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Note and Comment

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NOTE AND COMMENT

LIABILITY OF CARRIERS FOR INJURIES ARISING FROM FAILURE TO HAVE WAITING ROOMS PROPERLY HEATED.—It is elementary that a railway company is under an obligation to keep its station-house and the grounds that are immediately about it, insofar as they are open to the traveling public, in a safe and usable condition. Cases under this head usually arise on account of the failure of the company to exercise proper care in the construction or maintenance of its station approaches, station buildings and station platforms and stairs. See, for example, *Fullerton* v. *Fordyce*, 121 Mo. 1, 25 S. W. Rep. 587, 42 Am. St. Rep. 516; *Jordan* v. *New York, New Haven & Hartford Railroad Company*, 165 Mass. 346, 43 N. E. Rep. 111, 52 Am. St. Rep. 522. But sometimes a company renders itself liable because of its failure to furnish to its patrons, while waiting for trains in its station house, adequate protection from inclement weather conditions. In the recent case of *Cincinnati, N. O. & T. P. R'y Co.* v. *Mount* (Oct. 23, 1907), 104 S. W. Rep. 748, the Court of Appeals of Kentucky considers the question of the liability of a railroad company resulting from the failure of the company to provide a comfortably heated waiting room. It was claimed by the plaintiff that, while

waiting for her train in the station of the company, she contracted a severe cold with which she was confined to her bed for several days, and from which she suffered great pain; that the cold was due to the fact that the waiting room of the company in which she was expected to remain until her train arrived, was unheated. It was shown, and not denied, that there was no fire in the waiting room at the time, that the attention of the station agent was called to the fact of its chilly and uncomfortable condition, and that he was requested to have a fire started. There was a sharp dispute as to the condition of the weather, the evidence in behalf of the plaintiff tending to show that the day was cold and disagreeable, while that in behalf of the company was to the effect that the weather was mild and temperate. It was insisted by the railroad company that the testimony as a whole did not show negligence in the company in failing to have the waiting room heated by a fire, and that it was reasonable to conclude that the sickness and suffering of the plaintiff were due to her failure to exercise ordinary care in the protection of herself. The testimony of the plaintiff evidently appealed to the jury, since they awarded her a verdict of $400.

The court of appeals refused to disturb the judgment of the lower court, holding that, by the statutes of the state that provide that railroad waiting rooms shall be kept comfortably warm in cold weather, and also at the common law, a railroad company is under an obligation to maintain a fire in a waiting room, if necessary for the comfort of its patrons, and is liable for any damage resulting to a passenger from its failure so to do.

There is no doubt as to the soundness of the legal conclusion reached in this case by the appellate court. In a controversy of this kind the serious question must usually be one of fact and not of law. It would seem that in most cases it would be difficult to show that a cold and its consequent troubles were to be traced directly to the failure of a railroad company to keep its waiting room comfortable. Yet that this may be done to the satisfaction of a jury and in such a way that an appellate court will allow the verdict and judgment to stand, is apparent, not only from the result in the case under review, but also from results in other cases to which reference may be made.

A very recent case involving this question is that of *St. Louis, I. M. & S. R. Co.* v. *Hook,* decided by the Supreme Court of Arkansas July 22, 1907, and reported in 104 S. W. Rep. 217, wherein the railroad company was sued for damages for maintaining a waiting room in so cold and uncomfortable a condition that the plaintiff, a child, while waiting for a belated train, contracted pneumonia. "The evidence shows," said the court, "that the child was necessarily kept in the station for some time on a cold winter night. A northwest wind was blowing, and it was 'spitting snow.' Pneumonia was prevalent in the vicinity. The station was small, dirty, ill smelling, and unheated. The child got very cold, and his father several times took him out of the room and walked him around the station under cover of the roof in order to keep him warm. When he got on the heated coach of the train, he was shivering, and at once fell asleep. The next night he woke up with a chill. A physician was called in, and he was found to be in high fever,

and pneumonia had developed. The child was warmly clad, and was only taken three hundred yards from the house to the station, and then waited some hours for the train." There was conflicting testimony upon the subject of proximate cause. The jury found for the plaintiff. The supreme court concluded that if the condition of the waiting room was the proximate cause of the pneumonia, the railroad company would be liable, and that it could not be said, in view of the evidence, that it was the duty of the court to take the case from the jury upon the question of proximate cause.

In *Texas & Pac. R'y. Co.* v. *Mayes,* Texas Court of Civil Appeals, 15 S. W. Rep. 43, the plaintiff recovered a verdict for $250 for suffering sustained from contracting a severe cold and fever while waiting in an insufficiently heated station of the defendant company for a delayed train for which she had purchased a ticket. The reviewing court held that it was both the statutory and common law duty of the company to keep its passenger depots lighted and warm a reasonable time before the arrival and departure of passenger trains. The judgment below was affirmed, the court saying that the evidence supported the verdict and judgment and that the amount of damages awarded was not excessive. In *Texas & Pac. R'y. Co.* v. *Cornelius,* 10 Texas Court of Civil Appeals, 125, 30 S. W. Rep. 720, the reviewing court sustained a verdict and judgment for $1,300, rendered for damages sustained by the plaintiff on account of the serious sickness of his wife and child, due, as he claimed, to the fact that they were obliged to remain, while waiting for a delayed train for which the wife had a ticket, in the unheated passenger room of the defendant company. The court recognized the common law liability of the defendant company, if the negligent acts claimed were proved and consequent injury were shown to the satisfaction of the jury. In this case the Supreme Court denied a writ of error. In *Missouri, K. & T. R'y. Co.* v. *McCutcheon,* 33 Texas Court of Civil Appeals, 557, 77 S. W. Rep. 232, a verdict and judgment for $1,000 for injuries due to an unheated waiting room were allowed to stand. In *Texas Midland R. R.* v. *Little,* Texas Court of Civil Appeals, 77 S. W. Rep. 958, it was held that where injuries have resulted from an unheated railway waiting room, the company cannot claim immunity because the party suffering from the negligence of the company was cold when entering the room. "It is no less the duty of railway companies," said the court, "to provide warm depots for persons who go there cold to become passengers on their trains than for those who may arrive there in a warm and comfortable condition." It goes without saying, of course, that the company would not be liable for any injury resulting to a person from exposure to the cold before reaching the station. The foregoing are the reported cases, so far as the writer has been able to discover, in which the liability of a railroad company for injuries arising from an unheated waiting room has been directly considered. It will be noticed that, with two exceptions, they all arose in one jurisdiction and were decided by an inferior appellate tribunal. In *St. Louis, Iron Mountain and Southern R'y. Co.* v. *Wilson,* 70 Ark. 136, 140, it is suggested by the court that failure by a railroad company properly to heat a waiting room is *prima facie* negligence.

As germane to the subject under consideration, it may be suggested that it is undoubtedly the law that if the passenger room of a railroad company is an unfit place for its patrons by reason of its foul or uncomfortable condition, a person, while waiting for a train, may leave the place and go elsewhere on the company's premises without that fact affecting his right of action against the company in case of accident, through the fault of the company, while the party is going elsewhere, provided that in so going he uses proper care and does not violate some rule of the company of which he has actual knowledge or which, as a reasonable man, he would be bound to know existed. This proposition is clearly recognized by the Supreme Court of Iowa in *McDonald* v. *Chicago and Northwestern R. R. Co.*, 26 Iowa, 124. The action was brought for damages sustained by a person who, while waiting for a train, left the passenger room, which was in an offensive condition by reason of tobacco smoke, and endeavored to enter the train, while it was standing at some distance from the regular place for receiving passengers, and in so doing was thrown down by a loose plank in the platform steps and seriously injured. In delivering the opinion of the court, DILLON, Ch. J., said: "That, without any statute enacting it, there is a common law duty on these companies to provide reasonable accommodations at stations for passengers who are invited and expected to travel on their roads. See *Caterham R. R. Co.* v. *London R. R. Co.*, 87 Eng. C. L. 410. If the station room is full, or if it is intolerably offensive, by reason of tobacco smoke, so that a passenger has good reason for not remaining there, while this will not justify him in violating reasonable rules and regulations of the company, which are known to him, respecting the place, mode and time of entering the cars, it will justify his endeavor to enter the cars at as early a period as possible, especially if it is dark and cold without, if in so doing he uses proper care and violates no rule or regulation of the company of which he has actual knowledge, or which, as a reasonable man, he would be bound to presume existed. He would not, of course, be justified, by the condition of the passenger room, in rashly endeavoring to board a train in motion, or the like; but if the train had arrived, was on the track, the car doors open, and if, as is frequently if not generally the case, passengers are allowed, or at least not forbidden, to enter the cars before they are drawn up in front of the station, we think a passenger may reasonably and properly make the attempt to reach and enter the cars, if he is not aware of any rule or regulation to the contrary; and if he receives an injury in so doing (he using proper care) from the unsafe and dangerous condition of the platform or the steps in a place where passengers would naturally go, the company are liable therefor." It should be noted that while the judgment below for the plaintiff was reversed by the court for error not affecting the question under consideration, a second judgment in plaintiff's favor was affirmed in 29 Iowa, 170. H. B. H.

SPECIAL ASSESSMENTS AND RAILROAD RIGHTS OF WAY.—Taxation through special assessments, whereby public improvements are made at the expense of a limited number of individual property owners, was at one time severely criticised and often disapproved. Levies of this nature were tolerated by

the courts only on the ground that the improvements were of some special benefit to the property upon which the burden of payment fell. And this is the idea which underlies local assessments today. Justice COOLEY speaks of them as differing from the usual burden of taxation imposed for state and municipal purposes in that they do not exact contribution in return for the general benefits of government, but, "in addition to the general levy they demand that special contribution in consideration of the special benefit shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay." These considerations usually control when the assessments are for street improvements and fall upon private parties, but there is a pronounced tendency to depart from the rule requiring benefits both in the statutes and in judicial construction. Where the levy is made upon a railroad right of way abutting upon a street to be improved the departure is pronounced.

The question has been recently considered by the Supreme Court of Washington in the case of *Northern Pacific Ry. Co.* v. *City of Seattle* (1907), — Wash. —, 91 Pac. Rep. 244.

The statutes of the State of Washington grant to the councils of cities of the first class the power to determine what property will be benefited by street improvements and to assess it therefor. The city of Seattle, for the construction of a sidewalk, levied such an assessment, according to frontage, upon the abutting right of way of the defendant railway company. This right of way, from 60 to 100 feet in width, carried a single track and was used for no other purpose, being otherwise vacant and unimproved. The defendant contended that there was no benefit conferred sufficient to support the special assessment. The court held that the determination by the city council as to what property would be benefited by the improvement was legislative in its nature and, having been delegated to the municipal authorities, their decision was final, in the absence of fraud or oppression. They also held that the absence of any special benefit conferred upon the railroad property did not relieve it from its burden under the assessment.

It is probable that the benefits here conferred upon the railroad did not equal in value the assessment imposed, but the holding of the court that the decision of the council was final represents the weight of modern authority. On the question of benefits to the railroad, while the case may not be in accord with a majority of the authorities, it undoubtedly represents the modern tendency. In general, the validity of these special assessments still must depend upon benefits conferred upon the property taxed. This has been spoken of as the "true and only just foundation" upon which such levies could rest, and so the rule is stated in all text books and in a majority of decisions. In the absence of legislation to the contrary and where the property is in the hands of private individuals, this rule is followed with but

little dissent. Benefit to the property at least equal to the amount of the tax is generally required, and if the benefit be present the property would seem to be liable even though devoted to church or philanthropic purposes. *Atlanta* v. *Hamlein*, 96 Ga. 381; *City of Chicago* v. *Adcock*, 168 Ill. 221; *Adams* v. *Shelbyville*, 154 Ind. 467; *James* v. *City of Louisville*, 19 Ky. Law Rep. 447, 40 S. W. 912; *Dyer* v. *Farmington Village Corp.*, 70 Maine, 515; *Baltimore* v. *Johns Hopkins Hospital*, 56 Md. 1; *Sears* v. *Street Com'rs of Boston*, 173 Mass. 350; *Macon* v. *Patty*, 57 Miss. 378; *Hanscombe* v. *Omaha*, 11 Neb. 37; *Rosell* v. *Neptune City*, 68 N. J. L., 509; *Chamberlain* v. *Cleveland*, 34 Ohio St. 551; *Hammett* v. *Philadelphia*, 65 Pa. 146; *Hutcheson* v. *Storrie*, 92 Tex. 684; *Barnes* v. *Dyer*, 56 Vt. 469. The constitutions of many states either expressly or by implication forbid assessments of this character in the absence of benefits conferred. In others the same result is reached through statutes. But a tendency to depart from the strict requirements of the rule is noticeable, even where the property is owned by private parties. Some courts, apparently, would impose the liability wherever it is possible. *Chicago, M. & St. P. Ry. Co.* v. *Phillips*, 111 Ia. 377; *Bullitt* v. *Selvage*, 47 S. W. 255 (Ky. 1898); *McQuiddy* v. *Smith*, 67 Mo. App. 205; *Rolph* v. *City of Fargo*, 7 N. D. 640.

The sharp conflict, however, appears when these levies are made upon a railroad right of way. When the streets to be improved are adjacent to depots, warehouses or even freight yards there can be but little question. The railroad derives as much benefit as any other property owner. Sewers, too, are usually beneficial even if they only help drain a right of way. But paving a street or sidewalk which crosses or parallels the road-bed presents a different question. If the rule of the text books is followed railroads will escape all liability for such improvements. This was the case in most of the old decisions and is the law in a majority of the courts today. In *Village of River Forest* v. *Chicago & N. W. Co.*, 197 Ill. 344, the leading case on this side of the conflict, future probable benefits were held not to supply the absence of present benefits. *Kansas City, P. & G. Ry. Co.* v. *Board of Waterworks Imp. Dist. No. 1*, 68 Ark. 376; *Naugatuck R. Co.* v. *City of Waterbury*, 78 Conn. 193; *Village of River Forest* v. *Chicago & N. W. Co.*, 197 Ill. 344; *Chicago, R. I. & P. R. Co.* v. *Ottumwa*, 112 Ia. 300; *City of Boston* v. *Boston & A. R. Co.* 170 Mass. 95; *Detroit, G. H. & M. Ry. Co.* v. *City of Grand Rapids*, 106 Mich. 13; *St. Paul & Pac. R. R. Co.* v. *St. Paul*, 21 Minn. 526; *State* v. *Elizabeth*, 8 Vroom, 330; *Erie R. Co.* v. *Patterson*, 72 N. J. L., 83; *In re Commissioners of Public Parks*, 47 Hun 302; *Junction R. Co.* v. *City of Philadelphia*, 88 Pa. 424; *Borough of Mt. Pleasant* v. *B. & O. R. Co.*, 138 Pa. 365; *City of Allegheny* v. *Western Penn. R. Co.*, 138 Pa. 375; *Chicago, M. & St. P. R. Co.* v. *Milwaukee*, 89 Wis. 506. The conflict and the nature of the struggle to hold the railroads liable in the absence of benefits may be seen by comparing the following cases with those from the same states cited above. *Chicago, R. I. & P. R. Co.* v. *City of Moline*, 158 Ill. 64; *Illinois Cent. R. Co.* v. *City of Kankakee*, 164 Ill. 608; *Chicago & N. W. Ry. Co.* v. *Village of Elmhurst*, 165 Ill. 148; *Muscatine* v. *Chicago*,

R. I. & P. R. Co., 79 Iowa, 645; *Minneapolis & St. L. R. Co.* v. *Lindquist*, 119 Iowa, 144; *In re Assessment for Grading Prior Ave.*, 71 N. W. Rep. 27 (Minn., 1897); *State* v. *Passaic*, 54 N. J. L. 340. That there is a lack of complete harmony here in the courts of the same state cannot be denied. Iowa appears to have wavered and the Illinois cases do not go as far in their adherence to the rule as does the later case of *Village of River Forest* v. *Chicago & N. W. Co.*, 197 Ill. 344. Statutes, special taxes and particular charter provisions account for much apparent conflict but the fact nevertheless remains that the courts, even of those states which follow the rule of benefits, will hold a railroad liable if possible.

The first serious inroads were made upon the rule when assessments according to foot frontage were held constitutional and valid. It had required a hard fight to establish the constitutionality of special assessments in the first place and levies according to frontage met with even more bitter opposition. They were finally sustained as the most just and reasonable method of apportioning the burden in urban communities and their validity is now generally recognized. The corrollary to this proposition, that the legislature can grant to municipal governing bodies the power to determine what property is benefited by a proposed improvement and to assess it according to frontage, soon followed. Their decision, being legislative in nature, is now generally held conclusive in the absence of fraud or oppression. Statutes and the levying of a special tax, instead of the regular assessment, upon railroad rights of way for improvements show the strength of the present tendency. *Chicago, R. I. & P. R. Co.* v. *City of Moline*, supra. But its scope and extent are best seen in the decisions from those states in which the strict rule is not followed, at least with respect to railroad rights of way. That benefits conferred are not essential to the validity of these levies is becoming more and more the usual holding. The cases last cited with the following are in accord with the principal case: *North Beach & M. R. R. Co.'s Appeal*, 32 Cal. 499; *South Park Comr's* v. *Ry. Co.*, 107 Ill. 105; *Peru & I. R. R. Co.* v. *Hanna*, 68 Ind. 562; *Pittsburg, C. C. & St. L. Ry. Co.* v. *Taber*, 77 N. E. Rep. 741 (Ind. 1906); *Atchison, T. & S. F. R. Co.* v. *Peterson*, 58 Kan. 818, 51 Pac. Rep. 290; *Figg* v. *Louisville & N. R. Co.*, 25 Ky. Law Rep. 350; *No. Ind. R. R. Co.* v. *Connelly*, 10 Ohio St. 160; *Winona & St. P. R. Co.* v. *Watertown*, 1 S. Dak. 46; *Illinois Cent. R. Co.* v. *Decatur*, 147 U. S. 190; *Norwood* v. *Baker*, 172 U. S. 269; *Wright* v. *Davidson*, 181 U. S. 371; *Louisville & N. R. Co.* v. *Barber Asphalt Pav. Co.*, 197 U. S. 430, 25 Sup. Ct. 466. The Supreme Court of the United States in the case of *Norwood* v. *Baker*, supra, held benefits to the property essential to the validity of the levy, but later cases limit the doctrine and are in harmony with the tendency in the state courts. Keeping in mind the nature of this species of taxation it is difficult, upon principle, to uphold it in the absence of special benefits, but principle appears to have yielded to necessity. For a general treatment of special assessments see II MICHIGAN LAW REVIEW, 453.

F. B. F.

STATE AND FEDERAL REGULATION OF RATES.—Hon. CHARLES F. AMIDON, in his paper, "The Nation and the Constitution," read before the American Bar Association at its meeting last summer, expressed some very radical views on the extension of federal control over the matter of railroad rates. Judge LOCHREN of Minnesota, in *Perkins et al.* v. *Northern Pacific Ry. Co. et al.* (1907), — C. C. D., Minn., 3rd Div. —, 155 Fed. Rep. 445, has expressed similar views. The position of the two judges is briefly this: the enforcement of state rates must necessarily conflict with federal rates, because if a state rate in the same direction as an interstate rate is lower than the interstate rate, it will control that rate. Judge LOCHREN gives us an illustration by naming some cities in Minnesota. If the state rate from St. Paul to Moorehead, Minn., is lower than the interstate rate from St. Paul to Fargo, North Dakota, the interstate rate will be practically a nullity, and further, that if each state fixes its own rates within its boundaries the federal rate will be controlled by the sum of the state rates.

Judge AMIDON reminds us that the local state business of our railroads is a very small percentage of their total business. From his view it then appears that our state governments, which actually control but a small proportion of a railroad's business, can control practically all the rates. Upon that ground he argues for an extension of federal control over all rates both interstate and intrastate. If Judge AMIDON's reasoning is correct, there can be no avoiding the conclusion that state regulation of rates conflicts with interstate control and is therefore unconstitutional.

The reasoning of the two judges is very forceful. This view is no doubt occasioned by the recent development in both federal and state rate regulation. Both state and federal governments have recently been regulating rates and enforcing them. It has become apparent how difficult rate regulation is under our dual form of government. The Supreme Court, through a long line of decisions, including the Granger cases and *Wabash, etc., R. R. Co.* v. *Illinois*, 118 U. S. 557, has consistently held that the state governments have control of intrastate rates. This has been generally conceded one of the exclusive powers of the state governments. In fact, that the states retained control over commerce within their own borders is just as true as that they gave up control over matters concerning interstate commerce. It cannot be said that the carrying of goods from one point in a state to another is interstate commerce. It must be a strong argument indeed which can persuade us that the regulation of rates for such carriage is an interference with interstate commerce.

It is interesting then to see if there is any conflict between state and federal regulation of rates. Let us take the illustration of a passenger rate between two cities in adjoining states. The rate between them is an interstate rate. The purchase of a ticket between them makes the purchaser an interstate passenger. The railroad can charge the passenger the interstate rate. But suppose the same individual proposes to buy to a station near the state line and in the state in which he started his trip. In doing that he is a state passenger. The state rate controls. The government of the United States is not concerned with him. Now he descends at this station and buys a new

ticket to his destination. He probably is still within his first state. In buying his second ticket he becomes an interstate passenger. The federal rate applies to him, and he pays at that rate the rest of his way. So it seems that as soon as he undertakes a journey which is really interstate he is controlled by federal laws.

The same situation cannot easily occur in freight rates. A shipper must ship either through or not and must pay the rate that controls. Judge LOCHREN suggests that even here the railroad might be guilty of discrimination in charging less for the state haul than for practically the same length interstate haul. But discriminations work the other way. The danger seems to lie in the short haul rate being the greater. It is hard to see, then, just how these two systems of rates are going to conflict. They apply to different shipments and different trips.

It seems that we can make the situation clear in this way. We have one instrumentality, the railroad. It is doing two kinds of business—interstate and intrastate. They are distinct. They may be done by the use of one train but they still are distinct. We have the federal government telling this railroad what it shall charge in doing one thing. We have the state government telling the same railroad what it shall charge in doing another thing. How do the regulations of the two forms of government conflict? They apply to different kinds of business.

We can conceive in this same situation various ways in which state and federal regulations might conflict. If this one railroad uses the same train for both kinds of business and the federal government should prescribe one sort of safety brake for trains engaged in interstate commerce and the state government should prescribe another sort for state commerce, the two regulations would apply to the same thing—the train—and the federal regulation must control. But in the matter of rates they cannot and do not conflict.

We must not forget that states may do many things which affect interstate commerce providing they are acting for the benefit of their citizens. But this is not saying they may actually interfere with that commerce. From this source we find the doctrine of concurrent powers of state and federal governments.

There can be little doubt that federal and state rates will influence each other. Federal rates would not probably long be left higher than the sum of the state rates. Experience has shown us that the rates for the long hauls and the long distances are usually lower. Rates for short intrastate hauls would not long be higher than practically the same interstate hauls. Each will profit by the other and rates, while sometimes inconsistent, will probably soon adjust themselves. State rates must be adjusted according to revenue from state business. The roads are protected by the Fourteenth Amendment. If then the state rates are reasonable, certainly the sum of them is reasonable. If the rate of the federal government is less than the sum of the state rates, the roads still have the protection of the Fourteenth Amendment.

It is not hard, then, to separate the two kinds of commerce. One begins and ends in the state. The other crosses state lines. The state retained

control of one as much as the federal government received control of the other. It is hard to see why the federal government could encroach on the internal commerce of a state any more than the state government can take actual control of interstate commerce. The two forms of business are distinct. The powers to regulate the rates in the two forms of business are alike distinct. F. P. H.

DUTY TOWARD TRESPASSING CHILDREN WHERE A DANGEROUS ARTICLE IS LEFT IN THE STREET.—This much discussed question is once more the subject of a wide difference of opinion in a recent Michigan case. Defendant's driver left a drip wagon on the street at the close of the day's work. The wagon consisted of a platform on which a boiler was firmly fastened, on top of which was a vent hole which could be closed by means of a metal plug. When left in the street the tank was about one-third filled with drips and the vent was open. Neither the gas nor the mixture was explosive in itself, but when mixed with the proper proportion of air an explosive mixture is formed, and when brought in contact with fire an explosion will follow. Plaintiff, a boy about five and one-half years old, and a boy companion, between six and seven years old, were playing in the street and climbed upon the wagon. Plaintiff's companion dropped a lighted match in the vent hole and the tank exploded, injuring plaintiff. Plaintiff obtained a judgment in the trial court, and on error to the Supreme Court the judgment was affirmed by a divided court. *Iamurri* v. *Saginaw City Gas Co.* (1907), — Mich. —, 111 N. W. Rep. 884.

It is particularly interesting to note the equal division of the court and the decidedly opposite opinions expressed on both sides as to points involved. MCALVAY, C.J., and MONTGOMERY, CARPENTER and MOORE, JJ., for affirmative, hold (a) that an ordinance prohibiting any wagons or vehicles in the streets when not in actual use. was admissible as bearing upon the question of defendant's negligence: *Flater* v. *Fey et al.*, 70 Mich. 664; *Haines* v. *Lake Shore R. R.*, 129 Mich. 475; *Binford* v. *Johnston*, 42 Ind. 509; (b) that defendant's negligence was the proximate cause of the consequence; (c) that the action of plaintiff's companion, a child of tender years, was not an intervention of a responsible human agency; (d) that *Ryan* v. *Towar*, 128 Mich. 463, which holds that where plaintiff, an infant aged thirteen years, entered defendant's land and crawled into defendant's pumphouse and was injured in meddling with a water wheel therein, defendant was under no obligation of care towards such a trespasser upon his own *private* land and not liable for the injury, is not applicable to this present case, where defendant negligently left the drip tank standing in a *public* highway; (e) that *Powers* v. *Harlow*, 53 Mich. 507, where plaintiff, an infant of eight years, being by permission on defendant's land, found a dynamite cartridge in a common packing box among the sawdust, and proceeded to crack it on a stone and maimed himself for life, is authority for the rule that those who are chargeable with a duty of care and caution towards children must calculate upon the fact that they will act upon childish instincts and impulses and take precautions accord-

ingly; (f) that the case of *Kaumeier* v. *City Electric Railway*, 116 Mich. 306, where a street railway left a small flat-car unblocked upon its track in the highway and a child received injuries while playing on it, is easily distinguished from the principal case, in that there was no evidence of defendant's negligence since the defendant had the right to leave the flat-car standing upon the street-car track, whereas in this case defendant had no right to leave the wagon in the street; (g) that the intervention of human agency—at any rate, unless that intervention is a wrongful intervention—does not exempt a wrongdoer from the consequences where his wrong is one imminently dangerous to human life: *Skinn* v. *Reutter*, 135 Mich. 257; *Thomas* v. *Winchester*, 6 N. Y. 397; *Harrison* v. *Railway Co.*, 45 Ohio St. 11; *Binford* v. *Johnston*, 42 Ind. 508; *Fishburn* v. *Burlington Railway*, 127 Iowa, 483.

OSTRANDER, HOOKER, GRANT and BLAIR, JJ., for reversal, hold (a) that the leaving of the wagon in the street in violation of a city ordinance was not negligence, because it was the breach of no duty owed to plaintiff: *Flanagan* v. *Sanders*, 138 Mich. 253; *Stark* v. *Muskegon Traction Co.*, 141 Mich. 575; (b) that *Ryan* v. *Towar*, 128 Mich. 463, is authority for the rule, that a trespasser, whether an infant or not, cannot recover for injuries due to his trespassing, regardless of the attractiveness of the premises or things thereon to children; (c) that *Kaumeier* v. *Electric Company*, 116 Mich. 313, is authority for the rule that if personal property, mischievous only when set in operation, is left at rest in the highway and is set in motion by a trespasser, to whom the owner owes no duty of care, the owner is not liable to such meddler for any resulting injury, although he was an infant, and although the owner knew that infants had, and were again liable to, set the object in motion; (d) that *Powers* v. *Harlow*, 53 Mich. 507, is authority *only* for the holding that when a child is licensed to go upon land, he is *not a trespasser*, and that the owner owes it to such a person not to leave dynamite cartridges in a situation likely to attract his attention, and that the case *plainly intimates that had the child not been lawfully upon the ground, the holding would have been different.*

To sum up the arguments of both sides, it is seen that there are three main points disputed: First, the judges for the affirmative hold that defendant was negligent in leaving the wagon in a public highway contrary to a city ordinance; and the judges for reversal hold, that defendant was not negligent in this respect, because he committed no breach of duty as far as plaintiff was concerned. Second, the judges for the affirmative hold that defendant's negligence is further shown in that the wrong was one imminently dangerous to human life; while the judges for reversal hold that defendant's wrong was one dangerous only when set in motion by a meddler, in that it required a flame or red-hot metal to ignite the mixture of illuminating gas and air. Third, the judges for the affirmative hold that plaintiff can recover although he was himself a trespasser, because he is an infant; while the judges for the reversal hold that plaintiff cannot recover because he was himself a trespasser, and it does not matter whether he was an infant or not.

And it is interesting to note that the answer of the judges for reversal to the first question involves the third question of whether plaintiff's being

an infant allows him to recover. The second contention of the judges for the affirmative, that the wagon and its contents were intrinsically dangerous to the public safety, strengthens their first contention, that defendant was negligent in leaving the wagon in the public highway; but neither of these contentions is considered of great importance, nor given much attention by the judges for reversal, who seem to rely upon the particular fact that it required a flame or red-hot metal to ignite the mixture of illuminating gas and air as a sufficient answer. It is to the third question involved that the judges for reversal give most of their attention. Can plaintiff recover although he was himself a trespasser, because he is an infant? This is the chief bone of contention. It is upon this point that the three leading cases of *Ryan* v. *Towar, Kaumeier* v. *Electric Co.,* and *Powers* v. *Harlow,* quoted above, are cited pro and con. In the words of HOOKER, J., "Whether we are to understand that one who meddles with the property of another upon the highway is not to be considered a trespasser, or that a person, though a trespasser, if he invades the land of another, is not a trespasser when he climbs upon a wagon in the highway, or that a child is not a trespasser in such a case, though an adult would be, although both would be trespassers if they entered upon land of another, is not made clear. There is another alternative, viz., that while one does not owe a duty to a trespasser upon land, he does to a trespasser upon the personal property in the highway, especially if the property is attractive enough to induce a child to trespass, and it goes without saying that in every such case it must have been so attractive or the child would not have trespassed. Everybody knows that he who invades and injures personal property of another is a wrongdoer and liable for the damages, although he be a child. The boy who blew up the gas wagon is liable as a wrongdoer, and would be though it had been accidental, because he was trespassing. Whichever horn of the dilemma is taken, we find the three cases cited an obstacle to recovery. They all say that an owner of property owes no duty to guard a trespasser, and that the rule applies to juveniles as well as to adults, and all admit that adults cannot recover in such cases." And he goes on to say that the case of *Ryan* v. *Towar* expressly repudiates the doctrine that the fact that the article trespassed upon is attractive to children makes a difference as to the legal relations of the parties, if the injury is due to a trespass, thus holding therefore that the "turntable cases" are radically wrong in principle and erroneous in their reasoning, and that the one ground which in his view it is perhaps possible for the judges holding for the affirmative to stand upon must go down. B. H.

COLLATERAL ATTACK ON INJUNCTIONAL ORDERS.—A recent decision in the United States Circuit Court of Appeals for the seventh circuit presents the question of collateral attack on an injunctional order in an interesting and novel way. Foreclosure proceedings had been instituted in a federal court, in which conflicting mortgage interests were represented by trustees for the holders of bonds secured by the mortgages, the bond holders themselves not being

parties to the suit. The priorities of the contesting mortgagees were determined, and a decree of foreclosure and sale was rendered, by the terms of which the court retained jurisdiction to enforce the conditions imposed upon the parties and such other orders as might be needed for the purpose of carrying out the decree. The mortgaged property was sold under the decree, and on the presentation of the master's report, certain dissatisfied bond holders appeared by an attorney, the plaintiff in error in the case under consideration, and interposed objections to the confirmation of the sale. The Court entered an order overruling their objections and restraining the parties to the proceedings, persons claiming under them, and their attorneys from setting up any pretended title as against the purchaser at the sale. An appeal from this order was denied the objecting bond holders by the United States Supreme Court, on the ground that they were not named as parties in the record of the original proceedings, and therefore were not entitled to a review of the case. Mr. Justice DAY addressed a letter to their attorney advising him that if their rights had been invaded the matter could be worked out in an original proceeding. Thereupon they, by the same attorney, instituted foreclosure proceedings in a state court. On the petition of the purchaser under the original foreclosure sale, this attorney was cited into the federal court which had issued the injunction, and was sentenced to imprisonment for contempt for disobedience thereof, the sentence to be suspended in case the suit in the state court were dismissed within five days. After dismissing the suit, in accordance with the sentence, the attorney appealed therefrom and the Circuit Court of Appeals, by a divided court, held that, since the bond holders were not parties in the original suit, except insofar as they were represented by the trustee, the trial court had no jurisdiction over their persons to bind them by its injunctional orders, that their appearance for the purpose of objecting to the confirmation of the sale gave the court, on overruling their objections, no further jurisdiction over their persons, that the retained jurisdiction of the court did not embrace the right to issue such an injunction, and that the issues presented by the objections to the confirmation of the sale were not such as to warrant the court in granting the order.

A dissenting opinion was rendered, on the ground, inter alia, that the issues presented to the court by the objections of the bond holders called for the very order in question, that the court had retained jurisdiction to make such an order by the express terms of the original decree, that the bond holders and their attorney were actually before the court at the time the order was made, and consequently within its jurisdiction, and that, by defying the order, they could not obtain a review thereof in the collateral proceedings resulting from their disobedience. *Lewis* v. *Peck et al.* (1907), 154 Fed. 273.

It is well settled that where a court lacks jurisdiction, disobedience of its injunctional orders is not contempt. *Evans* v. *Pack* (1878), Fed. Cas. No. 4566; *Willeford* v. *State* (1884), 43 Ark. 62; *Darst* v. *People* (1871), 62 Ills. 306; *Kerfoot* v. *People* (1893), 51 Ill. App. 409; *Ex Parte Wimberley* (1879), 57 Miss. 437. And it is just as firmly settled that an injunction erroneously granted, where there is jurisdiction, must be obeyed. *Kerfoot* v. *People*

(1893), 51 Ill. App. 409; *Central Union Telegraph Co.* v. *State* (1886), 110 Ind. 203; *Billard* v. *Erhart* (1886), 35 Kans. 616; *Forrest* v. *Price* (1893), 52 N. J. Eq. 16; *Sullivan* v. *Judah* (1834), 4 Paige (N. Y.) 444; *People* v. *McKane* (1894), 78 Hun 154; *Rutherford* v. *Metcalf* (1818), 6 *Tenn.* (5 Hay.), 58; *Stimson* v. *Putnam* (1868), 41 Vt. 238.

It seems clear from the authorities that the trial court in the original proceedings between the trustees had no such jurisdiction over the persons of the bond holders as to make an injunctional order binding on them. The decree there rendered could bind the bond holders to the extent of their interest in *res* alone. *Pennoyer* v. *Neff* (1877), 95 U. S. 714; *Cooper* v. *Reynolds* (1870), 10 Wall. 308; *Parsons* v. *Greenville & C. R. Co.* (1877), 1 Hughes 279, Fed. Cas. No. 10776; *Hawley* v. *Fairbanks* (1882), 108 U. S. 543; *In Reese* (1900), 98 Fed. 984; *Iveson* v. *Harris* (1802), 7 Ves. 251; *Fellows* v. *Fellows* (1819), 4 Johns. Ch. (N. Y.) 25.

The appellate court was divided on the question whether, on the issues presented in the confirmation proceedings, the trial court could make such an order as the one under consideration, the majority holding that the issue was whether or not the sale should be confirmed, and, when that was decided, the proceedings were at an end. *Bostwick* v. *Atkins* (1849), 3 N. Y. 53, is a case which, although governed by the statute, accords with this view. There it is said, "As the inquiry [in confirmation proceedings] is limited to the fairness and good faith of the sale, the parties should not be precluded by the decree from subsequently contesting other matters."

Did the trial court acquire jurisdiction over the persons of the bond holders and their attorney when they appeared for the purpose of objecting to the confirmation sale? There are not many cases involving the point, but the following seem to answer the question affirmatively: *Taylor* v. *Gilpin* (1861), 3 Met. (Ky.), 544; *Franse* v. *Armbruster* (1890), 28 Neb. 467; *Herndon* v. *Crawford* (1874), 41 Tex. 267. In the latter case Herndon appeared for the purpose of objecting to the report of commissioners for partition, and the court said: "But, if it did not sufficiently appear from the judgment that the plaintiff in error was in court and consented to the decree, he certainly made an appearance when he filed his objections to the report of the commissioners." In this connection, however, it must be remembered that the dissatisfied bond holders had been denied an appeal by the United States Supreme Court, on the ground that they were strangers to the record.

One can hardly understand how the Circuit Court of Appeals could have decided the case otherwise than it did, since the effect of such a decision would have been to deny the bond holders the right of either direct or collateral attack on the order, thus binding them more absolutely than if they had been parties to the original suit. C. A. D.