Kellog *v.* Howes, 81 Cal., 170. But under the statute as it reads, there is no possible way for the owner to prevent liens attaching, except by obtaining the written consent of persons who may be absolutely unknown to him until after the mischief has been done.

Whether or not such an Act will be held constitutional, it seems to the writer, must depend very much upon what the Court before whom the Act comes shall deem to be good public policy. If the Court considered that the lien of the mechanic is something to which he is reasonably entitled, and which tends to the well-being of the community, the statute will probably be upheld: Henry & Coatsworth Co. *v.* Evans, 97 Mo., 47; Merrigan *v.* English, 5 L. R. A., 37; Colpetzer *v.* Trinity Church, 24 Neb., 113; Albright *v.* Smith, 51 N. W., 590. *Contra*, Spry Lumber Co. *v.* Trust Co., 77 Mich., 199.

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# EDITORIAL NOTES.

BY W. D. L.

THE NEW JURISDICTION OF THE SUPREME COURT OVER POLITICS. — Boyd *v.* Nebraska *ex rel.* Thayer, decided by the Supreme Court of the United States on the first of last February, and digested in our abstracts of cases for this number, excited considerable interest on account of the political importance of the result, since the decision involved the question of who had the right to the Governorship of Nebraska. It will probably be remembered, however, not on this account, but because it meets and decides for the first time an important question relating to the jurisdiction of the Supreme Court. The facts of the case were briefly these:

The Constitution of the State provided that no one was eligible to hold office in the State who had not been for two years previous to his election a citizen of the United States. James A. Boyd received the highest number of votes at the fall election of 1890, but after his inauguration he was ousted from his office by the Supreme Court of the State on the ground that he had not been for the two years previous to his election a citizen of the United States. Boyd then appealed to the Supreme Court of the United States. The Chief Justice, Mr. Justice

FIELD dissenting, delivered the opinion of the Court, and upheld the jurisdiction on the ground that a right claimed under *a statute of the United States* is drawn in question, and that the decision of the State Court had been adverse to the claimant. He says: "Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial court or otherwise. But when the trial is in the courts, it is 'a case,' and if a defence is interposed under the Constitution or laws of the United States, and is overruled, then, as in any other case decided by the highest court of the State, this Court has jurisdiction by writ of error."[1] The Court here simply follows the opinion of Mr. Justice BROWN in the case of Missouri *v.* Andriano.[2] In that case the question in dispute was the right to act as Sheriff of a county in Missouri. Under the law of the State no one but a citizen of the United States could hold office in the State. The Supreme Court of the State, reversing the court below, held that the respondent, whose citizenship was in question, was a citizen of the United States, and, therefore, entitled to the office. The decision being in favor of the right claimed, the Supreme Court of the United States dismissed the writ of error, but Mr. Justice BROWN distinctly said that, had the decision of the Supreme Courts of the State been against the right claimed, they would, without question, have had jurisdiction.

The text of the dissent of Mr. Justice FIELD in the Nebraska Governorship case has not yet been published, and we are unable to state the exact grounds on which it is placed.

The question presented is one of great interest, and we cannot but regret that the Court did not go more fully into the grounds of their decision. The argument against the jurisdiction which will occur to every one is briefly this: The State alone has the right to prescribe the qualifications necessary to hold public office under the State gov-

[1] 143 U. S., 160.
[2] 138 U. S., 496, 499.

ernment. This right is exclusively in the State Legislature. To say that the interpretation of laws relating to the qualifications of office-holders in the State can by any possibility involve the construction of a law of Congress, is impossible. When the State Constitution says that one of the qualifications for holding office in the State shall be citizenship of the United States, it impliedly adopts the naturalization laws of Congress as part of its laws relative to those qualifications. The construction of the laws of Congress by the State Courts in a case involving the right of one to hold office in the State, is not nor cannot be the construction of the laws of the United States, but of the State. To put an illustration of this argument: A State passes a law which requires the Governor of the State to have the qualifications which are necessary for one to be President of the United States. Would a decision by the State Courts, that A. B., who had received the highest number of votes, was thirty-four years old, and, therefore, ineligible to hold the office of Governor, be reviewable in the Supreme Court of the United States? Would not the law requiring the Governor to be thirty-five years of age be a law of the State, and its interpretation and application the exclusive province of the State Judiciary?

The argument in favor of the jurisdiction of the Supreme Court appears to us to be necessarily somewhat as follows: The State, in requiring the same qualifications for its office-holders as are required in order that one may become a citizen of the United States, places a qualification for office which can only be determined by the Federal Courts. Thus the question whether Boyd was entitled to the Governorship of the State of Nebraska could only be determined by first ascertaining the fact, to wit: Was he a citizen of the United States? The Federal Courts alone are competent for the final and authoritative ascertainment of this fact. To leave its determination to a State tribunal would be to deprive the citizens of the State and of the United States of the equal protection of the laws, because it would be to say that anyone whom the judges of the State thought was not eligible for office, could not hold

office. In other words, the State, by making as one of their qualifications for holding office the fact that one has complied with the laws of the United States, has necessarily surrendered to the Federal Courts the jurisdiction of the question whether any individual has complied with the law.

The importance and far-reaching consequences of the decision cannot be overestimated. There is not a State in Union which does not require its office-holders to be citizens of the United States. The decision, therefore, brings into the Supreme Court a great many political controversies concerning rights to a political office in a State. Concerning the soundness of the decision we do not venture an opinion. But anything which adds to the possible number of the political controversies in the Supreme Court, and especially State political controversies, is, from a practical standpoint, to be sincerely regretted.

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A NEW STATE TAX.—No sooner is one system of State taxation on the subjects beyond its jurisdiction, or on interstate commerce, upset, then another scheme is concocted by the members of the bar, or the committees of State legislatures. One of the most ingenious ever devised is embodied in the State tax law of North Carolina. The laws of that State, which have been upheld as constitutional both by the Federal Court for the Northern District of North Carolina, and the Supreme Court of the State, tax all grocers, druggists, etc., on the gross purchases made by them of certain articles, whether within or without the State. The tax is called a License Tax for the permission to carry on the drug or other business. The Supreme Court of North Carolina upholds the tax on the ground that it is one on the drug business which is carried on wholly within the State. It may be objected, however, that the fact that a business is carried on wholly within the State does not prevent it from being part of interstate or foreign commerce. A shopkeeper must buy or make before he can sell. No one would pretend that one can be taxed on all that he makes outside the State, before he brings his products

within the State. Can he be taxed on what he brings in for the purpose of sale? Brown *v.* Maryland, and Low *v.* Austin completely answer that question in the negative. By what ingenuity of logic then can a State tax the value of those things purchased for sale in the hands of him who has purchased them, even before he has imported them? It may be said that the tax is on the man, not on the goods. But it may be asked, what better way to tax goods, than to tax the owner, as in this case, according to the value of the goods as gauged by the amount of money he paid for them?

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THE QUESTION OF NEGLIGENCE AND THE APPELLATE COURTS.—In the case of the Grand Trunk Railway Co. *v.* Ives [1] the Supreme Court, through Mr. Justice LAMAR, has made a very careful review of the subject of the negligence and contributory negligence. The law of negligence is, or ought to be, simple. There are two, and only two, fundamental principles. First, that where there are two persons, and one is acting with ordinary care, and the other is not, and as a result of such a lack of care he hurts the former, he is responsible for the damage. Second, if both were in fault, that is if neither observed ordinary care, neither can recover from the other.[2] It is evident that what is ordinary care varies with each case. Ordinary care in a child would not, though in exactly similar circumstances, be ordinary care for a man.[3] One set of facts can never be a precedent for the determination of any other set of facts. "Ordinary care" in any particular instance is a fact, and not a law relating to those facts.[4]

If, therefore, there is one thing which one would imagine that under our system of jurisprudence would be a fact for a jury, and not law for the court, it would be the determination of whether there was "ordinary care"—

[1] 144 U. S., 408, decided April 4, 1892.

[2] Butterfield *v.* Forrester, 11 East., 60.

[3] Robinson *v.* Cone, 22 Vt., 213; Amer. & Eng. Ency. of Law, Vol. 16, p. 398; Title Negligence, 3.

[4] What constitutes due care must depend upon the circumstances of the case: COLT, J., in Gaynor *v.* Old Colony R. R., 100 Mass., p. 214.

under the peculiar circumstances of the case—exercised by a defendant charged with negligence. Yet we constantly hear that negligence is a *mixed question* of law and fact. What is meant by this does not always seem to be clear in the minds of those who employ the term.[1] The term itself is misleading. It is employed in reference to negligence in two ways. Stepping on a railroad track, not at a crossing, has been presumed to be contributory negligence by the court.[2] Just as in some States, not complying with statutory regulations for the running of trains through the city, is in law presumed to be negligence,[3] though as applied to a particular road or a particular crossing, no one would say that common prudence required one not to go on the tracks after inspecting the road, or to run at a slow rate of speed. And yet if either of these facts appear in evidence the case would have been taken from the jury by the court. The court is not supposed to consider whether the action of either party was *per se* neligence. The term "mixed question," therefore, is very inapplicable. It is no more "mixed" than any other application of law to facts. Again, the second sense in which this term is used is where it is intended to convey the idea that the court must first decide whether there is sufficient evidence for the jury to say whether there is negligence on the part of the plaintiff or defendant, before allowing the jury to decide whether there is negligence. As in the former case there is no question of fact, so in the latter case there is no question of law. The court, in taking a case from the jury because there is not evidence enough to warrant a jury in finding negligence or ordinary care, simply decides a question of fact, acting as a thirteenth and supervising juror.

The use of the word "mixed" is, and always has been, confusing, and it is not extraordinary that it does not appear once in the opinion of the Supreme Court in the case we

[1] See op. of CHRISTIANCY, Ch. J., in Lake Shore and Mich. R. R. Co. *v.* Miller, 25 Mich., p. 299.

[2] Mulhessin *v.* Delaware R. R. Co., 81 Pa. St., 366.

[3] Schlereth *v.* Missouri Pac. Ry., 96 Mo., 509; Virginia Ry. Co. *v.* White, 84 Va., 498.

have referred to. On the other hand, Mr. Justice LAMAR gives a very clear explanation of the principles which should govern a court in deciding when to leave a question of negligence to a jury. When a given statement is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is even considered to be one of law for the court.[1] It is necessary that courts should exercise some control over the findings of a jury. When the verdict is such that all men of common sense would agree that the verdict is against the weight of evidence, then it is the duty of the court to set that verdict aside and grant a new trial. Surely, then, there is much to be said in favor of the position taken by Mr. Justice FIELD, that where if the jury brought in any but one verdict, the court would be obliged to set that verdict aside; it is then a matter for the court's discretion, whether they shall direct a verdict for the defendant.[2]

The only difficulty—and it is a serious one—in allowing a judge to direct a jury on the evidence to bring a specific verdict, is the fact that the evidence is seldom plain and undisputed. It may be the province of the trial judge to act as a thirteenth juror in drawing a conclusion of fact from the facts in evidence, but there is no apparent necessity for his acting in that capacity to assist the jury in determining

[1] Op., p. 417.

[2] Op. in North Penn. R. R. *v.* Com. Bk., 223 U. S., p. 733. He says: "It would be an idle proceeding to submit the evidence to the jury when they could justly find only one way." Citing Anderson County Commissioners *v.* Beal, 113 U. S., 227, 271, Ch. J. CHRISTIANCY in Lake Shore & Mich. R. R. Co. *v.* Miller, 25 Mich., p. 292, puts the same thought in a slightly different way when he says: "The laws of nature and of the human mind, at least such of them as are obvious to the common comprehension of mankind, as well as the more obvious dictates of common sense and principles of human action – which are assumed as truths in any process of reasoning by the mass of sane minds—constitute part of the law of the land, and may, and must, be assumed by the court, without being found by a jury; indeed, the finding of a jury which should clearly disregard them, should itself be disregarded by the court."

what facts are in evidence. Therefore, if binding instructions on questions of the proper conclusion of fact from the facts in evidence are given by the judge, he should put the case in a hypothetical manner: "That if the jury believe, etc."[1]

Negligence is a question of fact, but like all other questions of that character, while properly a question for the jury, they should not be allowed to disregard reason and common sense.

Admitting, therefore, the duty of the trial judge to refuse to receive a verdict against reason and common sense, or even to direct the verdict of the jury where only one verdict can be given from the undisputed evidence, it does not make the question of negligence any less a question of fact. And if negligence or ordinary care is a pure question of fact with absolutely no legal test of what is negligence or ordinary care in a particular case, why make the refusal of a judge to grant a new trial, because the appellant thinks the verdict was against the evidence, and that only one verdict —the one in his favor—could have been rendered by reasonable men, the subject of a writ of error to a higher court?

Such an appeal can, confessedly, solve no question of law. The discussion, while burdening the reports, as the innumerable accident cases do, can only reiterate the long-settled fundamental principles of the law of negligence, but can never shed a ray of light on the decision of any other case. The reason for this is evident. It is a question of fact, not of law, which has been appealed. The Supreme Court retry the case on the record, a task for which, having failed to hear the evidence given, they are by no means as well fitted as the trial judge.

The purpose of an appellate court is not to delay justice, but to settle the law, and to see that inferior tribunals act in accordance with the law. And yet where, perhaps, the trial judge has made no error in law, the appellate tribunal is asked to go over the evidence given in the case, because the appellant's view of the evidence is not the same as the

[1] See op. WELSH, J., in Marietta Rd. Co. *v.* Pecksley, 24 O., 654.

jury's. The result is that every accident case, which is not compromised, is appealed in the hope that an appellate retrial of the facts of the case will result in a reversal of the judgment. Thus a plaintiff is kept from the enjoyment of the fruits of his verdict without any corresponding gain to the community arising from the likelihood of a more just result. No matter how able the judge who tried the case, there is certain to be an appeal; which the appellate court must take time to listen to, because it demands a review of all the evidence. This invariable delay for the purpose of delay throws a contempt on the administration of justice.

But, to the legal mind, perhaps the most serious consequence of allowing appeals in questions of fact, is the tendency observable in all the courts, except such carefully selected tribunals as the Supreme Court of the United States, and some of our State Supreme Courts, to regard questions of negligence in particular cases as questions consisting mainly of legal presumptions. In every appeal the briefs of counsel are burdened with cases whose facts are, or are claimed to be, somewhat similar to the facts of the case argued and in which certain decisions were made. The courts in their turn—the habit of looking to precedents being strong—in their opinions cite their prior opinions in cases with approval, or distinguish their former opinions from the one before them; so that what was at one time a mere opinion as to the proof in a particular case, tends to become a settled legal presumption and part of a so-called law of negligence. It may be affirmed with confidence that nothing so surely tends to defeat justice as to clog the determination of the question of whether A. B. or C. in peculiar circumstances used *ordinary care* or *reasonable care*, as a text-book full of arbitrary legal presumptions of what is ordinary and what is reasonable care. It is only the obsolete system of the schoolman of the middle ages reinstated.