cases, and *Rylands* v. *Fletcher* has been cited with approbation. Thus it was held in *Shipley* v. *The Fifty Associates*, 106 Mass. 198, that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of such escape."

And this language was quoted and approved in *Gorham* v. *Gross*, 125 Mass. 238, where GRAY, C. J., says: "The only exceptions to the liability which have been judicially recognised are in case of the plaintiff's own fault, or of *vis major*, the act of God, or the acts of third persons, which the owner had no reason to anticipate." That was a case where a party-wall built by the defendant fell and crushed the building of the plaintiff upon the adjoining lot. The jury found as a fact that either the defendants or the masons employed by them were guilty of negligence, and the main question involved was whether the defendants were responsible for the masons' negligence; but Judge GRAY, apparently having in mind the seemingly different views which have prevailed in regard to *Rylands* v. *Fletcher*, says: "The present case does not require us to decide whether it is more accurate to say that it is not a question of negligence, and that the defendant is liable even in case of latent defect, or to say that the fall of the wall, in the absence of proof of inevitable accident or of the wrongful act of third persons, is sufficient evidence of negligence."

Rylands v. *Fletcher* was followed in *Cahill* v. *Eastman*, 18 Minn. 324, and apparently the defendants were held liable without proof of negligence. The cases were here very elaborately examined by RIPLEY, C. J. See, also, *Knapheide* v. *Eastman*, 20 Minn. 479, and many other cases.

It should be remembered, however, that even in *Rylands* v. *Fletcher*, it was found as a fact that although there was no personal negligence or default on the part of the defendants themselves, "reasonable and proper care were not exercised by the persons they employed to provide for the sufficiency of the reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear;" and the real point involved was whether the defendants were liable for the negligence of the contractors employed by them. See L. R., 1 Ex. 268, 269, 276. The actual *decision*, therefore, in *Rylands* v. *Fletcher*, may be sound, even if the *dicta* are disapproved.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

PIOLLET ET AL. *v.* SIMMERS.

An owner of land through whose property a public highway runs, has an absolute right to use a portion of such highway for certain purposes, for a temporary period and in a reasonable manner, and this right may be exercised in derogation of the travelling public.

The mere exercise of this right of obstruction for a lawful purpose imposes no liability to pay for damages resulting therefrom. It must be an unreasonable or negligent exercise of the right to impose liability.

The owner of land along a highway, who places an object near such highway, on

his land, is not liable if it scares a horse driven along the highway, unless such object is calculated to frighten horses of ordinary gentleness, well broken for travelling upon public highways.

In an action for injuries alleged to have been caused by the fall and death of a horse, occasioned by his taking fright at an object on the highway, witnesses familiar with horses may be asked their opinion as to whether the object was calculated to frighten the horse, and whether the mere fall or the fright could have killed him.

The owners of property through which a highway ran were engaged in whitewashing their fence. In order to do this they used a small barrel mounted on wheels, which was full of whitewash, and which was moved along from time to time as the work progressed. This barrel was left standing, covered over with a cloth, and having a shovel projecting a short distance above its top all day Sunday on one side of the beaten track. In an action against such property owners for an injury alleged to have been occasioned by a horse taking fright at this object: *Held*, that the jury should have been instructed that unless there was something of an unusual and extraordinary character in the structure and appearance of this apparatus which would naturally tend to frighten horses of ordinary gentleness and training, it was not negligence to use it, and that its reasonable use for no longer a time than was fairly required along the highway in whitewashing the defendants' fences would not subject defendants to liability even though some horses might or did take fright at seeing it.

Travelling on Sunday, in such a case, is not a defence which can be set up by a private citizen against a possible liability, if established by the other facts of the case.

In the above case plaintiff having proved that other horses had been frightened by the same object, evidence was held admissible on behalf of defendants to show that those horses were skittish horses.

ERROR to the Common Pleas of Bradford county.

Case, by Alice Simmers against Victor E. Piollet and Joseph E. Piollet to recover damages for injuries alleged to have been caused by the negligence of the defendants.

On the trial, before MORROW, P. J., the following facts appeared: The defendants are the owners of a large tract of real estate situated in Wysox, Bradford county, Pa. There are several roads running through their lands along which they had constructed post and board fences, which for over twenty years they had been accustomed to whitewash. In the spring of 1881 they had erected a new fence along one of these roads, on both sides of which they owned the land, and in the months of June and July of that year were engaged in whitewashing the same. The whitewash, a preparation of lime and salt mixed in boiling water, was prepared in a heater in the hog-pen of the defendants, a distance from the nearest point of the fence to be whitewashed of one hundred and thirty rods. To get the whitewash to the fence for use a keg or barrel, two feet three inches high and fifteen inches in diameter was placed

upon a small four-wheeled wagon, the wheels of which were twelve inches and fourteen inches in diameter. The length of the wagon was three feet, and breadth two and a half feet. In the keg was a shovel, the handle extending above the keg a distance differently stated by the witnesses from a few inches to two or three feet. The outside of the keg was streaked with lime, and it was covered with a piece of canvas or dark carpet. The wagon, thus rigged, was taken to the hog-pen, the keg filled with the prepared whitewash and then drawn to the place of use, and placed by the side of the fence in the road convenient of access, and as the work progressed was drawn along the fence.

On the afternoon of Saturday, July 9th 1881, this barrel or keg had been filled and taken to a point in this fence two hundred and seventy-five rods from the hog-pen where the whitewash was prepared. At the close of the day it was still half full, and as the workman intended to resume work on Monday morning, he covered up the keg, and left it standing in the road. At this place the road is forty-five and seven-tenths feet wide. On the side next the fence being whitewashed there is a footpath from four to five feet wide, elevated above the road a foot or more. Next is a ditch about four feet wide and from four to five inches below the travelled track.

The surface of the road is composed of small gravel; there are no banks or dangerous places on this road at this point, or above or below it. The truck and keg were placed in the ditch.

On Sunday, July 10th, Henry Waters and the plaintiff left Towanda at four P. M. for a pleasure drive. After driving about fourteen miles they came, about eight P. M., to the point in the road above described, where, the plaintiff alleges, the horse, becoming frightened at the defendants' truck and lime keg, became unmanageable, reared up, plunged sideways and a little ahead, fell down and died instantly. The wagon was overturned and the plaintiff thrown under it, with its weight resting upon her, thereby causing the injuries for which this action was brought.

The plaintiff offered to prove by several witnesses that the obstacle above described tended to frighten horses. Objected to by the defendant because the question did not embrace the words "ordinarily well-broken and road-worthy horses." Objection overruled; exception taken. (First and third assignments of error.)

The plaintiff offered to prove other cases in which horses had

been frightened at the same object in the same position. Objected to by the defendants; objection overruled. (Second assignment of error.)

The defendants called J. G. Dougherty as a witness, who testified that he had had experience with horses for over twenty years; had owned quite a number, owned five at the time he was examined; had seen this horse shortly before his death the same afternoon, and had observed and described his condition, and had seen him immediately after his death. Defendants then asked him: "In your opinion, of what did that horse die?" Objected to by the plaintiff; objection sustained; exceptions. (Fourth assignment of error.)

Defendants then asked the witness the following question: "In your opinion, was that tub calculated, placed upon the road as it was, to frighten an ordinarily well-broken road-worthy horse, or an ordinarily quiet and well-broken horse?" Objected to by plaintiff because it is not sufficient that the obstacle might not have frightened an ordinarily well-broken horse, but that the plaintiff has the right to the highway in such a condition that even skittish animals may be employed without risk. Objection sustained. Exception. (Fifth and sixth assignments of error.)

Robert Ferguson, another witness for the defendants, testified that he had been a blacksmith for over fifty years, had "always handled horses more or less since he was big enough," and had seen horses frightened in various ways. He also testified that he had seen horses fall and thrown to the ground frequently. Defendants then proposed to ask witness the question whether the fall of this horse on its side straight out at full length could have killed it upon this piece of ground. Objected to by plaintiff as incompetent. Objection sustained. Exception. (Seventh assignment of error.)

Defendants then asked the same witness this question: "State to us your opinion whether a horse could be frightened to death at this object that was in the road." Objected to by plaintiff. Objection sustained. Exception. (Eighth assignment of error.)

The defendants also offered rebutting testimony to the effect that the horses that had been frightened by this obstacle were skittish horses. Objected to by the plaintiff. Objection sustained. Exception. (Ninth assignment of error.)

The court charged generally that the public had the right to the

entire width of the highway, and to the use of it; and that if the jury believed that this whitewash-barrel in this small cart or wagon was an object likely to frighten horses and render public travel unsafe, it was negligence on the part of the defendants to leave it in the highway, and they were liable for any injury resulting from such negligence. (Tenth to twenty-first assignments of errors, both inclusive.)

The defendants also requested the court to charge that if the horse behind which the plaintiff was riding at the time of receiving the alleged injury was *skittish*, and in the habit of shying at objects in the highway, and was not quiet and well broken, then the plaintiff cannot recover. Answer. "Refused. But if the horse was skittish, the plaintiff must exercise ordinary care under the circumstances. If he did not exercise such care, then the want of it so as to amount to contributory negligence is matter of defence, and is upon the defence to show it." (Twenty-second assignment of error.)

That the plaintiff cannot recover, because she was unlawfully on the public road on Sunday. Refused. (Twenty-third assignment of error.)

Verdict for the plaintiff for $1868, and judgment thereon. Defendant took this writ of error.

W. T. Davies and *Williams* (*Angle* and *Ellsbree & Son*, with them), for the plaintiffs in error.

Rodney A. Mercur and *John F. Sanderson* (*Edward Overton, Jr.*, with them), for defendant in error.

The opinion of the court was delivered by

GREEN, J.—The injury for which the present action was brought was occasioned in a peculiar and unusual manner. The plaintiff and another were riding in a carriage along a public road, in the open country, at about eight o'clock in the evening of a day in the month of July, when suddenly the horse drawing the carriage reared, plunged a few steps forward, fell to the ground on the side of the road and instantly died. In falling he upset the carriage, which fell upon the plaintiff and caused the injuries for which the suit is brought. The falling and death of the horse caused the overthrow of the carriage; but what was it that caused the falling and death of the horse? This is perhaps the true

problem of the controversy, but the cause does not seem to have been tried with much reference to its solution. There was an object standing by the side of the road, and quite near to the beaten track, at the place where the horse fell, and it seems to have been assumed that the horse took fright at the sight of this object, and this caused him to rear and fall and die. But this is an unsatisfactory theory. We do not know whether horses ever die from mere fright. No evidence on the subject was received. Some testimony was offered by the defendants to the effect that the horse could not have died of fright, and that his death was due to some other cause; but it was rejected by the learned court below, and that rejection constitutes the substance of several assignments of error. No post-mortem examination of the horse was made, and the cause of justice was thus deprived of what might have proved to be a most important aid in the determination of the catastrophe. No experts in farriery were examined. No veterinary or other medical authorities were invoked, and the case is really barren of testimony from which a satisfactory theory of the animal's death may be derived. It is notorious that horses, like human beings, die suddenly, and of similar diseases. Indeed, one of the medical witnesses testified to that effect in this case. If there were facts which indicated that this horse died from some sudden attack of disease, or opinions of intelligent witnesses to that effect, based upon facts observed by themselves, we think they should have been received in evidence. We think that both the witnesses, Dougherty and Ferguson, gave evidence which sufficiently qualified them to answer the questions proposed to them, but which were rejected. Dougherty had had much experience with horses for twenty years, had owned quite a number, owned five at the time he was examined; he had seen this horse shortly before his death, the same afternoon, and had observed and described his condition; saw him immediately after his death; saw the object which was supposed to have frightened the horse, and testified as to whether it was calculated to frighten horses. In view of all this we think the questions proposed to be put to him should have been allowed, the first one for the reasons above indicated, and the second for the reason here after stated. Ferguson was a blacksmith, had shod horses of many different kinds for over fifty years; had always handled horses "since he was big enough;" had seen horses frightened frequently; it was offered to prove by him that he had seen horses fall, and

thrown to the ground many times, and then to inquire whether the mere fall of this horse could have killed him, having reference to the ground where he fell, the witness having seen it. We think he was sufficiently qualified to answer this question, and his opinion should have been received, and also on the subject whether a horse could have been frightened to death by the object at which this horse was supposed to have taken fright. Had the horse run away, and in that manner upset the carriage, there would have been more force in the objections to this testimony. But such was not the fact. He died instantly, and the cause which produced his death probably occasioned his fall, and it was his fall that upset the carriage. Now, the actual physical fact or condition which produced his death cannot be known; and the *moral* condition, so to speak, is a mere matter of theory which requires illustration by the opinions of persons having experience in such matters. For these reasons we sustain the fourth, seventh and eighth assignments of error.

Another question arose on the trial which is presented in several assignments. It relates to the character and qualities of the horse against whose fright precautions are required. It was contended by the defendant that the animal should be an ordinarily quiet and well-broken horse. This was denied by the plaintiff, who contended that an object should be such as would not frighten any kind of horses, whether quiet and well-broken, or skittish and shy. The court adopted the latter view, and refused to allow the defendants to inquire whether the object in this case was calculated to frighten an ordinarily quiet and well-broken horse, or an ordinarily well-broken and road-worthy horse. The same idea was embodied in the answers to points, and in the general charge, where the thought was expressed in the more comprehensive form that if the object was calculated to frighten horses, without any qualification as to their disposition, it would be negligence to expose it to view. In this we think there was error.

There is a certain right of property owners, which we will discuss presently, to leave objects on or along a highway, in front of their premises, temporarily, and for special purposes, and where that right exists it is of equal grade, before the law, with the right of travellers to journey on the highway. Hence in such cases the obligations of each class to the other are equal, and not superior, the one to the other. Each is bound to ordinary care toward the

other, in the exercise of their respective rights, but not to care which is extraordinary. In the more particular application of this doctrine to a case like the present, we think the correct rule is, that a property owner who has a lawful right to expose an object on or along a public highway, within view of passing horses, for a temporary purpose, is bound only to take care that it shall not be calculated to frighten ordinarily gentle and well-trained horses. And this seems to be the tenor of the authorities in the cases in which there has been a judicial expression on the subject. Thus, in the case of *Mallory* v. *Griffey*, 4 Norris 275, which was an action to recover damages resulting from the fright of a horse, occasioned by a large stone along the highway, our brother STERRETT said: "It was claimed that the stone was an object calculated to frighten an ordinarily quiet and well-trained horse, and that the defendant was chargeable with negligence in leaving it on the highway. This presented a question of fact which was properly submitted to the jury with the instruction that the plaintiffs could not recover unless they 'found from the evidence that a stone or rock such as was placed in or near the road by the defendant, was, in and of itself, an object calculated to frighten an ordinarily quiet and well-broken horse?'"

In *Morse* v. *Richmond*, 41 Ver. 435, it was held that a town is liable for such accidents by fright as are the natural result of its neglect to remove any object of frightful appearance so remaining deposited on the margin as to render the whole road unsafe for travel with horses of ordinary gentleness. In *Foshay* v. *Glen Haven*, 25 Wis. 288, the court said: "We adopt upon this subject the rule established by the Supreme Courts of Vermont, New Hampshire and Connecticut, that objects within the limits of a highway naturally calculated to frighten horses of ordinary gentleness, may constitute such defect in the way as to render the town liable, even when so removed from the travelled path as to avoid all danger of collision."

In *Ayer* v. *Norwich*, 39 Conn. 376, CARPENTER, J., said: "In conclusion, we are satisfied that the law is and ought to be so that objects within the limits of a highway which in their nature are calculated to frighten horses of ordinary gentleness, may be nuisances, which make the highway defective within the meaning of the statute."

In *Card* v. *City of Ellsworth*, 65 Me. 547, the court said: "How far, if at all, the court would be inclined to admit the doctrine adopted in this discussion beyond the facts now before us, we cannot now decide. But in no case like this can a liability of the town exist, unless the object of fright presents an appearance that would be likely to frighten ordinary horses, nor unless the appearance of the object is such that it should be expected by the town that it naturally might have that effect, nor unless the horse was at least an ordinarily kind, gentle and safe animal, and well broken for travelling upon our public roads." The rule is stated in the same way in the cases cited by the defendant in error. Thus, in *Bartlett* v. *Hooksett*, 48 N. H. 18, SMITH, J., says: "But if objects are suffered to remain (except for the most temporary purposes) resting upon one spot, or confined within any particular space, within the highway, and are of such shape or character as to be manifestly likely to frighten horses of ordinary gentleness, injuries caused by the fright thus occasioned may properly be said to happen by reason of the obstruction or insufficiency of the highway, unless the person placing or continuing those objects upon the highway was, in so doing, making such use of the highway as was under all the circumstances reasonable and proper." To the same effect are *Young* v. *New Haven*, 39 Conn. 435; *Dimock* v. *Suffield*, 30 Conn. 129.

It seems to us it would be difficult to state a rational rule on this subject unless it is accompanied with this limitation. For if persons are bound to guard against frightening skittish, vicious, timid and easily frightened horses, it will not be possible to state any limit of precaution which will be a protection against liability. The reason is that there is nothing as to which it can be definitely said that such horses will not frighten. On this subject the language of our brother PAXSON, in the recent case of *Pittsburgh Southern Railway Co.* v. *Taylor*, 15 Weekly Notes of Cases 37, and Leg. Int. of Feb. 29th 1884, is particularly apposite. He said: "The frightening of a horse is a thing that cannot be anticipated, and is governed by no known rules. In many instances a spirited road horse will pass in safety an obstruction that a quiet farm horse will scare at. A leaf, a piece of paper, a lady's shawl fluttering in the wind, a stone or a stump by the wayside, will sometimes alarm even a quiet horse. I may mention, by way of illustration, that the severest fright I ever knew a horse to feel, was caused by the sun-

light shining in through the windows of a bridge upon the floor." If a farmer may not have a barrel of cider, a bag of potatoes, a horse power, a wheelbarrow or a wagon, standing on his own premises by the side of a highway, except at the risk of having his whole estate swept away in an action for damages occasioned by the fright of an unruly horse, the vocation of agriculture will become perilous indeed. These views lead us to the conclusion that the court below was in error in its treatment of this subject, and we therefore sustain the first, third, fifth, sixth, eleventh, twelfth, fourteenth and fifteenth assignments. We see no objection to allowing proof of specific cases of fright at this particular object, and, therefore, do not sustain the second assignment.

Another subject of complaint by the defendants is the restrained and limited manner of defining the defendants' rights adopted by the court, and their subordination, when stated, as rights of inferior grade to those of the travelling public, and, therefore, to those of the plaintiff. The defendants are farmers. They own a considerable body of land lying on both sides of the public road at the place where the accident happened. For some time before and after the accident they were engaged in whitewashing their fences, extending a considerable distance along the road. The road at this place was upwards of forty-five feet in width, the road-bed actually travelled being twenty-two feet wide. The distance from the track to the fence on the south side was thirteen and a half feet, and in this space there was a slope downwards of two and nine-tenths feet, a little steeper near the road than for the remainder of the distance. The surface of the road and slope was composed of small gravel. Next the fence was a raised footpath, about four and a half feet wide, and next to the path was a ditch four feet wide and four-tenths of a foot below the travelled track. In this ditch stood a small truck on wheels, about two and a half by three feet, the wheels being twelve to fourteen inches high, and on the truck was a small barrel about fifteen inches in diameter and two feet three inches high. A pole or stick projected above it, the height of which above the barrel is differently stated by the witnesses from a few inches to two or three feet, and a small piece of carpet covered the pole and barrel. The outside of the barrel was streaked with lime, and the barrel itself contained the lime with which the whitewashing was done. This is the object which, it is claimed for the plaintiff, caused the horse to frighten, and thereby produced his

fall and death. It was moved along the road as the work progressed, and was left standing in the ditch from Saturday night to Monday morning, covering the Sunday when the accident occurred, partly filled with lime prepared for use.

The learned court did instruct the jury that the defendants had the right to use any part of the highway for the purpose of building and improving their fence, provided they did not interfere with the rights of travellers; and that, if the lime tub was calculated to frighten horses, it would be negligence to use it, because all citizens had a right to pass without having their horses frightened by any obstruction placed on the highway. The learned judge also said that the public had a right to travel over every part of the highway; that everything between the fences was highway, and the public had the right to use any part of it they saw fit. It seems to us this is not a sufficiently precise designation of the relative rights of the property owners and the public. As we understand the law, there is an absolute right in the property owner to use a portion of the public highway for certain purposes for a temporary period and in a reasonable manner, and this right may be exercised in derogation of the right of the travelling public. Thus, in 2 Dill. on Municipal Corporations, § 581, the writer says: "We have heretofore shown that the primary purpose of a street is for passage and travel, and that unauthorized and illegal obstructions to its free use come within the legal notion of a nuisance. But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in the temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvements of adjoining lots by digging cellars, by building, etc.; this may occasion a reasonable necessity for using the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to, or limitations of it. They can be justified only when and only so long as they are reasonably necessary."

In the case of *Commonwealth* v. *Passmore*, 1 S. & R., on p. 219,

TILGHMAN, C. J., said: "No man has a right to throw wood or stones into the street at his pleasure. But, inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stone, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner."

The foregoing case was an indictment or a nuisance, where the question was simply whether the obstruction in question was a nuisance; but the case of *Palmer* v. *Silverthorn*, 8 Casey 65, was an action to recover damages for the broken leg of an ox which had wandered among a parcel of building materials placed by the defendant in the highway in front of his premises while erecting a building. Here a practical question of liability for damages arose, and it was determined for the defendant, because, although his materials were an obstruction to the street, they were lawfully there, and he was not responsible if he left sufficient room for the travel of the street. The case of *Commonwealth* v. *Passmore*, was cited and approved, and a similar case from 1 Denio 524, was quoted, in which the same doctrine was declared. THOMPSON, J., said the necessity of the case was probably the foundation of the rule, "but the practice has become a custom of such long standing that it is regarded as law, and the right will not be defeated by an investigation into the necessity of so doing in any particular case. It is a right to be exercised under responsibility for all injury arising from an unreasonable or negligent use of it." In *Mallory* v. *Griffey*, *supra*, which was an action for damages for an injury inflicted by a horse taking fright at a stone placed in the highway as a part of some building materials to be presently used, we affirmed the court below in charging that the defendant was not liable, although the horse took fright, merely because the stone was in the highway. Mr. Justice STERRETT said: "The jury were properly instructed that the defendant might place building material on a portion of the highway, and permit the same to remain there for a reasonable length of time for the purpose of erecting his barn on the line of the road, without, on that account alone, incurring liability for injuries sustained by persons passing along the road, provided ample room was left for the free passage of vehicles and animals; but he would be liable for injuries occasioned by an unreasonable or negligent use of the highway." All this doctrine was repeated by the present Chief

Justice in the case of *City of Allegheny* v. *Zimmerman*, 14 Norris 287, who further said: "But the right to partially obstruct a street does not appear to be limited to a case of strict necessity; it may extend to purposes of convenience or ornament, provided it does not unreasonably interfere with public travel."

The substance of the doctrine is that the mere exercise of the right of obstruction for a lawful purpose, imposes no liability to pay for damages resulting therefrom. It must be an unreasonable or negligent exercise of the right, in order to impose liability. To say that a man may lawfully deposit bricks and lumber on the highway, in front of a lot on which he is erecting a building with those materials, and yet if their presence has a tendency to frighten horses, and some over-sensitive horse does take fright at them and runs away and causes damage, the person depositing the materials is guilty of negligence, and shall pay the damage, is merely giving a right with one breath and taking it all away with another. In practical effect such a right would be no right at all. Any pile of bricks, stones, sand, lumber, or other building material, in a street, *has a tendency* to frighten horses, and in almost any community there could always be found some horses that would actually take fright at seeing them. But that circumstance alone will not take away the right to deposit them in such a place. There must be some abuse of the right, some unusual and extraordinary mode of arranging the materials, such as will probably produce fright with ordinary gentle and well-trained horses, before it can be fairly said liability arises. So in the present case. The defendants were whitewashing their fences—a perfectly proper and legitimate thing to do. The fence extended along a great length of the public road, and the process of whitewashing necessarily occupied considerable time. In this respect there does not seem to be anything unreasonable in the case. They used a small barrel to contain their material, the whole size of the vessel and its supporting truck not exceeding two and a half feet by three feet superficially, and three feet perpendicularly. It is difficult to see anything unreasonable or negligent in using such an apparatus. It stood by the side of the travelled track, and made no encroachment upon it of any kind. It therefore did not obstruct the highway so as to interfere with the travel upon it. It seems to us the jury should have been told that unless there was something of an unusual and extraordinary character in the structure and appearance of this apparatus which would

naturally tend to frighten horses of ordinary gentleness and training, it was not negligence to use it, and its reasonable use for no longer time than was fairly required, along the highway, in whitewashing the defendants' fences, would not subject defendants to liability, even though some horses might or did take fright at seeing it.

These views require us to sustain, as we do, the tenth, eleventh, twelfth, thirteenth, fourteenth, sixteenth, eighteenth, nineteenth, twentieth and twenty-first assignments. We do not sustain the twenty-second, because it is of too limited a scope to cover all the conditions of liability; nor the twenty-third, because the presence of the plaintiff on the road on Sunday is not a defence which can be set up by a private citizen against a possible liability, if established by the other facts of the case: *Mohney* v. *Cook*, 2 Casey 342; *Ranch* v. *Lloyd*, 7 Id. 369. We sustain the ninth assignment, for the reason that evidence being admissible to show the frightening of particular horses at sight of this object, it is competent to show that those horses were not of ordinary gentleness and training.

Judgment reversed and *venire de novo* awarded.

Temporarily Obstructing a Street.— With regard to obstructing a street, the law in *Rex* v. *Russell*, 6 East 427, is very well stated: "That the primary object of a street is for the free passage of the public, and anything which impeded that free passage, *without necessity*, was a nuisance; that if the nature of the defendant's business was such as to require the loading and unloading of so many more of his wagons than could be conveniently contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot."

In a Pennsylvania case it was said: "*Necessity* justifies actions which would otherwise be nuisances. This necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at pleasure; but inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stone, brick, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner:" *Commonwealth* v. *Passmore*, 1 S. & R. 217; approved in *People* v. *Cunningham*, 1 Denio 524, 530, and in *Clark* v. *Fry*, 8 Ohio St. 358, 374. Such instances as those enumerated in the Pennsylvania case, it is said in the Ohio case, "are not invasion of, but simply incident to, or rather qualification of, the right of transit; the limitation upon them is that they must not be *unnecessarily* and *unreasonably* interposed or prolonged."

In a Massachusetts case it was said: "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation, and much on public usage. The general use and acquiescence of the public is evidence of the right. The owner of land

may make such reasonable use of a way adjoining his land as is usually made by others similarly situated. As to the reasonableness of the use, it may well be laid down that in a populous town where land is very valuable, it is not unreasonable to erect buildings and fences on the line of the street, and to place doors and gates in them so as when opened to swing over the street. When the owner of a lot in such a situation has occasion to build, and, for that purpose, to dig cellars, he may rightfully lay his building materials and earth within the limits of the street, provided he takes care not improperly to obstruct the same, and to remove them within a reasonable time. It is very obvious that, without this privilege, it would be, in some situations, nearly or quite impracticable to build at all:" *O'Linda* v. *Lothrop*, 21 Pick. 292, 297. Thus, in an action for special damages against the author of an obstruction, it was held that a street of a city may be obstructed by placing material for building in it for a reasonable time and so as to occasion the least inconvenience, if, from a want of room elsewhere, it be reasonably necessary to deposit in the street; and a plea is defective which does not aver or show this reasonable necessity, as it cannot be judicially inferred from the fact that the building was being erected in a populous city: *Wood* v. *Mears*, 21 Ind. 515.

In addition to the cases already cited, the following cases support the doctrine of the principal case and the cases already cited in this note: *Rex* v. *Jones*, 3 Camp. 229; *Rex* v. *Ward*, 4 A. & E. 405; *Rex* v. *Cross*, 3 Camp. 226; *St. John* v. *New York*, 3 Bosw. 483; *Cline* v. *Cornwall*, 21 Grant (Canada) 142.

A street or sidewalk cannot be habitually used for delivery of distillery slops through pipes: *People* v. *Cunningham*, 1 Denio 529; or for wagons continually standing to receive goods: *Rex* v. *Russell*, 6 East 427; or receiving barrels from a cider press: *Dennis* v. *Sipperly*, 17 Hun 69; or for sawing timber, *Rex* v. *Jones*, 3 Camp. 230; nor can a person obstruct a street with carriages, even where he has been in the habit of so doing for a long time: *Gerring* v. *Barfield*, 16 C. B. (N. S.) 597; nor can a stage-coach stand in a street to ply for passengers, although it may so stop to put down or take up passengers: *Rex* v. *Cross*, 8 Camp. 224.

In the case of a stage coach it was held that if it stopped for an unreasonable time on a public highway, in front of and obstructing the entrance to a camp-meeting ground, it might lawfully be "moved on" by the person in charge of the ground. The court said: "Persons have a right to travel over public streets and roads, stopping only for necessary purposes, and then only for a reasonable time. Stage coaches may stop to set down and take up passengers, as this is necessary for public convenience; but this must be done in a reasonable time. A person travelling on the highway must do so in such a way as not unnecessarily or unreasonably to impede the exercise of the same right by others; and if he does not exercise this right in a reasonable manner, he is guilty of a nuisance [citing authorities]. The proof in this case clearly shows that the coach of the appellee, by remaining in the highway, under the circumstances as testified to by nearly all the witnesses on both sides, obstructed the travel over it for an unreasonable time, and was a public nuisance. Without stopping to inquire whether any one whose rights are not injured or interfered with by a public nuisance may abate it, about which there is some conflict in the decisions, there can be no doubt whatever that any person whose rights are injured or interfered with may abate it, provided its abatement does not involve a breach of the peace:" *Turner* v. *Boltzman*, 54 Md. 148.

In *State* v. *Edens*, 85 N. C. 522, the defendant was indicted in a common-law indictment with maintaining a nuisance by obstructing a street in that he kept a market cart in the street for an hour and a half, and the jury rendered a special verdict finding that he was notified to remove the same, but refused; that he and a number of other persons were accustomed to occupy places on the street with their carts, selling vegetables, etc., but that it was contrary to the municipal regulations, and that notwithstanding the alleged obstruction, there was the usual passing of vehicles and foot-passengers. It was held not to be *per se* a nuisance.

A temporary obstruction does not amount to such an obstruction as subjects the person placing it there, in all cases, to an action liable. Thus, a temporary and necessary use, such as the delivery of barrels from cars on skids across a sidewalk, is permissible, provided a sufficient space is left on the other side of the roadway: *Mathews* v. *Kelsey*, 58 Me. 56; s. c. 4 Am. Rep. 248.

In *Goldsmith* v. *Jones*, 43 How. Pr. 415, the plaintiffs, who occupied a store adjoining the defendant's, built a box around a telegraph pole, projecting two and a half feet on the sidewalk, using it as a sign; the defendant obliterated the name on the side, and this was held to be a malicious trespass. The court went further, and said that the only allowable act of abating would be the removal of the box, and this could not be justified unless it specially incommoded the defendant in his use of the street or sidewalk.

Distributing hand-bills on the street whereby a crowd was gathered, was held not indictable: *Rex* v. *Sarmon*, 1 Burr 516. Where a village ordinance provided that the sidewalk in front of certain stores should be fourteen feet wide, and that the outside ten feet should be of uniform grade and kept clear of all obstructions, but the inside four feet were left ungraded and were occupied for stairways, show-tables, etc., by the owners of the stores, and plaintiff, within the four feet in front of one of the stores, and by the authority of the owner, kept a fruit and candy stand, it was held that the stand was not an obstruction to the sidewalk, and the plaintiff was not liable to arrest by a peace officer for keeping the same, although a crowd may have collected in front of it so as to obstruct the street: *Barling* v. *West*, 29 Wis. 307. But a person is a trespasser who, instead of passing along on the sidewalk of a street, stops in front of a man's house, and remains there, using towards him abusive and insulting language: *Adams* v. *Rivers*, 11 Barb. 390. Nor may he warn the public from another's shop, or with a placard inscribed "Beware of Mock Auctions:" *Gilbert* v. *Mickle*, 4 Sandf. Ch. 357. Nor has any one a right to display such goods or signs in his shop windows, or to collect a *constant* crowd on the sidewalk, obstructing public travel—for instance, satirical effigies: *Rex* v. *Carlile*, 6 C. & P. 628; nor can a constable hold an auction: *Com.* v *Milliman*, 13 S. & R. 403; *Com.* v. *Passmore*, *supra*.

So a wooden awning in front of a store is not *per se* a nuisance. The court said: "Hawkins, who owns a hotel building in Ypsilanti, filed his bill to restrain the defendant, who owns a neighboring store building, from maintaining a wooden awning in front of his premises. The complainant's theory seemed to be that this is a public nuisance which injuriously affects him specially. The awning is, so far as we can see, no more of a nuisance than it would have been if made from any other material, and it was not, as shown from the evidence, such a structure as any court would regard as a public injury or grievance. It was such as was used habitually in Ypsilanti as well as elsewhere, and was recognised by the city ordinance as not objectionable. It was, therefore, no more than a

lawful use of defendant's own property. The special grievance complained of is simply that it obstructed the view of the sidewalk and a portion of the street. The testimony does not indicate that there was any very well founded objection in fact to the awning, and there is no legal objection to it:" *Hawkins* v. *Sanders*, 45 Mich. 491.

But a fruit stand, a permanent structure three feet eleven inches wide, seven feet high and twenty-three feet long, on the inside of a sidewalk fifteen feet wide, is a nuisance *per se*: *State* v. *Berdetta*, 73 Ind. 185; s. c. 38 Am. Rep. 117; 20 Amer. L. Reg. 342; *Com.* v. *Wentworth*, Brightly's Rep. (Penn.) 318. See *Echols* v. *State*, 12 Tex. App. 615. So placing large quantities of stone in a public highway is indictable: *Com.* v. *King*, 13 Met 115; or keeping a cart and machinery for the purpose of taking photographic sketches: *Queen* v. *Davis*, 24 U. P. Can. C. P. 575; or a projecting show-board: *Read* v. *Perrett*, L. R., 1 Ex. Div. 349. See *Original Hartlepool Collieries Co.* v. *Gibb*, L. R., 5 Ch. Div. 713.

So a railway company cannot turn a street into a car-yard: *Vars* v. *Grand Trunk Ry. Co.*, 23 U. P. Canada (C. P.) 143. So if a street railway unreasonably uses a street in front of a lot for switching and storing cars to the injury of the owner of the lot, such owner may maintain an action therefor: *Mahady* v. *Bushwick Rd. Co.*, 91 N. Y. 148; s. c. 43 Am. Rep. 661.

A horse unlawfully at large on a highway is a nuisance, and its owner is liable for any damages done by it, whether the animal is vicious or not: *Baldwin* v. *Ensign*, 49 Conn. 113; s. c. 44 Amer. Rep. 205.

Objects Frightening Horses.—The quotations from cases of frightening horses are unusually full, and no other need be made. A few instances will be cited.

The plaintiff's horse became frightened by a rock in the defendant's highway in a situation calculated to frighten horses, and the plaintiff in attempting to dismount was injured. It was held that if the horse was unmanageable, and the plaintiff was dismounting to avoid danger, the defendant was liable, but if the horse was manageable, and the plaintiff dismounted to avoid apprehended difficulty, the defendant was not liable; and further that the defendant was liable for the injury occurring from the fright of the horse at the rock, although neither the horse nor the carriage came into contact with the rock, the horse being ordinarily safe and gentle: *Card* v. *City of Ellsworth*, 65 Me. 547; s. c. 20 Amer. Rep. 722. But see *Agnew* v. *Corunna*, 21 N. W. Rep. 873.

A town is not liable for damages sustained by a traveller from the fright of his horse at meeting cows in the road with boards on their horns, and also from a defect in the way; the combined action of both cases operating to produce the accident: *Perkins* v. *Inhabitants of Fayette*, 68 Me. 152; s. c. 28 Am. Rep. 84; see *Moulton* v. *Sandford*, 51 Me. 127.

Where a horse scared and shied at a hole in a *turnpike*, the company was held liable: *Brooksville, &c., Co.* v. *Pumphrey* 59 Ind. 78; s. c. 26 Amer. Rep. 76.

If a city allows wild animals exhibited in the streets, it is liable if they frighten horses which run away and do damage to their owner: *Little* v. *City of Madison*, 42 Wis. 643; s. c. 24 Am. Rep. 435.

"A hollow, black and burnt log" was held to entitle to a recovery under certain circumstances: *Foshay* v. *Town of Glen Haven*, 25 Wis. 288; s. c. 3 Amer. Rep. 73; so the blowing of a steam-whistle of a factory near a highway: *Knight* v. *Goodyear's India Rubber Glove Manufacturing Co.*, 38 Conn. 438; s. c. 9 Am. Rep. 406; *Parker* v. *Union Woollen Co.*, 42 Conn. 399.

A steam traction engine, or roadster, is not a nuisance *per se* when used on a

public highway: *Macomber* v. *Nicholls*, 34 Mich. 212; s. c. 22 Am. Rep. 522; and the one using it is not liable at all unless it would frighten ordinary horses: *Watkins* v. *Reddin*, 2 F. & F. 629; see *Smith* v. *Stokes*, 4 B. & S. 84, and *Harrison* v. *Leaper*, 5 L. T. (N. S.) 640; See *Turner* v. *Buchanan*, 82 Ind. 147; s. c. 42 Am. Rep. 485; nor a company for cars running over a bridge across a highway: *Favor* v. *Boston & Lowell Rd. Co.*, 114 Mass. 350; s. c. 19 Am. Rep. 364. There is a liability, however, for leaving a steam roller over Sunday on the highway: *Young* v. *New Haven*, 39 Conn. 435; see *Harris* v. *Mobbs*, 3 Ex. Div. 268; s. c. 31 Moak 252.

But a tent in the highway is such an object as to frighten horses of ordinary gentleness: *Ayer* v. *City of Norwich*, 39 Conn. 376; s. c. 12 Am. Rep. 396; so a derrick used by a railroad company: *Jones* v. *Housatonic Rd. Co.*, 107 Mass. 261. See *Howard* v. *North Bridgewater*, 16 Pick. 189; *Keith* v. *Easton*, 2 Allen 552; *Kingsbury* v. *Dedham*, 13 Id. 186; *Lawrence* v. *Mt. Vernon*, 35 Me. 100; *Jewett* v. *Gage*, 55 Id. 538.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Iowa.

MOORE *v.* MONROE ET AL.

An injunction will not be granted to restrain the reading or repeating of the Bible, or parts thereof, or the singing of religious songs, in a school, at the suit of a tax-payer whose children are not required to be present during such exercises.

Section 1764 of the Iowa Code, providing that "the Bible shall not be excluded from any school or institution in the state, nor shall any pupil be required to read it, contrary to the wishes of his parent or guardian," is not in violation of article 1, § 3, of the bill of rights.

APPEAL from Davis District Court.

The plaintiff, as a resident and tax-payer of the independent district of Bloomfield, and patron of the public school taught in the district, brings this suit against the teachers of the school and directors of the district, and prays for an injunction to prevent the reading or repeating of the Bible, or any part thereof, in the school, and to prevent the singing of religious songs in the school. The court refused to grant an injunction, and from the order of refusal plaintiff appeals.

F. W. Moore and *S. N. Steele*, for appellant.

S. S. Carruthers and *Payne & Eichelberger*, for appellees.

The opinion of the court was delivered by

ADAMS, J.—The record shows that the teachers of the school are accustomed to occupy a few minutes each morning in reading selec-

tions from the Bible, in repeating the Lord's prayer, and singing religious songs; that the plaintiff has two children in the school, but that they are not required to be present during the time thus occupied. The record further shows that the plaintiff objected to such exercises, and requested that they be discontinued; but the teachers refused to discontinue them, and the directors refused to take any action in the matter.

The plaintiff concedes that under a statute of Iowa, section 1764 of the Code, if constitutional, neither the school directors nor courts have power to exclude the Bible from public schools. The provision of the statute is in these words: "The Bible shall not be excluded from any school or institution in this state, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian." Under this provision, it is a matter of individual option with school teachers as to whether they will use the Bible in school or not, such option being restricted only by the provision that no pupil shall be required to read it contrary to the wishes of his parent or guardian. It was doubtless thought by the legislature that an attempt on the part of school boards to exclude, by official action, the Bible from schools, would result in unseemly controversies, to be decided ultimately at the polls, and that such controversies would naturally disturb the harmony of school districts, and impair the efficiency of schools. Whether the provision is a wise one, it is unnecessary for us to express any opinion. It is the law of the state, unless unconstitutional.

The plaintiff insists, however, that it is unconstitutional. The provision of the constitution which it is said to conflict with is article 1, § 3, bill of rights. The provision is in these words: "The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry."

The plaintiff's position is that, by the use of the school-house as a place for reading the Bible, repeating the Lord's prayer, and singing religious songs, it is made a place of worship; and so his children are compelled to attend a place of worship, and he, as a tax-payer, is compelled to pay taxes for building and repairing a place of worship.

We can conceive that exercises like those described might be

adopted with other views than those of worship, and possibly they are in the case at bar; but it is hardly to be presumed that this is wholly so. For the purposes of the opinion it may be conceded that the teachers do not intend to wholly exclude the idea of worship. It would follow, from such concession, that the school-house is, in some sense, for the time being, made a place of worship But it seems to us that if we should hold that it is made a place of worship within the meaning of the constitution, we should put a very strained construction upon it. The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden.

It is, perhaps, not to be denied that the principle, carried out to its extreme logical results, might be sufficient to sustain the appellant's position; yet we cannot think that the people of Iowa, in adopting the constitution, had such extreme view in mind. The burden of taxation by reason of the casual use of a public building for worship, or even such stated use as that shown in the case at bar, is not appreciably greater. We do not think, indeed, that the plaintiff's real objection grows out of the matter of taxation. We infer from his arguments that his real objection is that the religious exercises are made a part of the educational system, into which his children must be drawn or made to appear singular, and perhaps be subjected to some inconvenience. But, so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the objection as one of great weight. Besides, if we regarded it as of greater weight than we do, we should have to say that we do not find anything in the constitution or law upon which the plaintiff can properly ground his application for relief. Possibly, the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible. Whether this be so or not, it is sufficient to say that the courts are charged with no such mission.

We think that the injunction was properly denied.

Affirmed.

Neither the Federal government nor any state government can make any law respecting an establishment of religion: Const. U. S., Amend. 1; 2 Kent's Com.

35 *et seq.*; Rawle on Const. 121; Story on Const., sec. 1879; *Reynolds* v. *U. S.*, 98 U. S. 145, and the state constitutions generally. An ordinance giving a special privilege to one sect infringes this principle: *Shreveport* v. *Levy*, 26 La. An. 671.

Nor can either State or Federal government compel attendance upon religious worship, nor hinder the free exercise of religious belief and expression: Cooley Const. Lim. 470, *et seq.* But a law is not unconstitutional because it forbids what one may conscientiously think right or requires what one may conscientiously think wrong: *Donahoe* v. *Richards*, 38 Me. 376; *Ferriter* v. *Tyler*, 48 Vt. 444; *Reynolds* v. *U. S.*, 98 U. S. 145.

Nor can either government, as a general rule, impose any tax for religious purposes; but otherwise in New Hampshire: Const., pt. 1, art. 6; and see, also, *Barnes* v. *First Parish*, 6 Mass. 401. It has been said that "religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state." And the use of a schoolhouse for religious meetings, when not required for school purposes, is not unconstitutional: *Nichols* v. *School Directors*, 93 Ill. 61; s. c. 34 Am. Rep. 160; *Townsend* v. *Hagan*, 35 Iowa 195; *Davis* v. *Boget*, 50 Id. 11. But it has been held, on the other hand, that such use is not allowable: *Spencer* v. *School Dist.*, 15 Kan. 259; s. c. 22 Am. Rep. 268; *Dorton* v. *Hearn*, 67 Mo. 301; *School Dist.* v. *Arnold*, 21 Wis. 657; *Scofield* v. *School Dist.*, 27 Conn. 499. And in Ohio, that they have no power to lease it for holding a select school: *Weir* v. *Day*, 35 Ohio St. 143.

The powers of school boards are limited to those expressly granted and those resulting by necessary implication from those granted: *Stevenson* v. *School Directors*, 87 Ill. 255; *Wells* v. *People*, 71 Id. 532; *Clark* v. *School Directors*, 78 Id. 474; *Peers* v. *Bd. of Ed.*, 72 Id 508; *School Directors* v. *Fogleman*, 76 Id. 189; *State* v. *Omaha*, 7 Neb. 267; *Gehling* v. *School Dist.*, 10 Id. 239; *Manning* v. *Van Buren*, 28 Ia. 332; *Bank* v. *Coffin's Grove*, 51 Id. 350; *Adams* v. *State*, 82 Ill. 132; *State* v. *Bd. of Ed.*, 35 Ohio St. 368. They have power to dismiss or exclude a pupil from school, when necessary to maintain good order and government: *Stephenson* v. *Hall*, 14 Barb. 222; *Sewell* v. *Bd. of Ed.*, 29 Ohio 89; *Hodgkins* v. *Rockport*, 105 Mass. 475; *Ferriter* v. *Tyler*, 48 Vt. 444; *Bd. of Ed.* v. *Thompson*, 33 Ohio St. 321; *Burdick* v. *Babcock*, 31 Ia. 562; *Murphy* v. *Directors*, 30 Id. 429; *Spear* v. *Cummings*, 23 Pick. 226. And are not liable for an error in judgment in so doing: *Dritt* v. *Snodgrass*, 66 Mo. 286; *McCormick* v. *Burt*, 95 Ill. 263; *Donahoe* v. *Richards*, 38 Me. 376. They have general power to make rules for the government of the school, but such rules must be reasonable: *Sherman* v. *Charleston*, 8 Cush. 160; *Guernsey* v. *Pitkin*, 32 Vt. 225; *Ward* v. *Flood*, 48 Cal. 36; *Donahoe* v. *Richards*, 38 Me. 376; *Roe* v. *Demg*, 21 Ohio St. 66; *Rulison* v. *Post*, 79 Ill. 567; *School Trustees* v. *People*, 87 Ill. 303. What are reasonable rules is a question of law: *Thompson* v. *Beaver*, 63 Ill. 353. In some states a rule requiring pupils to pursue particular studies is considered reasonable: *Sewell* v. *Bd. of Ed.*, 29 Ohio St. 89; *Guernsey* v. *Pitkin*, 32 Vt. 225; and in *State* v. *Mizner*, 50 Iowa 145; s. c. 32 Am. Rep. 128, it was held that while a pupil may not be chastised for not pursuing a study to which the parent objects, he may be expelled. In Illinois and Wisconsin, on the other hand, it is held that a pupil cannot be required to pursue a study when the parents request that he be excused from so doing: *School Trustees* v. *People*, 87 Ill. 303; *Rulison* v. *Post*, 79 Id. 567; *Morrow* v. *Wood*, 35 Wis. 59; s. c. 17 Am. Rep. 471.

A rule requiring the school to be opened with religious exercises, where attendance upon such exercises is not obligatory, has elsewhere been held to be a reasonable rule; and during such exercises all pupils may be required to lay aside their books, observe good attention, and bow the head during prayer: *Spiller* v. *Woburn*, 12 Allen 127; *McCormick* v. *Burt*, 95 Ill. 263. Some decisions have gone further, and have held that pupils may be required to read the Bible, as a school exercise, even against the protest of the parents: *Donahoe* v. *Richards*, 38 Me. 376; *Wall* v. *Cooke*, 7 Am. Law Reg. (O. S.) 417.

It is, however, equally competent for the school board to exclude the Bible from the school where its presence is not expressly required by law: *Bd. of Ed.* v. *Minor*, 23 Ohio St. 211.

It has been held that a request from parents and spiritual adviser that pupils be excused from school to attend religious exercises will furnish no valid excuse for such absence, and that for such absence pupils may be excluded from the school: *Ferriter* v. *Tyler*, 48 Vt. 444. As to general power to expel for absence, see *Burdick* v. *Babcock*, 31 Iowa 562; *King School Bd.*, 71 Mo. 628; s. c. 36 Am. Rep. 499; *Russell* v. *Lynnfield*, 116 Mass. 365.

While the decisions in some of the cases cited seem to carry the principle to an unnecessary extent, that laid down in the principal case seems reasonable, and we have been unable to find any authorities holding an opposite view. See 2 Kent's Com. *196, note "j," latter part; 2 Story on Const., sec. 1871, 1873.

M. D. EWELL.

Chicago.

Supreme Court of Ohio.

BLANDY'S ADMINISTRATOR *v.* HALL & CO.

Mortgages invalid against the creditors of a mortgagor are invalid against his assignee for the benefit of creditors.

The lien of such a mortgage is not preserved by a clause in the assignment excepting from its operation all existing liens and providing that such liens shall not be affected thereby.

Where a statute requires the entry, on a chattel mortgage, of a certain statement, a defect in such statement cannot be cured by conditions contained in the mortgage but not referred to in the statement.

ERROR to the District Court of Washington County.

On the 9th of February 1867, John L. Taylor executed to Henry Blandy a chattel mortgage on certain property therein described, to indemnify Blandy as surety for Taylor on certain indebtedness therein specified. On this mortgage was entered a statement verified under oath as follows:

"THE STATE OF OHIO, MUSKINGUM COUNTY, *ss.*

Henry Blandy, mortgagee, being duly sworn, upon his oath says that the within-named mortgagor, John L. Taylor, is indebted

to him in the sum of $1030, with interest; that the said claim is just and unpaid; and that to secure the payment of the same, the within mortgage has been executed to him in good faith.

HENRY BLANDY."

On the 31st of March and the 16th of April, respectively, Taylor executed to Blandy other chattel mortgages, similar in all respects to the foregoing, except as to names, dates, amounts and description of property. These several mortgages were duly filed.

On the 19th of April 1877, Taylor executed to one Alexander Johnson a deed of assignment for the benefit of his creditors, describing certain property, real and personal. This deed contains the following clause:

"This conveyance includes all the real and personal property owned by me, whether specifically described herein or not, excepting from the operation of this assignment all existing liens, which are not to be affected hereby; excepting therefrom and saving and reserving to the said John L. Taylor his homestead, and all other rights and property to which he may be entitled under the homestead exemption or other laws of Ohio."

This deed was duly filed in the probate court, in Muskingum county, and subsequently Henry Blandy was appointed trustee for the benefit of creditors in the place of Alexander Johnson, assignee.

Henry Blandy, as successor of Johnson, converted the assigned property, including the chattels embraced in the foregoing mortgages, into money, and filed in the probate court his account, claiming a credit of $1082.78 on account of moneys paid as surety for Taylor, under the chattel mortgages aforesaid.

The probate court allowed the credit claimed by Blandy, holding the mortgages to be valid liens against the general creditors of the assignor.

The creditors, Benedict, Hall & Co. and others, appealed from this judgment to the Court of Common Pleas, Muskingum county, where the preference of Blandy's mortgages over the claims of general creditors was denied. The judgment of the Common Pleas, on error, was affirmed by the District Court.

Moses M. Granger and *A. W. Train*, for plaintiffs in error.

John King, *T. J. Taylor* and *J. T. Crew*, for defendant in error.

The opinion of the court was delivered by

McILVAINE, J.—Two questions are presented in this case: 1. In the administration of the assigned estate, did the mortgage of Blandy have priority over the claims of other creditors? 2. If not, did the exception of liens in the deed of assignment give precedence to Blandy over the other creditors?

1. At the time these mortgages were executed it was provided by statute that every mortgage of goods and chattels shall be absolutely void, as against the creditors of the mortgagor, unless the mortgagee, his agent or attorney, "in case the said instrument shall have been given to indemnify the mortgagee against a liability as surety for the mortgagor, shall enter thereon a true statement of such liability, and that said instrument was taken in good faith to indemnify, against any loss that may result therefrom," &c.: S. & C. 475, § 1, and 66 Ohio L. 345, § 2.

In *Hanes* v. *Tiffany*, 25 Ohio St. 549, it was held that the omission to enter upon a chattel mortgage the statement required by the statute, renders the mortgage void as against the creditors of the mortgagor, and a mortgage void as to creditors is void as against the assignee for the benefit of creditors. But, in *Gardiner* v. *Parmalee*, 31 Ohio St. 551, it was held where the affidavit (statement) refers to matters contained in the mortgage, the matters thus referred to are to be regarded as part of the affidavit (statement). These cases are referred to and approved in *Nesbit* v. *Wortz*, 37 Ohio St. 378, and, we think, are conclusive on the question now under consideration. These mortgages of Blandy were given to indemnify him against a liability as surety for the mortgagor. This fact is stated in the mortgages, but such statement is not entered on the mortgage nor verified by the affidavit of the mortgagee, nor is it referred to in the affidavit. The statement in the affidavit simply is that the mortgagor is *indebted* to the mortgagee in the sum named; that the *said claim* is just and unpaid; and that to secure the payment of *the same*, the within mortgage has been executed to him in good faith. This is not a true statement of the liability as surety against which the mortgage purports to be indemnity, and no reference is made in the affidavit to any matter that can supply the omission.

We admit that a substantial compliance with the requirement of the statute is sufficient. What does the statute require? That the

mortgagee shall state, under oath, what the liability is for which he is bound as surety, and the mortgage was given in good faith to indemnify him against loss as surety from such liability. The affidavit states the mortgagor is indebted to the affiant, and that the mortgage was given in good faith to secure the payment of such debt. No reference is made to the contents of the mortgage, and for that reason we think the mortgage is void as against the creditors of the mortgagor.

2. As to the next question. The deed of assignment "excepts from the operation of the assignment all existing liens which are not to be affected thereby." By no fair interpretation of this clause can it be said that the assignor intended to except from the operation of the assignment his equity of redemption in the mortgaged property. The assigned estate was administered on the theory that the equity of redemption passed to the assignee for the benefit of creditors. What, then, was the purpose of this clause? We think there can be no doubt that the intention was to secure the mortgagees the full amount of their liens to the extent that such liens were valid as against the assignor.

Can such purpose be accomplished by such means? We think not Undoubtedly these mortgages were valid as against the assignor, but void as against his creditors. By the assignment the rights of creditors passed to the assignee as matter of law. The possession of the assignee was the possession of creditors. The right of creditors to seize the property in the hands of the assignee did not exist, but the assignee was bound, in law, to administer the trust for their benefit. Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for their benefit after the assignment. Liens invalid as against creditors at the time of assignment remain invalid. These mortgages were void as against creditors at the time of the assignment, unless they were made valid by the clause of the deed of assignment now under consideration. The validity or invalidity of an alleged lien is a question of law. It does not depend on the will of the grantor in an alleged mortgage. This clause neither validated nor invalidated the mortgage in any respect; nor did it except or assume to except from the operation of the assignment the mortgaged property. The property was assigned subject to the liens upon it, and it is the law, not the dictation or convention

of the parties which determines the validity of the liens, and against whom they exist.

Judgment affirmed.

JOHNSON, C. J., took no part in the decision.

SUBJECT TO WHAT ASSIGNEE TAKES. —As a general proposition, an assignee for the benefit of creditors takes the property subject to all prior equities: *Williams* v. *Winsor*, 12 R. I. 9; *Moody* v. *Sitton*, 2 Ired. Eq. 382; *Codwise* v. *Gelston*, 10 Johns. 507; *Haggerty* v. *Palmer*, 6 Johns. Ch. 437; *Frow* v. *Dowman*, 11 Ala. 880; *Reed* v. *Sands*, 37 Barb. 185; *Leger* v. *Bonaffe*, 2 Id. 475; *Addison* v. *Burckmyer*, 4 Sandf. Ch. 498; *Stow* v. *Yarwood*, 20 Ill. 497; *Goodwin* v. *Mix*, 38 Id. 115; *Griffin* v. *Marquardt*, 17 N. Y. 28; *Plunkett* v. *Carew*, 1 Hill Ch. 169; *Roberts* v. *Corbin*, 26 Iowa 315: *Tharpe* v. *Dunlap*, 4 Heisk. 674; *Warren* v. *Fenn*, 28 Barb. 333; *Corn* v. *Sims*, 3 Metc. (Ky.) 391; *Garrison's Appeal*, 2 Grant Cas. 216; *State* v. *Patten*, 49 Me. 383; *Stockett* v. *Goodman*, 47 Md. 54; *Seay* v. *Rome Bank*, 66 Ga. 609; *Zuring* v. *Cox*, 78 Ky. 527; incumbrances: *Corning* v. *White*, 2 Paige 567; *Walker* v. *Miller*, 11 Ala. 1067; *Crosby* v. *Hillyer*, 24 Wend. 280; *Van Heusen* v. *Radcliff*, 17 N. Y. 580; *Mellon's Appeal*, 32 Penn. St. 121; *Swoyer's Appeal*, 5 Id. 377; *Twelves v. Williams*, 3 Whart. 485; *Wurtz* v. *Hart*, 13 Iowa 515; *Dimon* v. *Delmonico*, 35 Barb. 554; *Hogan* v. *Strayhorn*, 65 N. C. 279; *In re Howe*, 1 Paige Ch. 125; *O'Hara* v. *Jones*, 46 Ill. 288; *Willis* v. *Henderson*, 5 Id. 13; and set-offs: *Bank of Harrisburg* v. *Sherlock*, 16 Bankr. Reg. 62; *Ainslie* v. *Boynton*, 2 Barb. 258; *Fry* v. *Boyd*, 3 Gratt. 73; *Wharton* v. *Hopkins*, 11 Ired. 505; *Haywood* v. *McNair*, 2 D. & B. 283. But see *McConnaughey* v. *Chambers*, 64 N. C. 284.

Thus, he takes real estate subject to equitable liens for the purchase-money: *Corn* v. *Sims*, 3 Metc. (Ky.) 391; and see *Zaring* v. *Cox*, 78 Ky. 527; and existing mortgages: *Wurtz* v. *Hart*, 13 Iowa 515; *Dimon* v. *Delmonico*, 35 Barb. 554; *Luchenbach* v. *Brickenstein*, 5 W. & S. 145; judgment liens. See *Crosby* v. *Hillyer*, 24 Wend. 280. But compare *Mifflin* v. *Rarey*, 3 Rawle 483; mechanics' liens: *Twelves* v. *Williams*, 3 Whart. 485; *Murry* v. *Hutcheson*, 8 Abb. N. Cas. 423; and legacies charged upon it: *Couch* v. *Delaplaine*, 2 N. Y. 397; *Swoyer's Appeal*, 5 Penn. St. 377. Likewise, he takes deposits in bank subject to any lien which the bank may have on the same: *Beckwith* v. *Bank*, 3 Whart. 485; goods levied upon subject to the levy: *Crosby* v. *Hillyer*, 24 Wend. 280; and, as stated, debts and choses in action subject to the right of set-off in the debtor: *Bank of Harrisburg* v. *Sherlock*; *Ainslie* v. *Boynton*; *Fry* v. *Boyd*; *Wharton* v. *Hopkins*; *Haywood* v. *McNair*, *supra*.

The owners of subsisting and valid liens on, and equities in, the property assigned, are in no wise affected in their rights by the fact of the assignment. A prior mortgagee, for example, may foreclose his mortgage after the assignment as effectually as if it had not been made; and if the assignee sells the mortgaged property the interest of the mortgagee is transferred to the fund arising from the sale: *Lindermann* v. *Ingham*, 36 Ohio St. 1.

WHEN EQUITY, LIEN OR SET-OFF MUST HAVE BEEN ACQUIRED. — The equity, lien, or set-off, to be available, must have been acquired prior to the taking effect of the assignment: *Smith* v. *Brinckerhoff*, 6 N. Y. 305; *Myers* v. *Davis*, 22 Id. 489; *Martine* v. *Willis*,

2 E. D. Smith 524; *Bank* v. *Knox*, 19 Gratt. 739, 747; *Birdwell* v. *Cain*, 1 Caldw. (Tenn.) 301; *Brashear* v. *West*, 7 Pet. 608.

But it has been held that a lien attaching subsequent to the making of the assignment and prior to its acceptance by the trustee has precedence: *Crosby* v. *Hillyer*, 24 Wend. 280.

A set-off, to be maintainable against the assignee, must have been also due at the time of the assignment: *Wells* v. *Stewart*, 3 Barb. 40; *Keep* v. *Lord*, 2 Duer 78; *Lawrence* v. *Bank*, 3 Rob. 142; *Beckwith* v. *Bank*, 9 N. Y. 211; *Myers* v. *Davis*, 22 Id. 489; *Lockwood* v. *Beckwith*, 6 Mich. 168, 175. *Contra*. *Maas* v. *Goodman*, 2 Hilt. (N. Y.) 275. And see *Morrow* v. *Bright*, 20 Mo. 298; *Fry* v. *Boyd*, 3 Gratt. 73. It is not sufficient that it became due before suit was commenced: *Hicks* v. *McGrorty*, 2 Duer 295. Or, if a judgment, it must have been obtained before the assignment: *Ogden* v. *Prentice*, 33 Barb. 160.

A creditor cannot set off his claim against the value of goods purchased at the assignee's sale: *Bateman* v. *Connor*, 1 Halst. L. 104.

ASSIGNEE NOT A "BONA-FIDE PURCHASER."—It has been attempted to establish the doctrine that an assignee for the benefit of creditors is a "*bona fide* purchaser" for value within the contemplation of the registry and other acts designed for the protection of such parties, and hence not bound, for instance, by prior equities of which he had no notice at the time of the assignment; but while this view has been entertained by several courts: *Dey* v. *Dunham*, 2 Johns. Ch. 182; *Wickham* v. *Martin*, 13 Gratt. 427; *Evans* v. *Greenhow*, 15 Id. 153; *Exchange Bank* v. *Knox*, 19 Id. 739; *Hollister* v. *Loud*, 2 Mich. 309; *Gates* v. *Labeume*, 19 Mo. 17. Also see *Wise* v. *Winer*, 23 Mo. 237; *Hardcastle* v. *Fisher*, 24 Id. 70; the prevailing opinion is that unless there be a consideration therefor of some sort at the time, or some right given up, an assignment for the benefit of creditors will not constitute the assignee nor the creditors *bona fide* purchasers for value within the meaning of such statutes, but they will, so far as such provisions are concerned, take subject to prior and valid equities and liens, whether or not they had notice of them: *Clark* v. *Flint*, 22 Pick. 231; *Frow* v. *Dowman*, 11 Ala. 880; *Walker* v. *Miller*, Id. 1067; *Pierson* v. *Manning*, 2 Mich. 444; *Knowles* v. *Lord*, 4 Whart. 500; *Haggerty* v. *Palmer*, 6 Johns. Ch. 437; *Griffin* v. *Marquardt*, 17 N. Y. 28; *Maas* v. *Goodman*, 2 Hilt. 275; *Willis* v. *Henderson*, 5 Ill. 13; *Slade* v. *Van Vechten*, 11 Paige 21; *Arnold* v. *Grimes* 2 Ia. (Clarke) 1; *Wolf* v. *Eichelberger*, 2 P. & W. (Penn.) 346; *Twelves* v. *Williams*, 3 Whart. 485; *Vandyke* v. *Christ*, 7 W. & S. 373; *In re Howe*, 1 Paige Ch. 125; *Leger* v. *Bonaffee*, 2 Barb. 475; *Taylor* v. *Baldwin*, 10 Id. 637; *Sieman* v. *Austin*, 33 Id. 20; *Reed* v. *Sands*, 37 Barb. 185; *Schieffelin* v. *Hawkins*, 14 Abb. Pr. 118; s. c. 1 Daly 294; *Ray* v. *Birdseye*, 2 Denio 626; *Wood* v. *Robinson*, 22 N. Y. 567; *Van Waggoner* v. *Moses*, 26 N. J. L. 570; *Bridgford* v. *Barbour*, 80 Ky. 529.

LIEN VOID AS TO CREDITORS.—The doctrine of the principal case expressed in the first paragraph of the syllabus, namely, that "a mortgage void as to creditors [by reason of some inherent defect or a failure to file or have recorded] is void as against an assignee for the benefit of creditors," is not uncontroverted. Indeed, although it is supported by the former decision of the same court in *Hanes* v. *Tiffany*, therein cited, and decisions elsewhere: *Building Association* v. *Willson*, 41 Md. 506; *Swift* v. *Thompson*, 9 Conn. 63; *Rood* v. *Welch*, 28 Id. 157; *In re Leland*, 10 Blatch. 503; *Barker* v. *Smith*, 12 Bank. Reg. 474, it is contradicted by decisions of courts of very high authority: *Vanheusen* v. *Radcliff*, 17 N. Y. 580; *Mellon's Appeal*, 32 Penn. St. 121; *Luckenbach*

v. *Brickenstein*, 5 W. & S. 145; *Wakeman* v. *Barrows*, 41 Mich. 363; and consult *Williams* v. *Winsor*, 12 R. I. 9; *Lockwood* v. *Slevin*, 26 Ind. 124; *Dorsey* v. *Smithson*, 6 Harr. & Johns. 61. These different decisions proceed upon different theories as to the position of the assignee and the relation he sustains to the several parties interested in the assignment. The one class consider him as the representative of the creditors, and possessing, in such capacity, the most of their rights and powers; the other, treat him as the representative of the assignor, and subject, in his rights and powers, to all things to which the assignor himself was subject. Thus, in the principal case, as has been observed, the judge delivering the opinion of the court, said: "By the assignment the rights of creditors passed to the assignee as matter of law. The possession of the assignee was the possession of creditors. The right of creditors to seize the property in the hands of the assignee did not exist, but the assignee was bound, in law, to administer the trust for their benefit. Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for their benefit after the assignment," while in *Mellon's Appeal*, *supra*, it was said that "the assignee is the representative of the assignor, and is affected by all the equities which existed against the property in the hands of his assignor, enjoying his rights, and no others, except that the property is protected from execution in his hands. He is in no sense the representative of the creditors, and, therefore, cannot take to himself any of their rights."

CONVEYANCE FRAUDULENT AND VOID AS TO CREDITORS.—The authorities are in like dispute as to the power of the assignee to take advantage of the common statutory provision that conveyances (including mortgages) in fraud of creditors shall be void; some holding that he has this power: *Pillsbury* v. *Kingon*, 33 N. J. Eq. 287; s. c. 36 Am. Rep. 556; *Hallowell* v. *Bayliss*, 10 Ohio St. 537; *Waters* v. *Dashiell*, 1 Md. 455. See also *Freeland* v. *Freeland*, 102 Mass. 475, *Shipman* v. *Ætna Ins. Co.*, 29 Conn. 245; *Shirle* v. *Long*, 6 Rand. 735; while others hold that he has not: *House* v. *Cremer*, 13 Neb. 298; *Heinrichs* v. *Woods*, 7 Mo. App. 236; *Sere* v. *Pitot*, 6 Cranch 332; *Estabrook* v. *Messersmith*, 18 Wis. 572; *Browning* v. *Hart*, 6 Barb. 91; *Leach* v. *Kilsey*, 7 Id. 466; *Maulers* v. *Culvers*, 1 Dev. 164; *Carr* v. *Gale*, 3 Woodb. & M. 68; *Flower* v. *Cornish*, 25 Minn. 473; *Hahn* v. *Salmon*, 20 Fed. Rep. 801.

WHEN LIENHOLDER ENTITLED TO DIVIDEND.—A creditor who has a claim secured by a lien is entitled to a dividend from the assignee only on such residue of his claim as may remain unpaid after he has exhausted the property subject to his lien: *Re Knowles*, 13 R. I. 90; *Wurtz* v. *Hart*, 13 Iowa 515.

L. K. MIHILLS.

Akron, Ohio.

Supreme Court of Nebraska.

STATE EX REL. WEBSTER *v.* NEBRASKA TELEPHONE CO.

Where a corporation or person assumes and undertakes to supply a public demand, made necessary by the commerce of the country, such as a public telephone, such demand must be supplied to all alike, without discrimination.

Telephone companies being common carriers of news, all persons are entitled to equal facilities in the enjoyment of the benefits to be derived from the use of the tele-

phone; and where no good reason is assigned for a refusal by a telephone company to furnish a telephone instrument to a person who desires to become a subscriber and tenders a full compliance with all the rules established for other subscribers, a writ of mandamus will issue to compel such company to furnish such person with the necessary instruments.

Respondent is the owner of and is conducting a system of public telephone exchanges in Nebraska and Iowa, including in its circuit about fifteen hundred telephone instruments, supplied by it to that number of subscribers, upon the terms fixed by itself. Relator applied to be admitted as a subscriber and was refused. He tendered a full compliance with all the rules of the company. His place of business was accessible, no reason being shown why his request should not be granted. On an application for a mandamus: *Held*, that the telephone is a public servant in the commerce of the country, and that respondent, having undertaken to supply the demand must supply to all alike, without discrimination; and that, having undertaken to supply the demand, in the city of L., wherein relator resided, and being fully able to furnish him with a telephone instrument, the same as its other subscribers, it was his duty to do so.

APPLICATION for mandamus. The facts of the case are sufficiently stated in the opinion.

J. R. Webster, for relator.

R. S. Hall, for respondent.

The opinion of the court was delivered by

REESE, J.—This is an original application for a mandamus to compel the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to the subscribers of the respondent. The respondent has refused to furnish the instruments, and presents several excuses and reasons for its refusal, some of which we will briefly notice. It appears that during the year 1883 the respondent placed an instrument in the office of the relator, but for some reason failed to furnish the relator with a directory or list of its subscribers in Lincoln, and various other cities and villages within its circuit, and which directory the relator claimed was essential to the profitable use of the telephone, and which it was the custom of respondent to furnish to its subscribers. Finally, the directory was furnished, but upon pay-day the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instruments were removed. Soon afterwards the relator applied to the agent of the respondent and requested to become a subscriber, and to have an instrument placed in his place of business, which the respondent refused to do. It is insisted that the conduct of the relator now relieves respondent

from any obligation to furnish the telephone, even if such obligation would otherwise exist. We cannot see that the relation of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone, the law gives it an adequate remedy by an action for the amount due. If the telephone has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not alone relieve it from the discharge of those duties. While either or perhaps both of the parties may have been in the wrong, so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action.

The pleadings and proofs show that the relator is an attorney at law in Lincoln, Nebraska; that he is somewhat extensively engaged in the business of his profession, which extends to Lincoln and Omaha, and surrounding cities and county seats, including quite a number of the principal towns in southeastern Nebraska; that this territory is occupied by respondent exclusively, together with a large portion of southwestern Iowa, including in all about fifteen hundred different instruments. By the testimony of one of the principal witnesses for respondent, we learn that the company is incorporated for the purpose of furnishing individual subscribers telephone connection with each other under the patents owned by the American Telephone Company; instruments to be furnished by said company and sublet by the Nebraska Telephone Company to the subscribers to it. This is clearly the purpose of the organization. While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the state, and in some matters has no higher or greater rights than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand or necessity in commerce the respondent proposes satisfying.

It is also true that the respondent is not possessed of any special privileges under the statutes of the state, and that it is not under quite so heavy obligations, legally, to the public as it would be,

had it been favored in that way. But we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of respondent, from the very nature and character of its business, gives it a monopoly of the business which it transacts. No two companies will try to cover the same territory. The demands of the commerce of the present day make the telephone a necessity. All people, upon complying with the reasonable rules and demands of the owners of the commodity—patented as it is—should have the benefits of the new commerce. The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things, no other wires or posts will be placed there while those of respondent remain. The relator never can be supplied with this new element of commerce, so necessary in the prosecution of all kinds of business, unless supplied by the respondent. He has tendered to it all the money required by it from its other subscribers in Lincoln for putting in an instrument. He has proven, and it is conceded by respondent, that he is able, financially, to meet all the payments which may become due in the future. It is shown that his office can be supplied with less expense and trouble to respondent than many others which are furnished by it. No reason can be assigned why respondent should not furnish the required instruments, except that it does not want to. There could, and doubtless does, exist, in many cases, sufficient reason for failing to comply with such a demand; but they are not shown to exist in this case. It is known to be essential to the business interests of relator that his office be furnished with a telephone. The value of such property is, of course, conceded by respondent; but, by its attitude, it says it will destroy those interests, and give to some one in the same business, who may have been more friendly, this advantage over him.

It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there; that, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations; that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public

demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send dispatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate,—the demand which it proposes to supply. It has so assumed and undertaken to the public. That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and in so far as it has been introduced for public use, and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. It has and must be held to have taken its place by the side of the telegraph as such common carrier.

The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is "affected with a public interest," it must supply all alike, who are alike situated, and not discriminate in favor of nor against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public, do not apply to telephones, for the reason that they are of recent invention, and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce, nor to the particular kind of service known or in use at the time when these principles were enunciated, "but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph," and from the telegraph to

the telephone, "as these new agencies are successfully brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they related, at all times and under all circumstances:" *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 9.

In *State* v. *Bell Telephone Co.*, 36 Ohio St. 296, a writ of mandamus was granted by the Supreme Court of Ohio to compel the telephone company to place one of its telephone instruments in the place of business of the relator, and to give it equal facilities with other telegraph companies. This decision was based upon the statute of that state which provided that telegraph companies should receive dispatches from and for other telegraph companies' lines, and from and for individuals, and transmit them with impartiality and good faith, under a penalty of one hundred dollars, and that the provisions of the act should apply also to telephone companies. So far as the obligations of the telegraph companies are defined by the act (except the payment of the penalty) they are simply declarative of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of the statute; and the same is true of the clause in the act making its provisions applicable to telephones. See authorities cited in the brief of relator in that case. But the court declines discussing that question, as the question between the parties could be determined by reference to the statute. In *Allnut* v. *Inglis*, 12 East 527, the Court of King's Bench, in England, in 1810, held that "where private property is, by the consent of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public, in the exercise of that public interest conferred for their benefit." In *Vincent* v. *Chicago & A. R. Co.*, 49 Ill. 33, the Supreme Court of Illinois held that it was the duty of a railroad company to make a personal delivery of consigned property to the consignee, in cases where such delivery was practicable, and that the duty existed independent of the statute, and it was within the power of the court to enforce the observance of such duty. See, also, *People* v. *Manhattan Gas-light Co.*, 45 Barb. 136; *Chicago & N. W. Ry. Co.* v. *People*, 56 Ill. 365; *Munn* v. *Illinois*, 94 U. S. 113.

It is insisted by the respondent that mandamus is not the proper remedy in this case; that if the obligations contended for by the