delay and the kind and amount of compensation it tenders, make it of little use.

If the railroad problem is in a transition state, the fact has an important bearing upon a question much agitated, and to which some paragraphs of the last presidential message are devoted—the question of a national control of inter-state traffic. Apparently, the point has not yet been reached where a satisfactory measure of the kind can be adopted. The utmost it would seem, which can safely be done, is the appointment of a carefully-selected commission, with powers quite limited save in the direction of investigation and report.

CHARLES CHAUNCEY SAVAGE.

RECENT ENGLISH DECISIONS.

House of Lords.

HUGHES v. PERCIVAL.

In the alteration or rebuilding of a house, involving the use of a party-wall, the law casts upon the owner the duty of seeing that reasonable care and skill is exercised to prevent injury to the adjoining property, and he cannot avoid responsibility by delegating the work to a third person.

A. employed a builder to tear down and rebuild his house. This involved the use of a party-wall between the properties of A. and B. and the rebuilding of a party-wall between the properties of A. and C. After the latter wall had been rebuilt, and the house nearly finished, the workmen of the builder, in fixing a staircase, without A.'s knowledge cut into the party-wall adjoining C.'s property, and so weakened it that A.'s house fell, dragging over the other party-wall and injuring B.'s property. This cutting was not authorized by the contract with the builder.

Held, that A. was liable to B. for the damage to the latter's house.

THIS was an action for negligence in taking down two houses standing on the defendant's land and erecting a new house, whereby the adjoining house of the plaintiff was injured.

The cause came on for trial at Westminster on the 3d and 4th of December 1880, before MANISTY, J., and a special jury, when the following facts were in substance detailed by the plaintiff's counsel in his opening address.

The defendant was the owner of a piece of land at the corner of Panton street and the Haymarket, upon which stood two old houses, Nos. 1 and 2 Panton street. The plaintiff was the owner

of No. 3 Panton street, which immediately adjoined the defendant's houses on the east side thereof. Between the defendant's houses and the plaintiff's house was a party-wall. On the south side of the defendant's house and immediately adjoining it there stood in the Haymarket a house occupied by one Baron. Between the defendant's houses and Baron's house also was a party-wall, which was stated to be rotten. The defendant being desirous of pulling down his two old houses and rebuilding a new house in their stead, employed a competent architect to prepare plans and to superintend the operations, and employed Newman & Mann as builders to execute the work. The old houses were pulled down, and the new house was built upon the defendant's land and nearly finished without injury to the adjoining houses. The party-wall between the defendant's and Baron's houses was taken down as far as the first floor, but it was left standing to the depth of twenty-two feet, and then twenty-five feet of new work was built on top of what remained of it. The wall was underpinned to a considerable extent. From the old part of the wall an iron girder was placed to support the first floor of the defendant's new house. Some of the girders of the defendant's new house were fixed against the party-wall next the plaintiff's house. When the defendant's house had been nearly finished, it became necessary to fix a staircase, and in order to fix it the workmen of the builders cut into the party-wall between the defendant's house and Baron's house to the depth of a few inches and to the height of about twenty feet, and to the width of about seven feet. The defendant's architect raised some objections to the proceedings of the builder's workmen in cutting away the wall. Very soon afterwards the defendant's house fell; by the fall the party-wall between the plaintiff's house and the defendant's house was dragged over, and the walls of the plaintiff's house were cracked and the house itself damaged.

This statement of facts not being disputed by the defendant's counsel, without any witnesses having been examined, the learned judge stated that there was a *prima facie* case of liability against the defendant which required an answer.

The defendant's counsel then proceeded to address the jury. He admitted that the new house of the defendant was to be a story higher than the old house; but he stated that the defendant employed Mr. Wimple, the architect, to prepare plans which were accepted by him; that he entered into a contract with Newman

& Mann, the builders, for the execution of those plans; that by the terms of that contract, except to comply with the provisions of some statute, no deviation from those plans was to be committed without the authority of the defendant. The plans showed that the party-wall between the defendant's two houses and Baron's house was to be rebuilt. The defendant himself did not personally interfere with the work during its progress, and never authorized any deviation from the plans. But in the course of the work it was agreed between Mr. Wimple and Mr. Wimperis, an architect acting for the owner of Baron's house, that the party-wall between the defendant's old houses and Baron's house should be taken down only as far as the first floor, and that the wall should be under-pinned in order to strengthen it, the basement or cellar of the defendant's new house being excavated to a greater depth than the basement of the defendant's old houses. The party-wall was accordingly taken down *only* as far as the first floor, instead of being wholly removed as provided for in the plans, and it was under-pinned in order to give it additional strength. This was done without any signs of weakness, fracture or settlement appearing in the party-wall. From the first floor the party-wall was newly erected. The work proceeded, girders were placed in the ordinary manner, and the house was roofed in. It became necessary to fix a wooden staircase from the basement, which was not in itself a hazardous operation; but the workmen of the builders, without any knowledge of the foreman of the works or of the defendant's architect, cut into the old part of the party-wall next Baron's house; this act was not permitted by the plans or specification, and was wholly unauthorized. Mr. Wimple, the defendant's architect, visited the works, and seeing the mischief which had been done, ordered it to be made good. Signs of weakness began to appear, and upon the very same night the defendant's house fell, injuring thereby the plaintiff's house in the manner above described.

At the close of the opening address of the defendant's counsel, the learned judge intimated that even if the defendant proved by evidence all that had been alleged upon his behalf, he would have no defence to the action, and he directed the jury to find for the plaintiff, the damages to be agreed upon between the parties, or to be ascertained by an arbitrator.

The court afterwards discharged a rule taken by defendant to enter judgment in his favor, and the Court of Appeal dismissed an

appeal taken from this order. Defendant then appealed to the House of Lords.

Philbrick, Q. C., and *Douglass Kingsford*, for appellant.

Webster, Q. C., and *McCall*, for respondent.

LORD BLACKBURN.—My lords, this is an appeal against an order of the Court of Appeal, dismissing an appeal from an order of the Queen's Bench Division, discharging a rule obtained by the defendant to enter judgment on the ground that the judge ought to have directed a verdict for the defendant, or that there should be a new trial.

The first point to be considered is, what was the relation in which the defendant stood to the plaintiff. It was admitted that they were owners of adjoining houses, between which was a party-wall the property of both. The defendant pulled down his house and had it rebuilt on a plan which involved in it the tying together of the new building and the party-wall which was between the plaintiff's house and the defendant's, so that if one fell the other would be damaged. The defendant had a right so to utilize the party-wall, for it was his property as well as the plaintiff's; a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that the duty went as far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party-wall, exposing it to this risk. If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.

This is the law I think clearly laid down in *Pickard* v. *Smith*, 10 C. B. (N. S.) 470, and finally in *Dalton* v. *Angus*, 6 App. Cas. 740. But in all the cases on the subject there was a duty

cast by law on the party who was held liable. In *Dalton* v. *Angus*, *supra*, and in *Bower* v. *Peate*, 1 Q. B. D. 321, the defendants had caused an interference with the plaintiff's right of support. Chief Justice COCKBURN, it is true, in *Bower* v. *Peate*, 1 Q. B. D. 321, 326, after showing this says: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed from which in the natural course of things injurious consequences to his neighbor must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

I doubt whether this is not too broadly stated. If taken in the full sense of the words it would seem to render a person who orders post-horses and a coachman from an inn, bound to see that the coachman, though not his servant but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention, and indeed not being a court of error had no power to alter the law laid down in *Quarman* v. *Burnett*, 6 M. & W. 499.

But if I am right in thinking that the defendant, in consequence of his using the party-wall of which the plaintiff was part owner, had a duty cast upon him by law, similar to that which, in *Dalton* v. *Angus*, 6 App. Cas. 740, it was held was cast upon the defendant in that case, in consequence of his using the foundations on which the plaintiff had a right of support, it is not necessary now to inquire how far this general language should be qualified.

I do not think the case of *Butler* v. *Hunter*, 7 H. & N. 826, is consistent with my view of the law. I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer I am obliged to differ from them.

If this be so the question is, I think, narrowed to this: Was the operation, during which the defendant's duty required him to see

that reasonable care and skill should be used, over at the time when those engaged in the work cut into the party-wall between the defendant's house and Baron's? for it is not disputed that there was a want of skill in doing this, and that it caused the damage; and it is not disputed that the men who did it were intending to carry out the work on which they were employed.

The defence opened at the trial, I think, was directed to this, that the contractor was bound not to do anything without written authority, and that there was no authority at all to cut into the party-wall. I do not think that could prevent the act which was done from being in breach of the defendant's duty.

The late Lord Justice HOLKER, however, thought, as I understand him, that the whole of the operation connected with the use of the plaintiff's party-wall was over, and that the contractor's men were engaged in a subsequent independent job, and that the defendant was under no further duty then than he would have been if, after the house was finished, he had brought in carpenters to repair a wooden staircase. I cannot, however, take this view of the counsel's opening. I regret that the case was stopped on the counsel's opening, for I feel convinced that if the evidence had been gone into this view of the fact could not have been taken. As it is, I do not think it necessary to say more of the view of the law taken by the late Lord Justice than that I think it well worthy of consideration in any case where the facts are as he seems to suppose.

I think that the order appealed against should be affirmed, and the appeal dismissed with costs.

Concurring opinions were delivered by Lords WATSON and FITZGERALD.

Appeal dismissed with costs.

The principal case is the most recent utterance of the House of Lords upon the exceedingly important subject of a person's liability for injuries resulting from work done for his benefit, though not by his servant. The case seems to have been most carefully considered, and Lords BLACKBURN, WATSON and FITZGERALD, while concurring in the judgment rendered, arrive at their conclusion by slightly different reasoning. Lord BLACKBURN'S argument seems to be, where an exercise of a right involves danger to the property of a neighbor, the party exercising such right is bound to provide against the danger by all reasonable prudence and care, and cannot rid himself of the responsibility by the employment of a third person. In this view Lord FITZGERALD substantially agrees, but goes a little further, and would seem to say that an employer would not be permitted to show that the work which

finally caused the catastrophe could not reasonably have been presumed hazardous, without showing in addition that it was an independent job which he did not authorize. Lord WATSON, on the contrary, expressed himself inclined to agree with Lord Justice HOLKER, who, in the court below, had held that if the work was not hazardous in the eyes of reasonable men, and, while in the same general undertaking, was not the original job, the hazardous part of which had been completed, there was no liability on the part of the employer for the negligence of the contractor's servants. It will be at once remarked, as, indeed, Lord FITZGERALD concedes, that the doctrine of the principal case comes very near making employers in such cases insurers of the safety of their neighbor's property. His lordship says: "The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendants as insurers of their neighbors, or warranting them against injury. It has not, however, quite reached that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his work, so as to protect his neighbor from injury, and that he cannot get rid of the responsibility thus cast upon him by transferring that duty to another. He is not in the actual position of being responsible for injuries no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbor caused by any want of prudence or precaution even though it may be *culpa levissima*."

The English cases are inharmonious. The earliest decision of note was that in *Bush* v. *Steinman*, 1 Bos. & Pul. 404. In the process of construction of a house by contract, the servant of a subcontractor left some lime in the road in front of the premises, whereby plaintiff's carriage was overturned. The owner of the house was held liable. Chief Justice EYRE, in delivering his opinion, expresses himself as in great doubt as to the satisfactoriness of the principle of the decision. He seems to prefer to rest the judgment upon the ground that the lime was a nuisance which no man has a right to allow to be maintained for his benefit. HEATH, J., bases his opinion squarely upon the ground that the work was being performed for the defendant's benefit, and that he must bear all loss occasioned during its progress. In *Laugher* v. *Pointer*, 5 B. & C. 547, A. had hired a driver and horses from a livery-stable, and by the negligent driving of his carriage plaintiff was injured. It was admitted that the relation of master and servant did not exist between A. and the driver, but on the authority of *Bush* v. *Steinman*, *supra*, it was sought to hold him liable. The court divided equally upon the point, Justice LITTLEDALE distinguishing *Bush* v. *Steanman*, *supra*, on the ground that a different rule applied to cases where a man had work done on his premises from which injury resulted, from that which should govern a case like the one before him. A precisely similar case was *Quarman* v. *Burnett*, 6 M. & W. 499, in which Justice LITTLEDALE'S view in *Laugher* v. *Pointer*, *supra*, is adopted by Baron PARKE. This case is considered by Lord BLACKBURN in the principal case, as settling the law, that in cases where there is nothing hazardous in the nature of work the contractor only is liable for negligent acts of his servants.

The cases gradually departed from the rule of *Bush* v. *Steinman*, 1 Bos. & Pul. 404, and the distinction between acts done with real and those with personal property, has been both in England and in this country pronounced untenable. The cases on the subject in the Exchequer have all held a less severe

doctrine of liability on the part of the employer; and proceed upon the principle that unless the acts contracted to be done are themselves unlawful, either as creating a nuisance, or as of themselves producing injury, there is no such liability: *Butler* v. *Hunter*, 7 H. & N. 826; *Reedie* v. *Railway*, 4 Exch. 244. To the same effect is *Ellis* v. *Sheffield Gas Co.*, 2 Ellis & Black. 767, a case in which Lord CAMPBELL delivered the opinion. *Bush* v. *Steinman* has been considered overruled by these cases. But the reasoning of the Exchequer has not been satisfactory to the House of Lords, or to the King's Bench, and the later cases, as was observed by Lord FITZGERALD, have tended toward a more stringent rule. *Pickard* v. *Smith*, 10 C. B. (N. S.) 470, was a case where the injury resulted from the negligence of a coal-dealer's servant in leaving unguarded an opening through which he was shooting coals into defendant's cellar. The defendant was held liable, WILLIAMS, J., saying: "If a contractor is employed to do a lawful act, and in the course of his work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. * * * That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor by parity of reasoning to cases in which the contractor is intrusted with performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." This last doctrine was alluded to in a much later case, *Bower* v. *Peate*, 1 Q. B. Div. 321, in the course of argument, by FIELD, J. But *Herschell*, Q. C., replied, that the remarks on that point by Justice WILLIAMS, besides being dicta, were only applicable to the maintenance of nuisances. The doctrine is well illustrated by *Tarry* v. *Ashton*, 1 Q. B. Div. 314, where a lamp in front of the defendant's house was in a dilapidated condition, and he employed a contractor to repair it and others, and through his negligence in not doing so it fell, injuring the plaintiff. The defendant was held liable. *Bower* v. *Peate*, *supra*, was for injuries caused by the negligent removal of lateral support. The defendants were held liable, Lord COCKBURN saying: "There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injury can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are taken." This case, and *Dalton* v. *Angus*, 6 App. Cas. 740, which followed it, are approved in the principal case. It will thus be seen that English law has almost returned to *Bush* v. *Steinman*.

The great preponderance of authority in America is in accord with the view taken by the Court of Exchequer. The subject has received a great deal of attention, and the cases are interesting and instructive. *Bush* v. *Steinman* is almost universally disapproved, and the distinction between real and personal property is rejected as unfounded. The leading cases are: *Blake* v. *Ferris*, 1 Seld. 48; *Carter* v. *Berlin Mills Co.*, 58 N. H. 52; *Pawlet* v. *Railroad*, 28 Vt. 298; *Hilliard* v. *Richardson*, 3 Gray 349; *Boswell* v. *Laird*, 8 Cal. 469; *De Forrest* v. *Wright*, 2 Mich. 371; *Clark* v. *Fry*, 8 Ohio St. 358; *Horner* v. *Nicholson*, 56 Mo. 220; *Robinson* v. *Webb*, 11 Bush 464; *Scammon* v. *City of Chicago*, 25 Ill. 424. The law is well stated in *Clark* v. *Fry*, *supra*.

1. The rule of respondeat superior, as its name imports, only arises out of the relation of superior and subordinate. The reason of it is to be traced to the power of control and direction which the superior has the right to exercise,

and which, for the safety of others, he is bound to exercise.

2. This rule does not apply to a case of injury sustained by reason of negligence in the manner of conducting the execution of a job of work in building a house, where the house builder, by a contract with the owner of a lot, has taken upon himself the responsibility of the employment of his own hands and the control and direction of the work in conformity with the terms of the contract.

3. Where anything to be done under the contract is itself unlawful, or necessarily injurious to a third person, the employer as well as the employee would be liable for any injury resulting therefrom; but where this is not the case, and the employer has not the control or direction in the execution of the work, he is not responsible for any negligence or other wrongful act committed in the performance of it.

4. Where, however, the owner of real estate wilfully suffers a nuisance to be created or continued on his premises by another in the prosecution of a business for his benefit, when he has the power to prevent or abate the nuisance, he will be liable for an injury resulting therefrom. See, in addition to cases already cited, *Conners* v. *Hennessey*, 112 Mass. 96; *King* v. *Livermore*, 9 Hun 298 (aff. 71 N. Y. 605); *Earl* v. *Beadleston*, 10 J. & Sp. 294; *King* v. *Railroad*, 66 N. Y. 181; *Kellogg* v. *Payne*, 21 Iowa 577; *Cunningham* v. *Railroad*, 51 Texas 503; *Ryan* v. *Curran*, 64 Ind. 345; *Pfau* v. *Williamson*, 63 Ill. 16; *Smith* v. *Simmons*, 13 W., N. C. (Pa.) 243; *City of Erie* v. *Caulkins*, 85 Pa. St. 247; *Allen* v. *Willard*, 57 Id. 374.

Two or three earlier cases in Illinois and Massachusetts, supported by dicta in later cases, hold a corporation liable for negligence of contractors to whom it has intrusted the exercise of its rights on the lands of others granted by the legislature: *Hinde* v. *Wabash Co.*, 15 Ill. 72; *Lesher* v. *Wabash Co.*, 14 Id. 85, approved in *Railroad* v. *Woosley*, 85 Id. 370; *Lowell* v. *Railroad Co.*, 23 Pick. 24; dicta in *Hilliard* v. *Richardson*, 3 Gray 349; *Cunningham* v. *Railroad*, 51 Texas 503. The rule is said to be founded on public policy. The law is otherwise in Maine: *Eaton* v. *Railroad*, 59 Me. 520; *Tibbetts* v. *Railroad*, 62 Id. 437.

Where an undertaking has been completed and accepted, although the negligence of the contractor in the execution of it may cause the injury, the employer is liable: *Robbins* v. *Chicago*, 4 Wall. 657; *Railroad Co.* v. *Steamboat Co.*, 23 How. 209; *Gorham* v. *Gross*, 125 Mass. 232; *Mulchey* v. *Society*, 125 Id. 487. A misapprehension of *Robbins* v. *Chicago*, *supra*, led the court astray in *Palmer* v. *City of Lincoln*, 5 Neb. 136.

The most recent decisions in England and America, are, it will be seen, different in tendency. In England there has been a reaction in favor of the earlier decisions—in America there has been no such reaction. But if it be conceded that the relation of contractor and contractee is not that of superior and subordinate, it is conceived that it admits of but one logical answer, namely, that where it is shown (as the cases properly require) that the employer had reason to believe the contractor competent, his liability for injuries caused by the execution of a *lawful work* in a negligent or unskilful manner, whether such negligence take the form of acts or omissions, is done away with. The distinctions between real and personal property, or as just mentioned, between *acts* and *omissions*, will be seen to be untenable when it is borne in mind that the employer has absolutely nothing, actually or constructively, to do with the acts of people engaged in a separate employment, who are not his subordinates. Whether the