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. ... 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.

* * * * * * *

[EDITOR'S NOTE. To the point about "going *along* roads" on p. 6, we may add an extension of it to injuries to persons or property *adjoining* roads. Lord Blackburn says "Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. ... The railings or windows of a shop may be broken by a carriage on the road; a pier adjoining to a harbour ... is liable to be injured by a ship. The owner of the injured property must bear his loss unless he can establish that some person is in fault. ... The owner of the carriage or ship incurs no liability merely because he is owner"; (L. R. 2 App. Ca. at p. 767; approved, L. R. [1924] 2 K. B. at p. 87. Cf. p. 599 *infra*.)]

[*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, 613.