RECENT CASES

CARRIERS.

Carters and Expressmen Common Carriers.

The defendant, a corporation engaged in conducting a general moving and express business for hire, agreed to move the plaintiff's household goods from one residence to another in the same city. In the course of the carriage one of the moving vans caught fire and the goods were injured. The defendant was held liable on the ground that it was a common carrier and could not relieve itself from liability by proof that the fire was not due to any negligence on the part of its agents. *Collier* v. *Langan & Taylor Storage & Moving Co.*, 127 S. W. Rep. (Mo.) 435 (1910).

It seems to be well settled at the present time that persons, who engage in the business of draymen or truckmen for the transportation of goods and merchandise within a city are common carriers and are liable for injury to the goods carried in all cases except where such injury is caused by the act of God or a public enemy. 6 *Am. & Eng. Encyc. of Law*, 2d Ed., pp. 251, 253. *Gates* v. *Bekins*, 44 Wash. 422 (1906). *Caye* v. *Pool's Assignees*, 108 Ky. 124 (1900). This insurance liability is imposed because of the public nature of the business, the holding out to the public to carry for hire. Consequently, where the carriage is in pursuance of a special contract to serve one person only, the employment being therefore private and not public, this liability does not attach to the carrier. *Fancher* v. *Wilson*, 68 N. H. 338 (1895). The fact that the carrier has no regular tariff of charges for its work, but did it for a special price, is immaterial. Also a carrier, which limits its employment to the mere carriage of particular kinds of property, may be a common carrier as regards that kind of property and a private carrier as regards other property entrusted to its care. *Jackson Iron Works* v. *Hurlbut*, 158 N. Y. 34 (1899.) No case has gone so far as to hold that a drayman or truckman is a common carrier to the extent that he is bound to serve the public at large without discrimination. In some cases this right on the part of the carrier to refuse to carry has been held to be the proper test in a doubtful case as to whether he is a common carrier or not. On the other hand, in a recent case it was decided that the mere fact that one holding himself out as a common carrier discriminates between patrons, accepting some and rejecting others, does not absolve him from his liability as a common carrier. *Haugh* v. *Keenan Storage & Transfer Co.*, 223 Pa. 148 (1909).

CONTRACTS.

Contributory Negligence as a Defense in an Action on Contract

Although the greater part of the opinion in *Trout* v. *Watkins Livery & Undertaking Co.*, 130 S. W. Rep. 136 (decided May 31, 1910, St. Louis Court of Appeals, Missouri), is *dicta*, the questions forming the basis of discussion present some interesting phases of the law of contracts. From the facts before the Court, it appeared that the defendant was a corporation engaged in the livery business. For a consideration paid by plaintiff, it agreed to carry her from a hospital, where she had been undergoing treatment for illness, to her home. The carriage used was a heavy, enclosed

CONTRACTS (Continued).

vehicle, the bottom of which approached to within fourteen inches of the ground. The driver, when about five or six blocks from plaintiff's house, notified her that it would be impossible to continue the journey on account of the muddy condition of the streets. Plaintiff and her sister informed him of plaintiff's inability to walk, although this should have been obvious to him from the fact that plaintiff had been assisted to the carriage by her sister and a nurse. Plaintiff and her sister also suggested to the driver that he procure another conveyance. The driver communicated the situation to his employer by telephone, and told plaintiff of the alternatives his "boss" offered. These were to return plaintiff to the hospital or to bring her to defendant's livery barn and there transfer her into a storm buggy, by means of which she would be conveyed to her home. The driver was told that plaintiff's condition was such that she could not withstand the strain of either of these trips. Finally plaintiff was taken home by the family grocer, to whom she had sent word of her plight. The conveyance he used was an open one, and upon reaching the house of her next door neighbor she was seized with a chill. The testimony further showed that plaintiff caught a severe cold which resulted in a protracted illness.

The lower Court directed a verdict for the defendant, apparently on the ground that plaintiff had voluntarily waived her right to insist upon a completion of the contract of carriage. The appellate Court decided that the facts on the record did not tend to indicate such waiver, and that, therefore, the lower Court had erred. The Court then proceeded to discuss the questions involved with a view to the future disposition of the case. One of the objections on the part of defendant was that to consider the question of defendant's failure to exercise ordinary care for the sick passenger would, as a corelative thereof, permit the introduction of evidence tending to prove contributory negligence on the part of plaintiff, and thus introduce an anomaly to the effect that contributory negligence may be put forward as a defense in a suit on contract. The Court dismissed the objection as untenable, and cited one of its own cases, *Francis* v. *St. Louis Transfer Co.*, 5 Mo. App. 7, and a Massachusetts case, *Ingraham* v. *Pullman Co.*, 190 Mass. 33, 76 N. E. 237, 2 L. R. A. (N. S.) 1087, as precedents that in such actions, plaintiff's negligence, contributing to the injury, is admissible as a defense. It is submitted, however, that the cases cited do no more than to illustrate the well-recognized principle that it is the duty of a person injured, either by the tort or breach of contract of another, to take steps to minimize the damages. The facts showed that in both cases the actions of the respective plaintiffs did not minimize, but aggravated the original injuries. Negligent though such acts on the part of the plaintiff in each of these cases undoubtedly were, it is inaccurate to say that they *contributed to the injury produced by the breach of contract.* As a matter of fact, the breach of contract was complete before plaintiff acted at all, hence what he subsequently did could have no greater effect than to aggravate the injury caused by the breach. And as the defendant is responsible only for damages occasioned as a natural and proximate result of the breach, of course, he could not be held liable for damages resulting from plaintiff's own acts after the breach had been complete. It is submitted that it is on this ground, and not on any theory of contributory negligence, that the actions of plaintiff subsequent to the breach of contract are admissible as a defense in a suit by him for damages caused by such breach.

CRIMES.

On an appeal from a conviction for murder in the first degree in the case of *Milo* v. *State,* 127 S. W. Rep. (1910) 1025, an interesting point was made on the following facts: The defendant had been one of a band of conspirators who had plotted to rob one A and who repaired armed, to his tent for the purpose of carrying out their design. On their entrance through the door, one B, who was in the tent, endeavored to get out and was deliberately shot to death.

Murder in Course of Robbery

The point raised on the appeal was that since the intended robbery was planned against A, the killing of B, an outsider and one totally outside the scope of the conspiracy, was not a killing done in the commission of a robbery and hence not murder in the first degree under the statute.

The Court, however, did not take this view of the case, but held that the statute by its language included any killing done while in the perpetration of robbery, without regard to whether the victim was the person the robbery of whom was intended or not. The conviction in the lower Court was therefore affirmed, it would seem on a fair and reasonable construction of the statute.

DAMAGES.

In *Texas & P. Ry Co.* v. *Corr et al.,* 130 S. W. Rep. 185, decided June 9, 1910, (Court of Civil Appeals of Texas), one of the questions discussed by the Court involved the law of contribution as between wrongdoers. The suit was instituted by C to recover for damage to his furniture, etc., resulting from a derailed car coming in contact with his house, situated within a few feet of the track of the A Railway Co. While some of the cars of this company were being pushed along the track near the building one of them became derailed, struck the wall of the house, and caused the damage complained of. The A Co. sought to have the B Traction Co. made a party defendant, in order that it might have judgment over against it for whatever sum C might recover. It was alleged that the traction company had constructed a line of street railway which intersected the track of the A Co. near the building occupied by C; that the traction company unskillfully constructed its switches, rails and appurtenances, and negligently failed to keep same in proper order and repair, so that at the time of the accident named it was in an unsafe and improper condition; and that if the cars of the A Co. left the track and ran against the building occupied by C, it was directly caused by the negligence of the traction company, and for which it was liable. Both the traction company and C, the appellee, appeared and excepted to this portion of the answer. Both exceptions were sustained, which action was alleged as error.

Contribution between Wrongdoers

In affirming the judgment, the Court said that there were instances in which the right of a wrongdoer to have contribution from another in case of recovery by the injured party was recognized, but the rule did not apply where the party seeking contribution was morally, as well as legally, at fault. The Court stated that true it was, the defect was at the point where its track was crossed by that of the traction company, but that fact did not relieve it from the duty of keeping its track at that point in repair. It will be noted that, although the Court decided that there could be no contribution on account of the rule it

DAMAGES (Continued).

stated, the facts were such as to bring the case out of reach of any doctrine of contribution. As viewed by the Court, they established on the railway company a duty of keeping its track in proper condition, this duty not being affected by any acts on the part of the traction company as to the track at the point of intersection by the latter's tracks. The rule, as stated by the Court, refuses contribution where the one seeking it is *morally* at fault, and appears to bear out the statement of Mr. Sedgwick, who states that the old rule that there can be contribution between wrongdoers has been much trenched upon. "So many exceptions have in fact been engrafted upon it," says he, "that it is practically confined to cases of active participation in acts or omissions recognized by the wrongdoers as torts." Sedgwick, Elements of Law of Damages, (2nd Ed.), p. 150, and cases there cited.

EVIDENCE.

Public Health Records: When Admissible to Prove Cause of Death

In an action brought by the heirs to recover death benefits for the death of their ancestor, one of the defences offered by the beneficial association, defendant, was that the deceased came to his death by reason of his own improper conduct, to wit, the excessive use of alcohol, and that by the rules of the association no death benefits were recoverable in such case. To sustain this contention, it offered in evidence the public health records of the City of Evansville, Ind., on the question of the cause of death of the deceased. The Court refused to permit the introduction of this evidence. On appeal, the Appellate Court sustained the ruling of the Court below. *Brotherhood of Painters, D. & P.* v. *Barton,* (Appellate Court of Indiana), 93 N. E. 64 (1910).

The plaintiff claimed that the evidence was admissible under the act of the General Assembly, Acts 1907, page 246; Acts 1909, page 343. The Act of 1907 is as follows: "An act to collect accurate records of deaths, births, contagious diseases and marriages, prescribing the duties of the State Board of Health, and of all health officers, in relation thereto, providing penalties for the violation of this act, and repealing all acts in conflict." The act among other things makes it the duty of all physicians to report to the health officers named therein upon blank forms supplied by the State Board of Health all deaths and births which occur under their supervision, and provides that all records of deaths shall be kept by the proper health officers in record books, the form of which shall be supplied by the State Board of Health; that any physician refusing or neglecting to make death reports as provided in this act shall upon conviction be fined, etc." * * * It also provides for the recording of marriages and births and contagious diseases; that the State Board of Health shall collect and tabulate the vital statistics. The Act of 1909 specifies the duties of the various health officers in connection with the aforesaid records.

There is a division of opinion as to the admissibility of the evidence rejected in this case. The reasons for its rejection as given in those decisions in accord with the present authority and summarized in the opinion of the Court are as follows: (1) That the health records are a part of the police regulations of the state for the protection of the health of the people of the state and are *prima facie* evidence of the facts therein set forth so far as questions arising under its pro-

EVIDENCE (Continued).

visions which involve public rights; but that it was not the intention of the legislature to change the common-law rule of evidence in controversies of private parties growing out of contract, and that such records being *ex parte*, the provisions of the statute should not be construed as applicable to such cases; (2) that such records, if signed by a physician contain matter relating to his patient which the physician is not allowed to disclose as a witness upon the trial against the objection of his patient or those representing him, and that it would be unjust to permit the use of the record where the testimony of the physician would be incompetent, and (3) that it would be hearsay evidence.

In *Davis* v. *Supreme Lodge K. of H.*, 165 N. Y. 159, 58 N. E. 891, the Court said: "It may well be that the records are competent to prove the fact of death, or prove marriages or births. It is quite possible that in some cases they might be competent on questions relating to pedigree. These facts could always, at common law, be established by a species of hearsay evidence, but the cause of death in an obligation between private parties concerning the obligation of a contract of life insurance must be established, when material, by common law proof, and that is precisely what this Court has held."

Contra, see the following cases, *Hennessy* v. *Ins. Co.*, 74 Conn. 699; *State* v. *McDonald*, Or. 104 Pac. 967; *Allen* v. *Kidd*, 197 Mass. 256; *Vanderbilt* v. *Mitchell*, 72 N. J. Eq. 910; and *State* v. *Pabst*, 139 Wis. 361. See also the dissenting opinion of Roby, J., in the present case.

NEGLIGENCE.

Railroad Relief Association Regulations

A regulation of the Relief Association declared, that the acceptance by a member of benefits for an injury released the road from liability incurred as a result of it. This is pronounced void in *Borden* v. *Atlantic Coast Line Railway Co.*, 67 S. E. (N. Ca.) 971 (1910). The plaintiff was employed by the defendant and paid dues as a member of the Relief Association maintained by the latter. Membership was voluntary. The objects of the association were to provide medical attendance for sick and injured members, to pay benefits to members incapacitated for work owing to illness or injuries, and in case of death, to their families. It is unincorporated and is administered as a department of the railway. The plaintiff became ill and underwent an operation at the hands of the Relief Association surgeon, and in consequence of the latter's negligence, he was permanently injured, for which he sued.

The actual decision of the case was that the Relief Association was a charity and as the complaint failed to allege a careless selection of the surgeon, the defendant's demurrer must be sustained. But the major part of Manning, J.'s opinion deals with the legality of the regulation mentioned at the beginning of this article. On the ground that it is an ingenious scheme devised by the company to avoid responsibility for its negligence, he holds it void. This reasoning is attacked by Brown, J., in his opinion. He points out, that in all jurisdictions where the question has been presented, it has been held valid, for the reason that the regulation in no way absolves the company from the legal consequences of its negligence, but merely provides in the event of the injured person accepting the benefits offered,

NEGLIGENCE (Continued).

he can't also sue the company. Pennsylvania decisions on this point are contained in *Graft* v. *B. & O. R. Co.*, 8 Atl. 206 (1887); *Johnson* v. *P & R. R. Co.*, 163 Pa. 127 (1894), and *Ringle* v. *P. R. R.*, 164 Pa. 529 (1894). A long list of decisions in various jurisdictions is appended by Brown, J.

Telegraph Companies Liability to a Recipient of a Telegram for an Error in Transmission

A recent Pennsylvania case, *Bailey & Co.* v. *The Western Union Telegraph Co.*, 227 Pa. 522 (1910), sustained a recovery in tort by the recipient of a telegram, of the actual damages incurred as a result of acting upon a telegram, the wording of which had been changed in transmission. The plaintiffs were commission merchants. They received a message from a manufacturing company reading: "Anxious that you sell summer deliveries of decade at chapel." Chapel was a code word meaning four and seven-eighths cents per yard. They contracted to sell at this price. It was then discovered that the word chapel should have been chaplet, which meant five cents per yard. The plaintiffs accordingly had to pay the one-eighth cent per yard in fulfillment of their obligations. They brought suit against the telegraph company to recover this sum. The principal defense was, that the message was an unrepeated one and under the stipulation on the telegraph blank, no liability attached in such a case.

The Court held, that this was not binding upon the recipient of a telegram and for the negligent transmission of an intelligible message an action in tort would lie. This is in accord with the earlier Pennsylvania cases on the subject. See *The New York and Washington Printing Telegraph Co.* v. *Dryburg*, 35 Pa. 298 (1860), *Western Union Telegraph Co.* v. *Richman*, 19 W. N. C. 569 (1887). As is said in the opinion of Mestrezat, J., a different rule prevails in England and in some jurisdictions in this country. The cases are collected and discussed in an essay, entitled "Suggestions as to the nature and extent of the liability of telegraph companies for failures to properly deliver messages," written by Mr. Morris Wolf, of the Philadelphia Bar, and published by the Department of Law, of the University of Pennsylvania.

Proximate Cause

The decision in the case of the *Santa Rita*, 176 Fed. Rep. (9 C. C. A. Feb. 1910), 890, has been reversed in the Circuit Court of Appeals. The decision of the Appellate Court justifies the criticism in this department (58 Am. Law Review, pp. 306-9, "Negligence as the Proximate Cause of Injury") of the decision of the Court below.

It will be remembered that fuel oil had escaped into the hold of a vessel at anchor in San Francisco Bay, and was pumped into the bay therefrom where it and a wharf taking fire, the fire was communicated by it to another vessel in the harbor.

The discharge of the oil into the bay was in violation of a penal statute; and counsel devoted their argument on appeal to its effect. The Court unanimously declared, however, that liability clearly existed independent of the statute. Tested by the rule of *Milwaukee Ry. Co.* v. *Kellogg*, 94 U. S. 469, they found the injury to be "the natural and probable consequences of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances."

NEGLIGENCE (Continued).

To store dynamite in a vacant unlocked structure on an unfenced lot, where, to the knowledge of the defendants, boys frequently went as trespassers or otherwise, has been held actionable negligence. (*Olson* v. *Gill Home Investment Co.*, 108 Pac. [Wash. 1910] 140). We have no fault to find with the decisions; but it is barely possible that the Court should not have so strongly asserted that the case "is stronger than the turntable cases" on account of boys' natural fondness for noise. Is it a matter of judicial knowledge that this is greater than their fondness for dangerous machinery?

Storing Dynamite in place Frequented by Boys held Negligence

While these acts of boys could have been foreseen, yet it could not have been reasonably anticipated (*Finkbeiner* v. *Solomon*, 225 Pa. 333), that boys would discover and play with a box of dynamite caps put on a dark shelf in a barn which was being moved through a village. Certainly, the possible possession of a dangerous toy was not held out to them, as in a preceding case.

PROPERTY.

In a recent case decided by the Supreme Judicial Court of the State of Maine, it was decided that the storm doors and windows came properly under the designation fixtures, and, as such, passed upon the sale of the property. *Roderick* v. *Sanborn*, 78 Atlantic, 283 (1910).

Are Storm-windows and Storm-doors Fixtures?

In that case, the plaintiff, in February, 1907, mortgaged to the defendant the dwelling house, in which she and her husband resided, the title to the same being in the name of the wife. In October of the same year the plaintiff conveyed the premises to the defendant by warranty deed. At the time of the mortgage, but not at the time of the warranty-deed, the doors and windows aforesaid were attached to the house in the usual manner by means of screws passing through the double window-frames and into the window-casings of the house and by means of screws passing through hinges on the doors and into the frame of the door-casing. Each window-frame was fitted to a particular window-casing on the building and the window-casings were numbered consecutively from one upwards, and the double windows were numbered to correspond, so that it might be readily determined to which window-casing each outside or double window was designed to be attached and used. In the spring of each year the double windows and doors were removed and stored on the premises, where they remained until attached to the house the next winter, when they would be replaced in their places on the building until the following spring. Their purpose was to make the house more comfortable for use.

The Court said that the old tests of physical annexation have been discarded and now the modern trend of authority is adverse to any arbitrary or fixed rule by which it may be determined whether a chattel is or is not a fixture. Following the case of *Hayword* v. *Wentworth* (97 Me. 374, 54 Atl. 940), it laid down the rule that a chattel is not merged in the realty unless (1) it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof; (2) it is adapted to and usable with that part of the realty to which it is annexed; and (3) it was annexed with the intention to make it a

PROPERTY (Continued).

permanent accession to the realty. This annexation need not be physical for it may be constructive as well as actual. It is sufficient if the owner duly manifests his intention to make the chattel a part of the realty.

From the facts of this case, a summary of which is given above, the Court found the necessary degree of annexation.

REAL PROPERTY.

Lateral Support: Liability for Negligence in Excavating

The defendant in the course of building operations on his own land excavated close to the boundary line between himself and the plaintiff his neighbor. The latter's house situated within a few feet of the line, fell into this excavation, solely as the complaint alleged, because of the negligent manner of carrying on the excavating work. The defendant was held liable for the injury caused to the land and the building. *Walker* v. *Strosnider,* 67 S. E. Rep. (W. Va.) 1087 (1910).

In a lengthy opinion the right of lateral support as between adjoining landowners is thoroughly discussed. The underlying principles are recognized as well settled. A land owner is entitled from his neighbor to the lateral support of his soil in its natural condition. This is a property right, and so, if his neighbor in excavating on his own land causes this soil to cave in, he is liable, irrespective of the question of negligence in the manner of excavating. *Bohrer* v. *Dienhart Harness Co.,* 49 N. E. 296 (1898); *Schultz* v. *Bower* 57 Minn. 493 (1894). However, there is no such right to lateral support for buildings erected on one's land, and so one, who excavates on his own land, is not liable for injury resulting from such excavations to buildings on the adjoining land. This rule has been qualified, and the excavating owner is now liable, if the injury is due to the negligent manner of carrying on the work. Liability is imposed in this case not because of any infringement of another's property right, but because of a failure to observe the maximum *"sic utere tuo ut alienum non laedas." Myer* v. *Hobbs,* 57 Ala. 175 (1876). *Bass* v. *West,* 110 Ga. 698 (1900).

No hard and fast rule has been laid down and there is some conflict of opinion as to what is sufficient negligence to render the excavating owner liable for injury to adjoining buildings. It is a question depending largely on the circumstances of the particular case. Where the injury is due to active misconduct on the defendant's part, such as piling bricks in a street, so as to cause water to flow into the excavation and thereby causing the injury, the defendant is universally held liable. *Bohrer* v. *Denhart Co., supra.* Our principal case goes further and holds that in cases of temporary excavation, where the digging is merely incidental to building purposes, the defendant is bound to underpin or shore up his neighbor's foundation walls, if such measures would be taken by a prudent man to protect his own property. This would seem to be against the weight of decided authority. The majority of cases hold that under such circumstances it is not negligent in the defendant failing to take active steps to protect his neighbor's property, but that the plaintiff should bear the cost of protecting his own building. *Block* v. *Haseltine,* 29 N. E. 937 (1892); *Ebert* v. *Dunn,* 140 Mo. 476 (1897); *Peyton* v. *Loudon,* 9

REAL PROPERTY (Continued).

B. & C. 725 (1829); *Contra, Geldersleeve* v. *Hammond,* 109 Mich. 431 (1896). In Pennsylvania the whole question of negligence is left to the jury with instructions to find for the plaintiff, if the defendant has not acted as a reasonable man would under the same circumstances. *Spohn* v. *Dives,* 174 Pa. 474 (1896).

As to the question of giving notice to the adjoining owner of an intention to excavate, it is in accord with the general rule, that failure to give such notice is not sufficient to render the excavating owner liable, provided the work has been carried on in a careful, prudent manner. *Manier* v. *Lussem,* 65 Ill. 484 (1872); *Bonaparte* v. *Wiseman,* 87 Md. 12 (1899); *Contra, Schultz* v. *Byers,* 53 N. J. L. 442 (1891).