THE
AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Published Monthly for the Department of Law by PAUL D. I. MAIER, at 115 South Sixth Street, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the TREASURER.

NEGLIGENCE; INSANITY AS DEFENCE FOR TORT; WILLIAMS V. HAYS (N. Y.), 52 N. E. 589 (1899). This was an attempt to hold the captain of a brig responsible for negligently causing the destruction of his vessel. The jury found that an ordinarily prudent man would have avoided the loss. The defendant claimed that while doing the acts complained of he was unconscious and knew nothing of what occurred; that in fact he was, from some cause, insane, and therefore not responsible for the loss of the vessel. At the trial the case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence, but if insane, was not responsible. Judgment being rendered in favor of the defendant, an appeal was taken, and the Court of Appeals, in an opinion by Earl, J., overruled the lower court, on the general rule that an insane person is just as responsible for his torts as a

sane person, except where intention is an essential ingredient. No distinction was drawn between negligence and other torts, but it was suggested that had the insanity of the captain resulted from his efforts to save the ship during the storm through which it passed, a different case might be presented. On the second trial of the case the lower court assumed that the captain's insanity was the result of his great exertions to save his ship, but failed to see how that fact presented any exception to the principle laid down, that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. The court of appeals held that this carried the law of negligence to an unreasonable point, and again reversed the judgment.

The responsibility of an insane person for negligence is the subject of much discussion among the text writers. See *Harvard Law Review*, May, 1896, p. 65. Wharton, in his book on Negligence, observes that negligence is not imputable to persons of unsound mind, the law intervening to protect them, at least, as tenderly as it does persons capable of taking care of themselves. See *Chic. & A. R. R. Co.* v. *Gregory*, 58 Ill. 226 (1871). Similar rules are laid down in Beven on Negligence, 2d Ed., pp. 52–55; Jaggard on Torts, Vol. II, p. 872; and by Clerk and Linsdell on Torts, pp. 11, 34. The opposite view is held by Shearman & Redfield on Negligence, Vol. I, sec. 121; Pollock on Torts, p. 46; and Cooley on Torts, 2d Ed., 117. Cooley sees no distinction between responsibility for negligence and any other tort, such as trespass. He points out (p. 98) that the wrong "consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it." He recognizes that there is an apparent hardship, but declares it to be a question of policy, a choice having to be made between two innocent parties. The American cases follow Mr. Cooley's view with scarcely a dissenting voice. On insanity as a defence for torts in general, see *Beals* v. *See*, 10 Pa. 56 (1848); *Lancaster Co. Bank* v. *Moore*, 78 Pa. 407 (1875); *Wirebach's Ex.* v. *First Nat'l Bank*, 97 Pa. 543 (1881); *Ins. Co.* v. *Shewalter*, 40 W. N. C. (Pa.) 80 (1896); *Jewell* v. *Colby*, 66 N. H. 399 (1890); *McGee* v. *Willing*, 31 Leg. Int. (Pa.) 37 (1874); *Sheppard* v. *Wood*, 1 Lanc. (Pa.) 175 (1884); *Weaver* v. *Ward*, Hobart, 134 (1724); *Moore* v. *Crawford*, 17 Vt. 499 (1845); *Bush* v. *Pettibone*, 4 N. Y. 300 (1850); *Krom* v. *Schonmaker*, 3 Barb. 650 (1848); *Cross* v. *Kent*, 32 Md. 581; *Behrens* v. *McKenzie*, 23 Iowa, 343 (1867); *Ward* v. *Constatter*, 4 Bax. 64 (1874); *McIntyre* v. *Sholty*, 13 N. E. 239 (1887). The following are cases where the tort complained of was negligence: *Neal* v. *Gillett*, 23 Conn. 437 (1855); *Morain* v. *Devlin*, 132 Mass. 87 (1882); *Brown* v. *Howe*, 9 Gray, 84 (1857); *Beals* v. *See*, 10 Pa. 56 (1843). Ordronaux's Judicial Aspects of Insanity, Chapter VII, contains a collection of cases on this subject.

The case of *Chic. & A. R. R. Co.* v. *Gregory*, 58 Ill. 226 (1871), is cited by Wharton as supporting his view of the subject.

In that case the court refused to impute contributory negligence to an imbecile child who sought to recover damages for injuries received upon a railroad track. The case, however, does not seem to support the rule contended for. It is true that an insane person cannot be said to be really negligent, but, as stated in *Karow* v. *Ins. Co.* (Wis.), 15 N. W. 27, damages are recovered "not on the ground of *negligence*, as that word is usually understood, but in the language of Chief Justice Gibson (*Beals* v. *See, supra,*) on the principle that, where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it." This being the reason of the rule adopted by the cases, it will be seen that the facts in *Chic. & A. R. R. Co.* v. *Gregory* do not fall within its spirit, and the case is no authority against it.

Accepting the doctrine of the cases, that insanity is not a good excuse for negligence, the lower court, in the case before us, found that the condition of the captain was brought about by his unceasing efforts to save his ship. For more than two days he was constantly on duty, refusing to leave the deck until he was exhausted. Finally he went to his cabin, took a large dose of quinine and lay down, and from that time until he found himself in the life saving station, he was found to have been deranged. As stated above, however, this state of facts did not, in the eyes of the trial judge, affect the question. The view of the Court of Appeals was that it altered the case entirely. The Court of Appeals cites no cases in support of its view, but reasons as follows: "The man is not yet born in whom there is not a limit to his physical endurance, and, when that limit has been passed, he must yield to laws over which he has no control. . . . What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must or be responsible." That one should be held responsible for omitting to do impossible things is looked upon by the court as an absurdity, and as the law does not suffer an absurdity, the defendant was held not liable. At first blush it would seem equally absurd to hold any insane person responsible for negligence, diligence being to such persons a practical impossibility. But it is submitted that the Court of Appeals is right, and the trial judge wrong, not because insanity should be a defence for negligence, but because the real defence of the captain was not his insanity, but the fact that he had done all that an ordinary prudent man could do under the circumstances and could do no more. Had he been swept overboard by the storm and lost, the case would have been no stronger. The principle involved is the same as that in the case in which a driver of ordinary skill and prudence lost control of his horses, and was held not to be liable for damage sustained by a passer-by. See *Brown* v. *Collins* (1873), 53 N. H. 442, and cases there commented upon.

NEGLIGENCE; INJURIES SUSTAINED BY A PERSON WHILE A TRESPASSER. IN *Quigley* v. *Clough*, 53 N. E. 884—a Massachusetts case decided in May, 1899—suit was brought by an involuntary trespasser for injuries sustained during the trespass and recovery was denied. The case arose on the following state of facts: The defendant was the owner of a corner property; a house stood on his lot, but at some distance from each of the intersecting streets, and passers-by were in the habit of taking a short cut across the lot. To prevent this he built a fence from his house to the street corner and later made it of barbed wire. The plaintiff coming along the street one dark night, by mistake left the sidewalk, ran into the fence, and received injuries for which he brought suit with the result stated above.

The case of *Howland* v. *Vincent*, 10 Metc. 371 (1845), cited by the court, is in accord with this decision. There the owner of land had made an excavation for a cellar about a foot or two from the sidewalk and had taken no precaution to prevent passers-by from falling in. The plaintiff in that case met with an accident in much the same manner as in the case of *Quigley* v. *Clough*, but no recovery was allowed him. The case of *McIntire* v. *Roberts*, 149 Mass. 450 (1889), also supports this view.

The well-known spring-gun case, in which a man has been held liable for injuries inflicted upon trespassers by concealed spring guns, is referred to; but a substantial distinction is made by Judge Holmes, when he points out in that case—*Bird* v. *Holbrook*, 4 Bing. 628—the *intention* of the defendant was to inflict personal injuries upon the trespasser, whoever he might be; and the case was much as though the defendant had found one trespassing on his land and then assaulted him. In Quigley's case the court does not admit that any intention to injure existed, but regards the barbed wire fence as a natural means of preventing the public from walking across the defendant's lot and a means wholly devoid of malice or intent to injure.

As against the position taken by the court, the case of *Marble* v. *Ross*, 124 Mass. 44 (1877), was strongly urged. There the owner of a field kept in it a vicious stag. A trespasser received injuries from this stag, and the court said that an action could be maintained to recover damages for the injuries received, provided the trespasser did not go on the land with knowledge of the danger. It was said that a duty vested upon the owner of keeping and restraining the stag at his peril. But here again an apparent distinction exists; for the stag is the active *cause* of the injuries sustained, while in the case in hand the fence is an *inert* passive condition of the injuries. In the case of *Marble* v. *Ross*, the court says, "The unlawful character of his (*i. e.* the trespasser's) act did not contribute to his injury or affect the defendant's negligence." Such a statement could not be made with regard to the facts in Quigley's case. So, on the other hand, in *Marble* v. *Ross*, the trespass was a mere *condition* of the injury, while in Quigley's case it was the *cause*.