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Note and Comment

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NOTE AND COMMENT

THE LIABILITY OF A TOWNSHIP FOR INJURY TO AN AUTOMOBILE DUE TO DEFECTS IN A HIGHWAY.—The very general introduction of the automobile as a vehicle for travel upon city streets and country highways has given rise to a variety of questions for settlement in the courts, some of which, on account of the character of the vehicle, its motive power and the speed at which it is ordinarily driven, are novel and as yet largely outside of the range of precedent. Such a question was recently determined by the Supreme Court of Massachusetts in the case of *Doherty* v. *Town of Ayer*, decided Feb. 24, 1908, and reported in 83 N. E. Rep., p. 677.

The plaintiff brought his action for damage to his automobile, alleged to have been caused by a defect in a highway which the defendant township was bound, under the law, to keep in repair. The road at the place of the accident was being changed and cut down by a street railway company, in order to prepare a place for its track, and, as a consequence, for a distance of three or four hundred feet, and throughout the entire width of the road, the surface, instead of being hard and well fitted for travel, was sandy and could only be used with difficulty. However, it could be used by, and was

constantly used for, ordinary vehicles without particular trouble and without danger. It was entirely safe also for heavily loaded teams, although they sometimes needed assistance in order to get through the sand. This the workmen upon the road, under orders from the railway company, stood ready to furnish. The road was always left in a level condition and without holes. The plaintiff was familiar with the road and knew of the changes in the grade that the railway company was making. Indeed, early in the afternoon of the day of the accident he passed over the road in his automobile without trouble. But returning in the evening, he had only partially cleared the sandy place in the road when the automobile became stalled. In the process of extricating it, which was accomplished only by the aid of a horse and laborers, the machine was broken and badly damaged. In answer to a special question, the jury found that the road at the place in question was reasonably safe for carriages other than automobiles. As to whether or not the place of the accident was within the traveled part of the old highway, or entirely outside of it, the evidence was conflicting. The trial judge instructed the jury that an automobile was a carriage within the meaning of a statute of the state providing that "highways, town ways, causeways and bridges shall, unless otherwise provided, be kept in repair at the expense of the city or town in which they are situated, so that they may be reasonably safe and convenient for travelers, with their horses, teams, and carriages at all seasons," and that it was the duty of the defendant township, under that statute, "to keep its roads reasonably safe and convenient for automobiles, so that they might be protected." To this ruling the defendant excepted.

The question raised by the exception is one of large importance to cities and townships that are by statute made responsible for the safe condition of highways. What is the extent of the responsibility imposed? Does it include the keeping of the highways in a usable and safe condition for all vehicles for travel that the wit of man may devise, or only for those of which mention is made in the statute and others that are similar? It is well known that the use of automobiles upon our city streets and country roads is the source of great inconvenience and at times of danger to those using such streets and roads, as it was contemplated they should be used when turned over to the public. It is also well known that the expense of keeping highways in a usable condition for ordinary vehicles is largely increased by the general use thereon of automobiles. Must the public meet this extra expense and also be responsible for any and all damages that may be suffered by those using automobiles on account of highways being in an unsafe condition for such vehicles, although usable and reasonably safe and convenient for travelers using the ordinary modes of conveyance?

The reviewing court sustained the exception, holding that, though persons may lawfully travel in automobiles upon highways, they cannot hold a township liable for a failure to make special provisions required only for their safety and convenience while using such vehicles, if the roads are kept reasonably safe and convenient for travel generally. "When towns," said the court, "were first required by law to keep their highways and town ways reasonably

safe and convenient for travelers, with their horses, teams and carriages at all seasons of the year, there was no thought of putting upon them such a burden as would be imposed if they were compelled to keep all of these ways in such a condition that automobiles could pass over them safely and conveniently at all seasons. Horses, teams and carriages are grouped together in the statute, and the carriages referred to are those drawn by animal power." The court goes on to suggest that many highways run into remote and sparsely settled portions of the state and over vast stretches of sandy surface, and that to keep such ways in a condition that would make them reasonably safe and convenient for travel in automobiles at all seasons of the year would be the imposition upon the public of an unreasonable burden, a burden, indeed, that in some sections would be heavier than could be borne.

But little direct authority upon the precise question involved in the case under review is as yet to be found in the books. In *Richardson* v. *Inhabitants of Danvers*, 176 Mass. 413, 57 N. E. Rep. 688, 50 L. R. A. 127, 79 Am. St. Rep. 320, to which reference is made in the opinion, the question was as to whether or not a township was liable for injuries received by a person while riding a bicycle, the accident resulting in such injuries being due to a defect in the highway which made it dangerous to the bicycle rider but not to the traveler by the ordinary modes of conveyance. The court held that while for many purposes the bicycle may be regarded as a vehicle or carriage, and while it may be lawfully used upon a highway, yet it cannot be considered as a carriage within the meaning of the term as used in the statute. "The statute in question" (the one hereinbefore quoted), said the court, "was passed long before bicycles were invented, but, although of course it is not to be confined to the same kind of vehicles then in use, we are of opinion that it should be confined to vehicles, *ejusdem generis*, and that it does not extend to bicycles." The court suggested that it would "impose an intolerable burden upon towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety." A case referred to in the opinion as one in which the question under discussion was raised but not decided is *Baker* v. *Fall River*, 187 Mass. 53, 72 N. E. Rep. 336. In this case the action was for damages for personal injuries to one riding in an automobile, the accident causing the injuries being due to an alleged defect in a city street. The jury returned a verdict for the plaintiff. The reviewing court said: "In the present case the alleged defect was one which would be dangerous to ordinary vehicles. Therefore, we now have no occasion to consider whether roads must be kept in such a state of repair and smoothness that an automobile can go over them with assured safety." The court held that as the defect was one that would be dangerous to ordinary travel, the plaintiff would not be precluded from recovery because of the nature of the vehicle in which he was riding. In the case of *Hendry* v. *Town of North Hampton*, 72 N. H. 351, 56 Atl. 922, 64 L. R. A. 70, the plaintiff, while riding a bicycle and exercising due care, "ran into a mud puddle, and was thrown over a dangerous embankment which was not railed or guarded, and received injuries for which she brought" an action against the township. The court, while recognizing apparently the doctrine that the township under

the statute of the state would not be required to keep its highways in a condition suitable for travel by means of the bicycle, held that the plaintiff was entitled to recover because the dangerous embankment was not guarded in such a way as to afford adequate protection to travelers by the methods of conveyance mentioned in the statute. "The plaintiff," said the court, "being a traveler upon the highway, * * * notwithstanding she was riding on a bicycle, was entitled at least to a highway in condition suitable for ordinary travel and to damages for injuries happening to her by reason of any unsuitableness of the highway for such travel." It has been held by the Supreme Court of Michigan that "reasonable care in the construction and maintenance of highways for ordinary vehicles, such as wagons and carriages, is the measure of duty resting upon municipalities" under the statute, and that in the absence of further legislation, the courts will not extend the duty so as to make it necessary for the public authorities to provide suitable highways for bicycles and vehicles of like character. *Leslie* v. *Grand Rapids*, 120 Mich. 28, 78 N. W. Rep. 885. See, also, *Sutphen* v. *North Hamstead*, 80 Hun 409, 30 N. Y. Supp. 128; *Rust* v. *Essex*, 182 Mass. 313, 65 N. E. Rep. 397; *Wheeler* v. *City of Boone*, 108 Iowa 235, 78 N. W. Rep. 909. It has been held by the Supreme Court of Washington that a city which exercises its option to construct a bicycle path along the side of one of its streets, is bound to maintain it in a condition reasonably safe for the purpose for which it is intended. *Prather* v. *City of Spokane*, 29 Wash. 549, 70 Pac. Rep. 55, 59 L. R. A. 346.

While the law of the present time in regard to damages suffered through accidents to automobiles and other like vehicles, by reason of imperfections in highways and streets, is undoubtedly that a recovery can only be had when the imperfection is of such a nature as to make the highway or street unsafe for travel by the ordinary modes of conveyance, yet it is not improbable that the growing use of the self-impelled machine may in the future lead to an extension of the rule governing liability. But a change in this regard will probably come through legislation and not by any material modification by the courts of the present doctrine. H. B. H.

THE STATUTE OF LIMITATIONS AND AMENDED COMPLAINTS.—Plaintiff brought action for damages for the death of his intestate in the mine of the defendant. In his original complaint, he sought to recover because of the failure of the defendant to provide a reasonably safe place in which his intestate might work. Subsequently he amended his complaint by adding a count under which he sought to recover because of the negligence of one Dunn, a servant of the defendant, whose orders the intestate was bound to obey, in ordering the intestate into a mine when it was filled with suffocating gas. The original complaint was based on common law liability of the defendant. The amendment was based on a statutory liability. (Code of 1896, § 1749, subdiv. 3). The Statute of Limitations was interposed as a defense to the amendment. If the amendment were considered as filed at the time of the original complaint, the Statute of Limitations had not run. If considered as filed at the time it actually was filed, the

Statute of Limitations had run. *Held*, that as no new cause of action was stated by the additional count, the Statute of Limitations had not run. *Alabama Consol. Coal & Iron Co.* v. *Heald* (1908), — Ala. —, 45 So. Rep. 686.

The decision in the principal case was rendered by a divided court, three judges dissenting. The point raised is one on which the courts are in hopeless confusion. It is generally conceded that an amendment will be considered as filed when the original complaint was filed unless a new cause of action is stated. But the courts differ as to when a new cause of action is stated. Various tests have been laid down to determine the identity of the causes of action. Would a recovery under the original petition bar a recovery under the amended petition? *Rhemke* v. *Clinton*, 2 Utah, 230. Would the same evidence support both of the pleadings? *Lottman* v *Barnett*, 62 Mo. 159. Is the measure of damages the same in each case? *Hurst* v. *Detroit City Ry.*, 84 Mich. 539. Are the allegations of each subject to the same defenses? *Lumber Co.* v. *Water Co.*, 94 Tex. 456, 61 S. W. 707. See 1 A. & E. ENCY. PL. AND PR. p. 556. But the courts differ as to the decisiveness of these tests and as to their application. When the beneficiary is changed, a new cause of action is stated. *Ry. Co.* v. *Hooper*, 92 Fed. 820, 35 C. C. A. 24. Amending a complaint which founded a right on a license to a right founded on a statute, is stating a new cause of action. *Sims* v. *Field*, 24 Mo. App. 552. When liability is charged as a common carrier in the original declaration and an amendment is added charging liability as a warehouseman, a new cause of action is stated. *Ry. Co.* v. *Ledbetter*, 92 Ala. 326, 9 So. 73. *People* v. *Judge*, 35 Mich. 227. Compare *Ry. Co.* v. *Woods*, 105 Ala. 561, 17 So. 41, relied on in the majority opinion with *U. P. Ry.* v. *Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, relied on in the dissenting opinion. Compare also the following cases in which it was held that no new cause of action was stated and that therefore the amendment dated from the filing of the original complaint: *Frost* v. *Witter*, 132 Cal. 421, 64 P. 705; *Roberts* v. *Leak*, 108 Ga., 806, 33 S. E. 995; *Cicero* v. *Bartelme*, 212 Ill. 256, 72 N. E. 437; *Ry. Co.* v. *Bergschicker*, 162 Ind. 108, 69 N. E. 1000; *Padden* v. *Clark*, 124 Ia. 94, 99 N. W. 152; *Louisville, etc. R. R. Co.* v. *Pointer's Adm'r*, 113 Ky. 952, 69 S. W. 1108; *Zier* v. *Chesapeake Ry Co.*, 98 Md. 35, 56 A. 385; *Pratt* v. *Circuit Judge*, 105 Mich. 499, 63 N. W. 566; *Bruns* v. *Schreiber*, 48 Minn. 366, 51 N. W. 120; *Courtney* v. *Blackwell*, 150 Mo. 245, 51 S. W. 668; *Seeley* v. *Insurance Co.*, 72 N. H. 49, 55 A. 425; *Wilhelm's Appeal*, 79 Pa. St., 120; *Love* v. *Southern Ry. Co.*, 108 Tenn. 104, 65 S. W. 475, 55 L. R. A. 471; *Cotter, etc. Co.* v. *Parks*, 80 Tex. 539, 16 S. W. 307; *Kuhn* v. *Brownfield*, 34 W. Va., 252, 12 S. E. 519, 11 L. R. A. 700; *Guild* v. *Parker*, 43 N. J. L. 430; *Townes* v. *Dallas Mfg. Co.*, — Ala. —, 45 S. 696, with the following cases in which it was held that a new cause of action was stated: *Ry. Co.* v. *Smith*, 81 Ala. 229, 1 S. 723; *Lambert* v. *McKenzie*, 135 Cal. 100, 67 P. 6; *Ry. Co.* v. *Bhymer*, 214 Ill. 579, 73 N. E. 879; *Blake* v. *Minkner*, 136 Ind. 418, 36 N. E. 246; *Patten* v. *Waugh*, 122 Ia. 302, 98 N. W. 119; *Thompson* v. *Beeler*, 69 Kan. 462, 77 Pac. 100; *Hamilton* v. *Thirston*, 94 Md. 253, 51 A. 42; *Bricken* v. *Cross*, 163

Mo. 449, 64 S. W. 99; *Buerstetta* v. *Bank*, 57 Neb. 504, 77 N. W. 1094; *Butt* v. *Carson*, 5 Okla., 160, 48 P. 182; *Montgomery* v. *Shaver*, 40 Ore. 244, 66 P. 923; *Philadelphia* v. *R. R. Co.*, 203 Pa. St. 38, 52 A. 184; *Mayo* v. *Ry Co.*, 43 S. C. 225, 21 S. E. 10; *Iron & Coal Co.* v. *Broyles*, 95 Tenn. 612, 32 S. W. 761. S. W. D.

A VENDEE'S RELIANCE ON HIS VENDOR'S REPRESENTATIONS.—How far a vendee of property can rely upon the representations of his vendor in regard to the property is interestingly presented in the case of *Abmeyer* v. *First National Bank of Horton* (1907), — Kan. —, 92 Pac. Rep. 1109. It is a general rule that a person seeking to enforce a right should not have by his negligence produced the injury complained of. The court in the principal case seems to think the question of negligence should be given little weight when fraudulent representations are in question.

The facts of this case were briefly these:

The defendant was a man with little or no knowledge of farming; Wright, his vendor, was a farmer and could estimate the quantity of corn standing in a field with reasonable certainty. Defendant bought the corn while standing and before it had matured. At the time of the sale, the vendor, Wright, represented that there were 1,300 bushels of the grain, but it turned out that there were but 431 bushels. The defendant took with him at the time a friend who also was a farmer and who inspected the corn before the deal was closed; but the evidence did not disclose whether the friend agreed with the vendor in the estimate made or not. The action was brought on a promissory note given for the purchase price which was negotiated to plaintiff, and defendant seeks to recoup his damages suffered from the alleged fraud. The trial court directed a verdict for the plaintiff on the ground that there was no evidence that plaintiff had any knowledge or notice of any fraud or claim of fraud in the inception of the note. The Supreme Court held that the trial court erred in taking the case from the jury; saying there was some evidence tending to show fraud in the inception of the note which ought to have gone to the jury; and which, if found to have been true, would have placed on plaintiff the burden of proving that it was an innocent purchaser.

In giving its opinion of the law to govern the trial court, the court in reply to plaintiffs contention that defendant was negligent in relying upon the representations of the vendor, said that one who cheats another by a falsehood, intended to deceive, was hardly in a position to say that his victim ought not to have believed him. The court based this statement expressly on the case of *Speed* v. *Holingsworth*, 54 Kan. 436, 38 Pac. Rep. 496; wherein it was said that the trend of modern decisions is toward the doctrine that one who has defrauded another cannot say in defense that the other might, with due diligence, have discovered the falsity of the representations, and that it mattered not that the other was "in some loose sense" negligent.

In the specially concurring opinion in the principal case, SMITH, J., disagreed with the majority's enunciation of the law. He contended that, if

the defendant had the same means of knowledge as the seller, he was bound to exercise his own judgment, instead of relying upon the estimate of one opposed in interest.

In *Speed* v. *Hollingsworth* (supra), the representations relied upon and upon which the court held the defendant was entitled to rely, were in regard to the acreage of a certain parcel of land, the number of acres of corn growing on the farm, as well as the rentals of certain pasture land. The court, while it did use the language set out above, expressly said that the representations then in question were of matters lying peculiarly in the knowledge of the seller. It is generally agreed that a person is justified in relying upon such representations. In such case he is not negligent. *Stewart* v. *Ranche Co.*, 128 U. S. 383; *Paine* v. *Upton*, 87 N. Y. 327; *Mitchell* v. *Zimmerman*, 4 Tex. 75. Conceding this to be the rule, do the facts in the principal case justify the general language used by the court?

There are many authorities to the effect that one claiming to recover by reason of fraud practiced upon him, must himself be free from negligence, or, as it is often put, if the falsity of the statements was apparent from the things open to his observations, or, if their falsity would have been discerned if he had used reasonable care and prudence, he cannot be deemed to have been deceived. *Long* v. *Warren*, 68 N. Y. 426; *Slaughter's Adm'r* v. *Gerson*, 13 Wall, 379; *Aetna Insurance Co.* v. *Reed*, 33 Ohio St. 283; *Marx* v. *Schwartz*, 14 Ore. 177; *Schoelkopf* v. *Leonard*, 8 Colo. 159; 14 AM. & ENG. ENC. OF LAW. pg. 115 et seq. and notes. It would seem that the rule laid down in the principal case was meant to operate in all cases, which was the occasion of the specially concurring opinion. The representations can hardly be said to have been of a character peculiarly within the knowledge of the vendor, Wright. The corn was immature when sold, and it was shown that defendant took a friend with him at the time he bought the corn. As said by SMITH, J., "he (defendant) was bound to exercise his own judgment, having full opportunity to investigate with little effort, instead of relying upon the estimate of one opposed in interest." Farther on he said, "It is a matter of common knowledge that results equally as disappointing as in this case come from cornfields that in an immature state promise as great returns as were estimated in this case. The representation was not of an existing fact, peculiarly within the knowledge of the seller, but in part, at least, an estimate of a prospective development."

In *Speed* v. *Hollingsworth* (supra), the court cited a great many cases to support the doctrine enunciated. An examniation of these cases discloses that, with the exception of one or two cases, in not one were the facts at all analogous to those in the principal case. Several involved representations in regard to the location and quantity of land; others were decided fraudulent, because of the relationship between the parties; others involved misrepresentations of the financial condition of business concerns by persons closely related with such concerns; and the rest were in regard to statements made by those who, on account of their position, had peculiar knowledge of the facts misrepresented. In the one or two in which the facts were

analogous, the courts came to a contrary conclusion, while it was said in others that the representations might be so palpably untrue that no one would be justified in relying upon them. R. F. M.

LACK OF JURISDICTION TO PROCEED WITH A SUIT AGAINST A FOREIGN SOVEREIGN.—The case of *Mason* v. *The Intercolonial Ry. of Canada* (1907), — Mass. —, 83 N. E. Rep. 876, illustrates one of the weaknesses of public ownership of railroads. Plaintiff, being injured in Canada, brought suit by trustee process, substantially a proceeding in rem in Massachusetts. The defendant neglecting to answer, it was disclosed by a friend appointed by the court that the title to defendant road was in the King of England in his right as ruler of Canada, without any intermediary corporation. It was also shown that the road was maintained by appropriations from the general government fund, being directly under the supervision of the Minister of Finance, and that all of its earnings were used to meet purely governmental expenditure. The court thereupon refused jurisdiction on the theory that a sovereign cannot be impleaded in a foreign court without his consent.

The status of the Intercolonial Ry. and its relation to the Dominion government was clearly stated in the case of *Queen, Appellant* v. *McLeod* (8 Canadian Supreme Court 1). The train upon which the plaintiff was riding was thrown from a sharp curve. The evidence showed that for a mile on each side of the curve many of the ties could be kicked to pieces with a boot and that spikes could be picked from the rotten wood with the fingers. A verdict of $36,000 was reversed on the ground that a sovereign could not be sued in the courts of his own country. The decision was undoubtedly in line with the weight of authority. Theoretically and historically the power of the courts is derived from the King, and until something can be created out of nothing there is logic at least in saying that the creator cannot be called to account by the created. (BL. COM. I, p. 242). But the immunity granted a sovereign in the courts of a foreign jurisdiction rests upon other grounds. The absolute authority of the sovereign country over its own territory is admitted, the refusal to implead the foreign sovereign being founded rather on the courtesy of nations, and the practical inability of the court to enforce its decree; the whole situation being graphically stated by Blackstone in the query "Who shall command a King?" (BL. COM. Supra), *The Duke of Brunswick* v. *The King of Hanover*. 6 Beav. 1

The latter reason underlying the international rule finds no application where the proceeding as in the principal case is in the nature of a suit in rem. The very property, the only essential of jurisdiction, is before the court, leaving the only reason for refusal to decree right as to the property, the character of one of the parties.

Under such conditions, and bearing in mind that the exemption in its first instance depends purely upon comity, it is reasonable to expect a modification in the scope of the immunity. "There is," says Chief Justice MARSHALL in the leading case of *The Schooner Exchange* "a manifest distinction between the private property of the person who happens to be a

prince, and that military force which supports the sovereign power and maintains the dignity and independence of the nation." [7 Cranch. (U. S.) 116]. All of the cases to be cited on this point are at great pains to show that the property held exempt in the particular case before the court was devoted to a public purpose, and most of them intimate that the conclusion would have been different if property devoted by the sovereign to a private purpose had been involved, a principle thoroughly established in connection with the liability of a municipality for its torts.

While there are no cases defining the scope of private property within the rule it has been held that a French man-of-war was public property and could not be libelled even by her former American owners in an American port. *The Schooner Exchange* (supra). So a lightship to be moored in the Potomac River could not be attached for material furnished the contractor in her construction after the United States had been given possession. *Briggs* v. *Lightship*, 11 Allen 157. Likewise transports carrying provisions to a government military post, and money in England appropriated to pay the interest on the Spanish debt have been declared property so exclusively devoted to a public purpose that the court could not proceed against it in rem. *The Swift*, 1 Dod. 320; *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171. And in a comparatively recent and elaborately argued opinion it was held in England that a mail packet owned and operated by the Belgium government could not be attached though she also transported persons and merchandise for hire. *The Parlement Belge*, L. R. 5 Prob. Div. 197. The tendency has undoubtedly been to broaden the public functions of government, so much so that Judge GRAY in *Briggs* v. *Lightship* doubts if any property may be held by a republican government except for public purposes, and the latest English case (*The Parlement Belge*) holds that the character of the property owned by a foreign state, i. e. whether public or private, is conclusively determined by the declaration of the foreign state, since to hold otherwise would compel the foreign sovereign to submit in the first instance to the court's determination, to avoid which the International rule was established. The Canadian Supreme Court in *Queen* v. *McLeod* (supra) had held that the Intercolonial Ry. was a "branch of the police power" and in no wise "a private mercantile speculation." Whether one follows the dicta of Judge GRAY in *Briggs* v. *Lightship*, a decision binding on the Massachusetts court that property owned by republics is presumed to be devoted to a public purpose, or that of the English court that the declaration of the foreign government is final, the result is the same; the property of the Intercolonial Ry. is devoted to a public use and exempt in a foreign court from proceedings in rem.

The case therefore emphasizes an inconvenience in public ownership. The injured party has no redress in the courts of his own country unless permission is first given him by the injuring party. And though a generous legislature provides a statutory action as comprehensive as that existing at common law, nevertheless the plaintiff has no standing in a foreign court unless that too is given by the enabling statute or the voluntary waiver by the injuring sovereign.

F. B. K.

ACQUITTAL IN A CRIMINAL PROSECUTION AS A DEFENSE TO A CIVIL ACTION FOUNDED ON THE SAME FACTS UNDER THE PHILIPPINE PRACTICE.—The case of *Almeida* v. *Abaroa*, decided March 27, 1907, by the Supreme Court of the Philippine Islands presents an interesting phase of the general question discussed in an article in the MICH. LAW REV., Vol. VI, p. 136, entitled "The Position of the Law of Torts in the Spanish System." It also illustrates the perplexing problems which arise from the clash of the American and Spanish systems of jurisprudence in our insular possessions. In a prosecution for arson the defendant had been acquitted on the ground that the evidence did not show his guilt beyond a reasonable doubt. In acquitting him, however, the trial court stated that the proof presented by the prosecution indicated the guilt of the accused and expressly reserved to the injured party all the rights which he had to institute a civil action for damages against the defendant. The prosecution appealed to the Supreme Court of the Philippine Islands in accordance with the practice then in vogue and the finding of the trial court was there sustained. Subsequently in *Kepner* v. *United States*, 195 U. S. 100, the United States Supreme Court decided that the assumption of appellate jurisdiction by the Supreme Court of the Philippine Islands under such circumstances was in violation of the double jeopardy clause in the federal constitution.

Under the Spanish system the civil action and the criminal action arising out of an alleged crime are ordinarily brought together, and in case the defendant is found guilty the court imposes on him, as a part of the sentence, the obligation to pay the damages occasioned by his crime. The injured party may, however, reserve his right to bring a separate civil action, if this can be done consistently with the finding in the criminal action. If this right is not so reserved it is considered that the two actions are combined. (Arts. 108 and 112 Enjuicimiento Criminal Peninsular.) In the case under consideration the injured party had not reserved the right to bring a separate civil action.

After the finding of the trial court in the criminal action was sustained on appeal the injured party instituted a civil action against the same defendant, alleging in his complaint the very same facts which had been the foundation of the prosecution. The answer of the defendant was a general denial and that the allegations of the complaint were *res judicata*, relying on the findings in the former criminal action predicated on the same facts. The trial court upheld the defense of *res judicata* and on appeal this holding was sustained by the Supreme Court of the Philippine Islands. It will be seen that the effect of this decision and of the *Kepner* case is to deprive a person injured by the commission of a crime of his right to appeal from the findings of the trial court in the criminal action, and also of his right to bring a separate civil action predicated on the same facts, except perhaps in the case in which that right has been expressly reserved.

Through the kindness of a member of the Supreme Court of the Philippine Islands and of counsel for the appellees the writer has before him the proof sheets of the decision and the briefs of both parties.

In an able and exhaustive brief in which the authorities, both Spanish and American, are reviewed, the appellant took the following positions:

1st. That under the Spanish Law the extinction of the penal action carries with it the civil action only in the case in which the non-existence of the facts from which the civil action might arise has been declared by final sentence. Inasmuch as there was no such finding in this case, but rather that the proof indicated the guilt of the accused, but not beyond a reasonable doubt, the civil action was not extinguished thereby.

2nd. That inasmuch as the accused in the criminal action was discharged for want of sufficient evidence, and was not found innocent, that finding, while a bar to further prosecution, is no bar to the civil action arising out of the same facts.

3d. That under the Spanish law the trial court in the criminal case has no jurisdiction over the civil action arising therefrom unless the accused is found guilty, and so a decision thereon would not be *res judicata*.

4th. That in order that a matter decided in one case be *res judicata* in another, there must be the most perfect identity between the causes of the actions and the persons of the litigants in the two cases. Inasmuch as under the Spanish law the government is the real party plaintiff in the criminal action, the injured person being a party only incidentally or conditionally upon a finding that the defendant is guilty, one of the essentials of *res judicata* in the present case, viz.—identity of persons—is lacking. This is especially so under the present practice, because according to Art. 107 of Gen'l Orders No. 58 the criminal action is completely controlled by the prosecuting attorney, the injured party being deprived even of his right of appeal under the decision in the *Kepner* case.

5th. That the defendant may have been civilly liable although guilty of no crime, according to Arts. 1093, 1902, and 1903 of the Civil Code.

6th. That Art. 795 of the New Code of Civil Procedure now in force in the Islands had the effect of completely divorcing the civil and criminal action arising out of a crime or misdemeanor, so that now they may and ought to be exercised entirely independently in all cases.

7th. That in a criminal case, the defendant must be proved guilty beyond a reasonable doubt, and in a civil case, his liability is established by a mere preponderance of evidence—that the changes in procedure established under the American regime have made this distinction of such importance that no finding of innocence in the criminal action, especially where, as in this case, it is based on want of sufficient evidence to prove the defendant's guilt beyond a reasonable doubt, should prejudice in any way the right of the injured party to recover his damages in a civil action.

8th. That upholding the defense of *res judicata* in this case would violate the 5th section of the Act of Congress of July 1st, 1902, which provides that no law shall be passed in these Islands which deprives any person of his property without due process of law, or which denies to any person the equal protection of the law, inasmuch as the effect of such a decision and of the *Kepner* case would be to deprive the persons injured by a crime of any redress in the courts.

In the brief of the appellees the following positions were taken:

1st. That the effect of the allegations of the complaint was to charge the defendant with the crime of arson.

2nd. That the innocence of the defendant as to that crime had already been established in the criminal action.

3rd. That the civil liability of the defendant for that crime is incident to and dependent upon his criminal liability and his discharge in the criminal action of necessity operated to exempt him from civil liability therefrom.

4th. That even if the right to bring a separate civil action had been reserved, it could not have been exercised unless there had been a conviction.

5th. That the only effect of the attempted reservation by the trial court in the criminal action was to give the offended party the right to bring an action for an act or omission when there was fault or negligence not punished by law.

6th. That the result of upholding the defense of *res judicata* in the case would affect all alike and so would not violate the pro ision of the Act of Congress referred to in the brief of the appellant. The justice or injustice of the situation is a matter for legislative, not judicial adjustment.

7th. That a sentence rendered in a civil action having for its basis an alleged crime would be null and void if in the criminal action the crime should not be proven or the defendant found not guilty.

8th. That the complaint in this case lacks an essential allegation, viz.—the conviction or criminal liability of the defendant.

9th. That the complaint in this case being based on Art. 1092 of the Civil Code, whereby the plaintiffs are governed by the provisions of the Penal Code, they cannot recover under Art. 1093 of the Civil Code whereby they would be governed by the provisions of the Ci il Code.

The Supreme Court of the Philippine Islands sustained the contentions of the appellee and held that the acquittal in this case necessarily implied the innocence and freedom from responsibility of the accused; that according to Art. 742 of the Law of Criminal Procedure all questions relating to civil liability are decided in the criminal action; that if the right to bring a separate civil action is reserved it can be exercised only in case the defendant is found guilty in a criminal action; and that the reservation of the right to bring a civil action in a judgment of acquittal refers to a civil action founded on causes separate and distinct from that of the offense charged.

The cause is now pending before the United States Supreme Court and it will be interesting to see what disposition is made of it there. C. A. D.