Michigan Law Review

Volume 5 | Issue 5

1907

Note and Comment

Harry B. Hutchins
University of Michigan Law School

Frank L. Sage
University of Michigan Law School

Ralph W. Aigler

T. Harry Slusser

George Gardner

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT

AMERICAN BAR ASSOCIATION MEETING

The Executive Committee at its meeting in New York on December 28, determined to hold the annual meeting of the American Bar Association at Portland, Maine, on Monday, Tuesday and Wednesday, August 26, 27 and 28, 1907. The reason for selecting Monday, Tuesday and Wednesday is that the International Law Association is considering holding its meeting in America this year, and the suggestion has been made to that body to hold its meeting in Portland on the last three days of said week.

DISBARMENT OR SUSPENSION OF ATTORNEY.—The decision of the Supreme Court of Oregon in the case of *State ex rel Grievance Committee of State Bar Association* v. *Tanner,* rendered Jan. 12, 1907, 88 Pac. Rep. 301, is of sufficient importance to merit brief notice. The proceeding was instituted by the grievance committee of the State Bar Association for the removal from practice of the defendant, an attorney at law, under a statute of the State that provides for the removal or suspension of an attorney from practice by the Supreme Court "upon his being convicted of a felony or of a misde-

meanor involving moral turpitude." The information alleged that, on a date named, a United States grand jury returned an indictment against defendant, charging him with the crime of perjury; that to this indictment he entered a plea of guilty, but that subsequently, and before further steps had been taken, the indictment, on motion of the government, was dismissed, for the reason that the defendant had been pardoned by the President of the United States. It was insisted in the information that the plea of guilty amounted to a conviction of a felony, from the consequences of which the defendant was not absolved by the subsequent pardon. The defendant answered the information admitting the facts but contesting the claim that the plea of guilty, under the circumstances, amounted to a conviction of a felony. By way of further and separate answer, the defendant alleged that the perjury with which he was charged, was not committed in the actual trial of any cause and that it did not occur in connection with any professional matter or with the discharge of any professional duty to any court or client, but during a hearing before a United States grand jury, sitting to investigate certain alleged criminal acts of John H. Mitchell, Senator of the United States, before which defendant had been called as a witness. He admitted that in testifying before said grand jury to facts other than those which were the strict and absolute truth, he made a great mistake and was guilty of a great wrong, but by way of extenuation of the offense he submitted the following: That he had for years been a close and intimate friend of Senator Mitchell and his law partner since 1890; that the senator assured him that the charges were the result of political intrigue and the persecution of his enemies in the political faction opposed to him; that he represented to the defendant that, "the practice of taking money for appearances before the department had at one time been customary and proper, and that the charges themselves were simply an accusation of a breach of the written law, and not a breach of any inherent morality," and that he implored him "in a most pathetic manner to stand between him and disgrace and ruin in his old age, after a lifetime of public service," representing that his fate was in the hands of defendant. And the defendant further stated by way of answer and extenuation, that though he protested until the last against what he was asked to do, he "did not have the strength to resist the most heartrending pleadings of a man like Senator Mitchell to whom" he "was tied by bonds of long association, obligation, and most kindly feeling," and that it was under such circumstances that, as a citizen, he appeared before the said grand jury, and, rather than seem a traitor to Senator Mitchell, testified that the partnership agreement between himself and Senator Mitchell was to the effect that all moneys paid for services in the land department belonged to defendant individually, whereas, in fact, they belonged to both jointly. He disclaimed having anything to gain by his false testimony, and insisted "that his conduct was influenced wholly and entirely by a feeling of loyalty toward Senator Mitchell and a great pity for his distress." The defendant showed further "that afterwards he appeared in open court, the said grand jury being present, and told the whole truth, exactly as the facts warranted, and that he so testified when sworn as a witness, during the course of the trial."

It appeared that defendant had practiced law in the city of Portland for more than twenty-five years and that never before had his standing as a man or as a lawyer been the subject of criticism. It was stipulated that the answer of defendant should be treated as evidence, and the case was submitted upon the information, the answer, and a copy of the testimony of defendant as given on the trial of *United States* v. *Mitchell* in the federal court.

After suggesting that it was doubtful if a mere plea or verdict of guilty could be regarded as a conviction within the meaning of the statute under which the proceeding was brought and citing authorities in support, but without deciding the question, as the attitude of the defendant in waiving technical defenses and freely admitting his guilt, made a decision unnecessary, the court said by way of conclusion and judgment: "There are circumstances which call for the exercise of clemency, but that does not justify the offense. The crime with which the defendant is charged, and the commission of which he admits, was a serious one, deliberately and intentionally committed, and the court would be unmindful of the duty it owes to itself, to the profession and to the public, if it allowed it to go unrebuked. Proceedings for the disbarment of an attorney, however, are not for the purpose of punishing him for the commission of a crime. That matter is left to the criminal courts. The objects of the proceedings here are to uphold the dignity and purity of the profession, protect the courts, preserve the administration of justice, and protect clients, and it is believed that it is not necessary, in order to accomplish this purpose, that the defendant should be permanently disbarred, but he will be suspended for a period of ninety days."

The court was certainly lenient with the defendant. There were, to be sure, extenuating circumstances, yet the offense was a grave one, particularly in view of the fact that it was committed by a lawyer, who above all men should realize, and by his example and teaching enforce, the fact that the integrity of our judicial system depends to a very large extent upon a general recognition of, and respect for, the sanctity of an oath. While it is undoubtedly true that proceedings for disbarment are not taken primarily for the punishment of the attorney, but rather for the purpose of sustaining the profession in its dignity and purity, yet the notion that they are not taken for punishment ought never to become so prominent in the mind of the court as practically to defeat the real object of the proceedings. It may, perhaps, be doubted if the order in this case will serve in any considerable degree "to uphold the dignity and purity of the profession, protect the courts, preserve the administration of justice, and protect clients," when it is seen that it was made in the case of an attorney who had been guilty of the crime of perjury.

It may be of interest to call attention to other cases in which mitigating circumstances have been considered by the courts in connection with proceedings for disbarment. *In re Stephens,* 84 Cal. 77, 24 Pac. Rep. 46, was a proceeding in the Supreme Court of the State for the disbarment of respondent for unprofessional conduct in encouraging the prosecution of an action and then, without any change of mind as to the guilt or innocence of the accused, assuming his defense. It was urged in mitigation that the evidence as to the graver features of the charge was conflicting and that the respondent was

led to take the course that he did through concern felt for a brother who was accused of a crime and whose case would be affected by respondent's attitude. The court held that, while the respondent had been clearly guilty of unprofessional conduct, the offense, under the circumstances of the case, should not be regarded as of a sufficiently grave nature to call for total disbarment, but that respondent should be suspended from practice for a period of six months, an order that was subsequently modified somewhat in respondent's favor on account of a petition from the bar of the county in which he had practiced. In *People* v. *McCabe,* 18 Col. 186, 32 Pac. Rep. 280, 36 Am. St. Rep. 270, 19 L. R. A. 231, proceedings for disbarment were taken against defendant for advertising for divorce business. It was shown in mitigation that defendant advertised in entire ignorance that it was wrong; that he ceased so to do in deference to the court upon the commencement of the proceedings, and that if the court should adjudge such advertising to be wrong or to be malconduct in office as an attorney, within the meaning of the statute, he would cheerfully abide by and obey the directions of the court. In view of the showing, the court concluded that defendant should be suspended from practice for the period of six months and until all costs of the proceedings should be paid by him. See, also, *People* v. *Taylor,* 32 Col. 250, 75 Pac. Rep. 914. Where an attorney altered an undertaking, and without procuring its re-execution or re-acknowledgment, used it upon an application for an attachment, he was held guilty of professional misconduct, but in view of his youth and inexperience (he had been admitted to the bar less than a year), the court concluded that "he would be sufficiently punished and the honor of the profession vindicated" by a judgment of suspension from practice for two years. *In re Goldberg,* 79 Hun, 616, 29 N. Y. Supp. 972. In *People* v. *George,* 186 Ill. 122, it was held that an attorney who had been convicted of a felony should be disbarred, although pardoned by the Governor of the State, the reason being that the pardon does not restore the "good moral character" required by the statute of members of the bar. See, also, *People* v. *Gilmore,* 214 Ill. 569.

As compared with the orders in the foregoing cases, the order in the case under review was lenient in the extreme, and it will doubtless be regarded by many as altogether too lenient. H. B. H.

Is the Property Owner Negligent if He Fails to Exercise Reasonable Care to Prevent an Injury to an Infant Trespasser?—This vital and important question has recently been answered in the negative by the Supreme Court of Errors of Connecticut, *Wilmot* v. *McPadden,* 65 Atl. R. 157. The facts are these. Defendants were demolishing an old dilapidated house on a lot entirely uninclosed. It was in a populous city and plaintiff's intestate, a boy seven and one-half years old, lived in the next house. Saturday night there remained of the house only the foundations, the first floor and two brick chimneys. No attempt of any kind was made to keep people away. On Sunday afternoon the intestate and some other boys were playing there and a chimney fell, killing him. There was some evidence tending to show that intestate and another boy, somewhat older, had pried some bricks out of the

chimney, thereby causing it to fall. On this point the court charged the jury as follows: "If you find that said buildings and chimneys were left in a safe condition by the defendants and that the chimney causing the injury was rendered dangerous and unsafe solely by the improper conduct of this boy, Alva, (the intestate), or his associates, which was the sole cause of its toppling over and falling, you should find for the defendants, unless you further believe and find from the evidence that such conduct and action on the part of the children could have been fairly and reasonably contemplated upon the part of the defendants."

This charge the higher court holds erroneous on the ground that the owner of property owes no duty to a trespasser except to refrain from inflicting a wilful injury and that this duty is no greater because the trespasser is an infant.

The question is not a new one, the principles involved are simple, but the courts divide quite sharply, reaching opposite conclusions. The common law has ever been jealous to protect the rights of the owner in the use and enjoyment of his property, and real property, especially, has been the object of its tender solicitude. This is readily understood when we recall how relatively insignificant personal property was at no very remote period and the transcendent importance of real property under the old feudal system. The law said to the owner, "You may do with your own as you will and may at your pleasure exclude any or all." One who intentionally or inadvertently put his foot on another's land was a trespasser and liable to respond to the owner in damages. Yet this dominion was not absolute, but limited to some extent by the doctrine *sic utere tuo ut alienum non laedas.* So a man could not with impunity maintain upon his land anything that would materially interfere with his neighbor's enjoyment of his land. This doctrine, however, could be invoked by that neighbor only if he staid at home. If without invitation, express or implied, he went upon another's land, he became a licensee or trespasser, as the case might be, and then he could demand only that the owner of the land upon which he went should refrain from doing him wilful injury. He could not require of such owner any care to keep his premises in such condition as would be likely to prevent any injury, however severe or however probable. Except as to wilful injury, he took his life in his hands. He was a *trespasser.* No motive or intent was necessary, so a child, regardless of its age, became a trespasser by any act that would produce that result in case of an adult, and, equally with the latter, liable for damages caused by such trespass. But is the landowner under no duty to a child of tender years except to refrain from inflicting intentional injury? May he maintain upon his premises, things dangerous and attractive, and leave the same entirely exposed and the property uninclosed? May he do this where children are likely to come, children so young as certainly to yield to the inclination that no one expects them to resist? May the little bodies be maimed and even the precious lives be destroyed with impunity? And is all this possible though it could easily have been foreseen and easily have been prevented? Is the law so at variance with every impulse of the heart? When the crippled child calls for redress, must the law turn to him a deaf ear, because he is a tres-

passer? When the little prattler dearer to some one than life looks to us confidingly for protection, shall we give him instead advice that is unintelligible and say to him, "Do not trespass?"

But the answer to all these questions is to be found in the answer to a further question, viz., is the right to property under the common law so sacred as to make it impossible to impose a burden however slight upon the owner to use reasonable care to prevent foreseeable injury to a trespasser so young as not to be chargeable with contributory negligence?

Some courts have given one answer and some the other. Let us first consider some cases which absolve the owner from any liability. They are grounded upon the propositions that a man in the use and enjoyment of his land is under no obligation to exercise any care to avoid injury to a trespasser. Put in the form of a syllogism it is this. All trespassers assume all risks except that of wilful injury. These children are trespassers. Therefore, they assume all risks except of wilful injury. It looks logical. It is beautifully simple. But it is also *brutally cruel.*

A child of seven is injured by an unboxed pulley. No recovery. *Uttermohlen* v. *Bogg's Run &c. Co.,* 50 W. Va. 457, 55 L. R. A. 911. A child of five was attracted by a fire unguarded on an open lot and was burned to death. No recovery. *Paolino* v. *McKendall,* 24 R. I. 432, 60 L. R. A. 133. A child of five falls into an unguarded excavation near streets and residences and is drowned. No liability. *S. F. & W. Ry.* v. *Beavers,* 113 Ga. 398. A licensee of less than six years was injured by an uninclosed and unfastened turn-table. No recovery. *Walsh* v. *Fitchburg R. R. Co.,* 145 N. Y. 301. Defendant left several street cars standing for days in the street in violation of an ordinance and plaintiff's child of ten, while playing with other children on these cars, was fatally injured by the recoil of a brake. Defendant not liable. *Gay* v. *Essex Elec. Ry. Co.,* 159 Mass. 238. A child of five was playing on an unguarded turn-table. His sister, thirteen years old, fearing he would be injured went to his rescue and her foot was so crushed as to necessitate amputation. No recovery. *D. L. & W. R. R. Co.* v. *Reich,* 61 N. J. L. 636. An infant, not yet five years of age, was drowned in a stone quarry coming to the street line and entirely uninclosed even on the street side. Recovery denied because the child fell from a part of the lot instead of from the sidewalk, though he was very near the latter. *Stendal* v. *Boyd,* 73 Minn. 53. In *Gillespie* v. *McGown,* 100 Pa. St. 144, a child less than eight fell into an open well on an unfenced lot. Recovery denied.

In full accord with the preceding cases are the following: *Frost* v. *Eastern R. R.,* 64 N. H. 220; *Hargreaves* v. *Deacon,* 25 Mich. 1; *Ratte* v. *Dawson,* 50 Minn. 450; *Ryan* v. *Tower,* 128 Mich. 463. As seeming to support this view though distinguishable in some respects on their facts, see *Stimson* v. *Gardiner,* 42 Me. 248; *Moran* v. *Pullman &c. Co.,* 134 Mo. 641; *Klix* v. *Nieman,* 68 Wis. 271; *O'Leary* v. *Brooks Elevator Co.,* 7 N. D. 554; *Fitzpatrick* v. *Cumberland Glass Co.,* 61 N. J. L. 378.

In some of these cases the opinions would indicate that any other conclusion would make the property owner an *insurer* of the safety of infant trespassers and obliged at his *peril* to keep them from harm. They have con-

jured up imaginary cases where no one would claim that the infant had a right to protection, and have concluded that because in such cases there could be no recovery, there could be none in any case. See particularly, *Ryan* v. *Tower, Gillespie* v. *McGown, Frost* v. *Railroad,* and *Stendal* v. *Boyd, ante.* They say that it is the duty of the parent to keep the child out of danger and that he cannot shift this duty upon another. That otherwise any person who saw a young child in imminent danger of injury and made no effort to prevent it would be liable to respond in damages to the child. There was a time, though the admission is humiliating, when the negligence of the parent was imputed to the child so as to charge the latter with contributory negligence and thus defeat his recovery. But this absurd view has been almost universally abandoned and a reliance upon it is enough to condemn any who invoke it. That the non-interfering third person is liable, in no sense follows as a necessary or even possible corollary, from the proposition that the property owner is liable. It is believed that the distinction between the creation or continuance of dangerous conditions upon one's own property and a mere passive failure to protect a child from a danger due to another's act is so patent as to require no discussion. The courts that assert that the property owner owes some duty, do not make him liable under all circumstances. He is answerable only for his negligence, for a failure to use *reasonable care* to avoid a foreseeable injury to an infant though technically a trespasser. On this ground it would seem possible to sustain the cases of *Holbrook* v. *Aldrich,* 168 Mass. 15; *Ritz* v. *Wheeling,* 45 W. Va. 262, 43 L. R. A. 148; *Buch* v. *Armory Man'f'g Co.,* 60 N. H. 257, though it is admitted that Massachusetts denies the existence of any duty to a trespasser adult or infant except that no wilful harm be done him. This seems also to have been the New Hampshire view, but the late case of *Hobbs* v. *Blanchard,* 65 Atl. 382, seems to change the rule.

We will now take up the cases that maintain the contrary doctrine. The earliest case appears to be *Lynch* v. *Nurdin,* 1 Adol. & El. 29, decided in 1840. A man had left a horse and cart unsecured in the street. A little child climbed upon the cart and another child started the horse, causing injury to the one on the cart. *Held,* defendant was liable, because, while the child was technically a trespasser, such injury could have been foreseen as probable, and it was the duty of the owner to use reasonable care to prevent injury to children so young as likely to yield to their childish instincts. It is conceded, of course, that the child had a right to be on the street, but so had the horse and cart. The child had no right to get upon the cart and yet the duty to be careful was imposed upon the driver. It has been claimed that later cases, particularly *Mangan* v. *Attertan,* L. R. 1 Ex. 239, have overruled this case, but in *Harold* v. *Watney,* in the Court of Appeal, SMITH, L. J., said that *Lynch* v. *Nurdin* had never been overruled and had been treated in subsequent cases as good law. 2 Q. B. 320, 1898.

The question was first presented to the United States Supreme Court in *Railroad Company* v *Stout,* 17 Wall. 657. Here a child of six had trespassed upon a turn-table which was unsecured and in an open place, and had received serious injuries It was held that the negligence of the company was properly submitted to the jury

This has been followed in the same court in *Union Pac. Ry. Co.* v. *McDonald,* where a boy of twelve fell into a burning slack pile which was entirely unguarded. 152 U. S. 262. Other cases allowing recovery because of injuries received by infants while trespassing upon a turn-table exposed and unsecured, are *Kansas City Ry. Co.* v. *Fitzsimmons, 22* Kan. 686, 31 Am. Rep. 203; *Barrett* v. *So. Pac. Ry. Co.,* 91 Cal. 296, 25 Am. St. Rep. 186; *Callahan* v. *Eel River R. R. Co.,* 92 Cal. 89; *Keffe* v. *M. & St. P. Ry. Co.,* 21 Minn. 207, 18 Am. Rep. 397; *O'Malley* v. *St. P., M. & M. Ry.,* 43 Minn. 289, 45 N. W. 440; *Nagel* v. *Mo. Pac. Ry. Co.,* 75 Mo. 653, 42 Am. R. 418; *Ft. W. & D. C. Ry. Co.* v. *Robertson,* — (Tex.) —, 14 L. R. A. 781; *Ilwaco Ry. & Nav. Co.* v. *Hedrick,* 1 Wash. 446, 25 Pac. Rep. 335; *Ferguson* v. *Columbus Ry.,* 75 Ga. 637, (but compare *S. F. & W. Ry.* v. *Beavers, ante); A. & N. Ry. Co.* v. *Bailey,* 11 Neb. 332; *Evanisch* v. *G. C. & S. F. Ry. Co.,* 57 Tex. 126; *G. C. & S. F. Ry. Co.* v. *McWhirter,* 77 id. 356.

This rule was applied to things other than turn-tables in the following cases: *City of Pekin* v. *McMahan,* 154 Ill. 141, 45 Am. St. Rep. 114 (child drowned in gravel pit); *Harriman* v. *Pittsburg &c. Ry. Co.,* 45 Ohio St. 11, 4 Am. St. Rep. 507 (torpedo left on railroad near crossing); *Westfield* v. *Levi Bros.,* 43 La. Ann. 63 (child injured by street roller); *Whirley* v. *Whiteman,* 1 Head 609 (child caught in unboxed gearing); *Brinkley Car Co.* v. *Cooper,* 60 Ark. 545 (child injured in pool of boiling water); *Kopplekom* v. *Colo. Cement Pipe Co.,* 16 Colo. App. 274 (infant killed by cement pipe); *Briggs* v. *Wire Co.,* 60 Kan. 217 (uninclosed machinery); *Hydraulic Works Co.* v. *Orr,* 83 Penn. St. 332 (falling platform); *Rachmel* v. *Clark,* 205 Penn. 314; *Mackey* v. *Vicksburg,* 64 Miss. 777 (excavation). Very similar are *Birge* v. *Gardiner,* 19 Conn. 507, 50 Am. Dec. 261 (falling gate); *Brennan* v. *F. H. & W. R. R. Co.,* 45 Conn. 284; *Bronson's Adm'r* v. *Labrot,* 81 Ky. 638; *I. P. & C. Ry. Co.* v. *Pitzer,* 109 Ind. 179.

Nebraska, Texas, Minnesota, and Pennsylvania seem inclined to give this beneficent rule a very limited operation. The first three apparently to turn-tables. *Richards* v. *Connell,* 45 Neb. 467; *Dobbins* v. *M. K. & T. Ry. Co.,* 91 Tex. 60; *Ratti* v. *Dawson, ante; Gillespie* v. *McGown, ante.*

The most careful, exhaustive, and convincing opinion that has ever been written on either side of this question is that of WEAVER, J., in *Edgington* v. *B. C. R. & N. Ry. Co.,* 116 Iowa 410, 57 L. R. A. 561. In this case an infant of seven years and eight months was allowed to recover for injuries sustained while playing upon an unguarded turn-table. This opinion leaves nothing to be said upon this side of the case.

In *Townsend* v. *Wathen,* 9 East 277, the defendant was held liable for luring his neighbor's dogs into traps baited with meat. According to this case it seems necessarily to follow that if a slave child was attracted to his injury or death by something likely to produce that result on the land of another than his master, such master would have a right to recover. Of course we recognize that this recovery would be in the interest of the master rather than of the child, but two facts remain: (1) That such a rule would have a powerful tendency to protect the child, and (2) that the burden upon the landowner would be as onerous as if the child were not a chattel. Is the free child to

be denied this protection because he happens to be a juristic person and the subject of rights? It seems inconceivable that he is.

Some courts have based their holdings in favor of the child on the ground that a thing attractive to him is an implied invitation and he thereby ceases to be a trespasser. But this is at best a fiction, for "Temptation is not invitation," and fiction has been overworked in the common law, and is entitled to be, and should be retired. We prefer to put the infant's right to recover on the broad ground that the owner of property is under a legal duty to exercise reasonable care to avoid an injury to a trespasser of tender years, where such injury was foreseeable. This duty need not be onerous. It is a fact at once startling and incontrovertible that in almost all the cases the injury could have been prevented by slight care and at a trifling expense. We are not satisfied with those courts that say that any such duty upon the property owner can be imposed only by the legislature, for the reason that such statement is not true. That it is not true is shown by the fact that the majority of courts have reached an opposite conclusion and they are sustained in such conclusion by the fact that all admit who know what is meant by the common law, viz., that it is not crystallized but is vital, and owes its present importance, if not its existence, to its adaptability to new conditions. F. L. S.

LIABILITY OF WATER COMPANIES FOR LOSSES BY FIRE.—Since water companies and the business of supplying cities and their inhabitants with water for city and domestic uses, and for fire protection have become so common, the courts have been called upon many times to determine the rights of the property owning inhabitant, the city and company in their relations to each other. Probably the question most frequently litigated is the liability of the water company to the property owner for loss by fire due to the failure of the company to fulfill the terms of its contract with the city, there being no contract between the party complaining and the company.

In a large number of cases the attempt has been made to recover on the basis of the rule of law giving the beneficiary of a contract the power to sue in his own right for a breach thereof, even though there was no privity of contract between him and the party sued. In a few cases the water company has been held liable on this theory, but there is no doubt that the great weight of authority, numerically at least, is to the contrary. Among the cases adopting the former view are: *Paducah Lumber Co.* v. *Paducah Water Supply Co.* (1889), 89 Ky. 340, and *Gorrell* v. *Greensboro Water Supply Co.* (1899), 124 N. C. 328; while among the cases supporting the opposite rule are the following: *Nichol* v. *Huntington Water Co.* (1903), 53 W. Va. 348, 44 S. E. 290; *Town of Ukiah City* v. *Ukiah Water and Imp. Co.* (1904), 142 Cal. 173, 75 Pac. 773; *Blunk* v. *Denison Water Supply Co.* (1905), 71 Ohio St. 250, 73 N. E. 210; *Britton* v. *Green Bay Water Works Co.* (1892), 81 Wis. 48; *Howsmon* v. *Trenton Water Co.* (1893), 119 Mo. 304; and *Fitch* v. *Seymour Water Co.* (1894), 139 Ind. 214, 37 N. E. 982. However, it is not the purpose of this note to more than merely mention these two conflicting views and call attention to the diversity of the decisions, for the subject has been very completely discussed in prior numbers of this REVIEW. See

articles, "The Liability of Water Companies for Fire Losses," by Edson R. Sunderland, 3 MICH. LAW REV. 442, and "The Liability of Water Companies for Fire Losses—Another View," by Albert Martin Kales, 3 MICH. LAW REV. 501.

Recently there has appeared a tendency in the courts to get around this more or less technical objection to allowing recovery in a contract action, by allowing recovery in an action of tort. That the objection is technical seems manifest, for it must be admitted that as a matter of abstract justice, if the water company has negligently failed to keep an adequate pressure of water in the mains and by that negligence property is burned, it should be held liable for the loss. In 1901 the Supreme Court of North Carolina, in *Fisher* v. *Greensboro Water Supply Co.*, 128 N. C. 375, 38 S. E. 912, made a radical departure from the current of decisions up to that time and held the water company liable in tort for negligently failing to supply water as its contract with the city obligated it to do, by reason of which negligent failure the plaintiff's house was burned. For a time the profession viewed this decision with more or less amusement. But when the same case, in a peculiar manner not necessary to note here, got into the Supreme Court of the United States and was there affirmed, the court adopting the same view as the North Carolina court, the conviction that a new rule of law or a new application of an old rule had been established, was forced upon them. This case, *Guardian Trust and Deposit Co.* v. *Fisher*, 200 U. S. 57, 26 Sup. Ct. Rep. 186, was briefly noted in 4 MICH. LAW REV. 540. The concluding paragraph of that note, "This decision is an important and far-reaching one, and may mark the beginning of a general movement among the courts to recognize the tort liability of water companies for fire losses due to insufficient water supply," has been in a measure substantiated by the very recent decision of the Supreme Court of Florida in *Mugge* v. *Tampa Waterworks Co.*—Fla. —, 42 So. 81, decided in November, 1906.

In this latter case there were the usual facts, viz., a contract by the water company with the city to furnish water for city and fire protection purposes and to private consumers; a failure of the company to maintain the supply as required by its contract; and a loss by fire of the plaintiff's house, the failure of the company to furnish the required water pressure preventing the city fire department from effectually performing its duty in attempting to save the plaintiff's property. The court, by Mr. JUSTICE HOCKER, after commenting upon the diversity of decisions where the action was in contract and noting that the action then before it was in tort, adopts the view expressed by the Supreme Court of North Carolina in the *Fisher* case and by the Supreme Court of the United States in the later *Fisher* case, and concludes the opinion as follows: "We are of opinion that the defendant in error, enjoying as it does, extensive franchises and privileges under its contract, such as the exclusive right to furnish water to the city and its inhabitants for thirty years, the right to have special taxes levied on the property of the citizens for its benefit, the right to use the streets with its mains and hydrants, the right to charge tolls and regulate the use of water, not to mention others, has assumed the public duty of furnishing water for extinguishing fires,

according to the terms of its contract, and that for negligence in the discharge of this duty, whereby the fire department, adequately equipped and prepared, was not furnished with water according to the contract, and the property of the property-owner was, on account of such negligence in furnishing water, destroyed, it is liable to him for the damage suffered in an action of tort."

In a number of cases prior to the *Fisher* case the attempt was made to fix liability upon the water company on the theory of tort, but nowhere did it meet the approval of the court. In the following cases the tort theory was discussed by the courts and its adoption refused: *Nickerson* v. *Bridgeport Hydraulic Co.*, 46 Conn. 24; *Fowler* v. *Water Works Co.*, 83 Ga. 219; *Nichol* v. *Water Co.*, 53 W. Va. 348; *Fitch* v. *Seymour Water Co.*, 139 Ind. 214; *House* v. *Houston Waterworks Co.*, 88 Tex. 233, and *Britton* v. *Green Bay etc. Water Works Co.*, 81 Wis. 48. In most of these cases the courts went on the theory that there was no duty imposed upon the company except by its contract, and for breach of that it was liable only directly to the city with which it had made its contract, and that the law imposed upon them no duty to the property owner to furnish water for fire protection purposes. The following extract from the opinion of the court in *Fowler* v. *Water Works Co., supra,* is indicative of the reasoning by which those courts have reached the conclusion that there is no tort liability: "There being no ground for recovery, treating the action as ex contractu, is it better founded treating it as one ex delicto? We think not. The violation of a contract entered into with the public, the breach being by some omission or non-feasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a tax payer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire. *Wright* v. *Augusta*, 78 Ga. 241; AM. & ENG. ENC. OF LAW, Vol. 7, p. 997, et seq. We are unable to see how a contractor with the city to supply water to extinguish fires commits a tort by failure to comply with his undertaking unless to the contract relation there is superadded a legal command by statute or express law." Cited approvingly. *Nicol* v. *Water Co., supra,* and *Fitch* v. *Seymour Water Co., supra.*

On the other hand, in *Guardian Trust and Deposit Co.* v. *Fisher, supra,* Mr. JUSTICE BREWER expresses the view of the Supreme Court on this point as follows: "We are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one ex contractu on the part of the city. It is true that a company, contracting with a city to construct water works and supply water, may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total

failure of the company. It may also be true that no citizen is a part to such a contract, and has no contractual or other right to recover for the failure of the company to act; but, if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites citizens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for the breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort."

So it would seem that the controlling point in these two lines of holding is the existence or non-existence of a public duty on the part of the water company to the property owner. In *Fowler* v. *Water Works Co.*, quoted from above, the court denied the existence of such a duty, but intimates that if there were, the tort action would lie. In the *Fisher* case, the court answered that objection very simply by holding that the entering upon the performance of its contract with the city ipso facto imposed upon the water company a public calling and consequently a public duty. There seems no reason on principle why the entering upon the exercise of its franchises by a railroad company should impose upon it any more of a public duty than where a water company enters upon the performance of its charter, or contract with the city. The difference is one of degree, not principle. In a number of cases arising under a variety of states of fact and presented in various ways, the courts have declared that a water company, having entered upon the performance of a contract by it with the city, is engaged in a public business and its duty to furnish water pursuant to its charter or contract is a public one. *Crosby* v. *Montgomery*, 108 Ala. 498; *McCrary* v. *Beaudry*, 67 Cal. 120; *Crow* v. *San Joaquin etc. Canal Co.*, 130 Cal. 309; *Wagner* v. *Rock Island*, 146 Ill. 139; *Smith* v. *Lincoln*, 170 Mass. 488; *New York State Trust Co.* v. *Duluth*, 70 Minn. 257; *American Water Works Co.* v. *State*, 46 Neb. 194, 50 Am. St. Rep. 610; *Crumley* v. *Watauga Water Co.*, 99 Tenn. 424.

The conclusions reached in the *Fisher* cases, and the *Mugge* case cannot help but have a very strong influence upon future litigation along those lines; and since this tort theory so simply and effectively obviates the technical objection to suing ex contractu, it may not be going too far to predict that in the future cases, which in the nature of things are certain to arise involving those questions, many courts will follow them. R. W. A.

EVIDENCE IN DEPORTATION PROCEEDINGS UNDER THE ACT OF CONGRESS OF MAY 5TH, 1892.—New light has been recently thrown upon the character and scope of the Act of Congress of May 5th, 1892, relating to Chinese laborers in the United States, without certificate of registration, by the case of *Moy Suey* v. *United States* (1906), C. C. A. 7th Cir., 147 Fed Rep. 697. The Act

has been criticised as being excessively harsh in its operation, and its constitutionality has been seriously questioned, in the case of *Fong Yue Ting* v. *United States,* 149 U. S. 698, in which case there was a divided court and strong dissenting opinions by the minority justices. But, granted that the Act is constitutional within its proper scope, as it must be under the decision of the Supreme Court above referred to, there still remain some very difficult questions relating to its scope and application. Section 6 of the Act provides in substance that Chinese laborers found in this country and arrested under the Act as such, shall be deported unless they produce the certificate prescribed or establish satisfactory reasons for not possessing it, and prove residence in the United States on May 5, 1892, by the testimony of one credible witness other than Chinese. Clearly these rules of evidence prescribed are radically opposed to the rules of evidence in criminal cases which have in the Anglo-Saxon system of jurisprudence, been evolved as best calculated to preserve the rights and liberties of the individual, and the best interests of society in general. The presumption of innocence, which is the basis of the criminal trial under the English system, is abolished. The Act is defended on the ground that the proceedings under it are civil in their nature, and hence it is competent for Congress to prescribe the rules of evidence which shall obtain, and it would seem that this is the only ground upon which the Act can be defended and be held to be constitutional.

The defendant in the principal case was arrested in Chicago, charged with being a Chinese laborer, unlawfully in the United States, without certificate of registration. He set up as a defence that he was a native born American citizen, and offered evidence in support of this contention. The court held that he was entitled to have the question of his citizenship judicially determined, in accordance with the ordinary and usual rules of evidence.

The decision in this case is in harmony with the doctrine contended for in the note on the case of *Low Foon Yin* v. *United States Immigration Commissioner,* 145 Fed. Rep. 791, in 5 MICHIGAN LAW REVIEW 129, where the position was taken that the Act of Congress of May 5, 1892, is not for all purposes civil in its nature so as to dispense in every case, with the ordinary rules of evidence. The court, in the principal case, seems not to have decided, in so many words, that the proceedings there were criminal in their nature, and therefore that the rules of criminal evidence must apply, since the question did not arise in precisely the same manner that it did in the *Low Foon Yin* case. But it seems that the question was necessarily involved and determined in the decision rendered. The two cases are substantially identical in their material facts. In both, the defendant was arrested within the United States and charged with being unlawfully therein, under the provision of the Deportation Act, casting upon *him* the burden of showing his right to remain, on pain of deportation. The point which is here sought to be made as applicable to both cases is this: before the provisions of the Act of Congress in question, prescribing the rules of evidence in deportation proceedings, can apply so as to cast upon the defendant the burden of showing by certificate or otherwise his right to remain, the burden is on the government to show

by affirmative proof that the defendant comes within the forbidden class covered by the Act. As to such preliminary investigation or examination, the proceedings are criminal in their nature and must be governed by the "ordinary rules" of criminal evidence. The mere arrest of a man on suspicion cannot cast upon him the burden of showing his innocence.

As stated in the note on the *Low Foon Yin* case, *supra,* the argument that the proceedings under the Act are entirely civil is this: it has been decided by the Supreme Court that aliens, and in this case Chinese aliens, have no inherent right to remain in the United States, though residing therein, *Fong Yue Ting* v. *United States, supra.* Therefore a proceeding to remove them can deprive them of no constitutional right to remain, for they possess none. Therefore, not being a proceeding for the forfeiture of any right or involving any punishment, it is a civil proceeding. To apply this argument to a case where it is not yet determined whether the defendant has or has not rights which may be forfeited, is to assume the very point in issue, and would seem entirely unwarranted. In the *Low Foon Yin* case, the defendant attempted to stand upon his constitutional right not to testify against himself in a criminal proceeding. He was, however, compelled so to testify, as to his birth, nationality and occupation, and this compulsion, before it was ascertained that the Act applied to him, was, it would seem, a violation of his right. In the principal case, the defendant did more than he could constitutionally have been compelled to do, namely, took the stand himself and introduced the evidence of his uncle and his cousin as to his status. The evidence so given, was held to be sufficient to establish the point in issue, the court saying, that "the ordinary rules of evidence" must control and not the rules of the Act.

The court does not specifically state whether or not the "ordinary rules of evidence," which it decides must apply, are to be those of civil or criminal actions, but there seems to be no escape from the conclusion that the latter was meant. If the possibility that the rules of *civil evidence* were meant, is considered, we are met by the proposition that in civil cases the Legislature or Congress has the power to prescribe the rules of evidence that shall govern, Cf. COOLEY, CONSTITUTIONAL LIMITATIONS, 7th Ed., p. 526, and that in this particular instance they have done so. By deciding that the rules of evidence prescribed by the Act do not apply, the court necessarily decided that the proceeding was criminal in its nature. To assert that it was civil, would be to negative the decision of the court that the Act could not govern; for, being civil, the Act must govern. In the opinion, the court uses language pointing strongly to the conclusion that it regarded the proceeding as criminal in its nature. It says, "Nativity gives citizenship and is a right under the Constitution. It is a right that Congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away * * * The citizen deported is banished, and banishment is a punishment that can follow only a judicial determination, in due process of law." The decision of the District Court was reversed and the appellant discharged. T. H. S.

DUTY OF A BANK TO A SURETY TO APPLY FUNDS OF A PRINCIPAL DEBTOR TO SATISFY A DEBT DUE THE BANK.—The right or duty of a bank holding funds of a principal debtor to apply those funds upon the obligation at its maturity in order to protect a surety is considered in the recent case of *Davenport* v. *State Banking Co.* (1906), — Ga. —, 54 So. Rep. 977. The court, in arriving at its conclusion that the bank is under no such duty, follows what is undoubtedly the weight of authority.

One L. executed a promissory note to D. and the latter endorsed it to the plaintiff, a banking company. At and after the maturity of the obligation the plaintiff had in its possession funds of L. more than sufficient to meet the debt. It allowed L. to draw out these funds and now seeks to hold D. liable, who claims that he is discharged as surety by reason of the failure of the bank to apply the funds of L. in satisfaction of the note. *Held,* that the surety is not discharged by the failure of the bank to apply the funds of the principal debtor upon the obligation.

As this is a case of first impression in the Georgia court and as the authorities which have decided the matter in other jurisdictions are conflicting, the opinion is rather exhaustive.

The position of the authorities holding contrary to the principal case is well illustrated in *McDowell* v. *Bank,* 1 Harr. (Del.) 369, where the court says, "On what principle of justice or equity can a creditor whose debt is due and the payment of which may be enforced, and who has on a running account money in his hands belonging to the debtor, the means of payment entirely under his own control * * * ; who refuses or neglects to make the appropriation or set-off, and voluntarily hands over to the debtor the money which he might have retained; upon what principle of justice can such a creditor in a court of equity claim to hold the surety bound, after the debt has been in point of fact paid, if the creditor had elected to say so or to so consider it. The creditor could have set off the debt and charged it in the account, and having the power was it not his duty to do so in justice to the surety?"

In claiming a discharge of the surety the courts base their holding upon the fact that since the bank may exercise the right, it must. But most of the cases cited are for notes payable at the bank, and this reason would be fully met in States having the Negotiable Instruments Law because such a state of facts is covered by § 89 of that law. The note in the principal case, however, was not payable at the bank and the plaintiff may be regarded as an ordinary holder in due course.

Most of the cases allowing the discharge of the surety, place it upon the broad ground that where a principal has the means of satisfying the debt, he must retain them for the benefit of the surety. The court in the principal case distinguishes between a bank deposit and the ordinary holding of funds, maintaining the position that a bank deposit is of such a nature that a set-off need not be made. The decisions in Pennsylvania modify the doctrine by holding that the funds must be sufficient at the time of the maturity of the note and that the bank is under no obligation to apply upon the indebtedness funds deposited subsequent to maturity. *Bank* v. *Peltz,* 176 Penn. St. 513;

Bank v. *Foreman,* 138 Penn. St. 474; *Bank* v. *Henninger,* 105 Penn. 496. The court in the case under discussion can see no reason for the distinction made by the Pennsylvania decisions and so discards their holding.

The claim is further made that the bank has a lien upon the funds deposited with them. That the title to the deposit passes to the bank absolutely and that the depositor has only a demand against the bank, see MORSE, BANKS AND BANKING, p. 30, and cases there cited; also *Ricks* v. *Broyles,* 78 Ga. 610; *Bank* v. *Peck,* 127 Mass. 300.

To the effect that the surety is not discharged under facts such as are given in the principal case, see *Bank* v. *Hill,* 76 Ind. 223; *Bank* v. *Peck, supra; Bank* v. *Patton,* 109 Ill. 479; *Glazier* v. *Douglass,* 32 Conn. 393; *Bank* v. *Harrison,* 10 Fed. 243; *Pursifull* v. *Bank,* 17 Ky. Law Rep. 38, overruling *Armstrong* v. *Helm,* 13 Ky. Law Rep. 460; *Bank* v. *Johnson,* 21 Me. 426; *Bank* v. *Smith,* 66 N. Y. Supp. 271, but see *Bank* v. *Thein,* 28 N. Y. Supp. 232. The position of the authorities just cited is given in *Bank* v. *Peck, supra,* the court saying, "When he (the principal debtor) owes the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterwards insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation."

The leading authorities opposed to the principal case are: *Dawson* v. *Bank,* 5 Pike 283; *McDowell* v. *Bank, supra;* MORSE, BANKS AND BANKING, p. 47; and to the extent above modified, the Pennsylvania cases. When the note is payable at the bank, the Neg. Instruments Law covers the case in States where it has been adopted, but if it is not payable at the bank, then the rule above given would apply. G. G.