RECENT ENGLISH CASES.

Court of Queen's Bench in Ireland.

POTTS *vs.* PLUNKETT.[1]

1. A master is not liable for an injury to a servant occasioned by the breaking of a flag, where the master's knowledge of the defect in the flag was not alleged.
2. A master is not bound to warrant each servant his safety in the course of his common employment.
3. The facts must be stated out of which an alleged breach of duty arises.
4. It is not necessary that a plaintiff should negative everything which might constitute a defence, but he must affirm everything which would constitute a liability on the part of a defendant.

Demurrer.—This action was brought to recover damages for injuries alleged to have been sustained by plaintiff when in the employment of defendant. The first count of the summons and plaint stated, in substance, that the plaintiff had been employed by the defendant to execute the carpenter-work of a dwelling-house of the defendant's; that the house was erected under the immediate inspection and direction of the defendant, without the superintendence of any architect or skilled person in the erection of such buildings; that the hall-door of the said house was to be approached by a flight of stone steps, terminating at the top in a landing, which was to be covered with flags, and to form the roof of an area; that defendant had selected the flags for said landing, and employed another person to set those flags; and the flag alleged to have broken was set in its position by said person according to the directions of the defendant, and it became necessary and was his duty to take instructions from the plaintiff; and it was plaintiff's duty, and incident to his said employment as house-carpenter, to give said other person instructions as to the proper slope of said landing; and that said other person did require and request plaintiff to give him such instructions; and to enable plaintiff to give him such instructions, and for the discharge of plaintiff's duty, and of said other person's duty, it became and was proper and convenient for plaintiff and said other person to go to and stand upon said landing which had

[1] From the Irish Jurist.

been partially set; and that plaintiff and said other person, in the execution and discharge of their duty, did go and stand upon said landing; and plaintiff said that it was defendant's duty to take reasonable precaution to secure the safety of the plaintiff in the execution of said business and duty, and that it was defendant's duty to provide that the flags of said landing should be sufficiently strong to sustain plaintiff and said other person while engaged in the performance of their business and duty, and that plaintiff should not, while so engaged, suffer injury by the insecurity or want of strength of said flag; yet plaintiff said that the defendant neglected his duty, and that one of said flags was, by order of defendant, set without any under-support, and that said flag was too thin to be set with safety, and that said flag was of a bad quality; and defendant was negligent and wanting in ordinary care and skill in selecting said flag. And plaintiff said that by reason of such negligence, carelessness, and want of ordinary skill of the defendant, the said flag gave way and broke, and plaintiff fell into said area, and sustained great injury. And the plaintiff also complained that the defendant negligently and improperly placed said flag in so unsafe and insecure a manner, that while the plaintiff was standing upon said flag on his necessary and proper business, said flag broke, and plaintiff was precipitated into the area beneath, and suffered the injuries complained of in the first count. To this cause of action the defendant pleaded and demurred together by leave of the court, that the causes of action in the first and second counts of the summons and plaint were the same, and the injuries of which the plaintiff complained in both counts occurred at the same time and under the same circumstances; and defendant said that he used all proper and necessary care in and about the selecting and laying down of said flags, and was not guilty of any negligence in relation to the premises, or any of them. And for a further defence to said causes of action, defendant said that the injuries complained of occurred to plaintiff while he was acting as a servant in defendant's employment, and in course of defendant's business. And defendant averred that he provided for the safety of the plaintiff in the course of his employment, according to the best of his (defendant's) judg-

ment, information, and belief; and plaintiff had full opportunity of seeing the mode and plan adopted for the laying of said flag, and that same was set without any under-support. And defendant further averred that he did not know that any defect existed in said flag. Demurrer to the summons and plaint: points of demurrer, first, that the summons and plaint did not disclose any cause of action good in substance, because that the first count of said plaint did not show or state that defendant had any knowledge of any defect in the quality of said flag therein alleged to have broken, or that defendant knew that same was too thin to be placed as in plaint alleged, or that defendant did not select a fit and proper person to lay down said flag, or that defendant had any knowledge relative to the thinness or quality of said flag that was concealed from or unknown to plaintiff, or that plaintiff did not himself know that said flag was too thin to be placed or set in the mode in plaint complained of, or that said flag was of a bad quality, or that plaintiff had not as full an opportunity of knowing all the facts in relation to the premises as the defendant had; or that defendant was aware of any danger or risk to plaintiff by reason of said flag being too thin; or that defendant was ignorant of, and had no fair opportunity of seeing or knowing all risk or danger to which he was exposed in the course of his business. Second count; that it is not therein shown how or in what manner defendant is answerable to the plaintiff for the negligence alleged on defendant's part, and does not set forth any state of facts from which it may legally appear that defendant is liable to answer in damages for alleged negligence. Nor does it show on what duty or business plaintiff was employed, or what caused him to be on the premises at the time the accident occurred, or that plaintiff was on the premises on such business as caused a duty to devolve on defendant to provide plaintiff's safety, and to make defendant liable at law for alleged negligence in the second count stated; and same does not show any privity between plaintiff and defendant.

Murphy (with him *Sullivan*, Q. C.) for the defendant, in support of the demurrer. The plaint does not aver that the person employed to set the flag was not a skilled person; *Priestly* vs. *Fowler*, 3 M. &

W. 1. It is not sufficient in the plaint to say that the defendant neglected his duty, but the plaintiff must show the facts to the court out of which the duty arises, which is an inference of law: *Browne* vs. *Mallett*, 5 C. B. 598. No help can be had from an allegation of duty, as unless the facts which are disclosed constitute a ground of action for breach of duty against the defendant, the duty will not be implied. The facts here do not support the allegation of duty. The plaint should have shown that the defendant knew of the defect in the flag, and the danger of going upon it: *Williams* vs. *Clough*, 3 H. & N. 258. Every declaration since the case of *Priestly* vs. *Fowler*, contains an averment of the fact that the master knew of the defect in the machinery, and that he had interfered in the execution of the work, and the ignorance of the fact on the part of the servant: *Vose* vs. *L. and Y. R. Co.*, 27 L. J. 249; *Roberts* vs. *Smith*, 2 Hur. & Nor. 213; *Barton* vs. *Reid*, 4 Jur. 769. The declaration should allege what was the business of the defendant, and what brought him on the flag at the time: *Southcote* vs. *Stanley*, 25 L. J. 339. The case states, the flag was laid negligently; but does not state the business the plaintiff came on, whether there in pursuance of the business of the defendant. The declaration should state a privity between the plaintiff and the defendant in action of tort of this nature, but this does not state a single fact what was the business of the plaintiff. In *Priestly* vs. *Fowler*, the direction of the master and the charge of negligence and carelessness is stated against the master; it must have occurred under the very eye of the master, and plaintiff must have known the insecure nature of the cart. There is no averment that an unskilled person was employed, or that the plaintiff had not sufficient opportunity to see the insecure state of the flag himself.

Thompson, with him *Armstrong*, Q. C. The house was built under the inspection of the party himself, who was not a skilled person. If a master does not employ a proper person for the performance of any work, then he is liable to an action. In this case it was averred that defendant himself was the party who performed the wrongful act; if so, and he provide insufficient securities, knowing them to be so, then he is liable; it is unnecessary to aver know-

ledge; the presumption is that he ought to know: *Hutchinson* vs. *Y. N. and B. R. Company*, 19 L. J. 266, Ex.; *Steele* vs. *South East Railway Company*, 16 C. B. 550; *Tarrant* vs. *Webb*, 18 C. B. 797, 804; *Whigmore* vs. *Jay*, 5 Exch. 354; *Roberts* vs. *Smith*, 2 Hur. & Nov. 213; *Seymour* vs. *Madden*, 16 C. B. 326; *Paterson* vs. *Wallace*, 1 Qu. H. of L. C. 748; *Brydon* vs. *Stewart*, 2 Qu. H. of L. C. 30; *Randelson* vs. *Murray*, 3 Ne. & Per. 239; *Dynen* vs. *Leach*, 26 L. J. 221, Ex.; *Bush* vs. *Steinman*, 1 Bos. & Pul. 404; *Grote* vs. *Chester and H. R. Co.*, 2 Exch. 251; *Harris* vs. *Baker*, 4 M. & S. 29; Broom's Legal Maxims, 768; 81st section C. L. P. A.

R. Armstrong, Q. C., same side.—A serious question arises upon the first paragraph of the declaration, and the want of averments go to the fundamental principle that if a plaintiff make a *prima facie* case, it is not necessary that a declaration should negative every possible state of facts which might afford a defence. In this case defendant does not employ a skilful person in the execution of the work; all the averments admit that it was the duty of the plaintiff to go on the flag, and that it was necessary in the performance of his duty. The defendant did not exercise ordinary care, being deficient in skill, and personally superintended the operation of laying the flag. [LEFROY, C. J.—Does it state that it was at the instance of the mason that plaintiff went on the flag?] It avers that it was proper and convenient for him to be there; submits that cases cited on the other side are not in point, as the mischief is done in this case by the master himself, not, as in cases cited on the other side, by the acts of a fellow-servant. The matter to be established here is negligence, not rashness. There was a duty on the part of defendant to provide for the safety of the plaintiff; it was no part of the plaintiff's duty to examine the state of the flag, and the proper way to raise that question would be upon the defence. [O'BRIEN, J.—There is no averment of duty in the summons and plaint, being there in discharge of duty is quite a different case; the fact of the employment being necessary, no knowledge alleged nor liability on the part of the defendant, the *scienter* is the gist of the action.]

Sullivan, Q. C., in reply.—The plaintiff was not required by the

defendant to go on this flag at all; it was his fellow-servant who desired him so to do; there is no duty shown by the plaint to have attached to the master to provide for the safety of his servant; he could not plead a traverse. [LEFROY, C. J.—The facts which raise the duty, if pleaded, might be traversed, but not the duty.] Unless the facts stated raise the duty, it cannot be implied. The master cannot be held responsible for an injury to his servant, unless the latter was especially desired by the former to go into the dangerous position, or in the event of the master knowing of the danger, and not warning the servant of same; the *scienter* should be clearly alleged. *Priestly* vs. *Fowler*, rules this case. It should have been shown that it was necessary for the plaintiff to have gone on the flag.

LEFROY, C. J.—In this case we are of opinion that this demurrer must be allowed. It is quite true, as Mr. Sullivan has said, that there were a long string of decisions which might be considered to have decided a new principle of law in respect to the responsibility of a master for accidents happening to his servants while in his employment, distinct from the law as laid down in the case of *Priestly* vs. *Fowler*, where it was laid down that a master was not responsible for injuries resulting to those in his service from accidents occurring in the course of that employment generally. In the course of time it came to be considered whether or not that rule was to be taken without any qualification, and certain qualifications were added; viz., when the master had been the cause of the injury, by employing his servants in work, knowing that the machinery by which they carried on the work could not be safely used for that purpose, and that its use was accompanied by risk and danger. That was a very rational qualification; it included the knowledge of the master. There is also another class of cases which affix a qualification to the general rule; viz., where the cause of the injury or mischief was equally known and palpable to the person employed as to the master, the servant could not then complain of an accident, for it might be said he went into the work with his eyes open, and he could not be said to have been put to work on a matter of which he was ignorant that there was risk involved. Then arose the case in the H. of L., and if that case was to be held to decide

all which the learned judges said in the course of the case, it would appear to have overruled the principle laid down by the case of *Priestly* vs. *Fowler*, and to have established the principle that the master was bound to warrant the safety of his servant in the course of their common employment. Now, that is the very converse of the case of *Priestly* vs. *Fowler;* without, however, saying anything as to the *dicta* of the H. of L., we have the Court of Error in England saying that it was only a *dicta*; the facts of the case did not warrant, nor was it necessary to lay down in that case, any such general proposition; for, upon looking to the case, it appears that the master was apprised of the danger that all the men in the mine were subjected to from a stone which was hanging over the mouth of the pit. This was complained of by the men; but he treated such complaint with disregard and contempt, and forced them to go on with their work, with the danger hanging over their heads; and he was properly held liable for the injury which resulted in the falling of the stone, by which the death of one of his servants was caused. He was liable on the principle that he knew of the danger, but forced on the servants to do the work. That case furnishes no authority in the present instance, the *dicta* only requiring you to make out a case against the master of knowledge of the danger, and negligence on his part in not guarding, to the best of his ability, his servants therefrom, without any negligence on the part of the servants. There is no averment in this plaint that the defendant knew of any defect in the flag which broke and occasioned the accident. A plaintiff need not negative everything which may constitute a defence; but he must affirm everything which would constitute a liability on the part of the defendant. If the facts show a case in which there was rashness on the part of the plaintiff, and that there was no necessity for him to expose himself to the danger by which the accident occurred, even if there was negligence on the part of the master, he would not be liable. I am putting the case upon that extreme point, although there is no necessity for my doing so. There is no averment on the part of the plaintiff of the knowledge of the defendant, nor any positive averment of negligence or want of skill on the part of the defendant,

but only that he was negligent by reason of his neglect of duty; and no facts were stated to constitute a breach of duty on his part. The facts must be alleged out of which the duty arises; if they are not averred, they cannot be traversed, since that which is merely put forward as an inference in point of law only cannot be traversed; taking, therefore, this case upon the *dicta* of the House of Lords, or upon the principles embodied in the decided cases, we think this demurrer is well founded. We have enough upon this plaint to show that there was rashness on the part of the plaintiff. There is nothing in the case to show that it was necessary for the plaintiff and the mason both to stand upon the flag at the same time, or that they were directed to stand there by the defendant; and was there any necessity for them to stand over a pitfall of ten feet deep without examining the state of the flag? Every man has a right to exercise his own skill and judgment in examining a place about which he is going to work; and that is more reasonable than that a master should be held liable for any injury to a man who will not so exercise his skill and judgment. The plaintiff here does not aver that he was acting under the direction of the defendant, but by a round-about way he seeks to imply that the defendant did direct him; the averment amounts to this merely; that the flag was laid generally by the defendant's direction, but as to the mode or particulars of the laying he says nothing, but adds that he went upon it at the request of the other servant, and that it was proper for him so to do. If that other person was a skillful person in his business, the master is exonerated. There is no principle to be found to sustain this plaint, and it would be hard if it could be sustained when the principle involved is that an employer should warrant every servant his safety in the course of his common employment; for these reasons the demurrer must be allowed.

PERRIN, J. concurred.

O'BRIEN, J.—Concurring fully in the judgment of my Lord Chief Justice, I may add, that on looking through the plaint, I find that it is an allegation of negligence on the defendant's part on which it is sought to make him liable. What is the negligence? It is the position and mode in which the flag was set without sup-

port; and there is no allegation as to the defendant's desiring it to be laid without support; nor is there any allegation of its having been set there for the purpose of a person going upon it; and it was not necessary for the plaintiff to go on it. The fact of the defendant's knowledge of the defects should have been averred. I have been unable to discover a case where there was not an allegation of knowledge on the part of the defendant, except where the cause of the injury was personally brought home to him.

Demurrer allowed.

Sullivan, attorney for plaintiff.

Littledale, attorney for defendant.

In the Exchequer Chamber, December, 1858.

HOLMES *vs.* KIDD AND ANOTHER.

An agreement was made between the drawer and acceptor of a bill of exchange, at the time it was given, that the acceptor should deposit with the drawer some canvas as a collateral security for the payment of the bill, with power to the drawer to sell the canvas and apply the money arising therefrom towards the discharge of the amount of the bill, should it not be paid at the proper time. The drawer endorsed the bill after it was overdue, and on nonpayment of the bill when due, sold the canvas, and realized part of the amount of the bill:

Held, (affirming the judgment of the Court of Exchequer,) that the agreement between the drawer and acceptor, as to the canvas, created an equity which attached to the bill in the hands of the endorsee, who received it after it was overdue; and, as the drawer, after the endorsement, had sold the canvas, and retained the proceeds, the endorsee was prevented from recovering on the bill for so much as the canvas realized on its sale.

This was an appeal from the judgment of the Court of Exchequer given in favor of the defendants upon demurrer. The declaration was upon a bill of exchange for £310, drawn by one Watson upon and accepted by the defendants, and endorsed by Watson to the plaintiff.

Plea, (there were others),—As to 272*l.* 2*s.* 6*d.*, part of the amount of the bill, that before the endorsement or acceptance of the said bill, the defendants applied to Watson (the drawer) to

advance them the sum of 300*l.*, which he agreed to do upon the terms of defendants, accepting the bill in question, and depositing with him, among other things, certain canvas of defendants, as a security for the due payment by defendants of the said bill, Watson to have power of selling the said canvas, and applying the proceeds of such sale in payment of the amount due on the said bill, if the same should not be paid by defendants, and that the bill was accepted and the canvas deposited, on the terms as aforesaid; that after the bill became due Watson sold the canvas, and realized by such sale 272*l.* 2*s.* 6*d.*, and still retained and held the said sum; and further, that the bill was endorsed to the plaintiff after it was overdue, and subject to the proceeds of the equity of the sale of the canvas being applied to the payment and satisfaction of the bill, and without any value or consideration being given by the plaintiff for the said endorsement.

Demurrer to the plea.

The court below held the plea good, and gave judgment for the defendants.

Atherton, Q. C., for the appellant, (the plaintiff below.)—This is the case of an innocent endorsee for value. The drawer had the option, after the arrangement between him and the acceptor, of selling the canvas and paying himself the amount of the bill; or he had the right of endorsing the bill to another. Directly the drawer endorsed the bill he conferred on the endorsee a perfect title to it. He committed a breach of contract by selling the canvas afterwards, for which the acceptor might have his remedy by action, but that does not affect the plaintiff's title to the bill, though taken overdue, for this contract is not an equity directly affecting it; the plaintiff had a good title at the time of the endorsement, and there was consideration between the drawer and acceptor. It might be assumed that the plaintiff knew nothing of the agreement in question. Should this plea be held good, an innocent endorsee who had a good title to the bill at the time of its endorsement to him will, for the first time, have that title defeated.

Brett, contra, was not called upon.

ERLE, J.—I think this is a good plea, and that the judgment of the court below should be affirmed. An agreement seems to have been made between the drawer and acceptor of this bill, that the canvas should be sold by the drawer in the event of the bill being unpaid at maturity; and the drawer held the bill subject to these conditions. On the bill not being paid at maturity, he sells the canvas. It has been asked, is such a sale good, as against the holder of the bill, and are the proceeds received after it was overdue, obtained by such sale, a bar to an action on the bill *pro tanto?* I think they are. The plaintiff took the bill subject to the rights of the acceptor as against the drawer from whom he had it. As soon as the drawer sells the canvas, his rights are defeated *pro tanto*, and the same with the holder who took it from him after it was overdue.

WILLIAMS, J.—I am of the same opinion. The plaintiff took the bill qualified by the equities with which it was subject when he received it; and the plaintiff received this bill incumbered with the equity arising out of the arrangement relating to the canvas.

CROMPTON, J.—The consideration for the acceptance of the bill in this case, was the agreement that if the canvas was sold on the bill becoming due and unpaid, the proceeds should be applied towards its payment. This case is not at all like those of set-off, such as *Burrough* vs. *Moss*, 10 B. & C., 558, where the set-off arises out of collateral matter. Here the equities attach directly to the bill, and what the holder takes from the drawer is in this case a defeasible title only to the bill in question.

CROWDER, J.—I think the plea is an answer to the declaration. The action is within the ordinary rule of a person taking a bill overdue; that it is subject to all the equities attaching to the bill in the hands of the endorser. This is a bill subject to an incumbrance, for the canvas when sold was to be taken as payment. The plaintiff took it incumbered with this equity.

WILLES, J., concurred.

Judgment affirmed.