THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

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

Edited by members of the Department of Law of the University of Pennsylvania under the supervision of the Faculty, and published monthly for the Department by OTTO KRAUS, JR., Business Manager, at S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa. Address all literary communications to the PRESIDENT EDITOR; all business communications to the BUSINESS MANAGER.

NOTES.

THE RIGHT OF A MOTHER TO RECOVER FOR INJURIES TO HER MINOR CHILD.—In the month of June, 1906, the Supreme Court of Pennsylvania handed down a decision which is an interesting illustration of the continual striving of tribunals toward an equitable interpretation of the law, and of the somewhat tortuous methods which have frequently to be employed in order to arrive at the results desired. The case referred to is that of *O'Brien* v. *The City of Philadelphia*, 215 Pa. 407 (Advance Sheets), and the question involved, the right of a mother to recover compensation for an injury to her minor child, whom she is supporting.

The action was brought by the child against the City for damages for personal injuries, and also by the mother, Louisa

O'Brien, (the father having deserted her ten years before) for compensation for the loss of the child's services; the jury returned a verdict of $3500 for the former and $500 for the latter. The defendant appealed from the second verdict. Chief Justice Mitchell in delivering the opinion of the Court, said, "The right of action of a father for injury to a child was based on his duty of support, and his consequent right to the services of the child. The common law, which paid no heed to merely sentimental considerations or matters of feeling, put the action on a basis of master and servant. Even the most serious of all, the seduction of a daughter, was redressed as an injury to the father as master, *per quod servitium amisit.* The mother, being under no obligation to support, had no corresponding right to service. This was the state of the law when the act of June 26th, 1895, P. L. 316, was passed——

"The mother who without compulsion voluntarily does what the father is under legal obligation to do,—*i.e.* support the child—shall have the same equal right to the custody and service as is now by law possessed by the father. In the present case, if the father were now supporting the child, his right of action would be unquestioned. As he is not doing so, but the mother is, her right to the services is by the statute the same as his would be, and her right to sue for their loss must necessarily be the same."

The entire ground of this decision is obviously the interpretation of a statute. Let us see how that statute reads. Act of June 26th, 1895, P. L. 316. Section I. "That hereafter, a married woman who is the mother of a minor child, and who contributes by the fruits of her own labor or otherwise towards the support, maintenance and education of her said minor child, shall have the same and equal power, control and authority over her said child and shall have the same and equal right to its custody and services as is now by law possessed by her husband, who is the father of such minor child. Provided however, "That the mother of such minor child is otherwise qualified as a fit and proper person to have the control and custody of said child."

Judge Mitchell's reasoning is clear. Once grant the mother's right to custody and services, once establish the tortious deprivation of those services, and the right to compensation accrues. The gist of the action, then, is loss of service. The statute has no bearing on the relation of parent and child as such, it merely establishes, under certain conditions, the relation of mistress and servant where apparently it did not exist before.

Was there no such natural relation of service between

mother and child at the common law? Certainly, as the law was understood in Pennsylvania, there was not. The question was definitely settled by the Supreme Court in 1867, in the case of *The Fairmount and Arch St. Passenger Ry Co.* v. *Stutler*, 54 Pa. 375. The action was by a widowed mother for injuries to her 19 year old son while alighting from one of the defendant's tram-cars. The boy lived with his mother, was occasionally employed in odd jobs, and turned over to her all the money he earned. Judge Hare left the case to the jury, and they returned a verdict for the plaintiff, but on appeal the Supreme Court reversed the judgment, saying: "The evidence was sufficient, had the action been by a father, to establish the relation of master and servant, and it is in right of such a relation, rather than in her character of parent, that the mother claims damages in this action. There was no evidence of any express contract between the mother and son by which she was entitled to his services, and at law she has no implied right to them."

But the same year, Judge Woodward, who pronounced this opinion, in deciding an action brought by a widow for the *death* of her minor son, (*Penn. R. R.* v. *Bantom*, 54 Pa. 495), after admitting her right to recover under the Act of 1855, said: "Thus far the Legislature have compelled us to go. We keep step with them, and limit the mother's right to a case of *death*, and not of *maiming*, because they have changed the rule of the common law no further than this."

There is nothing equivocal about this decision, nothing qualified, here is no opposition of legal principles nor balancing of conflicting authorities. Most evidently the law is looked upon as definite, incapable of other interpretation. Let us see whether this conclusion will stand the test of authority.

From the earliest stages of human society the right of the father to the custody of his children, and to the value of their services up to a certain age, has been undisputed. The Romans carried it to an extreme, granting the father the power of life and death over his household, and continuing certain of his powers of control through an indefinite span of years, or placing no limit on them whatever. The common law of England, while never admitting the father's powers to so extreme a degree, yet extended to him an almost complete control over his children during their minority, withholding only acts so flagrant as to be prejudicial to the natural rights of a human being, in which category the early English jurists, unlike the Romans, saw fit to rank a man's children. The theory of this doctrine seems to have been that he who gives life to a being is bound by moral law to maintain it

during its period of helplessness, which the law fixes as the first twenty-one years of its existence. Therefore a father was held legally responsible for the support of his children, and the laws considered that this responsibility carried with it a corresponding right to all the reciprocal advantages which might be gained from the children during this period of maintenance. Hence the privilege of requiring a child's services and appropriating his earnings, the right to control his property, to govern his marriage, and other similar prerogatives, all vested in the father.

The common law grew up in an age when the earning population, or at least that recognized as such, was wholly male. On the death or desertion of a father, the family were permitted to get along as best they might; the law cast no duty on the mother to maintain them. Hence there being no duty to support, there was no correlative right to service or control; no influence whatever save a moral one. "The legal power of a father," says Blackstone, (1.453),—"for a mother, as such, is entitled to no power, but only to reverence and respect,—the power of a father, I say, over the persons of his children, ceases at the age of twenty-one."

"Where a child was injured as a result of a tortious act he had, in common with an adult, his action against the tortfeasor for the pain and suffering caused by the injury. But he was entitled to no compensation for the loss of his time and earning capacity, for he was held to have no right to these, so their loss could mean nothing to him. In the father vested this right, his was held to be the privation, and to him was given the remedy. Here then is the origin of the doctrine that all rights of a father to compensation for injuries to his children are based on the loss of service. "Where a child suffers wrong, he has his action for the personal injury. But besides this, the parent may usually claim indemnity for loss of his child's services, to which should be added the incidental expenses incurred in consequence of the injury. Hence arises a cause of action in the parent, *per quod*, the foundation of which is the loss of the child's services—" Schouler "Domestic Relations "p. 105.

At first blush it would seem that there would be no hardship in not granting a similar right to the mother, for the child, on the father's death and in the absence of a guardian, being entitled to the value of his own services, it would appear reasonable that he could recover for their loss. But there were certain situations in which this was not possible. A notable instance was that of the civil action for seduction. The gist of this action by a fiction of the law, has always been held to be loss of service to the parent of the female

seduced, or to the one entitled to her services, no right of action, under any circumstances, lay with her, all such right having been vitiated by her consent to the wrong. Here then, in the event of the father's death, and in the absence of a guardian, the right of action must be in the mother or in nobody, so here we have the issue squarely before us. And here the authorities disagree.

In *South* v. *Denniston*, 2 Watts 474 (1834), the Supreme Court of Pennsylvania denies the right, saying: "Not being bound to the duty of maintenance, a mother is not entitled to the correlative right of services, and standing as a stranger to her daughter in respect to these, the relation of mistress and servant can be constituted between them but as it may be constituted between strangers in blood, save that less evidence would perhaps be sufficient to establish it."

In New York the contrary is held—*Gray* v. *Durland*, 50 Barber 100, *Furman* v. *Van Sise*, 56 N. Y. 435. This doctrine is generally followed in this country. "Any one entitled to the services of a female may sue for her seduction," says Webb in "Pollock on Torts," p. 278 n. "Any person who stands *in loco parentis*, as a stepfather, or grandfather, or guardian, where the facts prove the relation of master and servant, can maintain such suit. Or the mother, where she becomes the head of the family by the death of the father." And he cites a large number of cases in various jurisdictions in support of the rule.

Here is one class of cases in which a number of courts have seen fit to relax the hard and fast rule of the logical negative, and recognize the relation of mistress and servant between a mother and daughter. But the action for seduction is placed upon the foundation of service only in form; it is an extension by the courts of this form to the more serious offence, the substance being in reality the grief and mental anguish of the afflicted parent, and the measure of damages based thereon. So when, as in the case we are discussing, the substance as well as the form of the action, and consequently the damages awarded, are fixed on the standard of loss of earning power, so ready a laxity on the part of the courts is scarcely to be expected. Yet the tendency has been strongly set in that direction all through the nineteenth century, in this country at least.

Says Reeve in 1888 (Domestic Relations p. 369): "The older cases hold that the mother, after the father's death, has no right to the services of the minor child, nor is she liable, as the father is liable, for the support of such child. But the better modern authority is in favor of the principle that on the death of the father the mother has the same right to the

authority and services of a minor child that the father had in his lifetime."

Various courts have applied this doctrine in various ways. Where by interpretation of the common law or by statute, the duty is cast upon the mother of maintaining the child, when able to do so, courts have uniformly held her entitled to custody and services, and hence to compensation for their loss. In Massachusetts they have held it to be a common law duty—(*Nightingale* v. *Worthington*, 15 Mass. 270, and *Dedham* v. *Natick*, 16 Mass. 134). In the latter of these cases the court lays down the rule: "The mother, after the death of the father, remains the head of the family. She has the like control over the minor children, as he had when living. She is bound to support them, if of sufficient ability; and they cannot, by law, be separated from her." This is also the state of the law in Connecticut, (*Matthewson* v. *Perry*, 37 Conn. 35) and in New Jersey, (*Campbell* v. *Campbell*, 3 Stockton, 265).

In other states the obligation has been created by a legislative enactment, designed to reduce pauperism, and requiring any father or grandfather, mother or grandmother, children or grandchildren of every poor person not able to work, to support them if of sufficient ability. This rule is hinted at by the New York Court of Appeals in *Furman* v. *Van Sise*, *supra:* "She may maintain such action based upon the right to service and the loss thereof. Also upon the statutory duty upon her to support her indigent child, if able to do so."

Where, however, no such obligation is cast upon the mother, the courts of certain states have granted her a right to her child's services upon another ground. The New Hampshire court states this doctrine in *Riley* v. *Jameson*, 3 N.H. 23: "While a mother actually supports her children at her own expense, she is entitled to their services, and they may perhaps be presumed to be in her employment." In other words, admitting that no duty of support was laid upon the mother by the law, and that consequently no correlative rights could be presumed, they hold that, where she voluntarily assumes the maintenance of her children, she acquires thereby those rights which are considered inseparably connected with the obligation. The decision of the same court in *Hammond* v. *Corbett*, 50 N. H. 501, is based upon this presumption.

Indeed it is upon this principle that the Pennsylvania Statute is founded: "A married woman, who is the mother of a minor child, and who contributes by the fruits of her own labor or otherwise, toward the support, maintenance and education of the said minor child," etc. Under such a statute, finally, the mother has acquired this right in Pennsylvania

and certain other jurisdictions in which the courts have not seen the way clear to granting it to her upon any other grounds. This is the situation in Maryland (*County Commissioners* v. *Harford*, 60 Md. 340), and in Indiana (*Rwy Co.* v. *Willouby*, 43 N. E. 1058). Still others continue to deny the right entirely; in *Pray* v. *Gorham*, 31 Maine 240, the opinion sets out that "if it is intended to declare that the mother, after the death of the father, is entitled to the services of a minor child, in the same manner as the father while alive was entitled to them, the position cannot be maintained." At least this was the state of the law in Maine in 1850; whether it has since been changed or not the writer of this article has been unable to ascertain.

Altogether a situation sufficiently complicated, yet presenting solutions any one of which might readily have been accepted by the Pennsylvania courts of the early nineteenth century. Yet so strong was the tendency in the other direction, and so binding the effect of the decision in *Ry Co.* v. *Stutler*, *Supra*, that even after the passage of the enabling act, in the case of *Kelly* v. *Traction Co.*, 204 Pa. 623 (1903), Judge Brown threw out the dictum that "until the legislature gives the mother the right to sue in a case of injury to a minor child, caused by the negligence of another, and not resulting in death, we cannot give it to her." True the court here did not have the problem squarely before them, for, as the case stood, the child's father was alive at the time of the accident, and died pending the suit; the mother, being substituted in her personal capacity, acquired of course, no rights which she could not have claimed when the injury was suffered. Yet the language of Judge Brown would give rise to the inference that, even under the facts of the present case, the court of 1903 would scarcely have construed the act so as to cover it. Not until the present year, when the question came unavoidably before them, did they see their opportunity to overcome an ancient and unjust doctrine, the reason for which, if any ever had existence, has long since passed away.

Robert T. McCracken.

BREACH OF PROMISE TO—WHETHER EVIDENCE THAT DEFENDANT SEDUCED PLAINTIFF IS ADMISSIBLE IN AGGRAVATION OF DAMAGES.—In Bouvier's Dictionary we have the following definition of damages: "The indemnity recoverable by a person, who has sustained an injury either, in his person, property or relative rights through the act or default of another. Turning to Sedgwick we find that evidence of mental suffering due to seduction may be offered in fixing the damages.

The "jury are instructed that they may consider the following elements of damages, (1) disappointment of plaintiff's reasonable expectation and the loss caused thereby . . .; (2) injury to her affections; (3) mortification and distress resulting from defendants refusal to fulfil his promise— . ."

In 2 Starkie under the head of Breach of Promise of Marriage we are told that any circumstances which enable the jury to appreciate the loss sustained by the plaintiff are admissible in evidence in aggravation of damages.

To quote from the American Law Encyclopedia: "The authorities it is believed all agree in holding that mental injuries may constitute an element of damages. A person's mind it has been said being no less a part of his person than his body and indeed sufferings of the latter." (*Syer* v. *Barkhamsted* 22 Conn. 290.)

"Evidence to aggravate damages means nothing more than that evidence is admissible of facts and circumstances which would go in aggravation of the injury itself."

With this thought as to what should constitute proper indemnity in an action such as that under consideration, we are prepared to consider the attitude of the various courts.

The general rule undoubtably is that damages in actions of contracts are to be limited to the consequences of the breach of contract, and that no regard is to be had to the motives which induced the violation of the agreement.

Viewing the question from a strictly contractual point of view, one would be inclined to deny the admission of such testimony, on the maxim of *volenti non fit injuria*. In other words in as much as the woman is *particeps criminis* she has no legal rights or logical grounds upon which to complain in a court of justice (*Burke* v. *Shain* 2 Bibb. Ky.), rather it would be decidedly irrational to permit one to voluntarily enhance damages by acts aggravated by himself. It might also be a question whether if this were permitted, seduction would then be less frequent. In line with this thought let us quote the words of Judge Parker in *Peck* v. *Peck*, 12 R. I., 485: "It seems to us that social morality will not be promoted by relieving either sex of legal responsibility for voluntary action."

Judge Breese, in his dissenting opinion in *Fidler* v. *McKinley* 21 Ill., 316, goes so far as to say that he entertains grave doubts as to whether any really good and virtous woman has ever brought or ever will bring a suit of this nature.

It seems to us that the whole problem revolves about the one pivot whether every woman is unchaste who has been seduced. Some jurisdictions maintain that a woman, no matter what the circumstances may be, is *in pari delicto*

with the man in a criminal offence, that the act of seduction was not contrary to her will however basely it may have been obtained. (Gibson J., in *Weaver* v. *Bachert*, 2 Pa., 80).

On the other hand, an engagement brings the two parties into an intimate and confidential relation due largely to the fidelity, love, and implicit reliance which each should bear toward the other and which woman by her natural proclivities is prone to place in man. To take advantage of these relations is a palpable breach of trust, as flagrant as any act committed by a trustee, guardian or confidential adviser, who betrays a dependant ward, beneficiary or client. To subsequently rudely abnegate a promise of a person whose confidence has been invaded and basely abused, whose citadel and strong fortress of virtue has been taken and razed to the ground, should be a very relevant fact in determining the damages (*Sheahan* v. *Barry*, 37 Mich., 218).

In considering the cases bearing on this subject we discover three classes: (1) those in which seduction was committed prior to the promise of marriage (*Baldy* v. *Stratton*, 2 Pa., 80); (2) those in which the promise was merely a means to an end as the evidence plainly indicates (*Wells* v. *Padgett*, 8 Barb., 323); (3) those in which the promise was made in good faith prior to the seduction, but which for some reason or other has been broken.

One might very naturally expect in regard to these three different divisions, diverse views and opinions. For example in *Espy* v. *Jones*, 37 Ala., 379, it was held that if evidence of seduction can be received in any case to aggravate the damages, it is only where seduction follows the promise, and is affected by means of it; seduction prior to the promise is not admissible evidence. While some jurisdictions draw clear distinctions, mindful of these three divisions; others pay no regard to subtle reasonings or finely spun logic, but will either admit or deny such evidence.

There seems to be no fixed rule in this country upon this subject. Massachusetts decisions have been in the affirmative following *Sherman* v. *Rowson*, 102 Mass., 395, and *Kelley* v. *Riley*, 106 Mass., 337. The decisions of the supreme courts of New Jersey, Illinois, Missouri and Tennessee are all to the same effect. In some states (Califorina, Indiana, Iowa, and Tennessee) statutes have gone to the extent of providing that an unmarried woman may maintain an action for her seduction. In Pennsylvania on the other hand they take the opposite opinion, relying upon *Buldy* v. *Stratton*, 11 Pa., 316, and *Weaver* v. *Bachert*, 2 Pa., 80. The propriety of these Pennsylvania decisions has been questioned (*Kniffen* v. *McConnell*, 30 N. Y., 285). It does not appear that in these two Penn-

sylvania cases the question has been squarely met. In the former the promise was made subsequent to the seduction and then only to screen the degradation and disgrace of its effects. In the latter there is no clear or direct evidence that the defendant had entered into an engagement to marry. Judge Gibson among other things said: "But a more grave objection lies in the want of evidence that there were mutual promises or any promises at all." In both cases there is no evidence whatsoever which shows that there was a betrayal of a well grounded belief in a promise of marriage.

One of the strongest lines of argument against its admission is found in Judge Breese's dissenting opinion—a very ably drawn view, in *Fidler* v. *McKinley*, 21 Ill., 316. He points out that what is said in *Paul* v. *Frazier*, 3 Mass., R. 71, upon which a great many decisions are based, is solely *obiter dictum*. What Judge Parsons says in this case is: "She is a partaker of the crime and cannot come into court to obtain satisfaction for a supposed injury to which she was a consenting party," but in elaboration he says: "If seduction has been practiced under color of that promise, the jury will undoubtably consider it as an aggravation of the damages." This *obiter dictum* of Judge Parson has been so frequently refered to, in cases where the present point has been at issue and has been directly met and decided. It is so thoroughly the attitude of such a large number of courts that has become authoritative in its significance.

Judge Breese places strong reliance on the principle that a woman is *in pari delicto* and by reason of that position has no right to use a crime in which she is a co-partner for her own benefit (*Burk* v. *Shain*, 2 Bibb. Ky). "It was unquestionably a wrong in which the defendant had debauched the plaintiff but it was a wrong of which she was *particeps criminis* and has no right to complain in a court of justice." For mere seduction there can be no action upon the principle of *volenti non fit injuria* (*Mainz* v. *Leders*, 21 R. I., 370). But it would seem that evidence of seduction under promise of marriage should be introduced in accordance with justice, higher ethics and social morality. This view was assumed in *Turner* v. *Vaughan*, 2 Wilson 399, where a bond had been given in consideration of passed cohabitation and was declared valid. In like manner the court enforced a contract for the settlement of a case of fornication and bastardy, Rohrheimer *et al.* v. *Winters* Supreme Court of Pa., 1889 (126 Pa. 352).

The female and her seducer can hardly be considered on equal grounds (*Well* v. *Padgett*, 8 Barb., 323). The two parties in the majority of cases can hardly be considered as

being in *pari delicto*. Lord Mansfield in *Morton* v. *Tenn* (3 Doug. R., 211) says: "Where seduction is accomplished through a promise of marriage, which the seducer never intended to perform, it is a fraud on his part and I can not but think it an abuse of language to say that the parties are *in pari delicto*." True the action is in contract but the procedure partakes largely of the nature of a tort (*Wallace* v. *Coil*, 24 N. J.) and the damages should be left to the sound discretion of the jury. There being no rule to apply to the damages it would seem that the plaintiff is entitled to recover compensation for all the mental anguish she has experienced in consequence of the breach of contract of marriage. The jury should exercise their sound judgment under all the circumstances of the case (*Hattin* v. *Chapman*, 46 Conn., 607.)

Judge Breese (*Fidler* v. *McKinley supra*) gives a further reason for the exclusion of the evidence of seduction viz: because promise of marriage cannot be introduced in aggravation of damages in a suit for seduction brought by a parent or party in *loco parentis*. (*Foster* v. *Schaffield Johns.*, 297, *Henry* v. *Jestr*, 2 Houst. Del., 66).

2 Starkie states that "the jury in a case of this nature are instructed that they are not confined to, in their estimate of damages from loss of service and the expenses consequent upon the seduction, but may award a compensatory for the loss which the parent has sustained in being deprived of the society of his child. It seems, though the contrary has been asserted, that evidence to show the defendant prevailed by means of a promise of marriage is admissible, for this is proper evidence of the extent of the injury and means used to perpetrate it, which in all cases where the jury are to assess damages, seems to be material for their consideration. Starkie's view is followed in the cases: *Franklin* v. *McCorkle*, 16 Lea (Tenn.); *White* v. *Campbell*, 13 Gratt (Va.) 573; *Hadkins* v. *Haskins*, 22 W. Va., 645. There seems however to be a good reason why such should not accrue to a parent's benefit. Surely he does not suffer more by loss of the contract, and that is the sole legal ground upon which his action is allowed (*Well* v. *Padgett*, 8 Barb., 323). But who would contend that a daughter does not suffer more in a breach of promise by reason of her seduction. Moreover when there is no parent, or person *in loco parentis*, what hope is there of introducing seduction in any action?

This latter view of Judge Breese has been reinforced against the admission of such evidence, lest the defendant be subjected to double vindictory damages, were parent likewise to bring action (*Febbs* v. *VanKleck* Trent J. in dissenting 12 Ill., 466).

The maxim that no one shall be twice vexed for the same cause will prevent any defendant from being twice sued for the same damages. If they can be recovered in this action under the pleadings a recovery would necessarily be a bar to any future action. This subject was recently considered in *Leonard* v. *Pope supra* 45, (*Sheahan* v. *Barry*, 27 Mich., 22).

But even if he should suffer the same damages twice, has he not injured two parties, and why should she, whose future has been blighted, be denied her proper compensation (*Leavitt* v. *Cutler*, 37 Wis., 46).

In a recent case, *Wrenn* v. *Downey*, 63 Atl., 401, Judge Gibson follows the reasoning of Judge Breese which we have considered at some length. In addition to the points already given he says that in as much as the tort was the result of an injury occasioned by her own act and another's her contributory negligence bars all action. An answer is found in *Bennet* v. *Bean*, 42 Mich., 346, which holds that even though the suffering caused by seduction was the result of her voluntary act it is not the immediate cause, and would never have arisen had the defendant fulfilled his part of the contract, and hence the fact that she was seduced under plaintiff's promise should necessarily go a great way in fixing damages.

A defendant, if he proves that a plaintiff had sexual intercourse with a third party, mitigates damages arising from a breach of promise of marriage. (*Dupoint* v. *McAdow*, 6 Mont., 277).

Would it not seem in accordance with justice, that, if he were the only aggravator, the only person who had seduced the plaintiff that such evidence should be admitted against him, especially when the act was perpetrated under the promise of marriage?

A defendant cannot be heard to plead in reduction of damages that the injury would not have been accomplished had his own improper advances been resisted (*Sherman* v. *Rowson*, 102 Mass., 364 relying on *Landen Littlehole* v. *Joel Dix*, 11 Cush., 364). In the latter case it was decided that a party guilty of assault and battery cannot show that, from the intemperate habits of the other party the injury was more aggravated than it would have been upon a person of temperate habits.

The seducer is directly responsible for the injuries. His act is just as grave even if the resistence to his approaches were weak. A strong sentence which is thoughly in keeping with modern ethics is in *Sheahan* v. *Barry*, 27 Mich., 221. "The common sense of mankind has approved the rule which hold the seducer responsible" in a promise of marriage.

The following cases deny such admission: *Tubbs* v. *Van-*

Kleck, 12 Ill. R. 446, *Conn* v. *Wilson*, 2 Overton (Tenn.) R. 233, *Boynton* v. *Kelley*, 3 Mass. R. 189, *Whalen* v. *Layman*, 2 Black R. 194, *Mainz* v. *Lederer*, 21 R. I. 370, 375, *Matthew* v. *Cribbett*, 11 Ohio, 330.

While on the other hand these cases answer the question affirmatively: *Burks* v. *Shain*, 2 Bibb. 343, *Geen* v. *Spencer*, Missouri R. 194, *Baldy* v. *Stratton*, 11 Penn. Stat. R. 123, *Perkins* v. *Hersey*, 1 R. L. 493, *Conlon* v. *Cassidy*, 17 R. I. 518, 23 Atl. 100, *Weaver* v. *Bachert*, 2 Penn. St. R. 121.

Warren K. Miller.