telegram was intended to secure, are among the natural consequences of the delay, those for which, under the first part of that rule, the company would be liable without regard to its knowledge of the meaning of the message, and that the probability of such consequences is not a special circumstance requiring to be known by the company. In the Florida and Georgia cases, however, the rule in Hadley *v.* Baxendale seems to be regarded as wholly inapplicable, while in Virginia the statutory liability of telegraph companies is held to be independent of their knowledge of the meaning of messages.

The practical application of the doctrines above reviewed involves a consideration of the right of telegraph companies to limit their liability to cases where messages are repeated or specially insured, but such a consideration would exceed the space assigned to the present note.

CHARLES CHAUNCEY BINNEY.

DEPARTMENT OF EVIDENCE.

UNION PACIFIC RAILWAY CO. *v.* BOTSFORD.[1] SUPREME COURT OF THE UNITED STATES.

A court of the United States, in an action for an injury to the person, cannot, on application of the defendant, compel the plaintiff to submit to a physical examination in advance of the trial.

STATEMENT OF THE CASE.

Error to the Circuit Court of the United States for the District of Indiana.

This was an action by the appellee, Clara L. Botsford, against the appellant, for negligence in the construction and care of an upper berth in a sleeping car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concus-

[1] 141 U. S., 250.

sion of the same, and resulting in great suffering and pain to her in body and mind, and in permanent and increasing injuries. Answer, a general denial.

Three days before the trial (as appeared by the defendant's bill of exceptions) "the defendant moved the Court for an order against the plaintiff, requiring her to submit to a surgical examination, in the presence of her surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be made in manner not to expose the person of the defendant in any indelicate manner, the defendant at the time informing the Court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be without any witnesses as to her condition. The Court overruled said motion, and refused to make such order, upon the sole ground that this Court had no legal right or power to make and enforce such order."

To this ruling and action of the Court, the defendant duly excepted, and after a trial, at which the plaintiff and other witnesses testified in her behalf, and which resulted in a verdict and judgment for her in the sum of $10,000, sued out this writ of error. The Supreme Court affirmed the judgment of the Court below.

THE POWER OF A COURT TO COMPEL PLAINTIFF IN ACCIDENT CASE TO SUBMIT TO PHYSICAL EXAMINATION.

The principal case presented to the Supreme Court of the United States for the first time a question concerning the inherent powers of courts about which there had already been, in the courts of the several States, a considerable variance of opinion. The precise question was whether, in a civil action for an injury to the person, the Court, on application of the defendant, could compel the plaintiff to submit to physical examination in advance of the trial. Justice GRAY, by whom the judgment of the Court was delivered, after a characteristically exhaustive inquiry and research, pronounces the conclusion to be that neither by the common law, by common usage, nor by the statutes of the United States, has a Court of the United States the power to subject a party to examination by a surgeon, without his consent, and in advance of the trial. A dissenting opinion, in which Justice BROWN concurred, was filed by Justice BREWER.

The decisions throughout the

country, on the point involved, are much in conflict; but, in general, it may be said that the numerical weight of opinion in the State courts is against the view taken in the principal case. Particularly in the southern and western States, the doctrine that courts have an inherent power to grant such a compulsory order has been extensively adopted. That there is a growing tendency in favor of the recognition of the existence of such an inherent right and power cannot be doubted; but that the weight of precedent and authority is in support of the position, may well be questioned.

The closest analogy to be found in the common law is probably afforded by the ancient appeal of mayhem (abolished in 1719); for there, when the issue joined was whether it was mayhem or no mayhem, the question was decided by the Court upon inspection, for which purpose Blackstone tells us, the assistance of surgeons might be invoked. The trial by inspection or examination was likewise had for the determination of such questions at the infancy or the identity of a party. It is, however, very properly pointed out by Justice GRAY that always where trial by inspection was allowed, it took the form, not of a precedent auxiliary to a jury, by whom the result was subsequently to be finally adjudicated, but as a complete substitution for any jury whatsoever; and that it obtained only in exceptional cases, where, as Blackstone says, "It was not thought necessary to summon a jury to decide," because "the fact, from its nature, must be evident to the Court, either from ocular demonstration, or other irrefragable proof;" and, therefore, "the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the Court alone."

The writ *de ventre inspiciendo* at common law likewise presents somewhat of an analogy to the compulsory examination sought in the principal case. This, however, no less than the trial by inspection in the instances above named, was employed only to subserve some exceptional or unusual exigency; as, in criminal cases, to guard against destroying an innocent life, where a woman, convicted of a capital crime, was suspected to be quick with child; or, in matters of purely civil right, to secure the rightful succession to property; for where a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, the heir or devisee might have this writ to examine whether she was with child or not.

If it should seem, from this instance of the writ *de ventre inspiciendo*, as is contended by Justices BREWER and BROWN in their dissenting opinion, that always where the interests of justice seemed to require a personal examination, the power of the common law courts to compel such an examination was exercised, it is not to be forgotten that the exigency which induced the writ was required to be one of peculiar necessity and urgency; and that even in England, as remarked by Justice GRAY, in all the history of the common law courts no order to inspect the body of a party in a *personal* action appears ever to have been moved for, much less granted. If the power existed it is inconceivable that it should not have been frequently invoked. Actions for assault and battery,

and for personal torts, generally, it need hardly be said, were among the most common known; while in no case does it appear that the inherent power of the courts in this regard was ever claimed or even supposed. The writ *de ventre inspiciendo* has issued in England in comparatively recent times: *In re* Blakemore, 14 Law Journal (N. S.), Ch. 336 (1845). In America, on the other hand, there seems to be no instance of its ever having been considered in any part of the country as suited to the habits and conditions of the people.

The authority of courts, in actions for divorce proceeding on the ground of impotency or sexual incapacity, to make an order subjecting a party to physical examination, is plainly referable to the civil and canon law, and is in no wise according to the course of the common law. It rests also, as is remarked by Justice GRAY, upon the interest which the public, no less than the parties, have in the question of upholding or dissolving the marriage state.

If the common law, as thus far investigated, fails to disclose any colorable support to the doctrine of compulsory physical examination by the courts, it is still further to be remembered with how great respect and solicitude the common law guards the native right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law. This right has been well said to be a right "of complete immunity," a right "to be let alone:" Cooley on Torts, 29. "Inviolability of the person," says Justice GRAY, "is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, especially a woman, to lay bare the body or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass." If it should seem inconsistent (as the dissenting justices in their opinion declare it does) that a plaintiff may in the presence of a jury be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such wounds, the court, although persuaded that he is perjuring himself, cannot require him to roll up his sleeve and thus make manifest the truth, the answer should seem to be that while anyone, with the permission of the Court, and with a due regard for decency, *may* expose his body if he will, yet that it is impossible that he can be *compelled* to do so in a civil action, without his consent. Unquestionably, if he unreasonably refuses to show his injuries when asked so to do, then, as in any other case of a party declining to produce the best evidence in his power, that fact may be considered by the jury as bearing on his good faith.

In general, it may be said of the opinion of the Court as delivered by Justice GRAY, and of the dissenting opinion as filed by Justices BREWER and BROWN, that while the former is characterized by a tendency to uphold the considerations of delicacy which support the doctrine of the inviolability of the person at common law, the latter is distinguished by what may be the modern tendency throughout the country rather to relax or subordinate refined considerations of the sanctity of the person to the

attainment of an occasional more exact and impartial administration of justice.

In the State courts, the question of the power to order an inspection of the body of the plaintiff in an action for personal injury was first presented in 1868 before a judge of the New York Superior Court, at special term, in Walsh *v.* Sayre, 52 How. Pr., 334, who affirmed the existence of the power; a decision, however, which was subsequently overruled in general term: Roberts *v.* Ogdensburgh, etc., Railroad, 29 Hun., 154. In 1873, in Missouri, and in 1882, in Illinois (Parker *v.* Enslow, 102 Ill., 272), the power of the Court to make such an order was peremptorily denied, the Court in Loyd *v.* Railroad, 53 Mo., 509, saying: "The proposal of the Court to call in two surgeons and have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law." In 1877, however, the Supreme Court of Iowa, in Shroeder *v.* Railroad, 47 Iowa, 375, led off with the doctrine of the discretionary power of the courts in this regard; since which time, following her lead, the courts of the southern and western States have gradually announced the same doctrine: Turnpike Co. *v.* Baily, 37 Ohio, 104; Hatfield *v.* St. Paul, etc., Railroad, 33 Minn., 130; Owens *v.* Kansas City, etc., Railroad, 95 Mo., 169; Stuart *v.* Havens, 17 Neb., 211; Atchison, etc., Railroad *v.* Thul, 29 Kan., 466; White *v.* Milwaukee Railway, 61 Wis., 536.

In the Iowa case, Shroeder *v.* Railroad, *supra*, the Court said: "Whoever is a party to an action in a court . . . . has a right to demand therein the administration of exact justice. This right can only be secured and thoroughly respected by obtaining the exact and full truth touching all matters in issue in the action. . . . It quite satisfactorily appears . . . that the full effect of the injuries and the extent of the plaintiff's disability could be determined by physicians and surgeons upon an examination of the body of the plaintiff. . . . . The decided, indeed, the very great preponderance of the evidence offered, apart from his own testimony, was to the effect that the injuries had wrought no such effects as claimed by plaintiff. . . . To our minds the proposition is plain that a proper examination by learned and skillful physicians and surgeons would have opened a road by which the case could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right admininistration of the law, demand that he should have produced it. . . . It is the practice of the courts of this State to permit plaintiffs who sue for personal injuries to exhibit to the jury their wounds or injured limbs in order to show the extent of their disability or suffering. If for this purpose the plaintiff may exhibit his injuries, we see no reason why he may not in a proper case and under proper circumstances be required to do the same thing for a like purpose upon the request of the other party."

In Georgia, the power of the Court to order a physical examination, in the sound discretion of the presiding judge, is distinctly asserted: Richmond, etc., Railroad *v.* Childress, 82 Ga., 719. The

Court say: "It can certainly admit of no doubt that, in a proper case for such an examination, the cause of justice would be subserved by it. . . . As to the suggestion made in argument that the rule would operate hardly upon delicate and modest females, we can only say that this would be safely guarded by the discretion of the trial judge. There would be no danger, we think, in this country, of an examination being ordered needlessly, or where an improper shock to modesty or feelings of delicacy would be likely."

In Alabama, etc., Railroad *v.* Hill, 90 Ala., 71, the Court say: "When it becomes a question of possible violation to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice to the defendant on the other, the law cannot hesitate; justice must be done. . . . We are satisfied from the evidence that such an examination would not have involved any ill consequences to the plaintiff."

In Indiana it is held (Pennsylvania Co. *v.* Newmeyer, 28 N. E. Rep., 860), that in the absence of a statute the Court has no power to order an examination.

In Illinois, as has been said, it was declared, in 1882 (Parker *v.* Enslow, 102 Ill., 272), that the Court had no power to compel an examination. In Chicago, etc., Railroad *v.* Holland, 122 Ill., 461 (1887), however, such power in the Court appears to be recognized, the decision proceeding on the ground that as the defendant, after refusal of the Court below, had ample opportunity to make an examination by its own physician, there was no ground for complaint. See St. Louis Bridge Co. *v.* Miller, 28 N. E. Rep., 1091.

In Arkansas, where the plaintiff alleges that his injuries are of a permanent nature, the defendant is declared to be entitled, *as a matter of right*, to have the opinion of surgeons based upon a personal examination, unless there is already an abundance of expert evidence, in which case the Court will use its discretion: Sibley *v.* Smith, 46 Ark., 275.

In Texas it is ruled that such an order will never be made unless the ends of justice seem imperatively to demand it, and never where the party is willing to be examined by competent and disinterested men without such an order: Gulf, etc., Railroad *v.* Norfleet, 78 Tex., 321. See Missouri Pacific Railroad *v.* Johnson, 72 Tex., 95.

In New York, on the other hand, in McGuigan *v.* Railroad, 129 N. Y., 50 (1891), the Court say: "It is a significant fact that not a trace can be found in the decisions of the common law courts either before or since the Revolution of the exercise of the power to compel a party to a personal action to submit his person to an examination at the instance of the other party. . . . The non-existence of a power is not conclusive against its existence, but it is strange if the power existed that it should have been unused for centuries and never have been called into activity. . . . The power to compel a party to submit to an examination of his person has never been conferred by statute. We cannot say that the exercise of the power might not in some cases promote justice and prevent fraud. On the other hand, unless carefully guarded, it would be subject to grave objections. But we have to deal only with the question of the power of the courts, in the absence of legis-

lation. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have an inherent jurisdiction to mould the proceedings to meet new conditions and exigencies is true, but in a limited sense. They cannot, under cover of procedure, or to accomplish justice in a particular case, invade recognized rights of person or property. . . . The exercise by the Court of the power now invoked, as has been shown, is not sanctioned by any usage in the courts of England or of this State. Its existence is not indispensable to the due administration of justice. Its exercise depending on the discretion of the judge, would be subject to great abuse. We think the assumption by the courts of this jurisdiction, in the absence of statutory authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which had lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period, never in fact had any existence."

In Pennsylvania, in 1880, in an action by a dentist for the price of a set of teeth furnished to defendant's wife, where the defence was that the teeth did not fit, the Court of Common Pleas, No. 4, of Philadelphia County, dismissed a motion for a rule to show cause why an order of court should not be made requiring the defendant to produce his wife for the inspection of her mouth by the jury, THAYER, P. J., saying: "The compulsory attendance of the wife for the purpose of such an exhibition would be a tyrannical exercise of power wholly without authority of law, and contrary to the Bill of Rights:" Pettit *v.* Brewer, 8 W. N. C., 253. In 1888, however, the Court of Common Pleas, No. 2, of the same county, in an action for injuries to the person, required the plaintiff to file a bill of particulars, from which the necessity for ordering a physical examination might first be made to appear: Lawrence *v.* Keim, 45 Leg. Int., 434; and where, in Common Pleas, No. 1, the bill of particulars failed to state the injuries with sufficient definiteness, a physical examination was ordered: Harvey *v.* Traction Co., 26 W. N. C., 231 (1890). A physical examination was also, in 1890, ordered in Erie County: Hess *v.* Lake Shore, etc., R. R., 7 Pa. County Rep., 565. See Johnson *v.* Com., 115 Pa., 369.

The numerical weight of opinion throughout the country, as has been said, is against the view taken in the principal case. It is to be remarked, however, that while the courts have been strenuous in asserting the existence of the power, the instances where its exercise has been held to be necessary have been notably infrequent. Merely to say, as the majority of the decisions do, that the power rests in the sound discretion of the Court, obviously does not meet the case. The real question remains whether the power exists at all. If it be said that plaintiffs may exaggerate the injuries they have received, it may be "this evil is far less than the adoption of a system of bodily and, perhaps, immodest examinations, which might deter many, especially women, from ever commencing actions, however great the injustice they had sustained:" Roberts *v.* Ogdensburgh, etc., Railroad, 29 Hun. (N. Y.), 154.

HOWARD BENTON LEWIS.