist of particular cases decided upon particular facts: it consists of a number of principles, which are recognised as having existed during the whole time and course of the common law. The judges cannot make new law by new decisions; they do not assume a power of that kind: they only endeavour to declare what the common law is and has been from the time when it first existed. But inasmuch as new circumstances, and new complications of fact, and even new facts, are constantly arising, the judges are obliged to apply to them what they consider to have been the common law during the whole course of its existence, and therefore they seem to be laying down a new law, whereas they are merely applying old principles to a new state of facts. Therefore, with regard to the present case, we have to find out whether there is a principle of the common law, which although it has existed from the beginning, is now to be applied for the first time. I cannot find that there has been a decision of a court of law with reference to such facts as are now before us, that is, with regard to a person acting in the capacity of counsel: but there have been decisions upon analogous facts; and if we can find out

what principle was applied in these decisions upon the analogous facts, we must consider how far it governs the case before us....If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes—judge, witness, and counsel—it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. Far more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public....In *Kennedy* v. *Hilliard*[1], Pigott, C.B., delivered a most learned judgment, in the course of which he said[2]: "I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." Into the rule thus stated the word "counsel" must be introduced, and the rule may be taken to be the rule of the common law. That rule is founded upon public policy. With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution, can be maintained against a defendant, when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any court of justice into any matter concerning the administration of the law.

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Appeal dismissed.

[1] 10 Ir. C. L. Rep. (N.S.) 195. [2] Ib. at p. 209.

[EDITOR'S NOTE. But, as had long previously been said by Holroyd, J., "It by no means follows that because a counsel is privileged when in the course of the administration of justice he utters slanderous matter, therefore a third person may repeat that slanderous matter to all the world....That repeating is not done in the administration of justice, and therefore is not [equally] privileged"; (*Flint* v. *Pike*, 4 B. and C. at p. 481). As to the limited privilege possessed by reports of judicial proceedings, see *Wason* v. *Walter*, *infra*, p. 325.]

[*Moreover* Witnesses *have an Absolute Privilege; but only for so much of what they say as has reference to the litigation.*]

SEAMAN *v.* NETHERCLIFT.

COURT OF APPEAL. 1876. 2 C.P.D. 53.

CLAIM: that defendant said of a will, to the signature of which the plaintiff was a witness, "I believe the signature to the will to be a rank forgery, and I shall believe so to the day of my death," meaning that the plaintiff had been guilty of forging the signature of the testator, or of aiding and abetting in the forgery.

Defence: that defendant spoke the words in the course of giving his evidence as a witness on a charge of forgery before a magistrate.

Reply: that the words were not bonâ fide spoken by defendant as a witness, or in answer to any question put to him as a witness, and he was a mere volunteer in speaking them for his own purposes otherwise than as a witness and maliciously and out of the course of his examination.

[At the trial before Lord Coleridge it appeared that in the Probate suit of *Davies* v. *May* the defendant had been examined, as an adept, to express his opinion as to the genuineness of a signature to a will, and he gave it as his opinion that the signature was a forgery. The president of the Court, in addressing the jury, made some very strong observations on the rashness of the defendant in expressing so confident an opinion in the face of the direct evidence. Soon afterwards, on a prosecution for forgery, before the magistrate the defendant was called as an adept by the person charged, when he expressed an opinion favourable to the genuineness of the document. He was then asked by the counsel for the prosecution whether he had been a witness in the suit of *Davies* v. *May*. He answered "Yes." And he was then asked, "Did you read a report of the observations which the presiding judge made on your evidence?" He again said "Yes." And then the counsel stopped. I presume the

circumstances of the trial were well known, and the counsel thought he had done enough. The defendant, the witness, expressed a desire to make a statement. The magistrate told him he could not hear it. Nevertheless the defendant persisted and made the statement, the subject-matter of this action of slander.

On the proof of these facts Lord Coleridge reserved leave to the defendant to move to enter judgment, if the Court should be of opinion that there was no evidence on behalf of the plaintiff which ought to be left to the jury. It occurred to him, however, that it would be as well to take the opinion of the jury, and they found that the replication was true, viz. that the words were spoken not as a witness in the course of the inquiry, but maliciously for his own purpose, that is, with intent to injure the plaintiff. Upon these findings judgment was entered for the plaintiff, leave being again reserved to enter judgment for the defendant, and the Court of Common Pleas gave judgment for the defendant.]

M. Chambers, Q.C., and *J. Torr*, for the plaintiff, contended that the privilege of a witness was not unqualified, but was confined to matter strictly relevant to the issue; and that malice would also deprive the witness of the privilege; and that the statement of the defendant was, as the jury had found, volunteered after the defendant's examination as a witness was over.

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BRAMWELL, L.J. The judgment of the Common Pleas affirmed two propositions. First, that what the defendant said was said as a witness, and was relevant to the inquiry before the magistrate; secondly, that, that being so, the Lord Chief Justice should have stopped the trial of the action by nonsuiting the plaintiff.

As to the first proposition, I am by no means sure that the word "relevant" is the best word that could be used; the phrases used by the Lord Chief Baron and the Lord Chancellor in *Dawkins* v. *Lord Rokeby*[1], would seem preferable, "having reference," or "made with reference to the inquiry." Now, were the judges of the Common Pleas Division right in holding that this statement of the defendant had reference to the inquiry? I think that they were. There can be no doubt that the question put by the cross-examining counsel ought not to have been allowed: "Have you read what Sir James Hannen is reported to have said as to your evidence in *Davies* v. *May*?" What Sir James Hannen had said in a former case was not evidence. It was, therefore, an improper question, and the answer to it, if untrue, would not have subjected the witness to an indictment for perjury. But the question having been put, and the answer having been in the affirmative—and the question being, as Lord Coleridge observed,

[1] L. R. 7 H. L. at p. 744.

"ingeniously suggestive," viz. that the way the defendant had been dealt with on the former occasion did not redound to his credit as a witness—the defendant insisted on making in addition the statement complained of. He did so, in my opinion, very foolishly. It would have been better to have been satisfied with retaining his own opinion without setting it up in direct opposition to the positive testimony of eyewitnesses. But he foolishly, as I think, and coarsely exclaimed, "I believe that will to be a rank forgery, and shall believe so to the day of my death." Suppose after he had said "yes," he had added in a decent and becoming manner, "and I am sorry Sir James Hannen said what he did, for I took great pains to form my own opinion, and I shall always retain it, as I still think it right." Would not that have had reference to the inquiry before the magistrate? And would it not have been reasonable and right that the witness should have added that statement in justification of himself? Surely, yes. Mr Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose while the witness is in the box, a man were to come in at the door, and the witness were to exclaim, "that man picked my pocket." I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box, wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything a witness said as a witness should be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that, I think the words "having reference to the inquiry" ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the judge would give ground for a new trial; but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness. Taking that view, I think the first proposition is established, that the statement of the defendant was made as witness and had reference to the inquiry.

As to the second proposition, that, if the first be made out, no inquiry can be gone into as to whether the statement was false or malicious or as a volunteer, we are bound by authority. The case of *Dawkins* v. *Lord Rokeby*[1] is directly in point, and binding upon us even if we disliked the decision. Mr Chambers has not attempted to dis-

[1] L. R. 7 H. L. 744.

tinguish that case except on the ground that the inquiry in that case was before a military court. But it is clearly not distinguishable....

[AMPHLETT, L.J., after saying he could see many reasons why a witness should be absolutely protected for anything he said in the witness-box, added: "If he did voluntarily make a scandalous attack while giving evidence, he would be guilty of a gross contempt of Court, and might be committed to prison by the presiding judge; or if he were before an inferior tribunal, and he persevered in his scandalous statements, he might be liable to an indictment for obstructing the course of justice."]

Judgment affirmed.

[EDITOR'S NOTE. See *Watson* v. *M'Ewan* (L. R. [1905], A. C. 480); which extends the privilege to the witness's preliminary private statements to the solicitor.]

[*There is a* qualified[1] *privilege for the publication of fair* reports *of Parliamentary or judicial proceedings.*]

WASON *v.* WALTER.

COURT OF QUEEN'S BENCH. 1868. L.R. 4 Q.B. 73.

[ACTION against a proprietor of the *Times* for two libels contained in the same issue of that newspaper; one being in a report of a debate in the House of Lords in February 1867, the other in a leading article commenting on that debate. The debate had arisen on the presentation of a petition from the plaintiff to the House of Lords, accusing Sir Fitzroy Kelly of having, thirty-two years previously, pledged his honour as a gentleman to the truth of an assertion which he knew to be untrue; and asking that, in consequence, he might be removed from the office of Lord Chief Baron of the Court of Exchequer, to which he had been appointed in 1866. In the debate no speaker supported the accusation, and the Lord Chancellor declared the petition to be "a perpetual record of the petitioner's falsehood and malignity."

At the trial, the jury found for the defendant as to both libels. But a rule was obtained for a new trial on the ground of misdirection.]

[1] [EDITOR'S NOTE. Even an *absolute* privilege for any "fair and accurate report of proceedings publicly heard before any court exercising judicial authority," if published contemporaneously with such proceedings, has probably now been conferred on *newspapers*, by an ambiguous clause in the Law of Libel Amendment Act, 1888 (51 and 52 Vict. c. 64, s. 3).]

COCKBURN, C.J....The main question for our decision is, whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable....Decided cases leaving us without authority on which to proceed, we must have recourse to principle. Fortunately we have not far to seek before we find principles applicable to the case....

In the case of reports of proceedings of Courts of Justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of Courts of Justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of Courts of Justice, it has been said that the immunity accorded to the reports of the proceedings of Courts of Justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *Rex* v. *Wright*[1], namely, that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings."...

Both the principles, on which the exemption from legal consequences is thus extended to the publication of the proceedings of Courts of Justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with Lawrence, J., in *Rex* v. *Wright*[1], that the same reasons which apply to the reports of the proceedings in Courts of Justice apply also to proceedings in parliament. It seems to us impossible to doubt that it

[1] 8 T. R. at p. 298.

is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state,—no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it. Of this no better illustration could possibly be given than is afforded by the case before us. A distinguished counsel, whose qualification for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honour is an essential qualification. Can it be said that such a subject is not one in which the public has a

deep interest, and as to which it ought not to be informed of what passes in debate? Lastly, what greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the houses of parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community from the highest to the lowest looks with eager interest to the debates of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a parliamentary debate is to be held liable to legal proceedings because the conduct of a particular individual may happen to be called in question?

...We are glad to think that, on closer inquiry, the law turns out not to be as on some occasions it has been assumed to be. To us it seems clear that the principles on which the publication of reports of the proceedings of Courts of Justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely

brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of Courts of Justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of Courts of Justice lawful, have thought it necessary to distinguish what are called ex parte proceedings as a probable exception from the operation of the rule. Yet ex parte proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or indictment founded on a report of such an ex parte proceeding is unheard of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not ex parte, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public.... [EDITOR'S NOTE. It now is so held. See *Ugill* v. *Hales*, L. R. 3 C. P. D. 319.]

It is to be observed that the analogy between the case of reports of proceedings of Courts of Justice and those of proceedings in parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other: a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a *single*[1] speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *Rex* v. *Lord Abingdon*[2], and *Rex* v. *Creevey*[3]. At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison* v. *Duncan*[4], as to such a speech being privileged if bonâ fide published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a Court of Justice of immunity will equally apply to a report of proceedings in parliament....

Rule discharged.

[1] Earlier in the judgment, the Court had remarked (p. 85) that "There is obviously a very material difference between the publication of a speech made in parliament for the express purpose of attacking the conduct or character of a person, and afterwards published with a like purpose or effect, and the faithful publication of parliamentary debates in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards anyone."

[2] 1 Esp. 226. [3] 1 M. & S. 273.

[4] 7 E. & B. at p. 233; 26 L. J. (Q.B.) at p. 107.

[*There is a qualified privilege for defamation published in* discharge of any Duty, *whether legal or even merely social.*]

STUART *v.* BELL.

COURT OF APPEAL. L.R. [1891] 2 Q.B. 341.

[ACTION for slander. At the time when the slander was uttered the plaintiff was a valet in the employ of Mr H. M. Stanley, the celebrated African explorer. Mr Stanley was staying with the defendant (who was the mayor of Newcastle); and the plaintiff was with him. They had come from Edinburgh, and were going on further visits. Whilst Stanley and the plaintiff were still at the defendant's house, at Newcastle, the chief constable of that town received from the chief constable of Edinburgh a letter, to the effect that a lady who had been staying at the same hotel as the plaintiff had lost a gold watch, and that suspicion had fallen on the plaintiff as the person who stole it. The chief constable of Newcastle sent this letter to the defendant; who communicated its contents privately to Mr Stanley, just as he was leaving his house. This communication was the slander sued upon. Two days afterwards, Stanley told the plaintiff what had been communicated to him; and discharged him, on the ground that he could not keep in his employ a person on whom any suspicion of dishonesty had fallen. This discharge occasioned loss to the plaintiff, and this loss he alleged as special damage. At the trial, Wills, J., told the jury that the communication made by the defendant to Stanley was not privileged, and the jury found a verdict for the plaintiff, damages £250.

The defendant moved to set aside this verdict; contending that the occasion was privileged (on the four several grounds of the defendant's public duty as mayor, his private duty as host, his personal interest, and the common interest of himself and Mr Stanley), and that there was no evidence of malice. He urged that the judge ought therefore to have withdrawn the case from the jury. He also contended that special damage was necessary, and that the alleged special damage was too remote.]

* * * * * * *

LINDLEY, L.J....[After alluding to the doubtful legal question[1] whether *Mr Stanley's own* grave interest in receiving the communication could of itself suffice to render the occasion a privileged one.] Considering that Stanley and the plaintiff were just about to leave Newcastle when the defendant spoke, I am not clear...that *the de-*

[1] See *Coxhead* v. *Richards*, *infra*, p. 337.

fendant had an interest (as distinguished from a duty) to act as he did. The privilege turning then on the question of moral and social duty, it is necessary to consider the grounds on which such duty can be maintained. The grounds in this case are the relation in which the defendant stood to Stanley; and the relation in which he stood to the public. This relation to Stanley was that of host to guest, and to some extent, of friend to friend. His relation to the public was that of mayor and magistrate in Newcastle, where Stanley was. The defendant knew that Stanley was about to be entertained by other people at other places, and that the plaintiff would accompany him. Under these circumstances, I am clearly of opinion that it was the defendant's moral and social (though not legal) duty to communicate to Stanley the information he had received. That information was no vague rumour or idle gossip, but came officially from the chief constable of Edinburgh. Suppose the suspicion which had fallen on the defendant had been well founded and not ill founded, and that the defendant had withheld the information from Stanley, could the defendant have morally justified his reticence? I answer, No. He would not have been acting up to his duty either to the public or to Stanley....I take "moral or social duty" to mean a duty recognised by English people of ordinary intelligence and moral principle; (but at the same time not a duty enforceable by legal proceedings). My own conviction is that all, or at all events the great mass of, right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff.

...I pass to the question of Malice. There is no question here of the belief by the defendant in the truth of what he said. He did not intimate that the plaintiff had stolen a watch; he merely stated that the Edinburgh police suspected the plaintiff of having done so—which was true enough....The evidence shews that the defendant acted bonâ fide, and did not exceed what a reasonably careful man would have said or done....

[KAY, L.J., gave judgment to the same effect. Moreover he thought the defendant had not only a duty but also an interest; and that this interest continued till the guests had actually left the house.]

[LOPES, L.J., dissented; agreeing that there was no evidence of express malice, but holding that the occasion was not privileged.] Having regard to the defendant's position as host, I can well imagine cases where it would have been his duty to make a communication about his guest's servant. But was he justified, having regard to the exceptionally cautious character of the information he had received? He had been told that the groundwork of suspicion was very slender.... Yet, without making any inquiry, in hot haste he makes a communica-

tion to the master impugning the honesty of his servant. I cannot think the defendant in so acting was discharging any duty social or moral. I think it was an officious and uncalled for act on his part, and therefore the occasion was not privileged....

* * * * * * *

Judgment entered for defendant.

[See also PULLMAN *v.* HILL, *supra*, p. 296.]

[*A qualified privilege also exists whenever the persons by whom and to whom the defamation is published have a* common Interest, *in the matter it relates to, which its publication may protect.*]

THE KING *v.* HART.

COURT OF KING'S BENCH. 1762. 1 WM. BLACKSTONE 386.

MOTION for a new trial. It appeared that Mary Jerom, the prosecutrix, was a quaker; but, being less rigid than the rest of her sect, the brethren, according to their usual discipline, first admonished her for frequenting balls and concerts; then sent deputies to her; and lastly expelled her; and entered as a reason in their books, "For not practising the duty of self-denial." This was signed by the defendant, their clerk. The prosecutrix sent her maid for a copy of the entry; which was delivered to her by the defendant, and was the only act of publication proved. She thereupon moved the Court for an information for a libel, which was denied: whereupon she preferred an indictment, which was found at Nottingham Sessions, and removed into B. R. by certiorari, and tried at last Nottingham Assizes before Mr Justice Clive, who left it to the jury, and they brought in the defendant guilty. It was argued to be irregular to leave it at all to the jury, upon such an evidence only of publication; 5 Mod. 167. But as the Judge was dissatisfied with the verdict, the whole transaction being merely a piece of discipline (in which the Court strongly concurred), they for that reason granted the new trial, in the first instance, without any rule to shew cause; Serjeant Hewit having attended to watch the motion on the part of the prosecutrix, and confessed the dissatisfaction of Mr Justice Clive at the verdict.

[EDITOR'S NOTE. This case illustrates, not only the defence of Privilege, but also a further defence—one which is based on the principle of *Volenti non fit injuria*—viz. that a person cannot sue for the publication of defamation that was published at his own instigation.]

[*There is a like qualified privilege even when only the person* by whom *the defamation is published has an Interest thus to be protected.*]

SOMERVILLE *v.* HAWKINS.

COURT OF COMMON PLEAS. 1851. 10 C.B. 583.

* * * * * * *

THE plaintiff had been in the service of the defendant; and was dismissed, on a Thursday, in consequence of some articles being missed, which he was suspected of having stolen. When he went to the defendant's shop on the following Saturday to receive the wages due to him, the defendant called the other two servants, Jones and Williams, into the counting-house; and, speaking of the plaintiff, said to them—"I have dismissed that man for robbing me. Do not speak to him any more, in public or in private; or I shall think you as bad as him."

At the trial, before Wilde, C.J., and a jury, the defendant submitted that this was a privileged communication. On the other hand, it was insisted that the act complained of was perfectly gratuitous; not like a communication made to a confidential person, or on a matter that the other servants had any interest in....The judge thereupon directed a non-suit to be entered....

E. James moved for a new trial on the ground of misdirection.... The communication clearly was not privileged. A statement to the prejudice of a third person must, to justify it, be made in pursuance of some duty, legal or moral, or in answer to an inquiry made bonâ fide by some person having an interest in making it. [MAULE, J. That is narrowing the rule too much; there are many cases in which volunteered statements have been held to be privileged, when made bonâ fide. The question here is, whether the statement was privileged, assuming the defendant to have acted bonâ fide and without malice.]...The Lord Chief Justice ought to have left the question of malice to the jury. The circumstances under which the slander was uttered—the calling Jones and Williams into the counting-house for the express purpose of venting his ill-feeling towards the plaintiff in their presence—were enough to justify the jury, without any extraneous evidence, in finding that the defendant was actuated by malice. In *Wright* v. *Woodgate*[1] it was held that a privileged communication...throws upon the plaintiff the onus of proving malice in fact, but not of proving it by extrinsic evidence only. He has a right to require that the alleged libel itself shall be submitted to the jury, so that they may judge whether there is

[1] 2 C. M. & R. 573.

evidence of malice on the face of it. In *Pattison* v. *Jones*[1] it was held, that where a master, without being applied to, volunteers to give an unfavourable character of a discarded servant, it is primâ facie malicious and not a privileged communication.

* * * * * * *

MAULE, J., delivered the judgment of the court....It was contended for the plaintiff, that the judge was mistaken in both respects; i.e. that the communication was not privileged, and that there was evidence of malice.

But we think that the case falls within the class of privileged communications; which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made bonâ fide in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge—a supposition always to be made when the question is whether a communication be privileged or not—it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff. For such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself.

We think, therefore, that the communication in question was privileged; i.e. it was made under circumstances which rebut the presumption of malice which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to shew affirmatively that the words were spoken maliciously; for the question...must, in the absence of evidence, be determined in favour of the defendant.

On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are *consistent* with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury. For the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shewn in evidence. So that to say that, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved. This would be inconsistent with the admitted rule that (in cases of privileged communication) malice must be proved, and therefore its absence must be presumed until such proof is given.

[1] 8 B. & C. 578.

It is certainly not necessary (in order to enable a plaintiff to have the question of malice submitted to the jury), that the evidence should be such as leads necessarily to the conclusion that malice existed; or that it should be inconsistent with the non-existence of malice. But it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.

In the present case, the evidence, as it appears to us, does not raise any probability of malice; and is quite as consistent with its absence as with its presence. And considering, as we have before observed, that the mere possibility of malice which is found in this case—and in all cases where it is not disproved—would not be sufficient to justify a jury in finding for the plaintiff, we think the Lord Chief Justice was right in not leaving the question to them, and consequently that this rule must be discharged.

Rule discharged.

[*Sealed letters, unsealed letters, and postcards.*]

HUTH *v.* HUTH.

COURT OF APPEAL. L.R. [1915] 3 K.B. 32.

[ACTION for libel. The defendant, the father of the plaintiffs, sent by post to his wife, their mother, an unfastened envelope addressed to "Miss Edith Greaves," and containing a paper in which he also described her by that name and as having "forfeited all claims to the title of 'Mrs Huth.'" The plaintiffs alleged that the words meant that she was not married and therefore that they themselves were illegitimate. Mrs Huth's butler gave evidence that when the envelope was delivered he, from curiosity, took the paper out of it and read it.

Darling, J., withdrew the case from the jury; because (1) there was no evidence of publication, as the butler had no right to take the document out of the envelope; and (2) the document was incapable of bearing the alleged meaning, for there were no words mentioning the children. The plaintiffs appealed.]

McCardie for plaintiffs....The defendant knew that the document was likely to be taken out of the envelope and read; and he must be responsible for it....There is no difference in principle between the cases of an unclosed letter, a postcard, and a telegram; and a communication which would not be actionable if sent in a closed letter may be so if sent by telegram; *Williamson* v. *Freer* (L. R. 9 C. P. 393).

LORD READING, C.J....It would be impossible successfully to contend—and it is not contended, as I understand—that if a person, in breach of his duty, were to open a letter, and there was no reason to expect that he would commit that breach of duty, the fact that he had opened it, and read it, would amount to publication by the person who sent it. But on behalf of the appellants it was contended that, as the document was enclosed in an unsealed and ungummed envelope, it must be assumed that the defendant knew, or ought to have known, or might have expected, that a servant in the house would open a letter in such an envelope....I am clearly of opinion that there is no evidence of publication to the butler by the defendant, merely in the fact that the butler opened and read the letter because he was curious. Fortunately, it is no part of a butler's duty to open letters which come to the house of his master or mistress addressed to them; and in this case there is nothing exceptional, save that his curiosity was excited by reason of the lady being addressed by her maiden name. It is impossible to prevent a man's curiosity being excited, but it does not justify him in opening a letter; and (which is the only matter of importance in this connection) the butler's curiosity could not make the defendant liable for the publication to him of the contents of the envelope.

It must of course be borne in mind that, however offensive and insulting the matter might be which the husband wrote to his wife, if it was addressed to her and only intended for her, and she alone saw it, no action for libel could be brought by her; an action for libel can only be brought if there is publication to some third person....

SWINFEN EADY, L.J....Mr McCardie urged that a letter enclosed in an unclosed wrapper or envelope must be treated as being on the same footing as a postcard or a telegram. I am quite unable to accede to that view. With regard to a postcard and a telegram, it was said by A. L. Smith, M.R., in *Sadgrove* v. *Hole* (L. R. [1901] 2 K. B. 1, at p. 4), that "It is certainly my opinion that if a man writes a libel on the back of a postcard and then sends it through the post there is evidence of publication, as in the case of a telegram. The cases cited show that the two stand on the same footing." But that is wholly different from a case where a communication is enclosed in a cover, and is not, without some unauthorized act, withdrawn from the cover and perused. The case would have been different if the plaintiffs were able to show that it was withdrawn and perused by a Post Office official....

BRAY, J....In the absence of special circumstances, a defendant cannot be made responsible for a publication which was the wrongful act of a third person. He cannot be said, except in special circumstances, to have contemplated it. It was not the natural consequence of his sending the letter....There are no special circumstances in the present case....The Postmaster-General has the right to open the envelope and

read its contents. But it is the barest possibility; and the barest possibility will not do.

Appeal dismissed.

[EDITOR'S NOTE. It consequently became unnecessary for the Court of Appeal to express any opinion upon the second point—viz. as to whether the words were capable of a defamatory meaning.]

[*There is a like qualified privilege even when only the person* to whom *the defamation is published has an Interest to protect; at any rate whenever that interest is so grave as to create a social Duty of protecting it.*]

COXHEAD *v.* RICHARDS.

COURT OF COMMON PLEAS. 1846. 2 C.B. 569.

* * * * * * *

TINDAL, C.J. This was an action upon the case for the publication of a false and malicious libel, in the form of a letter written by one John Cass, the first mate of a ship called *The England*, to the defendant; the letter stating that the plaintiff, who was the captain of the ship, and then in command of her, had been in a state of constant drunkenness during part of the voyage, whereby the ship and crew had been exposed to continual danger: and the publication by the defendant was, the communication by him of this letter to the owner of the ship, by reason whereof,—which was the special damage alleged in the declaration—the plaintiff was dismissed from the ship, and lost his employment.

The defendant pleaded—first, not guilty—secondly, that the charges made by the mate against the plaintiff in his letter, were true—and, lastly, that the ship-owner did not dismiss the captain by reason, and in consequence, of the communication of the letter to him.

Upon the last two issues a verdict was found for the plaintiff; but, upon the first issue, for the defendant.

I told the jury at the trial, that the occasion and circumstances under which the communication of this letter took place, were such, as, in my opinion, to furnish a legal excuse for making the communication; and that the inference of malice,—which the law *primâ facie* draws from the bare act of publishing any statements false in fact, containing matter to the reproach and prejudice of another,—was thereby rebutted;

and that the plaintiff, to entitle himself to a verdict, must shew malice in fact: concluding by telling them that they should find their verdict for the defendant, if they thought the communication was strictly honest on his part, and made solely in the execution of what he believed[1] to be a duty; but, for the plaintiff, if they thought the communication was made from any indirect motive whatever, or from any malice against the plaintiff. And the only question now before us, is, whether, upon the evidence given at the trial, such direction was right.

There was no evidence whatever that the defendant was actuated by any sinister motive in communicating the letter to Mr Ward, the ship-owner: on the contrary, all the evidence went to prove that what he did he did under the full belief that he was performing a duty, however mistaken he might be as to the existence of such duty, or in his mode of performing it. The writer of the letter was no stranger to the defendant: on the contrary, both were proved to have been on terms of friendship with each other for some years; and, from the tenor of the letter itself, it must be inferred the defendant was a person upon whose judgment the writer of the letter placed great reliance, the letter itself being written for the professed purpose of obtaining his advice how to act, under a very pressing difficulty. The letter was framed in very artful terms, such as were calculated to induce the most wary and prudent man (knowing the writer) to place reliance on the truth of its details: and there can be no doubt but that the defendant did in fact thoroughly believe the contents to be true, amongst other things, that the ship, of which Mr Ward was the owner, and the crew and cargo on board the same, had been exposed to very imminent risk, by the continued intoxication of the captain on the voyage from the French coast to Llanelly, where the ship then was, and that the voyage to the Eastern Seas, for which the ship was chartered, would be continually exposed to the same hazard, if the vessel should continue under his command. In this state of facts, after the letter had been a few days in his hands, the defendant considered it to be his duty to communicate its contents to Mr Ward, whose interests were so nearly concerned in the information; not communicating it to the public, but to Mr Ward; and not accompanying such disclosure with any directions or advice, but merely putting him in possession of the facts stated in the letter, that he might be in a condition to investigate the truth, and take such steps as prudence and justice to the parties concerned required: in making which disclosure he did not act hastily or unadvisedly, but consulted two persons well

[1] *A*, a stranger, receives information respecting the misconduct of *B*, which he honestly misapplies to *C*. Is *A* justified in causing the dismissal of *C* from the service of *D*? [Reporter's note.]

qualified to give good advice on such an emergency—the one, an Elder Brother of the *Trinity House*—the other, one of the most eminent ship-owners in London: in conformity with whose advice he gave up the letter to the owner of the ship. At the same time, if the defendant took a course which was not justifiable in point of law, although it proceeded from an error in judgment only, not of intention, still it is undoubtedly he, and not the plaintiff, who must suffer for such error.

The only question is, whether the case does or does not fall within the principle, well recognised and established in the law, relating to privileged or confidential communications; and, in determining this question, two points may, as I conceive, be considered as settled—first, that if the defendant had had any personal interest in the subject-matter to which the letter related, as, if he had been a part-owner of the ship, or an under-writer on the ship, or had had any property on board, the communication of such a letter to Mr Ward would have fallen clearly within the rule relating to excusable publications—and, secondly, that if the danger disclosed by the letter, either to the ship or the cargo, or the ship's company, had been so immediate as that the disclosure to the ship-owner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbour, the defendant would have been not only justified in making the disclosure, but would have been *bound* to make it. A man who received a letter informing him that his neighbour's house would be plundered or burnt on the night following by *A* and *B*, and which he himself believed, and had reason to believe, to be true, would be justified in shewing that letter to the owner of the house, though it should turn out to be a false accusation of *A* and *B*. The question before us appears, therefore, to be narrowed to the consideration of the facts which bear upon these two particular qualifications and restrictions of the general principle.

As to the first, I do not find the rule of law is so narrowed and restricted by any authority, that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief, that it is true, will not be excused, though he has no personal interest in the subject-matter. Such a restriction would surely operate as a great restraint upon the performance of the various social duties by which men are bound to each other, and by which society is kept up. In *Pattison* v. *Jones*[1], the defendant, who had discharged the plaintiff from his service, wrote a letter to the person who was about to engage him, unsolicited; he was therefore a volunteer in the matter; and might be considered as a stranger, having no interest in the business; but, neither at the trial, nor on the motion before the court, was it

[1] 8 B. & C. 578, 3 M. & R. 101.

suggested that the letter was, on that account, an unprivileged communication; but it was left to the jury to say whether the communication was honest or malicious. Again, in *Child* v. *Affleck and Wife*[1], the statement, by the former mistress, of the conduct of her servant, not only during her service, but after she had left it, was held to be privileged. The rule appears to have been correctly laid down by the Court of Exchequer, that, "if fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them, within any narrow limits[2]." In the present case, the defendant stood in a different situation from any other person; he was the only person in the world who had received the letter, or was acquainted with the information contained in it. He cannot, therefore, properly be treated as a complete stranger to the subject-matter of inquiry[3], even if the rule excluded strangers from the privilege[4].

Upon the second ground of qualification—was the danger sufficiently imminent to justify the communication—it is true, that the letter, which came to the defendant's hands about the 14th of December, contains within it the information that the ship cannot get out of harbour before the end of the month. It was urged that the defendant, instead of communicating the letter to the owner, might have instituted some inquiry himself. But it is to be observed that every day the ship remained under the command of such a person as the plaintiff was described to be, the ship and crew continued exposed to hazard, though not so great hazard as when at sea; not to mention the immediate injury to the ship-owner which must necessarily follow from want of discipline of the crew, and the bad example of such a master. And, after all, it would be too much to say, that, even if the thing had been practicable, any duty was cast upon *the defendant*, to lay out his time or money in the investigation of the charge.

Upon the consideration of the case, I think it was the duty of the defendant not to keep the knowledge he gained by this letter himself, and thereby make himself responsible, in conscience, if his neglect of the warnings of the letter brought destruction upon the ship or crew—that a prudent and reasonable man would have done the same; that the disclosure was made, not publicly, but privately to the owner, that is, to the person who of all the world was the best qualified, both from

[1] 9 B. & C. 403, 4 M. & R. 338. [2] 2 C. B. 579.

[3] He did not cease to be a stranger in point of *interest*, by ceasing to be a stranger in point of *knowledge*. [Reporter's note.]

[4] In this view of the case, *quære*, whether the defendant would have once more become a stranger to the subject-matter of inquiry upon ceasing to be the *sole* depositary of the information? [Reporter's note.]

his interest in the subject-matter, and his knowledge of his own officers, to form the most just conclusion as to its truth, and to adopt the most proper and effective measures to avert the danger; after which disclosure, not the defendant, but the owner, became liable to the plaintiff, if the owner took steps which were not justifiable; as, by unjustly dismissing him from his employment, if the letter was untrue. And, as all this was done with entire honesty of purpose, and in the full belief of the truth of the information,—and that, a reasonable belief,—I am still of the same opinion which I entertained at the trial, that this case ranges itself within the pale of privileged communication, and that the action is not maintainable.

I therefore think the rule for setting aside the verdict and for a new trial, should be discharged.

COLTMAN, J. I regret much that I am unable in this case to agree with the opinion of my lord chief justice, that it is a sufficient justification of the defendant's conduct, that he acted *bonâ fide*, and without malice.

The facts of the case, which I consider as material, are, that, on the 14th of December, the defendant received from the mate of a ship belonging to Mr Ward, a letter containing imputations against the captain, of constant drunkenness and unfitness for command, asking for the defendant's advice, and informing him that the ship was then at Llanelly, and would not sail thence before the end of the month. There was no intimacy between the defendant and Mr Ward, nor any relation in business between them. The defendant, after consulting with two friends, by their advice communicated the letter to Mr Ward.

...Was there any moral duty binding on the defendant, to make the communication now in question? And, on the best consideration I can give the subject, I think the duty was plainly the other way. The duty of not slandering your neighbour on insufficient grounds, is so clear, that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity.

It may be said, that it is very hard on a defendant to be subject to heavy damages where he has acted honestly, and where nothing more can be imputed to him than an error in judgment. It may be hard: but it is very hard, on the other hand, to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others: the propensity of tale-bearing and slander is so strong amongst mankind, and, when suspicions are infused, men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected.

In the present case, the occasion was in no respect urgent. The vessel was not to sail till the end of the month. There was abundant time for the defendant to write to the mate, and for the mate to act as he should be advised; or for the defendant to take any other steps to ascertain the truth of the statement, before he communicated it in a quarter where it was likely to be productive of so much injury to the plaintiff. It appears to me, therefore, that the communication ought not to be considered as being privileged, and that its being made *bonâ fide* did not entitle the defendant to a verdict: and, with the greatest deference to those who differ from me, and whose opinions are entitled to much more weight than that which I have formed, I think it my duty to state my own.

[CRESSWELL, J., concurred with COLTMAN, J.; but ERLE, J., with TINDAL, C. J. The court thus being equally divided, the defendant retained his verdict.]

[EDITOR'S NOTE. The question here raised has not yet received an authoritative settlement. But the drift of subsequent opinion has tended to confirm the view of Tindal, C.J.; see the *dicta* of Willes, J., and Lord Blackburn, cited and approved by Lord Lindley in *Stuart* v. *Bell* (L. R. [1891] 2 Q. B. at p. 346).]

[*But if there be not* actually *a Duty or Interest, the* mere belief, *however honest and reasonable, that one exists, will not create a Privilege.*]

HEBDITCH *v.* MACILWAINE AND OTHERS.

COURT OF APPEAL. 1894. [1894] 2 Q.B. 54.

THE action, which was for libel, was tried before Vaughan Williams, J., with a jury. The defendants pleaded a justification and privilege.

It appeared that the plaintiff had been elected to the office of guardian of the poor for the parish of South Petherton. The defendants, who were ratepayers of the parish and entitled to vote at the election, signed and sent to the board of guardians a letter complaining of certain irregularities which they alleged to have occurred at the election, and suggesting that the matter ought to be inquired into. The first part of this letter alleged in substance that voting papers had been tampered with, that the voting paper of a voter had been filled up by an employé of the plaintiff in the absence of the voter, and his wife had been induced to put her mark to the paper, and that other similar cases had occurred; the latter part of the letter alleged in substance that electors had been treated with drink. The plaintiff alleged that the effect of the letter was to impute that he had himself participated in the malpractices therein mentioned.

[The jury found that the letter was libellous; that the justification was not proved; that the defendants wrote the first part of the letter, but not the second part of it, under a sense of duty, and in the belief that the board of guardians were the proper authority to whom to apply. They assessed the damages at £10. The judge ruled that the occasion was not wholly privileged, and gave judgment for the plaintiff.

The defendants applied for judgment or a new trial.]

* * * * * * *

LORD ESHER, M.R....The defendants had an interest in the matter. They were electors, and had an interest in having the office filled by a person properly elected. Then the position of the board of guardians, to whom the defamatory matter was published, had to be considered. They had no interest in the matter, as it seems to me, and, as I have already said, they had no duty or power to take any action upon the communication made to them. Under these circumstances I think it clear that the occasion was not privileged.

It was argued that, although the board of guardians had no power or duty or interest in the matter, nevertheless the occasion was

privileged, because the defendants honestly and reasonably believed that the board had such a duty or power or interest, and were asking them for redress in the matter, which they believed they could give. Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this: that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward. I cannot see how the belief of the defendants, who have made a mistake, and have published a libel to persons who have no interest or duty or power in the matter, can affect the question. The belief of the defendants might have a bearing on the question of malice; if it be assumed that the occasion was privileged, the belief of the defendants might be strong to shew that the communication was privileged, as being made without malice, but I do not think it has anything to do with the question whether the occasion was privileged.

A. L. SMITH, L.J....I think that the learned judge who tried the case, on the facts as proved to him, ought to have ruled that the occasion was not privileged. Being, however, pressed by the defendants' counsel with the contention for which he has argued before us, the judge appears to have thought it safer to put the questions which he did to the jury. I agree with the Master of the Rolls that he need not have done so, but he did so in favour of the defendants. The jury found that the defendants honestly and reasonably believed that the board of guardians were the proper authority to whom to apply in respect of the matter complained of, but they would not find that the defendants wrote the last part of the letter from a sense of duty. Upon these findings, even if we were wrong in the view we have taken of the law, I think the defendants would be out of Court.

Application dismissed.

[EDITOR'S NOTE. The case of *Jenoure* v. *Delmege* (L. R. 1891, App. Ca. 73) should be read. If it can be reconciled with this (more recent) decision, it must be by regarding complaints to the executive administration as coming within the privilege when made through any fairly suitable department of the Executive, even although not the most suitable. Cf. *Harrison* v. *Bush* (5 E. & B. 344).]

[*Where a qualified Privilege exists, the* burden of proof *of Actual Malice lies on the plaintiff.*]

[*If the defendant believed his defamatory statement to be true, the mere* unreasonableness *of that belief will not defeat his Privilege.*]

CLARK *v.* MOLYNEUX.

COURT OF APPEAL. 1877. L.R. 3 Q.B.D. 237.

AT the trial before Huddleston, B., at the Suffolk Summer Assizes, 1876, the following facts were proved: The plaintiff had been the curate in charge of the parish of Assington, near Sudbury, the vicar, the Rev. H. L. Maud, being absent on the Continent. The Rev. C. Smith was the vicar of the adjoining parish of Newton, at whose church the plaintiff was to preach one of eight Lenten sermons, Mr Green, Mr Smith, the son of C. Smith, and other gentlemen having undertaken to preach on certain other days. One Gascoigne Bevan, a banker at Sudbury, meeting the defendant at the Sudbury bank, said to him, "I wished to see you on account of a notice I have seen in the *Free Press*, in which the Rev. Nassau Clark's name is advertised to preach a Lenten sermon for Mr Smith. I had to make inquiries about Mr Clark in reference to the living of All Saints. The inquiries I made were from H. Oakes, and the result of them was very much to this man's discredit, so much so that seeing his name advertised to preach for Mr Smith, who was a very old friend of my father and mother, and also a most intimate friend of yours, I think it right to communicate these inquiries to you to do what you please with them. H. Oakes has told me that Mr Clark had left the army through some trouble at cards, and also had led an irregular life while preparing for his ordination; and that James Oakes had stated that he had seen a letter written by Mr Clark, in which he (Clark) said that he had seduced two girls while at Horringer." The defendant, bonâ fide believing the report on the respectability of his informant, went that same day to C. Smith's house, but C. Smith being unwell he communicated what he had heard to Mr C. Smith's son in order that he might tell Mr C. Smith. The defendant also informed his curate, Mr Green, of the statement made to him by Mr G. Bevan, in order to consult with him and take his advice on the matter; and he also afterwards communicated with Mr Martin, the rural dean, with a view of consulting him as to whether he should inform the bishop of the diocese or Mr Maud of the facts mentioned to him. The rural dean recommended the latter course, and the defendant afterwards meeting with Mr Canham, Mr Maud's solicitor, informed him of what he had heard,

and asked him to write to Mr Maud. Mr Canham replied that Mr Maud would shortly return to England, when he would mention the statements to him. Mr Canham informed Mr Maud of the statements, and Mr Maud wrote to the defendant for further information; the defendant replied by the letter set out in the statement of claim. The defendant was not acquainted with the plaintiff, and had never had any communication with him.

At the close of the case the learned judge ruled that the letter of the 2nd of May and statements made by the defendant to Mr Clark, Mr Green, and Mr Martin, were privileged communications, and he left the question of malice to the jury....

The jury found a verdict for the plaintiff for £200.

At the November Sittings, 1876, the defendant obtained an order calling on the plaintiff to shew cause why there should not be a new trial, on the ground that the verdict was against the weight of evidence, and on the ground of misdirection of the learned judge, in that he misdirected the jury on the question of bona fides and malice, in telling them that if they thought the defendant published the defamatory matter complained of carelessly and recklessly, or with a disregard of the feelings of others, and in such a way as, being men of the world, they would not have acted, they should find that the matter was not published bonâ fide.

At the Easter Sittings, 1877, after argument before Cockburn, C.J., and Mellor, J., the order was discharged.

The defendant appealed....

Philbrick, Q.C., for the plaintiff. It may be admitted that upon a privileged occasion the onus of proof is upon the plaintiff, and that it is for him to shew that the defendant was actuated by malice; but at the trial of the present action the judge did leave to the jury the question whether the letter complained of was written under a feeling of express malice. *Pitt* v. *Donovan*[1] was an action for slander of title, and it may well be that a person is not liable for setting up a claim to land which may ultimately prove to be groundless, unless he knew it to be false; and *Lister* v. *Perryman*[2] was an action for trespass and false imprisonment; these cases, therefore, are not authorities against the plaintiff. The letter itself, by its terms, affords evidence of express malice; the language is exaggerated, and goes beyond the statement made to the defendant by G. Bevan: *Fryer* v. *Kinnersley*[3]; *Gilpin* v. *Fowler*[4]. The communication to Mr Green was not privileged. There was neither a duty nor an interest to make it.

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BRETT, L.J. With regard to the misdirection, we do not differ

[1] 1 M. & S. 639.
[2] L. R. 4 H. L. 521.
[3] See note on p. 351 *infra*. 15 C. B. (N.S.) 422.
[4] 9 Ex. 615.

from the Queen's Bench Division as to the rule of law which governs this case, but we think that the direction of the learned judge was calculated to mislead the jury as to what was the right question for their decision. The direction to the jury was founded on the assumption that the occasions were privileged, and that which must be taken to be a libel would be excused if the defendant had used the privilege fairly and honestly. Before I address myself to the summing up, I think it advisable to lay down what I consider would be a true exposition of the law in such matters. When there has been a writing or a speaking of defamatory matter, and the judge has held—and it is for him to decide the question—that although the matter is defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the indirect and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive. I think I have laid down the correct rule on which to ground the direction to the jury, and I think the learned judge did not follow that rule, but he so expressed himself that the jury would be misled into following other rules. I think the jury were misled into believing that the burden of proof, that the defendant was not actuated by malice in the statements he had made, lay upon the defendant rather than on the plaintiff. I apprehend the moment the judge rules that the occasion is privileged, the burden of shewing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff. I also think that the learned judge was mistaken in the definition of malice he gave to the jury, and the jury might have been misled by his leaving to them to apply that

definition to the question of what was malice in fact. The judgment of Bayley, J., in *Bromage* v. *Prosser*[1], treats of malice in law, and no doubt where the word "maliciously" is used in a pleading, it means intentionally, wilfully. It has been decided that if the word "maliciously" is omitted in a declaration for libel, and the words "wrongfully" or "falsely" substituted, it is sufficient, the reason being that the word "maliciously," as used in a pleading, has only a technical meaning; but here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind. I am further of opinion that the direction to the jury—that assuming that the occasions were privileged if they thought that the defendant wrote the letter, and made the statements bonâ fide, and in the honest belief that they were true, not merely that he believed them himself, but honestly believed them, which means he had good grounds for believing them to be true,—left the jury to suppose that, although the defendant did believe them in fact, yet that did not protect him unless his belief was reasonable: whereas the only question was whether the defendant did, in fact, believe what he said, and not whether a reasonable man would have believed it. The question of wilful blindness, or of an obstinate adherence to an opinion, may be tests by which a jury may be led to consider whether the defendant did or did not really believe the statements he made; whereas the learned judge, by the way in which he directed the jury, left them to understand, as I think, that although the defendant did believe the statements, yet if his belief was founded on a wrong reasoning that he was not within the protection of the privilege. In that respect, with great deference, I think the learned judge's direction to the jury was erroneous.

I am also of opinion that all the occasions were privileged. The only occasion which has been questioned is the occasion of the defendant's communication with Mr Green. I am of opinion that where the relation between two persons is so intimate socially and professionally as that between a rector or a vicar and his curate, and when it can be said that the vicar is consulting with his curate either upon the conduct of the curate or of the vicar in ecclesiastical matters, that is an occasion which is privileged. Here the plaintiff calls Mr Green as his witness, and his evidence is that the vicar did consult him in order to obtain his advice. I think on this point that the plaintiff was bound by the evidence of his own witness, and the moment that it was ascertained as a fact that the statement to Mr Green was made at a consultation between the vicar and his curate, as to the conduct the vicar should adopt in an ecclesiastical matter, the judge was bound to tell the jury that the communication was made on a privileged occasion.

[1] 4 B. & C. at p. 255; *supra*, p. 306.

Assuming that the right question had been left to the jury, is there any evidence to support the finding of malice? Now, the occasion being privileged, the burden of proof to shew that the defendant was not within the protection of the privilege being on the plaintiff, and it being an admitted fact that the defendant did not know the plaintiff, had never even seen him, and that he had had no relations with him whatever, and no motive can be suggested why the defendant should have a vindictive feeling against the plaintiff, I think that the discrepancies which were relied upon, and the want of care in instituting inquiries, are too slight to justify a judge in asking the jury whether the defendant was actuated by indirect motives in making the statements. He certainly did not make them from a want of belief in them, nor was he influenced by anger in making them, not caring[1] whether they were true or false.

I am of opinion, therefore, if on a new trial the facts are the same, if they cannot be altered, it would be the duty of the judge to direct the jury that there was no evidence of malice which could properly be submitted to the jury. I think that there has been a miscarriage, and that the verdict is against the weight of evidence.

This is not a case in which we ought to enter a verdict for the defendant; for there may be further evidence on a future occasion. We ought, therefore, only to grant a new trial.

COTTON, L.J....It is not enough to shew stupidity, or a want of reasoning power; for those things do not, of themselves, constitute malice. A man may be very stupid, and still be acting bonâ fide, honestly intending to discharge a duty....And it is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty.

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New trial ordered.

[See also SOMERVILLE *v.* HAWKINS, *supra*, p. 333.]

[1] [EDITOR'S NOTE. For "Actual Malice" does not necessarily involve Spite; it may consist of a state of Recklessness as to truth and falsity, or even merely of honest Prejudice. See *Royal Aquarium Society* v. *Parkinson*; L. R. [1892] 1 Q. B. 431.]

[*The circumstances of the Publication may afford sufficient proof of Actual Malice.*]

THE QUEEN *v.* SANKARA.

HIGH COURT OF MADRAS. 1883. INDIAN L.R., 6 MADRAS 381.

[APPEAL from a District Magistrate, in whose court criminal proceedings for defamation had been taken against the high-priest of the Smarta sect of Hindus, by one of its members, whom he had placed out of caste for attending two weddings at which the brides were widows; the remarriage of widows being regarded by this sect as prohibited by Hinduism. One libel ("I") was an announcement of this excommunication to the other members of the sect; the other ("A") was a postcard, sent by post, registered, to announce it to the excommunicated man himself. The magistrate held the defamation to be covered by Privilege, in both instances; and accordingly acquitted the defendant.]

* * * * * * *

TURNER, C.J....Having spiritual jurisdiction over the complainant, which he was entitled to exercise in virtue of a contract implied in the complainant's adherence to the sect, he cannot be held criminally responsible for the censure which in good faith he passed on the complainant's conduct. In communicating the sentence of excommunication to the members of the caste, he acted in good faith for the protection of their interests, for by associating with an excommunicated person, they would contract impurity. And to give effect to this sentence some publication was necessary. In *Rex* v. *Hart*[1] [the record of the Quakeress's expulsion was held to be] merely a piece of discipline.

But by the admitted publication of the postcard the offence of defamation is established. A privilege does not justify publication in excess of the purpose or object which gives rise to it. A man may in good faith complain of the conduct of a servant to the master of the servant, even though the complaint amounts to defamation; but he is not protected if he published the complaint in a newspaper....The communication of the sentence of excommunication to the complainant by a card sent through the post was a publication in excess of the purpose for which the privilege was allowed, and is therefore not protected by privilege.

MUTTUSAMI AYYAR, J....Communicating a libellous statement by a postcard which may be read even by those who are not respondent's

[1] *Supra*, p. 332.

disciples and even of his caste, is illegal, and a wanton excess of privilege which appears to me to vitiate it altogether. Exhibit "A" was intended for the information of the complainant alone; and the privilege which the respondent had did not extend to its publication to the whole world.

In *Williamson* v. *Freer*[1]...Brett, J., observed:—"I think a communication, which would be privileged if made by letter, becomes unprivileged if sent through the Telegraph Office; because it is necessarily communicated to all the clerks through whose hands it passes. It is like the case of a libel contained on the back of a post-card."

This mode of communicating a sentence of excommunication is quite new and not sanctioned by custom, and the duty arising from the relation of spiritual superior and disciple does not protect libellous communication to persons who are not disciples....

Acquittal set aside.

[EDITOR'S NOTE. It was decided, in 1904, by the Judicial Committee of the Privy Council, in *The Citizens' Life Assurance Co. Ltd.* v. *Brown*, that in an action against a Corporation for a libel published, on a privileged occasion, by its agent, actual malice on the part of the agent will defeat the privilege so completely as to render the Corporation itself liable. Similarly where a libel had been published on a privileged occasion, and the author and printer were sued jointly, as joint tort-feasors, but actual malice was proved only against the author, this was held to defeat the privilege of the printer also; *Smith* v. *Streatfield* (L. R. [1913] 3 K. B. 764).

The question as to how far the excessiveness of the language used in the libel may afford evidence of express malice was raised in *Bentley* v. *Central L. B. Co. Ltd.* (June 10, 1920). The Court of Appeal quoted with approval the dictum that "the language must not be submitted to too strict a scrutiny, otherwise the whole value of the law in reference to privilege would be eaten away": and that of Cockburn L.C.J. that, "In order to justify leaving to the jury a case of excessive language as evidence of malice, the language used must be utterly beyond and disproportionate to the facts."]

[1] L. R. 9 C. P. 393.

[*If the defamatory statement be* true, *no tort is committed by publishing it*[1]. *But it must be true in* every *substantial part.*]

HELSHAM *v.* BLACKWOOD AND ANOTHER.

COURT OF COMMON PLEAS. 1851. 11 C.B. 111.

[THE plaintiff, a captain in one of Her Majesty's regiments of militia, brought this action for a libel published by the defendants in *Blackwood's Edinburgh Magazine*. The libel occurred in an article by Mr Samuel Warren, Q.C., the novelist; and the important part of it was as follows:—

"We ourselves were present at a remarkable trial for duelling about eighteen or twenty years ago, at the Old Bailey, before the late excellent and very learned Baron Bayley; on which occasion he laid down the rule of law respecting duelling with uncompromising firmness. This was the case of Captain Helsham who had shot Lieutenant Crowther in a duel at Boulogne. There were rumours of foul play having been practised; and a clergyman, a brother of the deceased, made strenuous and persevering efforts to bring Captain Helsham to trial. The latter continued for some time after the duel in France, though anxious to return to England. But after taking the opinion of a well-known counsel at the criminal bar, who advised him, that he could not be tried in this country for a duel fought in a foreign country not under the British crown, he came to England; where he was instantly arrested under the statute 9 Geo. 4, c. 31, s. 37 (which had been passed two or three years previously, and must have altogether escaped the notice of the counsel in question). Captain Helsham was a middle-aged man of gentlemanly appearance, with features indicating determination of character. But they wore an expression of manifest anxiety and apprehension as he entered the dock, and looking down beheld immediately beneath him the brother of the man whom he had shot, and through whose ceaseless activity he was then placed on trial for his life as a murderer. For he was to be tried by an uncompromising judge, stern and exact in administering the law....Throughout the whole of that agitating day, the prisoner stood as firm as a rock: sometimes his arms folded; at others, his hands resting on the bar;

[1] "Truth is an answer, not because it negatives the charge of Malice, but... because the law will not permit a man to recover damages in respect of injury to a reputation which he ought not to possess"; (*per* Littledale, J., 10 B. & C. at p. 272).

while his eyes were fixed intently on the judge, the witnesses, or the counsel,—every now and then glancing with gloomy inquisitiveness at the jury and the judge. His lips were from first to last firmly compressed. *It was understood that the counsel for the prosecution were in possession of a damning piece of evidence; viz., that the prisoner had spent nearly the whole of the night immediately preceding the duel in practising pistol firing.*"

The defendant put in a plea of justification; but it merely alleged that the plaintiff had murdered his antagonist, and had been tried for the murder and acquitted. The plaintiff objected that this plea was bad, inasmuch as it did not answer the gist of the libellous matter set forth in the declaration.]

Peacock for the defendants....The plaintiff's objection is that the plea does not amount to a justification of the alleged libel. But the substance of the plea is, that the plaintiff was actually guilty of murder; that he went out with intent to kill, and did kill, his adversary. [JERVIS, C.J. The plea does not justify that part of the libel which speaks of "a damning piece of evidence," namely that the prisoner had spent nearly the whole of the night immediately preceding the duel in practising pistol firing.] There are no degrees of murder. The court cannot inquire whether the duel was fought in a fair or an unfair manner. [JERVIS, C.J. It certainly would create a very different impression upon the public mind, whether the duel was honestly conducted or not. A man may be guilty of a libel, in imputing dishonourable conduct to another, though not involving a breach of any positive law. Suppose a man indicted for an assault, and acquitted, and another, in publishing an account of the transaction, to state that the assault was committed in a gross barbarous and unmanly manner,—would the publication be the less libellous because you are able to prove an assault unaccompanied by the circumstances of aggravation?] Assault is very different from murder; it may be condoned. [MAULE, J. The question here is, whether the whole libel is justified. Suppose the defendants had said that Captain Helsham fired at his opponent and killed him with a poisoned bullet, would that be justified by such a plea as this?] It is not denied that there may be circumstances of aggravation which must be specially justified. But, will the court try whether or not a duel has been fought strictly according to the laws of honour? [JERVIS, C.J. It is not as you are assuming, the question of murder or no murder that is to be tried here; but libel or no libel. MAULE, J. Perhaps you will say that practising pistol firing all the previous night, was no more than adopting reasonable and proper precaution.] It is no more than saying that he was a skilful shot. That which the libel imputes to the plaintiff, is, that he wilfully and maliciously shot at and murdered

the deceased. In *Hunt* v. *Bell*[1] it was held that a party who pursues an illegal vocation, has no remedy by action for a libel regarding his conduct in such vocation. [MAULE, J. There the charge was not libellous, except in relation to the plaintiff's vocation.] So, this is only libellous with reference to the particular act charged,—the fighting the duel. That which is the aggravation here, only goes to the manner of committing the murder. [MAULE, J. You impute a great amount of malice, and you say that you need only justify the minimum that suffices to constitute the killing murder.] The court cannot, it is submitted, measure the degrees of malice. [MAULE, J. Do you deny the existence of degrees in murder?] Yes. At least, it is denied that a court of justice can sit and try whether that which is confessedly a murder, has been committed according to the conventional rules of honour and propriety,—whether the thing has or has not been done in a gentlemanly manner. [MAULE, J. All murders are not of equal guilt. Many persons have been convicted of murder and, with the general concurrence of mankind, have not been visited with capital punishment. Nobody suggests that the law of France is absurd, when it speaks of "murder with extenuating circumstances."] The court would not try whether a prize fight was fairly conducted or not. [MAULE, J. Why not, in an action for libel? TALFOURD, J. In Captain De Roos's case, the court of King's Bench sat for two days to inquire whether or not Captain De Roos had been guilty of cheating at an illegal game of cards; and the issue was found for the defendant. MAULE, J. I cannot see why you should be relieved from justifying an imputation of unfair and dishonourable conduct, because it happens to be accompanied by a charge of crime.] In *Yrisarri* v. *Clement*[2] it was held that an action of libel does not lie for anything written against a party touching his conduct in an illegal transaction. Murder, like treason, is so repugnant to all law, human and Divine, that the court cannot enter into the consideration of the circumstances under which it was committed: they can only properly inquire whether the charge amounts to murder or not.

* * * * * * *

MAULE, J. When an action is brought for a libel, to make a good plea to the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff. If the libel charges the commission of several crimes, or the commission of a crime in a particular manner, the plea must justify the charge as to the number of crimes[3] or the manner of committing the crime. If the crime is charged with circumstances of aggravation, as here, the plea is clearly bad if it omit to justify that. That which is charged in this

[1] 1 Bingham 1.

[2] 3 Bingham 432, 11 J. B. Moore, 308.

[3] See *Clarkson* v. *Lawson*, 6 Bingham 266, 587; *Clarke* v. *Taylor*, 3 Scott, 95.

case, is, that the plaintiff had spent nearly the whole of the night immediately preceding the duel in practising pistol firing. If the fact were so, it would make the murder no more murder than if the fact were wanting; but it clearly aggravates the libel. The defendant's own description of it as a "damning piece of evidence," shews that the libel meant something more than the plea attempts to justify. If the libel had imputed murder simpliciter, it would have been enough to shew in the plea that the plaintiff had committed murder. But, if the libel goes further, and states something besides which is injurious to the plaintiff's character, it is clear upon every principle of the law of libel, that that must be justified as well as the rest, or the defence fails. Nobody can doubt that, if Captain Helsham had been guilty of the atrocity which this libel imputes to him, every one would have thought the worse of him for it. If so, the imputation is a matter for which he would be entitled to maintain an action; and it is not the less to be justified, because the libel couples it with something more.

* * * * * * *

Judgment for plaintiff, on insufficiency of the plea.

An apology, in the most ample and honourable terms, was afterwards tendered by the defendants, and accepted by Captain Helsham.

[*The province of the Jury in actions for Defamation.*]

CAPITAL AND COUNTIES BANK LTD. *v.* HENTY & SONS.

HOUSE OF LORDS. 1882. L.R. 7 APP. CA. 748.

[THE facts of this case are thus set out by Lord Blackburn in his judgment.] The plaintiffs' claim is thus stated: "1. The plaintiffs are bankers, and the defendants are brewers. 2. The defendants falsely and maliciously wrote and published of the plaintiffs the letter following: 'Messrs Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts.). Westgate, Chichester, 2nd December, 1878.' Meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers."

The statement of defence sets out the circumstances under which the defendants allege that the letter was published, and proceeds: "9. The defendants thereupon, as they lawfully might do, sent to their said tenants the letter in paragraph 2 of the statement of claim set out, which is the writing and publishing complained of, and for which the present action is brought. The defendants deny that the said letter under the circumstances aforesaid is a libel. 10. The defendants say that the occasion of sending the said letter to their tenants as aforesaid was privileged. 11. The defendants deny the innuendo alleged in paragraph 2 of the statement of claim, and say that the said letter does not bear the said alleged meaning. 12. The defendants deny each and every of the allegations set forth in paragraph 3 of the statement of claim."

On the trial evidence was given on both sides, and on the proof being completed the case was left to the jury, who did not agree, and were discharged. The plaintiffs desire that the case should go for trial before another jury. The defendants' contention is, that they are entitled to judgment on the ground that, if the jury had found in favour of the plaintiffs every circumstance relating to the publication which the evidence could prove, and even though the jury had found that, in their opinion, the letter was libellous, the Court ought to come to the conclusion that the letter published under those circumstances was no libel, and acting on its own conclusion give judgment for the defendants, not setting that verdict aside as not satisfactory, but letting it stand and giving judgment for the defendants, notwithstanding that

verdict. If this is right, it follows that the case ought not to be sent to another jury.

C. Russell, Q.C. (*Reid* with him) for the appellants:—

The plaintiffs succeed if they shew that there was evidence for the jury. It is for the Court to say if the words are capable of a defamatory meaning; and for the jury to say if they had that meaning in fact: *Parmiter* v. *Coupland*[1]; *Sturt* v. *Blagg*[2]; *Mulligan* v. *Cole*[3]; *Watkin* v. *Hall*[4]. A Judge ought not to withdraw the case from the jury unless he is satisfied that the words are incapable of such a meaning: *Cox* v. *Lee*[5]; *Hart* v. *Wall*[6]; *Baylis* v. *Lawrence*[7]. That these words were capable of the meaning charged by the innuendo was held by Lord Coleridge, C.J., who left the case to the jury, and by Grove and Denman, JJ., in the Common Pleas Division, and by Thesiger, L.J., in the Court of Appeal. It cannot therefore be said that no reasonable men would impute that meaning. The secret intent of the publisher is not material: *Hankerson* v. *Bilby*[8]; *Fisher* v. *Clement*[9]. The words must be construed as ordinary, reasonable, persons would construe them, and as the persons to whom the circular was shewn did in fact construe them, viz. that the plaintiffs were insolvent, thus causing a run on the bank and loss to the plaintiffs. There was evidence for the jury that this was the true meaning, in the circumstances attending the publication. The defendants were not customers of the bank; they had never received more than a very few cheques on the plaintiffs' bank. None of the persons to whom the circular was sent could know that there had been a quarrel between the plaintiffs and the defendants. The occasion was not privileged; but if it was there was actual malice.

Sir F. Herschell, S.G. (*Sir H. Giffard, Q.C.*, and *A. L. Smith* with him) for the respondents:—

In its primary meaning the circular is not libellous, for it only announces the defendants' intention, and primâ facie the primary meaning must be imputed. If a secondary meaning is imputed evidence of facts must be given to shew it, and none was given. The result of the authorities is that when words are capable of two meanings, one innocent and one libellous, the Judge must withdraw the case from the jury, unless the plaintiff gives extrinsic evidence in support of the libellous meaning. The only thing that can be libellous is the supposed reason for the act of the defendants; it is sought to make them liable for an inference drawn from their words. The same result might have followed from a bare refusal to take cheques on the bank, and that clearly would not have been actionable. What was injurious was the

[1] 6 M. & W. 105. [2] 10 Q. B. 207. [3] L. R. 10 Q. B. 549.
[4] L. R. 3 Q. B. 396. [5] L. R. 4 Ex. 284. [6] 2 C. P. D. 146.
[7] 11 A. & E. 920. [8] 16 M. & W. 442. [9] 10 B. & C. 472.

defendants' conduct; and no action lies for such conduct. The occasion was privileged, and there was no evidence of actual malice.

* * * * * * *

LORD BLACKBURN....The decision of the cause depends, first, on the question what is the province of the Court in an action for libel, and whether, where the writing is such that opinions might differ as to whether it is a libel or not, the Court can give judgment for the defendant, on the ground that, though the jury have found that, in their opinion the writing is a libel, the Court do not think it made out to be a libel; that is a question of great public interest; secondly, whether, supposing that this can be done, the state of the evidence in this case as to the publication is such that the Court ought to come to the conclusion that this is no libel. This is of importance to the parties, but except in so far as it may illustrate the meaning of the first general proposition, it is not of general importance. I have had and still have very great difficulty in making up my mind on this second branch of the case. I will first state my opinion on the first question.

A libel for which an action will lie, is defined to be a written statement published without lawful justification, or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule. It must be shewn by evidence that there was a writing, and that it was published. I shall afterwards say something as to what publications are privileged, so as to afford a lawful justification or excuse for the publication, though calculated to convey a libellous imputation. But, independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances.

I think that from the earliest times it has, by the law of England, been the province of the Court to say whether words published in writing were a libel or not; and in order that a Court of error might have before it the materials for enabling it to say whether the decision of the Court below was right or not, the plaintiff was, by the old rules of pleading, required to place all those materials, on which he relied, upon the record. The words themselves must have been set out in the declaration or indictment, in order that the Court might be able to

judge whether they were a libel or not. And this still remains the law (see *Bradlaugh* v. *The Queen*[1]; *Harris* v. *Warre*[2]).

In construing the words to see whether they are a libel, the Court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure another person than the plaintiff, or though he may have written in levity only. As was said in the opinion of the judges delivered in the House of Lords during the discussion of Fox's Bill, I think quite justly, no one can cast about firebrands and death, and then escape from being responsible by saying he was in sport.

...The onus always was on the prosecutor or plaintiff to shew that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not being a question for the Court, the defendant always was entitled to go free. Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libellous imputation. If the defendant can get either the Court or the jury to be in his favour, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the Court and the jury to decide for him.

Now it seems to me that when the Court come to decide whether a particular set of words published under particular circumstances are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of judges might, not unreasonably, hold such words to be libellous. In fact whenever a verdict has passed against a defendant in a case of libel, and judgment has been given in the Court below, those who bring their writ of error on the ground that there was no libel, assert that both the jury and the Court below have gone wrong: but they are not called upon to say that the words were incapable of conveying the libellous imputation; it is enough if they can make out, to the satisfaction of the Court in error, that the onus of shewing that they do convey such an imputation is not satisfied; and there are numerous cases in which, after a verdict for the plaintiff and judgment for him, that judgment has been set aside in error.

...Unless the plaintiff has so far satisfied the onus, which lies on

[1] 3 Q. B. D. 607. [2] 4 C. P. D. 125.

him to shew it to be a libel, that the Court can with sufficient certainty say that the writing has a libellous tendency, they should not so say....

This brings me to the second question; as to the evidence here;... whether the plaintiffs have so far satisfied the onus which is on them, that the Court can (to adopt Lord Tenterden's language) with reasonable certainty say that the tendency of the letter was to convey the libellous imputation.

There can be no doubt that the defendants were not required to take cheques drawn on this bank on account of any debts due to them, or in any other way whatsoever, and had a right to refuse to do so. No reason was needed to justify such a refusal. Such a refusal could not be made without using words which, whether written or spoken without sufficient occasion to give rise to a privilege, would be actionable if the tendency of those words would be to cast a doubt on the credit of the bank. I think, however, that there are so many reasons why a person may refuse to take on account the cheques drawn on a particular bank, that, acting in the spirit of what Lord Tenterden said in *Goldstein* v. *Foss*[1], the Court could not say that the letter, which in terms goes no further than merely to state the fact, was libellous, as tending to impute a doubt of the credit of the bank. No doubt some people might guess that the refusal was on that ground, but as Brett, L.J., says, it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. I do not think it libellous by itself to state the fact. But I quite agree that such a statement might be published in such a way, and to such persons, as to shew that its natural tendency would be to convey an impression that the person refusing to take the cheques on that bank did doubt its credit, and then it would be libellous.

I do not much like to express an opinion on a state of things not before me, but I think I may safely say that in a time of panic a statement published in the City article of one of our newspapers, that such a one had withdrawn his account from such a bank, might have a tendency to shake the credit of that bank, and that those who published such a statement in such a way would know, or ought to know, that it would be read by persons who come to the paper for information to guide them as to whom they would trust; and therefore the statement would very probably be understood by such persons as conveying an imputation on the credit of that bank. And a statement such as that contained in the letter, if published in such a way, though less obviously connected with the credit of the bank, might perhaps also be so construed. I am inclined therefore to think that in the case of such a publication as above supposed, not only might a jury reasonably find

[1] 6 B. & C. 462.

that it was a libel, but that if they did, the Court would think that the plaintiffs had satisfied the onus cast upon them to shew to the satisfaction of the Court that it was a libel.

Both Thesiger and Cotton, L.JJ., in this case go further, and intimate an opinion that any publication so made that it would come to persons who had no concern at all with the defendants' proceedings, but who might possibly be interested, as customers of the bank, in considering whether the bank was in good credit, would have a tendency to injure the credit of the bank in the opinion of such persons. I have not been able quite to make up my mind on this, and prefer to point out that the question does not arise.

I think if the letter had been sent to only one person, and that person was one who was in the habit of sending many such cheques to the defendants, it could not be said to be libellous. It was sent to a great many persons, who were in the habit of sending some, but very few, cheques to the plaintiffs, and the inconvenience which was occasioned to Messrs Henty by having to keep such cheques till Saturday was so slight, that I cannot but view their conduct with moral disapprobation; but unless some good legal reason can be suggested for holding what they did actionable, the judgment should be affirmed.

One point more has to be considered. A publication calculated to convey an actionable imputation is primâ facie a libel, the law, as it is technically said, implying malice, or, as I should prefer to say, the law being that the person who so publishes is responsible for the natural consequences of his act. But if the occasion is such that there was either a duty, though, perhaps, only of imperfect obligation, or a right to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved; or I should prefer to say that he is not answerable for it, so long as he is acting in compliance with that duty or exercising that right; and the burthen of proof is on those who allege that he was not so acting. In this case, if any customer of Messrs Henty who had been in the habit of remitting such cheques to Messrs Henty and having them taken on account of his debts, had had such cheques returned to him, that customer would have had good reason to complain that this was done. If, therefore, Messrs Henty had resolved to take no such cheques in future, there was a moral obligation on Messrs Henty either to tell such a one that the cheques would not be taken in future, or when he brought them, to take them and warn him to bring no more; and the occasion was, I think, one that gave rise both to a duty to their customers, and a right in themselves to give the warning, and the occasion was privileged. But I think there was here evidence (I say no more) that Messrs Henty did not send the circular because they had resolved to take no cheques,

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but resolved to take no cheques in order that they might send the circular. And if that was found by a jury to be the fact, I think they could not shelter themselves from the consequences of publishing the letter, if it was a libel, by an occasion which they sought. I think, therefore, that the only question is whether there was here evidence from which such facts could be found as, in the opinion of the Court, would satisfy the onus, which, I think, lies on the plaintiffs, to shew that this publication had a libellous tendency. And as I am of opinion that there was not, I think that the judgment should be affirmed.

* * * * * * *

Appeal dismissed.

[*The publication of Defamation can seldom give a right of action to any one but the person defamed; as the damage caused to any such third party would seldom be a* natural *consequence.*]

ASHLEY *v.* HARRISON.

NISI PRIUS. 1793. PEAKE 256.

THE declaration stated, that the plaintiff during the time of Lent, 1793, caused to be performed every Wednesday and Friday night, by divers singers and musicians at a certain place of public amusement called Covent Garden Theatre, certain musical performances for the entertainment of the public for certain rewards paid to him for admission into the said place of public amusement by those persons who were desirous of hearing the said musical performances, by means whereof he derived great gains, &c. Yet the defendant,—knowing the premises, but contriving to lessen the profits, &c. and to terrify, deter, &c. a certain public singer called Gertrude Elizabeth Mara (who had been before that time retained by the plaintiff to sing publicly for him at the said place) from so singing,—wrote and published a certain false and malicious paper writing of and concerning the said G. E. Mara, and of and concerning her conduct as such public singer as aforesaid. The libel was then set out. The declaration concluded, that by reason thereof the said G. E. Mara could not sing without great danger of being assaulted, ill-treated, and abused, and was terrified, deterred, prevented and hindered from so singing; and that the profits of the amusement were thereby rendered much less than they otherwise would have been.

On the opening of the cause...the declaration was proved; and Madame Mara said that "she did not choose to expose herself to contempt again; and therefore refused to sing."

When the defendant's counsel were proceeding to their defence, they were stopped by LORD KENYON, who said:—This action is unprecedented, and I think cannot be supported on principle. The injury is much too remote to be the foundation of an action. If this action is to be maintained, I know not to what extent the rule may be carried. For aught I can see to the contrary, it may equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the stage. If any injury has happened, it was occasioned entirely by the vain fears or caprice of the actress. Madame Mara says she did not choose to expose herself to contempt again. The action then is to depend entirely on the nerves of the actress. If she chooses to appear on the stage again, no action can be maintained; if she does not, her refusal is to be followed with an action. In actions for defamation whereby a woman loses her marriage it is not sufficient to prove that she was a virtuous woman, and one who might reasonably hope to have settled well in life; but a marriage already agreed upon must be shewn to have been lost.

The plaintiff was nonsuited[1].

[1] In *Taylor* v. *Neri*, 1 Espinasse 386, where a person engaged by the manager of a theatre as a public singer had been beaten, and thereby prevented from performing, Eyre, C.J., held that the manager could not maintain an action for the remote injury which he sustained in consequence. Had the artist been a domestic servant, an action would have lain; as in *Jones* v. *Brown* (*supra*, p. 269). Or had there been an intention to prevent the performance of the artist's contract with the manager, an action would have lain; as in *Lumley* v. *Gye* (*infra*, p. 522). But neither of these bases of liability was present here.

[*The right to Reputation does not include a right to* Privacy. *Hence to cause annoyance to any one by publishing personal details about him, even in writing or pictorially, does not constitute a Tort*[1].]

ROBERSON *v.* THE ROCHESTER FOLDING BOX COMPANY AND OTHERS.

NEW YORK COURT OF APPEALS. 1902. 171 NEW YORK 538.

[A demurrer by defendant to the plaintiff's complaint had been set aside by Davy, J., whose judgment was affirmed by the Appellate Division. The defendant then carried the point to the Court of Appeals.]

* * * * * * *

PARKER, C.J....The complaint alleges that the Franklin Mills Company, one of the defendants, was engaged in the manufacture and sale of flour; and that, without the knowledge or consent of the plaintiff, the defendants, knowing that they had no right so to do, had printed and circulated about twenty-five thousand likenesses of the plaintiff. Upon the paper upon which these likenesses were printed, there were printed, above the portrait, the words, "Flour of the Family[2]," and below the portrait in large capital letters, "Franklin Mills Flour," and in smaller letters "Rochester Folding Box Company, Rochester, N.Y."; and upon the same sheet were other advertisements of the flour of the Franklin Mills Company. These twenty-five thousand likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons and other public places. The complaint alleges that they have been recognized by friends of the plaintiff and other people; with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face in this advertisement, and her good name has been attacked, causing her great distress and suffering both in body and mind, so that she was made ill and suffered a severe nervous shock, and was confined to her bed and compelled to call in a physician....And that, by reason of the foregoing facts, the plaintiff has suffered damages in the sum of fifteen thousand dollars. The plaintiff prays that defendants be enjoined from making, publishing, or using in any manner any likenesses of the plaintiff in any form whatever; and for damages.

It will be observed that there is no complaint made that the plaintiff was *libelled* by this publication of her portrait. The likeness

[1] Contrast the malicious production of *damage* by publishing *false* (though non-defamatory) statements; as discussed in *Ratcliffe* v. *Evans*, *supra*, p. 292.

[2] [EDITOR'S NOTE. The advertiser intended to suggest, by his pun, that the fair plaintiff was the "Flower" of her family.]

is said to be a very good one, and one that her friends and acquaintances were able to recognize. Indeed her grievance is that a good portrait of her, and therefore one easily recognized, has been used to attract attention towards the paper upon which the defendants' advertisements appear. Such publicity, which some find agreeable, is to the plaintiff very distasteful. And thus, because of defendants' impertinence in using her picture without her consent for their own business purposes, she has been caused to suffer mental distress. Others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes; but, as it is distasteful to her, she seeks the aid of the Court....

No precedent for such an action is to be found in the decisions of this Court. Indeed the Court below said, "The theory upon which this action is predicated is new, at least in instance if not in principle." ... Nevertheless, that Court reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a "Right of Privacy"—in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law, nor—so far as the learning of counsel or the courts in this case have been able to discover—does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness and no inconsiderable ability in the *Harvard Law Review* (IV. 193), in an article entitled "The Right of Privacy[1]."

The so-called right of Privacy is, as the phrase suggests, founded upon a claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon, either in handbills, circulars, or newspapers; and, necessarily, that the things which may not be written and published of him must not be spoken[2] of him by his neighbours, whether the comment be favourable or otherwise. While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or a leading newspaper

[1] [EDITOR'S NOTE. This article, written by two Boston lawyers, Mr Warren and Mr Brandeis, maintained that the analogies of the law involved the recognition of a principle of "Inviolate Personality"; one result of which would be to make it a tort—akin to a breach of copyright—to publish, even truthfully and without malice, any written or pictorial representation of anything that is not of public interest (as measured by the extent of the defence of Fair Comment in cases of defamation); e.g. a private citizen's "personal appearance, sayings, and acts, and his personal relations, whether domestic or otherwise."]

[2] [EDITOR'S NOTE. But Messrs Warren and Brandeis had insisted that *oral* breaches of the Right of Privacy would—by analogy to the law of Slander—be actionable only when special damage could be proved.]

rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other. For the principle which a court of equity is asked to assert in this action is that the right of privacy exists and is enforceable; and that the publication of that which purports to be a portrait of another person, (even if obtained in the public streets by an impertinent individual with a camera,) will be restrained in equity on the ground that every person has the right to prevent his features from becoming known to those outside his circle of friends and acquaintances.

If such a principle be incorporated into the body of the law, the attempts to apply the principle logically will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd. For the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations, or habits. And were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed. For the one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be a violation of such a right; and with many persons would wound the feelings more seriously than would the publication of their picture. And so we might add to the list of things spoken and done day by day, that seriously offend the sensibilities of good people, to which the plaintiff's principle would seem to apply. I only go far enough to suggest the vast field of litigation which would necessarily be opened up should this Court hold that privacy exists as a legal right enforceable by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere; and arbitrarily provide that no one should be permitted, for his own selfish purpose, to use the picture or the name of another for advertising purposes without his consent. In such event, no embarrassment would result to the general body of the law, for the rule would be applicable only to the cases provided for by the statute. The Courts, however, being without authority to legislate, are required to decide cases upon principle; and so are necessarily embarrassed when precedents are created by any extreme, and therefore unjustifiable, application of an old principle.

The Court below properly said that "while it may be true that the fact that no precedent can be found to sustain an action in any given case is cogent evidence that a principle does not exist upon which the right may be based, it is not the rule that the want of a precedent is a sufficient reason for turning the plaintiff out of court," provided—

I think should be added—there can be found a clear and unequivocal principle of the common law which either governs it or by analogy or parity of reason ought to govern it.

Examination of the authorities leads us to the conclusion that the so-called "Right of Privacy" has not as yet found an abiding place in our jurisprudence; and as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law...

[The majority of the Court concurred with Parker, C.J.]

Judgment for defendants.

[EDITOR'S NOTE. The annoyances now caused by the increasing zeal of the cheaper newspapers and of Kodak photographers give a practical interest to the effort of the *Harvard Law Review* to provide a remedy. But this effort, though at first meeting with some judicial approval, has been—as the foregoing case shews—disapproved by a higher American authority. The same view would probably be taken in England. In *Monson* v. *Tussauds Ld.* (L.R. [1894] 1 Q.B. 671), where the plaintiff complained of the public exhibition of a wax effigy of himself, his counsel (see p. 674) did not suggest that his case could be rested upon any more general ground than that of Libel. "No one possesses a right of preventing another person from photographing him; any more than he has a right of preventing another from giving a description of him (provided that the description is not libellous or otherwise wrongful)"; *per* Horridge J., in *Sports Ld.* v. "*Our Dogs*," L.R. [1916] 2 K.B. at p. 884.

The matter is one in which the circumstances of time and place may well give rise to differences of legislation. Thus, in some parts of India, the law permits the acquisition, by enjoyment, of a still greater Right of Privacy—one forbidding (not only the publication but) even the opportunity of observation of the details of family life. In *Gokal Prasad* v. *Radho* (I. L. R. 10 Allahabad 358), Edge, C.J., said:—"Owing to differences in the conditions of domestic life this custom, perfectly reasonable in India, is unknown in England. But in these provinces of India *Parda* [seclusion of ladies] has for centuries been strictly observed by all Hindus except those of the lowest castes, and by all Muhammadans except the poorest. The male relations of a *parda-nashin* woman—and the woman herself—would consider it a disgrace were her face to be exposed to the gaze of male strangers....In the hot weather, great numbers of *parda-nashin* women are compelled by the climate to sleep in the open air, that is, in the courtyards or verandahs of their houses. A neighbour should not be allowed to open new doors or windows in such a way as would substantially interfere with those parts of his neighbour's premises which are used by *parda-nashin* women of the latter's family....To deprive this neighbour's old building of the privacy which has been enjoyed, would deprive it of all residential value and in this way depreciate its market price. Such a right of privacy exists in these Provinces by custom; and any substantial interference with that right (where it exists), affords the owner of the dominant tenement a good cause of action."

In England no such right to freedom from observation exists, even under a covenant for quiet enjoyment (L.R. [1911] 1 Ch. 219); nor can it be acquired by Prescription. So it was in vain that a dentist in 1904 sought for legal protection against "the annoyance and indignity" to which a neighbouring family at Balham were subjecting him by placing in their garden an arrangement of large mirrors which enabled them to observe all that passed in his study and his operating-room.]

SECTION III.

BREACHES OF RIGHTS OVER PROPERTY.

(1) TRESPASS.

[*To interfere with another man's property without lawful cause is a* Trespass.

This is so, even though the Trespasser used no Force; and did no actual Damage[1]; *and was not guilty of either Malice or Negligence.*]

[Force *is not necessary in Trespass.*]

PRESTON *v.* MERCER.

COURT OF EXCHEQUER. 1656. HARDRES 60.

IN trespass, the plaintiff declares that the defendant...did put and lay horse-dung, dirt, and other filth so near the walls of the plaintiff's dwelling-house that the said walls became rotten, wasted, and broken;... and filth and stinking water, being in the yard of the defendant's house, near adjoining to the plaintiff's said messuage, did make to run; which said water did pierce the walls of the said dwelling-house of the plaintiff, and sank into the plaintiff's cellar....

Verdict for £10 damages given.

* * * * * * *

After great wavering in opinion, and arguings pro and con, the Court gave judgment at last for the plaintiff.

[EDITOR'S NOTE. In *Reynolds* v. *Clarke* (2 Lord Raymond 1399) it is explained that Mercer's "making the water to run" was equivalent to an actual pouring of it; and for any immediate act of pouring water into another's land, an action of Trespass would lie.

On the other hand, an action on the Case would be the appropriate remedy wherever the damage was not produced by the defendant's act immediately, but only consequentially; e.g. by laying down on your own land a log which the plaintiff falls over, or digging in your own land a ditch which diverts the water from his portion of the brook.]

[1] Cf. Lord Coleridge's words on p. 44 *supra*. But a trivial trespass, though creating a right to Damages, does not necessarily create a right to an Injunction; *Behren* v. *Richards*, L.R. [1905] 2 Ch. 614.

[Actual Damage *is not necessary in Trespass.*]

[See ASHBY *v.* WHITE, *supra*, p. 195.]

ENTICK *v.* CARRINGTON.

COURT OF COMMON PLEAS. 1765. 19 STATE TRIALS 1029.

[THIS was an action of Trespass against messengers acting under a warrant from a Secretary of State, for breaking and entering the plaintiff's house, searching his boxes, and carrying away papers of his. The jury found a special verdict.

After elaborate argument, and time taken to consider, LORD CAMDEN, L.C.J., delivered the judgment of the Court for the plaintiff. In the course of his judgment he said:—]

The defendants, having failed in the attempt made to protect themselves by the stat. 24 Geo. 2, c. 44, are under a necessity to maintain the legality of the warrant under which they have acted, and to shew that the Secretary of State, in the instance now before us, had jurisdiction to seize the plaintiff's papers. If he had no such jurisdiction, the law is clear, that the officers are as much responsible for the trespass as their superior.

This, though it is not the most difficult, is the most interesting question in the cause; because if this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

The messenger, under this warrant, is commanded to seize the person described, and to bring him with his papers to be examined before the Secretary of State. In consequence of this, the house must be searched; the locks and doors of every room, box, or trunk must be broken open: all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable that nothing is left either to the discretion or to the humanity of the officer.

This power so assumed by the Secretary of State is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in it.

This power, so claimed by the Secretary of State, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself: the great executive hand of criminal justice, the Lord Chief Justice of the Court of King's Bench, Chief Justice Scroggs excepted (7 St. Tr. 929), never having assumed this authority.

The arguments, which the defendants' counsel have thought fit to urge in support of this practice, are of this kind.

That such warrants have issued frequently since the Revolution, which practice has been found by the special verdict; though I must observe that the defendants have no right to avail themselves of that finding, because no such practice is averred in their justification.

That the case of the warrants bears a resemblance to the case of search for stolen goods.

They say, too, that they have been executed without resistance upon many printers, booksellers, and authors, who have quietly submitted to the authority; that no action hath hitherto been brought to try the right; and that although they have been often read upon the returns of *habeas corpus*, yet no court of justice has ever declared them illegal.

And it is further insisted, that this power is essential to government, and the only means of quieting clamours and sedition.

These arguments, if they can be called arguments, shall be all taken notice of, because upon this question I am desirous of removing every colour of plausibility.

Before I state the question, it will be necessary to describe the power claimed by this warrant in its full extent.

If honestly exerted, it is a power to seize that man's papers who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man who is so described in the warrant, though he be innocent.

It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown.

It is executed by messengers with or without a constable (for it can never be pretended that such is necessary in point of law) in the presence or the absence of the party, as the messengers shall think fit, and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, as the only witnesses are the trespassers, the party injured is left without proof.

If this injury falls upon an innocent person, he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill he may do it with impunity, since there is no man capable of proving either the taker or the thing taken.

It must not be here forgot that no subject whatsoever is privileged from this search; because both Houses of Parliament have resolved that there is no privilege in the case of a seditious libel[1].

Nor is there pretence to say that the word "papers" here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay, I am able to affirm that it has been upon a late occasion executed in its utmost latitude: for in the case of *Wilkes* v. *Wood*[2], when the messengers hesitated about taking all the manuscripts, and sent to the Secretary of State for more express orders for that purpose, the answer was, "all must be taken, manuscripts and all." Accordingly all was taken, and Mr Wilkes's private pocket-book filled up the mouth of the sack.

I was likewise told in the same cause by one of the most experienced messengers, that he held himself bound by his oath to pay an implicit obedience to the commands of the Secretary of State; that in common cases he was contented to seize the printed impressions of the papers mentioned in the warrant; but when he received directions to search further, or to make a more general seizure, his rule was to sweep all. The practice has been correspondent to the warrant.

Such is the power, and therefore one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, &c., are all of this description; wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew, by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the

[1] 29 Comm. Journ. 689; Cobbett, Parl. Hist., vol. 15, pp. 1362 *et seq.*

[2] 19 St. Tr. 1153.

silence of the books is an authority against the defendant, and the plaintiff must have judgment.

According to this reasoning, it is now incumbent upon the defendants to shew the law by which this seizure is warranted. If that cannot be done, it is a trespass.

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods.

I answer, that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.

The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with. No less a person than my Lord Coke denied its legality[1]; and therefore if the two cases resembled each other more than they do, we have no right, without an Act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.

Observe, too, the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant, to shew them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him[2].

On the contrary, in the case before us nothing is described nor distinguished: no charge is requisite to prove that the party has any criminal papers in his custody: no person present to separate or select:

[1] 4 Inst. 176.

[2] See Hawk. P.C., ed. by Leach, Bk. 2, chap. 13, s. 17.

no person to prove in the owner's behalf the officer's misbehaviour.—To say the truth, he cannot easily misbehave unless he pilfers; for he cannot take more than all.

If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call upon the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy; my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.

What would the Parliament say if the judges should take upon themselves to mould an unlawful power into a convenient authority by new restrictions? That would be not judgment but legislation.

I come now to the practice since the Revolution, which has been strongly urged, with this emphatical addition: that an usage tolerated from the era of liberty, and continued downwards to this time through the best ages of the constitution, must necessarily have a legal commencement. Now, though that pretence can have no place in the question made by this plea, because no such practice is there alleged; yet I will permit the defendants for the present to borrow a fact from the special verdict, for the sake of giving it an answer.

If the practice began then, it began too late to be law now. If it was more ancient, the Revolution is not to answer for it; and I could have wished that upon this occasion the Revolution had not been considered as the only basis of our liberty.

The Revolution restored this constitution to its first principles. It did no more. It did not enlarge the liberty of the subject, but gave it a better security. It neither widened nor contracted the foundation, but repaired and perhaps added a buttress or two to the fabric; and if any minister of state has since deviated from the principles at that time recognized, all that I can say is that, so far from being sanctified, they are condemned by the Revolution.

With respect to the practice itself, if it goes no higher, every lawyer will tell you it is much too modern to be evidence of the common law; and if it should be added, that these warrants ought to acquire some strength by the silence of those Courts, which have heard them read so often upon returns without censure or animadversion, I am able to borrow my answer to that pretence from the Court of King's Bench, which lately declared with great unanimity in the *Case of General Warrants*[1], that as no objection was taken to them upon the returns, and the matter passed *sub silentio*, the precedents were of no

[1] I.e., *Leach* v. *Money* (19 State Trials 1001).

weight. I most heartily concur in that opinion; and the reason is more pertinent here, because the Court had no authority in the present case to determine against the seizure of papers which was not before them; whereas in the other they might, if they had thought fit, have declared the warrant void, and discharged the prisoner *ex officio*.

This is the first instance I have met with where the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office.

The names and rights of public magistrates, their power and forms of proceeding as they are settled by law, have been long since written, and are to be found in books and records. Private customs, indeed, are still to be sought from private tradition. But who ever conceived a notion that any part of the public law could be buried in the obscure practice of a particular person?

To search, seize, and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law, is incredible. But if so strange a thing could be supposed, I do not see how we could declare the law upon such evidence.

But still it is insisted that there has been a general submission, and no action brought to try the right.

I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law which a few criminal booksellers have been afraid to dispute.

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[See also ELLIS *v.* LOFTUS IRON CO., *supra*, p. 43, HUCKLE *v.* MONEY, *supra*, p. 208.]

[*Neither* Malice *nor* Negligence *is necessary in Trespass.*]

BASELY *v.* CLARKSON.

COURT OF COMMON PLEAS. 1680. 3 LEVINZ 37.

TRESPASS for breaking a close called a Balk and Hade, and cutting the grass therein and carrying it away. The defendant disclaimed any title in the plaintiff's close; but says that he too has a Balk and Hade adjoining that of the plaintiff, and that in mowing his own land he involuntarily and by mistake mowed some of the grass growing upon the plaintiff's land (intending to cut only the grass that grew upon his own land), and carried it away. Also that, before the issuing of the writ, he tendered to the plaintiff 2*s.* by way of satisfaction, and that this was a sufficient amends. Whereon the plaintiff demurs.

Judgment was given for the plaintiff, for it appears that the act was a voluntary one; and the knowledge and intention with which it was done are not traversable, and cannot be ascertained.

[*Neither* Malice *nor* Negligence *is necessary in Trespass.*]
[*Hence even the benevolent desire to protect another man's property from a Tort does not justify your trespassing into his land.*]

THE CASE OF TITHES IMPERILLED.

COURT OF COMMON PLEAS. 1507[1]. Y.B. 21 HEN. VII. fo. 27. pl. 5.

IN an action of trespass, the defendant put in a plea of justification; on the ground that the wheat, to which the action related, had been marked off, for tithes, from the remaining nine-tenths of the crops, and lay there in jeopardy of being destroyed by the beasts which were going about in the field; and that on that account the defendant took it and carried it away, and took it to a barn belonging to the plaintiff (who was parson of that parish) and put it there inside the barn. But to this plea the parson, as plaintiff, demurred in law.

Brudenell. The plea is not good. For when the wheat was severed from the nine-tenths and left in the ground where it grew, it was in a place apart, fit for keeping it in. In which case it is not lawful for anyone to enter and take it; just as it is not permissible for anyone to take my horse for fear that he may be carried off. And if a man's wife have lost her way, although he does not know where to find her, yet people must not take her, [to bring her] to her house; unless she be in jeopardy of being lost in the darkness or drowned in the water. And so here, though the wheat was in the midst of the field, yet it was in such a place as was apart and fit for keeping it in; and therefore, if anyone takes it, there is a good right of action against him. So the plea is not good.

Palmes. We have said that the wheat was in danger of being lost, and had we not taken it, would certainly have been lost; which is a sufficient and reasonable cause to justify our taking it. So if I see my neighbour's chimney on fire, I can justify entering his house to save the things that are therein, and taking what goods I find therein in order to save them. And here, since it is alleged that the goods were in danger of being lost, and we took them for their safety, for the benefit of the plaintiff, there is good reason that we should be excused herein. So the plea is good.

[1] Sir F. Pollock, in his account of this case (*Torts*, p. 378) shews that this is the true date; and that the Yearbook has placed it nearly a twelvemonth too soon. The correct date is given by Keilway in his report of it; where, moreover, we learn that the "beasts" were horses.

KINGSMILL, J. Where a man's goods are taken against his will, the taking can only be justified either as being a thing necessary to the commonweal, or else on account of some condition of law. In the first way, as a thing which concerns the commonweal, one may [in case of fire] justify taking goods out of a house to save them, or pulling down the house to save other houses. And so, in time of war, one can justify entering into another man's land to make a bulwark in defence of the king and the realm. These things are justifiable and lawful for maintenance of the commonweal. And in the other way, when they distrain my horse for the rent I owe, it is justifiable; because the land was let to me with a condition of distress. And so of other conditions. And thus in either of these ways one may justify the taking of a thing against the will of him who is its owner. But here we come under neither of the two; for we are not in a case of commonweal, and equally little in one of condition. For, as to the plea that the wheat was in danger of being lost, it nevertheless was not in a danger for which the party would not have had his remedy. If I have beasts doing damage [in another man's land] I cannot justify entering it to chase them out; but must first of all tender him amends. And similarly here, though the defendant took the plaintiff's corn for fear of its being destroyed, still this was not justifiable. For, if it had been destroyed, the plaintiff could have had his remedy against the person responsible for its destruction. And though the defendant put it in the plaintiff's own barn, yet perchance the plaintiff wanted to keep this barn for some other purpose, and so got no advantage by the defendant's act. Consequently such a plea is not good.

REDE, C.J.[1] So far as regards the defendant's intention, it was a good one. Yet, here, the intention cannot be considered. But in felony it would be. As, where a man is shooting at the butts, and kills some one; there is no felony, for he had no intention to kill. And so of a tiler on a house-top, who with a tile kills a man unknowingly; there is no felony. But where some one is shooting at the butts and wounds a man, though it is against his will, yet he shall be reckoned a Trespasser, against his intention. And where executors take the goods of some other person along with the goods of their testator, they will be held excusable if an action of trespass be brought against them for this taking. And, by the law, when my sheep are with other sheep and I chase them into a narrow place in order to be able to sever them, I can justify the driving of these others just as much as that of my own sheep. And in these cases there is reason for the rule. For, in the former case, the executors

[1] Who gave to the University of Cambridge the endowment which maintains the Rede Lecture.

cannot tell at the first glance which goods are their testator's and which are a stranger's. And, in the latter case, the sheep cannot be separated until they are penned up in a narrow place, and consequently the driving of them into one is justifiable. Similarly, where the arrest of a man on suspicion of felony is being justified, the defendant is bound to shew that he had good cause of suspicion; otherwise he will fail in his justification. Thus a hue and cry is sufficiently good cause; and if the cry were raised groundlessly, it is the man who raised it that must be punished. Accordingly it is a general rule that there must be some good ground for justification. And thus, in trespass a licence is a good justification, and therefore may be given in evidence under a defendant's plea of Not Guilty; for it excuses him at the time for the taking or cutting [for which he is being sued]....

But, in reference to the present case, when the defendant took the wheat—although this was a good act in regard to the damage which a stranger's beasts might have done to it—yet [in law] it is not a good act, nor any manner of justification against the party who had the property in the wheat. For he had his right of action against anyone who destroyed it, if it had in fact been destroyed. It is just as when my beasts are doing damage in another man's land; I cannot legally enter it to drive them out. And yet it would be a good act to drive them out, so that they should do no further damage. True, the rule is otherwise if some stranger had sent my horses into this person's land where they do harm. In such a case I can justify entering that land to fetch them out; because the injury they are doing originated in the wrongful act of another person. But here, since the plaintiff could have his remedy if his crops had been destroyed, it was not lawful for the defendant to take them. And it is not like a case where things are in danger of being destroyed by water or fire or the like; for there the destruction would take place without there being any right of action against anyone for it.

So the defendant's plea is not good.

FISHER, J., was of the same opinion.

And thereon the plaintiff would have obtained his judgment, had it not been that in respect of some other corn which was taken at the same time the defendant had pleaded a different plea, on which plea the plaintiff had joined issue. So the court would not give judgment on the demurrer until this issue had gone to trial, and the damages had been assessed by the jury.

[*Nor does your desire to recover your chattels, which you have intruded upon another man's land, justify your trespassing into it.*]

THE CASE OF THORNS.

COURT OF COMMON PLEAS. 1466. Y.B. 6 EDW. IV. fo. 7. pl. 18.

A MAN brings an action of trespass for breaking into his close with force and arms and destroying the herbage by trampling it under foot; alleging a trespass upon six acres. The defendant says Not Guilty as to the trespass in five of the acres. And as to the trespass on the sixth acre, he says that the plaintiff cannot have an action, for the defendant has an acre of land on which a hedge of thorns is growing, and which adjoins the said six acres, and the defendant (at the time of the alleged trespass) comes and cuts the thorns, and against his wish they fell upon the said sixth acre of the plaintiff, and thereupon the defendant enters upon the said acre and takes them up. And that is the trespass on which this action is brought. Hereon they demurred; and it was well argued; and was adjourned.

And, now, *Catesby* says—Sir, it has been said that if a man does a thing, even though it be quite lawful, and by that thing wrong and damage is done, though against his will, to someone else, then if the man could in anyway have avoided that damage, he shall be made to pay for doing this thing. But, Sir, I think otherwise. For, as I understand it, if a man does a lawful act and thereby, against his will, damage happens to someone else, he will not be liable for it. Thus I put the case of my driving my beasts on the high road, and your having an acre of land lying along the road; if my beasts enter your land and eat your grass and I come forthwith and drive them out of your land—in that case you have no action against me[1], for it was lawful to drive them out, and their entry upon the land was against my will, so you will have no action against me. Nor can there, any more, be an action in the present case. For the cutting of the thorns was lawful, and the falling of them upon your land was against my will; and therefore the entry to retake them was good and permissible. And, Sir, I put this case, that if I am cutting my trees, and the boughs fall upon a man and kill him, in that case I shall not be attainted as guilty of felony[2]; for my cutting of the boughs was permissible and their falling upon the man was against my will. And just so here.

[1] Y. B. 7 Hen. VII. 1.

[2] On such homicide by Misadventure, see Y. B. 2 Hen. IV. 25.

Fairfax. I hold the contrary. And I say that there is a difference between a man's doing a thing so as to become liable for felony, and doing it so as to become liable for the mere trespass. For in the case which Catesby has put there would be no felony; on account of felony being of malice aforethought. So that what was done against the man's will was not done with felonious intent. But if someone cuts trees, and the boughs fall on a man and hurt him, in such a case that man would have an action for trespass. And so, Sir, if an archer shoots at a mark, and his bow swerves in his hand, and against his will he kills a man, this, as has been said, is no felony[1]. But if he hurts a man with his archery, this man will have a good action of trespass against him, although archery is lawful and the wrong which the archer did was against his will. And so here.

Pigot. I think so, too. And I put the case that I have a mill, and the water that turns my mill flows through your land and you have sallows or willows growing by the water; and you cut shoots from them, and, against your will, they fall into the water and block the water, so that I have not sufficient water for my mill. In such a case I shall have an action of trespass. And yet the cutting was lawful, and the falling was against your will. So if a man has a pond in his manor; and he lets off the water from the pond, in order to take the fishes, and this water floods my land, I shall have a good action[2] against him; and yet his act was lawful.

Yonge. I think otherwise. For where a man has only suffered a *damnum absque injuria*, there he shall have no action. For if he has suffered no wrong, it is not reasonable that he should recover damages. So was it here when the defendant came into the plaintiff's close to take up the thorns which had fallen into it; his entry was not tortious. For when he cut them and they fell into the close against his will, then, seeing that the property in them remained in him it was lawful for him to seize them even when off his own land. So, in spite of the plaintiff's having sustained damage thereby, he suffered no tort.

Brian[3]. I think the contrary; for, in my opinion, when any man does a thing, he is bound to do it in such a way that his act shall cause no hurt or harm to others. Thus if, when I am building a house and the timbers are being reared, a piece of timber falls on the house of my neighbour and breaks into it, he will have a good action against me; and yet the building of my house was lawful, and the timber fell against my will. And so if a man makes an assault upon me and I cannot avoid him, and he wants to beat me, and I in defence of myself raise my stick and strike him and, in raising it, I hurt some

[1] 22 Liber Assissarum 56.

[2] Y. B. 12 Hen. VIII. 3.

[3] [Who is described by Sir Frederick Pollock as "a jurist of real genius."]

man who is behind my back, this man will have an action against me[1]. And yet it was lawful for me to raise my stick to defend myself, and it was against my will that I hurt him. And so here.

LITTLETON, J. In my opinion, if a man suffers damage, it is reasonable that he should be compensated. And in my opinion the case which Catesby has put is bad law; for if your beasts came on my land and ate my grass, then, in spite of your having come forthwith and turned them out, it behoves you to make me amends for what your beasts have done, whether it were more or less[2]. But if beasts escape into a man's land, his lord cannot distrain on them for his rent; and similarly if my beasts stray into any lordship, the lord cannot take them for his rent. For, when a lord distrains for his rent, he is to keep the distress until the rent be paid; and this he cannot do in the aforesaid cases, for if I choose to offer sufficient amends I must have my beasts back. Just so, in an action for rescuing beasts distrained upon as *damage feasant*, it is a good plea for the defendant to say that he tendered to the plaintiff sufficient amends. And, Sir, if it were law that he could enter and take the thorns, then, on the same principle, if he cut down a great tree he might come with carts and horses to carry the tree away. But that would not be reasonable at all; for peradventure there might be wheat or other crops growing upon the land. So no more will his entry be reasonable in the present case; since the law is all one for great things and for little. And therefore whatever be the amount of trespass done, it is fitting that amends should be made accordingly.

CHOKE, J. I think just the same. For when the principal thing is not lawful, then the thing which is accessory to it cannot be lawful. Now when he cut the thorns and they fell on my land, that falling was not lawful. Therefore his coming to take them out was not lawful. And if it is said, in reply to this, that they fell into the close against his will, that is no sufficient defence. He must go on to say that he could not do it in any other way, or that he did all that lay in his power to keep them out of the close. And if not, he must pay damages[3]. But, Sir, if his thorns, or even a great tree, had fallen over into his neighbour's land through the force of the wind, then he might[4] go into that land to take them out; because in such a case it would not be to his own act that the fall was due, but to the wind[5].

[Judgment for plaintiff.

[1] [Contrast however the modern rule as exemplified in BROWN *v.* KENDALL (*supra*, p. 146).]

[2] Y. B. 22 Hen. VI. 41; Y. B. 20 Ed. IV. 10; Y. B. 7 Hen. VII. 1.

[3] 27 Liber Assisarum 35; Y. B. 40 Ed. III. 6; Y. B. 22 Ed. IV. 8; Y. B. 13 Hen. VIII. 18.

[4] Y. B. 21 Hen. VII. 28.

[5] On this case, *see* Holdsworth's History of English Law, III. 301–4.

[*Even the use of a public highway may constitute a Trespass, if it be used in an unreasonable manner.*]

HARRISON *v.* DUKE OF RUTLAND.

COURT OF APPEAL. [1893] 1 Q. B. 142.

[ACTION of assault. Motion by plaintiff, and cross-motion by defendant, each asking for judgment or a new trial.]

LOPES, L.J. This is a case of great importance. It is an action of trespass to the person brought by the plaintiff against the defendants, claiming damages and an injunction. The defendants, amongst other defences, justified the alleged trespass on the ground that the plaintiff was trespassing upon the soil of the defendant, the Duke of Rutland, for the purpose of interfering with the legal right of shooting belonging to the said Duke, which by his friends and keepers duly authorized in that behalf he was then exercising, and alleging the use of no greater force than was necessary for the purpose of abating such trespass. The defendant, the Duke of Rutland, also counter-claimed against the plaintiff in respect of a trespass by the plaintiff to the soil of the said Duke, and for his interference with the exercise by the said Duke of his legal right of sporting over his said lands, alleging threats to continue and repeat such unlawful interference, and claiming an injunction and damages. Alternatively, the defendants brought into Court the sum of 5*s.* in satisfaction of all the causes of action of the plaintiff. The plaintiff joined issue on the defendants' defence, and denied the allegations in the counter-claim.

The case came on to be tried before the Lord Chief Justice. So far as material, the facts may be stated as follows: At the times in question the Duke of Rutland was lawfully exercising sporting rights over certain moors belonging to him. These moors were in certain parts intersected by certain highways. The soil of such highways, subject only to the easement of passing and repassing which belonged to the public, was vested in the said Duke, he being the owner of the lands on each side adjoining the said highways. Butts were erected, at some places near the said highways, at other places at a distance of 200 yards from the highways, for the purpose of the sportsmen concealing themselves from the grouse which were to be driven towards them. The vision of the grouse is signally acute, and very little will induce them to shy away from the butts and follow a course which would be out of reach of the guns of the sportsmen occupying the butts. The plaintiff, knowing this and believing that he had cause

of annoyance with the Duke or with his predecessor in title, placed himself, avowedly and admittedly, on the highway in such a position and so acted as to prevent the grouse from approaching the butts. The plaintiff had done this on former occasions, and had threatened to continue so to act whenever the Duke drove his moors. Some years before the moors had been let to a tenant. During that time the plaintiff, who had been paid by the tenant, had desisted from any interference with the shooting on the moors; but, so soon as the Duke resumed the shooting on his moors, so soon did the plaintiff renew his interference with the sport. It was an undisputed fact in the case that the plaintiff did not use the soil of the highway as one of the public for passing and repassing, or for the legitimate purpose of travel, but was at the times in question using it for the purpose of interfering with and obstructing the legal right of the Duke to exercise sporting rights over his said moors. There was a conflict of evidence as to the amount of force used by the defendants in their attempts to prevent the plaintiff interfering with the sport. In these circumstances the Lord Chief Justice directed the jury that the plaintiff was not a trespasser, and that therefore what the defendants did could not be justified; that the defendants had no cause of action on their counter-claim; and that the only question which they would have to consider was whether 5*s.* was enough to compensate the plaintiff for the acts of the defendants. The Lord Chief Justice said: "I do not think the plaintiff was a trespasser. I do not think, therefore, that what was done to him was lawful": and again: "The trespass is hardly denied, and is attempted to be justified on grounds that, in my judgment, fail. The trespass, therefore, remains a trespass, not a lawful act. It is an unlawful act. Five shillings has been paid in respect of that unlawful act. In your judgment, is 5*s.* enough? If 5*s.* is enough, verdict for the defendants. If 5*s.* is not enough, then verdict for the plaintiff, with such an addition to the 5*s.* as you think on the whole necessary." The jury thereupon found a verdict for the defendants on the claim, thinking 5*s.* enough, and the Lord Chief Justice ordered judgment to be entered for the defendants on the claim, and for the plaintiff on the counter-claim and pleas justifying the trespass. The result is that, while the defendants succeed on the issue raised as to the 5*s.* paid into Court, the plaintiff has had entered for him the issues raised by the pleas of justification, and has judgment on the counter-claim. This arises from the holding of the Lord Chief Justice that the plaintiff was not, under the circumstances, a trespasser. The plaintiff and defendants have both appealed to the Court, the plaintiff seeking judgment for him on the claim so far as the issue with regard to 5*s.* being enough to satisfy the claim is concerned, alleging the 5*s.* to be contemptuous and inadequate; and

the defendants seeking to have judgment entered for them on the pleas justifying the trespass and on the counter-claim.

With great deference I am of opinion that the Lord Chief Justice was wrong in directing the jury that on the facts as admitted the plaintiff was not a trespasser. In my opinion, the Lord Chief Justice ought to have told the jury that the plaintiff, on the admitted facts, was a trespasser, and that the pleas justifying the trespass and the counter-claim must be found for the defendants, and that the only question they had to consider was whether there had been an excess of force used in abating the trespass, and, if so, whether 5*s.* was enough to compensate the plaintiff for such excess. The Lord Chief Justice ought further to have told the jury that if there was no excess then they must find everything for the defendants; but if there was an excess, then if 5*s.* was enough, they ought still to find everything for the defendants; but if, on the other hand, they thought 5*s.* was not enough, then they should find for the plaintiff for such sum as in their opinion he was entitled to beyond the 5*s.* The jury were of opinion that 5*s.* was enough to cover everything to which the plaintiff was entitled. Their finding on that issue is therefore conclusive, and the verdict and judgment in that respect must stand. But ought the Lord Chief Justice to have told the jury that the plaintiff was not a trespasser?

The interest of the public in a highway consists solely in the right of passage; the soil and freehold over which that right of way is exercised is vested in the owner or owners of the adjoining land, who may maintain actions of trespass against persons infringing his or their rights therein; as, for instance, by permitting cattle to depasture thereon. In *Dovaston* v. *Payne*[1], Buller, J., says: "Whether the plaintiff was a trespasser or not depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers." Again, Heath, J., says: "If it be a way, he must shew that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public." In the case of *Reg.* v. *Pratt*[2], Pratt had been convicted by justices under 1 & 2 Wm. 4, c. 32, s. 30, of committing a trespass by being in the daytime on land in the occupation of one Bowyer, in search of game. On appeal, a case was reserved by the sessions for the opinion of the Court, and the facts appeared to be that Pratt was in the daytime on a public road (the soil of which as well as the land on both sides belonged to Bowyer) carrying a gun and accompanied by a dog, that Pratt sent the dog into a cover by the roadside which was in the actual occupation of Bowyer, and that a pheasant flew across the road from the cover and was fired at by Pratt, who was

[1] 2 H. Bl. 527. [2] 4 E. & B. 860.

still standing upon the road. Upon these facts the Court held that the conviction was right, the road being land in the occupation of Bowyer, subject only to the right of way of the public; and the evidence shewed that Pratt was not on the road in the exercise of the right of way, but for another purpose, namely, the search for game, and that thus he was a trespasser. "On these facts," said Lord Campbell, C.J., "I think that the magistrates were perfectly justified in concluding that Pratt was trespassing on land in the occupation of Mr Bowyer in search of game. He was, beyond all controversy, on land the soil and freehold of which was in the owner of the adjoining land, that is, Mr Bowyer. It is true the public had a right of way there; but subject to that right the soil and every right incident to the ownership of the soil was in Mr Bowyer. The road, therefore, must be considered as Mr Bowyer's land. Then Pratt, being on that land, was undoubtedly a trespasser if he went there, not in exercise of the right of way, but for the purpose of seeking game and that only. If he did go there for that purpose only, he committed the offence named in the Act: he trespassed by being on the land in pursuit of game. The evidence of his being there for that purpose is ample. He waved his hand to the dog; the dog entered the cover and drove out a pheasant, and Pratt fired at it. The magistrates were fully justified in drawing the conclusion that he went there, not as a passenger on the road, but in search of game." Erle, J., in the same case, says: "There can be no doubt, in fact, that Pratt was on land, and that he was in search of game; but it is said he could not be a trespasser because it was a highway. But I take it to be clear law that, if in fact a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser, like the cattle in *Dovaston* v. *Payne*[1]." Crompton, J., in the same case, says: "I take it to be clear law that if a man use the land, over which there is a right of way, for any purpose lawful or unlawful other than that of passing and repassing, he is a trespasser." I do not think the language used by the learned judges in that case too large or that it in any way imperils the legitimate use of highways by the public. The Lord Chief Justice, however, appears to have thought that this decision was founded on the fact that Pratt was committing an offence on the highway. The Lord Chief Justice says—I quote his own words: "As he was using the highway not to pass and repass but to be guilty of a criminal offence, the judges held that, he being on the highway for the purpose of committing that criminal offence, he was none the less doing that criminal offence because he was on the highway; but they could not take exception and say he had a right to be there as he had for all

[1] 2 H. Bl. 527.

purposes, and try to make that a defence for being there for a criminal purpose." In my opinion that is not the ground of the decision. The ground of the decision is that Pratt was using the highway for purposes other than those of legitimate travel, and was, therefore, a trespasser on the soil and freehold of the adjoining owner; he could not have been convicted unless he had been a trespasser.

The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public.

If this is the law, the plaintiff, on the admitted facts, was a trespasser. He was using the soil of the highway, not for the purpose of passing and repassing, but for the purpose of interfering with the exercise of a legal right by the defendant, the Duke of Rutland. In these circumstances the defendants are entitled to judgment on the pleas of justification, and also on their counter-claim for nominal damages. The plaintiff's appeal will, therefore, be dismissed, and the defendants' appeal be allowed with costs. Sir H. James, on the part of the Duke, does not press for an injunction; if he had I should have thought it ought to be granted; but he asks for a declaration that the plaintiff, on the facts appearing, was, at the time when he interfered with the legal right of the Duke, a trespasser. This I think he ought to have. An injunction is constantly granted by the Queen's Bench Division for trespasses threatened to be repeated. It is the effect of the Judicature Act and a most wholesome remedy. This action might have been brought in the Court of Chancery, and an injunction on the facts appearing would, in my opinion, have been readily granted; and under Order XXV., r. 5, there is full power to make a declaration such as we make.

* * * * * * *

[KAY, L.J., concurred; Lord ESHER, M.R., concurred, except as to allowing the judgment to include a declaration in addition to the damages.]

Judgment for defendants.

[EDITOR'S NOTE. The student may read as a supplement to this case the subsequent one of *Hickman* v. *Massey* [1900], 1 Q.B. 752; where a racing tout was held to have committed a trespass by spending an hour and a half in walking to and fro upon a particular fifteen yards of a highway, to watch the trials of horses on the land across which the highway ran. Unlike Harrison he neither interfered

with the owner's use of the land, nor even stood still on it. "What," it was argued, "if his only object had been to sketch—or to admire—the scenery? Is it a trespass for people to stand in Fleet Street to see the Lord Mayor's Show pass by?" It was conceded by the Court that the public enjoyment of highways is not now-a-days limited to the mere right of passing and repassing, but includes other reasonable and ordinary acts, such as sitting down to rest, or even to sketch. But, here, the tout's use of it had been (1) excessive in time; and (2) for a purpose which was "wholly disconnected with the purpose of passage"; a purpose which, indeed, (3) amounted to an interference with the plaintiff's lawful enjoyment of his land—though it involved no act for which the plaintiff could have sued, had the defendant done it on land that was his own.]

[*And even a* co-owner of land *may commit Trespass therein, by excluding another co-owner from exercising his rights.*]

MURRAY, ASH, & KENNEDY *v.* HALL.

COURT OF COMMON PLEAS. 1849. 7 C.B. 441.

THIS was an action of trespass for breaking and entering the dwelling-house of the plaintiffs, and expelling them therefrom, and seizing and converting their goods. The defendant pleaded, firstly, not guilty; secondly, as to breaking and entering the dwelling-house, leave and license; thirdly, that the premises were not the premises of the plaintiffs; fourthly, as to the goods, leave and license; fifthly, that the goods were not the goods of the plaintiffs. Issue was joined.

The facts that appeared in evidence were as follows. The three plaintiffs and one Hart had jointly become tenants of the premises in question—a room used as a coffee-room by the members of a Temperance Society—to one Hall. On the 23rd of November, 1846, the defendant and Hart forcibly expelled from the premises a person named Adams, who had been placed there by Murray.

On the part of the defendant it was proved that Hart had previously, on the 5th of November, 1846, surrendered his interest to the defendant by the following document.

"Mr W. Hall.

"Sir,—The premises I and my co-partners hold of you, being situated No. 11 Stacey Street, St Giles's, I, in the name of the same, give up, as we cannot pay you the rent due, my co-partners having misapplied the same.

"Yours, &c.,

"JOHN HART.

"P.S.—I have given the key to Mr G. for you."

It was then insisted for the defendant that the surrender by Hart inured as, at all events, a surrender of his own interest, and made Hall tenant in common with the three plaintiffs; and that one tenant in common could not maintain trespass against his companion, even for an actual expulsion, (*Cubitt* v. *Porter*[1]). Mr Justice Maule told the jury that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the premises by the defendant, their verdict ought to be for the plaintiffs. The jury returned a verdict for the plaintiffs; damages £35.

[The defendant afterwards obtained a rule to shew cause why a nonsuit should not be entered; on the ground that one tenant in common cannot maintain trespass against another, even for an actual expulsion.]

* * * * * * *

COLTMAN, J., delivered the judgment of the Court....The Court has felt some difficulty on the question, by reason only of the doubts expressed by Littledale, J., in his judgment in *Cubitt* v. *Porter*[1]. That learned judge there said that although, if there has been actual ouster by one tenant in common, ejectment will lie at the suit of the other, yet he was not aware that trespass would lie; for that in trespass the entering is the gist of the action, and the expulsion or ouster is a mere aggravation of the trespass; and that, therefore, if the original entry be lawful, trespass will not lie. It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And, as it has been further established, in the case of *Goodtitle* v. *Tombs*[2], that a tenant in common may maintain an action of trespass for mesne profits against his companion, it appears to us that there is no real foundation for the doubts suggested.

Rule discharged.

[EDITOR'S NOTE. In the case of *land*, it is possible for two co-owners to enjoy it concurrently, and therefore any attempt by one of them to exercise an exclusive enjoyment may easily constitute a Trespass against the other. But the very nature of a *chattel* often renders it—as in the case of a book, a deed, a ring—impossible that both co-owners should exercise their rights over it simultaneously. Accordingly—"Beati possidentes"—he who has got the chattel may keep it from the other; and that less fortunate one must simply watch for some opportunity of taking possession of it without using force. But if the possessor were to destroy the article, this would amount to a Trespass.]

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[1] 8 B. & C. 257. [2] 3 Wilson 118.

[*Mere* Possession *gives the possessor a right of action against all who disturb it without having some* better right *than his.*]

GRAHAM *v.* PEAT.

COURT OF KING'S BENCH. 1801. 1 EAST 244.

TRESPASS quare clausum fregit. Plea the general issue (and certain special pleas not material to the question). At the trial before Graham, B., at the last assizes at Carlisle, the trespass was proved in fact. But it also appeared that the locus in quo was part of the glebe of the rector of the parish of Workington in Cumberland, which had been demised by the rector to the plaintiff; and that the rector had not been resident within the parish for five years last past, and no sufficient excuse was shewn for his absence. Whereupon it was objected that the action could not be maintained; the lease being absolutely void by the act of the 13 Eliz. c. 20, which enacts, "that no lease of any benefice or ecclesiastical promotion with cure, or any part thereof, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice, without absence above fourscore days in any one year; but that every such lease immediately upon such absence shall cease and be void." And thereupon the plaintiff was nonsuited.

A rule was obtained in Michaelmas term last to shew cause why the nonsuit should not be set aside; upon the ground that the action was maintainable against a wrong-doer upon the plaintiff's possession alone, without shewing any title.

Cockell, *Sergt.*, *Park*, and *Wood*, now shewed cause, and insisted that possession was no further sufficient to ground the action, even against strangers, than as it was primâ facie evidence of title, and sufficient to warrant a verdict for the plaintiff if nothing appeared to the contrary. But here it did expressly appear by the plaintiff's own case that his possession was wrongful; for it was a possession in fact against the positive provisions of an act of parliament, without any colour of title even against strangers, (1 Leon. 307). He was not so much as tenant at sufferance; though it is not certain that even this latter can maintain trespass. It is settled that the plaintiff could not have maintained an ejectment against a stranger who had evicted him[1]. It appears from Plowd. 546 that there must not only be a possession in fact, of land, to maintain trespass, but the possession must be lawful at the time. And an instance is given: if the king be seised in fee, and a stranger enter upon him claiming title, and continue in possession a year and a day, yet he cannot maintain trespass against a wrong-doer.

[1] *Doe d. Crisp* v. *Barber*, 2 Term Rep. 749.

And though 5 Com. Dig. 537 says that he may, yet the authority cited for it does not warrant the position and is directly contrary to an adjudged case in 4 Leon. 184. [LORD KENYON. That goes upon artificial reasoning, that the king cannot be dispossessed by an intruder, and does not apply to other cases.] Suppose there had been a plea of soil and freehold of the rector, and that the defendant as his servant and by his command entered, &c.; it being settled that there cannot be a traverse to the command, the plaintiff must either have traversed its being the title of the rector, or have shewn a legal possession consistent therewith, as that he had a lease from him. And then it would have been shewn in answer that the lease was void by the statute; and either way there must have been judgment against the plaintiff. Now it was equally competent to the defendant to avail himself of this upon the general issue.

Law, *Christian*, and *Holroyd* contrà were stopped by the Court.

LORD KENYON, C.J. There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrong-doer; and if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrong-doer. Suppose a burglary committed in the dwelling-house of such an one, must it not be laid to be *his* dwelling-house notwithstanding the defect of his title under the statute [of 13 Eliz. c. 20]?

Rule absolute[1].

[EDITOR'S NOTE. The same principle was applied in an American case of *Cutts* v. *Spring* (15 Massachusetts 135), where the defendant had cut down some trees in a piece of Government land which the plaintiffs had been occupying without title for many years. It was held that the plaintiffs' occupation was good as against every one but the State.]

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[1] "Whoever is in possession may maintain an action of trespass against a wrong-doer to his possession," *Harker* v. *Birbeck*, 3 Burr. 1563; so *Cary* v. *Holt*, 2 Stra. 1238. "Trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question"; *Lambert* v. *Strootber*, Willes' Rep. 221.

[*The rule applies equally to Chattels.*]

ARMORY *v.* DELAMIRIE.

NISI PRIUS. 1722. 1 STRANGE 505.

THE plaintiff, being a chimney-sweeper's boy, found a jewel[1], and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice; who, under a pretence of weighing it, took out the stones, and called to the master to let him know it came to three halfpence. The master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. Trover against the master.

[Counsel for the defendant urged[2] (1) that the plaintiff had not such a property in the jewel as would support an action; and (2) that, as the apprentice's act was tortious, his master would not be responsible for it.]

The Court ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner; and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect[3].

3. As to the value of the jewels, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.

[EDITOR'S NOTE. In a very modern case (an action brought by the bailee of goods against a stranger, for the loss of these goods through his negligence), it was held that a bailee can recover the full value of the goods, whether he be or be not answerable to the bailor for the loss. The bailee must however account to the bailor for *his* proportion of the amount recovered. *The Winkfield*, L. R. [1902] P. 42.]

[1] A manuscript report of the case, which the present Editor lately found in the British Museum (Add. MSS. 35,996, fol. 43), describes this jewel as "a locket set with diamonds and jewels."

[2] According to the MS. report.

[3] The words of Pratt, C.J., were—according to the MS.—"I think that for what the apprentice does *in any respect*, in the way of his master's trade, the master shall be answerable." Cf. Lord Holt's ruling at p. 70 *supra*.

[*What otherwise would be a Trespass will be* no tort, *if it arise from* Inevitable Accident *in the course of a lawful and careful act.*]

See above, STANLEY *v.* POWELL (p. 140), and BROWN *v.* KENDALL (p. 146).

[*Again, a* License *from the owner will justify what otherwise would be a Trespass.*]

[*Yet such a license is* revocable, (*unless connected with a grant or given for valuable consideration*).]

WOOD *v.* LEADBITTER.

COURT OF EXCHEQUER. 1845. 13 M. & W. 838.

[To an action of trespass for assault and false imprisonment, the defendant pleaded that, at the time of the supposed trespass, the plaintiff was in a close of Lord E., and that the defendant, as the servant of Lord E., and by his command, molliter manus imposuit on the plaintiff to remove him from the said close; which was the trespass complained of. The plaintiff replied that he was in the close by the leave and license of Lord E.; which was traversed by the rejoinder.

The evidence at the trial was that Lord E. was steward of the Doncaster races; that tickets of admission to the Grand Stand were issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand, and the inclosure round it, during the races; that the plaintiff bought one of the tickets, and was in the inclosure during the races; that the defendant, by the order of Lord E., desired him to leave it; and, on his refusing to do so, the defendant, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea.

ROLFE, B., directed the jury, that, assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, it still was lawful for Lord Eglintoun, without returning the guinea, and without assigning any reason, to order the plaintiff to quit the inclosure, (which, on this record, was admitted to be his property); and that, if the jury were satisfied that notice was given to the plaintiff, requiring him to quit the ground, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed during which he might have gone away voluntarily, then the plaintiff was not, at the time of the

removal, on the ground by the leave and license of Lord Eglintoun. Upon this direction, the jury found a verdict for the defendant on this issue.

A new trial was moved for, on the ground of misdirection.]

ALDERSON, B., delivered the judgment of the Court....That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established, that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in *grant* and not in livery, and to pass by mere delivering of the deed. In all the authorities and text-books on the subject, a deed is always stated or assumed to be indispensably requisite.

And although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject-matter. A right of common, for instance, which is a profit à prendre, or a right of way, which is an easement (or right in nature of an easement), can no more be granted or conveyed for life or for years without a deed, than in fee simple. Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through and to remain in a certain close belonging to Lord Eglintoun; to go and remain where, if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land,—it is a right of way and something more: and if we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created otherwise than by deed. The plaintiff, however, in this case argues, that he is not driven to claim the right in question strictly as *grantee*. He contends, that, without any grant from Lord Eglintoun, he had license from him to be in the close in question at the time when he was turned out; and that such license was, under the circumstances, irrevocable.

...It may be convenient to consider the nature of a license... A mere license is revocable: but that which is called a license is often something more than a license; it often comprises or is connected with a grant; and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.

It may further be observed that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable

of being granted otherwise than by deed, there the license is a mere license. It is not an incident to a *valid* grant, and it is therefore revocable. Thus a license by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of acting lawful, which, without the license, would have been unlawful. If the license be, as put by Chief Justice Vaughan, a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land. And supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a watercourse, to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable....

The plaintiff here paid valuable consideration for the privilege of going on the stand. But this fact makes no difference. Whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed. Any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil....

Rule discharged.

[*But, since the Judicature Act, a license is not revocable if Equity would give an injunction against its premature revocation.*]

HURST *v.* PICTURE THEATRES, LIMITED.

COURT OF APPEAL. L.R. [1915] 1 K.B. 1.

THE plaintiff entered the defendants' picture-theatre and paid 6*d.* for his admission. Alleging that the plaintiff had not paid, the attendant at the theatre, and afterwards the manager also, called upon him to go out of the theatre, treating him as a fraudulent person who had come in without payment. The porter accordingly took hold of him to remove him. He then walked quietly out. The jury found that he had paid the sixpence; and gave a verdict for him for £150 damages. The defendants appealed.

BUCKLEY, L.J.... *Wood* v. *Leadbitter* (*supra*, p. 392) affirmed that a mere licence, by which I mean a licence not coupled with an interest or a grant (whether it be under seal or not), is revocable. It affirmed also that, if there be a licence coupled with an interest, or coupled with a grant, it is not (or at any rate in general is not) revocable....What Alderson, B. [meant in that judgment]...was:—"This man has got no deed; he has got nothing under seal; he has therefore not got a grant; he cannot in this Court be heard to say that he is a grantee; and because he is not a grantee he is a mere licensee; and being a mere licensee (whether it is under seal or not under seal does not make any difference) the licence is revocable."...The position of matters now is that the Court is bound under the Judicature Act to give effect to equitable doctrines. The question we have to consider is whether, having regard to equitable considerations, *Wood* v. *Leadbitter* is a decision which can be applied in its integrity in a Court which is bound to give effect to equitable considerations. In my opinion, it is not....What was relied on in *Wood* v. *Leadbitter*, and rightly relied on at that date, was that there was not an instrument under seal, and therefore there was not a grant, and therefore the licensee could not say that he was a licensee with a grant. That is now swept away. It cannot be said as against the plaintiff that he is a licensee with no grant, merely because there is not an instrument under seal which gives him a right at law.

There is another way in which the matter may be put. If there be a licence with an agreement not to revoke the licence, that, if given for value, is an enforceable right. If the facts here are (as I think they are) that the licence was a licence to enter the building and see the spectacle from its commencement until its termination, then there was included in that contract a contract not to revoke the licence until the play had run to its termination. It was a breach of contract to revoke the licence.

KENNEDY, L.J....The plaintiff, being in possession of a seat, had a right to stay and say "It is no use your saying to me I am obliged to go because I have not got (in the language of *Wood* v. *Leadbitter*) a grant by deed. This is an interest which, whether you call it an easement or not, is an interest which I can now acquire in equity by parol; and I have that interest."...There was here a good equitable right; which rendered the act of the defendants in the present case bad in law.

[PHILLIMORE, L.J. delivered ("in the nature of doubts, more as if the matter were non-proven than as a decision") a dissentient judgment.]

Appeal dismissed.

[EDITOR'S NOTE. "It is settled that the license granted by the sale of a ticket, for a seat at a theatre, includes a contract not to revoke the license arbitrarily." *Per* McCardie, J., in *Said* v. *Butt* (36 T. L. R. at p. 764).

The effects of the Judicature Act were authoritatively stated as early as 1882 by Jessel, M.R., in *Walsh* v. *Langdale* (L. R. 21 Ch. Div. 9). He ruled that "A tenant holding under an agreement for a lease, of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. Since the Judicature Act he is not a tenant from year to year, he holds under the agreement; and every branch of the Court must now give him the same rights." He added that "there are not two estates, as there were formerly; one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court; and the Equity rules prevail in it."

Parker, J. subsequently said, in *Jones* v. *Earl of Tankerville* (L. R. [1909] 2 Ch. at p. 443), "An injunction restraining the revocation of a license, when it is revocable at law...prevents him [the vendor] from breaking his contract, and protects a right in Equity, which but for the absence of a seal, would be a right in law. And since the Judicature Act, it may well be doubted whether the absence of a seal, in such a case, can be relied on in any court."]

[*The* revocation *of such a License.*]

HYDE *v.* GRAHAM.

COURT OF EXCHEQUER. 1862. 1 H. & C. 593.

[ACTION of trespass for entering the plaintiff's close, and breaking open a gate, and the lock with which it was fastened. The defendant pleaded, (as a defence on equitable grounds), that a dispute had arisen between the plaintiff and defendant and certain other persons as to whether there was a public highway over the plaintiff's land; and thereupon, (in order that the defendant and the plaintiff's solicitor might arrange to come to a definite understanding as to the course to be pursued in deciding or trying the question, and in consideration that the defendant and the other persons, at the request of the plaintiff, then signed the same), it was, (by a memorandum in writing, then signed by the plaintiff, his solicitor, the defendant, and the said other persons), agreed that, without prejudice on either side to the question of right to the said way, it should remain open and unobstructed for the passage of the defendant and the said other persons, until the plaintiff's solicitor and the defendant should come to a definite understanding as to the course to be pursued in deciding or trying the question then in dispute. The plea then stated that the alleged trespasses were committed before any understanding had been come to, and consisted only of the use of the way by the defendant; and that it was because the gate was (wrongfully and contrary to the agreement)

placed across the way and locked, that the defendant broke it open, inasmuch as he could not use the way without so doing.

The plea was demurred to, as disclosing no defence either at law or in equity.]

* * * * * * *

Dowdeswell, for defendant. Firstly, the plea is good at law; for the facts stated in it would be evidence in support of a plea of leave and licence. The agreement amounts to a contract on the part of the plaintiff that, during a certain interval, the way shall remain open and unobstructed for the passage of the defendant. Therefore he was justified in breaking open the gate in order to use the way. [POLLOCK, C.B. Not until after he had demanded the key. But if the licence has been revoked, what right is left?] The plaintiff cannot avail himself of his breach of contract to sue the defendant as a trespasser. In *Burridge* v. *Nicholetts*[1] it was held that a person might break open a lock in order to get possession of his own book. [CHANNELL, B. There the question arose under the County Court Act, 9 & 10 Vict. c. 95.] This is, in effect, an agreement that, if the plaintiff obstructs the way with a locked gate, the defendant may open it. Secondly, the plea affords a good defence on equitable grounds. The fact that the agreement is indefinite in point of time does not invalidate it. It is a sufficient consideration in equity that third persons are parties to it, and it may be supported on the same principle as an agreement of reference. If it had been under seal it would have been irrevocable; and in equity there is no distinction between instruments under seal and by parol. The plaintiff has acted contrary to conscience and good faith, and on that ground a court of equity would restrain this action by a perpetual injunction. A court of equity would also restrain the action on the ground that it is unjustifiable and vexatious.

* * * * * * *

BRAMWELL, B. I am of opinion that the plea is bad both as a legal and an equitable defence. Mr Dowdeswell says that it is good as a plea of leave and licence, but it is not in terms so pleaded. Neither does it contain any allegation of leave and licence, for it states that because the gate was wrongfully and contrary to the agreement placed across the way, locked, and fastened, the defendant broke it open. When the defendant found the gate locked, that was a tolerably clear intimation to him that the licence was revoked and the plaintiff did not intend to perform the agreement. It seems to me that the defendant had no right to break open the gate; and the plea, which professes to justify all the trespasses, being bad in part is bad altogether.

Then, as to its being a good equitable plea, the answer has been already given by my lord. There would be difficulty in a court of

[1] 6 H. & N. 383.

equity saying, "We will restrain you from revoking your licence, absolutely and without any qualification of any kind." If the defendant applied for a specific performance of the agreement, surely a court of equity would say: "You were to come to some arrangement as to the course to be pursued in deciding the disputed right of way; we will only restrain the plaintiff, from revoking the licence, upon the terms that you forthwith come to that arrangement." I therefore think that a court of equity would not, by injunction, restrain the plaintiff from proceeding with this action. Another difficulty is this—the way is to remain open without prejudice on either side to the question of right to it. Now suppose that, in using the way, some damage is done to the soil, and it is afterwards decided in the mode arranged between the parties that there is no way over the plaintiff's land, would he not be entitled to claim compensation for the damage? But if the defendant succeeded on this plea, the plaintiff never could recover damages for what would be an unjustifiable trespass, because he would be barred by this action in respect of it. It seems to me, not only on the grounds stated, but taking a common sense view of the matter, that the plea is bad.

[POLLOCK, C.B., and CHANNELL, B., gave similar judgments.]

Judgment for plaintiff.

[*In some cases* the Law *itself gives a license to do an act which would otherwise be a Trespass; (e.g. entering an inn, or levying an execution*[1]).]

[*But to commit any new Trespass whilst acting under a mere* License of Law *will revoke the Trespasser's License, and so render him a* Trespasser ab initio.]

THE SIX CARPENTERS' CASE.

COURT OF COMMON PLEAS. 1610. 8 COKE 146 *a*.

IN trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house and for an assault and battery, 1 Sept. 7 Jac., in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, &c., and upon the new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *præter fractionem domus* pleaded not guilty; and as to the breaking of the house, said, that the said house, *præd' tempore quo, &c., et diu antea et postea*, was a common wine tavern of the said John Vaux, with a common sign at the door of the said house fixed, &c., by force whereof the defendants, *præd' tempore quo, &c., viz. horâ quartâ post meridiem*, into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, by way of replication, did confess that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it; but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8*d*., and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same. Upon which the defendants did demur in law. And the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment, upon request, is a denying in law), makes the entry into the tavern tortious.

1. It was resolved *that when entry or licence is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio; but*

[1] Another class of examples arise under the law of Distress; e.g. for rent, or upon cattle *damage feasant*. A remarkable but obsolete form of Distress was that which the impecuniosity or extravagance of members of the University once rendered necessary at Cambridge. We find in the Year-Book of 21 Edw. I. (fo. 54) that "The burgesses of Cambridge have, by the King's Charter, a franchise that, when clerks or others are in debt to them, the burgesses may seize the horses or other things that are possessed, within the Liberty of Cambridge, by such debtors."

where an entry, authority, or licence is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser ab initio. And the reason of this difference is, that in the case of a general authority or licence of law, the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta. Vide* 11 H. 4. 75. b. But when the party himself gives an authority or licence to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or licence. Therefore the law gives authority to enter into a common inn or tavern; so to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like. But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the owner, for damage-feasant, works or kills the distress; or if he who enters to see waste break the house, or stays there all night; or if the commoner cuts down a tree; in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if a purveyor takes my cattle by force of a commission, for the king's house, it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6. 19. b. *Et sic de similibus.*

2. It was resolved *per totam curiam, that* not doing *cannot make the party, who has authority or licence by the law, a trespasser ab initio, because* not doing *is no trespass.* Therefore if a man takes cattle damage-feasant, and the other offer sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69. g. *temp.* E. 1. Replevin, 27. 27 E. 3, 88. 45 E. 3. 9. So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point 12 E. 4. 9. b. For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, The said case which Pigot has put is not law, for it is no trespass, but the taverner shall have an action of debt. And, there before, Brown held that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt. But the tailor in such a case shall have a special action of debt; *scil.* that *A* did put cloth to him to make a gown thereof for

the said *A*, and that *A* would pay him as much for making, and all necessaries thereto, as he should deserve, and that for making thereof, and all necessaries thereto, he deserves so much, for which he brings his action of debt. In that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor over-values the making, or the necessaries to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making, and the necessaries thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c., for so much, unless it is so especially agreed. But in such case he may detain the garment until he is paid, as the hostler may the horse. *Vide* Br. Distress, 70, and all this was resolved by the court. *Vide* the Book in 30 Ass. pl. 38, John Matrever's case, it is held by the court that if the lord, or his bailiff comes to distrain, and before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant, if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3. 8. b. in the Mr of St Mark's case; and so is the opinion of Hull to be understood in 13 H. 4. 17. b., which opinion is not well abridged in the title Trespass, 180. *Note, reader, this difference, that tender upon the land before the distress makes the distress tortious; tender after the distress and before the impounding, makes the detainer, and not the taking, wrongful.*

[Editor's Note. To cases of distress damage feasant this rule of the common law still applies. But in the (much more frequent) case of a distress for rent, it is enacted by 11 Geo. 2. c. 19, s. 19, that where a distress is made for any rent *justly due*, and any irregularity or unlawful act shall afterwards be done by the person distraining or his agent, the distress shall not be deemed unlawful, nor the distrainor a trespasser ab initio. The party grieved may recover full satisfaction for the special damage sustained thereby; but no more.]

[*Becoming a* trespasser ab initio.]

OXLEY *v.* WATTS.

COURT OF KING'S BENCH. 1785. 1 DURNFORD & EAST 12.

THIS was an action of trespass for taking a horse, tried before Lord Mansfield at the last summer assizes at Maidstone.

The defendant, as bailiff of the lord of the manor, justified taking the horse as an estray[1]. Replication that, after the taking mentioned in the declaration, the defendant worked the horse, and so became a trespasser *ab initio*.

Erskine now moved to set aside the verdict which had been obtained by the plaintiff. This should have been an action on the case for the consequential damage, and not an action of trespass; because the original taking was admitted to be lawful.

PER CURIAM. The subsequent using is an aggravation of the trespass in taking the horse; for the using made him a trespasser *ab initio*.

Rule refused.

[1] [EDITOR'S NOTE. Estrays are valuable animals found wandering at large, the owner being unknown; see 1 Blackstone's Commentaries 297.]

[*The necessities of* Self-defence *may justify what would otherwise be a* Trespass.]

See WRIGHT *v.* RAMSCOT, *supra*, p. 158.

[*E.g. in the Recaption of goods from one who has taken them wrongfully.*]

BLADES *v.* HIGGS AND ANOTHER.

COURT OF COMMON PLEAS. 1861. 10 C.B., N.S. 713.

THE declaration charged that the defendants assaulted and beat and pushed about the plaintiff, and took from him his goods, that is to say, dead rabbits.

The defendants pleaded, amongst other pleas,—thirdly, as to the assaulting, beating, and pushing about the plaintiff, that the plaintiff, (at the said time when, &c.), had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter[1]; that the said rabbits were then in the possession of the plaintiff without the leave and licence and against the will of the said marquis; and that the plaintiff was about wrongfully and unlawfully to take and carry away the said rabbits and convert the same to his own use; whereupon the defendants, as the servants of the marquis and by his command, requested the plaintiff to refrain from carrying away and converting the same rabbits, and to quit possession thereof to the defendants as such servants, which the plaintiff refused to do; and that thereupon the defendants, as the servants of the said marquis and by his command, gently laid their hands upon the plaintiff, and took the said rabbits from him, using no more force than necessary; which were the alleged trespasses in the declaration mentioned, &c. Demurrer and joinder.

Beasley, in support of the demurrer. The plea is clearly bad. In order to sustain it, it must be made out that, wherever *A*'s goods are wrongfully in the hands of *B*, *A* or his servants may forcibly take them, without shewing that a felony has been committed, or the way in which the goods came to *B*'s possession, or that the defendant was attempting to re-take them on fresh pursuit. To permit this, would be manifestly against one of the first principles of law. It is not alleged that the defendant had wrongfully taken the rabbits. He might have been an innocent bailee, or a purchaser in market overt. [BYLES, J. Or an executor.] No precedent is to be found for such a plea: it does not shew that there was any resistance to a lawful demand, or any necessity for an assault. All the precedents are of acts done in the defence of the party's possession of the goods[2]. Here,

[1] [EDITOR'S NOTE. The poachers, who had snared the rabbits, had sold them to the plaintiff, a game-dealer.]

[2] See 2 Chitty Pl. 345, et seq.

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there is no allegation that the Marquis of Exeter ever was in possession of these rabbits. The whole foundation, therefore, of the plea fails. In *Anthony* v. *Haney*, 8 Bingh. 186, 1 M. & Scott, 300, in trespass for entering the plaintiff's close, a plea that certain goods of the defendants' were there, and that they entered to take them, doing no unnecessary damage, was held ill. In giving judgment, Tindal, C.J., there says: "In none of the cases referred to has the plea been allowed, except where the defendant has shewn the circumstances under which his property was placed on the soil of another. Here, the defendant has confined himself to the statement that they were there, without attempting to shew how. To allow such a statement to be a justification for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace." A fortiori it must be unlawful to commit an *assault* for the purpose of getting possession of a man's goods.

* * * * * * *

ERLE, C.J., now delivered the judgment of the Court:—

The declaration in this case was for an assault and battery. The substance of the justification was, that, the plaintiff having wrongfully in his possession rabbits belonging to the defendants (we consider the servants here the same as the master), and being about to carry them away, the defendants requested him to refrain, and, on his refusal, molliter manus imposerunt, and used no more force than was necessary to take the rabbits from him. To this the plaintiff has demurred, and thereby admits that he was doing the wrong, and that the defendants were maintaining the right, as alleged. And he contends that the defendants are not justified in using necessary force, on account of the danger to the public peace: but he adduces no authority to support his contention. The defendants likewise have failed to adduce any case where the justification was supported without an allegation to explain how the plaintiff took the property of the defendant and became the holder thereof. But the principles of law are in our judgment decisive to shew that the plea is good, although that allegation is not made.

If the defendants had actual possession of the chattels, and the plaintiff took them from them against their will, it is not disputed that the defendants might justify using the force sufficient to defend their right and re-take the chattels. And we think there is no substantial distinction between that case and the present. For, if the defendants were the owners of the chattels, and entitled to the possession of them, and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession, and the plaintiff's wrongful detention against the request of the defendants would be the same violation of the right of property as a taking of the chattels out of the actual possession of the owner.

It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrong-doer therefrom. In respect of land, as well as chattels, the wrong-doers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified: (see *Newton* v. *Harland*, 1 M. & G. 644, 1 Scott N.R. 474). But, in respect of land, that argument has been overruled in *Harvey* v. *Brydges*, 14 M. & W. 442. Parke, B., says: "Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though in so doing a breach of the peace was committed."

In our opinion, all that is so said of the right of property in land, applies in principle to a right of property in a chattel, and supports the present justification. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it.

Judgment for the defendant.

[Editor's Note. In a case analogous to *Blades* v. *Higgs*, a man, whose house was being searched under a warrant, asked to see the warrant; and, on receiving it, put it into his pocket. Lord Tenterden, C.J., ruled that since this man had no right to retain the warrant, the searching officers "had a right to take it from him, and even to coerce his person to obtain possession of it, provided that they used no more violence than was necessary"; *Rex* v. *Mitton* (3 C. & P. 31).

The quotation made in *Blades* v. *Higgs*, from Parke, B., must not be pressed too far. It is true that a man's forcible entry into his own land, although a crime, is not, in itself, a Tort. But it is now held (*Edwick* v. *Hawkes*, L. R. 18 Ch. D. 199) that if an entry be made under such circumstances as render it criminal (under the statutes against Forcible Entries), the person so entering, though not civilly liable for the entry itself, *is* so liable for any independent wrong (e.g. breaking furniture or fastenings) that was incidental—not to the mere Entry, but—to needless Force.

Cf. *Hemmings* v. *Stoke P. G. C.*, L. R. [1920] 1 K. B. 720.

In Rolle's Abridgment (*Trespass*, I. 17) we find—"If a man comes into my close with an iron bar and sledge" [i.e. a sledgehammer] "and there breaks my stones, and afterwards departs and leaves the sledge and bar in my close, in an action of trespass against me for taking them away, I may justify the taking of them and putting them in the close of the plaintiff himself next adjoining, (especially giving notice of it to the plaintiff), inasmuch as they were brought into my close of his own tort. And in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself, by them, by tort of the plaintiff."]

[*A trespasser on* land *may, similarly, be ejected by force; unless, by acquiescence, he has come to acquire a true Possession.*]

[See HARRISON *v.* DUKE OF RUTLAND, *supra*, p. 382.]

BROWNE *v.* DAWSON.

COURT OF QUEEN'S BENCH. 1840. 12 A. & E. 624.

THE trustees of a free school drew up rules for the government of the school, prescribing also the terms upon which the master should hold or be dismissed from his office. These were signed by the trustees and by the master, who was already in office; and were produced by the trustees on the trial of a cause between them and the master (then dismissed), as "Rules agreed upon at a meeting of the trustees, held," &c.

The master had possession of the school-room for the purposes of his office, but was summarily dismissed by the trustees for an alleged breach of the rules. He acquiesced in the dismissal and gave up the room, which was peaceably taken possession of by them and locked up. He returned on the next day, broke open the room, and held it for eleven days, at the end of which the trustees forcibly ejected him. He then brought trespass, describing the premises as "a room of the plaintiff." Plea, denying that it was the room of the plaintiff.

[At the trial, before Lord Denman, C.J., at the Dolgelly assizes, he told the jury that if the plaintiff went out freely in the first instance, and gave up possession to the trustees, he was not to be considered as being in possession at the time of the forcible ejectment. A verdict was given for defendant. A new trial was moved for, on the ground of misdirection.]

Jervis, for plaintiff....The plaintiff was liable to dismissal only on proof that he had broken the rules. The trustees could not turn him out summarily, and without calling upon him for his defence. [LORD DENMAN, C.J. I was of that opinion. But, if he chose to go out rather than wait for such a proceeding, that alters the case. And, after he had consented to withdraw, and left the premises, his returning to them, and taking off the padlock, and remaining a certain time, could not restore him to possession.]

Again, the defence set up at the trial was, in substance, that the plaintiff was not possessed of the room; but that should have been specially pleaded. The declaration states merely that the locus in quo was a room "of the plaintiff"; the traverse of that allegation must be taken in the sense in which the declaration uses it; but in that sense

any possession was sufficient ground for an action. On this record the parties who could not prove *any* right were wrong-doers. [LORD DENMAN, C.J. You say that, on this record, it is sufficient if the plaintiff was in fact on the premises.] *Heath* v. *Milward*[1] is a direct authority on this point.

LORD DENMAN, C.J., delivered the judgment of the Court....It was said that the trustees could not dismiss the plaintiff in the middle of a quarter, without calling on him for his defence. What was the precise tenure by which he held his office did not appear distinctly; but the facts and his own acquiescence seem to shew that he held during good behaviour. That acquiescence, however, is an answer to this objection; and it is but justice to add that there is no foundation for imputing hardship or injustice to the trustees.

The most important objection, however, was to the direction given to the jury with regard to the meaning of the second plea. Mr Jervis urged that the considerations which that involved were not open to the defendants under the language of the plea; that they must be considered as wrong-doers, as they set up no title; and therefore that, as against them, the barest possession was enough for the plaintiff. *Heath* v. *Milward* was cited in support of this argument. We think that case well decided, and agree that the question of title is not to be raised on a plea of possession; we agree also that this action is possessory, and that possession is sufficient for the plaintiff in trespass against a wrong-doer. But these elementary principles must be understood reasonably. A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by Possession against the person whom he ejects, (and drive him to produce his title), if that person can, without delay, reinstate himself in his former possession. By the acquiescence of the plaintiff, the defendants had become peaceably and lawfully possessed as against him. He re-entered by a trespass; if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession. What he could not have done on the 1st July he could as little have done on the 11th: for his tortiously being on the spot was never acquiesced in for a moment; and there was no delay in disputing it. But, if he could not have denied their possession in the action supposed, it follows clearly that they might deny his in the present action. For both parties could not be in possession.

Rule refused.

[1] 2 Bingham, New Ca. 98.

[Public Necessity *may justify what otherwise would be a Trespass.*]

See above, Part I. section III. (H).

[*But there is no such Necessity for ordinary* Fox-hunting.]

PAUL AND ANOTHER *v.* SUMMERHAYES.

QUEEN'S BENCH DIVISION. 1878. L.R. 4 Q.B.D. 9.

CASE stated by justices under 20 & 21 Vict. c. 43, upon a conviction of the appellants upon an information for an assault.

The appellants were persons who, on the occasion in question, were engaged in hunting with a pack of foxhounds. In the pursuit of a fox, which the hounds were running, the appellants sought to enter upon a field forming part of a farm belonging to the respondent's father, which the respondent managed on his father's behalf. The respondent warned them off, and endeavoured to resist their entry on the field. For the purpose of overcoming his resistance to their entry, they committed the assault complained of. The main question in the case was whether, under the above-mentioned circumstances, there was any justification for the assault. The justices convicted the appellants in the sums of 20*s.* and 10*s.* respectively.

Cole, Q.C., for the appellants. The case of *Gundry* v. *Feltham*[1] is authority to shew that persons in fresh pursuit of a fox have a right to go on the land of another. No doubt the principle of that decision depends upon the notion that the destruction of a noxious animal is for the good of the public; and the motive of the modern sport of foxhunting is certainly not the destruction of a noxious animal. But it is contended that the motive is immaterial. The law has always given the right, because it favours the destruction of foxes, and the effect is the same whatever the motive. [He also cited *Mitten* v. *Faudrye*[2]; Year Book, 12 Hen. 8, fo. 10, and 1 & 2 Wm. 4, c. 32, ss. 31—35.]

Charles, Q.C. The 1 & 2 Wm. 4, c. 32, has no bearing on the present case. It relates to trespassers in pursuit of game, and a fox is not game. It leaves the question as to a justification at common law quite untouched. The case of *Gundry* v. *Feltham*[1] is distinguishable. There the demurrer admitted that the means adopted were the only

[1] 1 T. R. 334. [2] Poph. 161.

means of killing the fox. Now it cannot be contended that the modern mode of foxhunting is essential to the killing of the fox. The case of *Gundry* v. *Feltham*[1] was cited to Lord Ellenborough sitting at Nisi Prius in *Lord Essex* v. *Capel*[2]; and that learned judge was of opinion that the principle upon which it went was inapplicable to the modern sport of foxhunting pursued as a diversion, and held that that sport can only be pursued on the land of another by his consent. [He cited *Baker* v. *Berkeley*[3].]

Cole, Q.C., in reply.

Lord Coleridge, C.J. I am of opinion that the conviction should be affirmed. The statute 1 & 2 Wm. 4, c. 32, s. 35, really has no application to the case. That section of the statute merely provides that certain foregoing provisions shall not apply to persons in fresh pursuit of a fox. But, in truth, when the statute is examined, it will be seen that those provisions would not apply to the pursuit of the fox, the animal not being game. So the provisions of s. 35 seem only to have been put in ex majori cautelâ, to prevent certain penalties for a particular class of trespass, viz. trespass in pursuit of game, from applying to foxhunters. There is nothing, therefore, in the Act to alter the common law with regard to trespass so far as concerns foxhunting. The real question is whether under the circumstances the respondent was justified in resisting the entry of the appellants on his father's land. I am of opinion that he was. It was suggested that there is authority that foxhunting in the popular, well understood, sense of the term, that is, as a sport, can be carried on over the land of a person without his consent and against his will; and the case of *Gundry* v. *Feltham*[1] was cited as authority for that proposition. I am of opinion that no such right as that claimed exists. The sport of foxhunting must be carried on in subordination to the ordinary rights of property. Questions such as the present fortunately do not often arise; because those who pursue the sport of foxhunting do so in a reasonable spirit, and only go upon the lands of those whose consent is expressly, or may be assumed to be tacitly, given. There is no principle of law that justifies trespassing over the lands of others for the purpose of foxhunting. The case of *Gundry* v. *Feltham*[1] is distinguishable from the present case, and can be supported, if it is to be supported at all, only on the grounds suggested by Lord Ellenborough in the case of *Lord Essex* v. *Capel*[2], to which we have been referred. The demurrer admitted that what was done was the only means for destroying the fox, and Buller, J., expressly puts his decision on that ground. The case was brought under the consideration of Lord Ellenborough in

[1] T. R. 334.
[2] Locke on Game Laws, 5th ed. 45; Chitty on Game Laws, 2nd ed. 32.
[3] 3 C. & P. 32.

Lord Essex v. *Capel*[1], and he was distinctly of opinion that, where any other object was involved than that of the destruction of a noxious animal, an entry on the land of another, against his will, could not be justified. In the case of *Lord Essex* v. *Capel*[1] it had been pleaded that the means adopted were the only means, and also that they were the ordinary and proper means, of destroying the fox. But the evidence clearly shewed that in the case of foxhunting, as ordinarily pursued, the object of destroying the animal is only collateral. The interest and excitement of the chase is the main object. Lord Ellenborough, than whom there could be no higher authority on such a point, was of opinion that where this was the case, and where the real object was not the mere destruction of a noxious animal, a trespass could not be justified. If persons pursue the fox for the purpose of sport or diversion, they must do so subject to the ordinary rights of property. It would seem that there may be some doubt as to the validity of the justification even where the only object is the destruction of a noxious animal. The idea that there was such a right as that of pursuing a fox on another's land appears to have been based on a mere dictum of Brook, J., in the Year Book, 12 Hen. 8, fo. 10. This dictum was not necessary for the decision of the case, for there the chasing of a fox was not in question, and the case went off on an entirely different point. It may well be doubted (in my opinion) whether, even if the case were one in which the destruction of a fox as a noxious animal was the sole object, there would be any justification. That question, however, does not, I think, arise here. It is enough to say that the case of *Gundry* v. *Feltham*[2], and the dictum of Brook, J., in the Year Book, 12 Hen. 8, do not at all conflict with the opinion expressed by Lord Ellenborough in *Lord Essex* v. *Capel*[1], which appears to me to be the true view of the law; viz. that a person has no right, in the pursuit of the fox as a sport, to come upon the land of another against his will. For these reasons our judgment must be for the respondent.

Judgment for the respondent.

[1] Locke on Game Laws, 45. [2] 1 T. R. 334.

[*There is a remedy against Trespassers not only in Damages but also (where these are not an adequate redress) by* Injunction[1].]

GOODSON v. RICHARDSON.

COURT OF APPEAL. 1873. L.R. 9 CH. 221.

THE plaintiff in this case was owner in fee of an undivided moiety of lands in the Isle of Thanet, abutting upon the highway from Broadstairs to Ramsgate; and as such was owner in fee of an undivided moiety of the adjoining half of the highway. He was also shareholder in a waterworks company at Ramsgate. The defendant, R. Richardson, owned some houses at Ramsgate; and, being dissatisfied with the waterworks company, proceeded to construct waterworks for the supply of his houses. He applied to the Highway Board of the Isle of Thanet for permission to lay down pipes along the highway, which, after some time, and discussion and opposition from the waterworks company, was, on the 8th of April, 1873, granted to him; the clerk to the board at the same time informing him that the board could only give permission subject to the rights of the owners of the lands. The defendant had on the 4th of April begun to lay the pipes along the highway, and (apparently in the course of the day of the 9th of April) he laid the pipes in the soil of the side of the road adjoining the land of which the plaintiff had an undivided moiety. On the same 9th of April the plaintiff and other landowners served the defendant with notice not to lay pipes in their lands, and that they intended to apply for an injunction. There was a dispute as to the exact times when the pipes were laid and when the notice was received.

On the 21st of April the bill in this suit was filed, praying for a perpetual injunction to restrain the defendant from so laying any pipes and from allowing them to remain. The Master of the Rolls, Sir G. Jessel, made a decree for a perpetual injunction, and the defendant appealed.

Mr Jackson, Q.C., and *Mr J. Beaumont*, for the appellant:—

We contend, in the first place, that the plaintiff is too late. In the next place, the plaintiff's remedy, if any, is at law: *Deere* v. *Guest*[2]. No doubt the land is legally his, but he has in reality suffered no injury, and the Court will not interfere, or at all events will only give damages, *Bowes* v. *Law*[3]; especially where the work is all done, *Hindley* v. *Emery*[4]. The object of the plaintiff is not to protect his

[1] Cf. Lord Coleridge's judgment in *Mogul Steamship Co.* v. *McGregor*, supra, p. 226.

[2] 1 My. & Cr. 516. [3] L. R. 9 Eq. 636. [4] L. R. 1 Eq. 52.

land, but to prevent the defendant from making waterworks to the probable injury of the plaintiff's waterworks.

LORD SELBORNE, L.C....I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land. And it appears to me, as such, to be a proper subject for an injunction.

Some cases which have been referred to are either cases of ancient lights, such as *Durell* v. *Pritchard*[1], or cases of covenants, such as *Bowes* v. *Law*[2]; where a man had, once for all, done upon his own land something which exposed him to an action by the other party. In those cases the thing was finished; and in the judgment of the Court it was more equitable, having regard to the consequences of interference or non-interference, to leave the parties to their legal rights and liabilities or to give damages, rather than to interfere by injunction. No doubt in such a state of things the *quantum* of damage to the plaintiff, as compared with the *quantum* of loss to the defendant, is a material consideration; but that consideration does not appear to me to arise in the present case.

The other class of cases is that exemplified by *Deere* v. *Guest*[3], which, when rightly considered, amounted to neither more nor less than an action of ejectment brought in the Court of Chancery without any equitable circumstances to induce that Court to assume jurisdiction....In that state of circumstances, Lord Cottenham thought—and, in my judgment, was quite right in thinking—that there was no equity whatever to interfere, and that the case was a simple attempt to transfer the jurisdiction in ejectment from law to equity.

Had the circumstances of this case been similar, and had these pipes been laid with the consent of the tenant three years before, and used as part of the system of waterworks during the whole of that interval, and had it been a case of possession, originally legal but now liable to be displaced by ejectment, I have little doubt that I should have come to a similar conclusion. But all the circumstances of the case are entirely different, and the principle upon which this case ought to be dealt with is, in my opinion, that upon which the Master of the Rolls has dealt with it.

* * * * * * *

SIR G. MELLISH, L.J. I am of the same opinion. I think it is quite clear that the defendant has not got into possession of any portion of real property of the plaintiff so as to make it necessary for the plaintiff to bring an action of ejectment.

It is perfectly true that when a system of waterworks has been

[1] L. R. 1 Ch. 244. [2] L. R. 9 Eq. 636. [3] 1 My. & Cr. 516.

legally established, and the owners have made their reservoir, and have legally laid their pipes all along the streets through which they are supplying the water, then the law considers the pipes so far part of the realty that the owners are liable to be rated as in possession of a portion of the realty; and it may be that an ejectment might be brought against them. But in this case the waterworks had not, at the time this bill was filed, been established at all. All that had been done was that the defendant had entered upon the plaintiff's land, had dug a trench, and had put pipes at the bottom of that trench. I doubt extremely whether those pipes had become part of the realty at all. If they had, they would have become the plaintiff's property. But in my opinion there was never any intention to annex them to the soil so as to make them part of the realty; and I am inclined to think that they remained pure chattels. However that may be, it is not necessary to decide the question, because, in fact, the defendant has committed a trespass. If that had been the only thing done, it would have been right to leave the plaintiff to recover damages by an action at law; but the defendant was threatening to continue the trespass—threatening to complete his waterworks, and use as his own that which was really part of the plaintiff's property, and to make a profit by it. Then there is this further reason for coming to this Court, namely, that, from the peculiar circumstances of the surface of the road being dedicated as a highway, the plaintiff has not the ordinary remedy which he would have had if the defendant had dug a trench and laid pipes across the plaintiff's field. In this case the plaintiff would have had great difficulty in himself removing the pipes. Suppose that a similar trespass was committed on a man's soil while he remained in possession, and there was nothing to prevent him digging it up himself, it would be reasonable enough to leave him to remove what had been wrongly put in the soil, and then to bring an action to recover damages. But in the present case it is extremely doubtful whether he could remove the pipes without rendering himself subject to being indicted by the highway board; and in my opinion he is entitled to be relieved from that difficulty.

The appeal must be dismissed with costs.

(2) CONVERSION.

[*Where an interference with the possession of* Goods *is such as to manifest an intention of displacing the owner's rights, it constitutes the tort of* Conversion.]

FOULDES *v.* WILLOUGHBY.

COURT OF EXCHEQUER. 1841. 8 MEESON & WELSBY 540.

[TROVER for two horses. It appeared at the trial that the defendant was the manager of a ferry from B. to L., and that the plaintiff embarked on board the defendant's ferry-boat at B., having with him the horses in question, for the carriage of which he had paid the usual fare. When the defendant came on board, it having been suggested that the plaintiff had behaved improperly on board, the defendant told the plaintiff he would not carry the horses over the water, and that he must take them on shore. The plaintiff refused to do this, and the defendant took them from the plaintiff and put them on shore, and they were conveyed to an hotel kept by the defendant's brother. The plaintiff remained on board and was conveyed over the water. On the following day the plaintiff sent for the horses, but they were not delivered up; a message was however afterwards sent to the plaintiff, that he might have the horses on sending for them and paying for their keep, but that if he did not send for them, they would be sold to pay the expenses. The latter was accordingly done, and this action was brought. The defence set up was, that the plaintiff having misconducted himself on board, the horses were put on shore in order to get rid of the plaintiff by inducing him to follow them.

The learned Judge, in summing up, told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct justified his removal from the steam-boat, and he had refused to go without his horses.

The jury found a verdict for the plaintiff. A motion was made to set aside the verdict on the ground of misdirection.]

Watson, for plaintiff. The evidence shewed that which clearly amounted to a conversion, and it was not affected by the circumstance that the plaintiff had the means afterwards, if he had chosen, of obtaining the horses again. A wrongful removal of a chattel, even for a few yards, amounts in law to a conversion. [LORD ABINGER, C.B. According to that argument every trespass is a conversion.] If a man takes and rides another person's horse without his consent, however short a distance, it is in law a conversion. [ALDERSON, B. In that case

there is a user of the horse. LORD ABINGER, C.B. In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of their owner. ALDERSON, B. If a man were to remove my carriage a few yards, and then leave it, would he be guilty of a conversion?]...The mere exercise of dominion over a thing is, in law, a conversion of it. What is said by Buller, J., in *Syeds* v. *Hay*[1], is applicable to the present case: "If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me."

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LORD ABINGER, C.B. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare asportavit is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned Judge was wrong, in telling the jury that the simple fact of putting these horses on shore by the defendant, amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object (and whether rightly or wrongly entertained is immaterial) simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and on being put on shore, the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colourable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner nor any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case

[1] 4 T. R. 264.

must go the length of saying that it would. Then, suppose the reply to be, that those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued, that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all: but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from Strange's Reports, of *Bushell* v. *Miller*, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom House Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead, that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the Court there said, that whatever ground there might be for an action of trespass, in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no danger whatever in taking them? In order to constitute

a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held, that the single act of removal of a chattel, independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses. Consequently the rule for a new trial ought to be made absolute....

ALDERSON, B....Why did this defendant turn the horses out of his boat? Because he recognised them as the property of the plaintiff. He may have been a wrong-doer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass, to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover.

* * * * * * *

Verdict set aside.

[EDITOR'S NOTE. The modern simplification of Procedure has not altogether removed the importance of distinguishing the tort of Conversion from that of Trespass. The difference may materially affect the measure of Damages: which in Trespass is merely the amount of injury done, but in Conversion is the whole value of (the plaintiff's interest in) the goods. Hence on paying the damages, the defendant will usually become owner of the goods].

[*If a hirer of goods sells them, he becomes guilty of a Conversion.*]

COOPER *v.* WILLOMATT.

COURT OF COMMON PLEAS. 1845. 1 C.B. 672.

[CERTAIN household furniture was conveyed by bill of sale to the plaintiff by Parry Savage, in consideration of £100. An agreement was thereupon come to that Savage should retain the use of the furniture, paying 6*s.* a week for the hire of it, and should restore it to Cooper on demand. But Savage, soon afterwards, removed the furniture, and sold it to the defendant, a furniture broker, who bought it in the honest belief that it belonged to Savage. The plaintiff claimed it from the defendant, but the latter refused to give it up. At the trial, Erle, J., nonsuited the plaintiff. A motion was made to enter judgment for the plaintiff.]

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TINDAL, C.J. It appears to me that, if the transaction between Cooper and Savage is assumed (as perhaps it may be) to be a demise of the goods to the latter, it is such a demise as might at any time be put an end to at the will of the former. And it seems to me that, if Savage put the goods into the possession of another, meaning to give to that other a larger interest in them than he himself possessed, he must, at all events, be held to have parted with the limited interest he did possess. The demand upon the defendant, therefore, as much put an end to the tenancy of Savage as if the demand had been made upon Savage himself. But, supposing the tenancy not to have been determined, I cannot get over the authority of *Loeschman* v. *Machin*. There, the hirer of certain pianos had sent them to the defendant, an auctioneer, for sale. In an action against the auctioneer, Abbott, J., ruled that, "if goods be let on hire, although the person who hires them has the possession of them for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of a conversion; and that, if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion." That is a position I am not prepared to dispute. I therefore think the rule for entering a verdict for the plaintiff in this case must be made absolute.

Rule absolute.

[EDITOR'S NOTE. The same rule would apply to a *pledge* of hired goods by the hirer. But where a man has received goods (not as a hirer, but) as a pawnee, and he subpledges them, the result is different. He may thereby commit a breach of his contract with the owners who pawned them to him—and who have a right to

have them returned immediately that they pay off the debt—yet he does not become guilty of a conversion. For his rights are so much greater than those of a hirer that a pledge by him is not, in itself, a transaction so inconsistent with the remaining rights of the ownership as to amount to a displacement of it. See *Donald* v. *Suckling* (L. R., 1 Q. B. 585). The matter will be different, if, on tendering their debt, the owners cannot get back the articles they originally pawned.]

[*Unreasonable* refusal to deliver *goods, when demanded by the owner, is evidence of a wrongful exercise of acts of ownership; i.e. of a Conversion.*]

COBBETT, EXECUTOR OF BOXALL, *v.* CLUTTON.

NISI PRIUS. 1826. 2 CARRINGTON & PAYNE 471.

TROVER for a box and deeds. Plea—General issue.

It appeared that the testatrix, Mrs Boxall, died in the month of August, 1825, and that a box containing deeds and other papers belonging to the testatrix, was at the house of Mr William Clutton, of Hartwood, a relation of the defendant Clutton. The box, with its contents, was sent by him to the office of the defendants to be delivered to the plaintiff as her executor, on the plaintiff's giving a schedule of the deeds contained in the box. It was proved that the plaintiff demanded the box and its contents of the defendants; but they refused to deliver it up, unless the plaintiff would give them a schedule of its contents.

Marryat, for the defendants. The defendants received this box from Mr William Clutton, as his agents; and they had it delivered to them, on the special trust to deliver it to the plaintiff on his giving an inventory. Now, if they had delivered the box over, against their authority, they would have been doing wrong. A demand and refusal are evidence of a conversion; but if it appears that the refusal was on a fair ground, that is no conversion. William Clutton was interested in the property, and without an inventory he could have no check on the executor, who might do what he chose with the papers in the box. And further, it is the daily practice, when papers are delivered up, for the party delivering them to take a receipt specifying what papers are delivered up.

ABBOTT, C.J. It is in evidence that Mr William Clutton desired it; but I am of opinion that the defendants had no right to insist upon an inventory before they delivered up the box. The plaintiff, as executor, was entitled to the possession of the papers of the deceased; and, that being so, he is entitled to recover in this action.

Verdict for the plaintiff.

[See also COOPER *v.* WILLOMATT, *supra*, p. 418.]

[*But to lose goods, which have been sent to you* unasked for, *is not a Conversion.*]

HOWARD *v.* HARRIS.

NISI PRIUS. 1884. CABABÉ & ELLIS 253; *The Times*, Feb. 7, 1884.

[ACTION against the late Sir Augustus Harris, manager of Drury Lane Theatre, for conversion of a manuscript play. The plaintiff had written a dramatic version, entitled *Claverhouse*, of Sir Walter Scott's *Old Mortality*. He wrote to the defendant, stating that he had written a play, and asking the defendant to assist him in producing it. To this the defendant replied that, if the plaintiff would send to him "the scene, plot, and sketch" of the play, he would look through them. The plaintiff accordingly on the 27th of March, 1882, sent to the defendant the scene, plot, and sketch, *and also the play itself*. The plaintiff made numerous applications from time to time with reference to the MS. play, and at last in January, 1883, demanded back the play. But the play was not returned, as it could not be found. The plaintiff then brought this action.

Edward Clarke, Q.C., for defendant. The scene, plot, and sketch were the only things which the defendant asked for; and consequently the only things which he was under any duty to return. And in respect of these, you do not make any claim in this action.

Cock, for plaintiff. Along with the three things so asked for, the defendant received the MS. of the play. Having so received it, a duty devolved upon him of taking reasonable care of it.

WILLIAMS, J. There is no case to go to the jury. The plaintiff was requested to send three things. He voluntarily chose to send, in addition, something else which the defendant had never asked for. His so doing cast no duty of any sort or kind upon the defendant, with regard to what was so sent.

Judgment for defendant.]

[EDITOR'S NOTE. This case may be of practical interest to many readers, now that some pushing tradesmen are making a practice of sending goods, unasked-for, "on approval." It is well that both sides should realise that the mere loss of articles so sent will not support any action, either for conversion or even for negligence, against the involuntary recipient. A man cannot be made a bailee against his will; cf. *Hawkes* v. *Dunn*, (1 Crompton and Jervis 527), and *Lethbridge* v. *Phillips*, (2 Starkie 544). Unlike a finder, he has not voluntarily taken on himself the custody of the article. He therefore need not take any care of it; nor is he even bound to let it remain on his premises, so he may at once throw it away. But his immunity does not extend so far as to justify him in destroying it intentionally, or in appropriating it. Cf. *Simmons* v. *Lillystone*, (8 Exch. 442).]

[*What may* not *amount to Conversion.*]

THOROGOOD *v.* ROBINSON.

COURT OF QUEEN'S BENCH. 1845. 6 ADOLPHUS & ELLIS, N.S. 769.

[TROVER for lime, flints, and "breeze."]

On the trial, before Lord Denman, C.J., at the Middlesex sittings after last Michaelmas term, it was proved for the plaintiff that he was a limeburner, and, in January, 1844, was in possession of some land and of the lime, breeze, &c., in the declaration mentioned, which were lying on the land. The lime had been burnt in kilns on the premises from chalk dug there by the plaintiff. The defendant had recovered judgment in ejectment for the land; and, on the day mentioned in the declaration, he entered under the writ of possession, and turned two of plaintiff's servants off the premises, who, at the time, were loading a barge there with part of the lime. He refused to let them do anything to the kiln fires, or put any more of the lime on the barge. The defendant's evidence shewed that he was entitled to the land as landlord of a person in whose absence the plaintiff had entered without title. The Lord Chief Justice told the jury that it was not every dealing with another person's goods that amounted to a conversion, but only such as deprived the real owner of them; that under the circumstances it was reasonable that the plaintiff should have applied to the defendant to have the articles which belonged to plaintiff delivered to him again; but that it was a question for the jury whether the conduct of the defendant was a conversion of the lime and breeze. Verdict for defendant.

Knowles now moved for a new trial on the ground that the verdict on both issues was against the evidence. The Lord Chief Justice ought to have told the jury that the facts amounted to a conversion. Any act taking from a party even the temporary possession of his goods is a conversion; *Keyworth* v. *Hill*[1]. "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods, either wholly or but for a time"; 3 Stark. Ev. 1156[2]. In *Baldwin* v. *Cole*[3] "a carpenter sent his servant to work for hire in the Queen's yard; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the Queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after. HOLT, C.J. The very denial of goods to him

[1] 3 B. & Ald. 685.
[2] 3rd ed. 1842.
[3] 6 Mod. 212. See *White* v. *Teal*, 12 A. & E. 106, 111.

that has a right to demand them is an actual conversion,...for what is a conversion but an assuming upon one's self the property and right of disposing another's goods; and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them."

* * * * * * *

LORD DENMAN, C.J....It was a question for the jury whether the conduct of the defendant in turning the plaintiff's servants off the premises, and not letting them take away the lime and breeze, amounted to a conversion or not. I think the jury might fairly find that it did not. The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. The plaintiff certainly had a right to the goods; but he should have sent some one with a proper authority to demand and receive them: if the defendant had then refused to deliver them or to permit the plaintiff or his servants to remove them, there would have been a clear conversion. But it does not necessarily result from the facts proved in this case that the defendant was guilty of a conversion.

COLERIDGE, J. Neither the plaintiff nor his servants had any right to be upon the land; nor was the defendant bound to let them remain there for the purpose of removing the plaintiff's goods. What he was bound to do was, on demand, to let the plaintiff remove the goods, or to remove them himself to some convenient place for the plaintiff.

WIGHTMAN, J., concurred.

Rule refused.

[*Even an* innocent agent *may be liable for a Conversion.*]

STEPHENS (ASSIGNEE OF BANKRUPTS) *v.* ELWALL.

COURT OF KING'S BENCH. 1815. 4 M. & S. 259.

TROVER for goods. Plea, not guilty. At the trial before Le Blanc, J., at the last Lancaster Assizes the case was this:—

The bankrupts, being possessed of the goods in question, sold them after their bankruptcy to one Deane, to be paid for by bills on Heathcote, who had a house of trade in London, and for whom Deane bought the goods. Heathcote was in America, and the defendant was his clerk, and conducted the business of the house. Deane communicated to the defendant information of the purchase on the day it was made, and the goods were afterwards delivered to the defendant, and he disposed of them by sending them to America to Heathcote. No demand was made upon the defendant until nearly two years after the purchase. The learned Judge inclined to think, and so stated to the jury, that if the defendant was acting merely as the clerk of Heathcote he was not liable; but if he was transacting business for himself, though in the name of another, then he would be liable. The jury found a verdict for the defendant. And upon a rule nisi obtained in the last term for a new trial in order to question the accuracy of the learned Judge's direction in point of law, *Perkins* v. *Smith*[1] was cited; and it was contended that, the defendant being a tort-feasor, no authority that he could derive from his master would excuse him from being liable in this action.

Park, who now shewed cause, referred to the report of *Perkins* v. *Smith*, in Sayer, 40, and said that the decision went too far, and that it had not been approved of by Lawrence, J., when cited to him on the Western Circuit. And he took this difference, that there the defendant received the goods with knowledge that the bankrupt had absconded and shut up shop. But in this case no demand was made until two years after the purchase; therefore it would be a great hardship if the defendant were to be liable in respect of a demand, which from the lapse of time it is impossible to comply with.

Topping and *Richardson*, contrà, argued that the very assuming to dispose of another man's property, was a conversion, and cited *M'Combie* v. *Davies*[2] in support of that position. And in *Potter, Assignee*, v. *Starkie*, Exch. M.T. 1807, the Court held the sheriff liable in trover though he seized, sold, and paid over the money before commission issued, and before any notice; saying this necessarily followed

[1] 1 Wils. 328. [2] 6 East, 538.

from *Cooper* v. *Chitty*[1], for it was an unlawful interference with another's goods.

LORD ELLENBOROUGH, C.J. The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master. But nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the Court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution?

LE BLANC, J. I think the rule of law is very different from what I considered it at the trial. The great struggle made at the trial was, whether the goods were for Heathcote or not; but that makes no difference if the defendant converted them. And here was a conversion by him long before the demand.

Per Curiam, Rule absolute.

[EDITOR'S NOTE. In extenuation of the harshness of the rule here laid down, an American judge says, very strikingly:—"It is a matter of every-day experience that one cannot always be perfectly secure from loss in his dealings with others; and the defendant, here, is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who (it now appears) was a thief; and, relying on his representations, he aided this principal to convert the plaintiff's property into money. It is no greater hardship to require him to pay to the plaintiff the value of this property than it would be to take it away from any innocent vendee who purchased and paid for it. And it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner." *Per* De Haven, J., in *Swim* v. *Wilson* (90 California 126).

"In the face of *Stephens* v. *Elwall*, and of the opinion in *Hollins* v. *Fowler* [at p. 432 *infra*] that that case is law, it is impossible for me to hold that a person who, in good faith assumes to dispose of property as the servant (and under the authority and for the benefit) of one apparently entitled to possession but not already in possession, is *not* liable to an action by the true owner." *Per* Cave, J., in *McEntire* v. *Potter* (L. R. 22 Q. B. D. at p. 443).]

[1] 1 Burr. 20.

[*Or the principal who ratifies,* even innocently, *a conversion effected by his agent.*]

HILBERY *v.* HATTON.

COURT OF EXCHEQUER. 1864. 2 H. & C. 822.

[TROVER for a brig and stores. The plaintiff's ship, having been stranded on the coast of Africa, was unlawfully taken possession of there by a Mr Ward, who sold it to Thompson, the agent of the defendants, merchants at Liverpool. They, on being informed by their agent of the purchase and price, wrote (Feb. 24):—"We duly received your letter informing us of your having purchased the brig, but you do not say from whom you bought her, nor whether you have the register with her. *You had better, for the present, make a hulk of her.* From your description of her she is not out of the way in price if she has not sustained much damage."

On receiving notice from the plaintiff that the ship had been sold wrongfully, the defendants wrote to this agent in Africa, to do no more repairs to her; and they refused to accept the bill which he had drawn on them, in favour of the vendor, for the price of the ship. At the trial, Bramwell, B., left it to the jury to say whether the defendants had ratified the act of Thompson in purchasing the ship; and he told them, that although the defendants did not know that the ship had been unlawfully sold, yet if they ratified the sale they would be liable.

The jury found a verdict for the plaintiff, expressing their opinion that the letter of the 24th of February was a ratification of the act of Thompson.]

Cohen moved for a new trial....The maxim, "Omnis ratihabitio retrotrahitur et mandato priori æquiparatur," has never been applied so as to render a principal liable for a tortious act of his agent of which he had no knowledge. The ratification of an act of an agent, in order to bind the principal, must be made with full knowledge of all the material facts....

MARTIN, B....There is no doubt that Mr Ward was guilty of a conversion by the sale, and Mr Thompson guilty of one by buying and taking possession of the ship. If so, the only question is, did the defendants adopt and ratify his act of buying and taking possession, and it seems to us that there was evidence to go to the jury that he did. Indeed, we think that the letter of the 24th February, in answer to that of Thompson of the 5th January, proves this adoption and ratification, and rendered them responsible for Mr Thompson's acts.

We understand the jury expressed themselves clearly of the same opinion, and we are of opinion there was evidence upon which they might act, which is the only matter we have to decide....

[*A sheriff who, in levying execution, sells the wrong person's goods*, however innocently, *can be sued for a Conversion.*]

GLASSPOOLE *v.* YOUNG.

COURT OF KING'S BENCH. 1829. 9 B. & C. 696.

TROVER against the late sheriff of Surrey and his bailiffs for certain goods and chattels. Plea, the general issue. At the trial before Lord Tenterden, C.J., at the sittings after Trinity term, 1828, it appeared that in 1823 the plaintiff, then a widow, intermarried with one Mearing. The goods in question, at the time of the marriage, were her property. In 1824 a judgment on a warrant of attorney was entered up against Mearing, and a writ of fi. fa. issued, under which the sheriff of Surrey seized the goods in question, in the house where Mearing and the plaintiff lived together as man and wife. A motion to set aside that judgment was made, founded on the joint affidavits of Mearing and the plaintiff, in which she described herself as his wife. The matter was referred to the Master, who directed that the judgment should stand, and thereupon the sheriff sold the goods. The plaintiff afterwards discovered that when she intermarried with Mearing he had another wife living; of which she informed the defendants, and demanded her goods, which were not restored. For the defendants it was contended that the sheriff was justified in seizing the goods as Mearing's, inasmuch as the plaintiff represented herself to be his wife. Lord Tenterden told the jury, that if the goods were not Mearing's but the plaintiff's, she was entitled to recover, unless something had occurred to deprive her of that right. That if she had lived with Mearing and passed as his wife, knowing at the time that she was not so, perhaps she might not be allowed now to say she was not his wife. And his Lordship desired them to say whether at the time of the execution the plaintiff knew that Mearing had another wife living; if not, she was entitled to a verdict. The jury found a verdict for the plaintiff for the value of the goods, which considerably exceeded the sum for which they were sold under the execution.

The *Attorney-General* moved for a new trial....It is not every intermeddling with the property of another that amounts to a conversion;

the conversion must be wrongful. In the present case, although there was an intermeddling with the property of the plaintiff, the sheriff is in no fault, and it would be extremely hard if he could be made liable in trover, and saddled with payment of the whole value of these goods, which fetched at the sale scarce half the estimated value.

LORD TENTERDEN, C.J. I am of opinion that this rule must be discharged. It certainly may be hard on the sheriff, that he should be held liable in such a case as the present, where no misconduct can be imputed to him or his officers; and it may be hard on the plaintiff in the former suit, that he should be called upon to refund the money that he has received as the fruits of his judgment. But, if on account of such hardship we were to make this rule absolute, we should break in upon a well-established rule of law, that if by process the sheriff is desired to seize the goods of *A*, and he takes those of *B*, he is liable to be sued in trover for them. But it was said that the plaintiff, having seen the goods removed without expressing any dissent, could not recover, and the case of *Morgans* v. *Brydges* was cited. But that is very different from the present. An execution is a proceeding in invitum; and the plaintiff acquiesced, because she did not know that she had power to resist, but afterwards discovered her error. The case then is merely this, that the sheriff by mistake took her goods, supposing them to be Mearing's. Under such circumstances, it seems to me that she was entitled to recover in this action the value of the goods found by the jury, and not merely the price for which they were sold.

BAYLEY, J. There was no imposition practised by the plaintiff in this case. At the time of the seizure, both she and the sheriff laboured under a mistake. I think, therefore, that she was entitled to recover the value of her goods which were seized and sold without authority.

LITTLEDALE, J., concurred.

PARKE, J. The rule of law is undoubted, that the sheriff must at his peril seize the goods of the party against whom the writ issues. There was nothing like leave and licence in this case. A case may, perhaps, exist in which a woman would be estopped if the seizure of her goods was made upon her assertion that she was the wife of the person against whom the writ issued; but nothing of that kind occurred in the present case.

Rule discharged.

[EDITOR'S NOTE. An instance of the estoppel suggested by Parke, J., may be found in *Langford* v. *Foot*, (2 Moore & Scott 349).]

[*A person who, after buying goods from a non-owner, even innocently, resells and delivers them, can be sued by the true owner for a Conversion.*]

[*But a Broker, merely* negotiating the sale *from the non-owner to the buyer, cannot be.*]

HOLLINS *v.* FOWLER.

HOUSE OF LORDS. 1874. L.R. 7 H.L. 757.

THIS was an appeal on a case stated, on which the Court of Queen's Bench had given judgment for Fowlers, the plaintiffs in the action, which judgment had been affirmed in the Exchequer Chamber[1].

Fowler & Co. were merchants at Liverpool. Hollins & Co. carried on the business of cotton brokers there.

In December, 1869, Fowler & Co. instructed their brokers, Messrs Rew, to sell for them thirteen bales of cotton. A person named Hill, a clerk to H. K. Bayley, a cotton broker at Liverpool, proposed a purchase on his master's account. Messrs Rew refused to sell unless the name of a responsible person was given as the purchaser. Hill then said that Bayley was buying as broker for Thomas Seddon, of Bolton. The inquiries as to Mr Seddon being quite satisfactory, Messrs Rew forwarded to Fowlers, their principals, a sold note, in these terms:—"Liverpool, Dec. 18, 1869. Messrs Fowler Brothers. We have this day sold on your account the undermentioned cotton." Then came the description, "Thirteen bales—American—at 12*d.*, per Minnesota," and the buyer's name was given thus: "Thomas Seddon, per H. K. Bayley." The payment was to be "cash within ten days, less 1½ per cent. discount." A counterpart of this note was sent to Bayley himself. On the same day Bayley sent to Messrs Rew a sampling and delivery order, and the bales were delivered to him, and removed to his warehouse. On the same day, also, Messrs Rew sent to Bayley the following note: "Mr Thomas Seddon, per Messrs H. K. Bayley & Co. Bought from Fowler Brothers, per Rew & Freeman, brokers, 13 bales American cotton, ex Minnesota, at 12*d.* per lb., subject to the rules and regulations of the Liverpool Cotton Brokers' Association. Payment in cash, within ten days, less discount."

On the 23rd of December, H. K. Bayley, being thus in possession of the cotton, offered the same to Francis Hollins (one of the defendants); who consented to purchase the thirteen bales at 11½*d.* per pound, and who purchased at the same time twenty-five other bales of cotton from H. K. Bayley on the same terms. Messrs Hollins, under

[1] L. R. 7 Q. B. 616.

the usual form of order, sampled the cotton on the same day. They had on that morning received a message from Messrs Micholls, cotton spinners at Stockport (for whom they were in the habit of purchasing cotton), stating that on that day Mr Micholls would be in Liverpool to purchase cotton through the Messrs Hollins; and those gentlemen had bought the cotton from H. K. Bayley believing it to be of the sort which Messrs Micholls would require. On examining the cotton, Mr Micholls agreed to take it. Messrs Hollins were in the habit of thus buying cotton in the belief that their customers would take it. If any particular customer did not take the cotton thus speculatively purchased for him, Messrs Hollins disposed of it to some other customer. In the latter part of the 23rd of December, Bayley received a delivery order in these terms:—"Please deliver the bearer.....cotton, ex Minnesota, at 11¾*d.* per lb., bought this day for Micholls & Co. Francis Hollins & Co." The thirteen bales were delivered on the following morning to Messrs Hollins, by whom they were at once forwarded to Micholls & Co., at Stockport. Bayley received the price of the cotton from Hollins & Co., which was repaid by Micholls & Co., together with a sum for commission and porterage; the defendants, Messrs Hollins, not obtaining a profit on the cotton, but merely receiving a broker's commission on its purchase.

Messrs Fowler, not having received payment for the cotton at the stipulated time (ten days), applied to Mr Seddon, and then learnt that he had never employed H. K. Bayley to purchase cotton for him. Application was then made to Messrs Hollins for the bales of cotton, when the answer given was, "The cotton was bought by one of our spinners, Messrs Micholls & Co., for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render your client any assistance." The action for trover was brought.

The cause was heard before Mr Justice Willes, at the Liverpool Spring Assizes, 1870, when the facts above stated having been proved, the learned Judge left two questions to the jury; first, whether the thirteen bales in question had been bought by the defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods as agents for their principals. Both questions were answered in the affirmative, and Mr Justice Willes then directed the verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them.

A rule was afterwards obtained for that purpose, and on the 25th of November, 1870, was made absolute. On appeal to the Exchequer Chamber, the Judges were equally divided in opinion, and so the judgment of the Court below stood affirmed.

This appeal was then brought.

The Judges were summoned, and Mr Justice Blackburn, Mr Justice

Mellor, Mr Justice Brett, Mr Baron Cleasby, Mr Justice Grove, and Mr Baron Amphlett, attended.

The *Solicitor-General* (Sir John Holker) and Mr *Herschell*, Q.C., for the plaintiffs in error, defendants in the action :—

There was nothing here that really constituted a conversion on the part of Hollins & Co. The principle that ought to govern a case like the present was fully stated in *Fouldes* v. *Willoughby*[1]; and it is this, that a mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with the intent to convert it to the taker's own use or that of some third person. That case was expressly approved by Baron Martin in *Burroughes* v. *Bayne*[2]. The defendants were not the purchasers of the cotton—they were mere brokers who purchased for Micholls and Co., whom they charged with broker's commission on the purchase, but not with a profit on the price. Their simple possession of the cotton for the purpose of sending it on to Micholls, did not constitute them the owners of it, any more than would the mere possession of it for the purposes of carriage have constituted a railway company the owner. Something beyond that, namely a conversion to their own use, was necessary to render Messrs Hollins, the defendants, liable in this action. While they were acting in the ordinary discharge of their business as cotton brokers, and were in ignorance of the particular facts of the case—in utter ignorance of the fraud committed by H. K. Bayley—they could not be guilty of a conversion. In *Burroughes* v. *Bayne*[3] the acts of the defendant were held to amount to a conversion, but that was because he knew all the real facts of the case, and with that knowledge still retained the billiard table. Here Messrs Hollins had no knowledge to lead them to the inference, or even to the suspicion, that any fraud had been practised on the owner of the cotton, or that the cotton had not been bought and sold in the ordinary way. The general expression, so often referred to, that any appropriation of a chattel for the use of the defendants, or of a third party, amounts to a conversion, must be taken with this qualification, that the party appropriating it must do so with a knowledge of the facts which render his act of appropriation unlawful. Without that knowledge there can be no such "intent" as spoken of in *Fouldes* v. *Willoughby*[1]. The application of a different rule would render liable all persons who, in the ordinary discharge of their regular business, and without any special knowledge of the facts, dealt with persons who might appear to have a perfect title to property, but whose title was for some cause or other, utterly unsuspected by any one else, defective.

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[1] 8 M. & W. 540; *supra*, p. 416. [2] 5 H. & N. at p. 303. [3] 5 H. & N. 296.

LORD CHELMSFORD....Upon the argument of the rule, the Judges were unanimously of opinion that the rule to enter the verdict for the plaintiffs ought to be made absolute; on the ground that the defendants in effect bought as principals, and would have been liable to Bayley as vendees; and having dealt with the cotton as if the property was in them, by assigning it to Micholls, Lucas & Co., they were liable to the plaintiffs for a conversion on its turning out that no property had passed from the plaintiffs to Bayley. Upon the appeal to the Exchequer Chamber, that Court were equally divided, and in this state of things the appeal is brought.

In considering the case it is necessary, in the first place, to determine what is the exact effect of the finding by the jury, which some of the Judges thought was binding upon them to regard the defendants as acting in the transaction merely as brokers, in the ordinary mode of dealing by persons in that character. Now there was evidence at the trial (as already stated from the case upon appeal) that not an unusual mode of business with the defendants was to purchase cotton upon the chance of its suiting some of their numerous customers. Therefore the finding of the jury, (that the cotton in question was bought by the defendants as agents, in the course of their business as brokers), does not necessarily mean that they bought, according to the ordinary dealings of brokers, for principals, but merely that they bought in their character of brokers, involving in it the proved course of *their* business, in which they were accustomed to buy as brokers for the purpose not of retaining the goods for themselves, but of keeping them only till they could find a purchaser for them.

At the time when the defendants purchased the cotton from Bayley they had no principals, and therefore if Micholls, Lucas & Co. had not afterwards intervened, the appellants alone must have been liable. But if once the liability attached, (which liability would have been to the true owners of the cotton and not to the fraudulent vendor), the defendants could only have been discharged by the acceptance by the owners of Micholls, Lucas & Co. as purchasers, which it is unnecessary to add never took place. The defendants at the time of the sale to them were in the position of agents with an undisclosed principal. Bayley knew they were agents, because they promised to send in the name of their principal in the course of the day; but if the defendants had been sued before they had named a principal they would have had no defence.

The question upon the facts is whether the defendants were guilty of a conversion. There can be no doubt that the property and legal right of possession of the cotton remained in the plaintiffs; and Bayley, who had fraudulently obtained possession of it, could not give a title to any one to whom he transferred the possession, however ignorant the

transferee might be of the means by which Bayley acquired it. A great deal of argument was directed to the question, What amounts in law to a conversion? I agree with what was said by Mr Justice Brett in the Court of Exchequer Chamber in this case: "That in all cases where we have to apply legal principles to facts there are found many cases about which there can be no doubt, some being clear for the plaintiff and some clear for the defendant; and that the difficulties arise in doubtful cases on the border line between the two." But to my mind the proposition which fits this case is, that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

The Judges of the Court of Queen's Bench in their judgment in this case thought that it was not distinguishable in principle from *Hardman & Others* v. *Booth*[1]. In that case the plaintiffs were worsted manufacturers near Manchester. One of the partners, being in London, called at the place of business of a firm of Gandell & Co. for orders. At that time the firm, which had been long established and was well known, consisted only of Thomas Gandell, whose son Edward Gandell was his clerk and managed the business. On inquiring for Messrs Gandell one of the workmen directed the plaintiff to the counting-house, where he saw Edward Gandell, who led him to believe he was one of the firm of Gandell & Co., and under that belief the plaintiff sent goods to the place of business of Gandell & Co., and invoiced them to Edward Gandell & Co. Edward Gandell, who, unknown to the plaintiffs, carried on business with one Todd, pledged the goods with the defendant Booth for advances *bonâ fide* made to Edward Gandell and Todd, and the defendant afterwards sold the goods under a power of sale. It was held by the Court of Exchequer that the defendant was liable for a conversion, on the ground that there was no contract of sale; inasmuch as the plaintiffs believed that they were contracting with Gandell & Co. and not with Edward Gandell personally, and Gandell & Co. never authorized Edward Gandell to contract for them, consequently no property passed by the sale; and the defendant, though ignorant of Gandell and Todd's want of title to the goods, was liable in trover for the amount realized by the sale. I agree with the Court of Queen's Bench that *Hardman* v. *Booth*[1] is not to be distinguished from the present case.

I may also advert to the case of *Stephens* (assignees of Spencer and others) v. *Elwall*[2], mentioned by Mr Justice Blackburn, in his opinion delivered to your Lordships in this case. There the bankrupts, after their bankruptcy, sold goods to Deane, to be paid for by bills on

[1] 1 H. & C. 803.

[2] *Supra*, p. 423.

Heathcote, for whom Deane bought the goods. Heathcote was in America; and the defendant Elwall was his clerk, and conducted the business of his house in London. Deane informed the defendant of the purchase, and the goods being afterwards delivered to him, he sent them to America to Heathcote. This was held to be a conversion by the defendant. Lord Ellenborough said: "The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it." This case was decided sixty years ago, and I do not find that the authority of it has ever been disputed.

I think that the judgments of the Court of Queen's Bench and of the Exchequer Chamber are right, and ought to be affirmed.

The LORD CHANCELLOR (LORD CAIRNS):—

My Lords, in this case, having had the advantage of reading beforehand the opinion of my noble and learned friend who has moved the judgment of your Lordships, and agreeing entirely with that opinion, I do not delay your Lordships by any reference to the facts of the case.

It is quite clear that in law the defendants, at the time when they purchased the thirteen bales of cotton, on the 23rd of December, 1869, had no principals, and must themselves have been liable on the contract; and, although we must take it on the finding of the jury that the cotton was bought by the defendants as agents in the course of their business as brokers, that is explained by the statement that they were in the habit of making purchases of cotton without any definite instructions, but believing that the cotton would suit certain purchasers, and trusting to them to take it off their hands. There is no doubt that it was according to *this* course of their business as brokers that the cotton in question was purchased; and that the defendants bought it intending to request Micholls & Co. to adopt the contract. But until an agreement was made between Micholls & Co. and the defendants that the former would take the cotton, the defendants were the masters of it; they might, on the one hand, have done with the cotton what they pleased, and, on the other hand, if Micholls & Co. refused to take the cotton, the defendants alone would have been liable on the contract.

In this state of circumstances I agree with what is said by Mr Justice Grove, that the jurors appear to have meant that the appellants never bought intending to hold or to make a profit, but with a view to pass the goods over to Micholls & Co., (or, if Micholls & Co. did not accept them, to some other customer); and that therefore in

one sense they acted as agents to principals, only intending to receive their commission as brokers, and never thinking of retaining the goods or dealing with them as buyers and sellers. But, as Mr Justice Grove continues, "this would leave the question untouched, whether they did not exercise a volition with respect to the dominion over the goods, and whether, although they intended to act, and did act, in one respect, as brokers, not making a profit by resale, but only getting broker's commission, they did not intend to act and did not act in relation to the sellers, in a character beyond mere intermediates, and not as mere conduit pipes." In my opinion they did act, in relation to the sellers, in a character beyond that of mere agents; they exercised a volition in favour of Micholls & Co., the result of which was that they transferred the dominion over and property in the goods to Micholls, in order that Micholls might dispose of them as their own; and this, as I think, within all the authorities, amounted to a conversion.

I therefore agree with the motion of my noble and learned friend.

[EDITOR'S NOTE. The plaintiffs might, had they preferred it, have sued Micholls & Co. instead; as that firm too had effected a Conversion of the cotton, by spinning it.

The judgments in this case were so important that the student will do well to refer to Sir F. Pollock's comments on them (*Torts*, ch. ix, § v.); and to the comprehensive review taken in the judgment of Collins, J., in *Consolidated Co.* v. *Curtis*, L. R. [1892] 1 Q. B. 495.

Blackburn, J. laid down the rule that "one who deals with goods at the request of the person who has the actual custody of them, and in the bona fide belief that the custodian is (or has the authority of) the true owner, should be excused for what he does, if his act is of such a nature as would be excused if done by the authority of the person in possession if [that person] was a finder of the goods or was entrusted with their custody."

The judges differed in their views as to what action had, in fact, been taken by Hollins & Co. But all appear to have been agreed on the general principle that any acts which were such as to amount to an exercise of (apparent) ownership, or to a repudiation of the true owner's title, would constitute a Conversion.

In the later case of the *Union Credit Bank* v. *Mersey Docks Board* ([1899] 2 Q. B., at p. 216) Bigham, J., says:—"If a thief had given his stolen goods to a carrier to be carried, and the latter (at the end of the journey) had returned the goods to the thief, upon the thief's discharging the lien for the carriage, no action in Trover would lie against the carrier at the suit of the true owner. It would be different if, before the thief repossessed himself of the goods, the true owner were to demand possession. For if he did so, and possession were refused, the carrier would be guilty of Conversion."]

SECTION IV.

BREACHES OF GENERAL RIGHTS.

CHAPTER I.—NUISANCE.

[*The continuous disturbance of a Right, in such a manner as to cause inconvenience, constitutes the tort of* Nuisance.]

[*The difference between* Public *Nuisances and* Private *ones.*]

REX *v.* LLOYD.

NISI PRIUS. 1803. 4 ESPINASSE 200.

THIS was an indictment, for a nuisance, preferred by the Society of Clifford's Inn.

The defendant was a tinman. The nuisance complained of by the indictment was that, from the noise made by him in the carrying on his trade, the prosecutors were disturbed in the occupation of their chambers, and prevented from following their lawful professions.

It was proved by the prosecutors, who were attorneys, that in carrying on such part of their business as required particular attention (in perusing abstracts, and other necessary parts of their profession), the noises were so considerable that they were prevented from attending to it. It appeared, however, on the cross-examination of the witnesses on the part of the prosecution, that the noise only affected three houses viz., Nos. 14, 15 and 16 of Clifford's Inn; and that by shutting the windows the noise was in a great measure prevented.

LORD ELLENBOROUGH said that upon this evidence the indictment could not be sustained. It was, if anything, a *private* nuisance. It was confined to the inhabitants of only three numbers of Clifford's Inn; it did not extend to even the rest of the Society. And it could be avoided by shutting the windows. It was therefore not of sufficient *general* extent to support an indictment; and he thought this [species of] indictment had been already carried on far enough.

The defendant was acquitted.

[*If a nuisance be* Public, *it is a crime; but no civil action can be brought for it, except by someone on whom it has inflicted a* special damage.]

BENJAMIN *v.* STORR.

COURT OF COMMON PLEAS. 1874. L.R. 9 C.P. 400.

THE cause was tried before Honyman, J., at the sittings for Middlesex in Trinity Term last. The facts were as follows:—The plaintiff was a coffee-house keeper in Rose Street, Covent Garden. The defendants were auctioneers having sale-rooms in King Street, with a back or warehouse entrance in Rose Street, close adjoining the plaintiff's premises. The plaintiff had occupied his premises since March, 1870. The defendants and their predecessors had carried on their business since 1830, but of late years much more extensively than formerly. The carriage-way of Rose Street was only about eight feet wide; and when the defendants' vans were there loading or unloading (which was usually from 8.30 a.m. to 7 or 8 p.m. daily), not only was the access to the plaintiff's coffee-house obstructed so as to deter customers from coming there, but the light was diminished to such an extent as to make it necessary to burn gas nearly all day, and the smell arising from the staleing of the horses was excessively offensive. The consequence of all these accumulated evils was that the takings of the plaintiff's coffee-house were materially lessened.

Evidence was tendered to shew that the plaintiff's premises were rendered uncomfortable by the offensive smells arising from the staleing of the horses which were kept constantly standing opposite to the plaintiff's door. This evidence was objected to, as having reference to a damage not specifically alleged in the declaration. The learned judge, however, received it.

On the part of the defendants it was proved that the waggons and horses were not kept standing in the street longer than the exigencies of their business required; and it was submitted that in order to maintain the action, the plaintiff must shew, not only that the thing complained of was a public nuisance (in which case the remedy would be by indictment), but that he had sustained a private and particular injury beyond that suffered by the rest of the public: *Ricket* v. *Metropolitan Ry. Co.*[1]

The learned judge left it to the jury to say whether or not the obstruction of the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience; telling them that they were

[1] L. R. 2 H. L. 175.

not to consider solely what was convenient for the business of the defendants.

The jury returned a verdict for the plaintiff, damages £75; and the learned judge reserved leave to the defendants to move "on the question of the damage being enough to support the action."

Torr, Q.C., for defendants. Where the cause of action is compounded of a public nuisance and an alleged private injury, the recent cases shew that there must be some palpable pecuniary damage resulting to the individual from the public nuisance, not merely an inconvenience to (or a loss of) trade, such as being compelled to carry goods by a circuitous and inconvenient way: *Hubert* v. *Groves*[1]. The judgment of Erle, C.J., in the Exchequer Chamber, in *Ricket* v. *Metropolitan Ry. Co.*[2] contains an excellent summary of the earlier authorities. "An action lies," he says, "where the exercise of the right of way by or on behalf of a plaintiff has been obstructed, and a greater damage has been caused to him thereby than is caused to the Queen's subjects in general by obstructing them in the exercise of their right. This position is not disputed: and the following cases exemplify its application. In *Iveson* v. *Moore*[3] the plaintiff was prevented by the defendant's obstruction of the highway from using the way for carting coals from his colliery, which coals were deteriorated by the delay. In this case, the law on actions for obstructions of highways is well discussed. In *Maynell* v. *Saltmarsh*[4] the plaintiff was prevented by the defendant's obstruction from carrying his corn, and so the corn became damaged by rain. In *Hart* v. *Basset*[5] the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from carrying them home; and several grounds of special damage are suggested by Lord Holt in *Iveson* v. *Moore*[3]. In *Fineux* v. *Hovenden*[6] the special damage mentioned as an example is damage caused directly by the obstruction of the plaintiff in the use of the way. In *Greasley* v. *Codling*[7] the plaintiff was prevented by the defendant's obstruction from carrying his coals. In *Paine* v. *Patrick*[8] the plaintiff's damage was not actionable; and the example of actionable damage is put thus: 'A particular damage, to maintain the action, ought to be direct (and not consequential); as, for instance, the loss of his horse, or some corporeal hurt by falling into a trench on the highway.' In *Chichester* v. *Lethbridge*[9] the obstruction was held actionable because the plaintiff was personally opposed by the defendant in an attempt to abate the obstruction and use the way. In *Rose* v. *Miles*[10] the plaintiff was obstructed in his use of the navigable water, and was damaged by being obliged to unload his barge and carry the

[1] 1 Esp. 148.
[2] 5 B. & S. 156; 34 L. J. (Q.B.) 257, 259.
[3] Ld. Raym. 486.
[4] 1 Keb. 847.
[5] T. Jones, 156.
[6] Cro. Eliz. 664.
[7] 2 Bing. 263.
[8] Carth. 191, 194.
[9] Willes, 71.
[10] 4 M. & S. 101.

goods overland. In all these cases the plaintiff was exercising his right of way, and the defendant obstructed that exercise, and caused particular damage thereby directly and immediately to the plaintiff." To give a right of action, therefore, the plaintiff must have sustained a substantial injury other than that which is the natural result of the alleged nuisance to any one else: he must be damaged, not to a greater extent merely, but in a different manner. In *Winterbottom* v. *Lord Derby*[1], which was an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road or to remove the obstruction; and he was held not entitled to maintain the action....

BRETT, J. This action is founded upon alleged wrongful acts by the defendants, viz. the unreasonable use of a highway,—unreasonable to such an extent as to amount to a nuisance. That alone would not give the plaintiff a right of action; but the plaintiff goes on to allege in his declaration that the nuisance complained of is of such a kind as to cause him a particular injury other than and beyond that suffered by the rest of the public, and therefore he claims damages against the defendants. The first point discussed was whether it was necessary that the plaintiff should shew something more than an injury to his business, an actual injury to his property; and cases decided under the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18) were cited. In this case I think the action is maintainable without shewing injury to property. In the class of cases referred to, the action is brought to recover compensation for lands taken or injuriously affected; and there, of course, injury to property must be shewn, and not merely injury to the trade of the occupier. Those cases, therefore, do not at all affect the present. Before the passing of the Lands Clauses Consolidation Act, by the common law of England, a person guilty of a public nuisance might be indicted, and, if injury resulted to a private individual, other and greater than that which was common to all the Queen's subjects, the person injured had his remedy by action. The cases referred to upon this subject shew that there are three things which the plaintiff must substantiate, beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must shew a particular injury to himself beyond that which is suffered by the rest of the public. It is not enough for him to shew that he suffers the same inconvenience in the use of the highway as other people do, (if the alleged nuisance be the obstruction of a highway). The case of *Hubert* v. *Groves*[2] seems to me to prove that proposition. There, the plaintiff's business was injured by the obstruction of a high-

[1] L. R. 2 Ex. 316.

[2] 1 Esp. 148.

way, but no greater injury resulted to him therefrom than to any one else, and therefore it was held that the action would not lie. *Winterbottom* v. *Lord Derby*[1] was decided upon the same ground; the plaintiff failed because he was unable to shew that he had sustained any injury other and different from that which was common to all the rest of the public. Other cases shew that this injury to the individual must be direct, and not a mere consequential injury; as, where one way is obstructed, but another (though possibly a less convenient one) is left open, in such a case the private and particular injury has been held not to be sufficiently direct to give a cause of action. Thirdly, the injury must be shewn to be of a substantial character, not fleeting or evanescent. If these propositions be correct, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct, and substantial. The question then is, whether the plaintiff here has brought himself within the rule so laid down.

The evidence on the part of the plaintiff shewed that from the too long standing of horses and waggons of the defendants in the highway opposite his house, the free passage of light and air to his premises was obstructed, and the plaintiff was in consequence obliged to burn gas nearly all day, and so to incur expense. I think that brings the case within all the requirements I have pointed out; it was a particular, a direct, and a substantial damage. As to the bad smell, that also was a particular injury to the plaintiff, a direct, and a substantial one. So, if by reason of the access to his premises being obstructed for an unreasonable time and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage.

Rule discharged.

[1] L. R. 2 Ex. 316.

[*A manufacturing process that causes* visible *injury to a neighbour's property is an actionable Nuisance.*]

ST HELEN'S SMELTING CO. *v.* TIPPING.

HOUSE OF LORDS. 1865. 11 H.L.C. 642.

[THIS was an action brought by the plaintiff to recover, from the defendants, damages for injuries done to his trees and crops by the gases from their copper-smelting works.]

* * * * * * *

On the part of the defendants, evidence was called to shew that the whole neighbourhood was studded with manufactories and tall chimneys; that there were some alkali works close by the defendants' works; that the smoke from one was quite as injurious as the smoke from the other; that the smoke of both sometimes united; and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendants' works existed before the plaintiff bought the property was also relied on. Mellor, J., told the jury that an actionable injury was one producing sensible discomfort; that every man (unless enjoying rights obtained by prescription or agreement), was bound to use his own property in such a manner as not to injure the property of his neighbours; that there was no prescriptive right in this case. That the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and, therefore, in an action for nuisance to property, arising from noxious vapours, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances (including those of time and locality) ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance; for if so, the business of the whole country would be seriously interfered with.

The defendants' counsel submitted that the three questions which ought to be left to the jury were, "whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." The learned judge did not put the questions in this form, but did ask the jury (1) whether the enjoyment of the plaintiff's property was *sensibly* diminished, and the answer was in the affirmative; (2) whether the business there carried on was an ordinary business for smelting copper, and the answer was,

"We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was, "We do not." The verdict was therefore entered for the plaintiff. A motion was made for a new trial on the ground of misdirection, and the case was carried to the Exchequer Chamber, where the judgment was affirmed[1]....

[The judges were summoned, and after the argument, the Lord Chancellor asked them whether the directions given by the learned judge to the jury were correct? They unanimously answered that those directions were correct, and were such as they had given in similar cases for the last twenty years.]

LORD WESTBURY, L.C. In matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the *property*, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible *personal* discomfort. With regard to the latter,—namely, personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves,—whether that may or may not be denominated a nuisance must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce and also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that occupation is a material injury to *property*, then there unquestionably arises a very different consideration. In a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain

[1] 4 Best & Smith 616.

large smelting works. What the occupation of these copper-smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of the defendants, in their works at St Helen's. Of the effect of the vapours exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence.

The jurors have found the existence of the injury; and the only ground upon which your lordships are asked to set aside that verdict is that the whole neighbourhood where these copper-smelting works were carried on is a neighbourhood more or less devoted to manufacturing purposes of a similar kind, and, therefore, it is said that inasmuch as this copper smelting is carried on in what the appellants contend is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property. Of course, my lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place....

LORD CRANWORTH....I cannot do better than adopt the language of Mr Justice Mellor—"Persons using a lime kiln, or other works which emit noxious vapours, may not do an actionable injury to another; and any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a 'convenient' place."

* * * * * * *

Appeal dismissed.

[EDITOR'S NOTE. Commenting on the foregoing case, in *Salvin* v. *North Brancepeth Coal Company* (L. R. 9 Ch. App. 705), James, L.J., explained what is meant by the "sensible" or "visible" or "substantial" damage that must be shewn in cases of this class. He added, "It amounts to this, that although when you once establish the fact of actual substantial damage it is quite right and legitimate to have recourse to scientific evidence upon the question of the causes to which that damage is to be referred, yet if you are obliged to start with scientific evidence (such as the microscope of the naturalist or the tests of the chemist) for the purpose of establishing the damage itself, that evidence will not suffice. There must be actual damage capable of being shewn by a plain witness to a plain common-juryman. The damage must be substantial; and it must be, in my view, actual, that is to say, the Court has no right whatever, in dealing with questions of this kind, to have regard to contingent, prospective, or remote damage. I would illustrate this by analogy. The law does not take notice of the imperceptible accretions to a river bank, or to

the sea shore, although after the lapse of years they become perfectly measurable and ascertainable; for if in the course of nature the thing itself is so imperceptible, so slow, so gradual, as that it requires a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not do, although after the lapse of a million minutes the grain of poison or the grain of dust could be easily detected. It would never have done, as it seems to me, for this Court, in the reign of Henry VI., to have interfered with the further uses and extension of sea coal in London because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria roses, both white and red, would have ceased to blow in the Temple. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this Court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their loved solitudes.

"With respect to this particular property before us, I observe that the defendants have established themselves on a peninsula which comes far into the very heart of the ornamental and picturesque grounds of the plaintiff. If, instead of erecting coke ovens at that spot, they had been minded, as apparently some persons in the neighbourhood on the other side had been, to import ironstone and erect smelting furnaces, forges and mills, and had filled the whole of the peninsula with a mining and manufacturing village, with beer-shops and pigstyes and dog-kennels, with pigs, dogs and children, which would have utterly destroyed the beauty and amenity of the plaintiff's grounds, this Court could not in my judgment have interfered. A man to whom Providence has given an estate under which there are veins of coal worth perhaps hundreds or thousands of pounds per acre, must take the gift with the consequence and concomitants of the mineral wealth in which he is a participant."

The student may refer with advantage to *Polsue and Alfieri Ld.* v. *Rushmer*, L. R. [1906] 1 Ch. 235, and [1907] A. C. 121.

Very vivid is the definition of a Nuisance given by Knight Bruce, L.J.:—"An inconvenience more than fanciful, and more than one of mere delicacy or fastidiousness—an inconvenience materially interfering with the ordinary physical comfort of human existence; not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people" (4 De G. & S. at p. 322). "The ordinary notions prevalent amongst reasonable people" was a synonym adopted in 1919, in a successful action against a manufacturer of aeroplanes for the noise caused by his carrying on test-flights during the night.

But the standard of comfort varies with situation; it is not the same in a residential district as in a manufacturing one.]

[*Unreasonable use of a* Highway *is a Nuisance.*]

REX *v.* JONES.

NISI PRIUS. 1812. 3 CAMPBELL 230.

THIS was an indictment for depositing, hewing, and sawing logs of wood in St John Street.

It appeared that the defendant occupies a small timber-yard close by the spot in question, and that from the narrowness of the street, and the construction of his own premises, he had in several instances necessarily deposited long sticks of timber in the street; and had them sawed into shorter pieces there, before they could be carried into his yard.

Marryat, as his counsel, contended that he had a right to do so, as it was necessary to the carrying on of his business; and that it could not occasion more inconvenience to the public than draymen taking hogsheads of beer from their drays and letting them down into the cellar of a publican.

LORD ELLENBOROUGH. If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business.

Guilty.

[EDITOR'S NOTE. On the previous day, in a somewhat similar case of *Rex* v. *Cross* (3 Campbell 224), in which it was held an indictable offence for stage coaches to stand for an unreasonable time in the public highway near Charing Cross, plying for hire, Lord Ellenborough said, "No one can make a stable-yard of the King's highway." He pointed out that thus the undue lingering of the guests' carriages outside a West End house, where a ball was being given, might constitute a criminal nuisance. In *Rex* v. *Carlile* (6 C. & P. at p. 646) will be found mooted in argument the cognate question whether proceedings for a Nuisance could have been taken against Mr Very, the Regent Street confectioner, for having amongst his shopwomen one so beautiful that a crowd of over three hundred persons used daily to assemble round the windows of the shop and stand there to watch her. Police constables were obliged to be in constant attendance from day to day, to check the crowd, until it was more effectually dealt with by the dismissal of the lady.]

[*E.g., the unreasonable use of a Highway in unloading carts.*]

ATTORNEY-GENERAL *v.* BRIGHTON & HOVE CO-OPERATIVE SUPPLY ASSOCIATION.

COURT OF APPEAL. L. R. [1900] 1 CH. 276.

APPEAL against a decision of Kekewich, J.

The action was brought by the Attorney-General (at the relation of James Pack) and by James Pack, as plaintiffs.

The defendants carried on their business, which was that of a co-operative store, in premises situate in and abutting upon Lansdowne Street, in the urban district of Hove, adjoining Brighton, Sussex. The street was a public highway. It was rather less than twenty feet in width. The plaintiff James Pack carried on the business of a lodging-house keeper in a house situate in the same street. The defendants for the purposes of their business employed a number of vans, which were loaded with goods and unloaded in front of their premises. The plaintiffs alleged that, for the purpose of so loading and unloading, the vans were drawn up close to the footway abutting on the defendants' premises throughout the day, and were kept in that position for a considerable time, and that there was almost continually throughout the day an accumulation of vans loading and unloading at the same time. In the course of loading and unloading the defendants carried over, and deposited on, the footway parcels and heavy packages. By the unreasonable and excessive user to which the defendants put the roadway and the footway, and the obstruction thereby arising, they caused a serious nuisance to the persons residing in Lansdowne Street, and to all members of the public who had occasion to pass along it....

[Kekewich, J., found, on the evidence that the defendants took up half the highway for practically the whole of the day. He granted an injunction against the nuisance. The defendants appealed.]

Warmington, Q.C., for defendants....Access to premises abutting on a highway for the purpose of loading and unloading goods is a legitimate user of a highway, and the occupier of such premises is entitled to use the highway for that purpose so long as he does not improperly interfere with the rights of his neighbours or the general public. The public right of passing and repassing along the highway is subject to this right of the owner or occupier of premises abutting on it: *Rex* v. *Russell*[1]; *Attorney-General* v. *Sheffield Gas Consumers Co.*[2]; *Original Hartlepool Collieries Co.* v. *Gibb*[3]; *Rex* v. *Cross*[4]; *Rex* v. *Jones*[5]. The evidence

[1] (1805) 6 East, 427.
[2] (1853) 3 D. M. & G. 304, 339.
[3] (1877) 5 Ch. D. 713, 721.
[4] (1812) 3 Camp. 224; see p. 444 *n.*, *supra*.
[5] (1812) 3 Camp. 230; *supra*, p. 444.

shews that the defendants' vans give way when any one wishes to pass along the street. The plaintiffs' witnesses say that, if there were only one van loading or unloading at one time, the obstruction would be equally objectionable. The principle is the same whether the Attorney-General or a private individual is the plaintiff in the action. The evidence shews that the general traffic through the street is but small. The right of loading and unloading goods at premises abutting on a highway is not affected by the circumstance that the street is a narrow one. A large commercial association, such as that of the defendants, which carries on a business equal in amount to that of several ordinary tradesmen, must surely be entitled to load and unload as many vans as are necessary for the carrying on of their business, provided that they do this as quickly as is possible. This is a legitimate user of the street. There are many streets in the City of London so narrow that, if only one van were loading or unloading, there would not be room for any other vehicle to pass. The defendants are merely carrying on their business in a reasonable way, and keeping their vans stopping opposite their premises for a reasonable purpose and for a reasonable time; and there is no ground for the injunction.

LINDLEY, M.R....It appears to me that, looking *only* at the carrying on of the defendants' business, what they are doing is perfectly reasonable. They have a large business; there is a great deal of loading and unloading to be done; they have a number of vans, and each cart is loaded and unloaded with fair despatch. No complaint is made about that. We have, therefore, to consider what is the consequence of the defendants' reasonable exercise of their right coming into conflict with the right of the public to the use of the highway. Now, I take the law to be that which was laid down, and I believe with perfect correctness, in *Rex* v. *Russell*[1]. The facts there were not exactly the same as here, but the passage which I am about to read appears to me to express in better language than I could employ what the law is, and it has the great advantage of having stood the test of nearly a hundred years of criticism. There the Court said: "It should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public. That the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance. That if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot." I take that to be the law on the subject. What does it mean? It comes, in substance, to this—that in a case of

[1] 6 East, 427, 430.

doubt or difficulty, the private reasonable right of a householder to carry on his business must yield to the public right of user of the street. If the public right of user is, in fact, so obstructed that it cannot be used to the extent which the law requires, then the private right must give way; and it is no answer to say that the defendants can go on using this street in a way which is reasonable, looking at *their* interests alone. It is urged that it is difficult to draw the line. I admit that it is extremely difficult. It may be said that, if a cart stands opposite a grocer's door for five minutes to take up goods, it is obstructing the street, and, of course, it is doing so to a certain extent. But in such a case it would be ridiculous to say that there was an indictable or an actionable nuisance, or a ground for an injunction. It is always a question of degree. It may be asked, What is the difference between one cart and two, and so on? You cannot draw the line in that way. Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet, who has any difficulty in saying that an oak-tree is a plant and not an animal? When, however, we look at the facts of the present case, there is clearly such an obstruction as to block up the street so much and for so long that people avoid it rather than face the inconvenience of going along it; and that, to my mind, is utterly unjustifiable.

VAUGHAN WILLIAMS, L.J....The truth is that before you can answer the question, Was a particular user necessary or reasonable? you must always take into consideration all the facts of the case. If you are dealing with a narrow street—a single-carriage street—obviously it may be necessary to block up such a street much more than it can ever be necessary with a wide roadway. Again, if a railway company or the occupier of business premises have a yard in which they can load and discharge goods, that, I think, would be one of the circumstances which might be taken into consideration for the purpose of shewing that it was wholly unreasonable and unnecessary for them to obstruct the highway by loading or discharging their wagons at the kerb-side of the street. Again, one of the circumstances to be taken into consideration would be if a man had a business so large that the aggregate of the occasions upon which he might lawfully use the highway would substantially deprive the rest of the public of the use of the highway in the daytime. No one, I think, could doubt that that would be an unlawful obstruction; and not the less so because the unreasonableness of the proceeding is only demonstrated by shewing the effect upon the public of the number of occasions upon which he used the highway for his purposes....

ROMER, L.J....Whether the user by a tradesman of a highway for such purposes is reasonable or unreasonable is a question of degree—a

question of fact to be determined in each particular case. It does not follow that because the user is necessary or useful for the purpose of carrying on the business it must of necessity be held to be a reasonable user. For example, suppose a man had established a very large business, requiring the use of an enormous number of vans, and his premises bordered on a very narrow street, it might well be that in order to carry on his business he would require to keep the highway exclusively for himself and his wagons the whole day long, so as not to allow any one else to come up or down the street. In such a case as that I should say that his user of the highway would not be a reasonable user, even though it might be necessary for his business. It would practically amount to an appropriation of the highway to himself for the purposes of his business....

Injunction affirmed.

[*The mere Diminution of ancient* Lights *does not necessarily constitute a Tort.*]

BACK *v.* STACEY.

NORFOLK ASSIZES. 1826. 2 C. & P. 465.

THIS was an issue directed by the Lord Chancellor to try, first, whether the ancient lights of the plaintiff in his dwelling-house in the city of Norwich had been illegally obstructed by a certain building of the defendant. And, secondly, (if the first issue should be found in the affirmative), what damage the plaintiff had sustained in respect of the injury.

A great many witnesses, including several surveyors of eminence, were examined on both sides; and it was evident, that the quantity of light previously enjoyed by the plaintiff, had been *diminished* by the building in question. Under these circumstances, it was contended for the plaintiff that he was at all events entitled to a verdict on the first issue, *any* obstruction of ancient lights being wrongful and illegal.

BEST, C.J., told the jury, (who had viewed the premises), that they were to judge rather from their own ocular observation, than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient, to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, (the part of his house principally affected), could not be used for all the purposes to

which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as beneficially as he had formerly done. His Lordship added, that it might be difficult to draw the line, but the jury must distinguish between a *partial inconvenience* and a *real injury* to the plaintiff in the enjoyment of the premises.

The jury found for the defendant on both issues.

[EDITOR'S NOTE. This case—along with that of *Parker* v. *Smith* (5 C. & P. 538)—received in 1904 the emphatic approval of Lord Macnaghten, in his judgment in *Colls* v. *Home and Colonial Stores Ld.*, as "probably the most satisfactory statement of the rule as to ancient lights."]

[*The nature of the statutory right to Light.*]

KELK *v.* PEARSON.

COURT OF APPEAL IN CHANCERY. 1871. L.R. 6 CH. APP. 809.

G. KELK, the plaintiff in this case, was the owner and occupier of a leasehold house called Ness Cottage, situate at Notting Hill, and built soon after the year 1829. The principal windows of the plaintiff's house were to the north; and the plaintiff's house had a garden to the north, bounded on the east by a wall six feet high. To the east of the plaintiff's house and garden was open garden ground. The defendants, in September, 1870, began to build, on the garden ground to the east of the plaintiff's house, a row of houses; one of which was oblique to the east side of the plaintiff's house, almost touching it at one end, and would, when finished, shew a dead wall about forty feet high, being higher than the roof of the plaintiff's house. The plaintiff, as soon as the ground was laid out for building, wrote to complain to the defendants, who answered that they should not affect the adjoining property. Much correspondence passed, and the defendants began to build. On the 5th of October, 1870, the plaintiff filed his bill to restrain the defendants from building, and from allowing the buildings to remain, so as to interfere with the access of light and air to the plaintiff's house. The defendants, however, proceeded with their building and completed the side of their house.

There was contradictory evidence as to the amount of interference. The plaintiff and his family deposed that a scullery was made quite dark, that the light to the kitchen and dining-room was materially diminished, and that the principal bedrooms were made dark, gloomy and uncomfortable. The defendants' witnesses deposed that the rooms

in the plaintiff's house were low and naturally badly lighted, all facing to the north; but that, having the garden open, they had still such an amount of exposed sky area as was seldom seen in the suburbs of London, and that the light was not substantially or perceptibly interfered with.

The Vice-Chancellor Bacon granted an injunction, and the defendants appealed.

* * * * * * *

SIR W. M. JAMES. This bill is based upon the power which is possessed by every man who has by sufficiently long use acquired a right to the access of light and air, to ask this Court, in a sufficiently grave case, to prevent any new building being made which will obstruct that light and air.

On the part of the plaintiff it was argued before us that this was an absolute right—that now, under the statute 2 & 3 Will. 4, c. 71, he had an absolute and indefeasible right, by way of property, to the whole amount of light and air which came through the windows into his house; and that he could maintain an action at law or a suit in equity upon that absolute legal right; and the only question as to the effect or extent of his right would be with regard to the discretion of this Court in considering whether it was a case for damages, or to be interfered with by way of injunction.

Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, to such an extent as to render the house substantially less comfortable and enjoyable.

Since the statute, as before the statute, it resolves itself simply into the same question, a question of degree; which would be for a jury, if this were an action at law, to determine, but which it is for us, as judges of fact as well as law, to determine for ourselves as best we may, when we are determining it in Chancery.

That being the law which really appears to me to have been laid down in all the cases since the Act—whatever expressions may be found in one or the other of them comparatively enlarging or exaggerating it—that being the law, we have to apply it to this case. The plaintiff says: "I have a house which did enjoy a considerable amount

of light to several of the rooms before the defendants erected this building. That light is now substantially and materially diminished and affected, so as substantially and materially to affect my comfort as an inhabitant at that house." [His Lordship then said that with regard to the plaintiff's bedroom, which might be taken as a test room, (being an important part of the dwelling-house), those who lived in the house stated that it was formerly a light and cheerful room, and that the light had been taken from it to such an extent as to make it not only less light, but to make it substantially gloomy and uncomfortable; and the scientific witnesses agreed with them in that statement. There had been also scientific evidence on the other side, and the evidence of the surveyor appointed by the Court.] I am bound to say that, as a question of fact, the evidence to my mind on behalf of the plaintiff predominates far over the evidence, such as it is, on the part of the defendants; and that there is in this case a material diminution of light, and such a material diminution of light as substantially to affect the comfort of the residents in the house.

With regard to the interference of this Court, I am not at all prepared to say that a good deal of what is said in *Clarke* v. *Clark*[1] is not very good sound sense, which we may have occasion to apply: that is to say, if there be the right interfered with so as to give a ground for an action at law, and an action at law which could be repeated, I think it is very fit for this Court, taking into consideration all the surrounding circumstances, to consider whether the interference of the Court will be productive of more or less inconvenience to the parties. It may be that we should interfere more readily in a case of this kind than if it had been a case of a street in London, where a person was employing his house for city purposes. But in this case I cannot help noticing that to the defendants it is the mere loss of a piece of building-land, the site of one house, which they will have to convert into a garden or keep as a piece of pasture-land, instead of making it the site of a house; whereas on the part of the plaintiff it is a very serious deprivation of the comfort of his house, and a very serious diminution of the lettable value of his house as a residence.

That being so, I have no hesitation in saying that I think it is a case in which the legal right ought to be enforced by the equitable remedy, and that this Court ought to interfere and grant an injunction; and there must now be a mandatory order to restore that which now exists in the shape of a brick wall, or building of bricks and mortar, to the height at which it stood before the building was commenced.

[MELLISH, L.J., delivered judgment to a similar effect.]

[1] L. R. 1 Ch. 16.

[*To obstruct an Ancient Light does not constitute a Tort unless there be so great a diminution of light as to amount to a* Nuisance.]

COLLS *v.* HOME AND COLONIAL STORES, LD.

HOUSE OF LORDS. L.R. [1904] A.C. 179.

[MR COLLS, a builder, entered into a contract to erect a building 42 feet high, on a site in Worship Street, Finsbury, which had previously been occupied by buildings under 20 feet high. This site was opposite to a portion of a large block of buildings occupied by the Home and Colonial Stores, Limited. The ground-floor of this portion consists of a very long room which, though it extends backwards some fifty feet from its Worship Street front, is nevertheless lighted only from that front. It consequently requires much more light than a room whose length is in the ordinary proportion to its frontage. It is occupied as an office, and accommodates so many as about ninety of the company's clerks.

An action was brought by the company to restrain the erection of Mr Colls' new building. Joyce, J., refused an injunction (83 *Law Times* 759); holding that the evidence shewed that after the erection of the building the company's premises would still have sufficient light for all ordinary business purposes. This judgment was reversed by the Court of Appeal; who held that, though light enough for ordinary purposes would be left, the diminution of light would be sufficiently "substantial" to be an actionable wrong. "It seems to us impossible to hold that the company will not suffer 'real damage' if they have to consume more electric light than hitherto"; (L.R. [1902] 1 Ch. 302). From this judgment Mr Colls appealed to the House of Lords. The appeal was twice argued; and judgment was delivered on May 2, 1904.]

LORD HALSBURY, L.C....The question may be stated, very simply, thus:—After an enjoyment of light for twenty years, would the owner of the tenement be entitled to *all* the light, without any diminution whatsoever, at the end of such a period? My Lords, if that were the law it would be very far-reaching in its consequences. The application of it to its strict logical conclusion would render it almost impossible for towns to grow, and would formidably restrict the rights of people to utilize their own land. Strictly applied, it would undoubtedly prevent many buildings which have hitherto been admitted to be too far removed from others to be actionable. If the broad proposition which underlies the judgment of the Court of Appeal be true, it is not a question of 45 degrees, but *any* appreciable diminution

of light which has been enjoyed (that is to say, has existed uninterruptedly) for 20 years constitutes a right of action, and gives to the proprietor of a tenement that has had this enjoyment a right to prevent his neighbour's building on his own land. My Lords, I do not think this is the law. The argument seems to me to rest upon a false analogy, as though the access to and enjoyment of light constituted a sort of proprietary right in the light itself. Light, like air, is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none....

The statute [the Prescription Act, 2 & 3 Wm. 4, c. 71] on which reliance is placed in this case illustrates the danger of attempting to put a principle of law into the iron framework of a statute. The statute, literally construed, by the use of the words "*the* light" would mean all the light which for 20 years has existed in the surroundings of the tenement which has enjoyed it. Yet, singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof....Lord Hardwicke long ago, in 1752, (*Fishmongers' Company* v. *East India Company*[1]), laid down what I believe to be the law to-day. "It is not sufficient," he said, "to say that it will alter the plaintiff's light; for then no vacant piece of ground could be built on in the city; and here there will be 17 ft. distance. The law says it must be so near as to be a nuisance."...I am prepared to hold that the test given by Lord Hardwicke is the true one; and I do not think a better example could be found than the present case to shew to what extravagant results the other theory leads. The owner of a tenement on one side of a street 40 ft. wide seeks to restrain his opposite neighbour from erecting a room which, when erected, will not then be of the same height as the house belonging to the complaining neighbour. And the only plausible ground on which the complaint rests is that on the ground-floor he has a room not built in the ordinary way of rooms in an ordinary dwelling-house, but built so that one long room goes through the whole width of the house to a back wall and has, however, no window at the back or sides, and was, therefore, at the back of it, too dark for some purposes, without the use of artificial light, even before the building on the other side of the street was erected. I think that no tribunal ought to find as a fact that the building is a nuisance; and altogether apart from the inappropriateness of the remedy by injunction, I am of opinion that the plaintiff has no cause of action against the defendant. The test of the right is, I think, whether the obstruction complained of is a nuisance. And the value of the test [is that it] makes the amount of right acquired depend upon the surroundings, and circum-

[1] 1 Dickens 165.

stances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, (as free from smoke, smell, and noise) as if he lived in the country and distant from other dwellings; and yet an excess of smoke, smell, and noise may give a cause of action. But in each of such cases it becomes a question of degree; a question whether it amounts to a nuisance which will give a right of action. My Lords, I have not thought it necessary to enter into a discussion of the authorities, because I think it has been most carefully and accurately done by Wright, J., in *Warren* v. *Brown*[1].

LORD MACNAGHTEN....The reported cases on questions of light in recent times are not altogether consistent. There seem to be two divergent views, neither of which, I think, is absolutely accurate. The extreme view on one side is that the right which is acquired by so-called statutory prescription is a right to a continuance of the whole (or substantially the whole) quantity of light which has come to the windows during a period of twenty years....The extreme view on the other side is that the right is limited to a sufficient quantity of light for ordinary purposes.

...In some cases an injunction is necessary; for instance, if the injury cannot fairly be compensated by money; if the defendant has acted in a high-handed manner; if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money....

LORD DAVEY....What is the true nature and extent, in English law, of the easement of light? The numerous decisions on this subject are not infrequently contradictory....In the earlier authorities, the obscuration of ancient lights is dealt with on the footing of a nuisance[2].

...In *Lanfranchi* v. *Mackenzie*[3], Malins, V.C., held that a person could not, by using the dominant tenement for a period less than 20 years for some special purpose requiring an extraordinary amount of

[1] L. R. [1900] 2 Q. B. 722.

[2] See *Aldred's Case* (9 Coke 57 *b*); *Clarke* v. *Clark* (L. R. 1 Ch. 15).

[3] L. R. 4 Eq. 421.

light, in excess of what was required for the ordinary purposes of inhabitancy or business, entitle himself to protection for such extraordinary requirements, and thereby impose an additional restriction on his neighbour's use of his own land. In that case, as in the present one, it was not proved that the extraordinary amount of light had been used for 20 years. "No man," said the Vice-Chancellor, quoting the words of another Judge, "can by any act of his own suddenly impose a new restriction on his neighbour." In *Warren* v. *Brown*[1] the Court of Appeal dissented from this decision. But I do not concur with the opinion of the Court of Appeal, for I think that *Lanfranchi* v. *Mackenzie* was rightly decided.

...Whilst agreeing that regard may be had not only to the present use, but also to any ordinary uses to which the tenement is adapted, I think it quite another question whether the owner is entitled to be protected, at the expense of his neighbour, in the enjoyment of the light for some *extraordinary* purpose; [e.g. to light a room of such unusual shape as the ground-floor office of the present plaintiffs]. It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights, or by not using the full measure of light which the law permits....Now if the actual user is not the test, where that user falls below the standard of what may reasonably be required for ordinary purposes, why should it be made the test where the use has been of an extraordinary character in excess of that standard? It seems to me unreasonable to hold that where a man... converts part of his house into a photographic studio, he can suddenly call upon his neighbour to leave him an increased supply of light which is rendered necessary only by such alterations; and thus impose an increased burden on this neighbour....I am of opinion that the Courts have gone too far in this question of lights, and have imposed undue restrictions on the exercise of men's right to build on their own land.

...It is unnecessary to say whether a claim to the acquisition [of the special easement of an extraordinary quantity of light, by twenty years' enjoyment] would be good in law Malins, V.C., thought such a claim could be sustained if the special user was had with the knowledge of the owner of the servient tenement. I will only say that I see some difficulties in the way, and reserve my opinion[2].

I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind; and that the question

[1] L. R. [1900] 2 Q. B. 722.

[2] [EDITOR'S NOTE. In *Ambler* v. *Gordon*, L.R. [1905], 1 K.B. 417, Bray, J., decided against the acquisition of such a special right by mere enjoyment. He also thought that the servient owner's knowledge would not make any difference.]

for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question. The actual user will neither increase nor diminish the right. The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon, —whether the obstruction complained of is a nuisance....

LORD LINDLEY....The decision in *Kelk* v. *Pearson*[1] has a far-reaching effect. If there is no absolute right to *all* the light which comes to a given window, no action will lie for an obstruction to that light unless the obstruction amounts to a nuisance....In considering what is an actionable nuisance, regard is had—not to special circumstances which cause something to be an annoyance to a particular person—but to the habits and requirements of ordinary people. And it is by no means to be taken for granted that a person who wants an extraordinary amount of light for a particular business can maintain an action if only his special requirements are interfered with....As to the character of the neighbourhood, see *St Helens Smelting Co.* v. *Tipping*[2]. ...The general principle deducible from the authorities appears to be that the "right to light" is, in truth, no more than a right to be protected against a particular form of nuisance....

There are elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. Firstly, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and, secondly, there is the uncertainty as to whether the proper remedy is an injunction or damages....

[LORD ROBERTSON concurred. There was no dissentient.]

Judgment of Joyce, J., restored.

[EDITOR'S NOTE. The principle which this decision established, that the "right to light" is not a Proprietorship in particular cones of rays but only a protection against Nuisance, has since been confirmed by the House of Lords (*Jolly* v. *Kine*, L. R. [1907] A. C. 1) and the Judicial Committee (*Paul* v .*Robson*, L. R. 41 Ind. App. 180).

The oftquoted rough practical "Rule of 45 degrees" treats as innocent any building which is so low that the "angle of obstruction"—i.e. the angle contained at the centre (not the bottom) of the window, between the plane of the horizon and a line drawn to the top of the obstruction—does not exceed 45°. (See L. R. [1913] 2 Ch. 430.) In *Coll's Case*, Lord Davey (p. 204) pronounced this rule to be, at any rate, useful as *prima facie* proof; and Lord Lindley declared it to be, "generally speaking, a fair working rule."]

[1] *Supra*, p. 449. [2] *Supra*, p. 440.

[*The respective liabilities of the* Owner *and of the* Occupier *of the premises where the nuisance is.*]

TODD *v.* FLIGHT.

COURT OF COMMON PLEAS. 1860. 9 C.B. N.S. 377.

[ACTION by the owner of a chapel for the destruction of its roof by the fall of the chimneys of a building which the defendant had demised to a Mr Batt, though he knew its chimneys to be in a dilapidated and dangerous state. The defendant had wrongfully suffered them to remain in that state until they fell. The defendant demurred.]

Honyman, for defendant. The injury occurred whilst the chimneys were in the occupation of a tenant. There is therefore no ground to charge the present defendant...who has done no act to identify himself with the nuisance complained of.

* * * * * * *

ERLE, C.J., delivered the judgment of the Court[1]:—

In this case the plaintiff's right to sue some one in respect of the damage from the fall of defendant's chimneys was not denied....The point in contest is, whether the defendant is the proper party to be sued. And as to this point the material allegations are, that the defendant, at the time the cause of action arose, was the reversioner, he having demised the premises to Batt, who was then in occupation; that the chimneys were ruinous and in danger of falling, and were known by him to be so at the time when he demised them to Batt; and that he the defendant kept and maintained them in such ruinous and dangerous state.

Upon these facts, the defendant contended that the action should lie against the lessee in occupation, and not against himself, being only the reversioner: and he cited *Cheetham* v. *Hampson*, 4 T.R. 318, where the action was for non-repair of fences, and was held not to lie against the landlord, and *Russell* v. *Shenton*, 3 Q.B. 449, 2 Gale & D. 573, where the action for not cleansing the drains and sewers was also held not to lie against the landlord.

On the other hand, the plaintiff contended that, in many cases, the party suffering damage from a nuisance had the option of suing either the lessee in occupation or the lessor. Thus, where the damage was from the non-repair of the trap-door over a cellar, and it appeared that it was the duty of the lessor to do this repair, as between him and the lessee, it was held that the action lay against the lessor: *Payne* v. *Rogers*, 2 H. Bla. 348. And, where the damage arose from a wrongful

[1] Erle, C.J., Williams, J., Byles, J., and Keating, J.

act of the defendant, in erecting a wall which obstructed the plaintiff's light, and the defendant had (before action brought) leased the premises to a party who was then in possession, still the lessor was held liable for the continuance of the wall after the lease, because it existed at the time of the demise: *Rosewell* v. *Prior*, 2 Salk. 460, 1 Lord Raym. 713. So where the lessor demised houses either with a privy or with a right of resorting thereto, it was held that, either if he demised the privy when it had become a nuisance, or if he had the duty of cleansing it after it became a nuisance, he might be indicted for the nuisance; and, if he demised the houses with the use of the privy only, he would be the occupier, and so clearly liable: *The King* v. *Pedly*, 1 Ad. & E. 822, 3 N. & M. 627. These cases are authorities for saying, that, if the wrong causing the damage arises from the non-feasance or the mis-feasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it reconciles the cases.

In *Cheetham* v. *Hampson*, it was held that the action did not lie against the landlord for non-repair of the fences, because he had no duty to repair them, and therefore was guilty of no wrong in non-repair. So, in *Russell* v. *Shenton*, the Court assumed that the lessor was not bound to cleanse the drains during the demise, and so was guilty of no wrong. So, in *Rich* v. *Basterfield*, 4 C.B. 783, the lessor was held not liable for the damage occasioned by smoke from the fires which the lessee chose to make: but the reasoning of the judgment assumes it to be law that the lessor may be liable in cases of nuisance, if he has been guilty of a wrong causing the damage which made a cause of action. This is expressed in many parts of the judgment, but more particularly in page 805, commenting on *The King* v. *Pedly*, and saying,—"If the lessor had demised the buildings when the nuisance existed, or had re-let them after the user of the buildings had created the nuisance, or had undertaken the cleansing and had not performed it, we think he would have been made liable properly."

In the present case, it is alleged that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in that state; and thus he was guilty of the wrongful non-repair which led to the damage. After the demise the fall appears to have arisen from no default of the lessee, but by the laws of nature.

We therefore hold that the action lies against the lessor, and the judgment is for the plaintiff.

[EDITOR'S NOTE. See LANE v. COX, *infra*.]

[*A person injured by a Private nuisance, or specially injured by a Public nuisance, may (instead of resorting to litigation) himself* abate[1] *it, if he can do this peaceably.*]

ADAM'S CASE.

STAFFORD ASSIZES. 1293. Y.B. 20 & 21 EDW. I. fo. 462.

IF Adam places a fence where his neighbour *B* hath a right of driftway to his common of pasture, then *B* commits no tort if, freshly on the placing thereof, he do abate it in the daytime....But there will be a tort if he abate it by night, albeit it was placed unlawfully.

[*Thus the nuisance caused by trees overhanging my land I may* abate *by lopping them.*]

[*But where an Abatement involves entering upon an innocent person's land,* previous Notice *should be given to him.*]

LEMMON *v.* WEBB.

COURT OF APPEAL. 1894. [1894] 3 CH. 1.

* * * * * * *

LINDLEY, L.J. The plaintiff and the defendant in this case are adjoining landowners. Some old trees situate on the plaintiff's land had branches which projected over the defendant's land. The defendant cut off so much of these branches as projected over his land, and he did so without going on to the plaintiff's land, and without previous notice to him. The question is whether the defendant was justified in so doing. Mr Justice Kekewich thought not, and gave the plaintiff judgment for £5 and costs. The defendant has appealed.

There is some controversy as to whether the defendant did not cut rather more than he himself says he did, and more than he seeks to justify. But the evidence is clear that he certainly did not intend to cut more than so much of the branches as overhung his land; and the evidence is not sufficient to prove that he did in fact cut more. Having noticed this matter, I pass it over without further comment, for the action was not brought for such a trumpery purpose as to obtain damages for the wrongful cutting of two or three inches too much. The action was brought to obtain a declaration that the

[1] Abate=beat down, remove. From Norman-French, *abatre*. Cf. Spenser's "Misery doth bravest minds abate."

defendant had no right to cut the branches at all, or, at all events, no right to cut them without previous notice to the plaintiff and a request to him to cut them, and a non-compliance by the plaintiff with that request.

It was contended on behalf of the plaintiff that, having regard to the age of the trees and of the projecting branches, he had acquired a right to the exclusive possession of so much of the space above the defendant's soil as the branches actually filled, and that either under the Statute of Limitations or by prescription the plaintiff had a right to keep the branches when they had grown. It was contended that if a man erected on his own land something which projected over his neighbour's land, and it remained undisturbed for a sufficient length of time, his neighbour could not remove it nor maintain any action in respect of it. This is true. But to plant a tree on one's own land infringes no rights, and, if the tree grows over the soil of another, I cannot discover that any action lies for the encroachment unless damage can be proved. I can find no authority for the proposition that an action of trespass would lie in such a case, and it is plain that Lord Ellenborough did not think it would: see *Pickering* v. *Rudd*[1]. According to our law the owner of a tree which gradually grows over his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow. This is the view taken in Gale on Easements[2], to which reference will be made presently. Considering that no title is acquired to the space occupied by new wood, and that new wood not only lengthens but thickens old wood, and that new wood gradually formed over old wood cannot practically be removed as it grows, and considering the flexibility of branches and their constant motion, it is plain that the analogy sought to be established between an artificial building or projection hanging over a man's land and a branch of a tree is not sufficiently close to serve any useful purpose. The argument to which I am referring had the charm of novelty; but it is quite inconsistent with the authorities to which I will refer presently, and no Court can introduce by judicial decision a perfectly new mode of acquiring a title to land or to a portion of the space above it.

The right of an owner of land to cut away the boughs of trees which overhang it, although those trees are not his, is too clear to be disputed. This has been declared to be the law for centuries: see Brooke's Abr. "Nusans"[3]; *Norris* v. *Baker*[4]; *Pickering* v. *Rudd*[5]; *Crowhurst* v. *Burial Board of Amersham*[6]—and there is no trace of the age of the tree or its branches being a material circumstance for consideration. Nor did Mr Justice Kekewich intimate any doubt upon the law up to this

[1] 4 Camp. 219. [2] 6th ed. p. 461. [3] Vol. II. p. 105, pl. 28.
[4] 1 Roll. 393. [5] 4 Camp. 219; 1 Stark. 56. [6] 4 Ex. D. 5.

point. He, however, held that notice ought to be given to the owner of the tree before it was interfered with; and the real question is whether notice is required by law. The authorities to which I have referred do not allude to the necessity of notice. In *Pickering* v. *Rudd*, which was an action for cutting the plaintiff's Virginian creeper, the plea contained no averment of notice, and the plaintiff did not demur, but new assigned and alleged an excessive cutting. Lord Ellenborough held that the only question was whether the defendant had exceeded his right by cutting too much. Again, in Chitty on Pleading[1], a form of a plea justifying the lopping of overhanging branches is given, and there is no averment of notice to the owner of the tree. In the 7th edition, Vol. III. p. 364, such an averment is introduced, and reference is made to *Jones* v. *Williams*[2]. *Jones* v. *Williams* was not a case of cutting trees, but it is the leading authority on the right to abate nuisances without notice; and it was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance, or in case of emergency; but that in other cases notice to the person in possession, and a request to him to abate the nuisance, and non-compliance with that request, are necessary to justify the entry and the abatement of the nuisance by the person aggrieved by it. This is what the case decided; and so far the decision only applies to what one man may do on another man's land, it does not shew what a man may or may not do on his own land. But in *Jones* v. *Williams*, Baron Parke, who delivered the judgment of the Court, referred to a case in Jenkins[3], and to *Penruddock's Case*[4], as authorities for the proposition that an owner of land cannot without notice remove the overhanging eaves of a neighbour's house erected by a former owner through whom the neighbour had acquired title by feoffment. The reason of this doctrine is not explained.

But, assuming it to be correct as regards an overhanging house or eaves, it does not follow that it applies to the overhanging branches of a tree. The judgment of Mr Justice Best in *Earl of Lonsdale* v. *Nelson*[5] is explicit that overhanging trees may be lopped by the owner of land over which they hang without notice. Mr Justice Best says the right so to lop them is an exception to the general rule which requires notice before a nuisance, not created by the owner of what creates it, can be abated by a person injured by it. He is not alluding to a case of emergency, for in such a case no notice need ever be given. He refers to such cases afterwards. His Lordship says: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure; and the injured party may abate them without notice to the

[1] 7th ed. Vol. III. p. 364. [2] 11 M. & W. 176.
[3] Page 260. case 57. [4] 5 Rep. 100 b. [5] 2 B. & C. 311.

person who committed them. But there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence; which distinguishes this case from most of the other cases that have occurred."

What I have above said respecting the right to cut branches is equally true with respect to the right to cut roots. See Gale on Easements, p. 461, where the learned writer says: "There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted in his neighbour's soil. The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it. Supposing no easement to exist, there seems nothing to take this out of the ordinary rule that a man may abate any encroachment upon his property, and therefore that he may cut the roots of a tree so encroaching, in the same manner that he may the overhanging branches."

The law on the subject is, in my opinion, as follows: The owner of a tree has no right to prevent a person, lawfully in possession of land into or over which its roots or branches have grown, from cutting away so much of them as projects into or over his land; and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice, so long as he confines himself and his operations to his own land, including the space vertically above and below its surface.

The defendant contended that he was justified in cutting the plaintiff's trees because they were in imminent danger of falling; but this is not proved, and my judgment is not based on grounds of urgency.

The appeal, therefore, must be allowed, and the appellant must have the costs of the appeal. Judgment must be entered for the defendant; but, having regard to the obscurity of the law as to notice and to the very unneighbourly conduct of the defendant, there will be no order as to the costs of the action.

[EDITOR'S NOTE. An appeal failed: L. R. [1895] A. C. 1. Lord Macnaghten, however, suggested a possible limitation of the right to lop; saying—"Whether the same rule would necessarily apply to trees so young that the owner might remove

them intact if he chose to lift them (or to shrubs capable of being transplanted) may perhaps be worthy of consideration."

Should branches of a fruit-tree be thus lopped, the lopper must not sell or eat the fruit on them; (*Mills* v. *Brooker*, L. R. [1919] 1 K. B. 555).]

[*The nuisance caused by erecting buildings on a Common, any Commoner may* abate *by pulling them down, if he give Notice.*]

DAVIES *v.* WILLIAMS.

COURT OF QUEEN'S BENCH. 1851. 16 Q.B. 546.

* * * * * * *

WIGHTMAN, J., delivered the judgment of the Court. This was an action of trespass against the defendants, nineteen in number, for (1) breaking and entering and pulling down and demolishing the dwelling house of the plaintiff, then actually inhabited by the plaintiff and his family, and thereby endangering the lives of the plaintiff and his family; and (2) for seizing, carrying away and casting about divers goods and chattels of the plaintiff, then being in the dwelling house; and (3) for breaking and entering a building of the plaintiff called a beast-house, and driving out of it and converting certain cattle of the plaintiff.

[After a verdict for the defendant on certain issues, a motion was made to enter that verdict for the plaintiff, on three grounds. One of these was, that the pleas of right of common were no answer to the charge of trespass in pulling down a house whilst the occupier and his family were in it. On this point the plaintiff—whilst admitting] the general right of a commoner to abate any building erected upon the place over which he has the right of common—relied upon the case of *Perry* v. *Fitzhowe*[1]. There it was held that, where a declaration in trespass alleged that the defendants pulled down a dwelling house in which the plaintiff and his family actually were present and inhabiting, a plea which justified as a commoner entitled to abate a building wrongfully erected upon the common, but which did not allege any previous notice or request to remove, could not be sustained. There is obviously a wide distinction between the case of parties suddenly coming to the dwelling house alleged to be a nuisance—in which the occupier and his family are actually dwelling and are in the house, and without notice or demand forcibly pulling it down—and a case in

[1] 8 Q. B. 757.

which the occupier of the house has had previous notice and request to remove the building, but has persisted in remaining in the house in defiance of them. In the case of *Perry* v. *Fitzhowe*[1] Lord Denman, C.J., asks the counsel for the defendant whether he can maintain pleas which justify pulling down a house in which the plaintiff and his family are actually living, without alleging a previous notice to them to go out. It was unnecessary in that case to give any opinion as to the effect of such an allegation, as the plea did not contain it. But in the present case there is an express allegation both of notice and request; which we think distinguishes this case from that of *Perry* v. *Fitzhowe*. There is therefore nothing to take this case out of the general rule, that a commoner may pull down a building which is wrongfully erected upon the common and prevents his exercising his right as fully as he might otherwise; (provided he does no unnecessary damage). We are therefore of opinion that there is no sufficient ground to support the first point made by the plaintiff.

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[1] 8 Q. B. at p. 764.

[*What may be sufficient evidence that the Nuisance has been the* proximate *cause of damage.*]

FENNA *v.* CLARE & CO.

QUEEN'S BENCH DIVISION. L.R. [1895] 1 Q.B. 199.

APPEAL from county court of Cheshire.

The defendants were the owners of a shop adjoining a public highway. In front of a receding window of the shop, and immediately abutting on the footway, was a low wall eighteen inches high, the property of the defendants, on the top of which wall was a row of sharp iron spikes four and a half inches high. On May 21, 1894, the plaintiff, a little girl aged five years and nine months, was found standing on the footpath by the side of the wall with her arm bleeding from a recent wound, such as might have been caused by her falling upon the spikes. No person witnessed the accident. The plaintiff brought an action in the county court for damages for the injury, which was alleged to have been caused by reason of the defendants having maintained a state of things which was a nuisance to the highway. At the trial the plaintiff, who was ill, was not called as a witness; nor was any other evidence than the above given as to how the accident happened, except that of the defendants' shop-boy. He deposed that, shortly before the accident, he saw the plaintiff climbing up upon the wall between the spikes, and told her to get down, which she did.

The defendants' counsel submitted, upon the authority of *Wakelin* v. *London and South Western Ry. Co.*[1], that there was no case to go to the jury; for that, assuming that the spiked wall was a nuisance, and that the plaintiff's injury was caused by her falling upon the spikes, the facts proved were as much consistent with her having so fallen whilst wrongfully climbing upon the wall—in which case she would, upon the authority of *Hughes* v. *Macfie*[2], be disentitled to recover—as with her having fallen whilst lawfully using the highway. The county court judge, however, refused to nonsuit, and left to the jury the following questions:—1. Were the spikes a nuisance?—Answer: Yes. 2. Was the injury caused by the spikes?—Answer: Yes. 3. Was there contributory negligence on the part of the plaintiff?—Answer: No. Upon those findings the judge entered judgment for the plaintiff. The defendants appealed.

A. P. Thomas, for the defendants. The onus lay upon the plaintiff to shew that the existence of the nuisance was the cause of the injury,

[1] *Infra*, p. 554. [2] 2 H. & C. 744.

and of that she gave no evidence. There is no evidence that she was lawfully using the footpath; and "if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails," (per Lord Halsbury in *Wakelin* v. *London and South Western Ry. Co.*[1]). That case is on all-fours with the present. There the plaintiff's husband was knocked down and killed by a passing train at a point where the railway line crossed a public footpath on the level. The House of Lords held that, in the absence of evidence that the accident was caused by the negligence of the defendants rather than by the negligence of the deceased, there was no case to go to the jury.

[POLLOCK, B. But here there is this distinction, that you start with the established fact that the defendants were guilty of a nuisance which might have caused the injury. As against such wrongdoers, it is not an unreasonable inference that it did in fact so cause it.]

But in *Wakelin's Case*[2] the Lords assumed for the purposes of argument that the defendants were guilty of negligence which might have caused the accident. Therefore in that case the defendants were just as much wrongdoers as were the defendants here. In each case the question was whether the defendants' wrongdoing was causally connected with the injury.

In *Wakelin's Case*[2] Lord Halsbury (at p. 46) pointed out that there is "no legal presumption that people are careful and look before them on crossing a railway." So here there is no legal presumption that the plaintiff was lawfully using the highway. Indeed, having regard to the evidence of the defendants' shop-boy, the presumption of fact is rather the other way. The only means by which the defendants could have established their case was by cross-examination of the plaintiff; but she kept out of the box. In the absence of her evidence there was nothing left but mere conjecture, which is not enough....

POLLOCK, B. No doubt in these cases strict proof of the defendants' liability ought, in general, to be given. But here the facts are very special. The defendants maintained, at a spot immediately abutting on a public highway, a spiked wall which the jury have found to be a nuisance. Then a child is found on the highway close to the wall, with her arm injured; and injured in such a way as is consistent with the injury having been caused by her stumbling against the spikes whilst lawfully passing along the footpath. In my judgment, it cannot be said that there was no evidence on which the jury might have found that the injury was caused by the nuisance whilst the plaintiff was using the highway in a proper manner.

GRANTHAM, J. I am of the same opinion.

Appeal dismissed.

[1] 12 App. Cas. 41, at p. 45.

[2] *Infra*, p. 554.

[EDITOR'S NOTE. A supplementary sentence may be added from another report (64 Law Journal, Q. B. 240) of the judgment of Pollock, B.:—"The judge was right in asking the jury whether, *upon the whole probabilities of the case*, they thought that the child met with the injury, from the spikes, whilst properly using the highway."

The student may refer to the very similar facts of *Jewson* v. *Gatti* (2 T. L. R. 441); and to LYNCH *v.* NURDIN, *supra*, p. 27.]

[*In actions for nuisances, besides the general remedy in Damages, there is also, in appropriate cases, a remedy by* Injunction.]

COOKE *v.* FORBES.

COURT OF CHANCERY. 1867. L.R. 5 EQ. 166.

BILL filed by a firm of dealers in cocoa-nut fibre matting against the occupiers of an adjacent factory. For the purpose of weaving the plaintiffs' mats, the matting had to be immersed in bleaching liquids, and then hung out to dry. Ever since May 1863, fumes had issued from the works of the defendants, (who were manufacturers of sulphate of ammonia and carbonate of ammonia, from the ammoniacal liquor of gas works), particularly when the wind was in the north-west, north, or north-east, the effect of which was to turn the plaintiff's matting, when hung up to dry after bleaching, from a bright to a dull and blackish colour, requiring the material to be again dyed, at considerable expense, the colour even then being permanently injured....

The bill alleged damage, and prayed that the defendants might be restrained "from carrying on the said works of the defendants in such a manner as in any way to operate to the damage of the plaintiffs, or any of them, or of their or any of their servants, workmen, or agents, or of the said manufactures so carried on by the plaintiffs, as aforesaid"; and also for damages. The defendants filed an answer, in which they stated that shortly after the commencement of their occupation in 1863, they erected valuable plant and machinery for carrying on the business above stated, and extraordinary precautions were taken to prevent the escape of free ammonia and sulphuretted hydrogen, with the double object of economy, and of obviating all injury.

* * * * * * *

SIR W. PAGE WOOD, V.C....The defendants do not say (indeed, they could not have said, although it was so argued for them by their counsel at the bar): "We are entitled to pour noxious fumes into your

property, and you are not entitled to complain if you should suffer any injury in your manufacture; more especially regard being had to your choosing to establish in this neighbourhood a manufacture which requires such delicate handling as that a particular gas will affect it and impair its value." What they say by their answer, impliedly, if not distinctly, is—that their manufacture does require the greatest possible precautions to avoid the emission of sulphuretted hydrogen, which everybody knows to be a very offensive gas; that they have taken those precautions successfully; and that, in fact, no damage has been done. I may here say, I think it proved beyond dispute in this case, that sulphuretted hydrogen does produce an injurious effect to a certain degree on the manufacture of cocoa-nut matting; owing to the use in the bleaching liquid of chloride of tin, which when affected by sulphuretted hydrogen is turned to a darker colour.

In that state of things, I apprehend the issue is reduced to one of mere fact; not simply whether or not any damage has been done, but with reference, also, to the extent of the damage, and as to the necessity of granting an injunction, upon which point I took time to consider the whole case.

As regards the state of the law upon the question, whether or not a person is entitled, because there are noxious vapours existing already in the neighbourhood, to add to that accumulation by creating additional noxious vapours, and pouring them in upon his neighbour's property, it is sufficient to say that it is well settled by the case of *St Helens Smelting Company* v. *Tipping*[1], where the summing up of Mellor, J., was approved by the House of Lords, and must be taken to have laid down the correct law on the subject.

Consequently, it appears to me quite plain that a person has a right to carry on upon his own property a manufacturing process in which he uses chloride of tin, or any sort of metallic dye, and that his neighbour is not at liberty to pour in gas which will interfere with his manufacture. If it can be traced to the neighbour, then, I apprehend, clearly he will have a right to come here and ask for relief.

But the real point I have to consider and determine is, whether a person carrying on a manufacture in itself lawful—a manufacture required to be carried on with great precaution in order that the neighbour may not be injured, but still using these precautions, and yet occasionally, by accident, injuring that neighbour—whether that is a case for an injunction, or whether it is not a case in which, when the neighbour is injured, his remedy must be by action. In other words, whether a man is to be placed under the necessity of carrying on his manufacture subject to perpetual applications for commitment for contempt, because his manufacture is of such a character as that,

[1] 11 H. L. C. 642; *supra*, p. 440.

whenever an accident does occur, some damage may be inflicted upon his neighbour.

I take it in such a case as I have mentioned, although I have not found any authority expressly pointing to it, there is a limit which must be drawn. If a person has a quantity of material necessary for the manufacture of gunpowder, of so dangerous a character that if the slightest accident occur the damage done to his neighbours is irreparable—gunpowder being an article that if kept in quantities near any public highway, or near any property where individuals are living, is itself a nuisance, and held to be so in law—in that state of things the Court will interfere at once by injunction. I acted upon the same principle in the jute case, *Hepburn* v. *Lordan*[1]. I thought it was within the doctrine of the gunpowder case, that a person could not be allowed to expose jute to dry where the consequences of a slight accident would be fatal to everybody around. Here I have nothing of that description. This is an instance of a person carrying on a manufacture which, if his neighbour had not happened to have another manufacture of great delicacy, probably would not have caused any injury to the neighbour. Still, he has not a right to injure his neighbour's manufacture at all; and if it had been proved to me that the injury was of such a character as I have described, a grave injury occurring every time that an accidental escape took place—or if it had been proved to me that there had been a constant repetition of the injury, then, I apprehend, the proper course would have been to grant an injunction.

But if, on the other hand, it should be proved—and that is the conclusion I have come to upon a careful consideration of the evidence—that the injury, though it may have occasionally happened, is, to the whole extent of it, not traceable to these works, then, notwithstanding the authority of the *St Helens Case*, the plaintiff will not be entitled to an injunction. Or, if there be no right asserted by the defendant to injure his neighbour; if, on the contrary, the assertion by him is that he does not do it, or that, if he does, it is simply from accidental circumstances, which from time to time happen, and for which the plaintiff may have a remedy in damages; and if it appears that that is what the case amounts to upon the evidence, it does not seem to me that the proper remedy is by injunction in this Court.

I have referred to the case of *Attorney-General* v. *Sheffield Gas Consumers Company*[2], in which Lord Justice Knight Bruce differed from Lord Justice Turner and the Lord Chancellor:—[His Honour reviewed that case at length, and observed that there the injunction was refused because the injury, which consisted of hindrance to traffic from the taking up of parts of streets by a private gas company, was neither serious nor continuous. His Honour then continued:—]

[1] 2 H. & M. 345. [2] 3 D. M. & G. 304.

Now, I have to inquire what is the extent of the injury here? Upon the whole evidence I do not find anything to satisfy me that there were more than three occasions, at most, during the period of four years and a half since the defendants' manufacture commenced, when injury of any description was done. The question then being as I have before described it, I confess the case appears to me to be one much more governed by the doctrine which was referred to in *Attorney-General* v. *Sheffield Gas Consumers Company*[1] than any of those cases where the injury is either very vast, or of very sudden or frequent occurrence, or where the right is set up to inflict the injury. It is not because counsel argued that the defendants would have a right to do this—this being one of the points of law which they thought it right to submit to the Court—that therefore I am to assume that the defendants make it. As I have said, I do not find that the defendants have ever asserted a right to pour out anything deleterious upon their neighbours.

As to the extent of the damage, I am left extremely in the dark; but, as far as the evidence goes, if I had to decide upon it as a jury I should not feel competent to assess anything more than nominal damages. The only satisfaction I have in disposing of the case on these grounds is, that a jury would not have assisted me, because with a jury I could only have tried the particular cases on the particular days specified, of which days I have already given the plaintiff the benefit. I think that he has shewn evidence which might have satisfied a jury that upon two days mischief was done. I think as to the third there may be a doubt. He may have the benefit of the doubt, but a jury could not tell me that there was a single other day upon which it happened, because there is no evidence to go to a jury as to damage on any other day.

The result, therefore, of the whole case is, that I must dismiss the bill. I do not think it a case for an injunction, and considering that the bill was filed so late as it was, and considering all the opportunities given to the plaintiff to make out his case, of which he did not avail himself, I am bound to dismiss it with costs, without prejudice to any action he may be advised to bring if he thinks he can get damages.

[1] 3 D. M. & G. 304.

[*In what cases the remedy by Injunction is appropriate.*]

ATTORNEY-GENERAL *v.* CAMBRIDGE CONSUMERS GAS CO.

COURT OF APPEAL IN CHANCERY. 1868. L.R. 4 CH. 71.

[INFORMATION and bill, the relators and plaintiffs being the Cambridge University and Town Gaslight Company, and the joint defendants the Cambridge Consumers Gas Company, Limited, and also the Improvement Commissioners of Cambridge. The plaintiff company had lighted Cambridge since 1854, under a contract with the Improvement Commissioners; but the latter had now entered into a similar contract with the defendant company, as it had offered to do the work on cheaper terms. The plaintiffs prayed for an injunction to restrain the defendant company from breaking up the street and footpath adjoining the land of the plaintiffs, and from injuring or interfering with the pipes of the plaintiffs, and from breaking up any of the streets and pavements of the town, and from allowing any of the pipes already laid down to continue; and also to restrain the Commissioners from exercising, or assuming to exercise, the power of permitting the defendant company to break up the streets or interfere with the gas-pipes of the plaintiffs.

...Evidence was given that many of the streets of Cambridge, and principally some in the centre of the town, which they specifically mentioned, were so narrow that only one vehicle could pass through them at once, and that if the defendant company were to break up those streets for the purpose of laying such mains, the traffic through the streets would be entirely suspended; and that there were many narrow streets and places in the town of considerable importance for foot passengers, by the opening whereof, for the purpose of laying their mains, by the defendant company, much inconvenience and annoyance would be caused to the public.

An injunction having been granted by Malins, V.C., the defendant company appealed.]

* * * * * * *

SIR W. PAGE WOOD, L.J....To say that any private individual or company may break up the pavements for the purpose of laying down gas-pipes or water-pipes, or of making communications with the gas-pipes or water-pipes of another company without subjecting themselves to an *indictment*, would be to create confusion and discomfort to the inhabitants of a town. But *Attorney-General* v. *Sheffield Gas Consumers Company*[1] rests upon principles well established. One of them is this,

[1] 3 D. M. & G. 304.

that where the Court interferes by way of *injunction* to prevent an injury in respect of which there is a legal remedy, it does so upon [one or other of] two grounds, which are of a totally distinct character; one is that the injury is irreparable, as in the case of cutting down trees; the other that the injury is continuous, and so continuous that the Court acts upon the same principle as it used in older times with reference to bills of peace, and restrains the repeated acts which could only result in incessant actions, the continuous character of the wrong making it grievous and intolerable. As an illustration of this class of case, I may refer to *Soltau* v. *De Held*[1], where the annoyance from the ringing of the bell was in itself slight, but it was so continuous that the Court thought fit to arrest the nuisance *brevi manu*, and save the complainant all further annoyance.

If, therefore, in the present case it had been made out that there was, either to the public or to the owners of property adjoining the streets, such a continuous injury, an injunction would be granted; and we must accordingly look narrowly at the evidence, as the Judges did in *Attorney-General* v. *Sheffield Gas Consumers Company*[2], to learn the amount of continuous injury which is likely to be inflicted. The principal reasoning of the Judges in that case applies with still stronger effect here. They said in effect: "Although it is true that the company are about to take up no less than seventy miles of streets, it will be at different times, and at no one time will it occupy more than two or three days; that may be an indictable offence, but we do not think it is such an injury as to call for the interference of this Court." No doubt there may be cases in which this Court would interfere to prevent injury of this nature being done only for a single day; as where there is a street with immense traffic, and there is danger that by the loss of that traffic for a single day custom would be diverted elsewhere and lost. But this is not a case of that kind. We have here the same circumstance which occurred in *Attorney-General* v. *Sheffield Gas Consumers Company*, and which, I think, influenced the judgment of the Court—that it is not an *ex officio* information in which the Attorney-General gathers up the complaints and injuries of a whole district, and lays them before the Court; but it is an information at the relation of a rival gas company, who are also the plaintiffs. They have a perfect right to bring themselves forward as plaintiffs if any special damage has been inflicted upon them. But I agree with the Vice-Chancellor that upon the evidence before us they prove no injury whatever to their property; their witnesses speak a good deal of contemplated and possible injury to the pipes, but no one witness has come forward to prove that any specific injury has been done.

Then, when we come to the injury to the public,...any member of the

[1] 2 Sim. (N.S.) 133.

[2] 3 D. M. & G. 304.

town has it in his power to proceed by way of indictment; and if the matter had been brought before us at the instance of a large number of inhabitants who had proceeded by way of indictment, and we saw that they would be obliged to have recourse to perpetual indictments, that might take the case out of the authority of *Attorney-General* v. *Sheffield Gas Consumers Company*. But here we have a body of Commissioners incorporated from a very early period, (consisting of the Heads of all the colleges, and representatives of the borough in Parliament, the magistrates, and other persons), who have powers of the largest description over the carriage-way and the pathway, the soil of which is vested in them. Every stone that is dug out is a trespass upon their property, and if they thought it right, as representing the whole town, they might act in this matter. But they do nothing of the kind. We only find that the information is filed at the instigation of a rival gas company....

Appeal allowed.

CHAPTER II.—WRONGS OF FRAUD AND MALICE.

(A) DECEIT.

[*It is a tort to cause damage to a person by a false statement made with the intention that he should act on it.*]

PASLEY *v.* FREEMAN.

COURT OF KING'S BENCH. 1789. 3 TERM REPORTS 51.

[THIS was an action in the nature of a writ of deceit; to which the defendant pleaded the general issue. After a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment. This third count was to the effect that the defendant, intending to deceive and defraud the plaintiffs, and well knowing the contrary to be true, falsely, deceitfully, and fraudulently represented to them that one John Christopher Falch was a person safely to be trusted and given credit to, in the purchase on credit of sixteen bags of cochineal of the value of £2634. 16*s.* 1*d.*; that the plaintiffs, believing this to be true, were thereby fraudulently caused and procured to sell to Falch this cochineal on credit; but that he had never paid any part of the sum, and had then been and still was unable to pay it or any part of it; whereby the plaintiffs wholly lost the cochineal and its value.]

* * * * * * *

ASHHURST, J. The objection in this case, which is to the third count in the declaration, is that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with the other party who had. But I am of opinion that the action lies notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in *Bayly* v. *Merrel*[1], is a sound and solid principle—namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur an action will lie. The principle was not denied by the other judges; but only the application of it, because the party injured there, who was the carrier, had the means of attaining certain knowledge in his own power, namely, by weighing the goods, and therefore it was a foolish credulity, against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, (and this the jury have found to be true); but *non constat* that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs; as if there had been before this event subsisted a partnership between him and Falch, which had been dissolved; but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action, as in *Risney* v. *Selby*[2], which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him.

But it was argued that the action lies not, unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position. But if there were any such to be found, I should not hesitate to say that it could not be law, for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is the injury done to the plaintiff; and not whether the defendant meant to be a gainer by it. What is it to the plaintiff whether the defendant was or was not to gain by it? The injury to him is the same. And it should seem that it ought more emphatically to lie against him—as the malice is more diabolical—if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act. For it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said that if this be determined to be law, any man may have an action brought against

[1] 3 Bulstrode 95. [2] Salkeld 211.

him for telling a lie, by the crediting of which another happens eventually to be injured. But this consequence by no means follows. For in order to make it actionable it must be accompanied with the circumstances averred in this count, namely, that the defendant, "intending to deceive and defraud the plaintiffs, did deceitfully encourage and persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act." Any lie accompanied with those circumstances I should clearly hold to be the subject of an action; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon. For the *quo animo* is a great part of the gist of the action.

Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance. But where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence, as it was two centuries ago. If it were not, we ought to blot out of our law-books one fourth part of the cases that are to be found in them. The same objection might in my opinion have been made with much greater reason in the case of *Coggs* v. *Bernard*[1]. For there the defendant, so far from meaning an injury, meant a kindness; though he was not so careful as he should have been in the execution of what he undertook. And indeed the principle of that case does not in my opinion seem so clear as that of the case now before us; and yet that case has always been received as law. Indeed, one great reason, perhaps, why this action has never occurred may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested.

The rule for arresting the judgment ought to be discharged.

* * * * * * *

Judgment not arrested.

[EDITOR'S NOTE. The student will do well to read the dissertation appended to this case in J. W. Smith's *Leading Cases*, Vol. II.]

[1] Lord Raymond 909.

[*There must be an* actual Statement, *not a mere passive* Concealment.]

See PEEK *v.* GURNEY, *infra*, p. 480.

[*A* Corporation *may be rendered liable by its* Agent's *deceitful statements.*]

See BARWICK *v.* ENGLISH JOINT STOCK BANK, *supra*, p. 71.

[*The statement need not be made* to the injured person *directly.*]

LANGRIDGE *v.* LEVY.

COURT OF EXCHEQUER. 1837. 2 M. & W. 519.

[ACTION of deceit to recover damages for personal injuries sustained by the plaintiff through the bursting of a gun which had been sold by the defendant to the plaintiff's father, for the use of himself *and his sons*, with a fraudulent and deceitful warranty that it had been made by Nock (a skilful gun-maker) and was a good and safe gun.]

* * * * * * *

At the trial before Alderson, B., at the Somersetshire Summer Assizes, 1836, it appeared that in June, 1833, the plaintiff's father saw in the shop of the defendant, a gun-maker in Bristol, a double-barrelled gun, to which was attached a ticket in these terms: "Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty George IV.; cost 60 guineas: only 25 guineas." He went into the shop, and saw the defendant, and examined the gun. The defendant (according to Langridge's statement) said he would warrant the gun to have been made by Nock for King George IV., and that he could produce Nock's invoice. Langridge told the defendant he wanted the gun for the use of himself and his sons, and desired him to send it to his house at Knowle, about two miles from Bristol, that they might see it tried. On the next day, accordingly, the defendant sent the gun to Langridge's house by his shopman, who also on that occasion warranted it to be made by Nock, and charged and fired it off several times. Langridge ultimately bought it of him for £24, and paid the price down. Langridge the father, and his three sons, used the gun occasionally. And in the month of December following, the plaintiff,

his second son, having taken the gun into a field near his father's house to shoot some birds, putting in an ordinary charge, on firing off the second barrel, it exploded, and mutilated his left hand so severely as to render it necessary that it should be amputated. There was conflicting evidence as to the fact of the gun's being an insecure one, or of inferior workmanship. Mr Nock, however, proved that it was not manufactured by him. The defendant also denied that any warranty had been given. The learned Judge left it to the jury to say, first, whether the defendant had warranted the gun to be made by Nock, and to be a safe and secure one; secondly, whether it was in fact unsafe or of inferior materials or workmanship, and exploded in consequence of being so; and thirdly, whether the defendant warranted it to be a safe gun, knowing that it was not so. The jury found a general verdict for the plaintiff, damages £400.

In Michaelmas Term, *Erle* moved in pursuance of leave reserved by the learned Judge, and obtained a rule nisi for a nonsuit, on the ground that no duty could result out of a mere private contract, the defendant being clothed with no official or professional character out of which a known duty could arise; and that the injury did not arise so immediately from the defendant's act as that it could form the subject of an action on the case by the plaintiff, between whom and the defendant there was no privity of contract.

* * * * * * *

PARKE, B. It is clear that this action cannot be supported upon the warranty as a *contract*, for there is no privity in that respect between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon that contract for the breach of it.

The question then is, whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are of opinion that there is, and that the present action may be supported.

We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer: we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability, so strongly put in the course of the argument on the part of the defendant. And we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they might happen to pass, and who should be injured thereby. Our judgment proceeds upon another

ground. If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been *simply* delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain; upon the principle of a numerous class of cases, of which the leading one is that of *Pasley* v. *Freeman*[1]. That principle is, that a mere naked falsehood is not enough to give a right of action, [but only] if it be a falsehood told with an intention that it should be acted upon by the party injured, and if that act must produce damage to him. If, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit. Nor could it make any difference that the third person *also* was intended by the defendant to be deceived; nor does there seem to be any substantial distinction (if the instrument be delivered in order to be so used by the plaintiff) when it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view *that the plaintiff should use the instrument* in a dangerous way; and, unless the representation had been made, the dangerous act would never have been done.

If this view of the law be correct, there is no doubt but that the facts which upon this record must be taken to have been found by the jury bring this case within the principle referred to. The defendant has knowingly sold the gun to the father, *for the purpose of being used by the plaintiff* by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true, (for this is the meaning of the term *confiding*), used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less. The delivery of the

[1] 3 T. R. 51; *supra*, p. 473.

gun to the father is not, indeed, averred, but it is stated that, by the act of the defendant, the property was transferred to the father, *in order* that the son might use it; and we must intend that the plaintiff took the gun with the father's consent, either from his possession or the defendant's; for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appear.

We therefore think, that 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 party injured.

We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased.

Rule discharged.

[EDITOR'S NOTE. The case was carried, by a writ of error, to the Exchequer Chamber, and the decision was there affirmed (4 M. & W. 337). Lord Hatherley (see *Barry* v. *Croskey*, 2 Johnson and Hemming, at pp. 18, 23) regarded this decision as turning on the fact that the representation was made with a view that the plaintiff should be one of the persons acting upon it; so that the case would have been materially altered, had the injured person been some mere stranger who had found the gun lying idle, and had taken it up and fired it, and been hurt thereby. (Cf. PEEK *v.* GURNEY, *infra*, p. 480.) Lord Esher's criticism of *Langridge* v. *Levy*, considered as a case of Deceit, may be seen in *Heaven* v. *Pender* (L. R. 11 Q. B. D., at pp. 511–512): where he, however, suggests that the plaintiff might have recovered on the bare ground of Negligence when supplying a dangerous article, altogether irrespectively of the representation. Cf. *Dominion N. G. Co. Ld.* v. *Collins and Perkins*, L. R. [1909] A. C. 640.]

See also POLHILL *v.* WALTER, *infra*, p. 497.

[*But the person injured cannot sue unless he were one of those whose conduct the false statement was intended to influence.*
A company's prospectus is usually intended to influence only the original allottees.]

PEEK *v.* GURNEY.

HOUSE OF LORDS. 1873. L.R. 6 H.L. 377.

APPEAL against a decree of the Master of the Rolls, by which the appellant's bill had been dismissed with costs.

The appellant, when the Overend & Gurney Company was ordered to be wound up, was the holder therein of 2000 shares, in respect of which he was placed on the list of contributories, and his liability to be so was confirmed by a decision of this House[1]....

The company was formed in July, 1865, and the prospectus then issued. The business was begun on the 1st of August, 1865. The appellant was not an original allottee, but purchased his shares in the market in the months of October and December of that year. On the 10th of May, 1866, the company stopped payment. On the 11th of June a resolution was passed to have a voluntary winding-up, and on the 22nd of June the usual order for such winding-up, under supervision of the Court, was made. The appellant who had been by this House, in July, 1867, declared to be liable as a contributory, and had paid nearly £100,000 on his shares under this winding-up, filed his bill in March, 1868, against the then directors, and against the executors of Thomas Augustus Gibb, who had been a director at the time of issuing the prospectus, but had died in November, 1866. The bill alleged misrepresentation of facts and concealment of facts on the part of the directors, in the prospectus they issued, by which the appellant had been induced to purchase shares and had been damnified; and he sought indemnity from the estates of the directors.

The Master of the Rolls had held that if he had been an original allottee, and had come in due time, he would have been entitled to such indemnity, but that he was debarred of his remedy on the grounds, first, that he was in no better position than the allottee from whom he had bought, and secondly, that he had come too late for relief. The bill was therefore dismissed with costs[2]. Against that dismissal this appeal was brought....

Kay, Q.C., for appellant. Fraud is clearly established by the

[1] L. R. 2 H. L. 325. [2] L. R. 13 Eq. 79.

evidence in this case; but actual fraud is not necessary in order to give a ground for relief in equity. The statements in the prospectus were not only calculated, but were intended, to deceive. These statements were made, and meant, to have effect on all who should read the prospectus; and there was no thought of limiting the effect of that prospectus within a certain time, or of confining it to a certain class of readers. The object of those who framed it was the reverse. The allottees would, of course, be those who were first deceived by it, but the intention to deceive was not confined to them alone. Those who purchased from these first allottees would be persons who, like them, were deceived by the misrepresentations in the prospectus; the circulation of which, so far from being confined to the first allottees, was never for one moment suspended, but was pertinaciously kept up....

* * * * * * *

LORD CHELMSFORD....The suit is not for the rescission of the contract, but is founded upon the loss the appellant has sustained in consequence of the contract; it is a proceeding similar to an action at law for Deceit....

The case must be examined with reference to the charge which is made against the respondents of having concealed material facts, by which the appellant alleges that he was deceived and drawn in to the purchase of his shares in the company. It was argued on his behalf that the concealment of material facts which a person is bound to communicate may be the ground of an action for deceit and of a suit for relief in equity. The concealment in the present case was of the all-important fact of the true state of the affairs of the old firm, which, if they had been disclosed, the wildest speculator would have turned away from a proposal to build a company on such a foundation. That there was a moral obligation upon the respondents not to put forward a scheme which depended for its success upon keeping the public in ignorance of what ought in fairness to have been made known to them, no one can doubt. It is said that the directors entertained a bonâ fide belief that the company would be a prosperous and profitable undertaking, and they evinced the sincerity of their belief by all of them becoming holders of shares to a considerable amount. But they knew that the company could not possibly be upheld without the introduction of fresh capital, and that this fresh capital could only be obtained by concealing the real condition of the old firm. And however they might be convinced that, with additional capital and a careful and prudent management, the affairs of Overend & Gurney might be brought round, and afterwards a profitable business be carried on, yet as this was an experiment which was to be made with the money of other persons as well as their own, they were bound to give all those other persons such information as they themselves possessed, to enable a

competent judgment to be formed as to the prudence of joining the proposed company.

The question, however, is not as to the moral obligation of the respondents, but whether their intentional concealment, from whatever motive, of a fact so material that if it had been made known no company could have been formed, renders them liable to an action for damages, or to the analogous proceeding in equity, by the appellant, who was led by it to purchase shares in the company, by which he has been subjected to a most serious loss.

This case is entirely different from suits instituted either to be relieved from, or for the enforcement of, contracts induced by the fraudulent concealment of facts which ought to have been disclosed. Nor does it resemble such cases as *Burrowes* v. *Lock*[1] and *Slim* v. *Croucher*[2], where a person making an untrue representation to another, about to deal in a matter of interest upon the faith of that representation, has been compelled to make good his representation, whether he knew it to be false, or made it through forgetfulness of the fact. It is a suit instituted to recover damages from the respondents for the injury the appellant has sustained by having been deceived and misled, by their misrepresentations and suppression of facts, to become a shareholder in the proposed company, of which they were the promoters. It is precisely analogous to the common law action for deceit. There can be no doubt that Equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at Law and in Equity.

I am not aware of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally bound to disclose. The case of *Keates* v. *Earl Cadogan*[3] may be mentioned as an authority to the contrary. There it was held upon demurrer that an action for deceit would *not* lie against the owner of a house, who knew it to be in a ruinous and unsafe condition, for not disclosing the fact to a proposed tenant, who wanted the house for immediate occupation.

...Assuming that mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into a contract, but that there must be something actively done to deceive him and draw him in to deal with the person withholding the truth from him, it appears to me that this additional element exists in the present case. The concealment of the insolvent state of the old firm of Overend & Gurney was absolutely essential towards the formation of the limited company; and the respondents not merely were silent as to this important fact, but actively

[1] 10 Ves. 470. [2] 1 De G. F. & J. 518. [3] 10 C. B. 591.

represented that the firm was in such a flourishing condition that the goodwill of the business was worth half a million. It is said that the prospectus is true as far as it goes, but half a truth will sometimes amount to a real falsehood. And I go farther and say, that to my mind it contains a positive misrepresentation. The language of the prospectus must be read in the sense in which the respondents must have known it would be understood. In that sense it is not true (as already observed) that the sum of £500,000, the consideration for the business, was paid to the old firm in cash and in shares; for the whole of it was to be applied in liquidation of the enormous debt of that firm, the existence of which was designedly kept from the public, to whom the prospectus was addressed. I cannot doubt that there was, beyond the passive concealment of the state of the affairs of the old firm, an active misrepresentation of the truth by the respondents, for which they were answerable either at Law or in Equity.

...The last question to be considered is, whether the appellant, who alleges that he purchased his shares upon the faith of the prospectus, has a remedy against the respondents for the misrepresentations which it contains. The appellant contends that the prospectus being addressed to the public for the purpose of inducing them to join the proposed company, any one of the public who is led by it to take shares, whether originally as an allottee or by purchase of allotted shares upon the market, is entitled to relief against the persons who issued the prospectus. The respondents on the other hand insist that the prospectus, not being an invitation to the public to become ultimately holders of shares, but to join the company at once by obtaining allotments of shares, those only who were drawn in by the misrepresentations in the prospectus to become allottees can have a remedy against the respondents.

There can be no doubt that the prospectus was issued with the object alleged by the respondents. It is addressed from the temporary offices of the company for allotment and registration of shares. It states how much is to be paid upon application for shares, and how much upon allotment, and how and where the application for shares is to be made; and it gives the form of payment to the bankers and of the receipt to be given by them to the applicant for shares to be allotted.

But the learned counsel for the appellant, not denying the original purpose of the prospectus, contended, upon the authority of decided cases, that the prospectus, having reached the hands of the appellant, and he, relying upon the truth of the statement it contained, having been induced to purchase shares, the respondents were liable as for a misrepresentation made to him personally.

...It appears to me that there must be something to connect the

directors making the representation with the party complaining that he has been deceived and injured by it; as in *Scott* v. *Dixon*[1], by selling a report containing the misrepresentations complained of to a person who afterwards purchases shares upon the faith of it, or as suggested in *Gerhard* v. *Bates*[2], by delivering the fraudulent prospectus to a person who thereupon becomes a purchaser of shares, or by making an allotment of shares to a person who has been induced by the prospectus to apply for such allotment. In all these cases the parties in one way or other are brought into direct communication; and in an action the misrepresentation would be properly alleged to have been made by the defendant to the plaintiff. But a purchaser of shares in the market upon the faith of a prospectus which he has not received from those who are answerable for it, cannot by action upon it so connect himself with them as to render them liable to him for the misrepresentations contained in it, as if it had been addressed personally to himself.

LORD CAIRNS....We were pressed very much in argument with considerations as to the motives of those who made this statement, and it was pointed out with great accuracy that upon a trial in the nature of a criminal proceeding it had been held that they were not chargeable with that which was laid to their charge in that proceeding. My Lords, I must say that, so far as I understand the case, I entirely agree with the result at which the jury arrived in that proceeding. And, strange as it may appear, I think there is a great deal, in the papers before your Lordships, to shew that the gentlemen who formed this company were themselves, judging by the extent to which they embarked their means and continued their property in the concern, labouring under the impression that this transaction, disastrous as it ultimately turned out, had in it the elements of a profitable commercial undertaking; and so far as motive is concerned they may be absolved from any charge of a wilful design or motive to mislead or to defraud the public. But in a civil proceeding of this kind all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? And if there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done....

How can the directors of a company be liable, after the full original allotment of shares, for all the subsequent dealings which may take place with regard to those shares upon the Stock Exchange? If the argument of the appellant is right, they must be liable *ad infinitum*, for I know no means of pointing out any time at which the liability would, in point of fact, cease. Not only so, but if the argument be right, they must be liable, no matter what the premium may be at which the shares may be sold. That premium may rise from time to

[1] 29 L. J. R. Ex. 62. [2] E. & B. 476.

time from circumstances altogether unconnected with the prospectus, and yet, if the argument be right, the appellant would be entitled to call upon the directors to indemnify him, up to the highest point at which the shares may be sold, for all that he may expend in buying the shares. My Lords, I ask, is there any authority for this proposition? I am aware of none....

Appeal dismissed.

[EDITOR'S NOTE. With this case may usefully be contrasted that of *Andrews* v. *Mockford* L. R. [1896] 1 Q. B. 372, which also turned upon a fraudulent prospectus; but was held, on the facts, not to fall within the principle of *Peek* v. *Gurney*, because the evidence shewed that the particular prospectus had been issued with the aim of influencing a wider circle than merely that of the allottees.]

[*The burden of proving that the words did actually mislead the plaintiff lies upon* him.]

SMITH *v.* CHADWICK.

HOUSE OF LORDS. 1884. L.R. 9 APP. CA. 187.

[ACTION of deceit for fraudulent misrepresentations in a company's prospectus, which had led the plaintiff to take shares. The representation principally relied on was:—"The ironworks can now produce at the rate of 75,000 tons per annum; the rolling mills will, with some slight alterations, be capable of turning out 90,000 tons per annum. The present value of the turnover or output of the entire works is over £1,000,000 per annum." This last sentence was true if it only meant that the *possible* turnover described would have that value: but false if it meant that the works *actually* were producing, or ever had produced, so much iron.

FRY, J., gave judgment in favour of the plaintiff; which was reversed by the Court of Appeal[1]. The plaintiff appealed from this reversal.]

Romer, Q.C., for plaintiff. The decision of Fry, J., was right and the representation as to the turnover or output would to ordinary men of business mean that the works had actually produced the amount stated, and it was so understood by the plaintiff who took shares on the faith of it. That the statement might have another and less natural meaning does not exonerate the defendants. The burden lay on them to shew that the meaning was what they alleged it was. The

[1] See L. R. 20 Ch. D. 27.

defendants' counsel should have asked the plaintiff in cross-examination what meaning he put upon the representation. The person who makes a false representation, in order to induce another to act upon it to his injury, makes a primâ facie case against himself that the misrepresentation is material; and the presumption is that the person to whom the representation was made and who acted upon it was in fact deceived by the representation.

* * * * * * *

EARL OF SELBORNE, L.C. In an action of deceit, like the present, it is the duty of the plaintiff to establish two things: first, actual fraud, (which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts); and, secondly, he must establish that this fraud was an inducing cause to the contract (for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct).

All your Lordships are, I believe, agreed in thinking that, of the several representations in this prospectus, by which the appellant alleges himself to have been deceived, only one is material, viz., that as to "the present value of the turnover or output of the entire works" (stated as being "over £1,000,000 sterling per annum"). Of the materiality of that representation there can be no doubt; and if the appellant was justified in understanding, and did understand it, in the sense insisted upon by his counsel at the bar, it was untrue as well as material. If, in the context in which it stands, it could not be honestly intended or reasonably understood in any other sense, I should think that the appellant's case was made out; although he has contented himself with swearing, in his answer to the defendants' interrogatories, that he understood the meaning of the words to be "that which they obviously convey," and has professed to be "unable to express in other words what he understood to be the meaning thereof." If, for instance, the material statement had been that Mr Grieve was a director, I should have thought such an answer quite sufficient. But it is otherwise, in my opinion, if the words in the context in which they stand may have been honestly intended to bear another sense (in which they would be true), and might reasonably have been so understood by an intelligent man of business, aware of the current prices at that time of bar and plate iron, and if at the time when that answer was given, the appellant had notice that the defendants, who made the representation, did in fact allege such other sense to be the true one, and the sense which they intended.

The sentence is, beyond question, unhappily expressed. And I think its more natural primâ facie meaning is that which takes the verb "is" literally, as affirming a present fact, and the words "the present value of the turnover or output" as equivalent to "the present value of the present turnover or output." I cannot however consider the words, in the context in which they stand, to be clear or unambiguous. In any point of view I do not think that they sufficiently explain themselves. Some reference, at least, to current prices as a basis of valuation must be implied in them. Even on the appellant's construction, "the turnover or output" is a term requiring some further definition. Does it mean the rate of production then actually going on, if extended over a whole year; or the total production of the past twelve months, estimated at the then present prices; or the actual yearly production on a series or an average of years? If the demonstrative article "this" had preceded the words "turnover or output" (instead of the definite article "the") the sense would clearly be that which the defendants say they intended. After repeatedly considering the words in connection with their context and with the evidence, I think the soundest conclusion is that this sentence was honestly intended to be understood as a statement of the value, at the then current prices, of *that* "turnover or output" of which the works were in the immediately preceding context stated to be "capable"; and that, to an intelligent man of business, who knew what those current prices actually were, and who took the trouble of comparing them with the figures given, they would really convey that meaning. The appellant was an intelligent man of business; and it does not appear to me to be a hypothesis inconsistent with anything to which he has sworn, that he may have had the requisite knowledge, and may have made use of it, and may have himself understood the representation in this sense, and have intended (in that sense) to challenge its truth. He did expressly challenge the truth of part of the representation, in the antecedent context, as to the capacity of the works. That the defendants would offer that explanation of it, he had (to my mind) clear notice, by their answers to his own interrogatories, sworn or filed on the 12th of June, 1877. Having such notice, and afterwards answering the defendants' interrogatories in the way that he did, and not attempting in any other way to prove that he was deceived by the representation, I cannot think that he has satisfied the burden of proof which, under those circumstances, was incumbent upon him. The Court of Appeal have so decided. I cannot say that they were wrong. It ought not to be forgotten that the appellant has sworn in precisely the same way as to *all* the representations which in his pleadings he alleges to be false; as to some of which your Lordships do not accept his construction, and as to others of which it is certain that he was not deceived by, and did not rely on them....

LORD BLACKBURN....In *Pasley* v. *Freeman*[1] Buller, J., says: "The foundation of this action is fraud and deceit in the defendant and damage to the plaintiffs. And the question is whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies."

Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage. In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage. It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when *Pasley* v. *Freeman*[1] was decided, and for many years afterwards, he could not be so called. I think that if it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. (In *Redgrave* v. *Hurd*[2] the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this, he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law.) Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely; and on the absence of all other grounds on which the plaintiff might act. I quite agree that, being a fair inference of fact, it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be a proper direction to tell a jury that, if convinced that there was such a material representation, they ought to find that the plaintiff was induced by it, unless one of the things which the late Master of the Rolls specified was proved. Nor do I think he meant to say so. I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference. And, whenever that is a matter of doubt, I think the tribunal which has to decide the fact should remember that now (and for some years past) the plaintiff can be called as a witness on his own behalf; and that if he is not so

[1] *Supra*, p. 473. [2] 20 Ch. D. 21.

called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. I do not say it is conclusive.

[As to the meaning which the plaintiff did actually put upon the representation, I infer that his counsel feared to ask him the question when they examined him in chief], lest he should answer that he did *not* understand the prospectus as meaning that there had been an actual output during the last year, or at least that he would not swear that he was influenced by his belief in that statement. The counsel for the defendants did not choose, on cross-examination, to risk bringing out of a hostile witness evidence which his own counsel had not brought out in chief. If I am right in the opinion which I have already expressed, that the burthen lay on the plaintiff to prove that he was induced, I think they acted wisely. If the plaintiff had made a primâ facie case which required affirmative proof of an answer from the defendants, I think it would be otherwise.

It will be observed that this opinion is quite irrespective of what the true construction of the prospectus is. I should think that a reasonable man would give much more weight to a statement of fact that the actual produce of the works had been so much, than to a statement that their productive power was estimated at so much; and therefore that the statement, if understood as Fry, J., and Lindley, L.J., (and I believe some of your Lordships) think, was material. I should think that a reasonable man reading this prospectus would hardly act on the faith of such an obscure statement without further inquiry. But he might so act. My reason for supporting the judgment of the Court of Appeal is, that I do not think it proved that he did so act. In the case of the misstatement as to Mr Grieve being a director, I think it positively proved that he did not.

I may say, though it is not necessary for the decision of the case, that I think, as a matter of law, the motive of the person saying that which he knows not to be true to another, with the intention to lead him to act on the faith of the statement, is immaterial. The defendants might honestly believe that the shares were a capital investment, and that they were doing the plaintiff a kindness by tricking him into buying them. I do not say this is proved; but if it were, if they did trick him into doing so, they are civilly responsible as for a deceit. And if with intent to lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff putting that meaning on it is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him in a double sense, it may be that they lie *like* truth; but I think they lie, and it is a fraud. Indeed, as a question of casuistry, I am inclined to think the

fraud is aggravated by a shabby attempt to get the benefit of a fraud, without incurring the responsibility. But I do not think there is any case made out against the defendants of that sort. There is a third possible case, that a man may make a statement which he intended to mean one thing only, but which negligently and stupidly he sends out in such a shape as to bear another meaning, and the plaintiff acts upon that meaning. On that I need only say that the defendant, in such a case, would have great difficulty in establishing that it was only honest blundering; but if he did, as for instance, by shewing that his manuscript sent to the printer, contained the word "not," which by some printer's error was omitted in the published prospectus, or that 10,000 was by a printer's error printed 100,000, which escaped notice in revising the proofs, I should say it was not a fraud, though perhaps gross negligence. But the question whether in such a case there would be any, and if any, what remedy for the party misled, may, I think, safely be left for decision when it arises[1]. It never has arisen and I think is not likely ever to arise. It certainly does not arise now.

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[LORD WATSON concurred: LORD BRAMWELL dissented.]

Appeal dismissed.

[1] [EDITOR'S NOTE. See the next case.]

[*The false statement must have been made, not through mere Negligence, however gross, but with* actual disregard *of Truth.*]

DERRY *v.* PEEK.

HOUSE OF LORDS. 1889. L.R. 14 APP. CAS. 337.

APPEAL from a decision of the Court of Appeal. The facts are set out at length in the report of the decisions below[1]. For the present report the following summary will suffice:—

By a special Act (45 & 46 Vict. c. clix.) the Plymouth, Devonport and District Tramways Company was authorized to make certain tramways.

By sect. 35 the carriages used on the tramways might be moved by animal power; and, *with the consent* of the Board of Trade, by steam or any mechanical power for fixed periods and subject to the regulations of the Board.

By sect. 34 of the Tramways Act 1870 (33 & 34 Vict. c. 78), which section was incorporated in the special Act, "all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only."

In February 1883 the appellants as directors of the company issued a prospectus containing the following paragraph:—

"One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

Soon after the issue of the prospectus the respondent, relying, as he alleged, upon the representations in this paragraph and believing that the company had an absolute right to use steam and other mechanical power, applied for and obtained shares in the company.

The company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power except on certain portions of the tramways.

In the result the company was wound up. The respondent in 1885 brought an action of deceit against the appellants, claiming damages for the fraudulent misrepresentations of the defendants whereby the plaintiff was induced to take shares in the company.

[1] 37 Ch. D. 541.

At the trial before Stirling, J., the plaintiff and defendants were called as witnesses. The effect given to their evidence in this House will appear from the judgments of noble and learned Lords.

Stirling, J., dismissed the action; but that decision was reversed by the Court of Appeal (Cotton, L.J., Sir J. Hannen, and Lopes, L.J.) who held that the defendants were liable to make good to the plaintiff the loss sustained by his taking the shares, and ordered an inquiry[1]. Against this decision the defendants appealed....

Bompas, Q.C., for respondent....It is not necessary that there should be carelessness whether the statement is true or not: it is enough if there be carelessness or negligence in making the statement. Making an untrue statement without reasonable ground is negligence which will support an action of deceit....But even if this is not law, the appellants are nevertheless liable; for the evidence shews that the statements were made either with the knowledge that they were untrue or with no belief on the subject.

It was stated that it was fully expected that a considerable saving would be effected by the use of steam. In fact the directors had not considered the matter, and when they did so afterwards there was a majority of one only in favour of steam. The effect of the evidence is not the same as to all the directors. As to Derry, the inference is that he never took the trouble to consider whether the statement was true or false. Wakefield and Wilde had complete knowledge but made statements which they knew not to be true at the time, thinking the requisite consents would be given. Pethick's evidence is inconsistent with itself. At one moment he says that he thought the Board of Trade had no right to refuse consent if its reasonable requirements were met, at another that he thought they had an absolute right to refuse.

The respondent is entitled to judgment on the grounds accepted by Lord Cranworth in *Western Bank of Scotland* v. *Addie*[2] and by the Earl of Selborne in *Smith* v. *Chadwick*[3]. The belief which would justify the appellants must be one founded on an exercise of judgment. Grounds which would be sufficient in some cases would not be so in others, where uberrima fides is required, e.g. in statements made to an intending partner.

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LORD HERSCHELL:—This is an action of Deceit. Such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation;

[1] 37 Ch. D. 541, 591. [2] L. R. 1 H. L. (Sc.) 145, 164.

[3] *Supra*, p. 485.

then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language, used in relation to such actions, to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes* v. *Lock*[1] may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in *Brownlie* v. *Campbell*[2] that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeal in the case before your Lordships. An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit.

...I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, care-

[1] 10 Ves. 470.

[2] 5 App. Cas. at p. 935.

less whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley* v. *Freeman*[1] down to *Western Bank of Scotland* v. *Addie*[2] in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shewn that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir* v. *Bell*[3], where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view, it is treated as established law. The dictum of the late Master of the Rolls that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained, notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud; and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton, L.J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for con-

[1] *Supra*, p. 473. [2] L. R. 1 H. L., Sc. 145. [3] 3 Ex. D. 238.

sideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie* v. *Campbell*[1], a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled. For I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation; and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done, the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

...I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test; with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true.

Adopting the language of Jessel, M.R., in *Smith* v. *Chadwick*[2], I

[1] 5 App. Cas. at p. 952.

[2] 20 Ch. D. at p. 67.

conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and bonâ fide statement on the part of the defendants, and by no means exposes them to an action for deceit."

[LORDS HALSBURY, WATSON, BRAMWELL, and FITZGERALD concurred.]

Order of Stirling, J., restored.

[EDITOR'S NOTE. This case, as was tersely said by Lord Bowen, in *Le Lievre* v. *Gould* [1893] 1 Q. B. 491, "decided that you cannot succeed in an action of fraud without proving that the defendant was fraudulent. It is singular that any doubt should ever have been cast upon that proposition."

The Legislature, however, proceeded at once to pass the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), which renders not merely belief, but also *reasonable grounds* for belief, necessary in the particular case of any prospectus or notice with regard to a Company. But this, of course, leaves the ruling in *Derry* v. *Peek* still in force as a general legal principle. The principle, however, it must be remembered, does not apply "where there is a legal obligation on the part of the defendant, towards the plaintiff, to give him *correct* information. If such an obligation exists, an action for damages will (I apprehend) lie for its non-performance, even in the absence of fraud"; (per Lindley, L.J., in *Low* v. *Bouverie*, L. R. [1891] 3 Ch. at p. 100). Hence if A, by the assertion that he is the authorised agent of an alleged principal, induces B to enter into a transaction with him on that footing, and the assertion turns out to be untrue, to the damage of B, A will be regarded in law as having undertaken that it was true. He will therefore be liable for the damage that has been caused. See *Oliver* v. *Bank of England*; (L. R. [1902] 1 Ch. 610).]

[*But it is not necessary that the defendant should have intended his deceit to cause any* damage *to the plaintiff.*]

POLHILL *v.* WALTER.

KING'S BENCH. 1832. 3 B. & AD. 114.

[ACTION of deceit for the defendant's fraudulent representation that he was duly authorized, by the drawee of a bill of exchange, to accept it (by procuration) on behalf of the drawee; by which representation the plaintiff was led to take the bill in payment for goods, and had been injured by its being subsequently dishonoured by the drawee.]

At the trial before Lord Tenterden, C.J., at the London sittings after Hilary term 1831, it appeared in evidence that the defendant had formerly been in partnership with Hancorne, but was not so at the time of the present transaction. The latter, however, still kept a counting-house on the premises where the defendant carried on business. The bill of exchange drawn upon Hancorne was, in June 1829, left for acceptance at that place, and, afterwards, a banker's clerk, accompanied by a Mr Armfield, then a partner in the house of the payees, called for the bill. The defendant stated that Hancorne was out of town, and would not return for a week or ten days, and that it had better be presented again. This the clerk refused, and said it would be protested. Armfield then represented to the defendant that expense would be incurred by the protest, and assured him that it was all correct; whereupon the defendant, acting upon that assurance, accepted it per procuration of Mr Hancorne. After this acceptance, it was indorsed over by the payees. On the return of Hancorne, he expressed his regret at the acceptance, and refused to pay the bill. The plaintiff sued him, and, on the defendant appearing and stating the above circumstances, was nonsuited. The present action was brought to recover the amount of the bill, and the costs incurred in that action, amounting in the whole to £196. The defendant's counsel contended that as there was no fraudulent or deceitful intention on the part of the defendant, he was not answerable. Lord Tenterden was of that opinion, but left it to the jury to determine whether there was such fraudulent intent or not; and directed them to find for the defendant if they thought there was no fraud, otherwise for the plaintiff; giving the plaintiff leave to enter a verdict for the sum of £196 if the Court should be of opinion that he was entitled thereto. The jury found a verdict for the defendant. In the ensuing Easter term Sir James Scarlett obtained a rule nisi, according to the leave reserved, against which in the last term cause was shewn by

Campbell and *F. Kelly*. The jury having negatived all fraud and deceit, it must now be assumed that the defendant, when he represented that he had authority to accept the bill, bonâ fide believed that he had such authority; and if that be so, he is not liable in this action by an indorsee.

* * * * * * *

Sir James Scarlett....The jury have, indeed, negatived fraud in fact; they have found that the defendant thought Hancorne would pay the bill, and that he did not mean to cheat any person. But still there was in this case that which constitutes fraud in law, for the defendant, by accepting a bill per procuration of another, has represented to all the world that he had authority from that other to do so, whereas he had no such authority. That representation being false to his knowledge, is a fraud in law, *Pasley* v. *Freeman*[1], *Tapp* v. *Lee*[2], *Haycraft* v. *Creasy*[3]. In the late case of *Foster* v. *Charles*[4], Tindal, C.J., says, "It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad; the party who makes such representations is responsible for the consequences." Here, the false representation has misled the plaintiff; he has a bill for which he has given a valuable consideration, and which has not been paid. He is consequently damnified; and he may recover against the defendant.

Lord Tenderden delivered the judgment of the Court....It is contended by the plaintiff's counsel that the allegation of *falsehood and fraud* in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff. It was said to be enough if a representation is made which the party making it *knows to be untrue*, and which is intended by him, or which, from the mode in which it is made, is calculated, to induce another to act on the faith of it, in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, *a fraud*; and for this position was cited the case of *Foster* v. *Charles*[5], which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of *Corbet* v. *Brown*[6]. The principle of these cases appears to us to be well founded, and to apply to the present.

It is true that there the representation was made *immediately* to the plaintiff, and was intended by the defendant to induce the plaintiff

[1] *Supra*, p. 473. [2] 3 Bos. & Pull. 367. [3] 2 East, 92. [4] 7 Bingham 105. [5] 6 Bingham 396; 7 Bingham 105. [6] 8 Bingham 33.

to do the act which caused him damage. Here, the representation is made to *all* to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to *all*, and the plaintiff is one of those; and the defendant must be taken to have intended, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result.

If, then, the defendant, when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge; and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.

It is of the greatest importance in all transactions, that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified, and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an *accepted* bill, and it was only in consequence of the false statement of the defendant that he actually had authority to accept, that the bill gained its credit and the plaintiff sustained a loss. For these reasons we are of opinion that the rule should be made absolute to enter a verdict for the plaintiff.

Rule absolute.

[*To shew that the person deceived had ready means of detecting the falsity of the statement, and yet omitted so to protect himself, constitutes no defence.*]

DOBELL *v.* STEVENS.

COURT OF KING'S BENCH. 1825. 3 B. & C. 623.

CASE for a deceitful representation. The declaration stated that before the time of committing the grievance thereinafter mentioned, defendant kept a public-house, and was possessed of a lease of the house for a certain term of years; and thereupon the plaintiff, at the request of the defendant, on, &c. at, &c. was in treaty with defendant to buy his interest in the said house for a certain sum of money, to wit, the sum of £460, and also to buy the household furniture and fixtures, and stock in trade, at a valuation; and defendant falsely, fraudulently, and deceitfully pretended and represented to the plaintiff that the returns or receipts for the spirits sold in the said public-house had been and then amounted to the sum of £160 per month; and that the quantity of porter sold in the house amounted to seven butts per month; and that the tap was let for £82 per annum, and two rooms in the public-house for £27 per annum; and by such representation then and there induced the plaintiff to buy the said lease of the house at the price of £460. The declaration then averred the falsehood of each particular of the statement. At the trial before Littledale, J., at the London sittings after last term, the plaintiff proved that whilst the treaty for the purchase was going on, a representation was made, as stated in the declaration, and that it was false. On the cross-examination of his witnesses it was proved that the defendant's books were in the house at the time of the treaty, and might have been inspected by the plaintiff; and that they would have shewn the real quantity of spirits and porter sold in the house. The plaintiff, however, did not examine them. A written memorandum of the bargain was afterwards drawn up, and an assignment of the lease was executed; but neither of those instruments contained any mention of the defendant's representation. The learned Judge left it to the jury to say whether the representation was frandulent, and they found a verdict for the plaintiff.

Gurney now moved for a rule nisi for a new trial....The contract having been reduced into writing, the parties cannot add to it by evidence of previous conversations....And the plaintiff had the means of knowledge within his reach, and neglected to use them....

ABBOTT, C.J. Whether any fraud or deceit had or had not been practised in this case was peculiarly a question for the jury; nor has

any complaint been made against the mode in which that question was presented to their consideration. If then this motion be sustainable at all, it must be sustainable on the ground that evidence of a fraudulent or deceitful representation could not be received, inasmuch as it was not noticed in the written agreement, or in the conveyance which was afterwards executed by the parties. The case of *Lysney* v. *Selby*[1] is to the contrary of that position, and precisely analogous to the present case. That was an action against the defendant for falsely and fraudulently representing to the plaintiff that certain houses of him (defendant) were then demised at the yearly rent of £68, to which plaintiff giving credit, bought the houses for a large sum of money, to wit, &c., and an assignment was afterwards executed to him; whereas, in truth and in fact, the houses were at that time demised at the yearly rent of £52. 10*s.*, and no more. After verdict for the plaintiff a motion was made in arrest of judgment, on the ground that it did not appear that the assertion was made at the time of the sale. Lord Holt says, "If the vendor gives in a particular of the rents, and the vendee says he will trust him, and inquire no further but rely upon his particular, then if the particular be false an action will lie." Here the plaintiff did rely on the assertion of the defendant, and that was his inducement to make the purchase. The representation was not of any matter or quality pertaining to the thing sold, and therefore likely to be mentioned in the conveyance, but was altogether collateral to it; as was the rent in the case of *Lysney* v. *Selby*. That case appears to me to be exactly in point, and the jury having found that that which was untruly represented was fraudulently and deceitfully represented, I think that we ought not to grant a rule for a new trial.

Rule refused.

[1] 2 Ld. Raym. 1118.

(B) Slander[1] of Title.

[*It is a Tort to cause damage to any person by maliciously making a false statement disparaging his title to, or the value of, any Property that belongs to him.*]

[*The same principle applies to the disparagement of a person's legal* right to marry.]

Court of King's Bench. 1661. 1 Siderfin 79.

SHEPERD *v.* WAKEMAN.

An action on the case was brought for that the defendant had falsely and maliciously written, to one who intended to take to wife the plaintiff, a letter wherein he said:—"You ought not to marry her. For, before God, she is my wife. And therefore, if you do, you will live in adultery with her, and your children will be bastards." Whereby the plaintiff lost her marriage. A verdict was given for the plaintiff.

Motion in arrest of judgment was made; on the ground that the words were not actionable, since the defendant wrote them in claiming the woman as his own wife. And, if a man is to be hindered from claiming what is his own he can never recover it; which would be a great mischief....

After several arguments on different days, it seemed at first to all the Court (except Twisden, J.) that the action did not lie, for there was no wrong in claiming his own wife. It would be a wrong if a claim were made maliciously in order to hinder a woman's preferment; and, accordingly, if the jury had found that the words were written with that intent, the letter would (the Court considered) have been actionable. But here the words "falsely and maliciously," in the declaration, were mere matter of form, and the jury took no heed of them....

Twisden, J., however, thought the defendant's intention of slandering the plaintiff had been sufficiently found [by the jury's verdict]....

The case stood over by adjournment until Hilary Term, 1663. And then the other judges, having changed their opinion, gave judgment for the plaintiff; on the ground that the words had been false and malicious.

[1] The word 'Slander' is here used in its original wide sense, as equivalent to 'scandal' or 'calumny'; and not in the usual (and more technical) sense which limits it to such calumnies as are by word of mouth and so excludes Libels.

[Actual Damage *is essential to this Tort.*]

MALACHY *v.* SOPER.

COURT OF COMMON PLEAS. 1836. 3 BINGHAM N.C. 371.

[THE plaintiff was possessed of certain shares in a silver mine at Calstock in Cornwall; touching which shares certain claimants had filed a bill in Chancery, to which plaintiff had demurred. The defendant falsely published in a newspaper an assertion that the demurrer had been overruled, and that the prayer of the plaintiff's antagonists (for the appointment of a receiver and for an injunction restraining the plaintiff from selling his shares in the mine) had been granted. The plaintiff brought his action for this assertion, alleging that it had hindered him in working the mine and disposing of his shares. A verdict was given in his favour, for £5 damages.

Talfourd moved in arrest of judgment, on the ground that no special damage had been shewn.

Bompas....The injury is printed, not oral. The same distinction as where *persons* are defamed should be applied to defamation of *title*. For writing is permanent and pervading: whilst speech is fleeting and local. Moreover, it is, at all events, sufficient if the words in themselves import damage to the plaintiff in his estate....

TINDAL, C.J....The publication is one which slanders not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed enjoyment of his shares of the mine. And the objection taken is, that the plaintiff, in order to maintain this action, must shew a special damage to have happened from the publication, and that this declaration shews none.

The first question, therefore, is, Does the law require in such an action an allegation of special damage? And, looking at the authorities, we think they all point the same way. The law is clearly laid down in *Lowe* v. *Harewood*[1]. "Of slander of title, the plaintiff shall not maintain action unless it was re vera a damage, e.g., that he was hindered in sale of his land; so the particular damage ought there to be alleged." And *Cane* v. *Golding*[2] furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by falsely and maliciously speaking these words, viz., "His right and title thereunto is nought, and I have a better title than he"; and he was likely to sell and was injured by the words; and by reason of the speaking the words he could not recover his tithes. Rolle, C.J., held that the action did not lie, for "the plaintiff ought to have shewed a

[1] Sir W. Jones, 196.

[2] Styles, 169.

special damage, which he hath not done, and this the verdict cannot supply. The declaration here is too general, and upon which no good issue can be joined; he ought to have alleged that there was a communication had touching the sale of the lands whereof the title was slandered (before the words spoken), and that by speaking of them the sale was hindered."

We hold that an action for slander of title is not properly an action for words spoken or for libel written and published, but is an action on the case for special damage sustained by reason of the publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the Digests and other writers on the text law, and such we feel bound to hold it to remain at the present day.

The next question is, Has there been such a special damage alleged in this case as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell; and that it will not be sufficient to say only that he had an intent to sell, without alleging a communication for sale. Admitting that these may be put as instances only (and that there may be many more cases in which a particular damage may be equally apparent without such allegation), they establish at least this, that in the action for slander of title there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, "that the plaintiff is injured in his rights; and the shares in which he is interested are much depreciated in value; and divers persons do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked for his benefit; and that he hath been hindered from disposing of his said shares in the said mine, and from working the same in so ample and beneficial a manner as he otherwise would have done." And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require where the action is founded (not on the words spoken or written but) upon the special damage sustained.

It has been argued in support of the present action that it is not so much an action for slander of title, as an action for a libel *on the plaintiff in the course of his business*[1], and in the way of gaining his

[1 EDITOR'S NOTE. Cf. FOULGER *v.* NEWCOMB, and DOYLEY *v.* ROBERTS, *supra*, pp. 280—284.

The same distinction, between defamation of a plaintiff's title and defamation of the plaintiff (himself) in the way of his business—i.e., in Dr Blake Odgers' terse phrase, between an attack on a Thing and an attack on a Person—is well illustrated by the American case of *Dooling* v. *The Budget Publishing Co.* (144 Massachusetts 258). The plaintiff sued upon the following criticism in the defendants' newspaper: "Probably never in the history of the Ancient and

livelihood; and that such an action is strictly and properly an action for defamation, and so classed by all the authorities. But we think it sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plaintiff's title to his shares, and nothing else. The bill in chancery, out of which the publication arose, was filed by Tollervey, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the actual working of the mines was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the *plaintiff*, in the course of his business or occupation or mode of acquiring his livelihood; and not as referring to the disputed title of the shares of the mine.

It has been urged again that, however necessary it may be to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, (which of itself, it is contended, affords presumption of injury to the plaintiff). No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words or writing or print; but that it rests on the nature of the action itself, namely, it is an action for special damage *actually* sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other [written] publication, appears to us to make no other difference than that it is more widely and permanently disseminated, and in conse-

Honourable Artillery Company was a more unsatisfactory dinner served than that of Monday last. One would have supposed, from the elaborate bill of fare, that a sumptuous dinner would be furnished by the caterer, Dooling. But, instead, a wretched dinner was served; and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much better." But the Court held that, although "disparagement of property *may* involve an imputation on personal conduct (and the question may be nice, in a particular case, whether or not the words do so)"...yet in this case "there was no libel on the plaintiff, even in the way of his business. There is only a condemnation of the dinner itself. No lack of good faith, no violation of agreement, no promise that the dinner should be of a particular quality, no habit of providing dinners which the plaintiff knew to be bad, is charged; not even an excess of price beyond what the dinner was worth. The charge was, in effect, simply that the plaintiff, being a caterer, provided on a *single* occasion a very poor dinner, vile cigars and bad wines. Such a charge is not actionable without special damage."]

quence more likely to be serious, than where the slander of title is by words only. But it makes no difference whatever in the legal ground of action.

For these reasons we are of opinion that the action is not maintainable, and that the judgment must be arrested.

[See also RATCLIFFE *v.* EVANS, *supra*, p. 291.]

[Actual Malice *is essential to this Tort.*]

HALSEY *v.* BROTHERHOOD.

CHANCERY DIVISION. 1880. L.R. 15 CH.D. 514.

* * * * * * *

JESSEL, M.R....The defendant has a right to manufacture steam-engines according to two several patents granted to him in the year 1873, which, as far as I can see, have never been challenged. They are not alleged in the statement of claim to have been challenged. He alleges that the plaintiff is making and selling engines which are infringements of his patent. It is said that he is not entitled to tell persons buying the plaintiff's engines that they are infringements and that those persons are liable to an action; and that he is not entitled even to give a notice that these engines are infringements of his patent rights unless he follows up that notice by some legal proceeding. I must entirely dissent from that proposition. There is, as far as I am aware, no law in this country compelling a man to assert his legal right by action. He may, if he thinks fit, give notice to persons, the notices being given bonâ fide, that they are infringing his legal rights: in many cases it is his duty to do so before bringing an action. In some cases the Legislature has compelled him to do so before bringing an action. Take, for instance, those cases of infringement of copyrights and designs, and so on, where the seller is only liable if he knows that the right has been infringed; there you must let him know before bringing an action, or your action would fail....Take the late cases before me, as to trespassing on a common belonging to the lord of the manor: there it is most desirable that the lord should, before bringing an action, give notice to everybody not to trespass. In the cases to which I refer many of the persons were trespassing ignorantly, being incited to do so by persons who ought to have known better. Many of these trespassers were not worth suing; indeed it would have been a

cruelty to sue them, because the only result would have been to ruin them and take the property of unfortunate cottagers who had trespassed in ignorance and by reason of the persuasion of others. One can see that there are a number of cases of that sort where a man is always required, (not by law, but by propriety), to give notice of his rights to persons who are infringing them and request them to desist.

Now, is there any reason in the world for saying there is any different law with regard to patents? A man says, "I have a monopoly under the patent; you are infringing it; now please to desist"; or, "I give notice that *A B* is infringing. He is not worth suing: I give notice to everybody not to buy of *A B*." If that is done bonâ fide in assertion of his legal right, as far as I know there is no obligation on him to bring an action. The person may desist on warning being given, and then there is no occasion for bringing an action. The person may desist; or if he does not desist he may not be worth suing, and a man is not bound in addition to the loss incurred by the infringement, to incur the further costs of bringing an expensive action....It is a totally different thing where a man, knowing he has no legal right, threatens proceedings for a collateral purpose. There he may be liable to an action. If a man, with a view to prevent another man carrying on his business, (knowing he has himself no patent, or knowing that he has an invalid patent, or, knowing that the thing manufactured by the other man is no infringement), for the purpose of injuring the other man in his trade, threatens the purchasers, or advertises that the thing is an infringement, of course he is liable like any person who makes a false assertion to the injury of another in his trade; because it is an untrue assertion and not made bonâ fide. The mere fact of a man mentioning he has a right, and that something is an infringement of it, does not *per se* give a ground of action. It is obvious that such a course of conduct, adopted *bonâ fide*, does not constitute a case in which an action could be maintained; for the essence of the case is the falsity of the assertion and the want of good faith in making it. That is, the assertion is made, not for the purpose of preserving the alleged legal right, but for a different purpose, and has injured the plaintiff in his trade.

Now I come to the second point, which is rather different. Although the man who gives the notice is not subject to an action for damages, is he liable to be restrained by injunction? I think he would be liable to be restrained by injunction if certain other proceedings are adopted by the persons threatened. If, for instance, the vendor of the machines finds his customers interfered with, and writes to the person who has given the notice and says, "My machines are not an infringement; if you go on threatening without bringing an action against me to try that question, I shall apply for an injunction to restrain you from

interfering with my trade"; and then the defendant does not bring an action and takes no proceedings—as is the case here—and the plaintiff comes for an injunction, he may be entitled to it if he shews that the defendant's statement is false, because the defendant's threat would be a threat to continue making a statement to the injury of the plaintiff. And if it is a false statement, the plaintiff would be entitled to restrain the continuance of it to his injury, although he may not be entitled to bring an action for damages for the false statement. For if the defendant says, "I insist that those are infringements, and I will give notice to all your customers," the plaintiff has a right to try that question by bringing his action for injunction. But if in answer to that action the defendant says, "I did make the statement, and I will make the statement, but the statement is true," and he proves the statement to be true, it appears to me plain that that is a good defence to the action. I do not think that it is a good defence to the action for an injunction merely to say, "I made the statement *bonâ fide*"; because if the defendant is challenged, and says, "the statement is true, and I now maintain it," and he fails in maintaining it, and it turns out to be false, I think then that *bonâ fides* ought not to defend him from an injunction against continuing to make it. But if he succeeds in shewing that the statement is true, that is another thing.

Therefore it appears to me that in the present case the plaintiff must make out, if he wants to maintain an action for damages, that the defendant has not been acting *bonâ fide*. If he wants an injunction, he must make out that the defendant intends to persevere in making the representations complained of, although his allegation of infringement by the plaintiff is untrue.

Action dismissed.

[EDITOR'S NOTE. This case was taken to the Court of Appeal, where the judgment of the Master of the Rolls was affirmed (L. R. 19 Ch. D. 386). Lindley, L.J., said, "This action was brought upon the theory that honesty or dishonesty was an immaterial inquiry. That was a mistake....If I am a patentee (or have property) I am entitled—so long as I act honestly—to say that somebody is infringing my patent, without running the risk of having an action for damages brought against me. If I say it dishonestly, I am liable. And if a defendant knew that what he said was untrue, it would not take much to persuade a jury that he was acting dishonestly."]

[*A like Tort may be committed, without any actually false statement, by fraudulently* using the Trade-name *of another person.*]

SYKES *v.* SYKES.

COURT OF KING'S BENCH. 1824. 3 B. & C. 541.

[ACTION on the case, by a manufacturer who made shot-belts, powder-flasks, &c., which he was accustomed to mark with the words *Sykes' Patent*; alleging that the defendants wrongfully, knowingly, and fraudulently, and without the consent of the plaintiff, had made a great quantity of shot-belts and powder-flasks, and marked them with the words *Sykes' Patent*; and had sold them *as and for* the manufacture of the plaintiff; whereby plaintiff was greatly injured in reputation, the articles so manufactured and sold being greatly inferior to those manufactured by the plaintiff.

At the trial, it was proved that the plaintiff's father obtained a patent for the manufacture of the articles in question. The patent was afterwards held to be invalid, on account of a defect in the specification. But the patentee (and afterwards the plaintiff) continued to mark the articles with the words *Sykes' Patent*, in order to distinguish them. The defendants afterwards commenced business, and manufactured articles of the same sort, but of an inferior description; and they marked them with a stamp resembling as nearly as possible that used by the plaintiff, in order that the retail dealers might sell them again, as goods manufactured by the plaintiff. But these dealers, who bought them directly *from the defendants*, for the purpose of so reselling them, knew by whom they were manufactured. It appeared that the plaintiff's sales had decreased since the defendants commenced this business.]

It was contended at the trial that the plaintiff could not maintain this action. For one of the defendants, being named Sykes, had a right to mark his goods with that name; and he had also as much right to add the word "patent" as the plaintiff, the patent granted to the latter having been declared invalid. Bayley, J., overruled the objection, as the defendant had no right so to mark his goods *as and for* goods manufactured by the plaintiff (which is the allegation in the declaration). It was further urged that the declaration was not supported by the evidence. For it charged that the defendants sold the goods as and for goods made by the plaintiff; whereas the *immediate* purchasers knew them to be manufactured by the defendants. Bayley, J., overruled this objection also; and left it to the jury to say whether the defendants adopted the mark for the purpose of inducing *the public* to

suppose that the articles were not manufactured by them but by the plaintiff. They found a verdict for the plaintiff.

Brougham moved for a new trial; and renewed the objection that the facts proved did not support the declaration.

ABBOTT, C.J. I think that the substance of the declaration was proved. It was established, most clearly, that the defendants marked the goods, manufactured by them, with the words *Sykes' Patent*, in order to denote that they were of the genuine manufacture of the plaintiff. And although they did not *themselves* sell them as goods of the plaintiff's manufacture, yet they sold them to retail dealers for the express purpose of being resold as goods of the plaintiff's manufacture. I think that is substantially the same thing, and that we ought not to disturb the verdict.

Rule refused.

[EDITOR'S NOTE. "No man is entitled to represent his goods as being [made by another manufacturer];...and no man is permitted to use any mark, sign, symbol, device, or other means whereby (even without making a direct false representation himself to a purchaser who purchases from him) he enables such purchaser to...make a false representation to...the ultimate customer." *Per* James, L. J., in *Singer M. Co.* v. *Loog*; L. R. 18 Ch. D. at p. 412.]

(C) Malicious Prosecution.

[*It is a Tort to institute criminal proceedings against an innocent man, if they are instituted without reasonable and probable cause and from motives of Malice.*]

WALLIS *v.* ALPINE.

Nisi Prius. 1805. 1 Campbell 204.

Action against defendant for maliciously, and without probable cause, charging plaintiff with having assaulted him and brandished a stick at him.

It appeared in evidence that the defendant had, on oath before the Lord Mayor, charged the plaintiff with assaulting him and brandishing a stick at him. A warrant had in consequence been issued against the plaintiff, on which he had been apprehended. He was bound over to the Sessions by recognisance. At the Sessions, no indictment was preferred; and the plaintiff was therefore discharged from his recognisance. No evidence was called to shew a want of probable cause; or to shew that the defendant had acted maliciously.

Lord Ellenborough laid it down as law, that the *mere* nonprosecution of a charge, made on oath against another, was not sufficient to maintain such an action.

Plaintiff nonsuited.

[See also the cases given *supra* Part II. Sec. I. (B) False Imprisonment.]

[Actual *Malice*[1] *is essential to this Tort.*]

See Allen *v.* Flood, *supra*, at pp. 184 and 186.

[1] Not necessarily Spite, but *some* Unlawful Motive. E.g. a desire to extort money suffices, and this even though the would-be extortioner honestly believed the accused (i.e. the present plaintiff) to be guilty. See *Mitchell* v. *Jenkins*, 5 B. and Ad. 588.

[*Absence of Probable Cause is essential to this Tort.*]

ANONYMOUS.

COURT OF QUEEN'S BENCH. 1703. 6 MODERN 25, 73.

PER CURIAM. If the person be ever so *innocent*, an action for Malicious Prosecution will not lie if there were a probable cause of prosecution. For it must be direct malice, without any colour of cause, that will support such an action.

...And let a prosecution be ever so *maliciously* carried on, yet if there be probable cause or ground for it, no action for malicious prosecution will lie[1].

[*And the onus of proving this, i.e. that there was no reasonable cause for prosecuting, is on the plaintiff; (in spite of its being a* negative *averment).*]

ABRATH *v.* NORTH-EASTERN RY. CO.

COURT OF APPEAL. 1883. L.R. 11 Q.B.D. 79, 440.

ACTION for malicious prosecution.

At the trial, before Cave, J., and a jury at the Durham summer assizes, 1882, the following material facts were proved in evidence or admitted :—

The plaintiff, a doctor, had attended one McMann for personal injuries alleged to have been sustained in a collision between two trains upon the defendants' railway. McMann brought an action against the defendants to recover compensation in respect of these injuries, but a compromise was effected by the defendants agreeing to pay McMann a large sum. Subsequently the defendants, acting upon information obtained, resolved to prosecute Dr Abrath, the plaintiff in the present action, for a conspiracy with intent to defraud.

[1] [EDITOR'S NOTE. From the most express malice, the want of probable cause cannot be implied. But from the want of probable cause, malice may be (and most commonly is) implied. Yet an honest and *reasonable* belief in the plaintiff's guilt negatives that latter implication, and renders necessary some express evidence of Malice; *Cruise* v. *Burke*, Irish L. R. [1919] K. B. 182.

An information was accordingly laid before certain justices of the county of Durham, who committed Dr Abrath for trial. He was tried at Durham winter assizes, 1882, and acquitted, and thereupon commenced the present action against the defendants.

Upon these facts Cave, J., left three questions to the jury: 1. Did the defendants in prosecuting the plaintiff take reasonable care to inform themselves of the true state of the case? 2. Did they honestly believe the case which they laid before the magistrates? and, 3. Were the defendants actuated by any indirect motive in preferring the charge against the plaintiff?

With respect to the two first questions, the learned judge directed the jury that, if they answered them in the affirmative, then the defendants had reasonable and probable cause for the prosecution, and were entitled to a verdict; and he further directed the jury with respect to those two questions that the onus of proving that the defendants did not take reasonable care to inform themselves of the true state of the case, and did not honestly believe the case which they laid before the magistrates, lay upon the plaintiff.

The jury answered the two first questions in the affirmative, but gave no answer to the third question, and Cave, J., thereupon directed a verdict to be entered for the defendants, and gave judgment for them.

[A new trial was ordered by the Queen's Bench Division, on the ground that there had been a misdirection by Cave, J., in telling the jury that the onus lay on the *plaintiff* of proving that the defendants had not taken reasonable care to inform themselves of the true state of the case, and had not honestly believed the case which they laid before the magistrates. The defendants appealed.]

* * * * * * *

BOWEN, L.J. In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice. All those three propositions the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff. I think that the whole of the fallacy of the argument addressed to us, lies in a misconception of what the learned judge really did say at the trial, and in a misconception of the sense in which the term "burden of proof" was used by him. Whenever litigation exists,

somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a primâ facie case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, (for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner). The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises, it ceases to be a question of onus of proof.

There is another point which must be cleared, to make plain what I am about to say. As causes are tried, the term "onus of proof" may be used in more ways than one. Sometimes when a cause is tried the jury is left to find generally for either the plaintiff or the defendant; and it is in such a case essential that the judge should tell the jury on whom the burden of making out the case rests, and when and at what period it shifts. Issues again may be left to the jury upon which they are to find generally for the plaintiff or the defendant, and they ought to be told on whom the burden of proof rests; and indeed it is to be observed that very often the burden of proof will be shifted, within the scope of a particular issue, by presumptions of law which have to be explained to the jury. But there is another way of conducting a trial at Nisi Prius; which is, by asking certain definite questions of the jury. If there is a conflict of evidence as to these questions, it is unnecessary, except for the purpose of making plain what the judge is doing, to explain to the jury about onus of proof; (unless there are presumptions of law, such as, for instance, the presumption of consideration for a bill of exchange, or a presumption of consideration for a deed). And if the jury is asked by the judge a plain question, as, for instance, whether they believe or disbelieve the principal witness called for the plaintiff, it is unnecessary to explain to them about the onus of proof; because the only answer which they have to give is Yes or No, or else they cannot tell what to say. If the jury cannot make up their minds upon a question of that kind, it is for the judge to say which party is entitled

to the verdict. I do not forget that there are canons which are useful to a judge in commenting upon evidence and rules for determining the weight of conflicting evidence; but they are not the same as onus of proof.

Now in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative; and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms "negative" and "affirmative" are after all relative and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of contending that in *all* those cases the onus shifts and the person (within whose knowledge the truth peculiarly lies) is bound to prove or disprove the matter in dispute. I think a proposition of that kind cannot be maintained; and that the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds....

...When Cave, J., came to address the jury, the whole of the case was before him. There were, in theory, two logical ways of treating it. The question whether there was want of reasonable and probable cause depended upon the materials which were in the possession of the prosecution at the time it was instituted, and also on the further point whether those materials were carefully collected and considered. Now there might be two views of the materials which were in the possession of the prosecution. It may be said that the materials were evidently untrustworthy, or that they were obviously trustworthy; according as the one view or the other is taken of the facts. The burden of shewing carefulness in the inquiry would be shifted according to the view of the facts adopted. If the materials were admittedly untrustworthy, that would be a strong reason for throwing on the defendants the burden of shewing that they, nevertheless, had been misled, after all their care, into relying upon worthless materials. If the materials were obviously trustworthy, they would be enough primâ facie to justify those who trusted to them. The view for the plaintiff is, as it seems to me, that

as a matter of law Cave, J., ought to have assumed that the materials in the possession of the prosecutors at the time they instituted the prosecution were untrustworthy and suspicious; and that he ought to have directed the jury to go on and consider, as if it were an independent matter, whether the prosecution had so conducted themselves as to relieve themselves of this grave opprobrium of having acted upon worthless materials: in effect, that he ought to have left to them a specific issue whether the inquiry had been conducted reasonably and properly by the prosecution,—whether they had collected the information carefully. Now I think that would have been a mistake in law. The trustworthiness of the materials—I do not mean the legal inference to be drawn from them, but the worth of them—was a question of fact, not a question of law, a question of fact depending on the view the jury took about the evidence. It seems to me that Cave, J., would have been wrong in dividing into two parts the questions of fact, assuming one half necessarily to be decided one way and telling the jury that the onus of proof shifted about the other. He put the two together; and asked the jury a question, I think, covering the whole of the controversy, whether the defendants took reasonable care to inform themselves of the true state of the case; not whether they took reasonable care to collect the materials in their possession, but whether they took reasonable care to inform themselves of the true state of the case. He then told the jury that they must bear in mind that it lay on the plaintiff to prove that the railway company did not take reasonable care to inform themselves of the true state of the facts. The meaning of that is, that if the jury were not satisfied whether the defendants did or did not take proper care—inasmuch as the plaintiff was bound to satisfy the jury that the defendants had not taken due care—the defendants would in the end be entitled to the verdict. That direction was quite correct.

Something has been said about innocence being proof, primâ facie, of want of reasonable and probable cause. I do not think it is. When mere innocence wears that aspect, it is because the fact of innocence involves with it other circumstances which shew that there was the want of reasonable and probable cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting, is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and proper care. Except in cases of that kind, it never is true that mere innocence is

proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause. The ground of our decision comes back to what was suggested. Who had to make good their point as to the proposition whether the defendants had taken reasonable and proper care to inform themselves of the true state of the case? The defendants were not bound to make good anything. It was the plaintiff's duty to shew the absence of reasonable care.

Judgment of Cave, J., restored.

[EDITOR'S NOTE. This decision was affirmed by the House of Lords (L. R. 11 App. Ca. 247).]

(D) MISCELLANEOUS WRONGS OF MALICE.

The Tort of Maintenance *is committed when you cause damage to any one by maliciously assisting some third person to bring (or defend) against him a* civil *action wherein you have no interest.*]

[*But such assistance is not 'malicious' if it be prompted by either Kinship or Charity.*]

HARRIS *v.* BRISCO.

COURT OF APPEAL. 1886. L.R. 17 Q.B.D. 504.

THE action was brought to recover damages occasioned to the plaintiff by reason of the defendant's "maintenance" of one Nailer in an action which he had brought against the plaintiff. Nailer was entitled to the equity of redemption of a farm which was mortgaged to the plaintiff, and which was occupied by Nailer. Nailer sold his equity of redemption to the plaintiff; who, after the sale, allowed Nailer to remain in occupation for some time, but ultimately turned him out. Nailer then brought an action against the plaintiff for the redemption of the farm. In this action Nailer was aided and maintained by the defendant. The plaintiff set up the assignment of the equity of redemption to him; and Nailer then alleged that he had never executed the assignment, and that, if he had, his execution of it had been obtained by the fraud of the plaintiff. Nailer failed in this action, and it was dismissed with costs, which were taxed at £118. Nailer, who was a pauper, failed to pay these costs; and the present action was brought by the plaintiff against the defendant to recover the £118, on the ground that he had "maintained" Nailer in the former action. The defendant's principal defence was, that he had maintained Nailer

from motives of pure charity, believing that he was oppressed by the plaintiff and was without the means of obtaining redress.

* * * * * * *

[Judgment was given for plaintiff. The defendant appealed.]

Underhill, Q.C., for plaintiff....It is not necessary to shew that the defendant has a mens rea. It is sufficient that there was no reasonable or probable ground for bringing the former action, and that the defendant acted recklessly in assisting Nailer without proper inquiry into the truth of his case. Reckless charity of this kind is not a defence to the present action; it is not charity within the meaning of the authorities which say that charitable motives are a good excuse for aiding a stranger in carrying on legal proceedings against another person.

FRY, L.J., delivered the judgment of the Court....On this appeal many points have been urged.

The defendant's counsel have, in the first place, contended that no such action will lie. On principle, this contention appears untenable; for maintenance is an unlawful act, and, when an unlawful act results in a particular wrong to a particular person, our law, generally speaking, gives to such person a remedy by action against the wrongdoer. But it is hardly necessary to resort to principle, for the point is well covered by authority.

In the next place, the defendant alleges that he aided and maintained Nailer out of charity; and that charity is an answer to an action of maintenance. Now the facts of the case, as found by Wills, J., appear to us to be, shortly: that the defendant Brisco aided Nailer out of charity and because he believed him to be oppressed by Harris, but that in fact Nailer was not oppressed by Harris and had no cause of action against him; and that Brisco took no reasonable pains to make inquiry into the real facts of the case or to ascertain those facts; and that, if he had acted as a reasonable man, he would never have aided Nailer in an action, and thereby put Harris, not only to the anxiety and trouble of being defendant in the action, but to the loss of his costs from the poverty of Nailer. Wills, J., has held, as a matter of law, that the mere desire to benefit Nailer is not a defence to the present action, "unless the defendant had some reasonable ground for his belief that he was furthering the cause of justice and supporting the oppressed against the oppressor."

It is, no doubt, remarkable that no case can be found in our law books in which the defence of charity has been actually raised to a proceeding for maintenance. But the proposition, that charity is a good defence, was asserted by the judges as well known and understood law more than four hundred years ago, when the law of maintenance was more familiar than it is now; and it has been adopted and accepted by the compilers of the Digests to which we are accustomed to look for

guidance; and upon this proposition no judge, counsel, or writer has, so far as we can learn, thrown any doubt. We hold that the proposition is part of the law of England....

But, if the law be correctly laid down in the passages we have cited, it appears to us to follow that the limitation put on the meaning of the word "charity" by Wills, J., cannot be maintained. He requires that charity shall be thoughtful of its consequences, shall be regardful of the interest of the supposed oppressor, as well as of the supposed victim, and shall act only after due inquiry and upon reasonable and probable cause....Of this limitation on the word "charity" no trace can be found in any of the authorities which have been cited; and, furthermore, in the other exceptions to the law of maintenance, (such as those arising from the relations between lord and tenant, master and servant, neighbour and neighbour), there appears, so far as we can learn, to be no case or dictum in the books in which the duty of making inquiry, or of acting only on reasonable and probable grounds, has been recognised as a limitation of the right of giving assistance.

Appeal allowed.

[EDITOR'S NOTE. In *Neville* v. *London "Express" Newspaper Ld.*, (L. R. [1919] A. C. 368) it was held by a majority of the House of Lords that the fact that the 'maintained' litigant—whether plaintiff or defendant—proved successful, is no bar to an action for Maintenance; the rule thus differing from that in actions for Malicious Prosecution. "The mischief to the public interest is done by the act of [a stranger's] affording support to the litigation; irrespectively of the result of the litigation"; p. 402. A majority also held, in the same case, that in an action for the tort of Maintenance nominal damages can never be recovered; so the civil action only lies when special damage can be proved, even though the Maintenance be punishable criminally. The action is not brought, as in Trespass or Assault, for the invasion of an absolute right; but only when the wrong has caused actual damage. "In the present case, there is no damage. The plaintiff has had to repay money which he had obtained by fraud; and to pay costs in respect of having resisted payment. It cannot be regarded as damage, sufficient to maintain an action, that he has had to discharge his legal obligations, or that he has incurred expense in endeavouring to evade them." (Lord Finlay, L.C. at p. 380.)

To 'maintain' *criminal* proceedings is not a Tort.]

[*It is a Tort to cause damage to a person by knowingly, and without justification, inducing any one, who has entered into a contract with him, to* break *that contract.*]

LUMLEY *v.* GYE.

COURT OF QUEEN'S BENCH. 1853. 2 E. & B. 216.

[THE declaration in this case consisted of three counts. The first two stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss Wagner, for her performing, as a singer, during three months at the plaintiff's theatre; and then stated that the defendant, knowing the premises and with a malicious intention, whilst the agreement was in full force and before the expiration of the period for which Miss Wagner was engaged, wrongfully and maliciously enticed and procured Miss Wagner to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre; and special damage, arising from the breach of Miss Wagner's engagement, was then stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of Her Majesty's Theatre, to perform at the said theatre for a certain specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his said theatre for profit to the plaintiff in that behalf; and that the defendant, well knowing the premises and with a malicious intention, whilst Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the said employment of the plaintiff; whereby she wrongfully departed from and out of the said service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time; and special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred: and the question for decision was, Whether any of the counts are good?]

ERLE, J. The question raised upon this demurrer is, Whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are

numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance; the answer appears to me to be, that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and, if he is made to indemnify for such breach, no further recourse is allowed; and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the action for this wrong, in respect of other contracts than those of hiring, are not numerous; but still they seem to me sufficient to shew that the principle has been recognised. In *Winsmore* v. *Greenbank*[1] it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contracts is, that the wife is not liable to be sued: but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green* v. *Button*[2] it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Sheperd* v. *Wakeman*[3] is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In

[1] Willes, 577. [2] 2 C. M. & R. 707. [3] 1 Sid. 79; *supra*, p. 502.

Ashley v. *Harrison*[1] and in *Taylor* v. *Neri*[2] it was properly decided that the action did not lie, because the battery, in the one case, and the libel, in the other case, upon the contracting parties were not shewn to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least Lord Mansfield's judgment in *Bird* v. *Randall*[3] is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measure of damages is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto.

* * * * * * *

[CROMPTON, J., and WIGHTMAN, J., delivered concurring judgments.

But COLERIDGE, J., delivered an elaborate dissentient opinion (which Lord Esher describes as "most careful, learned, and able"[4]); insisting that "This action cannot be maintained. Because:—1st. merely to induce or procure a free contracting party to break his covenant, (whether done maliciously or not), to the damage of another, is, for

[1] *Supra*, p. 362.
[2] 1 Esp. N. P. C. 386. Cf. p. 363 *n.*, *supra*.
[3] 3 Burr. 1345.
[4] L. R. 6 Q. B. D. at p. 337.

the reasons I have stated not actionable; 2nd. The law with regard to seduction of servants from their masters' employ, in breach of their contract, is an exception, the origin of which is known, and that exception does not reach the case of a theatrical performer."]

Judgment for plaintiff.

[EDITOR'S NOTE. The principle here asserted was confirmed by the Court of Appeal (though again the decision was not unanimous) in *Bowen* v. *Hall* (L. R. 6 Q. B. D. 333); and ultimately received the approval of the House of Lords in QUINN *v.* LEATHEM (*supra*, p. 188; L. R. [1901] A. C. 495).

The student should be warned that although the principle is stated as applying only against a person who acts *maliciously*, yet the only "malice" necessary to render him liable consists merely of the knowledge that the contract exists and that he has no adequate justification for procuring a breach of it. The embarrassing term "malice" appears therefore to be used here in only its weakest sense; and consequently may with advantage be replaced by the simpler word "knowingly." See the judgments of Lord James and Lord Lindley in *South Wales Miners' Federation* v. *Glamorgan Coal Co. Ld.* (L. R. [1905] A. C. 239). It still remains for the courts to determine what circumstances may afford a legal justification for deliberately procuring the breach of a contract. Will, for instance, a doctor's advice to a patient about service in a tropical climate, or a parent's to a daughter about an imprudent betrothal? The latter apparently would (L. R. [1903] 2 K. B. at p. 577); and so would the interest of a person who had a contract with the advisee older than, and inconsistent with, the advisee's contract with the plaintiff (L. R. [1919] 1 K. B. at 265). But the defendant's own self-interest is not an adequate justification; nor is his altruistic desire to benefit the advisee—see the *South Wales Case* above cited.

Conspiracy is in no wise essential to this tort; though it may well enhance the damages.

The student should note the wide exception created by the Trade Disputes Act, 1906 (6 Edw. 7, c. 47, § 3):—"An act done by a person in contemplation or furtherance of a Trade Dispute shall not be actionable on the ground *only* (1) that it induces some other person to break a contract of employment, or (2) that it is an interference with the trade, business, or employment, of some other person, or with the right of some other person to dispose of his capital or his labour as he wills." The word which I italicize—"only"—removes this exceptional defence wherever there is unlawful Molestation, for then there *is* some further ground of action; *Conway* v. *Wade*, L. R. [1909] A. C. 506.]

[*It is also a Tort to cause damage to a person by maliciously using any intrinsically unlawful means*[1] (*e.g. fraud, or threats of assault*) *to induce any one to* abstain from entering into *a contract with him.*

TARLETON AND OTHERS *v.* McGAWLEY.

NISI PRIUS. 1793. 1 PEAKE 270.

THIS was a special action on the case. The declaration stated that the plaintiffs were possessed and owners of a certain ship called the *Tarleton*, which at the time of committing the grievance was lying at Calabar on the coast of Africa under the command of one Fairweather. That the ship had been fitted out at Liverpool with goods proper for trading with the natives of that coast for slaves and other goods. That also, before the committing the grievance, Fairweather had sent a smaller vessel called the *Bannister* with a crew on board, under the command of one Thomas Smith, and loaded with goods proper for trading with the natives, to another part of the said coast called Cameroon, to trade with the natives there. That while the last mentioned ship was lying off Cameroon, a canoe with some natives on board came to the same for the purpose of establishing a trade, and went back to the shore; of which the defendant had notice. And that he, well knowing the premises, but *contriving and maliciously intending to hinder and deter the natives from trading* with the said Thomas Smith, for the benefit of the plaintiffs, did with force and arms fire from a certain ship called the *Othello* (of which he was master and commander), a certain cannon loaded with gunpowder, and shot at the said canoe, and killed one of the natives on board the same. Whereby the natives of the said coast were deterred and hindered from trading with the said T. Smith for the benefit of the plaintiffs, and the plaintiffs lost their trade.

Erskine, in his opening for the plaintiffs, distinguished this case from that of *Ashley* v. *Harrison*[2] where Lord Kenyon had held the injury to be too remote to be the foundation of an action. That decision (he said) was founded on principles recognized by the law of England from the earliest antiquity. So long ago as the days of

[1] Contrast ALLEN *v.* FLOOD (*supra*, p. 180), where the action failed because the abstinence had been induced by mere Advice, without the use of any means that were intrinsically unlawful.

On the question whether the *mere* fact that the inducement is effected by a numerous Combination of persons, can amount to a use of unlawful means, the student may consult QUINN *v.* LEATHEM (*supra*, p. 188), and the note at p. 194, *supra*. As Mr Balfour has said, "If too many people try 'peaceful persuasion' at one and the same time, it ceases to be peaceful."

[2] *Supra*, p. 362.

Bracton it was held that to constitute a duress in law it must not be "suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus qui in se contineat vitae periculum, aut corporis cruciatum[1]." But in this case the plaintiff's loss was not occasioned by "vain fears" in the negroes, or even by the fear of a battery being committed on them, but by a fear arising from the danger of life itself.

The plaintiffs called Thomas Smith, who proved the facts stated in the declaration; and further that the defendant had declared that the natives owed him a debt and that he would not suffer any ship to trade with them until that was paid; in pursuance of which declaration he committed the act complained of by the plaintiffs. On his cross-examination Smith admitted that by the custom of that coast no Europeans can trade until a certain duty has been paid to the king of the country for his licence, and that no such duty had been paid or licence obtained by the captain of the plaintiffs' vessel.

Law, for the defendant, contended that the plaintiffs being engaged in a trade which by the law of that country was illicit, [for want of the local chief's licence], could not support an action for an interruption of such illicit commerce. He compared this case to an action brought for interrupting a plaintiff in his endeavours to smuggle goods into this country, or for alarming the owner of a house which a plaintiff was about to break into. He also objected that this act of the defendant amounted to a felony, and therefore could not be made the ground of a civil action; but he did not lay much stress on this objection.

Lord Kenyon, C.J. This action is brought by the plaintiffs to recover a satisfaction for a civil injury which they have sustained. The injury complained of is, that by the improper conduct of the defendant the natives were prevented from trading with the plaintiffs. The whole of the case is stated on the record, and if the parties desire it, the opinion of the court may hereafter be taken whether it will support an action. I am of opinion that it will.

This case has been likened to cases which it does not at all resemble. It has been said that a person engaged in a trade violating the law of the country cannot support an action against another for hindering him in that illegal traffic. That I entirely accede to; but it does not apply to this case. This is a foreign law; the act of trading is not itself immoral, and a *jus positivum* is not binding on foreigners[2].

[1] Bracton II. 5.

[2] [Editor's Note. The student must not accept too implicitly Lord Kenyon's ruling as to this portion of the defendant's case. The doctrine that our courts will not give effect to the *Revenue* laws of other countries received high judicial support in the eighteenth century; but at the present day, as Mr Dicey says (*Conflict of Laws*, p. 562), "its validity may be open to question." Cf. Pollock on Contracts, ed. 1902, pp. 323–4.]

The king of the country and not the defendant should have executed that law.

Had this been an *accidental* thing, no action could have been maintained. But it is proved that the defendant had expressed an *intention* not to permit any to trade, until a debt due from the natives to himself was satisfied. If there was any court in that country to which he could have applied for justice, he might have done so. But he had no right to take the law into his own hands.

The plaintiffs had a verdict.

Note. In the beginning of the cause the plaintiff's counsel proposed asking the witnesses whether some of the negroes did not assign their fear of the defendant as a reason for not trading with the plaintiffs. But Lord *Kenyon* said that no declaration of the negroes could be received in evidence[1].

[EDITOR'S NOTE. See *Carrington* v. *Taylor* (11 East, 571); where the same principle was applied when guns had been maliciously fired to frighten away *birds* from an ancient decoy-pond of the plaintiff's, where he otherwise would have caught them. But Mr East, the reporter, raises the question whether the defendant would still have been liable if his motive, instead of being mere spite, had been—cf. the *Mogul Case*, p. 195 *supra*—the hope of *himself* shooting the birds on the wing, when he had frightened them into flight. In *Keeble* v. *Hickeringill* (cited 11 East 576), Lord Holt referring to the *Gloucester Grammar Schools Case* (*supra*, p. 174), said:—"If a man should lie in the way *with guns*, and frighten the boys from going to school, sure the schoolmaster might have an action."]

[1] [EDITOR'S NOTE. On the rule which thus excludes Hearsay evidence, see Kenny's *Outlines of Criminal Law*, pp. 363—373.]

[*If this inducing is done by a* Combination *of many persons, a continuous manifestation of ill-will by them, even when it involves no fear of* physical *violence, (e.g. mere Boycotting), may become an annoyance so serious as to constitute an* unlawful means *of inducement.*]

VEGELAHN *v.* GUNTNER AND OTHERS[1].

SUPREME COURT OF MASSACHUSETTS. 1896. 167 MASSACHUSETTS 92.

[IN this case the workmen of a manufacturer of furniture combined together to endeavour to induce him to adopt a new schedule of rates of wages. In pursuance of this combination, they struck work. To induce other workmen from filling up the situations they had abandoned, they "picketed" their late employer's premises by stationing a patrol there. This patrol, however, never consisted, at any one time, of more than two persons; and therefore did not constitute any physical intimidation. No violence to person or property was at any time threatened.

The Court was divided in opinion. The five judges who formed the majority held (against two dissentients) that an Injunction must issue to restrain the defendants from picketing; picketing being a Nuisance, and therefore intrinsically illegal. They further held that the Injunction must also restrain the defendants from any *combined* attempt to injure the plaintiff's business, by whatever means, e.g. even by mere "moral" intimidation.

O. W. HOLMES[2], J. (one of the two dissentients), delivered an elaborate judgment; in which, however, he conceded that a tort would have been committed if threats of *physical* violence had been used; for "working men cannot, any more than their opponents, be permitted to usurp in their controversies the State's prerogative of Force." He, moreover, fully admitted that, even when no physical force is threatened, any Combination of persons who effect injury to a man's business, though it be only by their "organised refusal of social intercourse," commit a Tort unless they can shew some lawful ground of justification.

But he proceeded to maintain that, for this mere Boycotting, Trade Competition would constitute full justification. For he regarded the *Mogul Steamship Co.'s Case* (*supra*, p. 195), as shewing that a combination, "of the most flagrant and dominant kind," to injure a man's business, will be legally justified whenever "the damage is done not for its own sake, but as an instrument in reaching the end of victory in

[1] This case was referred to with approval by Lord Lindley in *Quinn* v. *Leathem*.

[2] The author of an important treatise, well known to English students, on "The Common Law."

the battle of Trade." He added, "If the policy on which our law is founded be too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life'."...After referring to the change of opinion which has legalised Strikes, he proceeded (p. 109): "I feel confident that intelligent economists and legislators will similarly abandon the idea that an organized refusal, by workmen, of social intercourse with a man who shall enter their antagonist's employ, is wrong, when it is dissociated from any threat of violence and is made for the sole object of prevailing in a contest...about the rate of wages. The fact that the immediate object of the act (by which the benefit to themselves is to be gained) is to injure their antagonist does not necessarily make it unlawful; any more than when a great firm lowers prices in order to drive a smaller antagonist from the business."]

[EDITOR'S NOTE. The power and activity of Trades Unions is now so great in England that much legal controversy will probably continue to take place as to the precise extent of the rules of law that limit their conduct of hostilities. It will be important to consider in each case the particular *means* of inducement employed by the Combination in preventing the formation of contracts of service. For the means may be mere ordinary advice; or advice obtruded beyond the time up to which the advised person is willing to continue to listen; or picketing; or boycotting; or, beyond all these "moral" means, threats of physical force.

Notwithstanding the frequent references made to Combination in some of the judgments in *Quinn* v. *Leatham* (*supra*, p. 188), it now seems clear that there is *no* substantive tort of Conspiracy; *Davies* v. *Thomas*, 36 T. L. R. 571. (Yet see what was said by Peterson, J., in *Hodges* v. *Webb*, L. R. [1920] 2 Ch. at p. 92.) Thus what is innocent if done by a single individual will not become intrinsically unlawful by the mere fact that others combine with him in doing it. Combination, however, may become important as affording evidence of Actual Malice; or as intensifying into an illegal coercion the pressure which would be negligibly trivial if exercised by one person alone (cf. p. 524 *n. supra*); or even merely as increasing the harm done and consequently the damages.

An open question still [1920] awaiting judicial determination, notwithstanding *Bradford* v. *Pickles* (*supra*, p. 8), is whether the concurrent presence of both Combination and Actual Malice may not suffice to render interference with a man's business actionable, even where no illegal means of Molestation have been employed. See *per* McCardie, J., in *Pratt* v. *British Medical Association*, L. R. [1919] 1 K. B. at p. 277.]

[*It is a Tort for persons to prevent an actor from exercising his calling by combining together to hiss him down wantonly.*]

GREGORY *v.* DUKE OF BRUNSWICK, & H. W. VALLANCE.

NISI PRIUS. 1843. 1 C. & K. 24.

[ACTION on the case for a conspiracy to prevent an actor from performing; which was carried out by hiring a large number of persons to hoot, hiss, groan, and yell, and make a great noise, outcry, uproar, and riot, at and against him whilst performing the character of Hamlet at Covent Garden Theatre; whereby he lost the engagement which he was about to receive at the same theatre. He had made himself unpopular by writing scurrilous newspaper articles.]

Shee, for the plaintiff, referred to the case of *Rex* v. *Leigh and others* which occurred in the year 1775, and was an indictment for raising a disturbance at Covent Garden Theatre for the purpose of procuring the discharge of Mr Macklin. He cited the case of *Clifford* v. *Brandon*[1], in which Sir James Mansfield, C.J., says, "But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment." He also argued that, however the public might have a right either by hissing or otherwise to express their opinions of an actor, with respect to his merits or demerits as an actor, the public could have no right to hiss any actor on account of any dislike that might be entertained of his private character or conduct apart from his performance on the stage.

* * * * * * *

TINDAL, C.J., (in summing up)....You will say whether upon the evidence you are satisfied that the defendants are guilty of the conspiracy charged, and, if you are, what amount of damages the plaintiff has sustained. The law on this subject lies in a narrow compass. There is no doubt that the public who go to a theatre have the right to express their free and unbiassed opinions of the merits of the performers who appear on the stage. And I believe that no persons are more anxious that the public should have that right than the actors themselves; for if it were laid down that persons who exercised their free judgments would be subject to actions for damages, not only would it be fatal to the actors on the stage, but it would prevent persons from frequenting the theatre at all. At the same time parties have no right to go to the theatre by a preconcerted plan to make

[1] 2 Camp. 358.

such a noise that an actor, without any judgment being formed on his performance, should be driven from the stage by such a scheme, probably concocted for an unworthy purpose. And therefore it is only if you can see, by the evidence that has been given, that the two defendants had laid a preconcerted plan to deprive Mr Gregory of the benefits which he expected to result from his appearance on the stage, that you ought to find a verdict against them. A distinction has been taken as to the right of the public to express their feelings as to an actor's *private* character when on the stage. It is not necessary that I should give any opinion on that point; as the question here is, whether these parties went to the theatre according to a scheme that had been laid to prevent an actor from appearing. I, therefore, reserve to myself the free exercise of my opinion on the other point, and I will state it whenever it shall become necessary.

Verdict for the defendants.

[EDITOR'S NOTE. The subsequent discussion of the case, on a motion for a new trial, will be found in 6 Manning and Granger 205, 953. The law as above laid down was not disputed by the defendant's counsel.

"If hissing an actor off the stage is not actionable" writes Sir F. Pollock (*Torts* p. 336 *n.*), "the addition of malice will not make it so." But with sincere deference to so great a jurist, I would suggest that that broad principle does not apply here. (Cf. Irish L. R. [1906] 1 Ch. at p. 110.) Hissing is a defamatory act, a species of Slander; and though it can be justified when it is a Fair Comment, malice will prevent its being such; (see p. 318 *supra*). In an action by the well-known Charles Dibdin for a libel on his musical entertainment, Lord Kenyon sustained the right of fair comment on public performances, "but it must be done fairly and without malice or view to injure"; (*Dibdin* v. *Swan*, 1 Esp. 28). Slander does not necessarily involve the use of words. It "may be conveyed by signs or gestures only," (we may add) or by inarticulate sounds; as was held in Scotland, in *Drysdale* v. *Earl of Rosebery*, (11 Sessions Cases at p. 1121, A.D. 1909).

For the right to ask, and (if necessary) compel, an unreasonably troublesome spectator to leave the theatre, see *per* McCardie, J., in *Said* v. *Butt* (*Times*, June 26, 1920), and *per* Scrutton, J., in *Jay* v. *New B. P. V. Ld.*, (*Times*, June 30, 1910).]

Chapter III.—Negligence.

[*To cause damage to any one by your* carelessness *is no Tort, unless you were under some legal duty* to him *of being careful.*]

BLYTH *v.* TOPHAM.

Court of King's Bench. 1607. Cro. Jac. 158.

Action upon the case, for that Topham digged a pit in a common[1], by occasion whereof Blyth's mare (being straying there) fell into the said pit and perished. The defendant pleaded not guilty; and a verdict was found for him.

The plaintiff, to save costs, moved in arrest of judgment; saying the declaration was not good. For the mare was straying, and the plaintiff shews not any right why his mare should be in the said common. The digging of the pit was lawful as against *him*; and, although his mare fell therein, he hath not any remedy. It is *damnum absque injuria*; an action lies not by him.

And of that opinion was the whole court.

[Editor's Note. Similar to this is the American case of *Bush* v. *Brainard* (1 Cowen, 78). Brainard had put some buckets of maple syrup into an open shed, on his own unenclosed woodland. The plaintiff's cow came in the night and drank so much of the syrup that it caused her death. It was held by all the court that, although the defendant was guilty of gross carelessness, yet, as the plaintiff had no right to permit his cow to go at large on the defendant's land, he could not recover for the loss of her.]

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[1] Thirty-six feet distant from the highway; according to the report in 1 Rolle's Abr. 88.

[*Thus, as there is no legal duty to keep down the weeds on your land, there is no Tort in letting their seed spread over your neighbour's land.*]

GILES *v.* WALKER.

QUEEN'S BENCH DIVISION. 1890. L.R. 24 Q.B.D. 656.

APPEAL from the Leicester County Court.

The defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles; but, immediately upon its being cultivated, thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for such damage in the county court. The judge left to the jury the question whether the defendant in not cutting the thistles had been guilty of negligence. The jury found that he was negligent, and judgment was accordingly entered for the plaintiff. The defendant appealed.

Toller, for the defendant. The facts of this case do not establish any cause of action. The judge was wrong in leaving the question of negligence to the jury. Before a person can be charged with negligence, it must be shewn that there is a duty on him to take care. But here there is no such duty. The defendant did not bring the thistles on to his land; they grew there naturally. [He was stopped by the Court.]

R. Bray, for the plaintiff. If the defendant's predecessor had left the land in its original condition as forest land the thistles would never have grown. By bringing it into cultivation, and so disturbing the natural condition of things, he caused the thistles to grow, thereby creating a nuisance on the land just as much as if he had intentionally grown them. The defendant, by entering into occupation of the land with the nuisance on it, was under a duty to prevent damage from thereby accruing to his neighbour. The case resembles that of *Crowhurst* v. *Amersham Burial Board*[1], where the defendants were held responsible for allowing the branches of their yew trees to grow over their boundary, whereby a horse of the plaintiff, being placed at pasture in the adjoining field, ate some of the yew twigs and died.

[1] L. R. 4 Ex. D. 5.

LORD COLERIDGE, C.J. I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed.

[EDITOR'S NOTE. The yew-trees of the Amersham Board, on the other hand, were *not* a "natural growth," but had been actually planted (only four feet off the fence) by the Board.]

[*The plaintiff must shew that* a duty towards him *has been broken.*]

LANE *v.* COX.

COURT OF APPEAL. 1896. L.R. [1897] 1 Q.B. 415.

APPEAL from a judgment of nonsuit.

The defendant was owner of a house which he let unfurnished to a weekly tenant. There were no covenants to repair on the part of either the landlord or the tenant. The plaintiff was a workman, who came upon the premises at the request of the tenant for the purpose of moving some furniture. While so employed the plaintiff was injured owing to the defective state of the staircase in the house. There was evidence that at the time the house was let the staircase was in an unsafe condition. The plaintiff brought this action to recover damages for the injuries he had sustained, and it was tried before the Lord Chief Justice, who entered a nonsuit.

The plaintiff appealed.

E. W. Sinclair Cox (with him *F. Lampard*), for the plaintiff. The defendant let the premises in an unsafe condition and is liable, to a stranger who is injured, for misfeasance in so doing: *Nelson* v. *Liverpool Brewery Co.*[1] Where the defect exists at the time of letting the house, the landlord, in order to avoid liability to a stranger who is injured in consequence of the defect, must have thrown the duty of repairing upon the tenant. [He cited also *Payne* v. *Rogers*[2] and *Sandford* v. *Clarke*[3].]

B. F. Williams, Q.C. (with him *F. R. Y. Radcliffe*), for the defendant. The first proposition laid down by Erle, C.J., in *Robbins* v. *Jones*[4] covers this case: "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house." Apart from liability by contract, there

[1] (1877) 2 C. P. D. 311.
[2] (1794) 2 H. Bl. 350.
[3] (1888) 21 Q. B. D. 398.
[4] (1863) 15 C. B. (N.S.) 221, at p. 240.

is no case of a stranger, who is injured owing to the condition of the premises, being held to be entitled to recover against the landlord; unless the omission of the landlord creates a nuisance, or there was a duty arising to persons using a highway, or to an adjoining neighbour. Here there was no contract, no nuisance, and the landlord owed no duty to the plaintiff; and without the existence of a duty he cannot be liable for negligence. [He cited *Francis* v. *Cockrell*[1]; *Le Lievre* v. *Gould*[2].]

LORD ESHER, M.R....There was no contractual relation between the plaintiff and the defendant, and it was not like the case of a person who keeps a shop to which he intends people to come. It is said, however, that the defendant was guilty of negligence which led to the accident, because he let the house in a defective condition. It has been often pointed out that a person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. There are many circumstances that give rise to such a duty; as, for instance, in the case of two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other. So if a person has a house near a highway, a duty is imposed on him towards persons using the highway, and similarly there is a duty to an adjoining owner or occupier; and, if by the negligent management of his house he causes injury, in either of these cases he is liable. In this case the negligence alleged is the letting the house in an unsafe condition. It has been held that there is no duty imposed on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition; because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant, there cannot be a duty to a stranger. There was, therefore, no duty on the part of the defendant to the plaintiff, and there could be no liability for negligence, and the nonsuit was right.

* * * * * * *

Appeal dismissed.

[See TODD *v.* FLIGHT, *supra*, p. 457.]

[EDITOR'S NOTE. "If in *Lane* v. *Cox* no duty was created towards the plaintiff by the letting of the house in a dilapidated condition, what difference could it have made if the landlord had contracted with the tenant to keep it in repair?" So asked Collins, M.R., in *Cavalier* v. *Pope* (74 L. J. R., K. B. at p. 862); a case where the landlord had thus contracted, and the tenant's wife had been injured through the landlord's failing to repair.]

[1] (1870) L. R. 5 Q. B. 501. [2] [1893] 1 Q. B. 491.

[*And also that this breach was the proximate cause of the Damage.*]

COBB *v.* THE GREAT WESTERN RAILWAY COMPANY.

COURT OF APPEAL. 1893. L.R. [1893] 1 Q.B. 459.

APPEAL of plaintiff from judgment of a Divisional Court (Day and Collins, JJ.) on a point of law raised by the pleadings, which had been ordered to be disposed of before the trial; under Order xxv., r. 2.

The point of law was in substance whether the statement of claim disclosed any cause of action.

The statement of claim was as follows:—

1. On May 6, 1892, the plaintiff was received by the defendant company as a passenger, to be carried on defendants' railway by the 8.15 P.M. passenger train from Shrewsbury to Birmingham, for reward to the defendant company then paid by the plaintiff.

2. The said train, in the course of its journey, stopped at Wellington, and the plaintiff was there, while in the defendant company's railway carriage on the journey aforesaid, robbed by a gang of men, who there entered the said carriage, of the sum of £89. 1*s*., consisting of gold and silver and notes, which the plaintiff was then carrying in his pocket. The said gang of men numbered about sixteen.

3. The plaintiff forthwith complained of having been robbed as aforesaid to the defendant company's station-master; but the said station-master refused to detain the train to permit the plaintiff to give the said men into custody and have them searched.

4. It is the duty of the said station-master, as the defendant company's servant, to give the signal for the said train to be started; and, immediately upon plaintiff's complaint being made to him, he negligently and improperly, (and in breach of the duty owed by the defendant company to the plaintiff, as a passenger on their line, to protect him in person and property, and to oppose no obstacle to his recovering the property, whereof he had while on their line been wrongfully deprived), gave the signal for the said train to leave, and it left accordingly; and the plaintiff was thereby prevented, without any negligence on his part, from having the said men searched and his aforesaid property recovered. There was in and about the said station at the time of the robbery, as the said station-master well knew, a large force of police ready and willing to effect the said arrest for the plaintiff, and to search those arrested; but they were prevented from doing so by the action of the defendant company's servant in immediately starting the said train. The said £89. 1*s*. was still in the aforesaid compartment of the carriage at the time when the

plaintiff complained to the said station-master, and might and would then have been recovered, had he afforded time for the necessary search.

5. The defendant company was negligent in permitting the said carriage to be overcrowded, and so facilitating the hustling and robbing of the plaintiff. The said compartment of the carriage plaintiff was in was constructed to carry ten passengers, and the defendant company caused or permitted the said gang of sixteen men to enter it, after plaintiff was already seated in the said compartment.

6. The plaintiff has since prosecuted to conviction two of the aforesaid gang of sixteen men who robbed him (being all that have as yet been identified).

7. The plaintiff has by reason of the aforesaid negligence of the defendant company wholly lost the said £89. 1*s*.

The Divisional Court held that the statement of claim disclosed no cause of action.

R. W. Harper, for the plaintiff. It is the duty of a railway company towards a passenger to use due care for the safety of his person, and of the property which he has about him. Upon the statement of claim it appears that the defendants refused and neglected to give reasonable facilities for the recovery of the plaintiff's property which had been stolen while he was in their carriage. It was the duty of the defendants to give the plaintiff reasonable opportunity of having the carriage and the thieves searched and recovering his property. [He cited on this point the judgment of Chalmers, J., in *New Orleans, St Louis, and Chicago Ry. Co.* v. *Burke*[1].]

[LORD ESHER, M.R. The facts in that case were altogether different. There the question was as to the duty of the company to protect a passenger who was being assaulted by fellow-passengers. There was no question in the present case of interfering at the time to prevent violence or robbery. The robbery was over, and the question is as to the existence of a subsequent duty to give facilities for arresting or searching the thieves.

BOWEN, L.J. It is not specifically alleged in the statement of claim that the plaintiff ever told the station-master that he desired to give anybody in charge or to have anybody searched. His complaint in reality seems to be that the station-master did not delay the train to give him an opportunity of seeing what course he would take.]

By starting the train the station-master facilitated the escape of the thieves with the stolen property.

Secondly, it was negligence on the part of the defendants to allow the carriage to be overcrowded; and the statement of claim alleges,

[1] 24 American Reports, 689.

and, on this argument, it must be taken to be the fact, that the result of such negligence was that the plaintiff was robbed of his property....

LORD ESHER, M.R....It must be taken that the robbery was not due to any negligence of the defendants; it is not alleged that the plaintiff was being ill-used or assaulted in the train, and that, that fact being made known to the defendants' servants, they did not interfere to protect him. That would be a different case. Whatever was done to him was done and over; the robbery was finished when he complained to the station-master. The station-master was not, so far as appears from the statement of claim, asked to have the carriage or the men in it searched. What, upon the facts as stated, I should infer the plaintiff really wanted was that the train and the other passengers in it should be detained whilst the complaint of the plaintiff was being inquired into by the police. Was this part of the obligation imposed upon the company by their contract to carry the plaintiff safely? It seems to me to have nothing to do with that contract, and to be wholly outside of it. I do not think that, on the facts as stated, it is shewn that there was any obligation imposed on the station-master, as the servant of the company, to detain the train. If there was no obligation imposed on the company which they have broken or negligently performed, then it follows that there is no cause of action. Therefore, so far, I think that the plaintiff has no cause of action.

With regard to the second head of complaint, there was, according to the statement of claim, a breach of duty. It was the duty of the defendants not to allow their carriage to be overcrowded. But then it is necessary to shew that the alleged damage was such as would naturally and ordinarily result from such breach of duty. It cannot be considered as the probable and ordinary result of allowing a compartment of a railway carriage to be overcrowded that a passenger should be robbed by his fellow-passengers. The damage alleged is too remote. Therefore, upon the facts, as alleged by the statement of claim, I think that no cause of action is shewn.

* * * * * * *

Appeal dismissed.

[EDITOR'S NOTE. See the further proceedings in the House of Lords, L. R. [1894] A. C. 419.]

[*But the* doing *of any act, however lawful, usually imposes the legal duty of taking so much care as an ordinary reasonable man would take to prevent its causing damage to any one.*]

VAUGHAN *v.* MENLOVE.

COURT OF COMMON PLEAS. 1837. 3 BINGHAM N.C. 468.

[VAUGHAN, at the time of the injury complained of, was the owner of two cottages. The defendant was possessed of a close of land, with certain buildings and a hayrick thereon, near the said cottages. Owing to the spontaneous ignition of this hayrick, fire was communicated to the defendant's buildings. This fire spread to the plaintiff's cottages; which were thereby consumed.]

At the trial it appeared that the rick in question had been made by the defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire; that though there were conflicting opinions on the subject, yet during a period of five weeks the defendant was repeatedly warned of his peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

Patteson, J., before whom the cause was tried, told the jury that the question for them to consider, was, whether the fire had been occasioned by gross[1] negligence on the part of the defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the plaintiff, a rule *nisi* for a new trial was obtained, on the ground that the jury should have been directed to consider, not, whether the defendant had been guilty of gross[1] negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion; but whether he had acted bonâ fide to the best of *his* judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of

[1] [EDITOR'S NOTE. Negligence is divided into three degrees—slight, ordinary, extraordinary. "Gross" negligence is an ambiguous term; usually meaning "extraordinary," but sometimes employed (as in the present case) to mean no more than the "ordinary" degree; see Story on Bailments, sec. 17.]

intelligence. The action under such circumstances, was of the first impression....

R. V. Richards, in support of the rule.

First, there was no duty imposed on the defendant, as there is on carriers or other bailees, under an implied contract to be responsible for the exercise of any given degree of prudence. The defendant had a right to place his stack as near to the extremity of his own land as he pleased: *Wyatt* v. *Harrison*[1]. Under that right, and subject to no contract, he can only be called on to act bonâ fide to the best of his judgment. If he has done that, it is a contradiction in terms, to inquire whether or not he has been guilty of gross negligence. At all events what would have been gross negligence ought to be estimated by the faculties of the individual, and not by those of other men. The measure of prudence varies so with the varying faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence. In *Crook* v. *Jadis*[2], Patteson, J., says, "I never could understand what is meant by parties taking a bill under circumstances which ought to have excited the suspicion of a prudent man": and Taunton, J., "I cannot estimate the degree of care which a prudent man should take."...

TINDAL, C.J. I agree that this is a case *primæ impressionis*; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like where the bailee is responsible in consequence of the remuneration he is to receive. But there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequence of his own neglect. And though the defendant did not himself light the fire, yet mediately he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbour, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee: *Turbervill* v. *Stamp*[3]. And put the case of a chemist making experiments with ingredients, singly innocent, but when combined, liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbour, can any one doubt that an action on the case would lie?

It is contended, however, that the learned judge was wrong in leaving this to the jury as a case of gross negligence; and that the question of negligence was so mixed up with reference to what would

[1] 3 B. & Adol. 871. [2] 5 B. & Adol. 910. [3] 1 Salk. 13.

be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the defendant had acted honestly and bonâ fide to the best of *his own* judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various. And though it has been urged that the care which a prudent man would take is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs* v. *Bernard*[1]....The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

* * * * * * *

VAUGHAN, J. The principle on which this action proceeds, is by no means new. It has been urged that the defendant in such a case takes no duty on himself. But I do not agree in that position: every one takes upon himself the duty of so dealing with his own property as not to injure the property of others. It was, if anything, too favourable to the defendant to leave it to the jury whether he had been guilty of gross negligence; for when the defendant upon being warned as to the consequences likely to ensue from the condition of the rick, said, "he would chance it," it was manifest he adverted to his interest in the Insurance Office. The conduct of a prudent man has always been the criterion (for the jury) in such cases: but it is by no means confined to them. In insurance cases, where a captain has sold his vessel after damage too extensive for repairs, the question has always been, whether he has pursued the course which a prudent man would have pursued under the same circumstances. Here, there was not a single witness whose testimony did not go to establish gross negligence in the defendant. He had repeated warnings of what was likely to occur, and the whole calamity was occasioned by his procrastination.

Rule discharged.

[See FILLITER *v.* PHIPPARD, *infra.*]

[1] Ld. Raym. 909.

[EDITOR'S NOTE. Sir F. Pollock says (43 Revised Reports, p. v.): "*Vaughan* v. *Menlove* finally settled the rule of what Chief Justice Holmes of Massachusetts has aptly called 'the external standard'—that due care and caution do not consist in acting to the best of *one's own* judgment, but in acting with not less judgment than a man of *ordinary* sense and prudence may be expected to shew. The reasonable man of the law is a man of fair average understanding as well as good intentions." In the case of *Commonwealth* v. *Pierce* (138 Massachusetts at p. 176), Holmes, J., had said:—"So far as civil liability, at least, is concerned, it is very clear that what I have called 'the external standard' would be applied; so that, if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in *him*....The law deliberately leaves *his* idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation."]

[*The degree of care obligatory varies with the* obviousness *of the risk run.*]

SMITH *v.* THE LONDON AND SOUTH WESTERN RY. CO.

COURT OF EXCHEQUER CHAMBER. 1870. L.R. 6 C.P. 14.

APPEAL from a decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants or a nonsuit.

This was an action for negligence. The declaration contained three counts, of which the second and only material one was as follows:—"That at the time of the committing by the defendants of the grievances in this count mentioned, the plaintiff was possessed of a cottage and premises; and the defendants were possessed of and had the care and management of a railway running near the said cottage and premises, with banks belonging thereto, and part of the said railway, and were possessed of locomotive engines containing burning substances, which were used by the defendants for conveying carriages along this railway. Yet, by the negligence and improper conduct of the defendants, and the want of due care on the part of the defendants in the keeping and management of their said railway engines and banks, quantities of cut grass and hedge trimmings were heaped up on the said railway and banks, and became and were ignited; and a fire was occasioned which spread over and along a stubble-field, near the said railway, unto the said cottage and premises, and set fire to the same, and thereby the same and the plaintiff's furniture, &c., then being

in and near the said cottage and premises, were burnt and destroyed, and the plaintiff lost the use and enjoyment of the same."

The defendants pleaded not guilty, and issue was joined thereon.

The case was tried before Keating, J.

It was proved that the defendants' railway passed near the plaintiff's cottage, and that a small strip of grass extended for a few feet on each side of the line, and was bounded by a hedge which formed the boundary of the defendants' land; beyond the hedge was a stubble-field, bounded on one side by a road, beyond which was the plaintiff's cottage. About a fortnight before the fire the defendants' servants had trimmed the hedge and cut the grass, and left the trimmings and cut grass along the strip of grass. On the morning of the fire the company's servants had raked the trimmings and cut grass into small heaps. The summer had been exceedingly dry, and there had been many fires about in consequence. On the day in question, shortly after two trains had passed the spot, a fire was discovered upon the strip of grass land forming part of the defendants' property. The fire spread to the hedge and burnt through it, and caught the stubble-field; and, a strong wind blowing at the time, the flames ran across the field for 200 yards, crossed the road, and set fire to and burnt the plaintiff's cottage. There was no evidence that the defendants' engines were improperly constructed or worked; there was no evidence except the fact that the engines had recently passed, to shew that the fire originated from them. There was no evidence whether the fire originated in one of the heaps of trimmings or on some other part of the grass by the side of the line; but it was proved that several of the heaps were burnt by the fire. Two of the company's servants were proved to have been close to the spot when the fire broke out, and to have given the alarm; but they were not called by either side.

At the close of the plaintiff's case the counsel for the defendants submitted that there was no case to go to the jury. At the suggestion of the judge, and by a consent, a verdict was taken for the plaintiff for £30, subject to leave reserved to the defendants to move to set it aside, and instead thereof to enter a verdict for them, on the ground that there was no evidence to go to the jury of any liability on the part of the defendants....

The defendants applied for and obtained a rule pursuant to the leave reserved, which, after argument, was discharged[1], and from the judgment so given the present appeal was brought.

Kingdon, Q.C. (*Murch* with him), for the defendants. There is no evidence that the trimmings were the cause of the fire. It was proved that they were partially consumed by it, but not that it originated in them. Nor was there any evidence that the fire was caused by sparks

[1] L. R. 5 C. P. 98.

coming from the engine. There were many other ways in which it may have begun which are equally consistent with the evidence. Thus, a fusee may have been thrown from a window of one of the carriages of the train, or one of their workmen on the line may have dropped a spark from his pipe. Where the evidence is equally consistent with the view that the defendants were liable, and that they were not, there is no evidence to go to the jury.

[CHANNELL, B. But here the two causes of the fire that are suggested, viz., the engine and the pipe or cigar, are not of equal probability, and there was evidence for the jury, therefore, that the fire was caused by the more probable of the two alleged causes.]

The company would not be responsible for the sparks unless they acted negligently. The spark may have set fire to the dry grass, and then spread to the trimmings; and if the banks were properly kept, the fire would not, in that view, have been caused by the defendants' negligence, nor would the defendants be responsible.

[BLACKBURN, J. I understand Keating, J., to say that the trimmings increased the fierceness of the fire, if they did not originate it, and so made it spread.]

There is nothing in the evidence to shew what was the character of the fire before it got into the stubble-field.

[KELLY, C.B. Surely it would be for the jury to say whether it was more probable that the trimmings or the grass first ignited?]

Even if there be evidence that the heaps of trimmings contributed to the fire, there is no evidence that they contributed to the final result. The defendants are not answerable for any exceptional state of circumstances which they could not reasonably expect....

Cole, Q.C., for plaintiff. The season when this fire occurred had been a very dry one, and it was the duty of the defendants to take special care of their banks. Probably for that reason they did send men to cut the rummage, as it was called, and trim the hedges; but, instead of taking it away, they left the litter all along the line for a fortnight, to get dryer; and on the day in question it had been raked together in small heaps. It was clearly negligent, under the circumstances, to leave such inflammable matter lying all along the line....

KELLY, C.B....There is some doubt how the fire originated; but there was ample evidence for the jury, which would have been rightly left to them, that it originated from sparks from the engine falling on the dry heaps of trimmings, and thence extending to the hedge and stubble-field. If that was so, the question arises whether there was any negligence in the defendants. Now it can scarcely be doubted that the defendants were bound in such a summer, knowing that trains were passing from which sparks might fall upon them, to remove these heaps of trimmings. And, at any rate, it was a question for the jury

whether it was not negligent of them not to do so. I think, therefore, there was a case for the jury on which they might reasonably have found that the defendants were negligent in not removing the trimmings as soon as possible, and that this was the cause of the injury.

Then comes the question raised by Brett, J., to which at first I was inclined to give weight. He puts it thus: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding that they were of the best construction, and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage." It is because I thought, and still think, the proposition is true that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described that I felt pressed at first by this view of the question; but on consideration I do not feel that that is a true test of the liability of the defendants in this case. It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it....

BLACKBURN, J....It is clear that when the company were planning the railway they could not expect that the hedge would become so dry, and therefore were not negligent in putting a hedge instead of a stone wall; and though the drought had lasted some weeks, I can hardly think it was negligent in them not to remove the hedge. I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury, and not the state of the hedge, but I doubt on this point, and, therefore, doubt if there was evidence of negligence. If the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused. But if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots; which shews that what a person may reasonably anticipate is important in considering whether he has been negligent. Yet if a person fires across a road when it is dangerous

to do so and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a labourer.

* * * * * * *

LUSH, J....The more likely the hedge was to take fire, the more incumbent it was upon the company to take care that no inflammable material remained near to it.

Judgment affirmed.

[EDITOR'S NOTE. See Sir Frederick Pollock's remarks on this case; *Torts*, pp. 474–476.

A good contrast to *Smith* v. *L. S. W. Ry. Co.* is afforded by *Blyth* v. *Birmingham Waterworks Co.* (11 Ex. 781); a case, not of unusually hot weather, but of unusually cold. An extraordinary frost, "which penetrated to a greater depth than any which ordinarily occurs south of the Polar regions," prevented the due action of a safety-plug in the main water-pipe under a street, and so caused the plaintiff's house to be flooded. But such a frost was a contingency so remote that no reasonable man would have thought it necessary to provide against it. Alderson, B., (p. 784) well defined Negligence as being "The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or the doing something which he would not do."

In *Williams* v. *Eady* (9 T. L. R. 637, and 10 T. L. R. 41), Cave, J., thus illustrates the principle:—"Negligence is a question of degree. It would be negligence to leave a knife about, where a child of four could get at it; but not where only lads of eighteen would have access to it. Again, there are some dangerous things which it is necessary to leave about; whilst this would be negligence if they were not necessary." Accordingly the defendant, a schoolmaster, who kept a bottle of phosphorus, (which he used for making hockey-balls luminous when played with at night), in the room where the pupils' cricketing things were kept, was held liable for injuries caused to one boy by another's having carried off the bottle to the play-ground, where it exploded.]

[*And in matters requiring the skill of an* Expert *it is tortious Negligence not to exercise that full degree of skill.*]

DEAN *v.* KEATE.

NISI PRIUS. 1811. 3 CAMPBELL 4.

THIS was an action for the improper treatment of a horse, let to hire by the plaintiff to the defendant.

The defendant jobbed a pair of coach horses of the plaintiff. One of them being slightly indisposed, the defendant wrote a prescription for him. This medicine was not of itself calculated to do any injury; but after the horse had swallowed it, the defendant put him into harness, gave him strong exercise, and kept him exposed to the inclemency of the weather. In consequence of this treatment the animal was seized with an inflammation in the intestines. The defendant then, without consulting a veterinary surgeon, very imprudently prescribed a stimulating dose of opium and ginger. The horse, soon after taking it, died in great agony. Medical advice was called in when it was too late.

Park, for defendant, contended that the action could not be maintained; as the defendant had, at most, been guilty of only an error of judgment, and had treated the plaintiff's horse exactly as he would have treated his own.

LORD ELLENBOROUGH. The question is, whether the defendant has been guilty of gross negligence with respect to the horse. Had he called in a farrier, he would not have been answerable for the medicines the latter might have administered. But when he himself prescribes, he assumes a new degree of responsibility. And, prescribing so improperly, I think he did not exercise that degree of care which might be expected from a prudent man towards his own horse.

Verdict for plaintiff.

[EDITOR'S NOTE. Similarly any one who attempts to treat a sick person, (otherwise than on sudden emergency), will be liable for any lack of such skill as an ordinary qualified medical practitioner possesses; *Jones* v. *Fay* (4 F. & F. 525). If a local Board alter a sewer beneath some one's house, without an architect's help, they must do it, not merely to the best of *their* judgment, but as an architect would do it, to keep the house supported; (*Jones* v. *Bird*, 5 B. & Ald. 837).

The liability is wholly independent of Contract; thus a surgeon who, spontaneously and gratuitously, attends to a man who has fallen down senseless in the street, is bound to exercise his full professional skill; L. R. [1918] A. C. at p. 689. Yet there is no Contract; for neither consideration nor concurrent consent is present.]

[*But in the exceptional case of a* Barrister, *no Tort is committed by his conducting his client's business without* expert skill, (*or even without* ordinary care).]

FELL *v.* BROWN.

NISI PRIUS. 1791. 1 PEAKE 96.

THIS was an action against the defendant, a barrister, for unskilfully and negligently settling and signing a bill filed by the plaintiff in the Court of Chancery. The bill was referred by the Lord Chancellor to the Master, for scandal and impertinence; and the plaintiff was obliged to pay the costs of that reference.

Erskine, for the plaintiff, said he should prove this to be *crassa negligentia* and not a mere error in judgment. If a counsel gives his opinion on any question, and happens to be mistaken, it cannot be said that he has been guilty of gross negligence. But if he is so inattentive to his duty as to blunder in the ordinary course of business, he makes himself liable to an action, (as would a physician[1] for such gross misconduct).

LORD KENYON, C.J., was clearly of opinion that this action could not be supported....The Court of Chancery will in such cases exert a summary power if it is found expedient so to do; but if that Court will order the counsel to pay the costs, it does not follow that an action can be maintained....In a case where Lord Weymouth was a defendant, the Court thought the declaration full of unnecessary matter, and ordered it to be struck out with costs: but no one ever entertained an idea that an action could be maintained against the counsel who drew that declaration.

His Lordship added that he believed this action was the first—and, he hoped, the last—of the kind.

On this opinion, the cause was given up and the plaintiff nonsuited, without one witness being examined. His Lordship told the plaintiff's counsel he would take a note of the cause, that they might move for a new trial if they thought proper.

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[1] [EDITOR'S NOTE. See *Jones* v. *Fay*, (4 F. & F. 25); *Seare* v. *Prentice*, (8 East 348); and PIPPIN *v.* SHEPPARD, *infra*, p. 632.]

[*The burden of proving that the damage was caused by Negligence is on* the plaintiff.]

COTTON *v.* WOOD.

COURT OF COMMON PLEAS. 1860. 8 C.B, N.S. 568.

THIS was an action under Lord Campbell's Act, 9 & 10 Vict. c. 93, brought by the plaintiff, as administrator of his deceased wife, for an injury which resulted in her death....

The circumstances out of which the action arose were as follows:— The defendant was the proprietor of an omnibus running between Camberwell Gate and Hackney. On the 30th of November 1859, the omnibus was proceeding at a moderate pace on a journey from the latter place, the evening being dark, and snow falling fast, when, upon its reaching the Eastern Counties Railway Station, the wife of the plaintiff, accompanied by another woman, was attempting to cross the road (not at any ordinary crossing-place) in front of the omnibus, but, alarmed by the approach of another vehicle from the opposite direction, turned back, and was knocked down and run over by the omnibus before she could regain the pathway, and so injured that she died. The defendant's omnibus was on its right side, and within seven or eight feet of the kerb. The only circumstance which was at all suggestive of negligence on the part of the defendant's servant, was, that, though he saw the woman cross in front of his omnibus, he had (at the moment they turned back) looked round to speak to the conductor, and was not aware of their danger until warned by the cry of a bystander, but too late to avert the mischief.

It was proved on the part of the plaintiff, that the deceased had by her industry contributed to the extent of about 10*s.* weekly towards the maintenance of the family.

On the part of the defendant it was submitted that there was no evidence to go to the jury of actionable negligence on the part of the defendant's servant. Of this opinion was the learned judge, Willes, J.: but, to avoid the necessity of going down again if the court should think otherwise, he left the case to the jury, who returned a verdict for £25,—£10 for the plaintiff himself, and £15 for the children....

Thomas, Serjt., and *Griffits*, now shewed cause. They submitted that the fact of the driver permitting his attention to be called from his horses for a moment in a crowded thoroughfare was amply sufficient to justify the jury in finding negligence; and, they having by their verdict affirmed negligence, the court would not interfere....

Montagu Chambers was not called upon to support the rule.

ERLE, C.J. I am of opinion that this rule must be made absolute to enter a nonsuit. The plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of the defendant or his servant; and there can be no such proof, unless it be shewn that there existed some duty owing from the defendant to the plaintiff, and that there has been a breach of that duty. Now, I am utterly at a loss to find any evidence of any breach of duty here. It is as much the duty of foot-passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers. Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case.

According to the evidence, the plaintiff's wife, on a dark night, and in a snow-storm, proceeded slowly, accompanied by another female, to cross a crowded thoroughfare, whilst the defendant's omnibus was coming up on the right side of the road, and at a moderate pace, and with abundant time as far as I can judge for the women to get safe across if nothing else had intervened. But, in turning back to avoid another vehicle, they returned and unfortunately met the danger. What, then, is the ground for imputing negligence and breach of duty to the defendant's servant? One of the plaintiff's witnesses stated that the driver was looking round at the time to speak to the conductor. That alone clearly would be no affirmative proof of negligence. The man was driving on his proper side, and I do not find it imputed to him that he was driving at an improper pace. As far as the evidence goes, there appears to me to be just as much reason for saying that the plaintiff's wife came negligently into collision with the defendant's horses and omnibus as for saying that the collision was the result of negligence on the part of the defendant's servant.

Pollock, C.B., in a case of *Williams* v. *Richards*[1], laid it down that "it is the duty of persons who are driving over a crossing for foot-passengers, which is at the entrance of a street, to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon a crossing at the entrance of a street, so as not to get among the carriages, and thus receive injury." And I think I have known that to have been since followed by more judges than one. In *Toomey* v. *The London, Brighton, and South Coast Railway Company*[2], which was an action against a railway company for negligence, the facts were these:—On the platform of the station there were two doors in close proximity to each other; the one, for necessary purposes, had painted over it the words "For gentlemen," the other had over it the words "Lamp-room." The

[1] 3 C. & K. 81. [2] 3 C. B., N. S. 146.

plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and, having received a direction, by mistake opened the door of the lamp-room, and fell down some steps and was injured. It was held by this court, that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was *no evidence* of negligence on the part of the company. My Brother Williams there said: "It is not enough to say that there was *some* evidence; for, every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence." And that was adopted by Bramwell, B., in the case of *Cornman* v. *The Eastern Counties Railway Company*[1]. The very vague use of the term "negligence" has led to many cases being left to the jury in which I have been utterly unable to find the existence of any legal duty, or any evidence of a breach of it. I am clearly of opinion that the plaintiff has failed to make out any cause of action here, and consequently the rule for entering a nonsuit must be made absolute....

WILLIAMS, J. I wish merely to add, that there is another rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz. that, where the evidence is equally consistent with either view,—with the existence or non-existence of negligence,—it is not competent to the judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. That is a rule which ought never to be lost sight of.

The rest of the court concurring,

Rule absolute.

[EDITOR'S NOTE. The student may refer to *The East Indian Ry. Co.* v. *Kalidas Mukerjee*, L. R. [1901] A. C. 396, where a railway passenger in a smoking carriage had been burned by the explosion of fireworks brought into this carriage by a fellow-passenger. It would have been negligence in the railway company to permit *knowingly* the introduction of such a parcel. But the mere fact that the company had failed to detect the nature of the parcel was no proof that they had been negligent by so failing. It was for the plaintiff to prove that the parcel was a suspicious-looking one; not for the company to give proof that it was not.]

[1] 4 H. & N. 781.

[*Facts which are* not *sufficient to prove Negligence in a Rider.*]

HAMMACK *v.* WHITE.

COURT OF COMMON PLEAS. 1862. 11 C.B., N.S. 588.

THIS was an action upon Lord Campbell's Act, 9 & 10 Vict. c. 93, by Mrs Hammack, the widow and administratrix of William Hammack, to recover damages against the defendant for having by his negligence caused the death of the intestate.

The declaration alleged that the deceased, in his life-time, was lawfully passing in and along a certain common and public highway, and that the defendant so carelessly, negligently, and improperly rode a certain vicious horse in the said highway, that, by and through the carelessness, negligence, and improper conduct of the defendant in that behalf, the said horse ran with great force and violence upon and against the deceased, and cast and threw him down and so injured him that the deceased died.

The defendant pleaded not guilty; whereupon issue was joined.

The cause was tried before the Recorder of London in the Lord Mayor's Court, when the following facts appeared in evidence:—

On the 7th of May, 1861, the deceased was walking on the foot-pavement in Finsbury Circus, when he was knocked down and kicked by a horse on which the defendant was riding. He was picked up and carried to St Bartholomew's Hospital, where he died on the 16th from the injuries. The defendant had bought the horse at Tattersall's, and had taken it out to try it, when the horse became unmanageable and swerved from the roadway on to the pavement, notwithstanding the defendant's efforts to restrain him. It did not appear that the defendant had omitted to do anything he could have done to prevent the accident: but it was insisted on the part of the plaintiff, that the mere fact of the defendant's having ridden in such a place a horse with whose temper he was wholly unacquainted, was evidence of negligence. Some reliance was also placed upon the fact of there being certain police-notices affixed at various parts of the Circus, cautioning all persons not to exercise horses there.

The learned Recorder, being of opinion that there was nothing in the evidence to warrant a jury in finding that the defendant had been guilty of negligence, directed a nonsuit.

Patchett obtained a rule nisi for a new trial, on the ground of misdirection.

* * * * * * *

Patchett, for plaintiff...The deceased was walking on the foot-pavement in a populous thoroughfare, when he was knocked down and

killed by a horse which the defendant was "trying," having only purchased him the day before at Tattersall's, where it is well known that all horses are sold without warranty. That, it is submitted, was ample primâ facie evidence of negligence. [WILLIAMS, J. The defendant was carried against the deceased by a horse which all his apparently well-directed efforts were ineffectual to control.] What more could the plaintiff do than shew that the deceased was in a place where he might reasonably conceive himself to be safe, and that the defendant rode where he had no right to be? [ERLE, C.J. The fair result of the plaintiff's evidence was that the defendant was riding along quietly, when, for reasons not given, the horse became restive.] If the defendant had been called, it might have come out on cross-examination that he incautiously used a whip or a spur. [ERLE, C.J. The question before us, is, whether, on the evidence *then* before him, the judge was right in point of law in nonsuiting the plaintiff.]

ERLE, C.J....The plaintiff in a case of this sort is not entitled to have his case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant. The sort of negligence imputed here is, either that the defendant was unskilful in the management of the horse, or imprudent in taking a vicious animal (or one with whose propensities or temper he was not sufficiently acquainted) into a populous neighbourhood. The evidence is: that the defendant was seen riding the horse at a slow pace, that the horse seemed restless and the defendant was holding the reins tightly, omitting nothing he could do to avoid the accident; but that the horse swerved from the roadway on to the pavement, where the deceased was walking, and knocked him down and injured him fatally. I can see nothing in this evidence to shew that the defendant was unskilful as a rider or in the management of a horse. There is nothing which satisfies my mind affirmatively that the defendant was not quite capable of riding so as to justify him in being with his horse at the place in question. It appears that the defendant had only bought the horse the day before, and was for the first time trying his new purchase,—using his horse in the way he intended to use it. It is said that the defendant was not justified in riding in that place a horse whose temper he was unacquainted with. But I am of opinion that a man is not to be charged with want of caution because he buys a horse without having had any previous experience of him. There must be horses without number ridden every day in London of whom the riders know nothing. A variety of circumstances will cause a horse to become restive. The mere fact of restiveness is not even primâ facie evidence of negligence. Upon the whole, I see nothing which the learned Recorder could with propriety have left to the jury.

WILLIAMS, J....It is said that primâ facie the defendant was guilty of negligence because he was wrongfully on the foot-pavement. But the fact of his being on the foot-pavement is nothing unless he was there voluntarily: and, to say the least, it is quite as consistent with the facts proved that he was there involuntarily as that he was there by his own mismanagement....It was further contended that there was evidence to warrant the jury in coming to the conclusion that the defendant was riding a horse which he knew not to be fit for the purpose. But there was no evidence of a scienter.

KEATING, J. I am of the same opinion. If the evidence had shewn that this horse was a quiet and manageable horse, and that the deceased at the time he met with the injury which resulted in his death was walking on the foot-pavement, I must own I should have thought that there was primâ facie enough to call upon the defendant to shew that he had used due care and skill. Because then it would have been more consistent to assume that the accident arose from his want of care and skill. But here the evidence gets rid of that difficulty; for it shews that the beast was restless at the time, that he took fright, and that the defendant against his will, and not negligently, (inasmuch as he was doing all he could to avoid it), got placed in the position from which the mischief arose. That being so, the case is left in this position, that it is equally probable that there was not as that there was negligence on the part of the defendant. The plaintiff, therefore, fails to sustain the issue the affirmative of which the law casts upon her.

Rule discharged.

[*The plaintiff must prove not merely that the defendant was negligent but also that the damage was* caused by *that negligence.*]

WAKELIN *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

HOUSE OF LORDS. 1886. L.R. 12 APP. CAS. 41.

APPEAL from a decision of the Court of Appeal.

The action was brought by the administratrix of Henry Wakelin on behalf of herself and her children under Lord Campbell's Act, 9 & 10 Vict. c. 93.

The statement of claim alleged that the defendants' line between Chiswick Station and Chiswick Junction crossed a public footway; and that on the 1st of May 1882 the defendants so negligently and unskilfully drove a train on the line across the footpath and so neglected to take precautions in respect of the train and the crossing that the train struck and killed one Henry Wakelin, the plaintiff's husband, whilst lawfully on the footpath.

The statement of defence admitted that on that day the plaintiff's husband whilst on or near the footpath was struck by a train of the defendants, and so injured that he died, but denied the alleged negligence; did not admit that the deceased was lawfully crossing the line at the time in question; and alleged that his death was caused by his own negligence and that he might by the exercise of reasonable caution have seen the train approaching and avoided the accident.

At the trial before Manisty, J., and a special jury in Middlesex in December 1883 the following evidence was given on behalf of the plaintiff. It appeared from the defendants' answers to interrogatories that the crossing was a level crossing open to all foot passengers: that the approaches to the crossing on each side of the line were guarded by hand gates: that there was a slight curve at the crossing: that assuming the deceased to have been crossing the line from the down side and standing inside the hand gates but not on the line he could have seen a train approaching on the down side at a distance of nearly if not quite half a mile, but that when standing in the centre of the line he could have seen a train approaching on the down side at a distance of more than one mile: that the body of the deceased was found on the down side of the line and that he was run upon and killed by a down train: that the engine carried the usual and proper head lights which were visible at the distances above mentioned: that the company did not give any special signal or take any extraordinary precautions while their trains were travelling over the crossing: that

a watchman in the company's employ was on duty from 8 A.M. to 8 P.M. to take charge of the gates and crossing and amongst other duties to provide for the safety of foot passengers.

Oral evidence was given that from the cottage where the deceased lived it would take about ten minutes to walk to the crossing; that he left his cottage on the evening of the 1st of May after tea, and that he was never seen again till his body was found the same night on the down line near the crossing. There was no evidence as to the circumstances under which he got on to the line. Witnesses for the plaintiff gave evidence (not very intelligible) as to the limited number of yards at which an approaching train could be seen from the crossing, and as to obstructions to the view.

The defendants called no witnesses, and submitted that there was no case. Manisty, J., left the case to the jury who returned a verdict for the plaintiff for £800. The Divisional Court (Grove, J., Huddleston, B., and Hawkins, J.) set aside the verdict and entered judgment for the defendants. The Court of Appeal (Brett, M.R., Bowen and Fry, L.JJ.) on the 16th of May 1884 affirmed this decision. In the course of his judgment Brett, M.R., said that in his opinion the plaintiff in this case was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was also bound to give primâ facie evidence that the deceased was not guilty of negligence contributing to the accident; and that by reason of the plaintiff having been unable to give any evidence of the circumstances of the accident she had failed in giving evidence of that necessary part of her primâ facie case.

From this decision the plaintiff appealed.

Acland, for appellant. There was evidence of negligence (viz. the dangerous nature of the crossing; the neglect to whistle or use any kind of warning except the use of head lights; the withdrawal of the gatekeeper after 8 P.M.); from which the jury might reasonably infer that the negligence caused the death. The case was on all fours with *Williams* v. *Great Western Railway Company*[1]; which governed the present case.

[LORD HALSBURY, L.C.:—There the defendants neglected a statutory duty, thereby allowing the child to stray on to the line.]

Whether the duty is statutory or not can make no difference. He also contended that the onus was not on the plaintiff to shew that nothing else but the defendants' negligence contributed to the accident: per Lord Penzance in *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery*[2]; that all dicta to the contrary effect by Lord Esher, M.R., in the Court of Appeal in the present case and elsewhere were unsound and contrary to reason and authority; and commented upon *Davey* v.

[1] L. R. 9 Ex. 157. [2] 3 App. Cas. 1155, 1180.

London and South Western Railway Company[1]. He also distinguished *Hammack* v. *White*[2] and *Cotton* v. *Wood*[3]....

LORD HALSBURY, L.C.:—My Lords, it is incumbent upon the plaintiff in this case to establish, by proof, that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails. And if, in the absence of direct proof, the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails; for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition. "Ei qui affirmat non ei qui negat incumbit probatio." I am not certain that it will not be found that the question of onus of proof and of what onus of proof the plaintiff undertook, with which the Court of Appeal has dealt so much at large, is not rather a question of subtlety of language than a question of law.

If the simple proposition with which I started is accurate, it is manifest that the plaintiff, (who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without —her husband's own negligence as by the negligence of the defendants), does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both; but if that is the state of the evidence the plaintiff fails, because "in pari delicto potior est conditio defendentis." It is true that the onus of proof may shift from time to time as matter of evidence; but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, i.e., in this case the negligent act done, has discharged herself of that burden. I am of opinion that the plaintiff does not do this unless she proves that the defendants have "caused" the injury, in the sense which I have explained.

In this case I am unable to see any evidence of how this unfortunate calamity occurred. One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to shew that the train ran over the man rather than that the man ran against the train? I understand the admission, in the answer to the sixth interrogatory, to be simply an admission that the death of the plaintiff's husband was caused by contact with the train. If there are two moving bodies which come in contact, whether ships, or carriages, or even persons, it

[1] 12 Q. B. D. 70. [2] *Supra*, p. 551. [3] *Supra*, p. 548.

is not uncommon to hear the person complaining of the injury describe it as having been caused by his ship, or his carriage, or himself having been run into, or run down, or run upon. But if a man ran across an approaching train so close that he was struck by it, is it more true to say that the engine ran down the man, or that the man ran against the engine? Neither man nor engine were intended to come in contact, but each advanced to such a point that contact was accomplished....

LORD WATSON. In all such cases the liability of the defendant company must rest upon these facts,—in the first place that there was some negligent act or omission on the part of the company or their servants which materially contributed to the injury or death complained of; and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought; and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury.

I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants; and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour. That opinion was expressed by Lord Hatherley and Lord Penzance in the *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery*[1]. I agree with these noble Lords in thinking that, whether the question of such contributory negligence arises on a plea of "not guilty," or is made the subject of a counter issue, it is substantially a matter of defence; and I do not find that the other noble Lords, who took part in the decision of Slattery's Case, said anything to the contrary. In expressing my own opinion, I have added the words "in the first instance," because in the course of the trial the onus may be shifted to the plaintiff so as to justify a finding in the defendants' favour to which they would not otherwise have been entitled....

The evidence appears to me to shew that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents; and I am willing to

[1] 3 App. Cas. 1169, 1180.

assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned....

LORD FITZGERALD....There was evidence intended to establish negligence on the part of the defendants, in the absence of due and proper precautions for the safety of the public using that footpath. It seems to me that there was evidence of negligence, but it did not go so far as to establish that such negligence led to the death of Wakelin. It fell short of proving that the immediate and proximate[1] cause of the calamity was the negligence of the defendants. We are left to mere conjecture as to whether it was the causa causans, and that we cannot resort to. The plaintiff undertook to establish negligence as a fact, and that such negligence was the cause of her husband's death. She failed to do so, and the proper course to have adopted at the close of the plaintiff's case was to have directed a verdict for the defendants....

It has been truly said that the propositions of negligence and contributory negligence are (in such cases as that now before your Lordships) so interwoven as that contributory negligence, if any, is generally brought out and established on the evidence of the plaintiff's witnesses. In such a case, if there is no conflict on the facts in proof, the judge may withdraw the question from the jury and direct a verdict for the defendant, or if there is conflict or doubt as to the proper inference to be deduced from the facts in proof, then it is for the jury to decide. But if the plaintiff can establish his case in proof without disclosing any matters amounting to contributory negligence or from which it can be reasonably inferred—then the defendant is left to give such evidence as he can to sustain that issue....

Appeal dismissed.

[EDITOR'S NOTE. With this case the student may usefully contrast that of *Fenna* v. *Clare* (*supra*, p. 465), where the very peculiar facts rendered it less necessary to connect the nuisance and the injury by express evidence; and also that of *Byrne* v. *Boadle* (*infra*, p. 562), where the mere cause of the injury raised, of itself, a presumption of negligence on the part of the defendant. See also the opinion expressed by Vaughan Williams, L.J., *supra*, p. 26 n.]

[1] [EDITOR'S NOTE. There are various other synonyms; e.g. 'effective,' 'direct,' 'causa causans.' But Lord Sumner has expressed (*Times*, May 14, 1920) a preference for 'direct.' The very appropriate adjective 'proximate' has—he pointed out—the drawback of having acquired a specially narrow meaning when applied to marine or fire Insurance. *There* "only the *causa proxima*, the last cause alone, must be looked to," although in other liabilities a defendant may be responsible for an event which is simply an efficient cause or *causa causans* of the damage.]

[*What* may *be evidence of Negligence.*]

THE NORTH EASTERN RY. CO. *v.* WANLESS.

HOUSE OF LORDS. 1874. L.R. 7 H.L. 12.

THE cause was tried before Mr Justice Brett, at Durham, in the spring of 1869. It appeared that on the Pensher branch of the North Eastern Railway, there was, near Hylton, a spot at which the railway crossed a public highway on the level. There were the proper carriage-gates, and there was also on each side of the railway a gate for foot-passengers. The south side of the railway is called the up-line, the north, the down-line. The number of coal trucks daily passing there is very considerable. On the 27th of April, 1868, the plaintiff, in company with three other boys, came along the road on the north side of the railway to cross over the line by the level crossing. The evidence as to how the boys got on the line, whether through the carriage or the foot-passenger gate, was contradictory. A train of forty-eight empty coal-trucks was coming on the up, or south side of the line, from Sunderland to Pensher, and it passed through the Hylton station without stopping. The boys had with them a dog; and persons who were on the north, or down side of the line, shouted to the boys to keep the dog from running among the trucks. This train passed, and when it had done so the plaintiff advanced to cross the line, and was instantly knocked down by a train passing on the north, or down side, of the line, the side on which the boys had been standing. For the company, evidence was given that the plaintiff might have seen this train at the distance of half a mile; but on the part of the plaintiff it was stated that the distance between the carriage-gate on the north side and the line itself, is about twelve feet, and that the boys could not on that side see the approaching train till they were seven or eight feet within the gate on the north side. The rules and regulations of the company on this subject were put in evidence. Rule 174 was in these terms: "Unless a written order to the contrary be given by the engineer, the gates shall be kept shut across the carriage roads except when required to be opened to allow the railway to be crossed." Rule 175: "When the railway is required to be crossed, the gatekeeper shall, before opening the gates, satisfy himself that no engine is in sight, he shall then shew his danger signals, and keep them exhibited until the line is clear, when he shall close the gates and alter the signals." It did not appear that any signal was exhibited; and on the question whether the carriage-gate on the north side was or was not open, the evidence was contradictory.

It was contended for the company that there was no evidence of negligence to go to the jury. The learned judge, however, held that there was, and left the case to the jury, who found a verdict for the plaintiff, damages £100. A rule was obtained to enter a nonsuit on the ground that there was no evidence of negligence. This rule was discharged; and on appeal to the Exchequer Chamber that decision was affirmed[1]. This appeal was then brought.

Manisty, Q.C., for the company....The plaintiff was warned about the danger to his dog; he knew, therefore, that caution was necessary; he did not act with reasonable caution; he stayed till one train had passed by, and then, without taking any trouble to look whether another was coming, which he might have seen if he had looked, he advanced on the line and was injured. That injury was altogether the result of his own negligence, and there was no evidence to go to the jury that the company's servants had been guilty of any negligence at all. Even if the gates had been left open, that did not constitute an invitation to the plaintiff to come on the line; and there was no evidence to shew how he came there, or that he came through the carriage-gates at all; and it was those gates that were the special subject of provision in the section of the statute.

LORD CAIRNS, L.C....The only question raised in the case for your Lordships' determination is, whether there was here evidence of negligence to go to the jury? What the jurors should do upon the evidence, or whether they should find any damages or not, was a question for the jury, and is not for this House now to consider.

My Lords, the facts of the case have been stated so recently, that I do not think it necessary to repeat them. It appears to me that the circumstance that the gates at this level crossing were open at this particular time, amounted to a statement, and a notice to the public, that the line at that time was safe for crossing. And any person who, under those circumstances, went inside the gates, with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the circumstance that the gates were open. Then, when inside the gates, the boy who in this case was injured, saw what was inconsistent with the gates being open, namely, he saw one train passing; and it may very possibly be the case that that circumstance embarrassed him, and that his eyes and attention being fixed upon that particular train, when it passed out of the way he failed to see the other train. He appears not to have seen it, but attempted to cross the line, and was knocked down and injured. It is quite clear he might have seen the other train—there is no doubt about that—but the result of the state of facts only comes to this, that being brought upon the line through the circumstance of the gate being open, he was

[1] L. R. 6 Q. B. 481.

placed in a position which was more or less embarrassing, and he did not use his faculties so clearly as he might have done under other circumstances.

My Lords, the question is, might not a jury fairly consider that his being there at all was owing to the negligence of the railway company? It appears to me that there was evidence to go to the jury to which weight might have been given, and from which the jurors might have been led to conclude that he was there in consequence of the circumstance I have referred to, viz., the gates being open. And that being the only point for the Court to consider, I certainly am of opinion that the Court could not do otherwise than hold that the question of negligence might, upon this evidence, rightfully be submitted to the consideration of the jury.

I therefore move your Lordships that the judgment of the Exchequer Chamber and of the primary Court be affirmed, and that this appeal be dismissed with costs.

LORD CHELMSFORD and LORD SELBORNE concurred.

Appeal dismissed.

[*The respective functions of the* judge *and the* jury *as to the evidence adduced to prove Negligence.*]

See METROPOLITAN RAILWAY COMPANY *v.* JACKSON[1], *supra*, p. 45.

1 With this case may be compared that of *Drury* v. *N. E. Ry. Co.*, L. R. [1901] 2 K. B. 322; in which, as in it, the plaintiff's hand had been injured through a porter's having hastily shut the door of a railway-carriage.]

[*But sometimes the accident itself implies Negligence. "Res ipsa loquitur."*]

BYRNE *v.* BOADLE.

COURT OF EXCHEQUER. 1863. 2 HURLSTONE & COLTMAN 722.

[DECLARATION. For that the defendant, by his servants, so negligently and unskilfully lowered certain barrels of flour by means of certain machinery attached to the shop of the defendant, situated in a certain highway along which the plaintiff was then passing, that, through the negligence of the defendant by his said servants, one of the said barrels fell upon the plaintiff, whereby the plaintiff was thrown down and permanently injured, and was prevented from attending to his business for a long time, and incurred great expense for medical attendance. Plea, not guilty.

At the trial, the evidence adduced on the part of the plaintiff was only as follows: A witness named Critchley said: "I was in Scotland Road, on the side where defendant's shop is. When I was opposite to his shop, a barrel of flour fell from a window above, in defendant's house and shop, and knocked the plaintiff down. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope; I cannot say. I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. No one called out until after the accident." The plaintiff said: "On approaching defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling, I don't know how; but from defendant's." The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The plaintiff was accordingly nonsuited; but with leave to him to move the Court of Exchequer to enter the verdict for him with £50 damages (an amount assessed by the jury).

A motion was made to enter the verdict for the plaintiff.]

Charles Russell, for defendant....There is no evidence that the defendant or his servants were lowering the barrel. The purchaser of the flour may have been doing so. [POLLOCK, C.B. The presumption is that the defendant's servants were moving the defendant's flour. If

not, it was competent to the defendant to prove that.]...And there is no evidence of negligence;...the defendant's servants may have been using the utmost care and the best appliances....

POLLOCK, C.B. We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise. But I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out; and I think that such a case would, beyond all doubt, afford primâ facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence. And to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be primâ facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are primâ facie responsible; and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this; a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises and who is responsible for the acts of his servants who had the control of it. In my opinion the fact of its falling is primâ facie evidence of negligence; and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

Judgment for plaintiff.

[EDITOR'S NOTE. The phrase *Res ipsa loquitur*—"the accident talks," as Lord Justice Scrutton has graphically translated it—applies only "when the direct cause of the accident, and so much of the surrounding circumstances as was essential to the occurrence, were within the sole control of the defendants or their servants; so that it is not unfair to attribute to them a primâ facie responsibility. An accident in the case of traffic on a highway is in marked contrast to such a condition of things"; *per* Moulton, L.J., in *Wing* v. *L. G. Omnibus Co.*, L. R. [1909] 2 K. B. 652. That the hirer of a motor-cycle brings it back damaged, does not of itself prove that he has been negligent.]

[*A collision between two trains of the same Company is evidence of negligence on its part.*]

SKINNER *v.* LONDON, BRIGHTON AND SOUTH COAST RY. CO.

COURT OF EXCHEQUER. 1850. 5 Ex. 787.

[THE plaintiff went, in a train of the defendants, on an excursion from London to Brighton and back. On the return journey, it being then dark, the train in which the plaintiff was ran into another train, which had stopped a short distance from the station, in consequence of a luggage train before it having broken down. In the collision he received injuries, for which he brought this action.]

In summing up, Pollock, C.B., told the jury that the fact of the accident having occurred was of itself primâ facie evidence of negligence on the part of the defendants; referring to the ruling of Lord Denman, C.J., in *Carpue* v. *The London and Brighton Railway Company*[1]. The jury having found a verdict for the plaintiff,

Bramwell moved for a new trial on the ground of misdirection. The effect of the learned Judge's direction was to cast the onus probandi on the wrong party. The plaintiff complains of negligence, and therefore he is bound to prove it; and for that purpose it is not enough to shew that an accident in fact happened, but he ought further to prove, that the accident was the result of the defendants' negligence. [POLLOCK, C.B. Surely the fact of a collision between two trains belonging to the same company is primâ facie some evidence of negligence on their part. ALDERSON, B. This is not the case of a collision between two vehicles belonging to different persons; where no negligence can be inferred against either party, in the absence of evidence as to which of them is to blame. But here all three trains belong to the same company; and whether the accident arose from the trains running at too short intervals, or from their improper management by the persons in charge of them, or from the servants at the station neglecting to stop the last train in time, the company are equally liable; and it is not necessary for the plaintiff to trace specifically in what the negligence consists. And if the accident arose from some inevitable fatality, it is for the defendants to shew it.]...

PER CURIAM. We are all of opinion that there was evidence for the jury.

Rule refused.

[1] 5 Q. B. 751.

[*If the defendant's negligence compels the plaintiff to make a choice between two evils, the defendant is responsible for the evil incurred.*]

JONES *v.* BOYCE.

NISI PRIUS. 1816. 1 STARKIE 493.

THIS was an action on the case against the defendant, a coach proprietor, for so negligently conducting the coach, that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken.

It appeared that soon after the coach had set off from an inn, the coupling rein broke, and, one of the leaders being ungovernable, whilst the coach was on a descent, the coachman drew the coach to one side of the road, where it came in contact with some piles, one of which it broke, and afterwards the wheel was stopped by a post. Evidence was adduced to shew that the coupling rein was defective, and that the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road in order to stop the career of the horses. Some of the witnesses stated that the wheel was forced against the post with great violence; and one of the witnesses stated, that at that time the plaintiff, who had before been seated on the back part of the coach, was jerked forwards in consequence of the concussion, and that one of the wheels was elevated to the height of eighteen or twenty inches; but whether the plaintiff jumped off, or was jerked off, he could not say. A witness also said, "I should have jumped down had I been in his (the plaintiff's) place, as the best means of avoiding the danger." The coach was not overturned, but the plaintiff was immediately afterwards seen lying on the road with his leg broken, the bone having been protruded through the boot.

Upon this evidence, Lord Ellenborough was of opinion that there was a case to go to the jury; and a considerable mass of evidence was then adduced, tending to shew that there was no necessity for the plaintiff to jump off.

LORD ELLENBOROUGH, in his address to the jury, said,—This case presents two questions for your consideration; first, whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance, and if you should be of that opinion, the second question for your consideration will be, whether that default was conducive to the injury which the plaintiff has sustained. For if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the plaintiff, as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action is not maintainable. To enable the

plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril. If that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation. His Lordship, after recapitulating the facts, and commenting upon them, and particularly on the circumstance of the rein being defective, added:—If the defect in the rein was not the constituent cause of the injury, the plaintiff will not be entitled to your verdict. Therefore it is for your consideration, whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences. If, therefore, you should be of opinion, that the reins were defective, did this circumstance create a necessity for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril? If you are of that opinion, then, since the original fault was in the proprietor, he is liable to the plaintiff for the injury which his misconduct has occasioned. This is the first case of the kind which I recollect to have occurred. A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger; it must appear that there existed a reasonable cause for alarm.

The jury found a verdict for the plaintiff.—Damages £300.

[EDITOR'S NOTE. On proximity and remoteness of Damage see HADLEY *v.* BAXENDALE, *supra*, p. 207.]

[*Choice between evils.*]

CLAYARDS *v.* DETHICK.

COURT OF QUEEN'S BENCH. 1848. 12 Q.B. 439.

ON the trial, before Lord Denman, C.J., at the sittings in Middlesex after Easter term, 1847, it appeared that the plaintiff was a cab proprietor, having stables in Gower Mews, Gower Street. The mews communicated with the street by a passage 13½ feet wide and 56½ feet long, and had no other outlet. In November 1845, the defendants, acting under directions from the Commissioners of Sewers, were deepening a sewer in Gower Street, and carrying a drain, in communication with it, up the passage leading into Gower Mews. For this purpose they made an open trench about 13 feet long and 6½ feet wide; but not in the middle of the passage, the unbroken space on one side being about 4½, and on the other side 2½ feet wide. The opening was not fenced. Before the day on which the accident in question happened, the Commissioners had given notice to the occupiers of stables in the mews that the trench would continue open for a day or two longer, and they must put up with it; and had advised them to get other stables. On November 19th, the excavators had thrown the earth and gravel from the trench (unavoidably as was represented on behalf of the defendants) upon the wider space between the trench and the wall, to the height of four feet. About five in the afternoon of that day, the plaintiff was bringing one of his horses out of the mews, and was about to put down planks for the purpose of getting him over the narrower space, which was least obstructed. The defendant Davis asked him what he was going to do, and said he would not be answerable for anything that happened by taking the horse over in that manner. The plaintiff asked how he was to do it; and said that he must get the horse out. The defendant said: "Take him over on the other side; and I will be answerable." The plaintiff, with assistance, led the horse out, over the gravel. A little before six in the same evening, the plaintiff endeavoured to get another horse out in the same direction (neither defendant being then present); but the rubbish gave way. The horse fell into the trench, and was strangled in an endeavour to drag him out with ropes.

Evidence was given, on the part of the defendants, that, on this second occasion, their men cautioned the plaintiff not to make the attempt, for that he would endanger, not only his horse, but the lives of men who were in the trench; but that the plaintiff said he did not care, and would go over. The statement was denied by the plaintiff.

The Lord Chief Justice, in summing up, left it to the jury, in the first place, to say whether the defendants had been guilty of culpable negligence in not fencing the trench. His Lordship then observed that, if the defendants' witnesses were to be believed, and the plaintiff on the second occasion had, in defiance of warning, incurred an evidently great danger, this was a rashness on his part which would excuse the defendants: but that it could not be the plaintiff's duty to refrain altogether from coming out of the mews merely because the defendants had made the passage in some degree dangerous: that the defendants were not entitled to keep the occupiers of the mews in a state of siege till the passage was declared safe, first creating a nuisance and then excusing themselves by giving notice that there was some danger: though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained. And he left it to the jury to say whether or not the plaintiff had so acted. Verdict for plaintiff: damages £20.

Miller moved for a new trial on the ground of misdirection. He cited *Proctor* v. *Harris*[1], as shewing that a plaintiff cannot recover for damage caused by negligence where the injury has been partly occasioned by negligence of his own; and he contended that the plaintiff here committed such fault by attempting to bring his horse out of the mews, if the passage was at all dangerous; and that, instead of incurring danger even if it had been slight, he should have kept his horse in the stable, and brought an action, if necessary, for the obstruction. [LORD DENMAN, C.J. I thought the plaintiff might be justified in incurring a moderate danger, and that the facts proved as to the first coming out shewed it to be no more.]...[COLERIDGE, J. If a man is lying drunk on the road, another is not negligently to drive over him[2]. If that happened, the drunkenness would have made the man liable to the injury, but would not have occasioned the injury.] Here the plaintiff had an obvious danger before him, and was not justified in encountering it to avoid a delay. For that he might have had a legal remedy: if he chose rather to incur a danger, he might do so, but not at the cost of the defendants. If an extraordinary emergency had arisen, as a fire, the case might have been different. [PATTESON, J. Suppose the horse had been coming home; must he have been kept out of the stable till the entrance was pronounced safe?] He might have placed the horse at livery and brought an action for the keep....

COLERIDGE, J. The question is, not only whether the defendants did an improper act, but also whether the injury to the plaintiff may legally be deemed the consequence of it. The defendants say that that

[1] 4 C. & P. 337.

[2] [EDITOR'S NOTE. Contrast *Button* v. *Hudson R. R. Co.* (18 N. Y. 349), where a drunken man was thus run over; but, from the darkness, *without* negligence.]

injury was the result of his own wrongheadedness in attempting to pass when he was told that it could not be done without risk to his horse and to the men below. Then, was the question on this point properly left to the jury? I understand the Lord Chief Justice to have expressed himself strongly against the view taken by the defendants' counsel, but to have put the question in the manner which appears correct, by asking, namely, whether the plaintiff acted as a man of ordinary prudence would have done, or rashly and in defiance of warning. The plaintiff was not bound to abstain from pursuing his livelihood because there was some danger. It was necessary for the defendants to shew a clear danger and a precise warning. Whether these facts existed or not, was for the consideration of the jury; and, if the jury disbelieved them, the plaintiff was entitled to the verdict.

[Concurring judgments were delivered by LORD DENMAN, C.J., PATTESON, J., and WIGHTMAN, J.]

Rule discharged.

[EDITOR'S NOTE. This case was followed by the Supreme Court of the United States, in *Mosheuvel* v. *Columbia*, (191 U. S. 247).

Sometimes one of the two evils between which the plaintiff has had to make his choice may be an evil threatening not himself but a third person.

Thus in *Langendorff* v. *Pennsylvania Ry. Co.* (48 Ohio 316) a judgment against a railway company was upheld in a case where a little child had been (through the company's negligence in having no watchman at a level crossing) imperilled by a passing train, and the plaintiff bravely sprang to the child's rescue but was struck by the engine. The company urged that the plaintiff had voluntarily taken on himself a risk of an obviously hazardous character, and one which he was under no legal obligation to accept. But the court held that, though it was thus true that if he had chosen to stand by and permit the train to kill the child, he would have violated no rule of law, civil or criminal, yet that was not a conclusive test of the company's liability. "To entitle a plaintiff to relief for the consequences of another's negligence it is by no means necessary that the party injured should have been at the time in the discharge of a duty; his rights are perfect if he is in the performance of any lawful act. The act of the present plaintiff was not only lawful, but highly commendable; nor was he, in any legal sense, responsible for the emergency that called for such prompt decision. The negligence of the railroad company, in having no watchman, and in the unlawful rate of speed at which the train was running, were the causes of the danger. There was but the fraction of a minute in which to resolve and act; to require that a man so situated should stop and weigh the danger to himself, and compare it with that overhanging the person to be rescued, would be to deny the right of rescue altogether when the danger is imminent. The alarm, the excitement, and confusion; the uncertainty as to the proper move to be made; and the promptness required: all suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. A man is not necessarily chargeable with Contributory Negligence because he adopted a course of action that imperilled his life."]

[*But a plaintiff cannot recover for damage which, though* preceded *by Defendant's Negligence, was* not caused *by it.*
Nor even for damage caused *by it, if Negligence* of his own *also formed a part of the immediate cause.*]

PLUCKWELL *v.* WILSON.

NISI PRIUS. 1832. 5 CARRINGTON & PAYNE 375.

ACTION for an injury done to the plaintiff's chaise by a carriage of the defendant's, driven by his servant. There was contradictory evidence as to the cause of the injury, and also as to whether the defendant's carriage was in the centre of the road, or on its proper side.

Mr Justice ALDERSON left it to the jury to say whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servant, without *any* negligence on the part of the plaintiff himself; for if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict. Also, they would have to say whether it was altogether an accident; in which case also the defendant would be entitled to the verdict.

His Lordship also observed that a person was not bound to keep on the ordinary side of the road; but that, if he did not do so, he was bound to use more care and diligence, (and keep a better look-out, that he might avoid any concussion), than would be requisite if he were to confine himself to his proper side of the road.

Verdict for the plaintiff—Damages £25.

[EDITOR'S NOTE. Cf. *Lack* v. *Seward* (4 C. & P. 106) where a collision with the defendant's barge had sunk the plaintiff's; and Lord Tenterden, C.J., similarly ruled that plaintiff could not recover if the collision arose either (1) "from the state of the tide or other circumstances which persons of competent skill could not guard against," or (2) "when the plaintiff had put his barge in such a place that persons, though using ordinary care, would run against it."

An omnibus company is negligent if it do not stop its omnibuses when an intending passenger is getting up. But if he gets up without making it stop, he is guilty of "contributory negligence"; which may defeat his right to sue them for any injuries he may sustain by falling whilst getting up.

A curious American instance of contributory negligence is the case of *Green* v. *Ashland Water Co.* (101 Wisconsin 258); in which a water company, sued for causing typhoid fever by supplying water polluted by sewage, pleaded successfully that the customer had been guilty of contributory negligence in drinking it, for its pollution had become notorious. In several American cases where ladies have sued for injuries caused by falling upon a path or staircase, negligently left dangerous, they have been met by a plea of Contributory Negligence because they walked in such a place in high-heeled shoes.]

[*Over-strict adherence to the "Rule of the Road" may be such Contributory Negligence.*]

CHAPLIN *v.* HAWES.

NISI PRIUS. 1828. 5 CARRINGTON & PAYNE 554.

ACTION for an injury done to a horse which the plaintiff's servant was riding, by a cart which the servant of the defendant was driving. It appeared that the cart was advancing towards a turnpike having two gates; one for carriages going one way, and one for carriages going the opposite way. A chariot was stopping at the proper gate through which the cart should have gone, and this induced the driver to turn off to the other gate, when at the distance of about six yards. The plaintiff's servant was riding through that gate when the injury happened. He was called as a witness; and, on his cross-examination, stated that he was three or four yards from the gate, when he saw the cart coming towards it, and could have pulled up, but did not, because he thought the driver would wait for him, as it was not the gate through which the cart had a right to pass.

Wilde, Serjt., for the defendant. If the plaintiff's man was pertinaciously insisting on his right of coming through the gate, when he might have avoided the injury either by waiting or turning aside, the plaintiff cannot recover. His being on his right side will not justify him in persisting so as to produce the injury when it might have been prevented by his pursuing a different line of conduct[1].

Spankie, Serjt., for the plaintiff. It is desirable to adhere to the law of the road, in order not to mislead the opposite party; and, unless there is a clear mode of escape, the party who is on the proper side should not attempt any departure from the ordinary course, as he will make such an attempt at his own peril.

BEST, C.J. If the plaintiff's servant had such clear space that he might easily have got away, then I think he would have been so much to blame as to prevent the plaintiff's recovering.

But, on the sudden, a man may not be sufficiently self-possessed to know in what way to decide; and in such a case I think the wrong-doer is the party who is to be answerable for the mischief, though it might have been prevented by the other party's acting differently.

Verdict for the plaintiff—£31. 10*s.*

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[1] And, *a fortiori*, "where the road is sufficiently broad, even though a carriage be on its wrong side, yet, if there is sufficient room on the other side for other carriages, they are not justified in crossing the way [from *their* wrong side] in order to assert the right of the road. That is going into danger voluntarily." (*Per* Lord Kenyon, C.J.; 2 Espinasse 685).

[*To walk in the carriage-road does not constitute such Contributory Negligence.*]

BOSS *v.* LITTON.

NISI PRIUS. 1832. 5 CARRINGTON & PAYNE 407.

TRESPASS for injuring the plaintiff, by driving a cart against him. Plea—Not guilty.

It appeared that the plaintiff was walking in the carriage way in the neighbourhood of Islington, about ten o'clock in the evening, when the defendant, who was driving a taxed cart, turned out from behind a post chaise and drove against the plaintiff, and knocked him down. A policeman, who was called as a witness, stated that he never walked upon the foot-path, it was in so bad a state.

Comyn, for the plaintiff, called another witness, and was questioning him as to the state of the foot-path, when—

DENMAN, C.J., observed—I do not think that any more evidence need be given on that subject. The policeman has proved the state of the path. A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as carriages. But he had better not, especially at night, when carriages are passing along.

* * * * * * *

Thesiger addressed the jury, and contended that the plaintiff ought to have used the foot-path, so that he might have avoided any carriage passing; and that, if he had done so, the injury would not have been sustained.

Witnesses were called to shew that the plaintiff, previous to the injury, had had a paralytic stroke.

DENMAN, C.J., in summing up, said—That all persons, paralytic as well as others, had a right to walk in the road, and were entitled to the exercise of reasonable care on the part of persons driving carriages along it.

Verdict for the plaintiff—Damages £20.

[*Nor is it Negligence in a railway passenger to lean on the carriage-window.*]

GEE *v.* THE METROPOLITAN RY. CO.

EXCHEQUER CHAMBER. 1873. L.R. 8 Q.B. 161.

DECLARATION that the plaintiff was a passenger on defendants' railway to be safely carried; that defendants so negligently conducted themselves in carrying plaintiff and managing the carriage in which plaintiff travelled, that plaintiff fell out and was injured....

[The plaintiff was a passenger by the defendants' train, and, as it was passing from one station to another, he rose from his seat with a view of looking out of the window and took hold of the bar of the window and pressed against it. The pressure, such as it was, of some part of his body, upon his taking hold of the bar, caused the door to open, and the motion of the train to throw him out of the carriage, whereby he sustained the injury complained of.]

At the conclusion of the plaintiff's case, it was submitted on behalf of the defendants that the plaintiff was not entitled to recover, and the Chief Justice reserved to the defendants leave to move to enter a verdict for them or a nonsuit. The defendants did not offer any evidence, and the plaintiff then had a verdict for £250[1].

A rule was obtained to enter the verdict for the defendants on the ground that there was no evidence of liability.

* * * * * * *

M. Chambers, Q.C., for defendants....If the plaintiff had sat still in his place in the carriage, the company would have carried him safely. He must shew that their negligence was the immediate cause of the injury; whereas the whole mischief resulted from his own act....

[The rule having been discharged by the Court of Queen's Bench, the defendants appealed to the Exchequer Chamber.]

* * * * * * *

KELLY, C.B....Was there any evidence of negligence at all on the part of the defendants? I am of opinion that there was evidence for the jury to consider, whether the defendants' servants had not, when this train left the station from which it started on its journey, failed to see that the door was properly fastened in the ordinary manner in which such railway carriage doors are fastened. There was evidence to go to the jury that they had failed in the performance of that duty.

[1] It appeared that the Chief Justice left two questions to the jury: first, whether there was negligence on the part of the defendants in not properly fastening the door; secondly, whether there was negligence or improper or imprudent conduct on the part of the plaintiff.

But the preliminary question arises, is it their duty? I am of opinion that it is—that it is the duty of the railway company, by their servants, before the train starts upon its journey, to see that the door of every carriage is properly fastened. Here was evidence that this door was not properly fastened: for if it had been, it would not have flown open upon the degree of pressure that was applied to it by the plaintiff; and therefore there was evidence to go to the jury, upon which they were justified in finding negligence on the part of the defendants.

But then, I agree, we must go further, and inquire whether there was evidence of "liability": in other words, whether there was evidence also that this negligence of the company was the cause of the mischief which occurred to the plaintiff. I am of opinion that there was evidence. Certainly the mischief would not have befallen him if that door had been properly fastened. The question is, therefore, whether he did anything which it was not lawful for him to do, and which we should be satisfied, taking the whole evidence together, was the cause of the mischief which befel him. If he did, I agree that the case fails on the part of the plaintiff. But why? Because, though he has proved that the defendants were guilty of negligence, he has not proved that that negligence was the cause of the mischief which befel him. The question of what has been termed contributory negligence does not, in my opinion, arise: because I am clearly of opinion upon the facts that there was no evidence of contributory negligence.

...On the facts that are before us, then, the question is, whether there was evidence of negligence on the part of the company which caused the accident. I have already shewn that there was evidence of negligence; and that there was evidence to go to the jury that their leaving the door not properly fastened was the cause of the injury which the plaintiff sustained without any improper act on the part of the plaintiff. Because I am of opinion that any passenger in a railway carriage, who rises for the purpose either of looking out of the window, or of dealing with (and touching, and bringing his body in contact with) the door for any lawful purpose whatsoever, has a right to assume, and is justified in assuming, that the door is properly fastened; and if, by reason of its not being properly fastened, his lawful act causes the door to fly open, the accident is caused by the defendants' negligence.

* * * * * * *

Judgment affirmed.

[*If the plaintiff's negligence could have been obviated by ordinary care on the defendant's part, then the defendant's negligence is the* proximate *cause of the damage.*]

TUFF *v.* WARMAN.

COURT OF COMMON PLEAS. 1857. 2 C.B., N.S. 740.

THIS was an action in which the defendant was charged with having so negligently navigated a steam-vessel in the river Thames as to run against and damage the barge of the plaintiff.

The defendant pleaded,—first, not guilty,—secondly, that he had not the control or management of the steamer.

The cause was tried before Willes, J. The defendant was in charge of a steam-vessel called the *Celt*, as pilot, coming up the river, some miles below Gravesend. The plaintiff's sailing-barge was proceeding with a fair wind down the river, having two men on board, one of whom was at the helm. It did not appear where the other was; but it was clear that they kept no look-out. For the man at the helm stated that, the sail being in his way, he could not see forward without stooping; and he admitted, that, although he saw the steamer coming when a considerable distance off, he did not look out again until she was within two or three yards of him, and when it was too late to avoid the collision. The steamer, it appeared, was on her right side, according to the Admiralty regulations. The defendant stated that he was standing on the poop of the steamer, and saw the barge when about 300 yards distant, and immediately ported his helm; that, if the barge had done the same, the collision would have been avoided; that he thought the barge put her helm a-starboard; and that, finding a collision inevitable, he put his helm hard a-port, and backed his engines, but too late. The defendant's evidence was corroborated by that of the captain and the mate of the steamer. On the other hand, two seamen, who were on board a yawl, and who saw the whole transaction, distinctly swore that the steamer's helm was not ported.

On the part of the defendant, it was insisted that the plaintiff was not entitled to recover, inasmuch as he had failed to comply with the sailing regulations enforced by the statute 17 & 18 Vict. c. 104, ss. 296, 297, 298; and that, assuming that the defendant had been guilty of negligence, still, if there was any negligence on the part of the plaintiff, he could not maintain the action.

In leaving the case to the jury, the learned judge told them, that, if both parties were equally to blame, and the accident the result of their joint negligence, the plaintiff could not be entitled to recover; that, if the negligence or default of the plaintiff was in any degree the

proximate cause of the damage, he could not recover, however great may have been the negligence of the defendant; but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might not by the exercise of ordinary care have avoided it; that, as the people on board the plaintiff's barge were keeping no look-out, the defendant should have gone to starboard, or reversed his engines, and so avoided the collision. He referred for an illustration to the case of *Davies* v. *Mann*[1]. And he concluded thus,—"Do you consider that the absence of a look-out was negligence on the part of the plaintiff? If so, you will consider whether it directly contributed to the accident. If you think that the plaintiff directly contributed to the accident, you will find for the defendant; but, if you think that the defendant by his negligence directly caused the injury, you must find for the plaintiff."

The jury returned a verdict for the plaintiff, damages £106.

Collier, *Q.C.*, obtained a rule nisi for a new trial on the ground of misdirection on the subject of negligence, and that the verdict was against evidence.

* * * * * * *

Cockburn, C.J. This rule should be discharged.

As to the verdict being against the evidence, my Brother Willes, who tried the cause, reports to us not only that he was not dissatisfied with the conclusion the jury came to, but that he thinks the verdict was right: under these circumstances, therefore, the rule cannot be sustained on that ground.

As to the other ground, I have satisfied myself that the direction of the judge was right. The first objection to the summing up is, that it was left to the jury to say whether the plaintiff had by his own negligence directly contributed to the result: and it was contended, that, looking at the 296th and 298th sections of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, the case as to this part of it

[1] [Editor's Note. 10 M. & W. 546. In this action—which Lord Campbell, C.J., calls "the often-quoted Donkey Case"—the facts were these. The plaintiff, having tethered the forefeet of his donkey, turned it on a public highway, eight yards wide. Here the donkey remained, and was grazing on the side of the road, when the defendant's waggon and horses, coming down a slight descent at a smart pace, ran against it, and hurt it. The driver of the waggon was careless in being some distance behind his horses whilst they were going so fast. The judge told the jury that the plaintiff's negligence in leaving the tethered donkey on the public highway was no answer to the action, unless the donkey's being there was the *immediate* cause of the injury. The Court of Exchequer held that as the defendant might, by proper care, have avoided injuring the animal, he was liable for the consequence of his negligence, though the animal were there through the faulty act of the plaintiff. For that fault was connected with the injury only remotely; and not as its proximate cause.]

should have been left to the jury independently of the question of the plaintiff's having been contributory to the accident.... But all that the statute has done, is, to bring within the category of negligence the non-observance of the regulations prescribed by s. 296; so that, in the event of accident arising from such non-observance, the case stands precisely the same as it did before, and the question is to be tried by the ordinary rules. That being so, I think the direction was right, and that the true question in these cases, is, whether, the damage having been occasioned by the negligence of the defendant, the negligence of the plaintiff has directly contributed to it; and I think that, in this case, if the defendant could have made out negligence on the part of the plaintiff, that would have been an answer to the action. The way in which it was put on the part of the defendant was this, that, by his own negligence in omitting to keep any look-out, the plaintiff contributed to the accident. If that had been established to the satisfaction of the jury, the plaintiff would have been directly contributory, and the defendant would have been entitled to a verdict. That question *was* left to the jury, with such observations as suggested themselves to the learned judge. There being no misdirection, therefore, and the learned judge not being dissatisfied with the verdict, we see no ground for disturbing it.

* * * * * * *

WILLIAMS, J....After well considering the case of *Dowell* v. *The General Steam-Navigation Company*[1], I am unable to distinguish the mode of directing the jury here from that which the Court of Queen's Bench sustained there. The law was there laid down, in conformity with several previous decisions, that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he cannot recover, however great may have been the negligence of the defendant: but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question is whether the defendant might not by the exercise of ordinary care have avoided it. So far the doctrine of the cases is perfectly plain. But then comes the question, what is meant by the negligence of the plaintiff being proximately (or directly) contributory, or only remotely connected with the accident? And that is a question which must somehow or other be disposed of at the trial. I dissent entirely from the proposition urged by Mr Collier, that the plaintiff is disentitled to recover if his negligence is either proximately or remotely connected with the accident. But I feel great difficulty in dealing with the question whether the negligence was proximate or remote: and I certainly feel great difficulty in getting rid of that question of law by leaving it to the jury. That, however, was the course adopted in the

[1] 5 Ellis & Blackburn 195.

case of *Dowell* v. *The General Steam-Navigation Company*, and followed upon this occasion[1]....It was further objected that, when the matter came to be left to the jury, it should have been left to them to say whether they thought the defendant might by exercising ordinary care and diligence have avoided the accident. It seems to me that that was in effect left to them....

Rule discharged.

[EDITOR'S NOTE. On appeal, this decision was affirmed by the Exchequer Chamber; 5 C. B., N. S. 573. American lawyers call the rule laid down in it "the doctrine of the Last Clear Chance," imposing the injunction "Look and Listen."]

[*The plaintiff's own negligence affords no defence unless it formed part —not of the* inducing *causes but—of the* proximate *cause of the damage.*]

RADLEY AND BRAMALL *v.* THE LONDON AND NORTH WESTERN RY. CO.

HOUSE OF LORDS. 1876. L.R. 1 A.C. 754.

APPEAL against a decision of the Court of Exchequer Chamber.

The appellants were the plaintiffs in an action brought in the Court of Exchequer, in which they claimed to recover damages for the destruction of a bridge occasioned, as they alleged, by the negligence of the defendants' servants....

[The material facts were stated by Bramwell, B., in the Court of Exchequer as follows:—

The plaintiffs are colliery owners, who have sidings out of and on one of the defendants' lines; over these sidings is a bridge belonging to the plaintiffs with a headway of eight feet. It has been the course of business between the plaintiffs and defendants for the defendants to take from these sidings the plaintiffs' waggons loaded with coals and deliver or leave them at their destination; also to collect the plaintiffs' waggons when empty, and bring them to the sidings, and then leave them. When the waggons were so left on the sidings the plaintiffs dealt with them as they thought fit; i.e. took them to the pit to be loaded in such order and at such times as they pleased, or took them to their workshops if they needed repair. On a certain Saturday, after

[1] [EDITOR'S NOTE. And now followed invariably. For, though the question may be extremely subtle, it is one of Fact and not of Law.]

working hours, when the men were gone and the plaintiffs could only move them as they might on a Sunday, (i.e. by some special engagement of workmen), the defendants brought and left on one of the plaintiffs' sidings some empty waggons of the plaintiffs, and a waggon empty except that it had on it a waggon of the plaintiffs which had broken down and could not travel, and had to be brought in this way to the plaintiffs. The waggon so loaded was, with its load, eleven feet high, and therefore could not pass under the bridge. It remained where so left. On the next Sunday night, after dark, the defendants brought in a very long train of the plaintiffs' empty waggons, and pushed it on the siding where this waggon loaded with the disabled waggon was. It was pushed as far as the bridge. Had it been empty it would have passed underneath. (Probably the defendants had often pushed waggons in this way under the bridge; though there was evidence to shew they had been requested not to push things on the siding beyond a public highway, which was some distance before getting to the bridge in the direction from which the defendants brought the train of empty waggons. This is, perhaps, of no moment.) But the waggon so loaded coming to the bridge, and being unable to pass underneath, the train stopped. Those who had charge of it, without looking to ascertain the cause of the stoppage, gave momentum to the engine to such an extent that the waggon with its load knocked the bridge down.]

...At the trial, Mr Justice Brett told the jury that "You must be satisfied that the plaintiffs' servants did not do anything which persons of ordinary care, under the circumstances, would not do, or that they omitted to do something which persons of ordinary care would do.... It is for you to say entirely as to both points. But the law is this, the plaintiffs must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants[1]." The jurors having, on this direction, stated that they thought there was contributory negligence on the part of the plaintiffs, the learned judge directed that the verdict should be entered for the defendants, but reserved leave for the plaintiffs to move.

A rule having been obtained for a new trial, it was, after argument before Barons Bramwell and Amphlett, made absolute[2]. On appeal to the Exchequer Chamber the decision was, by Justices Blackburn, Mellor, Lush, Brett, and Archibald (*diss.* Justice Denman), reversed[3]. This appeal was then brought.

* * * * * * *

[1] Printed papers in the case.

[2] L. R. 9 Ex. 71.

[3] L. R. 10 Ex. 100.

LORD PENZANCE....The law in these cases of negligence is, as was said in the Court of Exchequer Chamber, perfectly well settled and beyond dispute.

The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann*[1], supported in that of *Tuff* v. *Warman*[2] and other cases, and has been universally applied in cases of this character without question.

The only point for consideration, therefore, is whether the learned judge properly presented it to the mind of the jury.

It seems impossible to say that he did so. At the beginning of his summing-up he laid down the following as the propositions of law which governed the case: It is for the plaintiffs to satisfy you that this accident happened through the negligence of the defendants' servants; and as between them and the defendants, that it was solely through the negligence of the defendants' servants. They must satisfy you that it was solely by the negligence of the defendants' servants, or, in other words, that there was no negligence on the part of their servants contributing to the accident; so that, if you think that both sides were negligent, so as to contribute to the accident, then the plaintiffs cannot recover.

This language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the plaintiffs' servants, they could not, without disregarding the direction of the learned judge, have found in the plaintiffs' favour, however negligent the defendants had been, or however easily they might with ordinary care have avoided any accident at all.

...It is true that in part of his summing-up the learned judge pointed attention to the conduct of the engine-driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine-driver might at this stage of the matter by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.

[1] 10 M. & W. 546; cf. p. 576, *supra*. [2] *Supra*, p. 575.

In point of fact the evidence was strong to shew that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine-driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. This substantial defect of the learned judge's charge is that that question was never put to the jury.

* * * * * * *

New trial ordered.

[*Contributory negligence on the part of the persons navigating a ship is not to be treated as contributory negligence in the passengers themselves.*]

MILLS *v.* ARMSTRONG.

THE "BERNINA."

HOUSE OF LORDS. 1888. L.R. 13 A.C. 1.

APPEAL from a decision of the Court of Appeal, reported as *The Bernina* (No. 2) in L.R. 12 P.D. 58. The facts appeared in a special case stated for the opinion of the court in three actions in personam brought in the Admiralty Division against the owners of the steamship *Bernina*; who were the appellants in this appeal.

In September, 1884, a collision occurred between the *Bernina* and the steamship *Bushire*, the result of which was that J. H. Armstrong, first engineer of the *Bushire*, T. T. Owen, second officer of the *Bushire*, and M. A. Toeg, a passenger on board the *Bushire*, were drowned. The collision was caused by the fault or default of the master and crew of the *Bernina*, and by the fault or default of the master and crew of the *Bushire*. Armstrong and Toeg had nothing to do with the negligent navigation of the *Bushire*; but Owen was in charge of her at the time and was directly responsible for it. The three actions were brought by the personal representatives of Armstrong, Owen, and Toeg respectively, to recover damages for their respective deaths.

The questions for the opinion of the court were (1) whether the defendants were liable for the damages sustained in each case; and (2) if liable, whether they were liable to pay the whole of such damages, or only a moiety in each case. Butt, J., on the authority

of *Thorogood* v. *Bryan*[1], pronounced that the defendants were not liable in any of the actions[2]. The Court of Appeal reversed this decision so far as it concerned the actions by the representatives of Armstrong and Toeg, and pronounced that the defendants were liable in those two actions for the damages proceeded for, and referred the amount to the registrar; being of opinion that *Thorogood* v. *Bryan* was wrongly decided; and that actions under Lord Campbell's Act (9 & 10 Vict. c. 93) were not admiralty actions; and therefore that the admiralty rule as to half damages did not apply to them[3].

Before the Court of Appeal the claim on behalf of Owen's representatives was given up; and the respondents in the appeal to this House consisted only of the representatives of Armstrong and Toeg respectively. The question as to damages was mentioned by the appellants' counsel but was not argued before this House.

Phillimore, for the appellants....The principle of *Thorogood* v. *Bryan* is sound....It is admitted that a plaintiff cannot sue when his driver is his own servant and is guilty of contributory negligence. The same result should follow whenever a plaintiff delegates [to *any* one, though not a servant], the control of a carriage or a vessel. The principle is sound in the case of goods; why not in the case of passengers?...

Lord Herschell....The appellants having, as they admit, been guilty of negligence from which the respondents have suffered loss, a primâ facie case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor again do they allege that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third person to be regarded as their acts; e.g. the relation of master and servant or employer and agent. But they rest their defence solely upon the ground that those who were navigating the vessel in which the deceased men were being carried were guilty of negligence without which the disaster would not have occurred.

They rely upon the case of *Thorogood* v. *Bryan*[1], which undoubtedly does support their contention. This case was decided as long ago as 1849, and has been followed in some other cases; but it was early subjected to adverse criticism. It has never come for revision before a court of appeal until the present occasion. The action was one brought, under Lord Campbell's Act, against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the kerb; and before he could

[1] 8 C. B. 115. [2] L. R. 11 P. D. 31. [3] L. R. 12 P. D. 58.

get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be able to pull up. The learned judge directed the jury that "If they were of opinion that want of care on the part of the driver of the deceased's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in *either* of those cases—notwithstanding that the defendant, by her servant, had been guilty of negligence—their verdict must be for the defendant." The jury gave a verdict for the defendant. The question was then raised, on a rule for a new trial on the ground of misdirection, whether the ruling of the learned judge was right. The court held that it was.

It is necessary to examine carefully the reasoning by which this result was arrived at. Coltman, J., said: "The passenger has so far identified himself with the carriage in which he was travelling that want of care in the driver will be a defence to the driver of the carriage which directly caused the injury." Maule, J., and Vaughan Williams, J., also dwelt upon this view of the "identification" of the passenger with the driver of the vehicle in which he is being carried.

With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of Identification upon which they lay so much stress. In what sense is the passenger by a public stage-coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former *liable* to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; (though if "negligence of the owner's servants is to be considered negligence of the passenger," it is not easy to see why it should not be a bar to such an action). In short, as far as I can see, the "identification" appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured....But the relation between the passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognised categories in which the act of one man is treated in law as the act of another....

Lord Watson. *Thorogood* v. *Bryan* has not met with general acceptance, and it cannot be represented as an authority upon which persons guilty of contributory negligence are entitled to rely.

When the combined negligence of two or more individuals, who are not acting in concert, results in personal injury to one of them, he

cannot recover compensation from the others; for the obvious reason that but for his own neglect he would have sustained no harm. Upon the same principle individuals who are injured, without being personally negligent, are nevertheless disabled from recovering damages if at the time they stood in such a relation to any one of the actual wrongdoers as to imply their responsibility for his act or default. That any constructive fault which implies the liability of those to whom it is imputable to make reparation to an innocent sufferer, must also have the effect of barring all claims at their instance against others who are in pari delicto, is a proposition at once intelligible and reasonable. If they are within the incidence of the maxim "qui facit per alium facit per se," there can be no reason why it should apply in questions between them and the outside public and not in questions between them and their fellow-wrongdoers. But the facts which were before the court in *Thorogood* v. *Bryan* do not appear to me to bring the case within that principle....

It appears to me that the "Identification" upon which the decision in *Thorogood* v. *Bryan* is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle except perhaps the right of remonstrance when he is doing, (or threatens to do), something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am therefore unable to assent to the principle upon which the case of *Thorogood* v. *Bryan* rests. In my opinion an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or in one with innocent third parties, by the negligence of the driver or of the master and crew, unless he actually assumes control over their actions and thereby occasions mischief. In that case he must of course be responsible for the consequences of his interference....

Appeal dismissed.

[EDITOR'S NOTE. This decision confirms the emphatic opinion which Lopes, L.J., had expressed in the court below, that "The theory of the Identification of the passengers with the driver is a fallacy and a fiction, contrary to sound law and opposed to every principle of justice"; (L. R. 12 P. D. at p. 99).]

[*If, though the defendant were negligent, another person's negligence were the sole proximate cause of damage, neither that person nor even any* child under his charge *can recover from the defendant.*]

WAITE *v.* THE NORTH EASTERN RY. CO.

EXCHEQUER CHAMBER. 1858. E.B. & E. 719.

[ACTION by Alexander Waite, the younger, an infant, (by Alexander White, his "next friend").

The plaintiff, an infant of the age of five years, accompanied his grandmother, Mrs Park, to a station belonging to the defendant company. Mrs Park there bought a ticket for herself, and a half ticket for plaintiff. She and the plaintiff began to cross the line to get to the platform from which their train was to start. But whilst so doing, they were run over by a train; and Mrs Park was killed, and the child was injured.

The jury, (in answer to questions put to them by the learned judge, Martin, B.), found that defendants were guilty of negligence, and that Mrs Park was also guilty of negligence which contributed to the accident; and they assessed the damages at £20. There was no negligence, nor was any suggested, on the part of the infant plaintiff. The judge directed a verdict for the plaintiff for £20, with leave to the defendants to move to enter a verdict for them. The Court of Queen's Bench, after argument, entered the verdict for the defendants. The plaintiff appealed to the Exchequer Chamber.]

* * * * * * *

Overend, for plaintiff. It does not follow, from the company accepting the child as a passenger, that they accepted the grandmother as his agent. Suppose a party is injured by the collision of two carriages in neither of which he is: he may recover against both. Now that is the present case, unless the grandmother is, for the purpose of the conveyance, the agent of the child; and that she cannot be, inasmuch as the child has no capacity for selecting an agent. But, further, the jury have found positive negligence on the part of the defendants: that puts an end to the defence from negligence of the plaintiff, which is a defence properly resting on estoppel. Nor is this quite like the case of a child in arms: the company might have ordered the plaintiff to be taken off the railway, and ought to have done so.

COCKBURN, C.J. I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I put the case on this ground: that, when a child of such tender and imbecile age is brought to a railway station or to any conveyance, for the purpose of being con-

veyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. Such care not being used, where the child has no natural capacity to judge of the surrounding circumstances, a child might get into serious danger from a state of things which would produce no disastrous consequences to an adult capable of taking care of himself. Here the child was under the charge of his grandmother; and the company must be taken to have received the child as under her control and subject to her management. The plea and the finding shew that the negligence of the defendants contributed partially to the damage; but that the negligence of the person in whose charge the child was, and with reference to whom the contract of conveyance was made, also contributed partially. There is not therefore that negligence on the part of the defendants which is necessary to support the action.

* * * * * * *

Judgment for defendants.

[EDITOR'S NOTE. This decision was recognised in the *Bernina* case, (*supra*, p. 581), as unaffected by the judgments there given.

It may be supported on various grounds. There is the narrow one of the Contract, whereby the plaintiff's rights had impliedly been made conditional upon his grandmother's taking ordinary care of him. A wider one, which would be available on behalf of even a non-contracting wrongdoer, is the principle of a fictitious "Identification" of young children (too young to take charge of themselves) with the persons in whose charge they are. The fiction of such a species of "constructive contributory negligence" is far less glaring than that once-current identification of an ordinary passenger with the carrier who is conveying him, which was authoritatively rejected in the *Bernina* case; and consequently may still be valid, in spite of that rejection. When Lord Watson said in that case, (L. R. 13 App. Ca. at p. 19), "The theory that an adult passenger places himself under the guardianship of the driver, so as to be affected by the driver's negligence, appears to me to be absolutely without foundation," he also said, "There is no analogy between an infant incapable of taking care of itself, and a passenger *sui juris*."

But a plainer explanation, and one which would be more generally accepted at the present day, is that of Proximity of Causation. The company were free from liability simply because (in Sir F. Pollock's words) "the needful foundation of liability was wanting; namely, that the defendant's own negligence, and not something else for which he is not answerable, should be the proximate cause." See the remarks on this case in Pollock on *Torts*, p. 455; and in Bigelow on *Torts*, p. 382. That explanation, however, (as both writers admit) assumes that the grandmother's negligence constituted the whole and sole "proximate" cause of the child's injuries. The assumption is sound enough. Yet it may be doubted whether the jury adopted it; they may really have regarded the proximate cause as consisting of the *combined* acts of negligence of the grandmother and the railway company—a view apparently adopted by the company themselves when urging, in their second plea, merely that the lady's negligence "occasioned the said damage and injury *as much as* the negligence of the defendants."]

Chapter IV.—Breaches of Duties of Extraordinary Responsibility.

[*In some exceptional cases, the law imposes a higher duty than the usual one of avoiding ordinary Negligence on the part of yourself and your servants*[1].]

(1) Duties of Insurance.

[*A person in possession of loaded* firearms *is responsible—even though guilty of no Negligence—for any harm done by them.*]

DIXON *v.* BELL.

Court of King's Bench. 1816. 5 Maule & Selwyn 198.

[The declaration stated that the defendant was possessed of a gun; and that he, well knowing the same to be loaded, wrongfully sent a female servant to fetch away the gun so loaded, he well knowing that the said servant was too young to be sent for the gun, and to be intrusted with the care of it; and which said servant afterwards, while she had the custody of the said gun accordingly, carelessly and improperly shot off the same into the face of the plaintiff's son and servant, and struck out his right eye and two of his teeth, whereby the plaintiff was deprived of his service, and put to great expense in procuring his cure. There was a second count, for taking such improper care of the gun, knowing that it was loaded, that the gun was afterwards discharged against the plaintiff's son. Plea, not guilty.]

The plaintiff and defendant both lodged at the house of one Leman, where the defendant kept a gun loaded, in consequence of several robberies having been committed in the neighbourhood. The defendant left the house, and sent a mulatto girl, his servant, of the age of about fourteen[2], for the gun, desiring Leman to give it to her and to take the priming out. Leman accordingly took out the priming, told the girl so, and delivered the gun to her. She put it down in the kitchen; but soon afterwards took it up again, and presented it, in play, at the plaintiff's son (a child between eight and nine), saying she would shoot him; and drew the trigger. The gun went off, and the consequences

[1] [Editor's Note. See Pollock and Maitland's *History of English Law* (I. 32), that the cases—now distinctly exceptional ones—in which this principle is adopted, are relics of what, in Anglo-Saxon law, used to be the *general* legal doctrine.]

[2] The Nisi Prius reporters, (Holt 233, 1 Starkie 287) make her only *twelve*.

stated in the declaration ensued. There was a verdict for the plaintiff, damages £100.

The *Attorney-General* moved for a new trial, on the ground that the defendant had used every precaution which he could be expected to use on such an occasion; and, therefore, was not chargeable with any culpable negligence.

LORD ELLENBOROUGH, C.J. The defendant might and ought to have gone farther. It was incumbent on him who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents. And though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved that the order to Leman was not sufficient. Consequently, as, (by this want of care), the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable.

BAYLEY, J. The gun ought to have been so left as to be out of all reach of doing harm. The mere removal of the priming left the chance of some grains of powder escaping through the touchhole.

Rule refused.

[EDITOR'S NOTE. Sir F. Pollock points out (*Torts*, p. 485 *n.*) that the case might even have been disposed of on a lower ground; viz. that defendant was guilty of ordinary negligence, by sending an incompetent person to fetch a loaded gun, as insisted on in the first count of the declaration. It is, however, as he elsewhere says, (17 Revised Reports v) a hard case but one that has not been disputed. Had the child died, would Bell have beeu guilty of manslaughter? The editor of Russell on *Crimes* (III. 177) says Yes; but Stephen (*Digest*, art. 210 *n.*) says No, (so making the case show the difference between civil and criminal standards of negligence). Yet he admits that it is "just on the line."

Though the master was here held liable, it was not because the servant was acting within the scope of her employment, for clearly she was not; (contrast LIMPUS *v.* LONDON GENERAL OMNIBUS CO., *supra*, p. 79). A distinction must be noted between such cases, where the defendant's liability arises from his *keeping* a loaded gun, and those in which it arises from his *using* one. In the latter class, it is now settled that he is only rendered liable by his actual Negligence; see STANLEY *v.* POWELL, *supra*, p. 140, (unless this latter case is to be explained away as applying only to persons who have voluntarily joined a shooting party and thereby accepted some of its risk, not to mere outsiders even when injured by sheer accident). In a later Irish case of *Sullivan* v. *Creed* (Ir. L. R. [1904] 2 K. B. 317) the possessor had placed the gun in a field; but near a private path. A passer-by took it up; and, by his carelessness, wounded the plaintiff with it. The Court of Appeal unanimously held the (original) possessor to be liable. In the court below some of the judges, whilst agreeing in the legal principle that he would be liable for the damage done by any *probable* use of the gun, thought that the facts lay just over the border-line, and that the chance of the gun's being meddled with by anybody, in this field, was too remote. Cf. the phosphorus case, p. 545 *n.*]

As to *Vendors* of firearms, see *Langridge* v. *Levy* (*supra*, p. 476); and consider the question which is raised on p. 477, near the end. For legislative provisions as to gunpowder, see the Explosives Act, 1875 (38 & 39 Vict. c. 17).]

[*A man who kindles* a fire *is under a like responsibility for any damage done by it, even though he be innocent of negligence; except* (*by Statute*) *when the fire was lit on his own premises for some ordinary purpose.*]

BEAULIEU *v.* FINGLAM.

COURT OF COMMON PLEAS. 1401. Y.B. 2 HENRY IV. fo. 18, pl. 5.

A MAN named William Beaulieu sued Roger Finglam for that—whereas (according to the law and custom of our realm of England hitherto obtaining) everyone in the realm keeps, and is bound to keep, his fire safe and sure so that no damage in any way happen through his fire to his neighbours,—yet the aforesaid Roger kept a fire of his, at Carlion, so negligently that, through his lack of a due care of the said fire, the goods and chattels of the said William, then being in his house, to the value of forty pounds, and the said house itself, were then and there burnt through that fire, to the damage of the said William.

Hornby. I ask judgment for the defendant on this count; for the plaintiff lays his count upon a common custom of the realm, and he has not gone on to say that this custom has been practised, etc.

To which ALL THE COURT said, Go to your next point; for the common custom of this realm is the common law of the realm.

THIRNING said that a man shall answer for his fire if by mischance it burn another man's goods.

Whereupon some gave the opinion that the fire cannot be called "his" fire; for a man can have no property in fire. But that opinion was not allowed[1].

MARKHAM. A man is bound in such a case to answer for the acts of his servant or his ostler. For if my servant or my ostler fix a candle against the wall, and the candle fall into the thatch and burn down all my house and my neighbour's house too, in that case I must answer to my neighbour for the damage done to him.

And THE COURT agreed to this.

[1] [EDITOR'S NOTE. Lord Holt, C.J., met the like objection, when raised three hundred years later, by saying "The property in the *materials* makes the property in the fire"; (1 Lord Raymond 264).]

Hornby. But the plaintiff would have to sue by the special writ for burning (or burning down) a house.

Hull. It would be against all reason to put blame or default upon a man when there was none in him. (For the negligence of his servants cannot be called his.)

THIRNING. Nay; for if a man kills or slays another by misadventure, he will have to forfeit his goods, and it is only by an act of grace that he can get his charter of pardon.

To which THE COURT agrees.

MARKHAM. I shall have to answer to my neighbour for anyone who enters my house by my will or my knowledge (or is received by me or by my servant as a guest), if he do any act, (as with a candle or anything else), by which my neighbour's house is burnt. But if a man from outside my house, against my will, puts fire into the thatch of my house (or anywhere else) whereby my house is burned, and, in consequence, my neighbours' houses are burned too, I shall not be bound to answer to them for this. For it cannot be said to be through any wrongdoing on my part, but was quite against my will.

Hornby. This defendant will be undone and impoverished for ever, if this action be allowed against him; for then twenty other such actions will be brought against him for like matter.

THIRNING. What is that to us? It is better that he should be utterly undone than that, for him, the law should be changed.

And then they went to an issue on a plea that it was not by the defendant's fire that the house of the plaintiff had been burned down.

[EDITOR'S NOTE. See, accordingly, in *Powell* v. *Fall*, (L. R. 5 Q. B. D. 297), the owner of a steam traction-engine held liable for the burning of a stack of hay by sparks escaped from his engine, although it was admitted that there had been no negligence on the part of either himself or his servants.

A question may often arise as to distinguishing between successive stages in the course of a fire originally innocuous but afterwards spreading, and ultimately doing damage—viz. at what stage did it become *that* fire which is to be regarded in law as the direct cause of the harm done?

The Judicial Committee lays down the wide rule that "in the case of articles dangerous in themselves,—such as loaded fire-arms, poisons, explosives, and other things ejusdem generis—a peculiar duty to take precaution is imposed upon those who send forth...such articles when it is necessarily the case that other parties will come within their proximity"; (*Dominion Natural Gas Co. Ld.* v. *Collins and Perkins*, L. R. [1909] A. C. at p. 646).]

[*The (above mentioned)* statutory *relaxation of this common-law rule does not abolish the liability for* Negligence.]

FILLITER *v.* PHIPPARD.

COURT OF QUEEN'S BENCH. 1847. 11 Q.B. 347.

[THIS was a motion in arrest of judgment, on a declaration stating (with some other particulars) that the plaintiff was possessed of a close in which certain hedges and gates were standing, and several trees growing; that the defendant was possessed of an adjoining close; and that the defendant made and kept a fire in his close in such a negligent manner, and at a time when, by reason of the then state of the wind and weather, it was dangerous and improper so to do; that, through the negligence and improper conduct of himself and his servants, and for want of due care and caution, the said fire extended itself out of his close into plaintiff's; and the plaintiff's trees, hedges, fences, &c. were burned and destroyed. After a verdict for the plaintiff, at the Dorsetshire Assizes, the defendant moved in arrest of judgment.]

* * * * * * *

LORD DENMAN, C.J., delivered the judgment of the Court:—The ancient law, or rather custom of England, appears to have been, that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss. And it is well established that, where the fire was occasioned by a servant's negligence, the owner, the master of the house where it began, is answerable for the consequences to the sufferer. And the case of *Turberville* v. *Stamp*[1], the last decided before Stat. 6 Ann. c. 31, makes this plain, and declares the same principle where the fire originates in the defendant's close. The Act contemplates the probability of fires in cities and towns arising from three causes, the want of water, the imperfection of party walls, and the negligence of servants. The Act provided some means for supplying these material defects: but...in the sixth section, enacts that (after a day named) no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered or occasioned thereby.

Both provisions seem to have found favour with the legislature; for both were re-enacted by stat. 12 G. 3, c. 73, and stat. 14 G. 3, c. 78; the latter (s. 86) adding (to the words "house or chamber"), the further words "stable, barn, or other building," and also the words "or on whose estate."

[1] 1 Comyns's R. 32; S. C. 1 Salk. 13.

No terms can be more comprehensive. We cannot doubt that Baron Parke, in *Richards* v. *Easto*[1], rightly viewed it as a general law. And, though the word "estate" is used in a sense very different from that which it bears in the language of the law, it clearly applies to land not built upon, and treats the owner of such land in the same manner as it had previously the owner of buildings.

The question then is upon the meaning and effect of the word "accidentally," here applied to fire....

It is true that, in strictness, the word *accidental* may be employed in contradistinction to wilful, and so the same fire might both begin accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance, or incapable of being traced to any cause; and so would stand opposed to the negligence of either servants or masters. And when we find it used in statutes which do not speak of wilful fires but make an important provision with respect to such as are accidental, (and consider how great a change in the law would be effected, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servants), we must say that we think the plaintiff's construction much the most reasonable of the two....

In *Vaughan* v. *Menlove*[2], a plaintiff recovered damages for a fire spreading to his corn from the defendant's field through the negligence of the defendant and his servants. Lord Lyndhurst says[3] that stat. 14 G. 3, c. 78 escaped notice on that occasion. But, if we ask how it came to be overlooked, since it would have furnished a complete and easy defence, the only answer can be the universal impression of the eminent lawyers, both at the bar and on the bench, who took part in the argument and judgment, that the clause in the Building Act, respecting accidental fires, cannot apply to such as are produced by negligence....

Judgment for plaintiff.

[EDITOR'S NOTE. The protection given by the Statute has been still further narrowed by a decision (*Musgrove* v. *Pandelis*, L. R. [1919] 2 K. B. 43) that it does not remove the liability of a person—under the rule in *Rylands* v. *Fletcher* (p. 600 *infra*)—for fire arising from some extraordinary source of potential danger which he has brought upon his land. Defendant's petrol, in the carburettor of his motor-car in his garage, caught fire. His chauffeur negligently failed to turn off the tap of the petrol tank. Hence the fire spread to the plaintiff's rooms over the garage. He did recover damages.]

[1] 15 M. & W. 244. [2] *Supra*, p. 538. [3] 1 Phillips 306.

[*The possessor of a* Wild Beast *is responsible—even when innocent of Negligence—for any harm done by it.*]

MAY *v.* BURDETT.

COURT OF QUEEN'S BENCH. 1846. 9 Q.B. 101.

THE declaration stated that the defendant, "before and at the time of the damage and injury hereinafter mentioned wrongfully and injuriously kept a certain monkey, he well knowing that the said monkey was of a mischievous and ferocious nature and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the said monkey to be at large and unconfined: which said monkey, whilst the defendant kept the same as aforesaid, did attack, bite, wound, lacerate, and injure Sophia, the wife of the plaintiff, Stephen May; whereby the said Sophia became greatly terrified and alarmed, and became sick, sore, lame, and disordered, and so remained and continued for a long time."

Plea, not guilty. Issue thereon.

On the trial, before Wightman, J., a verdict was found for the plaintiff with £50 damages.

Cockburn moved in arrest of judgment....The plaintiff assumes that however carefully a destructive animal may be kept, as at the gardens of the Zoological Society, yet if it escapes—without any fault on the owner's part—and does damage, or even if an excessively timid person be terrified by the animal whilst under proper restraint, the owner is answerable. No decision has gone that length....A man may, on his own land, do what he thinks proper, so long as he does not thereby interfere with the rights of others, *Jordin* v. *Crump*[1]; so he may keep a dangerous animal there. Moreover it is consistent with all the averments, in the declaration, that the plaintiff may herself have been in fault.

LORD DENMAN, C.J., delivered the judgment of the Court....A great many precedents were cited upon the argument. The conclusion to be drawn from them appears to us to be, that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is primâ facie liable, in an action on the case, at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the *keeping* the animal after knowledge of its mischievous propensities. The precedents, both ancient and modern, with scarcely

[1] 8 M. & W. 782.

an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care....No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also.

But various dicta in the books were cited to shew that this is an action founded on negligence, and therefore not maintainable unless some want of care is alleged....Passages were cited in which expressions were used shewing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large (or to be otherwise ill-secured). But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*; and that, if it does mischief, negligence is presumed without express averment. The precedents, as well as the authorities, fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith* v. *Pelah*[1], and a passage in 1 Hale's Pleas of the Crown, 430[2], put the liability on the true ground.

It may be that, if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence[3]. But

[1] 2 Strange 1264; [where the owner of a dog, though knowing that he had once bitten a man, continued to "let him go about or lie at his door." The Chief Justice pronounced the owner to be liable for this *second* biting, "for it was owing to his not hanging the dog on the first notice."]

[2] After stating that "if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner *knew not* his quality, he is not punishable," Sir Matthew Hale adds that:—

"1. If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it.

"2. Though he have no particular notice that it did any such thing before, yet if it be a beast that is *feræ naturæ*, (as a lion, a bear, a wolf, yea, an ape or monkey), if it get loose and do harm to any person, the owner is liable to an action for the damage. And so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey that broke his chain and got loose.

"3. And therefore in case of such a wild beast—or in case of a bull or cow that doth damage, where the owner knows of it—he must at his peril keep him up safe from doing hurt. For, though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages."

[3] [Editor's Note. This suggestion was quoted and considered in an American case, *Muller* v. *McKesson* (73 N.Y. 195); where it was pointed out that in *Smith* v. *Pelah*, where the owner had been held liable, although the injury happened by reason of the person injured having trodden on the dog's toes, it still is not stated that the person injured knew of the dog's propensities, or that he trod on its toes intentionally. The American court ruled that "If a person with a full knowledge

it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shews a primâ facie liability in the defendant.

It was said indeed, further, on the part of the defendant, that, the monkey being an animal *feræ naturæ*, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control. But we cannot allow any weight to this objection. For, in the first place, there is no statement in the declaration that the monkey had escaped; and it is expressly averred that the injury occurred while the defendant kept it. And besides, we are of opinion that the defendant, if he would keep it, was bound to keep it secure at all events.

Rule discharged.

[Editor's Note. The same principle would apply to even a domestic animal of a quiet species, e.g. a dog or a horse, if the particular animal were known to its owner to be ferocious[1]. And in *Worth* v. *Gilling* (L. R. 2 C. P. 1), Erle, C.J., pointed out that it is not necessary to prove that it has already *actually* injured any person. In that case it was proved that the dog "made every effort in his power to get at any stranger who passed by, and was only restrained by the chain"; and this was held to be abundant evidence to shew that the owner did know of the animal's ferocity. By modern statute (28 & 29 Vict. c. 60), owners of dogs are always to be regarded as being aware that they are sufficiently ferocious to be likely to attack sheep or cattle or horses (but, still, not human beings).

But the category of animals where this express knowledge is necessary is not to be extended lightly. It does not include elephants. For in *Filburn* v. *People's Palace Co.* (L. R. 25 Q. B. D. 258), the case of an elephant that was expressly declared by the jury not to have been dangerous to man, the Court held that "It cannot possibly be said that an elephant comes within the class of animals shewn by experience to be harmless in this country; and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances (unless the person to whom the injury is done brings it on himself). It was therefore immaterial in this case whether or not the particular animal was a dangerous one."

In Nichols *v.* Marsland (*infra*, p. 606), Bramwell, B., treated the rule about wild beasts as being so stringent that he doubted whether even the "Act of God" would afford any excuse to the owner—though it was there decided that it would afford one to the owner of a dangerous Reservoir. He says "If a man kept a tiger, and *lightning* broke its chain and it got loose and did mischief, I am by no means sure that the man would not be liable" (L. R. 10 Ex. at p. 260).]

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of the evil propensities of an animal voluntarily and unnecessarily puts himself in its way, he should be adjudged to have brought the injury upon himself, and not to be entitled to recover."

[1] I.e., ferocious towards *mankind*; L. R. [1896] 2 Q. B. 109.

[*Not only the owner but even the mere* harbourer *of a savage dog can be sued for damage done by it.*]

McKONE *v.* WOOD.

NISI PRIUS. 1831. 5 CARRINGTON & PAYNE 1.

CASE for keeping a dog accustomed to bite mankind. Plea—General issue.

On the part of the plaintiff, it was proved that the dog had bitten the plaintiff, and that it had bitten two other persons before; but one of the witnesses, who proved that he had made a complaint to the defendant respecting the dog, stated that the defendant had told him that the dog belonged to a person who had been his servant, but who had left him.

It was also proved, on the part of the plaintiff, that the dog was seen about the defendant's premises, both before and after the time when the plaintiff was bitten.

Campbell, for the defendant, submitted that there was not sufficient evidence to shew that this was the defendant's dog; but, on the contrary, it was shewn that it was not. He therefore contended that the defendant was not liable in this action.

LORD TENTERDEN, C.J. It is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action. It was the defendant's duty either to have destroyed the dog or to have sent him away, as soon as he found that he was mischievous.

Verdict for the plaintiff—Damages £5.

[*And the owner of cattle and similar* quiet animals *is responsible—even when innocent of Negligence—for any harm, of a probable kind, done because of their escaping from his land to another's*[1].]

See ELLIS *v.* LOFTUS IRON CO., *supra*, p. 43.

[*But not for such harm as was* improbable.]

See COX *v.* BURBIDGE, *supra*, p. 37.

[*And when these quiet animals are lawfully passing on the* public highway, *their owner is no longer responsible for harm done by them, unless he be guilty of Negligence.*]

TILLETT *v.* WARD.

QUEEN'S BENCH DIVISION. 1882. L.R. 10 Q.B.D. 17.

THE action was to recover £1 for the damage done to goods in the plaintiff's shop.

It appeared that on the 15th of May, 1882, an ox of the defendant was being driven from a live-stock market in Broad Street, Stamford, along a public street called Ironmonger Street, to the defendant's premises. Ironmonger Street has a paved carriage road with a foot pavement on either side, and the plaintiff was the occupier of an ironmonger's shop in the street. The ox, after having gone for some distance down the paved carriage road of Ironmonger Street, driven by the defendant's men, went for a short distance upon the foot pavement on the near or left-hand side. It was driven therefrom by one of the drovers in charge on to the carriage road; and after continuing for a farther distance upon such carriage road, turned again on the pavement about twelve yards from the plaintiff's shop and continued upon the pavement until it came opposite the plaintiff's shop when it passed through the open doorway into the shop, and did damage to goods therein to the amount claimed. The ox was, as soon as possible after such entry and damage, driven by the defendant's men from the shop to the carriage road and to defendant's premises in another street, but they did not succeed in getting it out until about three-quarters of

1 "Ils ont fait tort quand les bestes vont oustre la terre"; Y. B. 7 Hen. VII. Mchas. fo. 16, pl. 1.

an hour from the time when it entered. No special act of negligence was proved on the part of the persons in charge of the ox; and there was no evidence that it was of a vicious or unruly nature, or that the defendant had any notice that there was anything exceptional in its temper or character, or that it would be unsafe to drive it through the public streets in the ordinary and usual way. It was proved that, at the time the ox left the carriage way the second time, one of the two men of the defendant in charge of the animal was walking by its side, having his hand upon it, and that the other man was walking about three yards in the rear of it. The two men in charge proved that they drove it unaccompanied by other cattle from the market; and they both declared that they did all they could under the circumstances to prevent it going on to the foot pavement and entering the open doorway of the plaintiff's shop. They stated that the movement of the ox from the carriage way on to the foot pavement was sudden, and could not by any reasonable or available means have been prevented. It was alleged by the defendant's witnesses, and not contradicted, that it was a usual thing for several oxen to be driven from the Stamford market in charge of two men and sometimes one man. It was admitted that it is not customary to drive oxen with halters, and that they would probably not go quietly if led by halters.

The county court judge gave a verdict for the amount claimed, giving the defendant leave to appeal.

The question for the opinion of the Court was whether, upon the facts, the plaintiff was entitled to the verdict....

Lord Coleridge, C.J. In this action the county court judge has found as a fact that there was no negligence on the part of the drivers of the ox; or, at all events, he has not found that there was negligence, and as it lies on the plaintiff to make out his case, the charge of negligence, so far as it has any bearing on the matter, must be taken to have failed.

Now, it is clear, as a general rule, that the owner of cattle and sheep is bound to keep them from trespassing on his neighbours' land; and, if they so trespass, an action for damages may be brought against him, irrespective of whether the trespass was or was not the result of his negligence. It is also tolerably clear that where both parties are upon the highway, where each of them has a right to be, and one of them is injured by the trespass of an animal belonging to the other, he must, in order to maintain his action, shew that the trespass was owing to the negligence of the other or of his servant. It is also clear, where a man is injured by a fierce or vicious animal belonging to another, that primâ facie no action can be brought without proof that the owner of the animal knew of its mischievous tendencies.

In the present case, the trespass, if there was any, was committed off the highway, upon the plaintiff's close which immediately adjoined the highway, by an animal belonging to the defendant, which was being driven on the highway. No negligence is proved; and it would seem to follow, from the law which I have previously stated, that the defendant is not responsible. We find it established as an exception upon the general law of trespass, that where cattle trespass upon unfenced land immediately adjoining a highway the owner of the land must bear the loss. This is shewn by the judgment of Bramwell, B., in *Goodwyn* v. *Cheveley*[1]. That learned judge goes into the question whether a reasonable time had or had not elapsed for the removal of cattle who had trespassed under similar circumstances, and this question would not have arisen if a mere momentary trespass had been by itself actionable. There is also the statement of Blackburn, J., in *Fletcher* v. *Rylands*[2], that persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk. I could not, therefore, if I were disposed, question law laid down by such eminent authorities; but I quite concur in their view, and I see no distinction for this purpose between a field in the country and a street in a market town. The accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town. No cause of action is shewn, and the judgment of the county court judge must be reversed.

STEPHEN, J. I am of the same opinion. As I understand the law, when a man has placed his cattle in a field it is his duty to keep them from trespassing on the land of his neighbours; but while he is driving them upon a highway he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. The case of *Goodwyn* v. *Cheveley*[3] seems to me to establish a further exception, that the owner of the cattle is not responsible without negligence when the injury is done to property adjoining the highway; an exception which is absolutely necessary for the conduct of the common affairs of life. We have been invited to limit this exception to the case of high roads adjoining fields in the country; but I am very unwilling to multiply exceptions, and I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town. I think the rule to be gathered from *Goodwyn* v. *Cheveley*[3] a very reasonable one; for otherwise I cannot see how we could limit the liability of the owner of cattle for any sort of injury which could be traced to them.

Judgment for the defendant.

[1] 23 L. J. (Ex.) 298. [2] *Infra*, p. 599. [3] 28 L. J. (Ex.) 298.

[EDITOR'S NOTE. So far back as the fifteenth century, it was already familiar law that "If a man comes with a drove of cattle *on the high road* past where trees or corn or other crops are growing, then, should any of the beasts eat from these crops, the man who was driving them would have a good defence, provided the thing happened against his will. For the law understands that a man cannot control his cattle all the while. But if he permitted them, or if he let them continue, then it would be otherwise." (*Per* Catesby, J., Y. B. 22 Edw. IV. fo. 24).]

[*It is a Tort for a landowner*[1] *to cause damage by the escape, (even without any negligence of his) of any* extraordinary *source of danger which he has brought upon his land.*]

RYLANDS *v.* FLETCHER.

HOUSE OF LORDS. 1868. L.R. 3 H.L. 330.

FLETCHER brought an action against Rylands & Horrocks to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the defendants had constructed. The declaration contained three counts, each count alleging negligence on the part of the defendants. But in this House the case was ultimately treated upon the principle of determining the relative rights of the parties independently of any question of personal negligence by the defendants, in the exercise of them.

The plaintiff was the lessee of certain coal mines known as the Red House Colliery, under the Earl of Wilton. He had also obtained from two other persons, Mr Hulton and Mr Whitehead, leave to work for coal under their lands. The positions of the various properties were as follows. There was a turnpike road, which formed a southern boundary to the properties of these different persons. A parish road formed their northern boundary. These roads formed two sides of a square, of which the other two sides were the lands of Mr Whitehead on the east and Lord Wilton on the west. The defendants' grounds lay along the turnpike road, or southern boundary, stretching westward. On these grounds were a mill and a small old reservoir. The proper grounds of the Red House Colliery also lay along the southern boundary, stretching eastward. Immediately north of the defendants' land lay the land of Mr Hulton, and still further north that of Lord Wilton. On this land of Lord Wilton the defendants in 1860 constructed (with his lordship's permission) a new reservoir, the water from which would

[1] [Or an occupier; or even one who uses land as a mere licensee, e.g. under leave to run through it a waterpipe or electric cable, L. R. [1914] 3 K. B. 772.]

pass southerly across the lands of Lord Wilton and of Mr Hulton, and so reach the defendants' mill.

The plaintiff worked the mines under his lease from Lord Wilton, and under his agreements with Messrs Hulton and Whitehead. In the course of doing so he came upon old shafts and passages of mines formerly worked but of which the workings had long ceased. The existence of these shafts and passages was unknown. The shafts were vertical, the passages horizontal; and the former especially seemed filled with marl and rubbish. The defendants employed, for the purpose of constructing their new reservoir, persons who were admitted to be competent as engineers and contractors to perform the work; and there was no charge of negligence made against the defendants personally. But in the course of excavating the bed of the new reservoir five old shafts, running vertically downwards, were met with in the portion of the land selected for its site. The case found that "On the part of the defendants there was no personal negligence or default whatever in the selection of the said site, or in the planning or construction of the said reservoir. But, in point of fact, reasonable and proper care and skill were not exercised by the persons so employed by them with reference to the shafts, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear."

The reservoir was completed at the beginning of December, 1860, and on the 11th of that month, (it being then partially filled with water), one of the vertical shafts gave way, and burst downwards. In consequence of this, the water of the reservoir flowed into the old passages and coal-workings underneath, and by means of the underground communications between them and the plaintiff's workings in the Red House Colliery the colliery was flooded and the workings thereof stopped.

The question for the opinion of the court was whether the plaintiff was entitled to recover damages. The Court of Exchequer, (Bramwell, B, dissenting), gave judgment for the defendants; (3 H. & C. 774). That judgment was afterwards reversed in the Court of Exchequer Chamber, (4 H. & C. 263; L.R. 1 Ex. 265). The case was then brought on error to this House....

Sir R. Palmer, for the defendants....The communications between the workings of the plaintiff and the old shafts were not known to the defendants. As the possible cause of injury was unknown to them they could not by any care on their part prevent that injury....They employed competent persons; and to do something which in itself was perfectly lawful; and so cannot be held liable in damages without clear evidence of impropriety or negligence on their own part[1]. No pretence for setting up a charge of neglect was suggested....

[1] [EDITOR'S NOTE. See the cases reported *supra*, pp. 91—102.]

LORD CAIRNS, L.C. The plaintiff is the occupier of a mine, and works, under a close of land. The defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of storing water to be used about their mill upon another close of land which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, (although in point of fact some intervening land lay between the two). Underneath the close of land of the defendants, on which they proposed to construct their reservoir, there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish; and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency of an engineer and contractor. Personally the defendants appear to have taken no part in the works or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that *they* did not exercise, as far as they were concerned, the reasonable care and caution which they might have exercised, taking notice (as they appear to have taken notice) of the vertical shafts filled up in the manner which I have mentioned. However, when the reservoir was constructed, and partly filled with water, the weight of the water—bearing upon the disused and imperfectly filled-up vertical shafts—broke through those shafts. The water passed down them, into the horizontal workings; and, from the horizontal workings under the close of the defendants, it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer Chamber unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used. And if in what I may term the "natural" user of that land there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the

plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving (or interposing) some barrier between his close and the close of the defendants, in order to prevent that operation of the laws of nature.

On the other hand if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a "non-natural" use—for the purpose of introducing into the close that which in its natural[1] condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril. And if, in the course of their doing it, the evil arose to which I have referred, (the evil namely of the escape of the water and its passing away to the close of the plaintiff and injuring him), then for the consequences of that, in my opinion, the defendants would be liable....

The same result is arrived at on the principles referred to by Blackburn, J., in his judgment in the Court of Exchequer Chamber, in these words: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own. And it seems but reasonable and just that the neighbour who has brought on his

[1] [EDITOR'S NOTE. But many introductions that are artificial are not held to be "non-natural." An installation for supplying water to the various parts of a house is "an almost necessary feature of town life....It would be unreasonable to regard those who maintain such a supply as doing so at their peril, with an absolute liability even when there has been no negligence"; *Rickards* v. *Lothian*, L. R. [1913] A. C. at p. 281.]

own property something which was not naturally there—harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's—should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion I entirely concur.

Lord Cranworth. My Lords, I concur in thinking that the rule of law was correctly stated by Blackburn, J., in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage....

The doctrine appears to me to be well illustrated by the two cases, referred to, of *Smith* v. *Kenrick* and *Baird* v. *Williamson*. In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level; so that the water percolating through the upper mine flowed into the lower mine and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was *his* business to erect or leave a sufficient barrier so to keep out the water (or to adopt proper means for so conducting the water) that it should not impede him in his workings. The water was only left by the defendant to flow in its natural course.

But in the later case of *Baird* v. *Williamson* the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water; which passed into the plaintiff's mine, in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in

the former case may be treated as having arisen from the act of God; in the latter from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr Whitehead, and up to the old workings. If water naturally rising in the defendants' land had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do. For according to the principle acted on in *Smith* v. *Kenrick*, the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff; and for that damage, (however skilfully and carefully the accumulation was made), the defendants, according to the principles to which I have adverted, were certainly responsible.

Judgment of the Court of Exchequer Chamber affirmed.

[EDITOR'S NOTE. The student will do well to refer to the valuable note appended to this case in J. W. Smith's *Leading Cases*.

In the later case of *The Eastern and South African Telegraph Co. Ld.* v. *The Capetown Tramways Co. Ld.* (L. R. [1902] A. C. 381) the principle of *Rylands* v. *Fletcher* was reasserted; and was declared to apply to cases where the artificial source of danger, which the land-owner accumulates, is Electricity. "Electricity (in the quantity we are now dealing with) is capable, when uncontrolled, of producing injury to life and limb and to property." But, in the particular case, it was held that the plaintiffs could not recover for the damage done by the escape of the electricity, inasmuch as that damage was not of the same species as the "tangible and sensible" injuries, (interferences with the *ordinary* use of property), to which alone the extreme responsibility established in *Rylands* v. *Fletcher* extends. For the plaintiffs' only complaint was that this escape of electricity produced such irregularity in the working of their own electric cables that the telegrams became confused and unreadable. Had, on the other hand, the *cable itself* been injured, they could have recovered. But the mere interruption of a business, when of so peculiarly delicate a character as to be interrupted by the escape of even minute currents of electricity, is a matter for which the law ought not to afford a remedy, when the interruption has not been brought about by either malice or even negligence. "The principle of *Rylands* v. *Fletcher*—which subjects to a high liability the owner who uses his property for purposes other than those which are natural—would become doubly penal if it implied a liability created (and measured) by the *non-natural* uses of his neighbour's property" (p. 393). That liability is high, for it is independent both of Scienter and of Negligence.]

[*But this responsibility does not extend to cases where the cause of damage is* specially authorised *by law.*]

See the cases given above, Part I. Section III. (D), pp. 127—140.

[*Nor to cases where the damage has arisen through an* "Act of God[1]."]

NICHOLS *v.* MARSLAND.

COURT OF APPEAL. 1876. L.R. 2 Ex. DIV. 1.

[THIS was an action brought by the county surveyor[2] of the county of Chester against the defendant to recover damages on account of the destruction of four county bridges, which had been carried away by the bursting of some reservoirs. At the trial before Cockburn, C.J., it appeared that the defendant was the owner of Henbury Hall; with a series of artificial ornamental lakes, which had existed for a great number of years and had never previous to the 18th day of June, 1872, caused any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed; the dams at their end gave way, and the water out of the lakes carried away the county bridges lower down the stream. The jury found that there was no negligence either in the construction or the maintenance of the reservoirs; but that if the flood could have been anticipated, the effect might have been prevented; but the banks and weirs were sufficient for all events that could reasonably be anticipated, the particular storm having been of such excessive violence as to be properly called vis major or an Act of God.

The judge, on the authority of *Rylands* v. *Fletcher*[3], directed a verdict for the plaintiff. The Court of Exchequer subsequently ordered it to be entered for the defendant[4]. The plaintiff appealed.]

Cotton, Q.C., for plaintiff. Assuming the jury to be right, still the defendant is liable; because she has, without necessity and voluntarily for her own pleasure, stored on her premises an element which was liable to be let loose, and which, if let loose, would be dangerous to her neighbours....The authorities were all discussed in *Madras Ry. Co.*

[1] "The *Act of God* is a plea very often brought forward to excuse the negligence of man," says a South African judge; (1 Griqualand 373). In Pollock on *Contracts* (ch. XII.) will be found a valuable discussion of the meaning of this indefinable phrase. Elsewhere he says it means nothing more precise than "an event which, as between *these* parties and for the purpose of *this* litigation, is to be regarded as incapable of being definitely foreseen and controlled." The cognate term *vis major* is somewhat wider, and includes, besides Acts of God, all other events which it is practically impossible to resist; e.g. not only earthquakes and lightning but also the violence of a mob.

[2] Under 43 Geo. III. c. 59, s. 4.

[3] *Supra*, p. 600.

[4] L. R. 10 Ex. 255.

v. *Zemindar of Carvatenagarum*[1], where the defendant was held not liable on the ground that it was his duty to maintain the reservoirs on his premises. The present defendant was under no such duty. Even if she be considered innocent of wrong doing, why should the plaintiff suffer for the defendant's voluntary act of turning an otherwise harmless stream into a source of danger? But for the defendant's embankments, the excessive rainfall would have escaped without doing injury. The fact of the embankments being so high caused the damage. They ought to have been much higher, or less; or the weirs ought to have been much larger and kept in order. Even if vis major does excuse from liability, the vis major must be the sole cause of the damage, which it was not here; [for water already stored, *before* the storm, cooperated with it.] Moreover such a storm as this occurs periodically, and may be foreseen; and is therefore not the act of God or vis major in the sense that excuses from liability.

* * * * * * *

MELLISH, L.J., read the judgment of the Court....It appears to us that we have two questions to consider:—First, the question of law, which was left undecided in *Rylands* v. *Fletcher*[2], can the defendant excuse herself by shewing that the escape of the water was owing to vis major, or, as it is termed in the law books, the "act of God"? And, secondly, if she can, did she in fact make out that the escape was so occasioned?

Now, with respect to the first question, the ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands* v. *Fletcher*[2] establishes that he must be held liable. The

[1] L. R. 1 Ind. App. 364, 385; *supra*, p. 131.

[2] L. R. 3 H. L. 330; *supra*, p. 600.

accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands* v. *Fletcher*[1] in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening vis major of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God.

The remaining question is, did the defendant make out that the escape of the water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate. In the late case of *Nugent* v. *Smith*[2] we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it.

It was indeed ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law

[1] *Supra*, p. 600.

[2] 1 C. P. D. 423.

the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow....

Judgment affirmed.

[EDITOR'S NOTE. Compare HOLMES *v.* MATHER, *supra*, p. 1. In Roman law, see Dig. 39. 3. 1. 22. The exception established in *Nichols* v. *Marsland* as to an escape due to an Act of God or of the King's enemies applies equally to one due to the malicious act of a third person, e.g. where an explosion is caused by a burglar's leaving a gas-tap open; see L. R. [1913] A. C. at p. 276.]

[*Nor to cases where the source of danger* has not escaped *from the defendant's land.*]

PONTING *v.* NOAKES.

QUEEN'S BENCH DIVISION. L.R. [1894] 2 Q.B. 281.

[THE plaintiff was a farmer, and occupied a field separated from the premises of the defendants by a fence. On the side of the fence next the plaintiff's field was a ditch, belonging to the defendants. On the defendants' land near the fence grew a yew tree, the branches of which projected over the ditch, but not beyond it. They did not overhang the plaintiff's field. At the distance of about 120 yards grew another yew tree which overhung the plaintiff's field, in the garden of one Hunt; and in the hedge of the plaintiff's field about fifty yards from the defendants' yew tree there was a small yew bush. On the 25th of June a colt, and several other horses, were in the plaintiff's field. On the 26th the colt was found dead five yards from the defendants' yew, and there was no doubt from the examination made of the body that it had died from eating yew leaves. All the three trees—the defendants', Hunt's, and the plaintiff's yew bush—presented appearances of having been recently eaten. A veterinary surgeon stated that horses usually drop dead directly, or within a very short distance, after eating yew leaves.

Counsel for the defendants urged that there was no case to go to the jury, as the evidence was equally consistent with the colt's having been poisoned by either the defendants' or the plaintiff's own tree. The county court judge however left the case to the jury, who found a verdict for the plaintiff for £22.

The defendants appealed.]

* * * * * * * *

COLLINS, J. The yew tree was wholly within the defendants' boundary, therefore it seems clear that the principle of which *Fletcher* v. *Rylands*[1] is an instance has no application to this case. The principle there stated was that "The person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril." That case was decided on the analogy of *Tenant* v. *Goldwin*[2], where it was said, "He whose dirt it is must keep it in, that it may not trespass." Here there has been no escape or trespass of anything kept by the defendants.

If they were liable it must be for not taking precautions to prevent the plaintiff's cattle from getting access to the defendants' yew tree on the defendants' own premises—in other words, for negligence. I should add that there was no evidence of any obligation on either party to maintain the fence for the benefit of the other, and the case may be treated, therefore, as if there had in fact been no fence. What, then, was the duty cast upon the defendants, the breach of which grounds this action? Mr Chitty, who argued for the plaintiff, contended that the owner of anything capable of attracting cattle, and dangerous to them if they yielded to the attraction, was bound to use reasonable care to prevent them getting access to it. Does such a duty exist? I think not, and Mr Chitty was not able to produce any authority which went near to establish it. The point might have arisen in *Crowhurst* v. *Amersham Burial Board*[3]. There a horse had died of eating of a yew tree growing on defendants' land; and the case, as originally stated by the county court judge, left it doubtful whether the death was caused by eating portions of the tree which projected over the plaintiff's land, or portions on the defendants' own land which the horse was able to reach by stretching his neck over the intervening fence. The court, however, sent the case back to be restated, and it was then found as a fact that the horse died exclusively from the effects of eating portions which projected over the plaintiff's land; and the case was accordingly decided in favour of the plaintiff, on the authority of *Fletcher* v. *Rylands*....

It was the duty of the plaintiff to keep his horse from trespassing, and not of the defendants to guard against the consequences of such trespass. Such duty is clear, and the plaintiff might have been liable to the defendants for damage done by his horse while so trespassing on the land of the latter: *Cox* v. *Burbidge*[4], *Ellis* v. *The Loftus Iron Co.*[5]

Does it, then, make any difference that a yew tree is likely to tempt a horse to trespass? I think not, unless it were proved that it was put or kept there for the *purpose* of enticing the animal to his destruction; as was done in *Townsend* v. *Wathen*[6], cited by Mr Chitty.

[1] *Supra*, p. 600. [2] 1 Salkeld 360. [3] L. R. 4 Ex. D. 5.
[4] *Supra*, p. 37. [5] *Supra*, p. 43. [6] 9 East 277.

The wrongful intention was the gist of that action. If such intention is disproved it follows, if the above reasoning is sound, that there can be no liability. Indeed, the very point is put as an illustration by Gibbs, C.J., in *Deane* v. *Clayton*[1], at p. 531, where he takes the case of water in which a plaintiff has no right, polluted by the act of the defendant and drunk by the plaintiff's cattle, who reach it through a trespass on the defendant's land. He says: "The right to be there is the gist of the action, and in no instance has an action been supported when cattle have no right to be in the place in which they received the damage; unless the defendant had used some undue means to entice them, as in *Townsend* v. *Wathen*, which stands on a distinct ground." It is obvious that water might have just as great an attraction for cattle as a yew tree. The result may be summarized by saying that the action is one of negligence; and the possession of something attractive and injurious to cattle casts no duty on the owner to take precautions against their trespassing in pursuit of it, when he has not placed or kept it there with that purpose....

Lastly, it was suggested that the analogy of such a case as *Lynch* v. *Nurdin*[2] might apply; and that as, in that case, a defendant who had left his cart and horse in a highway (where he had a right for the time being to place them) was held liable for injury to a child who trespassed upon them in his absence, so here the defendants might be liable for not taking precautions to prevent the horse getting across to the tree. The cases, however, differ in a crucial point. There the cart was left in a public highway where the children and the plaintiff had an equal right to be, and the children were not trespassers before they got into the cart. If the plaintiff had licensed the defendants to carry the yew tree across the plaintiff's field, and the defendants while so doing had left it unguarded, and while so left the horse had eaten it, the cases would be more nearly parallel....

Appeal allowed.

[*There is no such responsibility for the escape of noxious weeds that have grown* naturally[3] *upon the land.*]

See GILES *v.* WALKER, *supra*, p. 532.

[EDITOR'S NOTE. As to the similar absence of responsibility for damage done by the escape from your land of the wild rabbits, or wild deer, that have accumulated there *naturally*, see the Irish case of *Brady* v. *Warren*, (2 Ir. C. L. [1900] 645).]

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[1] 7 Taunton 531. [2] *Supra*, p. 27. Cf. *Barnes* v. *Ward*, p. 623 *infra*.

[3] Contrast the yew-trees in Crowhurst's case (*supra*, p. 610, and p. 533 *n.*) which had been planted by man. On immunity for rats, see L. R. [1919] 1 K. B. 394.

(2) The Responsibility of Possessors of Structures.

[*The possessor of any* Structure *is responsible* (*to all who come to it either by his Invitation in respect of some affair in which he has a pecuniary interest, or by a Right*) *for any Negligence, in its construction or management, even though committed by a person who was* not his servant[1].]

INDERMAUR *v.* DAMES.

Court of Common Pleas. 1866. L.R. 1 C.P. 274.

[The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with a patent gas-regulator, to be paid for upon the terms that it effected a certain saving. For the purpose of ascertaining whether such saving had been effected, the plaintiff's employer sent the plaintiff to the defendant's place of business to test the action of the regulator. The defendant was a sugar-refiner; and at the place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary and usual in the way of the defendant's business. Whilst it was in use, it was necessary that it should be open and unfenced. When it was not in use, it was sometimes necessary, for ventilation, that it should be open. But when not in use it might, without injury to the business, have been fenced by a rail. Whether it was usual to fence similar shafts (when not in use) did not distinctly appear; but such protection was reasonable for the safety of persons upon the floor where the shaft opened. Whilst the plaintiff was engaged upon the floor where the shaft was, he accidentally and, as the jury found, without any fault or negligence on his part, fell down the shaft; which was unfenced, though not in use. He was seriously hurt.

At the trial, Erle, C.J., directed the jury thus:—"The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due precaution in respect of the hole in the floor. To my mind, there was not the least want of due care as between the defendant and persons permanently employed on his premises; because the sugar-baking business requires the use of a lift, (which must be as well known to the persons employed there as the top of a staircase in every dwelling-house). But

[1] See the remarks of Mr Baron Parke, in the last paragraph of Quarman *v.* Burnett, (*supra*, p. 101, *ad finem*).

that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises. If there was no negligence on the part of the defendant; or if there was want of reasonable care on the part of the defendant but there was also want of reasonable care on the part of the plaintiff, which materially contributed to the accident; then the plaintiff is not entitled to recover. But if there was want of reasonable care in the defendant, and no want of reasonable care in the plaintiff, then the plaintiff is entitled to a verdict." The jury returned a verdict for the plaintiff, damages £400.

[The defendant moved to enter a nonsuit.]

* * * * * * *

WILLES, J., delivered the judgment of the Court....It was argued that the plaintiff was at best in the condition of a bare licensee or guest; who, it was urged, is only entitled to use the place as he finds it, (and whose complaint may be said to wear the colour of ingratitude, so long as there is no design to injure him); *Hounsell* v. *Smyth*[1].

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest; and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant, and that of a person testing the work which he was to be paid for if it stood the test, (whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so). Any duty to enable the workman to do the work in safety seems equally to exist during the accessory employment of testing; and any duty to provide for the safety of the master workman seems equally owing to the servant workman whom he may lawfully send in his place....

Cases were also referred to as to the liability for accidents to servants employed in a business which necessarily and obviously exposes them to danger, as in *Seymour* v. *Maddox*[2]. The person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur....But this we need not now consider; for the plaintiff in this case was not a servant of the defendant, but the servant of the patentee.

The authorities respecting guests (and other bare licensees), and those respecting servants (and others who consent to incur a risk), being therefore inapplicable, we are to consider what is the law as to

[1] 7 C. B., N. S. 731.

[2] 16 Q. B. 326.

the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop. But it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, (such as a trap-door left open, unfenced and unlighted); *Chapman* v. *Rothwell*[1]. There Erle, J., said: "The distinction is between the case of a visitor, who must take care of himself, and a customer, who (as one of the public) is invited for the purposes of business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. If a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go (not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go) upon business which concerns the occupier, and upon his invitation, express or implied.

With respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, (by notice, lighting, guarding, or otherwise), and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact....

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the

[1] E. B. & E. 168.

place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to this case: because it was proved that, when the shaft was not in use, a fence might be resorted to without inconvenience; and no usage could establish that what was in fact necessarily dangerous was in law reasonably safe, (as against persons towards whom there was a duty to be careful).

We think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it....

Rule discharged.

[On appeal to the Exchequer Chamber, this judgment was affirmed[1].]

[EDITOR'S NOTE. The liability established by this case does not extend to dangers which the possessor of the Structure not only did not know of but could not reasonably be expected to know of; *Maclenan* v. *Segar*, L. R. [1917] 2 K. B. 325. Nor to dangers which the visitor does know of and voluntarily takes the risk of; L. R. [1906] A. C. 432.

The liability may be avoided either by Removal of the danger or by giving an *appreciated* Warning of it. Where a painted notice "Beware of the Dog" had been put up, it was held in 1830 to be no defence against a visitor who could not read and consequently had got bitten; (*Sarch* v. *Blackburn*, 4 C. and P. 297).

Still higher degrees of liability may, of course, arise under a Contract, e.g. where the landlord of a series of flats undertakes to light their common staircase throughout the night; but the present treatise is concerned with the law of Tort alone.]

[1] L. R. 2 C. P. 311.

[*What amounts to such an* Interest.]

MILLER *v.* HANCOCK.

COURT OF APPEAL. L.R. [1893] 2 Q.B. 177.

[ACTION for damages for personal injuries. The defendant was the owner of "Cannon Street Chambers," a building which he let out in flats to tenants. The flats were reached by a common staircase, which remained in the control and occupation of the defendant. The plaintiff, in the course of his business, had to call upon the tenant of one of these flats. In coming away, he slipped on the stairs, in consequence of their worn and defective condition; and broke his leg. The jury found a verdict in his favour, for £200 damages.]

R. M. Bray moved to enter judgment for the defendant.... When people have business with a tenant, it is not the landlord that invites them to use the stairs. It is the tenant who invites them. The plaintiff may have a good cause of action against the tenant, but there is none against this defendant....

LORD ESHER, M.R....The landlord was bound so to keep the staircase as to afford a reasonably safe entrance and exit to the tenants. It seems to me that there is an implied obligation on the part of the landlord to the tenants to that effect, or else he is letting to the tenants that which will be of no value to them. What is the use of a second floor to any one, if the staircase, by which alone there can be access to it, is to be allowed to go to ruin? Furthermore it is obvious that in such a case the landlord must know that premises so let will be of no use to tenants, unless those who supply or deal with the tenants, (such as tradesmen or others having business with them), also have access to the premises. He must know that such people will go up and down the stairs; and those, who go up and down a staircase left open in premises of this kind in the City, would naturally suppose that such staircase would, in the ordinary course of things in regard to such premises, be under the control of and looked after by the landlord of the premises. Under those circumstances, I think that there is a relation between the landlord and those who resort to the premises for business purposes, from which a duty arises on the part of the landlord to keep the staircase, which is the means of access to the premises, in reasonably safe repair. Is there any authority for that proposition? It seems to me that the case of *Smith* v. *London and St Katharine Docks Co.*[1] is an authority for the line of reasoning which I have adopted in this case. There the defendants, a dock company,

[1] L. R. 3 C. P. 326.

provided gangways as a means of access to ships lying in their dock. There appears to have been no express contract between the defendants and the shipowner as to these gangways; but it was the ordinary course of business that they provided them, and so there would be an implied contract to provide them. In the nature of things they would be necessary for the use, not only of the crew, but also of other persons having business with the ship. The Court said that the defendants must have known that they would be used by such persons; and, that being so, there was a duty on their part towards persons, between whom and them there was no other relation than that created by going on board the ship on business, to have such gangways in a safe condition. Similar reasoning appears to me to apply to this case.

* * * * * * *

Application dismissed.

[EDITOR'S NOTE. In *Heaven* v. *Pender* (L. R. 11 Q. B. 503) it was settled—though the precise grounds of the decision are still a matter of controversy—that when the owner of docks supplies staging for the use of ships that are under repair in his docks, he is liable, for injuries caused by defects in its condition, not only to the owners of these ships, but also to workmen whom they employ to do the repairs; though there is no contract between the workmen and him. This liability exists even though he does not know of the defect, and though the defective thing is (unlike that in INDERMAUR *v.* DAMES, *supra*, p. 612) no longer under his control. For he derives pecuniary benefit from admitting ships into his docks for repair. See the remarks made on this case by Lord Herschell in *Caledonian Ry. Co.* v. *Mulholland*, L. R. [1898] A. C., at p. 226. The extreme doctrine sometimes supposed to have been involved in Lord Esher's judgment in *Heaven* v. *Pender* was explained and qualified by him subsequently. Moreover *Heaven* v. *Pender* "applies only to a thing dangerous *in itself*, such as a loaded gun. It does not extend to a waggon; and still less to a heap of stones." *Per* Farwell, L.J., L. R. [1913] 1 K. B. 468.

With *Miller* v. *Hancock* the student should compare *Dobson* v. *Horsley*, L. R. [1915] 1 K. B. 643; where the injury was caused by the absence—not concealed but obvious—of one bar in the railing protecting a flight of steps; *scienti non fit injuria.*

In *Miller* v. *Hancock* the circumstances were held to imply (1) an undertaking by the landlord to keep the staircase in repair, and (2) an authority from him to the tenants to invite visitors for business purposes as *his* invitees. The case was discussed, and distinguished, in *Huggett* v. *Miers* (L. R. [1908] 2 K. B. 278), where a similar landlord was held *not* to have impliedly undertaken to keep the staircase lighted after dark.]

[See also TODD *v.* FLIGHT, *supra*, p. 457.]

[*The rule applies even to a merely temporary structure; e.g. a timber stand, on a racecourse.*]

FRANCIS *v.* COCKRELL.

COURT OF QUEEN'S BENCH. 1870. L.R. 5 Q.B. 184, 501.

[THE defendant, acting on behalf of himself and several other persons interested in the Cheltenham steeplechases, entered into a contract with Messrs Eassie by which they engaged to erect and let to the defendant and the other persons a temporary stand for the accommodation of persons desiring to see the races. The stand having been erected, the defendant, on behalf of himself and his colleagues, received money from visitors for the use of places on the stand. Messrs Eassie were competent and proper persons to be employed to erect the stand, but it was in fact negligently erected by them; and in consequence of its being so negligently erected it fell, and the plaintiff, who had paid for admission, and was upon the stand looking at the races, was injured by the fall. Neither the plaintiff nor the defendant knew of the improper construction of the stand.

The plaintiff sued to recover damages for his injuries. A case was stated for the opinion of the Court as to whether or not the plaintiff was entitled to recover, either in an action of tort or one of contract.

H. Matthews, for the defendant, distinguished the case from *Indermaur* v. *Dames*[1] on the ground that there the defendant *knew* of the danger.]

* * * * * * *

HANNEN, J., delivered the judgment of the Court for the plaintiff. ...In *Grote* v. *Chester and Holyhead Ry. Co.*[2] the point now under consideration was directly raised. There an accident happened from the defective construction of a bridge over a railway, for the erection of which the company had employed a competent engineer. It was left to the jury in effect to say whether the engineer as well as the company had used due care and skill. For the defendants it was objected that they would not be liable unless they had been guilty of negligence, and after verdict for the plaintiff[3] it was argued for the defendants that, as they had engaged the services of a most competent engineer in the construction of the bridge, they had done their duty. Upon which Parke, B., said[4], "It seems to me they

[1] *Supra*, p. 612.
[2] 2 Ex. 251.
[3] Whose contract of carriage was *not* with the defendants.
[4] 2 Ex. at p. 254.

would still be liable for the accident, unless he also used due and reasonable care and employed proper materials in the work"; and later, with reference to the case of *Sharp* v. *Grey*[1], he says, "A coach proprietor is liable for an accident which arises from an imperfection in the vehicle, although he has employed a clever and competent coachmaker"; and the Court held that the jury had been properly directed, saying, "It cannot be contended that the defendants are not responsible for the accident, merely on the ground that they have employed a competent person to construct the bridge."...

[An appeal was then made to the Exchequer Chamber, where the following judgments were delivered.]

MARTIN, B....I do not at all pretend to say whether the relation of the parties raised a contract, or a duty. It seems to me exactly the same thing; but I am of opinion that when a man has erected a stand of this kind for profit, that he contracts impliedly with each individual who enters there, and pays money to him for the entrance to it, that it is reasonably fit and proper for the purpose; or, if you choose to put it in another form, that it is the duty of a person, who so holds out a building of this sort, to have it in a fit and proper state for the safe reception of the persons who are admitted. I apprehend it might have been described, at a time when pleading was more strict than it is now, either as a contract or as a duty, and that it is one of those implied contracts which, in point of fact, is the same as a duty. I do not at all distinguish between them, and, therefore, in my judgment, the duty was personal on the defendant, when he received this money, to provide that the stand was fit and proper—ordinarily fit and proper for the purpose. Not that I consider the defendant in any way an insurer, and responsible for anything beyond what a man would reasonably be responsible for; but I think that he was responsible for that stand being in a fit and proper condition,—in a reasonably fit and proper condition for the purpose for which he took the money and admitted the person; and, therefore, I am very clearly of opinion that, supposing the defendant to have been a person who had fitted up this stand for his own private benefit, he would be responsible on that contract.

But the defendant relies upon the fact that Messrs Eassie, the contractors, built the stand. The facts were, that a short time before the race Messrs Eassie were employed by the defendant and others for the purpose of erecting this stand, and the case finds that Messrs Eassie were very competent and proper persons to be employed for the purpose of erecting a sufficient and proper stand; and it was contended by Mr Matthews that the plaintiff would have had a right

[1] 9 Bing. 457.

of action against Messrs Eassie. In my opinion he would not.... The law of England looks at proximate liabilities as far as is possible, and endeavours to confine liabilities to the persons immediately concerned; and I apprehend it would be impossible to contend that a person, who had erected a building of this kind strictly according to his contract, would be responsible to a stranger who happened to go upon it, if it is found not to be fit for its purpose....I think the plaintiff is clearly entitled to recover from the defendant, either in Case or in contract....

CLEASBY, B. The defendant being a party to providing a stand for the use of the public, it appears to me that he was certainly under some duty in connection with that stand so provided by him; and the question is, whether that duty is only a duty of a personal nature, that is to say, only so far as regards his own personal interference in the matter, that he shall use due and reasonable care himself, or whether it was a duty annexed to the thing itself, a duty in connection with the way in which the thing itself should be erected. The public, or those coming to use this place, have no idea of contracting with any particular person, or of any personal obligation in anybody. What they rely upon is the thing itself. They rely upon the security of the thing itself; and I think that the duty on the part of those who provide the building is co-extensive with that, and the duty of the defendant was to take care that the stand should be erected so as to be reasonably fit and proper for the purpose.

Now, it appears that the stand was not erected so as to be reasonably fit and proper for the purpose; and, although, of course, until somebody comes to make use of this building no obligation can arise which can be enforced, yet as soon as any person does come to make use of the building, then, like the other cases where the public do not contemplate any particular person, the duty which has been imposed upon the defendant makes a right in the person who has connected himself with the matter, and that right and breach of duty give rise to a cause of action in the person who has suffered by the breach of duty. That is the construction I am disposed to put upon the relation of the plaintiff and defendant in this case. The liability would not apply to latent defects, because the defendant is only to take care that it is properly erected so as to be reasonably fit and proper. Here the erection was negligently done....I think the proper ground of decision in this case is, that the duty here is not of a personal nature merely, as regards the man himself, that he will take due and reasonable care (for the defendant did take due and reasonable care in employing a respectable and proper builder); it is not personal in that way, nor do I think that there was any personal contract in this sense between the defendant and the plaintiff; nor do I put my

decision so entirely upon the ground of contract between them; I might lean in that direction, but I do not put my decision upon that ground. I think the plaintiff relied upon the thing itself being in a proper state; and as the fault or breach of duty of the defendant was that it was not in that state, the plaintiff is entitled to recover in this action.

Judgment affirmed.

[*But to a mere* Licensee[1] *he is not responsible except for a "Trap," i.e. for some* known *but* concealed *danger*[2].]

CORBY *v.* HILL.

COURT OF COMMON PLEAS. 1858. 4 C.B. N.S. 556.

[ACTION for negligently leaving certain slates upon a certain road whereby the plaintiff's horse was injured. The road in question was a private road leading from the turnpike-road to the Hanwell Lunatic Asylum and to the residence of the superintendent, Dr Saunders. The defendant, a builder, was employed to do certain work at the asylum; and, with the consent of the owners of the land, stacked certain slates and other materials upon a portion of the road, without taking the precaution of placing a light near them at night. In consequence of this, the plaintiff's servant, who was driving a horse and carriage along the private road to the residence of Dr Saunders, during the night-time, not seeing the slates, drove against them, and seriously injured the horse.

In answer to questions put to them by the learned judge, the jury found that the defendant had the consent of the owners of the property for placing the slates and materials where he placed them, but upon the usual terms of properly providing for the safety of the public, or of such of the public as had permission to use the way; that there was negligence in leaving the stack without a proper light; and that that

[1] As to Licenses, see WOOD *v.* LEADBITTER, *supra*, p. 392.

[2] [EDITOR'S NOTE. "A permission to use a Way is of the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time and omitted to caution the donee. There must be something like Fraud on the part of the giver, before he can be made answerable....Otherwise a man who allows strangers to roam over his property would be answerable for any danger which they might encounter whilst using the licence." (*Per* Willes, J., in *Gautret* v. *Egerton*, L. R. 2 C. P. at p. 375.)]

negligence was chargeable upon the defendant, in conjunction with the owners of the soil.

BYLES, J., entered a verdict for the plaintiff.]

Huddleston, Q.C., moved to enter it for defendant....*Stone* v. *Jackson*[1] comes very near this case. There—in an action for an injury to the wife of the plaintiff through the negligence of the defendant in leaving an open vault or cellar on his own premises unfenced, whereby she fell in and was injured,—the evidence was, that many persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from a street to the main road by avoiding an angle, but that the owner of the premises, as often as he saw them, turned them back. And it was held that the defendant was not liable. [WILLIAMS, J. The plaintiff was not a trespasser here, as the woman was in that case.]

...In *Southcote* v. *Stanley*[2], the declaration alleged that the defendant was possessed of an hotel into which he had invited the plaintiff to come as a *visitor*[3], and in which there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff by the permission of the defendant lawfully opened for the purpose aforesaid, and that, by and through the default of the defendant, the door was then unfit to be opened, and a large piece of glass fell from the door and wounded the plaintiff: and it was held that no cause of action was disclosed.

* * * * * * *

WILLIAMS, J....I see no reason why the plaintiff should not have a remedy against such a wrong-doer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it. All the cases referred to, with one exception, are cases where the question has been as to the remedy which a trespasser has for an injury resulting to him from the manner in which the proprietor of the land has dealt with it. They therefore have nothing to do with the case before us, where the plaintiff is not a trespasser. The case of *Southcote* v. *Stanley* stands entirely on the relation of host and guest; and was decided upon this principle, that one who chooses to become a guest cannot complain of the insufficiency of the accommodation afforded him....

WILLES, J....The question is, whether there is any legal remedy for a person lawfully using a road, to whom injury results from the act of a third person in negligently placing an obstruction upon the road. I should have thought that the bare statement of the proposition was enough. The defendant had no right to set a trap for the plaintiff.

[1] 16 C. B. 199.

[2] 1 H. & N. 247.

[3] [EDITOR'S NOTE. I.e., a social guest, not a customer. The latter would have come under the "Interest" rule.]

One who comes upon another's land by the owner's permission has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury....

Rule refused.

[EDITOR'S NOTE. To a mere Licensee the responsibility is only for Commission and not for Omission; *e.g.*, for setting a spring-gun, but not for leaving un-mended a glass-door that contained a crack which he had not detected. Hence a merely "social"—*i.e.* non-paying—guest obtains no right of action when he catches cold through being seated next to a broken window or being put into a damp bed. He takes the peril along with the permission.

A 'Trap' involves the ideas "of Concealment and Surprise; an appearance of safety under circumstances cloaking a reality of danger"; *per* Hamilton, L.J., L.R. [1913] 1 K.B. at p. 415. *E.g.* a vicious horse kept in a field without warning given.]

[*A* tacit *License may be created by habitual acquiescence in known Trespasses.*]

[*To* juvenile *licensees greater care is due than to adult ones.*]

COOKE *v.* MIDLAND G. W. RY. OF IRELAND.

HOUSE OF LORDS. L.R. [1909] A.C. 229.

[ON land belonging to the Midland Great Western Railway of Ireland there lay a disused turn-table, unfenced and unfastened. A notice-board forbade trespass there; but children, to the knowledge of the Railway Company's servants[1], habitually resorted to it, and played on the turn-table. The plaintiff, a child of four years old, played on the turn-table; and by its motion his leg was crushed against a wall. The jury found that he had been allured to the turn-table by the company's negligence; and that negligence of theirs was the effective cause of the misfortune. Judgment was entered for £550 damages; and was affirmed by the Irish

[1] [EDITOR'S NOTE. In *Jenkins* v. *G. W. Railway* (L. R. [1912] 1 K. B. at p. 533) Fletcher Moulton, L.J. says: "It is not sufficient to say that *some* servant of the railway company must have known. It depends on what servant it was. The knowledge of an errand-boy employed by the company is not knowledge of the company."]

King's Bench Division but set aside by the Irish Court of Appeal. The plaintiff appealed to the House of Lords.]

Ronan, K.C. for the defendants....It would be a novel doctrine that a Trespasser is converted into a Licensee by the mere fact that the owner had not turned him off when he was committing similar previous acts of trespass. The evidence of Acquiescence is weak. And no case of anything like Invitation is made out. The trespasser must take the consequences of his trespass....

LORD MACNAGHTEN...[The judge] would have been wrong if he had withdrawn the case from the jury. I think the jury were entitled, in view of all the circumstances...to find that the company were guilty of negligence.

It does not seem unreasonable to hold that, if persons allow their property to be open to all comers (infants as well as children of maturer age), and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission and who are unable, in consequence of their tender age, to take care of themselves....

LORD COLLINS. This case has given rise to much difference of view.... I think the facts, in combination, were evidence from which a jury might well infer not merely a licence, but an invitation, which fixed the defendants with a high responsibility towards those people to whom such an invitation would mainly appeal—namely those who from their tender age would be deemed incapable of caution and, therefore, of Contributory Negligence....

LORD LOREBURN, L.C....This case is near the line. The evidence is very weak; though I cannot say there was none....

LORD ATKINSON....To the blind the most obvious danger may be a "trap." To the idiotic the most perilous act may appear safe. The duty the owner of premises owes, to the persons to whom he gives permission to enter them, must be measured by his knowledge (actual or imputed) of the habits, capacities, and propensities of those persons. If the owner of premises, on which dangerous and alluring machines are placed, gives to boys of a mischievous and intermeddling age, or to children of such tender years as to be quite unable to take care of themselves, leave to enter upon the premises, he will be...responsible for any injury one of the boys or children may sustain....

I think that there was evidence, proper to be submitted to the jury, that the children...played upon the turn-table with the leave and license of the company....

The question may have to be determined by your Lordships on some future occasion, whether or not the owner of premises which he knows boys and children, of the class and character above mentioned, are in

the habit of frequenting *merely as Trespassers*, would be liable, if he placed dangerous and alluring machines upon the premises, to the same extent as if these boys or children were his Licensees; and, if not, to what extent...his liability is to be restricted[1]...."

Judgment for plaintiff restored.

[EDITOR'S NOTE. This case, so frequently quoted, is too often (as Lord Sumner has said) "relied on for principles which it does not lay down, and applied to facts to which it does not apply." The student should be careful to notice that the House of Lords did *not* rule as matter of law that the knowledge and conduct of the railway company's servants did actually amount to a tacit licence; but only that they were sufficient to entitle the jury to find (if it thought fit) that they did so amount. Had the jury found an opposite verdict, the House would, apparently, have been equally willing to leave it similarly undisturbed. A like remark applies to a judgment delivered upon almost identical facts by the Supreme Court of the United States in 1873 (*Stout* v. *Sioux C. P. R. Co.*, 17 Wallace 657); where a railway company was held liable to a child of six, who had been injured by playing with a turn-table. The Court said: "The evidence is not strong, and the negligence is slight. But we are not able to say that there is not evidence sufficient to justify the verdict."

In a later English case, that of *Jenkins* v. *Great Western Railway* (L. R. [1912] 1 K. B. 525), children were known to be in the habit of coming into the company's premises to play on a pile of wooden sleepers, but had no licence to go beyond it to the railway line, thirty-five yards further away. The plaintiff, a child of two and a half years old, did go upon the line; and his foot was cut off by a passing train. Judgment was given for the defendant: the plaintiff appealed. He urged that, as the children were known to play upon the sleepers, the company must have known that they were likely to go on further and so approach a place of danger, which place it therefore became bound to fence off. The appeal was dismissed. Farwell, L. J. said:—"To say that *Cooke's Case* would have been decided as it was, if the children who were invited to go and play with the turn-table had strayed on, to the other side of the field, and had there fallen into the ditch (although they had never before been known to go over to the ditch, and although there was no...leave and licence except up to the turn-table...) would be an undue extension of...*Cooke's Case*."

The defence of Contributory Negligence was not available in these cases, because, as Palles, C.B. explained in *Cooke's Case* (Irish Rep. [1908] 2 K. B. D. at p. 258) that doctrine "is entirely grounded upon the fact that man is a reasonable animal; and it has no application to the case of a child of such age as to be incapable of appreciating the danger, and of reasoning in reference to it." Care must be measured by Capacity. Cf. p. 545 *n.*, *supra*. Yet even a child of only five "knows perfectly well not to run up against obstructions...a matter quite within his capacity for self-care" (Scotch Session Cases [1910] at p. 789). Cf. p. 32 *supra*.

Where children are concerned, both the idea of an Invitation and that of a Trap must be taken in an enlarged sense. What an express Invitation would be to an adult, the mere temptation of an alluring plaything is to a child of tender years; as has been well said in the United States by Young, J. (21 Minnesota 207). Moreover the child's ignorance may prevent his realizing that there are dangers connected with

[1] [EDITOR'S NOTE. Contrast the stricter view of Lord Shaw in *Lowery* v. *Walker* (L. R. [1911] A. C. at p. 15) with the laxer one of Darling, J. (L. R. [1909] 2 K. B. at p. 435) and Vaughan Williams, L.J. (L. R. [1910] 1 K. B. at p. 186) as to a landowner's duty towards Trespassers.]

this plaything, or with the premises where it stands, even when those dangers are such as would be obvious to the mind of an adult. To the child, therefore, these dangers are concealed ones; and thus constitute a Trap.

At the same time, it must be borne in mind that the mere presence of an attractive toy on a man's land does not necessarily make him liable to every child who enters that land and is injured by some source of peril that exists there. The toy may have constituted an implied invitation; but an invitation cannot create legal responsibilities if it has not been acted upon. Unless it was actually by the toy itself that the child was induced to come into the zone of danger, the owner of the land and toy is under no obligation to compensate him for the harm which he has sustained.

Turn-table cases have been singularly frequent in America. By 1907 the courts of twelve States had followed the doctrine of *Stout's Case* but nine of them had refused to extend its application to attractive articles that were not turn-tables; and eight (amongst which were Massachusetts and New York) had rejected the doctrine altogether. For details see 122 American State Reports, pp. 508—510. In 1917 an American judge said that "No other subject within the domain of the law has given rise to greater divergence of judicial opinion than the doctrine of *Stout's Case*": 53 Montana at p. 259.

But in England the authority of *Cooke's Case* is of course unquestionable.]

[*The liability to* juvenile *licensees.*]

LATHAM *v.* R. JOHNSON & NEPHEW Ld.

COURT OF APPEAL. L.R. [1913] 1 K.B. 398.

[THE plaintiff, a child between two and three years old, left her home, unaccompanied; and was found, soon after, on some waste ground belonging to the defendants, sitting on a heap of paving stones. Her hand was under a stone that had so crushed it, that one finger had to be amputated. The jury found (1) that children habitually played upon the land, with the permission of the defendants; (2) that there was no invitation to the plaintiff to go upon the land unaccompanied; (3) that the defendants ought to have known that there was a likelihood of children being injured by the stones; and (4) that the defendants did not take reasonable care to prevent children being injured thereby. They gave £15 damages. The defendants appealed.]

Atkinson, for plaintiff....To children who go upon their land with leave and licence, the owners owe a duty not to put anything dangerous upon the land.

COZENS HARDY, M.R. When children are allowed to play in a meadow through which a stream runs, is the owner responsible for the death of a child by drowning?

* * * * *

HAMILTON, L.J....Children's cases are always troublesome....How can the child take care of himself? The way out of the dilemma was found in *Burchell* v. *Hickisson* (50 L. J. R., C. P. 101) by deciding that the circumstances may evidence the attachment, to the licence or permission to enter, of a condition; namely, that the child shall only enter if accompanied by a person in charge, capable of seeing and avoiding obvious perils, and thus of placing both himself and his charge in the position of an ordinary licensee, both able, and bound, to look after himself.

Lindley, J. says: "There could be no duty on the part of the defendant towards the plaintiff" (aged four) "further than that the defendant must take care that no concealed danger exists....The defendant never invited such a person as the plaintiff to come, unless he was taken care of by being placed in charge of others; and if he was in charge of others there was no concealed danger. In other words, there was no invitation to the plaintiff if he was not guarded; and if guarded, then there was no trap." Logically this principle is applicable to all cases of infirmity or disability and not to infants only....

One asks what kind of chattel it is in respect of which its owner owes a duty of care towards strangers, equally whether it is in a public place or on his own premises, and equally whether the strangers are invited or only licensed. There is only one answer:—the chattel must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be. Danger is relative. What property must the chattel possess to make the consideration of its attractiveness to children relevant? It must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation. Hence, in my opinion, in any view of it, the decision in *Cooke's Case* [*supra*, p. 623] is a decision on traps for children....There was no evidence that this recently deposited heap of stones was a trap. It was no more than was to be looked for naturally on such an open plot as this was.

FARWELL, L.J....There is nothing in this case to raise any liability in the defendants. There is neither allurement, trap, invitation, nor dangerous thing. The use of the land for depositing stones is a normal user; and stones are no more dangerous than cows or donkeys, if indeed as much....

Appeal allowed.

[EDITOR'S NOTE. "What may be an effective warning to an adult may be no warning at all to an infant. What to a child may amount to a license or an invitation, may to an adult be neither." *Per* Bankes, L.J., in *Hardy* v. *Central London Ry. Co.* (*Times*, July 27, 1920).]

[*And to a mere* Trespasser *he is not responsible except for a Nuisance* (*or some danger akin to one*).]

BARNES *v.* WARD.

COURT OF COMMON PLEAS. 1850. 9 C.B. 392.

[ACTION under Lord Campbell's Act by the administrator of Jane Barnes, who had been killed by falling into an excavation, on the defendant's land, which he had left unfenced. That Act, 9 and 10 Vict. c. 93 ("An Act for compensating the families of persons killed by accident"), provides (s. 1) that "whensoever the death of a person shall be caused by wrongful act, neglect, or default...such as would (if death had not ensued) have entitled the party injured to maintain an action... then the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death," and even though the killing be a felonious homicide.]

* * * * * * *

The facts were as follows:—The deceased, Jane Barnes, between eight and nine o'clock in the evening of the 26th of October, was proceeding, in company with her sister and a child, along an unfinished pathway near a row of houses then in the course of erection by the defendant (a builder), called Victoria Grove Terrace, in the Uxbridge Road. It being dark, and no light near, the deceased accidentally fell down the area in front of one of the houses; and died shortly afterwards from the injuries she thus sustained. It appeared that the deceased was sober at the time of the accident; and that there was no fence to guard the area, but merely a low stone coping for the reception of iron railings. It further appeared that there had always been a thoroughfare; but the evidence as to what particular part of the newly formed road had constituted the ancient pathway was somewhat confused. The land belonged to the Bishop of London, by whom it had been leased for terms of years to various persons, under one of whom the defendant held the premises in question.

On the part of the defendant it was contended, firstly, that there was no sufficient evidence that the footpath was a public way; and, secondly, that a man has a right to excavate his own land to its extremity, and there is no common-law obligation upon him to fence or guard such excavation, even though it abut upon a highway....

Coltman, J., told the jury, that, if there was a public way *abutting on* the area, which would be dangerous to persons passing, unless fenced—or if there was a public way *so near* that it would produce danger to the public, unless fenced—the defendant would be liable;

(unless the accident was occasioned by want of ordinary caution on the part of the deceased). The jury found that there was an immemorial public way abutting on the area, and they returned a verdict for the plaintiff, damages £300; (being £100 to the husband of the deceased, £75 each to her two infant daughters, and £50 to her son).

[A motion was made to enter judgment for the defendant; and was argued twice.]

* * * * * * *

MAULE, J., delivered the judgment of the Court....The arguments for the plaintiff were that, when a public way has existed from time immemorial, the public have a right to enjoy it with ease and security; and that if a man prevents that enjoyment, even by the use of his own property, he is responsible as for a public nuisance. And the case was put of the proprietor of land, over which a public way passes, excavating his land on each side thereof, so as to leave the line of way running between two precipices; which it was argued would, in effect, make the way impassable, and therefore be a public nuisance. And the cases of *Coupland* v. *Hardingham*[1] and *Jarvis* v. *Dean*[2] were cited....

On the part of the defendant, it was argued that no use which a man chooses to make of his own property can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful enjoyment of that right; that in the present case the excavation of the area in no manner interfered with the way itself, or was in any sense hurtful or perilous to those who confined themselves to the lawful enjoyment of the right of way; and that it was only to those who, like the deceased, committed a trespass, by deviating on to the adjoining land, that the existence of the area (though not fenced) could be in any degree detrimental or dangerous. In support of this view of the subject, reliance was placed on the case of *Blyth* v. *Topham*[3];...with respect to which case it must be observed that there the existence of the pit, in the waste adjoining the road, is not said to have been dangerous to the persons or cattle of those who passed along the road, if ordinary caution were employed.

In the present case the jury expressly found the way to have existed immemorially; and they must be taken to have found that the state of the area made the way dangerous for those passing along it, and that the deceased was using ordinary caution in the exercise of the right of way at the time the accident happened. The result is—considering that the present case refers to a newly made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care—that it appears to us after consideration, that the defendant in having made that excavation was

[1] 3 Camp. 398. [2] 3 Bingham 447.

[3] *Supra*, p. 531; Cro. Jac. 158.

guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road. For the danger thus created may reasonably deter prudent persons from using the way; and thus the full enjoyment of it by the public, is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.

With regard to the objection that the deceased was a trespasser on the defendant's land at the time the injury was sustained, it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained. Thus in the case of *Bird* v. *Holbrook*[1], the plaintiff was a trespasser—and, indeed, a voluntary one—but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant (without any want of ordinary caution on the part of the plaintiff), although the injury would not have occurred if the plaintiff had not trespassed on the defendant's land. This decision was approved of in *Lynch* v. *Nurdin*[2]....

Rule discharged.

[EDITOR'S NOTE. In *Hardcastle* v. *South Yorkshire Railway* (4 H. & N. 67) Martin, B., pointed out that in *Barnes* v. *Ward* the danger was not only to trespassers, but might have affected even a person who had never voluntarily quitted the highway at all, e.g. if such a person were seized with sudden giddiness or if his horse suddenly started; so that the excavation was obviously a nuisance to the highway. And the court, whilst "entirely concurring" with the decision in *Barnes* v. *Ward*, held its principle to be inapplicable to the circumstances of the case before them; inasmuch as the excavation by which Hardcastle had been injured was *not* sufficiently near the highway to be dangerous to travellers thereon. Thus—so long as he keeps clear of those extreme omissions which are in themselves unlawful—a landowner need not *do* anything to make his premises safe for trespassers. As was vividly said by an American judge, (Clark, J., in *Frost* v. *Railroad Co.*, 64 New Hampshire, 220), "The owner of a fruit-tree is not bound to inclose it—or to exercise care in securing the staple and lock which hold his ladder—for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner of premises upon which there is a pond, legally required to exercise care in securing his gates to guard against accidents to trespassing children. And a man having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling." Indeed an owner may go so far as to *create* sources of danger, if they are slight and obvious, to deter trespassers; e.g. he may, on the top of any wall that is not very low, set spikes or broken glass. Yet even to trespassers he will become liable, should they be injured through his action in setting up anything that is intrinsically unlawful, like the pit beside the highway, or that creates a peril which is serious or is concealed, like a spring-gun in a plantation, (*Bird* v. *Holbrook*, 4 Bingham 628). But he is entitled to protect his premises, during the dead of the *night*, by letting loose, within a walled yard or garden, a dog, even though fierce; (*Sarch* v. *Blackburn*, 4 C. & P. 297).]

[1] 4 Bingham 628. [2] 1 Q. B. 37; *supra*, p. 27, cf. p. 32 *n*.

[*All these three*[1] *forms of responsibility arise irrespectively of any* Contract *between the parties.*]

FOULKES *v.* THE METROPOLITAN DISTRICT RY. CO.

COURT OF APPEAL. 1880. L.R. 5 C.P.D. 157.

[THE plaintiff had taken, at the Richmond station of the London and South Western Railway Company, a return ticket to Hammersmith. Over the London and South Western Company's lines the defendant company had running powers. The plaintiff made his return journey in the defendants' train. Owing to their carriage, in which he was travelling, not being adapted to the height of the Richmond platform, he fell and was injured. At the trial of the action it was assumed that it was from the defendant company that the plaintiff had taken his ticket. This error was afterwards discovered. The jury found negligence in the defendants, and gave a verdict for plaintiff. A Divisional Court having refused to set aside the verdict, the defendants appealed to the Court of Appeal.]

* * * * * * *

BRAMWELL, L.J....Even though the contract were with the South Western, the plaintiff is entitled to recover against these defendants. In that case there would be no duty of contract, and consequently no cause of action for a nonfeasance. But there would be that duty which the law imposes on all, namely, to do no act to injure another. It is clear that if a porter of the defendants had run a truck against the plaintiff at Broadway station, and hurt him, he could maintain his action against the defendants. So if he had left the carriage there, and while getting in, the train improperly started, and he was hurt, or if his hand was wrongfully pinched. These are clear cases, but the law is the same in cases not so clear; for example, if the carriage he was put in was dangerous, if the step he had to tread on was rotten. Apply that to the present case. The difficulty is with the question and finding: the jury have found there was negligence. Now, there was no negligence. What was done or omitted was wilful. But the substance of the finding of the jury is that the carriage was dangerous with reference to the platform, or the platform with reference to the carriage, and that the plaintiff might and did reasonably act in the belief that they were not in that state, but safe for him to use; that in truth the combined arrangements were a trap or snare: so that if he had been carried gratuitously as by a friend, he would have had a right of action against him. With the propriety of so finding we have nothing to do. There was according to that finding a tort, (whether in the defendants alone or in conjunction with the South Western does not matter).

* * * * * * *

Appeal dismissed.

[1] As to still higher responsibilities under Contract, see p. 615 *n*, *supra*.

PART III.

THE RELATIONS BETWEEN TORT AND CONTRACT.

[*If your breach of your contract with one person should injure* others, *they usually have no remedy against you, even in Tort.*
E.g., a telegraph company by whose negligence a telegram is transmitted incorrectly commits no Tort against the addressee misled by it.]

DICKSON *v.* REUTER'S TELEGRAM CO.

COURT OF APPEAL. 1877. L.R. 3 C.P.D. 1.

APPEAL from the judgment of the Common Pleas Division[1], in favour of the defendants; on demurrer to the statement of claim.

The plaintiffs were merchants at Valparaiso, and were a branch house of the firm of Dickson, Robinson, & Co., of Liverpool; the defendants were a telegraph company, having their chief offices in London, and agencies in Liverpool and in various parts of the world, including South America. The defendants had a system of forwarding in one "packed" telegram the messages of several senders, each message being distinguished and headed by a registered cipher known to the defendants and their agents and also to the senders; which messages, on receipt of the packed telegrams by the defendants' agents, were transmitted to the proper recipients. Previous to December, 1874, Dickson, Robinson, & Co. were in the habit of sending messages to the plaintiffs through the defendants' company, and were instructed by the defendants to head the messages by a registered cipher word indicating that the messages were intended for the plaintiffs. On the 26th of December, 1874, the plaintiffs received at Valparaiso a telegraphic message, which they understood, and reasonably understood, to be a direction from Dickson, Robinson, and Co. to ship barley to England; but the message was not in fact intended for the plaintiffs. The mis-delivery was caused by the negligence of the defendants or their agents. On receiving the telegram, the plaintiffs proceeded to execute the supposed order; and shipped large quantities of barley to England. Owing to a fall in the market for barley, the plaintiffs, by reason of the shipments, sustained a serious loss; and they now claimed that the defendants' company should reimburse them for that loss.

Herschell, Q.C., for plaintiffs....This action can be supported on two grounds: first, the defendants warranted to the plaintiffs that they

[1] L. R. 2 C. P. D. 62.

had been employed to deliver this message to the plaintiffs, and the defendants are liable for a breach of warranty, in analogy to the case of *Collen* v. *Wright*[1], where the agent represented that he was acting for a principal; secondly, the defendants are carrying on the business of delivering telegraphic messages, and they are liable to anyone dealing with them who is injured through their negligence in carrying it on....If a person carrying on a business acts negligently in conducting that business, he is liable to any person dealing with him who is injured by his negligent act. The defendants, in carrying on their business, negligently delivered a message, which they knew might be mischievous if they delivered it to the wrong person. The telegram was supposed by the plaintiffs to be received, not from a stranger, but from persons who were in the habit of dealing with the defendants in the course of their business by means of a cipher; and it was the duty of the defendants to use the cipher with due care. This they failed to do, and therefore they are liable to compensate the plaintiffs for the injury sustained by them.

A great analogy exists between the liability of a common carrier and a telegraph company: Sedgwick on Damages, 6th ed. p. 443; *New York and Washington Printing Telegraph Company* v. *Dryburgh*[2]. A carrier is bound to deliver safely the goods intrusted to him, and a telegraph company are equally bound to transmit to the proper recipients the messages which they undertake to send along their lines.

If the defendants are not liable in the present action very serious consequences will ensue. A telegraph company may deliver a message to a person for whom it is not intended, and may with impunity cause very great injury to the person who receives it and is induced to act upon it. The consequence will be that telegraph companies will become

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147; in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

[2] [Editor's Note. In this case, a man handed in a telegram to Dryburgh, a florist, ordering "two hand bouquets." The telegraph-clerk read it as "two *hund* bouquets"; and, assuming that this must mean "two hundred bouquets," telegraphed those words. The florist accordingly cut that quantity of flowers, but the customer refused to accept them. It was admitted that the company were liable to the customer.

But they repudiated any liability to Dryburgh. The Supreme Court of Pennsylvania, however, held them liable; and the decision has been followed throughout the United States. Still this American liability in Tort, for *mis*-transmission, does not extend to *non*-transmission; see Bigelow on *Torts*, 7th ed. sec. 708.

The customer would not be liable to the florist for the superfluous bouquets. For the company were merely "special" agents, their authority being limited to the transmission of the message as actually handed in; see *Henkel* v. *Pape*, L. R. 6 Ex. 7.]

careless in the conduct of their business, and very great public detriment will be sustained.

* * * * * * *

BRETT, L.J. Upon consideration of the nature of the business of a telegraph company, it seems to me plain that all that they undertake to do is to deliver a message from the person who employs them, and that they perform the part of mere messengers; *primâ facie*, therefore, their only contract is with the person who employs them to send and deliver a message. In the present case the plaintiffs did not send the message, and therefore the defendants have made no contract with them.

The defendants have in effect made a representation which is false in fact, but which they did not know to be false at the time of making it. If the case for the plaintiffs be simply that there was a misrepresentation upon which they have reasonably acted to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false. This seems to be admitted by the plaintiffs' counsel; it is urged, however, that *Collen* v. *Wright* has introduced an exception to that rule. But after the argument of the defendants' counsel I have come to the conclusion that the decision in that case was founded upon a different and independent rule; which may be stated to be, that where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into upon that footing, he is liable to an action if he does not fill that character. But the liability arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation. Therefore the decision in *Collen* v. *Wright*[1] does not establish an exception to the rule that an innocent misrepresentation does not form the ground of an action. Now the telegraph company, being mere messengers, did not either expressly or impliedly invite the plaintiffs to act with them in any character; and the present facts do not fall within the principle of that case....

BRAMWELL, L.J....It is argued that this is a case of negligence. But before any person can complain of negligence, he must make out a duty to take care[2]....And it has never been laid down that the exemption from liability for innocent misrepresentations is taken away by carelessness....

It has been argued that if this action be not maintainable the consequences will be mischievous. I am not of that opinion. If it were held that a person is liable for a negligent misrepresentation,

[1] 7 E. & B. 301; 26 L. J. (Q. B.) 147; in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q. B.) 215.

[2] [EDITOR'S NOTE. See pp. 531—4, *supra*.]

however *bonâ fide* made, a great check would be put upon very many useful and honest communications, owing to a fear of being charged, and perhaps untruly charged, with negligence. I do not think the rule upon which we are acting unreasonable, either in itself or in its application to a telegraph company. It is to be recollected that a telegraph company are generally under some liability to the sender of the message, and if they are careless in delivering it and thereby occasion damage to him, he may maintain an action against them; and (apart from the natural desire to carry on their business properly so as to gain customers) the existence of this liability is a kind of security for the proper delivery of the messages intrusted to the telegraph company.

I wish further to say that I do not see any analogy between the liability of a common carrier and that of a telegraph company. A carrier is liable both to the person who employs him and also to the owner of the goods: but the plaintiffs did not employ the defendants, and they are not owners of the message....

Judgment affirmed.

[Editor's Note. Of the five grounds of liability suggested by the plaintiff—(1) Warranty, (2) Misrepresentation, (3) Bailment, (4) Public policy, (5) Negligence—the fifth is shewn by Sir F. Pollock to be far the most solid; see Pollock on *Torts*, ch. xiii. s. iii. American Courts, whilst agreeing in establishing the liability, have differed as to the grounds on which they establish it. One ground, suggested in Dryburgh's case by the Court, is that the telegraph company ought, "for all purposes of liability, to be considered as much the agent of him who receives the message as of him who sends it; the recipient being supposed to ratify, by acting on the message, an authority which the sender had—on behalf of the recipient—conferred upon the company."]

[*But your breach of your contract with a person sometimes gives him the option of suing you either in Contract or even in Tort.*]

KELLY *v.* METROPOLITAN Ry. Co.

L.R. [1895] 1 Q.B. 944.

Court of Appeal.

[The statement of claim alleged an agreement by the defendants to carry the plaintiff safely; and a breach of that agreement in negligently managing the train in which he was, so that it ran into the wall at Baker Street Station: whereby the plaintiff sustained injury. It was admitted by the defendants that the accident occurred by the negligence of the engine-driver in not turning off steam in time. The jury returned

a verdict for £25. When the plaintiff's costs were taxed, the taxing-master was of opinion that the action was founded on Contract; and that therefore the plaintiff, having recovered less than £50, was only entitled to costs on the county-court scale. (In an action of Tort the similar limit would have been only £20.) This decision was affirmed by Day, J. The plaintiff appealed...

Lawson Walton, Q.C. The duty of the defendants was contractual...

LORD ESHER, M.R....The plaintiff might maintain an action either in Contract or in Tort. In the former case he might allege a contract by the railway company to carry him with reasonable care and skill, and a breach of that contract. On the other hand, he might allege that he was being carried by the railway company to the knowledge of their servants, who were bound not to injure him by any negligence; and, if they were negligent, that was a matter on which an action of Tort could be brought. A plaintiff may frame his claim in either way. But he is not bound by the pleadings; and if he puts his claim on one ground but proves it on another, he is not now embarrassed by any rules. The question to be tried is the same in either case. If the jury found that there was negligence, they in fact tried an action of Tort...

Appeal allowed.

[EDITOR'S NOTE. Similar instances may arise where goods bailed are damaged through the negligence of the bailee; or where (*Edwards* v. *Mallan*, L. R. [1908] 1 K. B. 1002) a patient's jaw is injured through the unskilfulness of his dentist. Cf. also p. 631 *supra*.

The County Courts Act, 1919, s. 11, has increased the stringency of the rule against commencing in the High Court actions of trivial importance. Except where a judge orders otherwise, or where the action is one that could not have been commenced in the county court, a plaintiff in the High Court now obtains no costs if he recovers less than £40 in an action founded on Contract or than £10 in one founded on Tort. And he obtains costs only on the county court scale if he recovers £40 but less than £100 in the case of Contract, or £10 but less than £50 in the case of Tort.]

[*And* sometimes *your breach of your contract with one person may constitute a Tort against another.*]

PIPPIN and wife *v.* SHEPPARD.

COURT OF EXCHEQUER. 1822. 11 PRICE 401.

[ACTION on the case by a husband and wife against a surgeon, for negligent and unskilful treatment of the wife. The defendant demurred; on the ground that the declaration did not state that the defendant had been retained as such surgeon by the plaintiffs or either of them, nor did it state by whom he had been retained.]

Carter for plaintiffs....The plaintiffs seek damages for the suffering endured by the wife; to which they will be entitled, if they prove their declaration, without reference to any other person who may have retained the surgeon. Whatever right that person might have to sue on the contract, they have a right to sue for the special damage, a right which is independent of any contract and is founded on a different cause of action....

RICHARDS, L.C.B....The question is, to whom was the injury done? If a stranger had sent the defendant as a surgeon to cure this woman, undertaking to pay him for his attendance, he would not be entitled to recover for injury done to her in consequence of the surgeon's negligence. The only person who can properly sustain an action for damages for an injury done to the person of the patient, is the patient himself. Damages on that account could not be given to any other person, although the surgeon may have been retained by *him* to undertake the cure.

GARROW, B....Patients would frequently be precluded from seeking damages, if it were necessary—to enable them to recover—that there should have been a previous retainer, on *their* part, of the person professing to be able to cure them. In cases of surgeons retained by public establishments the patient would be without redress. For it could hardly be expected that the governors of an Infirmary should bring an action against the surgeon employed by them to attend a child (of poor parents) who may have suffered from his inattention.

* * * * * * *

Judgment for plaintiffs.

[EDITOR'S NOTE. Similarly, a child who had been injured in a railway accident was held entitled to sue the railway company, although his mother, in charge of whom he was travelling, had (by an honest mistake) taken no ticket for him when taking her own ticket. For even if the circumstances did not raise (as most of the judges thought they *did*) a contract to carry the child as well as the mother, yet

"the right which a passenger by railway has to be carried safely does not depend on his having made a contract; but the fact of his being a passenger casts on the company a duty to carry him safely.... The child was taken into the train and received as a passenger by the railway company's servants, with their authority. Under these circumstances, does not the law require those who were carrying the child to take reasonable care that he should come to no damage?" (*Per* Blackburn, J., in *Austin* v. *G. W. Ry. Co.*, L. R. 2 Q. B. at p. 445.) Cf. *Grote* v. *Chester*, *supra*, p. 618.]

[See also LANGRIDGE *v.* LEVY, *supra*, p. 476; WAITE *v.* N. E. RY. Co., *supra*, p. 585; FRANCIS *v.* COCKRELL, *supra*, p. 618; and FOULKES *v.* METROPOLITAN RY. Co., *supra*, p. 626.]

[*And it is a Tort to cause damage to any one by, knowingly and without special justification, inducing a person, who has made a contract with him, to commit a breach of it.*]

See LUMLEY *v.* GYE, *supra*, p. 520.

APPENDIX

[*The American rule as to Vendors of Poisons.*]

THOMAS *v.* WINCHESTER.

COURT OF APPEALS. 1852. 6 NEW YORK 397.

[APPEAL from a judgment of the Supreme Court for defendant.]

RUGGLES, C.J. This is an action brought to recover damages from the defendant for negligently putting up, labelling, and selling as the extract of dandelion (which is a simple and harmless medicine) a jar of the extract of belladonna (which is a deadly poison); by means of which the plaintiff, Mary Ann Thomas—to whom, being sick, a dose of dandelion was prescribed, and a portion of the contents of the jar was administered as and for the extract of dandelion—was greatly injured....

Mrs Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the

medicine prescribed, at the store of Dr Foord, a physician and druggist. ...A small quantity of the medicine thus purchased was administered to Mrs Thomas; on whom it produced very alarming effects;...for a short time her life was thought to be in extreme danger. The jar was labelled "half-lb. dandelion, prepared by A. Gilbert." [Gilbert was a person employed by the defendant.]...Dr Foord purchased the article as the extract of dandelion from J. S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged in New York in the...sale of vegetable extracts for medicinal purposes ...The extract contained in this jar was not manufactured by the defendant but was purchased by him from another manufacturer. The extract of dandelion and the extract of belladonna resemble each other in colour, consistence, smell and taste; but may, on careful examination, be distinguished by those who are well acquainted with these articles. Gilbert's labels were ...used in Winchester's business with his assent....

The question is, whether, the defendant being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If in labelling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If *A* builds a wagon and sells it to *B*, who sells it to *C*, and *C* hires it to *D*, who (in consequence of the gross negligence of *A* in building the wagon), is overturned and injured, *D* cannot recover damages against *A*, the builder. *A*'s obligation to build the wagon faithfully arises solely out of his contract with *B*. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life....

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label. Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs Thomas had died....

In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid

the creation of that danger by the exercise of greater caution? Or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labelled into the market; and the defendant is justly responsible for the probable consequences of the act....The plaintiffs' injury and their remedy would have stood on the same principle if the defendant had given belladonna to Dr Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label....

Whether Foord was justified in selling the article upon the faith of the defendant's label would have been an open question in an action by the plaintiffs against him; and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant cannot, in this case, set up as a defence that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion; and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation....

Judgment affirmed.

[EDITOR'S NOTE. This decision, though at first doubted by English opinion, received the approval of the Judicial Committee in *Dominion Natural Gas Co.* v. *Collins* (L. R. [1909] A. C. 640), as an instance of the general rule regarding "articles dangerous in themselves, such as loaded fire-arms, poisons." See p. 590, *supra*.

American courts now extend the rule to articles of "food." Chewing-tobacco was held not to be a food in *Liggett M. T. Co.* v. *Cannon* (132 Tennessee 419), known as "The Bug in the Plug case"; and the manufacturer who had sold it to a retailer was consequently held not to be liable to a third person who had bought it from the latter, and had been made ill by biting a large insect that was embedded in it. But in a more recent similar case—*Pillars* v. *Reynolds* (78 So. 365)—a similar subvendee did recover from the manufacturer. Indeed some American judges now incline to extend the liability to any article by which life or health has been in fact injured, even though it be not of a species that usually is dangerous and so would obviously impose on its manufacturer a duty of caution.]

THE END

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