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NOTES.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND OF THE PRESS—RECENT DECISIONS—The frequent occurrence of the first amendment as a defense in recent cases bids fair to establish it as the most popular as well as the most versatile of the constitutional guaranties, the younger but lustier fourteenth amendment, of course, excepted. Whether its presence in a most heterogeneous aggregation of decisions is due to the decreasing vogue of the fourteenth amendment or can be ascribed to its own inherent potentialities, must be a matter of conjecture. Obviously, however, the term "freedom of speech . . ." can be used to cloak a multitude of social sins, and a precise delimitation of its meaning is desirable.

Certain things seem patent. Liberty of the press is not synonymous with license. "The constitutional provision is not a refuge for malicous slanderers and libelers."[1] Nor can it be interposed to defeat the operation of a Federal statute against the dissemination of obscene matter.[2] It does not prevent a court from punishing for contempt, whether committed within or without its presence.[3] A court may enjoin the publication of libellous matter or of articles intended to obstruct justice.[4] But whether under the wording of some of the state statutes, prevention instead of punishment of the unlawful speech or publication is constitutional, is exceedingly doubtful.[5] Some of the courts have taken the position that under a constitution providing that persons exercising liberty of speech or of the press shall be responsible for an abuse of that liberty, without specifying what shall constitute an abuse, the legality of any speech is to be determined by common law principles or by statutory declaration of the police power.[6]

The constitutional provision has been invoked in cases less obviously within its intendment. The Civil Service Act of 1876, which restricted the political activities of government officeholders, was attacked as contrary to the amendment. The act was upheld by a majority of the court, but the dissenting opinion of Justice Bradley to the effect that, "Neither men's mouths nor their purses can be constitutionally tied up in this way," foreshadowed the conflict in recent decisions upon similar questions.[7]

Statutes requiring the procurement of a license for theatrical performances have been held not to violate the constitutional provision.[8] In the large number of cases which contested the censorship of motion pictures, the first amendment was relied on as a defense, but the courts have been reluctant to extend the words "speech" and "press" beyond their usual meanings.[9] Lawyers who

[1] McDougall v. Sheridan, 128 Pa. 954 (1913); Hyde v. State, 159 Wis. 651 (1915).

[2] Tyonues Publishing Co. *et al.* v. U. S., 211 Fed. 385 (1914); Clark *et al.*, v. U. S., 211 Fed. 916 (1914).

[3] *In re* Fite, 11 Ga. App. 665 (1912); *In re* Egan, 123 N. W. 478 (S. Dak. 1909).

[4] U. S. v. Toledo Newspaper Co., 220 Fed. 458 (1915).

[5] *Ex Parte* Heffron, 162 S. W. 652 (1914).

[6] 32 L. R. A. 829; 34 L. R. A., N. S. 482.

[7] *Ex Parte* Curtis, 106 U. S. 371 (1882).

[8] Com. v. McGann, 213 Mass. 213 (1913).

[9] Mutual Film Corporation v. City of Chicago *et al.*, 224 Fed. 101 (1915); Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230. The court, speaking through Mr. Justice McKenna, said: "The first impulse of the mind is to reject the contention (i. e., that motion pictures came within the protection of the amendment). We immediately feel that the argument is wrong or strained which extends the guarantees of free opinion and speech to the multitudinous shows which are advertised on the billboards

have been disbarred for indiscreet and unprofessional utterances, and physicians whose licenses have been revoked for similar reasons, have fallen back upon their constitutional rights as a last resort, but without success.[10] In an anomolous and extraordinary case a member of a social club who had been expelled for the publication of an article reflecting upon his fellow-members, asked to be reinstated by judicial decree by virtue of the constitutional guarantee.[11]

Within the last few years two large classes of cases have arisen in which "freedom of speech . . ." is a very mooted phrase. The first arises out of the struggles of capital and labor. Here vagueness and inconsistency are the rule rather than the exception, with very marked differences in the attitude of the courts of the various sections of the country.[12] Where it was urged that a statute requiring a corporation to give a discharged employee the reason for his discharge, was unconstitutional, the court, summarily dismissed the objection with these words:[13]

"It does not take away the right of free speech or right to make, print or publish one's own opinion. It does require under certain conditions that an employer shall speak the truth in regard to the ex-employee."

The second class of cases in which the constitutional amendment figures strongly relates to that large and increasing body of legislation which seeks to control the conduct of elections, limit the expenses of candidates and keep certain offices without the arena of politics. Here the first amendment has proved to be a serious obstacle to what is admittedly salutary and progressive legislation.[14] Some of the courts, in whole-hearted sympathy with these

of our cities and towns, and which regards them as emblems of public safety . . . and which seeks to bring motion pictures into practical and legal similitude to a free press and liberty of opinion. It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit like other spectacles, not to be regarded nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion."

[10] People v. Apfelbaum, 251 Ill. 18 (1911).

[11] Barry v. The Players, 130 N. Y. S. 701 (1911). The court said, *inter alia:* "If no member of a social club could be expelled for any act which he had a constitutional right to commit, no matter how unpardonable such act might be from a social standpoint or from the standpoint of a particular social organization, then manifestly it would be impossible to preserve the continued existence of organizations, the breath of whose life is congeniality and harmony in respect to matters wholly unsusceptible of measurement or control by such instruments as constitutions and laws."

[12] *Ex Parte* Heffron, *supra.*

[13] St. Louis Southwestern Rwy. Co. v. Hixon, 126 S. W. 338 (Tex. 1909); Affd. in 162 S. W. 383 (Tex. 1913).

[14] In State v. Junkin, 85 Neb. 1 (1909), a divided court held unconstitutional a statute which provided that "candidates for judicial and educational

acts, have confined the amendment within very narrow limits. Where the constitutionality of a statute which forbade a candidate from expending in his election campaign more than fifteen per cent. of the yearly salary of the aspired office, was involved, the court said:[15]

"It is argued that said provisions are contrary to the provisions of Sec. 9 of Art. 1 of our state constitution, which is as follows: 'Every person may freely speak, write or publish on all subjects, being responsible for the abuse of that liberty.' There is nothing in that contention.

"The provisions of the primary election law in regard to the expenditures of a person aiding or promoting his nomination for an office in no manner conflict with said provisions of the constitution. That law does not attempt to prevent a candidate from *freely*[16] speaking, writing and publishing his views on all subjects."

A very recent case[17] adopts an essentially dissimilar point of view. A statute of the state forbade one, not a candidate nor a committeeman, from spending money outside his own county for political purposes. A majority of the court held that the statute infringed the constitutional freedom of the press, giving the term its broadest meaning.[18] The dissenting opinion, in its desire to effectuate the admirable aim of the act, would fritter away the substantial protection of the constitutional provision by "subordinating it to the great leading purpose for which constitutional governments have been established—to form a more perfect government . . . to promote the general welfare . . ." Such an interpretation of the first amendment, while permitting the more speedy adoption of needful legislation after the manner of the Idaho court, would emasculate the term "freedom of speech."

offices shall not be nominated, indorsed, recommended, censured, criticised or referred to in any matter by any political party or any political convention or primary." So, also, in *Ex Parte* Harrison, 212 Mo. 88 (1908), the court held unconstitutional a statute making criminal the publication by a civic league of any report concerning candidates for office without stating in full the facts upon which the report is based and the names and addresses of all persons furnishing the information.

[15] Adams v. Lansdon, 18 Idaho 483 (1910).

[16] The italics are the writer's.

[17] State v. Pierce, 158 Wis. 696 (1916). The court, speaking through C. J. Winslow, said: "The defendant being a citizen of Roth County, spent money in Dane County, gathering facts concerning governmental affairs and in communicating those facts to the people of the state at large with the intent of influencing the voting at an approaching election. This cannot be made a criminal act while the constitutional guaranties of speech and freedom of the press remain as they now are."

[18] Mr. Justice Siebecker, saying, *inter alia*: "Where the abuse of the purity of elections begins, through whatever means it might be accomplished, liberty of speech and press must end, for without such a check, this right could be made a most effective instrument of mischief."

It is submitted that the attitude of the majority of the Wisconsin court, is the more tolerant and the more wholesome. Though the purpose of the contested law be most praiseworthy, though it express the keen desires of a progressive community, the remonstrant who relies upon the constitution is entitled to a respectful hearing.

With the struggle between capital and labor growing more acrimonious, and with the increase of reform legislation of doubtful constitutionality, the future looms bright for the first amendment.

B. W.

JUDGMENTS—RELIEF IN EQUITY AGAINST JUDGMENTS AT LAW—The power of equity to relieve against judgments at law when fraudulently obtained or where some strong natural equity can be alleged against them, although it is at the present day so firmly established, was violently resisted by the common law lawyers and judges. Fraud being the original attaching point of equity jurisdiction, it was natural that one of the very first subjects to engage the attention of the English chancellors was that of equitable interference with a judgment of a law court obtained by fraud. The question whether a court of equity could give relief for or against a judgment at common law was the subject of the famous controversy in the reign of James I, which was conducted principally by Lord Coke against, and by Lord Ellesmere in favor of, the chancery jurisdiction, and which was finally decided in favor of the latter.[1] From that time down to this day the jurisdiction has been repeatedly exercised by courts of equity and it remains only to consider under what circumstances they will act and what is the nature of the relief.

At the outset it is well to remember that judgments are not reversed or vacated in equity. The adjudications at law are not overhauled or re-examined. It is to the party himself that the energies of the court of equity are directed and its remedial power is exercised by placing restraint upon his usual right to follow up his judgment by the appropriate process for its collection. Equity therefore acts on the person in this, as in all matters; and while it will enjoin the enforcement of a judgment in a proper case, it will not interfere with the judgment itself.[2] Cases sometimes arise where the right to move for a new trial at law was lost in consequence of some of the circumstances which equity always regards

[1] I Story's Equity, Sec. 51.

[2] Harding v. Fiske, 12 N. Y. Supp. 139 (1890); Justice v. Scott, 39 N. C. 108 (1845). But equity may reform a judgment, by the addition of something omitted through mistake, when due cause therefor is shown, Hamburg Ins. Co. v. Pelzer Co., 76 Fed. 479 (1896).

as sufficient warrant for its interference. The language employed in the decisions with respect to the granting of new trials in equity in such cases, or the compelling of a party to submit to a new trial, is often misleading, in that it produces the impression that the verdict and judgment at law are vacated and set aside and the case there taken up and retried. Nothing of the kind occurs. The court of equity, when it grants relief, does not vacate or otherwise disturb the judgment at law.[3] If it finds that with respect to some issues presented in the action at law, the complainant ought not to be concluded by the judgment in that action, and that such issues ought to be tried anew, it will require the defendant to submit to the re-trial thereof.[4] But this re-trial does not take place in the original action at law. The chancery court merely orders the issue to be tried as other issues out of chancery are tried, enjoining enforcement of the judgment during the meantime, and when so tried the result is certified to it for its final action.[5]

The power which the law courts have assumed in modern times in controlling their own judgments and in opening and vacating judgments upon equitable grounds,[6] although it does not affect the concurrent jurisdiction of courts of equity to grant relief, has, nevertheless, lessened the number of occasions upon which equity will interfere with proceedings at law.[7] For on the principle that equity will not grant relief where there is an adequate remedy at law, it is generally held that equitable relief will not be given if the party can be equally well relieved by motion or other proceeding in the original action.[8] So while courts of equity have uniformly refused their aid in all cases where their action would involve either the usurpation of appellate jurisdiction or the granting of a second opportunity of presenting a cause upon the merits, they have, on the other hand, uniformly extended their relief to two well defined

[3] Knifong v. Hendricks, 2 Grat. 212 (Va. 1845); Givens' Appeal, 121 Pa. 260 (1888).

[4] Equity will not set aside a judgment at law on grounds which were presented to the trial court in a motion for a new trial and held insufficient. Telford v. Brinkerhoff, 163 Ill. 439 (1896); Hendrickson v. Bradley, 85 Fed. 508 (1898).

[5] Wynne v. Newman, 75 Va. 811 (1881).

[6] In Pennsylvania a judgment remains within the control of the common law court during the term, and ends with the term. Any further control is exercised by the same court vested with equitable powers and applying equitable principles. Boyd v. Kirch, 234 Pa. 432 (1912); Jaffe v. Cooperman, 231 Pa. 237 (1911).

[7] Metcalf v. Williams, 104 U. S. 93 (1881); Froebrich v, Lane, 45 Ore. 13 (1904).

[8] Dilworth Co. v. Kidney, 43 Pa. Super. 625 (1910); Hussey v. Gourley, 153 Ill. App. 501 (1910), Clark v. Bayonne B. E., 76 N. J. Eq. 326 (1909); Flanagan v. McNutt, 113 N. Y. Supp. 42 (1908).

[9] Freeman on Judgments, Sec. 488.

classes of cases, with the objective that no man should retain an unconscionable advantage procured in a court of law through his own fraud, or through some excusable mistake or unavoidable accident on the part of his adversary. The relief of equity in such cases is grounded in the fact that a party could not, for certain reasons, successfully prosecute his claim nor make his defense in the original action. Those reasons naturally form the division of the two classes: first, all those cases in which a defense or prosecution could not be made on account of the fraud or act of the adversary; second, all those cases where a party failed to present his side of the controversy because of some unavoidable accident.[9]

In both these classes of cases courts of equity have undoubted jurisdiction to grant relief against a judgment at law under many and different circumstances which we will not here discuss. However, the important point to observe is that in either class of case, the power of equity to interfere is founded, not alone upon the presence of fraud in the one case or of unavoidable accident in the other, but upon the additional presence of some original ground of equitable relief, namely, the injustice of the judgment itself. Equity will not grant relief against judgments entered in a court of law, without some showing of ground for equitable relief—without some showing that the judgment itself is unjust or inequitable.[10] There must be something inherently wrong in the judgment, and the burden rests upon the complaining party to impeach it. He must not only show that the judgment is unconscionable and inequitable, that it was procured by fraud, was the result of accident or mistake, or the act of the opposite party, unmixed with any fault or negligence on his part,[11] but it must be such a judgment as a court of equity, in good conscience, will not permit to be enforced against the complaining party. Mere technical errors, which do not go to the merits of the controversy, committed by the law court on the trial, will not call for the interference of a court of equity. The complainant must allege not only the fraud or the accident, but must set forth a good and meritorious defense to the claim on which the judgment was rendered, by which it is reasonably made to appear that the result would be other or different than that already reached, in the event of a retrial.[12]

A recent decision in Iowa affords an excellent illustration of this.[13] A judgment had been rendered against the defendant in the lower court and within thirty days from its rendition he had requested the official shorthand reporter to certify the testimony

[10] Johnson v. Branch, 48 Ark. 535 (1886); Galbraith v. Barnard, 21 Ore. 67 (1891).

[11] Hollister v. Sobra, 264 Ill. 535 (1914).

[12] Hollister v. White v. Crow, 110 U. S. 183; Combs v. Hamlin Oil Co., 58 Ill. App. 123 (1895).

[13] Bingham v. Clarke, 159 N. W. 172 (Iowa 1916).

in accordance with the statutory requirement where an appeal was desired. This the reporter failed and neglected to do, and the defendant, being thus deprived of his right to appeal through no fault or negligence of his own, sought the relief of equity. The court, in a well considered opinion, refused the relief on the ground that there was no claim made that the defendant did not have a fair and impartial trial, and no facts alleged tending in the least to show that the verdict of the jury was not the result of a fair and impartial deliberation upon the evidence submitted. In other words, there was nothing offered to show that the judgment entered in the lower court was either unjust or inequitable, or that the result would be different from that already reached, in the event that a new trial were granted. There was no concurrence of both the accident complained of and the injustice of the judgment. The complainant had not fulfilled his burden of showing that there was something inherently wrong in the judgment.

The position taken by the court is in accord with the well settled rule enunciated by a long line of decisions, that where a judgment is regular on its face, one who seeks to set it aside or enjoin its collection must set forth a meritorious defense to the original action.[14] And it is also in accord with the fundamental principle of equity, that a party seeking its aid must show some substantial injury. The fraud or accident is, in such cases, a mere technical wrong, and the aid of equity will not be invoked unless in addition to the mere technical wrong, a meritorious defense is shown so that on re-examination and re-trial of the case the result would be different.

P. H. R.

MASTER AND SERVANT—AUTOMOBILES—LIABILITY TO THIRD PERSONS—"COURSE OR SCOPE OF EMPLOYMENT OR AUTHORITY"—The general use of the automobile has led to a constantly increasing volume of litigation on causes of action arising out of its use. Not the least interesting and important class of cases so developed is that dealing with the owner's liability to persons injured by the negligent use of motor vehicles by persons other than the owner.

Two recent cases decided by the Supreme Court of Michigan[1] furnish excellent examples of this class. In *Brinkman* v. *Zucker-*

[14] Brandt v. Little, 47 Wash. 194 (1907), 14 L. R. A. (N. S.) 213; Reed v. N. Y. Nat. Bank, 230 Ill. 50 (1907); Bernhard v. Idaho Bank, 21 Idaho 598 (1912). This rule is universal as to judgments obtained merely by fraud or accident. In cases where the ground of attack on the judgment is want of jurisdiction, as where there is no service of summons, there is some conflict of authority; but the prevailing view is that even there a good defense on the merits must be shown before equity will grant relief. Needle v. Biddle, 32 R. I. 342 (1911); 6 Pomeroy's Eq. Jur., Sec. 667.

man, the chauffeur drove his owner to a certain place at eight o'clock in the evening, and was given instructions to return for his master at twelve. The chauffeur thereupon drove to his father's residence, a journey of some three miles, remained there for several hours, and left about a quarter of twelve to keep the appointment with his employer. On the way in, he picked up three men as passengers and while driving them to their destination, a little off the direct route into town, the accident happened. The court held that the owner was under no liability, as the servant was at the time acting for his own benefit and not in the master's business, hence was not acting within the course or scope of his employment or authority.

Johnston v. *Cornelius* presents a slightly different problem, but one which depends for its solution on the same basic principle. Here the owner of the car was the father of the driver, a minor, and not a licensed chauffeur. The boy had been in the habit of driving the machine when his father or mother were in it, and even alone for his own pleasure, but never without the supervision, consent or direction of one of his parents, and in fact had positive instructions not to use it except under those conditions. On the night of the accident the parents had gone out, and, violating instructions, the boy obtained the car and went for a ride with a young woman acquaintance. When returning home the accident happened. The court held that the father was not liable, for at the time the boy was not acting as the servant or agent of the owner, nor did the parental relation, as such, create the relation of master and servant.

These cases illustrate the application of the general rule that to hold the owner liable there must be not only the relation of master and servant between the owner and driver, but he must also act within the scope of his employment as servant.[2] The automobile is universally accepted as not being of itself a dangerous instrumentality, so the law affecting the liability of the owner of a dangerous instrument in the charge of another does not apply.[3] And, as stated in *Johnston* v. *Cornelius*, the mere fact of family relationship between the owner and driver does not establish the owner's responsibility. There, as in other cases, the relation of master and

[1] Brinkman v. Zuckerman, 159 N. W. 316 (Mich. 1916); Johnston v. Cornelius, 159 N. W. 318 (Mich. 1916).

[2] There must be relation of master and servant before any liability may even be presumed: Denison v. McNorton, 228 Fed. 401 (1916); Hartley v. Miller, 165 Mich. 115 (1911); Sarver v. Mitchell, 35 Pa. Super. Ct. 69 (1907); Doran v. Thomsen, 76 N. J. L. 754 (1908). The driver must be within the scope of his employment: Coal Co. v. Rivoux, 88 Ohio St. 18 (1913); Hartley v. Miller, *supra;* Lotz v. Hanlon, 217 Pa. 339 (1907); Neff v. Brandeis, 91 Neb. 11 (1912).

[3] Danforth v. Fisher, 75 N. H. 111 (1908); Jones v. Hoge, 47 Wash. 663 (1907); Cunningham v. Castle, 127 App. Div. 580 (N. Y. 1908); Indiana Springs Co. v. Brown, 165 Ind. 465 (1905).

servant or principal and agent must be shown.[4] Very often, in such cases the determination of the relation is difficult. Many cars are bought for the pleasure and use of the whole family. But it is settled that the family relationship itself is not enough. There must be authority given by the owner, either expressly or impliedly, or the act must be done for his benefit or under his direction. The fact that the owner may not receive the benefit directly in such cases does not destroy the principle nor make it any the less the use in the owner's business.[5]

The phrase "source or scope of the employment or authority," when used relative to the acts of a servant means in the service of his master or while about his master's business.[6] This principle is easily stated but its application to varying sets of facts is most difficult and has resulted in confusion and apparent conflict in the cases, especially so in the automobile cases; hence a determination in any particular case must serve as a guide rather than a positive rule of law. A number of cases illustrative of varying circumstances and the application to them of the "scope of employment" rule, are appended.[7]

T. L. H.

NEGLIGENCE—VIOLATION OF SPEED LAW—NEGLIGENCE PER SE—The question of the evidential value of proving the violation of a "speed law," in establishing the fact of negligence in the conduct of a defendant, is simply a branch of the larger problem of the extent to which proof of violations of any statute or ordinance may be introduced as evidence of negligence. There are many conflicting opinions upon this subject, and the decisions, in many

[4] Parker v. Wilson, 60 So. 150 (Ala. 1912); Reynolds v. Buck, 127 Iowa 601 (1905); Schumer v. Register, 12 Ga. App. 743 (1913); Loehr v. Abell, 174 Mich. 590 (1913); Linville v. Nissen, 162 N. C. 95 (1913); Maher v. Benedict, 123 App. Div. 579 (N. Y. 1908).

[5] Stowe v. Morris, 147 Ky. 386 (1912); Marshall v. Taylor, 168 Mo. App. 240 (1913); Birch v. Abercrombie, 74 Wash. 486 (1913).

[6] Riley v. Roach, 168 Mich. 294 (1912).

[7] Owner not liable where chauffeur took the car to go to dinner, Steffen v. McNaughton, 142 Wis. 49 (1910); where chauffeur went out on owner's business, but went some distance out of the way to deliver a note for another party, Northup v. Robinson, 33 R. I. 496 (1912); where chauffeur took a six-mile trip for his own purposes, Fleishner v. Durgin, 207 Mass. 435 (1911); chauffeur entertaining his friends, Symington v. Sipes, 88 Atl. 134 (Md. 1913). The owner is not liable "Where the servant or chauffeur, although originally taking the vehicle out for the owner's use, deviates from his owner's business and goes upon some independent journey for his own or another's pleasure or benefit." 28 Cyc. 39, and see Provo v. Conrad, 149 N. W. 753 (Minn. 1915), anotated in 64 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 102; Blaker v. Phila. Elec. Co., 60 Pa. Super. Ct. 56 (1915), annotated in 64 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 210; and cases cited therein.

cases, seem to rest upon the peculiar circumstances of the individual case, rather than upon any fixed principles of law.

Generally speaking, the decisions upon this subject may be roughly divided into two large sub-divisions: namely, those in which the violation of a statute or ordinance is deemed negligence *per se* —that is, an irrebuttable presumption of law; and those in which the violation is regarded as merely *prima facie* evidence of negligence, to be considered by the jury, together with all the other evidence, in determining the fact of negligence.

Negligence is generally defined as "failure to comply with some duty imposed by law";[1] and if this is the correct definition, it would seem as an academic proposition, that those decisions which accept the theory that the violation of a statute is negligence *per se* as to those for whose benefit the statute was passed, are more nearly correct in principle, than those which view such violation as only *prima facie* evidence of negligence.

At common law, actions for negligence were predicated upon the theory that the defendant had been guilty of conduct, either omissive or commissive, which, as a reasonably prudent man, he should have avoided. The test as to what constituted a "reasonably prudent man" was left to the discretion of the jury, who determined what conduct such a person should, under the circumstances, have pursued toward the plaintiff, and whether the particular defendant did so conduct himself. If not, he was guilty of negligence. Now, when the law-making body enjoins certain conduct for the benefit of one or more classes of people in the community, it thereby establishes a criterion for determining what should be the conduct of a reasonably prudent man under the circumstances contemplated by the statute or ordinance. Instead of allowing the jury to determine by hindsight whether the conduct of the defendant was what a reasonably prudent man should have done, the legislative body prescribes, in advance, what shall be the conduct of a reasonably prudent man under certain circumstances; and if negligence is "a failure to comply with some duty imposed by law," it would seem, on theory, that a failure to comply with a duty imposed in advance by statute or ordinance, would be negligence just as truly as a failure to comply with a common law duty as interpreted by a jury after the commission of the act. This is the prevailing view in the United States;[2] and the rule is the same with respect both to statutes enacted by the state, and to ordinances passed by a municipal corporation.[3]

[1] Jones v. American Warehouse Co., 138 N. C. 546 (1905).

[2] St. Louis & Iron Mountain Rwy. v. Taylor, 210 U. S. 281 (1908); Cooper v. B. & O. R. Co., 159 Fed. Rep. 82 (1908); Siemers v. Eisen, 54 Cal. 418 (1880); Indiana B. & W. Rwy. Co. v. Barnhart, 115 Ind. 399 (1888); Salisbury v. Herchenroder, 106 Mass. 458 (1871); Schaar v. Comfort, 128 Minn. 460 (1915); Beaver v. Mason, Ehrmant & Co., 143 Pac. Rep. 1000 (Okl. 1914).

[3] Hayes v. Mich. Cen. R. Co., 111 U. S. 237 (1883).

However, in order for a plaintiff alleging violation of a statute or ordinance to recover, he must be a member of that class which the law was enacted to protect; the injury complained of must be one which the law sought to guard against, and must be the proximate result of the violation.[4] But the fact that the law contains no express authorization of a civil action for its violation, though it does prescribe a punishment by fine or imprisonment, will not prevent the party injured from setting up such violation as negligence *per se,* if the other essential ingredients of the action are present.[5] In such case, however, where no right of civil action is conferred by the statute, it still retains its characteristics as a common law action for negligence, in which the defendant's duty toward the plaintiff is defined and substituted by the statute in place of what was formerly his common law duty. It is in no sense an action "on the statute," or "for breach of the statute."[6]

While the weight of authority seems to be that the violation of such statutes is negligence *per se,* as a matter of law, there are a number of authoritative jurisdictions which maintain the view that such violation is only *prima facie* evidence of negligence, subject to be rebutted by proof that, although the defendant violated the statute, he was not, in fact, negligent in doing so.[7] In such jurisdictions, the question also arises whether proof of the violation of the statute is, of itself, sufficient evidence of negligence to warrant a verdict for the plaintiff, assuming that the other necessary elements of a good cause of action are present. The majority view seems to be that such evidence is, of itself, sufficient to justify the jury in finding, as a fact, that the defendant was negligent.[8] But in Pennsylvania, at least, such evidence, though competent to be considered by the jury together with other evidence of negligence, is not, of itself, sufficient to warrant a finding that the defendant was negligent.[9]

Laws regulating the speed of vehicles are undoubtedly passed to protect persons and property along and upon the highway from injury which is liable to result to them from excessive speed of

[4] Denton v. Missouri, K. & T. Ry. Co., 90 Kan. 51 (1913); Chicago, R. I. & P. Rwy. Co. v. Pitchford, 143 Pac. Rep. 1146 (Okl. 1914).

[5] Schell v. Du Bois, 113 N. E. 664 (Ohio 1916).

[6] Evers v. Davis, 86 N. J. L. 196 (1914).

[7] Hartnett v. Boston Store of Chicago, 265 Ill. 331 (1915); Burbank v. Bethel Steam Mill Co., 75 Me. 373 (1883); Scott v. Dow, 162 Mich. 636 (1910); McRickard v. Flint, 114 N. Y. 222 (1889); and see the curious decision in Willette v. Rhinelander Paper Co., 145 Wis. 537 (1911), where it was said that breach of a statute is "negligence *per se,* as matter of fact, rebuttable by proof to the contrary."

[8] U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531 (1904); Blickley v. Luce's Estate, 148 Mich. 233 (1907); McRichard v. Flint, *supra,* note 7.

[9] Ubelmann v. American Ice Co., 209 Pa. 398 (1904); Riegert v. Thackery, 212 Pa. 86 (1905).

such vehicles. It is therefore apparent that, whether or not the violation of a speed law is deemed negligence *per se*, will depend upon the view which the courts of a particular jurisdiction have taken with respect to the violations of similar statutes and ordinances, and such decisions as there are in point, support this view.[10]

There is, however, an exception to the general rule which should be noted. It is agreed in practically all of the recent decisions that the violation of a statute requiring all persons driving along the highway to keep to the right, is not negligence *per se*, if the offender can show that what he did was a necessary choice of hazards in an emergency. But unless he can establish that fact affirmatively, the usual rule applies.[11]

E. L. H.

PROPERTY—WILLS—CONSTRUCTION OF WORD "ISSUE" IN BEQUESTS—The construction of the word "issue" can hardly be said to raise a novel question at this time, but it is one that the courts are called on to answer daily. The difficulty lies in the fact, that the word in the abstract embodies two meanings—a vulgar and a legal one. In the former sense it is commonly used to denote immediate offspring; in the latter, it may include lineal descendants beyond the first generation.[1] This latter idea of the word had its origin in the necessity of so taking it in connection with devises of real estate to one for life, then to the issue, in order to make it a word of limitation rather than one of purchase.[2] The legal meaning was then applied to the word regardless of the character of the property, in the absence of controlling words to the contrary in the will itself.[3] But in cases relating to personal property, the English courts began, early in the nineteenth century, to show a tendency to break away from the stricter rule if possible; and to do this they naturally resorted to the expedient of limiting the word "issue" by other words used in connection with it by the testator—in short, to decide as nearly as possible, what was the intention of the testator in that particular instance. The landmark

[10] Schell v. Du Bois, *supra*, note 5. See also Thompson's Commentaries on Negligence, Vols. 1 and 8, Sec. 10.

[11] Borg v. Larson, 111 N. E. 210 (Ind. 1915); Johnson v. Heitman, 88 Wash. 595 (1915).

[1] Hawkshead, Operation in Wills of the word "issue," p. 417.

[2] Roe v. Grew, 2 Wils. 322 (Eng. 1767); Jesson v. Wright, 2 Bligh 1 (Eng. 1820).

[3] In Jesson v. Wright, *supra*, Lord Redesdale says: "The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise."

in this line of cases is *Sibley* v. *Perry*,[4] where the word was used in connection with "parent," and the court restricted it to the vulgar meaning.[5] Despite this seeming predilection that grew up, for restricting the import to "children,"[6] there is little doubt that *prima facie* it is generally held to be synonymous with "descendants."[7] This construction of the word has not gone unchallenged, however, and in America, especially, there seems to be some little tendency to adopt wholly the common interpretation of the word when applied to personalty. So great an authority as Chancellor Kent,[8] seems to have looked with disfavor on the legal definition; and cases which have referred to his opinion, have laid even greater emphasis on his views than their exposition in his Commentaries seem to warrant. Indeed, in New York, it was at one time expressly stated that "issue" ordinarily was to be considered coterminous with "children."[9] The importance of the cases taking this view, is practically negatived, however, by the fact that a slightly earlier case[10] in the Court of Appeal of that State, recognized the English rule, and was misinterpreted by the later cases.

Aside from the difficulties based on the two meanings of "issue," there are several instances where its use raises a further question as to what persons are included. As in the case of a reference to "children," "issue" *prima facie* means "legitimate

[4] 7 Ves. Jr. 522 (Eng. 1802).

[5] Lord Eldon, in Sibley v. Perry, *supra*, laid the foundation for the rule that where the parent of an issue is spoken of, the *prima facie* meaning of "issue" becomes restricted to "children." This doctrine was strengthened by the later case of Pruen v. Osborne, 11 Sim. 132 (Eng. 1840)—in fact, the latter is often treated as the better authority.

[6] This is well illustrated in a recent English case—*Re* Timson, 115 LAW TIMES 55 (1916). There an income was left to A for life, and on his death to his children; if he had none, it was to be divided among five other nephews and nieces of the testator, and if any or all of them should have died in the lifetime of A, *"leaving lawful issue,* then such issue shall take the share or shares which his, her or their *parents* would have taken." A had no children, and it became necessary for the court to construe "issue." It was held that it was so closely connected with *"parents"* as to be restricted to the common meaning of "children." Yet, as far as the logic of allowing one word thus to change the meaning of another, a comparatively recent American case, Jackson v. Jackson, 153 Mass. 374 (1891), in holding to the legal definition, intimated that there was no more reason for allowing "parents" to change the meaning of "issue" than the reverse.

[7] Davenport v. Hanbury, 3 Ves. Jr. 257 (Eng. 1796); Ross v. Ross, 20 Beav. 645 (Eng. 1855); *Re* Embury, 109 LAW TIMES 511 (Eng. 1913); Appeal of Miller, 52 Pa. 113 (1866); Pearce v. Rickard, 18 R. I. 142 (1893); 2 Jarman, Wills (6th Ed.), p. 1590; 2 Redfield, Wills (2d Ed.), p. 355 *et seq.*; Ward, Legacies, p. 107; 1 Williams, Executors (10th Ed.), p. 870.

[8] 4 Kent, Commentaries, p. 278n.

[9] Murray v. Bronson, 1 Dem. Sur. 217 (N. Y. 1883); Taft v. Taft, 3 Dem. Sur. 86 (N. Y. 1885).

[10] Palmer v. Horn, 84 N. Y. 516 (1881).

issue." [11] But the children of a legitimatized daughter of a legatee, have been allowed to take under the description of "lawful issue" of that legatee [12]—thus departing from the *prima facie* meaning as to legitimacy, and holding to it as to general scope. Another point on which there is a distinct split of authority, is whether or not "issue" includes an adopted child. By a logical analysis of the common meaning of "issue" as offspring, an adopted child could not come under such a description.[13] But when one considers that by adoption a child is enabled to inherit, by reason of statutory wording, the courts taking the opposite view, seem to hold a sounder, and, on the whole, a more just position.[14] Perhaps the most interesting phase of the general topic, is centered on this point: Who is included by the words "male issue"? The question can only arise when the person attempting to qualify under that description, is in at least the second generation from the testator. Does it include a son of the testator's daughter, or must the descent be by the male line throughout? The probable weight of authority [15] seems to favor the latter view through analogy to such a restriction in real estate. The reasoning of the opposite view, however, is more logical. A daughter's son certainly fits in with the words used to the fullest extent; there is no need for restricting to the male line as was often the case with realty in early times; and, when relating to personalty, the words are generally used as words of purchase.[16]

Not the least of the difficulties raised by this word, occurs when it is used more than once in a will. Sometimes there will be such a connection that there can be no doubt that it has the same meaning throughout. But where there are a number of separate clauses, it is a different matter. It is now generally admitted, however, that if used in what the court considers its vulgar sense, in all but one clause, and in that one it does not *clearly* appear which meaning it has, then it must be given the meaning of "children" in all the clauses.[17] Indeed some authorities go so far as to hold that

[11] Cartwright v. Vawdry 5 Ves. Jr. 530 (Eng. 1800); Gibson v. McNeely, 11 Ohio St. 131 (1860); Flora v. Anderson, 67 Fed. 182 (1895).

[12] Appeal of Miller, *supra*.

[13] N. Y. Life Ins. Co. v. Viele, 161 N. Y. 11 (1899).

[14] Johnson's Appeal, 88 Pa. 346 (1879); Hartwell v. Tefft, 19 R. I. 644 (1896).

[15] Lywood v. Kimber, 29 Beav. 38 (Eng. 1860); Hawkins, Wills (2d Ed.), p. 211; Theobald, Wills (5th Ed.), p. 302.

[16] Wistar v. Scott, 105 Pa. 200 (1884); Wistar v. Gillilan, 4 Atl. 815 (Pa. 1886); Beckman v. De Saussure, 9 S. Car. 531 (1856); 2 Jarman, Wills (6th Am. Ed.), p. 913*.

[17] *Re* Birks, L. R. 1 Ch. Div. 417 (Eng. 1900); Duckett's Estate, 214 Pa. 362 (1906).

[18] Ridgeway v. Munkittrick, 1 Dr. & War. 84 (Eng. 1841); 1 Williams, Executors (10th Ed.), p. 835.

it must always have the same meaning throughout.[18] But this seems doubtful unless understood to include an exception when the testator puts in words strictly to the contrary.[19]

From this brief survey, some of the difficulties attendant on this word, can be appreciated. Whether the courts will ever wholly remove the difficulty by disregarding the legal meaning, when concerned with personalty, is doubtful. That they should do this seems to be the consensus of opinion to be gathered from the many cases where they have avoided the technical meaning by special interpretation. As the modern tendency of the law is to simplify legal proceedings as much as possible, this would be but a step in that direction—for to the person unacquainted with the law, "issue" connotes "children" rather than "descendants." One of the leading authorities on the Law of Wills,[20] thinks that the later English cases show a disposition to get away from the idea that "issue" is synonymous with "descendants"; and speaks with approbation of Chancellor Kent's view. But the double meaning has existed so long, that it is likely to continue until abolished by legislatures rather than by judicial interpretation.

R. T. B.

[18] *Re* Birks, *supra;* Theobald, Wills (5th Ed.), p. 292.
[20] 2 Redfield, Wills (2d Ed.), p. 358.