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### LIABILITY OF A CHARITABLE INSTITUTION FOR THE NEGLIGENCE OF ITS SERVANTS.

The rules in regard to liability for negligence are pretty firmly established and, in the main, with but little diversity between the several states. Especially well established is the rule of *respond-eat superior*, which requires the master to stand responsible for all damage resulting from the negligence of his servant, while acting in his capacity as such. There is, however, one notable exception to the settled applicability of this rule, namely, the responsibility of a charitable corporation for the negligence of its servants. Here there are various elements which have given rise to much discussion and make the question of the application of the rule an interesting one.

The latest case dealing with this question is *Taylor v. Protestant Hospital Association*, 96 N. E. (Ohio), 1089. The facts were that the defendant association received a woman at its hospital as a pay patient and agreed, for a valuable consideration, to furnish her with board, lodging, nursing, etc., and assist in and about an operation to be performed on her by a certain named surgeon. Through the negligence of one of the nurses a small gauze sponge was left in the body of the patient, and this caused her death.

Action was brought by the administrator to recover damages from the hospital association. The court decided in favor of the defendant, saying that a public hospital, organized as a charitable association and open to all persons, although conducted under private management, is not liable for injuries to a patient of the hospital resulting from the negligence of a nurse employed by it. The fact that this was a pay patient made no difference.

Much reliance was placed by the court upon the case of *McDonald v. Massachusetts General Hospital*, 120 Mass., 432, which is a leading case upon the subject. It was there said that a corporation is rendered none the less a public charity by the fact that its funds are supplemented by such amounts as it may receive from patients who are able to pay. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence, and no contract can be inferred from the relation of the parties, except, perhaps, on the part of the corporation, that it shall use due and reasonable care in the selection of its agents. And in addition, quoting the words of the Court: "The liability of the defendant corporation can extend no further than this. If there has been no neglect on the part of those who administered the trust and control its management, and if due care has been used by them in the selection of their inferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible. The funds intrusted to it are not to be diminished by such casualties if those immediately controlling them have done their true duty in reference to those who have sought to obtain the benefit of them."

In accordance with the doctrine thus stated is *Downes v. Harper Hospital*, 101 Mich., 555, holding that charitable bequests cannot be thwarted by negligence for which the donor is in no manner responsible, but the law jealously guards the trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. And holding also, that the fact that patients who are able to pay are required to do so, does not deprive the defendant of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations.

Damages may be recovered from the wrongdoer but not from the trust fund, for if these funds were allowed to be thus diverted,

the usefulness, and even the existence, of charitable institutions would soon be terminated. *Williamson v. Louisville Industrial School of Reform*, 95 Ky., 251.

In Maryland a like rule was laid down upon English authority, the Court saying that in the absence of any decisions in that State they were constrained to adopt the exposition of principles given by certain eminent English judges there cited. *Perry v. House of Refuge*, 63 Md., 20.

A voluntary association for charitable purposes cannot appropriate its funds for any other purpose than the one intended by the articles of association or by-laws. *Penfield v. Skinner*, 11 Vt., 296.

The foregoing cases have all reached the same conclusion upon practically the same reasons, but there is another class of cases which base their decisions on another reason, that of public policy. Of these cases the leading one is *Hearns v. the Waterbury Hospital*, 66 Conn., 98. After an extensive review of the English and American authorities the Connecticut court decides that a charitable institution is not liable for the negligence of its servants, but distinguishes between such negligence and the corporate negligence of an eleemosynary institution for which the corporation is liable. To quote from the opinion: "On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned. But we think the law does not justify an extension of the rule of *respondeat superior*, making the owners of a public charity, involving no private profit, responsible not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and a public benefit. A charitable corporation like the defendant is not liable, on grounds of public policy, for injuries caused by the negligence of a servant whom it has selected with due care."

On the same grounds it has been held that a master who sends his servant to a hospital maintained by the master for charitable

purposes, is not responsible for injuries caused to the servant by negligence of hospital attendants, where the master has exercised ordinary care in selecting such attendants. *Union Pacific Railway Co. v. Artist*, 60 Fed., 365. To like effect are *Hall v. Smith*, 2 Bing., 156; and *Holliday v. St. Leonards*, 11 C. B., U. S., 192.

There remains one more case to be considered since it represents a class of cases based on still different reasoning from those heretofore mentioned. This is the case of *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed., 294, where the Court says, "If, indeed, there can be shown an agreement by the plaintiffs to hold the defendant harmless for the acts of its servants, then it follows that this action cannot be maintained, and we agree with the learned judge of the court below that this agreement arises by necessary implication from the relation of the parties. That a man is sometimes deemed to assume a risk of negligence, so that he cannot sue for damages caused by the negligence, is familiar law. One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate if the benefactor has used due care in selecting those servants."

The great weight of authority then, as portrayed in the three cases chiefly discussed, holds that a charitable institution, such as a public hospital, is not liable for the negligence of its servants in any case, provided due care is exercised in their selection. Three main reasons are given for this exemption from liability. First, that the trust fund is not to be diverted from the purpose for which it was given, *McDonald v. Massachusetts General Hospital*, *supra*; second, that public policy makes such exemption desirable and even necessary, *Hearns v. the Waterbury Hospital*, *supra*; and third, that when a person accepts the benefit from one of these institutions, he impliedly agrees to take all risk of injury through the negligence of the servants, *Powers v. Massachusetts Homeopathic Hospital*, *supra*. Almost all the decisions are based upon one or more of these reasons, and the three cases cited fully discuss and express the doctrine of the United States and English courts upon this subject. Among the cases cited as holding a contrary view, *Glavin v. Rhode Island Hospital*, 12

R. I., 411, is one of the few which cannot be easily distinguished as containing other elements which affected the decision, and even in that case, there is some implication of corporate negligence on the part of the association in its selection of servants. And immediately after the decision in that case, the Rhode Island legislature expressed its disapproval and distrust of the doctrine by passing a statute relieving charitable corporations of such liability. So it is concluded that *Taylor v. Protestant Hospital Association*, *supra*, was decided according to the weight of authority and in harmony with common sense and popular ideas of justice.

#### EX-OFFICIO POWERS OF THE PRESIDENT OF A PRIVATE CORPORATION.

The authorities are not uniform as to the powers possessed by the president of a private corporation, merely by virtue of his office.

In the recent case of *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 73 S. E., 93 (N. C.), (omitting facts not involved in the question under consideration), the plaintiff brought an action on a promissory note signed by the president of the defendant corporation. The contention of the defendant was that the president was not authorized to sign the note, and since no such authority existed by virtue of his office, the company was not bound by his act. The court held that the president was *ex vi termini* its general agent, and that all his acts are presumed to have been within his authority unless the contrary appears.

It is a well recognized and uncontradicted principle of the law of private corporations that a corporation has the implied power to borrow money for legitimate corporate purposes. This power may be exercised by the general manager of a corporation, when entrusted with the entire control of its business. *Matson v. Alley*, 141 Ill., 284.

Some of the courts, in sustaining the doctrine of the principal case, hold that the president of a corporation, since he is usually given the general control of the affairs of the company, is presumed to have authority to execute promissory notes in the name of the corporation. *Consolidated Perfume Co. v. Nat. Bank of Republic*, 86 Ill. App., 642. The burden is upon the corpora-

tion of showing that the acts of its president were not authorized. If the act of the officer is within the scope of the corporate business, it is presumed to be within the officer's authority. *Patterson v. Robinson*, 116 N. Y., 193.

Instead of placing the authority upon the assumption of a grant of the entire management of the corporation to its president, some courts would appear to imply the power to contract, merely *virtute officii*. In the absence of by-laws or legislative enactments, corporations act through their president and those representing him. Therefore, when an act pertaining to the business of the company is performed by him, it will be presumed that the act was legally done and binding upon the corporation. *Smith v. Smith*, 62 Ill., 493.

The courts repudiating the doctrine of the principal case base their decisions upon the fact that it is the directors and not the president who wield the powers of the corporation when the same are not vested in the stockholders or members collectively. The president is a mere agent, and, like other agents, must derive his authority by delegation from the board of directors. "The mere fact that he is president, without more, does not imply that he has any greater power than any other director." *Marshall on Corporations*, 961. It is therefore held that one who seeks to hold a corporation on a contract executed by its president must show that he has such authority. He has no inherent authority by virtue of his office to execute a negotiable note which will bind the corporation. *Third Nat. Bank v. Mercantile Mfg. Co.*, 56 W. Va., 446. As regards the inherent powers of a corporation, *Morawitz on Corporations*, Sec. 537, states: "It seems that a president has no greater power by virtue of his office merely than any other director of the company, except that he is the president of the board."

It is well recognized, however, that a corporation may be estopped to deny the authority of its president by clothing him with apparent authority to act for it in making contracts, as where the corporation has acquiesced in the exercise of powers not by virtue of his office conferred upon him. *Chambers v. Lancaster*, 160 N. Y., 342. The directors may expressly authorize the president to do a particular act, or he may be given the general

management of the corporation. And the fact that he is president creates no limitation on his powers as general manager, *Geeder v. H. M. Loud & Sons Lbr. Co.*, 86 Mich., 541. If he is intrusted with the entire management of the company's business, it is not a delegation of corporate rights and powers, but is merely the authority to perform for and in the name of the corporation the business it is authorized to transact. *Jones v. Williams*, 130 Mo., 1.

As regards the question of notice to a person dealing with an officer of a corporation, it has been held that a person taking a note from the president of a corporation is bound to inquire into the regularity of such note. *Wilson v. Metropolitan R. R. Co.*, 120 N. Y., 145.

It is not infrequently the case that the courts in applying the doctrine of the principal case construe the inherent powers of the president of a corporation to be the same as those of the cashier of a bank. Therefore in sustaining their position that the president of a corporation is by virtue of his office managing agent of its business they cite cases in which the contract is one which has been executed by the cashier of a bank. However, a distinction should be drawn between these two officers. The cashier of a bank has greater inherent powers than any other corporate authority, excepting directors. *Coats v. Donnell*, 94 N. Y., 168. "By custom the cashier of a bank is the general agent of the bank, and has charge as general managing officer of all its ordinary business. He has the power to borrow money when necessary in the usual course of business." *Marshall on Corporations*, 967.

It has been held in a number of cases that although the president of the corporation is general manager, if he is not intrusted with the entire management of the business, he has no power to execute promissory notes. *Railway Equipment & Pub. Co. v. Lincoln Nat. Bank*, 82 Hun., 8.

According to the weight of authority, the president of a private corporation has no power whatever to bind the corporation as its agent unless that power is specially conferred by the board of directors or stockholders. This doctrine, which is directly opposed to that of the principal case, is undoubtedly more in consonance with justice to the stockholders, who should not be

required to suffer loss through the unauthorized and nefarious acts of agents.

WHEN THE SENDING OF A SUNDAY TELEGRAM IS A WORK OF  
NECESSITY.

In the recent case of *W. U. Tel. Co. v. Fulling*, 96 N. E. Rep., 967 (Ind.), the question was presented to the Court whether or not a telegraph message from a husband to his wife, telling her that late trains prevented him from returning home until the following morning, was a work of necessity within the exception of the statute prohibiting any work on Sunday, save that of charity or necessity. It was held that its tranquil effect on the mind of an anxious wife for the unexplained delay of her husband's arrival would be apparent to the ordinary mind; that this reason was of itself sufficient to prompt a considerate husband in sending the telegram; and that even if this was the only purpose for which it was sent that a necessity was shown which would bring it within the statutory exception.

The Massachusetts Court has said that any labor, business or work which is morally fit and proper to be done on the Lord's day, under the particular circumstances, is a work of necessity within the statute; and that it does not have to be a mere physical or absolute necessity to come within the definition. *Flagg v. Millbury*, 4 Cush., 243. And in a later case, *Doyle v. Lynn & B. R. R. Co.*, 118 Mass., 195, the same court says that the word "charity", used in the Sunday Law, which prohibits work and labor on Sunday, except work of necessity or charity, includes whatever proceeds from a sense of moral duty, or a feeling of kindness and humanity, and is intended wholly for the purpose of relief or comfort of another, and is not for one's own benefit or pleasure. In *Lawton v. Rivers*, 13 Amer. Rec., 741 (N. C.), the Court says that the word "necessity" is an elastic term; that it does not mean that which is indispensable, but still, on the other hand, that it does mean something more than that which is merely needful or desirable. And the Michigan Court lays down the rule that mere convenience of time or opportunity cannot be a test as to whether or not work done on Sunday is a work of necessity. *Allen v. Duffie*, 43 Mich., 1.

It seems to be well settled that the mere sending of a telegram is not of itself a work of necessity. And in Indiana it was held that there could be no recovery of the statutory penalty for failure to deliver a telegraphic message, where it was delivered to the company for transmission on Sunday, unless it is shown that there is a reasonable necessity for transmitting the message on that day. *Rogers v. W. U. Tel. Co.*, 78 Ind., 169. This doctrine was further affirmed in a later case which held that the transmittal of telegrams concerning ordinary business, or social affairs, cannot be regarded as a work of necessity. *W. U. Tel. Co. v. Yopst*, 118 Ind., 248.

The exact question involved in the principal case seems to have come up in no other jurisdiction except that of Missouri, and in that court it was held that where a telegraph company fails to deliver a message, in consequence of which it is sued for the statutory penalty, it is no defense that the message was delivered to the company for transmission on Sunday, when the sending of the telegram is an act of necessity or charity; that its transmission is such an act when it is sent by a husband to a wife for the purpose of explaining a protracted absence of the former from home, and to announce the time of his return. It was further laid down that the delivery of such a telegram for transmission on Sunday is not rendered illegal by the act that the sender could have sent it as well on the preceding Saturday, but failed to do so through inadvertence. *Burnett v. W. U. Tel. Co.*, 39 Mo. App., 599.

In *W. U. Tel. Co. v. Wilson*, 93 Ala., 32, the Court holds that the notification to a person of the death of his father, involves such a necessity that the work of sending a telegram for that purpose is perfectly legal although done on Sunday. And in an Arkansas case, *Ark. & La. Ry. Co. v. Lee*, 79 Ark., 448, where a message sent by one brother to another, informing him of the death of their father, was not properly transmitted, and as a result the brother did not arrive in time for the burial of the father, it was held that the company was liable for the statutory penalty, regardless of the fact that the message was sent on Sunday.

In *Gulf C. & S. F. Ry. Co. v. Levy*, 59 Tex., 542, the company failed to deliver a telegraphic message which announced the death

of the sender's wife and child, and was directed to his father, requesting his presence and help. The court, holding the company liable, said that the sending of a telegram on Sunday to secure a decent burial for the dead, and to procure the presence of the parents of the deceased, is, in contemplation of the law, a work of necessity and charity, and therefore lawful. (Following *Doyle v. Flynn, supra.*)

In *W. U. Tel. Co. v. Griffin*, 1 Ind. App., 46, it was held that where a message was addressed to a doctor in another town, notifying him that the sender's daughter was ill, and asking him to come at once, it is sufficiently shown that there was a reasonable necessity for sending the message on Sunday. And the Mississippi court has even gone so far as to say that the sending of a telegram on Sunday which requests the presence of a lawyer in another city, whose services are urgently required in a criminal case, and whose work would be liberally remunerated, is to be considered an act of necessity; that the failure to deliver it was a breach of duty, and that the company was liable in damages for failing to transmit the message. *W. U. Tel. Co. v. McLaurin*, 70 Miss., 26.

In another Indiana case, *W. U. Tel. Co. v. Henley*, 23 Ind. App. 14, it was held that information given to a telegraph agent, to whom a telegram was delivered on Sunday—announcing the sender's arrival at a certain time over a certain railroad—that the sender's mother, who lived with the person to whom the message was directed, was on her death-bed, and that the sender was anxious to have it go at once, showed a reasonable necessity for the sending of the message on Sunday. But in *W. U. Tel. Co. v. Hutcheson*, 91 Ga., 252, the company was held not to be liable for the statutory penalty (for failure to deliver a telegram) where the message was sent on Sunday from a son to his mother, telling her that a friend would be with them for dinner, inasmuch as this was executing a work on Sunday, and unlawfully, as it did not come within the statutory exception of a work of necessity or charity.

From a review of these cases, and the reasons given for the decisions therein, it seems that the court was correct in reaching its conclusion in the principal case; for it is universally conceded

that there at least rests a strong moral necessity upon a husband of telegraphing an anxious wife as to an unexplained delay, when to do so would comfort her and relieve her mind of unnecessary worry and suffering.

IS A RESTRICTION IN A DEED FORBIDDING THE ERECTION OF A STABLE  
VIOLATED BY ERECTING A GARAGE?

It was recently held in *Riverbank et al. v. Bancroft, et al.*, 95 N. E. (Mass.), 216, that a restriction in a deed providing that "no stable of any kind, private or otherwise, shall be erected or maintained on the premises" is not violated by the building of a garage on the described premises. A clear understanding of the holding demands a somewhat detailed statement of the circumstances under which the deed was executed. In 1889 the plaintiff company acquired title to a tract of land adjacent to the city and laid it out in building lots. These lots were sold to diverse persons and all of the deeds of conveyance were of a standard form, containing a number of restrictions from which it is evident that this territory was laid out for a residential district. On this point the Court said, "It is apparent from the form of the deeds and from the facts shown, that the company intended that this territory situated upon the south bank of the Charles River, and at some distance from the business section, should be a fine residential district." Under these circumstances all the deeds, including the one involved in this case, were executed. About twenty years later the building of a garage on one of these lots prompted the plaintiffs to bring a bill for an injunction to restrain its erection.

The question before the Court was whether a "garage" was a "stable" within the meaning of the restriction forbidding the erection of a "stable of any kind." Owing to the fact that the garage is a product of recent years, the answer to this question cannot be had from a study of cases. Necessarily it must be obtained from the general principles underlying the construction of restrictive covenants in deeds. It is almost a maxim of real property law that the construction of covenants will be favorable to the grantee. A restriction will not be enlarged or extended by construction. *Glenn v. Davis*, 35 Md., 208; *Hawes v. Favor*,

161 Ill., 440; *Roberts v. Porter*, 100 Ky., 130. But perhaps the truer and more helpful rule is laid down in *Silberman v. Mayer*, 48 Misc. (N. Y.), 468, 472, where the Court said, "The intent of the parties as gathered from the instrument and the surrounding circumstances, must control, and the rights of the parties as fixed by the intent should neither be extended on the one hand nor limited on the other, but strictly enforced." Affirmed, 116 App. Div., 869.

An examination of some of the cases will show the attitude of the courts on this question. In *Levy v. Shreyer*, 27 App. Div. (N. Y.), 282, there was a covenant in the deed forbidding the building of any houses, "except private dwellings." It was held that a house internally arranged for the accommodation of three families, although externally not essentially different from adjoining private dwellings, offended the covenant.

In *Wilkinson v. Rogers*, 10 Jur. N. S., 5 (Eng.), it was held that a covenant to use a house as a dwelling house only was broken by putting up a notice in the window, "A. B., coal office," and taking orders for the coal at the house, although no coal was actually supplied there to customers, and the house was in other respects used as a dwelling house.

Another and more striking case showing that the courts do not hesitate to construe the restriction in a manner that is apparently favorable to the grantor if by so doing they can carry out the intent of the parties, is the case of *Blackemore v. Stanley*, 159 Mass., 6, where the restriction in the deed provided that no building should be erected on the lot, costing less than a certain sum. The grantee put up a tent, 10 feet by 12 feet in size, in which he and his family cooked but did not sleep. It was held that the tent was a building within the meaning of the restriction, and since it cost less than the stated sum, it was a violation of the covenant. This decision was by the same Court that gave the decision in the principal case.

To determine whether a garage is intended under the term stable one naturally turns to the lexicographic definitions. The *Standard Dictionary*, edition of 1898, defines a stable as a building often used for putting up vehicles. The *Century Dictionary*, edition of 1911, defines "garage" as a "stable for motor cars."

However, most definitions of "stable" show that it implies the idea of shelter for domestic animals. In *Dugal v. State*, 100 Ind., 259, the Court said that a stable is a house, shed or building for beasts to lodge or feed in; and to call a building a stable is sufficient to indicate the purpose for which it is intended to be used.

In *Kitching v. Brown*, 180 N. Y., 414, a deed executed in 1873 contained a restrictive covenant that no tenement house should be built on the lot. In 1900 the defendant erected a modern apartment house on it. When the covenant was made in 1873 the modern tenement house was unknown. But the plaintiff contended that it differed from a tenement house in degree rather than in kind, and that the building of it was a violation of the covenant. The court held, however, that an apartment house is an essentially different thing from a tenement house, and therefore the covenant was not violated. There is a very striking analogy between this case and the principal case. In the principal case the deed was executed in 1889, when a garage was unknown and undefined. And a garage certainly differs from a stable as much as an apartment house differs from a tenement house. The fact that a garage may be as objectionable as a stable does not affect the case if it is so different as to be said not to come within the intent of the parties.

It is undoubtedly true that the courts will not generally construe a covenant in a deed in favor of the grantor. Yet the court will do so when this clearly appears to have been the intent of the parties. To determine what this intent was the circumstances under which the covenant was made must be taken into consideration. In the light of these guiding principles it would seem that the court in the principal case properly held that the erection of a garage was not a violation of the covenant against the erection of a stable.

#### FRIGHT AS AN ELEMENT OF DAMAGES.

In the early English and American decisions fright caused by the negligence of another, but unaccompanied by actual physical impact, did not constitute a ground of recovery. The tendency

of later decisions to allow recovery in such cases represents one of the most interesting phases in the development of damage suit law.

Thus, *Arthur v. Henry*, 73 S. E. (N. C.), 211, illustrates the view taken by modern authorities in allowing recovery for fright followed by mental and physical injuries. There defendant was blasting rocks in close proximity to plaintiff's house, when plaintiff became frightened to such an extent that she suffered pain and was made ill. The Court held that while mere fright was not actionable, yet if it was brought about by defendant's negligence in blasting, and was its proximate cause, damages would be allowed.

The New York Court in *Mitchell v. Rochester Ry. Co.*, 151 N. Y., 157, reached a conclusion directly opposite to that found in the principal case. Plaintiff was in the act of boarding one of defendant's street cars. While standing on the crosswalk a horse-car belonging to the defendant was negligently driven so close to plaintiff that when it stopped she was standing between the horses' heads. Fright was followed by unconsciousness, which resulted in a miscarriage and consequent illness. The Court held there could be no recovery for fright unless actual bodily injury could be shown.

To the same effect is *Smith v. Postal Telegraph Co. of Mass.*, 174 Mass., 576. Defendant was blasting near plaintiff's house and one explosion hurled rocks against plaintiff's house with great force and violence, causing plaintiff to become frightened so as to suffer physical and mental pain. The court held that sickness as a result of the internal operation of fear and fright, although the fright was caused by a negligent act, would not constitute a cause of action. And so in *Braun v. Craven*, 175 Ill., 401, where plaintiff was frightened by a negligent act of defendant, the Court held that terror or fright, even if it results in a nervous shock which constitutes a physical injury, does not create a liability. The same general principles enunciated by the New York, Massachusetts, and Illinois courts, *supra*, are found in *Ewing v. P. C. & St. I. Ry. Co.*, 147 Pa., 40. Through the negligence of defendant's agents a collision of cars near plaintiff's house precipitated one of the cars against the house, frightening plaintiff and caus-

ing severe sickness. The Court, citing with approval a note by Mr. Wood to *Mayne on Damages*, said, "in no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground for relief."

The courts which deny the right to recover where mere fright is followed by mental and physical injury are not harmonious as to the grounds upon that conclusion is reached. Upon a review of the authorities two distinct reasons are found. (1) Some courts hold that fright and its consequences cannot be reasonably anticipated by one committing a negligent act, and is therefore not the natural and probable result of the act. (2) Others hold that to allow recovery under the circumstances would give rise to the prosecution of unjust claims in the courts. Whatever virtue may be contained in the former reason, the latter, according to some of the authorities, is without merit and unsupported by experience.

In *Dulieu v. White* (1901, 2 K. B., 669, the English court overruled *Victorian Ry. Com. v. Coultas*, 13 Appeal Cases, 222, and established the doctrine laid down in the principal case. In *Dulieu v. White supra* plaintiff was in the state of pregnancy and standing behind the bar of her husband's saloon. Defendants servants negligently drove a pair of horses through the door into the saloon, whereupon plaintiff received a nervous or mental shock by her reasonable apprehension of bodily hurt. Premature child birth and physical pain and suffering followed as a natural and direct result of the shock. The court allowed damages on the theory that defendant owed plaintiff a legal duty, and in the opinion Kennedy J. said, "once get the duty and the physical damage following on the breach of that duty and I hold that the fact that one link in the chain of causation being mental only makes no difference."

There is considerable American authority in line with the decision of the English court in *Dulieu v. White, supra*. In *Purcell v. St. Paul Ry. Co.*, 48 Minn., 134, plaintiff was a passenger on one of defendant's cars. As the car approached the intersection of that line with the cable car line operated by defendant the servants in charge attempted to pass in front of a rapidly approaching cable car. The ringing of alarm bells and the confusion among

passengers frightened plaintiff, who suffered great pain and finally a miscarriage. It was held that the negligence of defendant's servants was the proximate cause of plaintiff's injuries and damages were accordingly allowed. In South Carolina a boy was riding a mule over a private crossing on defendant's railroad to his home. The animal balked on the track and the boy was unable to lead him away before a rapidly approaching train struck the mule. The boy fell beside the track from fright and remained there until the train passed. The boy's mind received a permanent injury and his nervous system was badly deranged. The injury was attributed to the negligence of defendant and although the injury was primarily to the mind it was in effect physical rather than mental damage. Consequently damages were recovered. *Mack v. Ry. Co.*, 52 S. C., 323. The California and Texas courts also recognize the doctrine in the principal case. *Sloane v. So. Cal. Ry. Co.*, 111 Cal., 220, and *Gulf Colorado & S. F. Ry. Co. v. Hayter*, 93 Tex., 239.

Where fright and its injurious consequences form the basis of the action it is interesting to note an apparent consistency between the English and American doctrine of recovery. Thus in *Dulieu v. White, supra*, Kennedy J. refers to an unreported case in which the essential facts were that plaintiff was standing nearby when defendants through negligence killed a man. The sight rendered plaintiff ill, not from any reasonable anticipation of personal injury, but at the sight of seeing another person killed. The Court held the cause of the injury too remote and therefore no action would lie. In a favorable comment upon the decision in *Smith v. Johnson & Co., supra*, unreported case referred to, Kennedy J. said in substance that the shock must be caused by fear of bodily injury to plaintiff, and it is not enough that she fears injury to her husband or his property. This rather psychological distinction is recognized by the Court in *Renner v. Canfield*, 36 Minn., 90. There plaintiff was standing in her yard when defendant jumped from his wagon in the street and shot plaintiff's dog, which was just retreating into the yard. The extreme fright which plaintiff experienced resulted in a miscarriage. It was held that the shooting of the dog was not the proximate cause of the injury.

After carefully considering the foregoing decisions the irreconcilable conflict existing among them is readily apparent. New

York, Massachusetts, and many other leading States deny the right of recovery for fright and its consequent injuries, unless the alleged negligent act caused some actual physical injury to the plaintiff. Notwithstanding the strength of these courts, and the tenacity with which they adhere to the above doctrine, the inclination of other courts is towards the recognition of the more lenient rule laid down in North Carolina, South Carolina, Minnesota, and the recent English cases. If in the States last above mentioned it is shown conclusively that the injury complained of is the proximate result of defendant's negligent act it is immaterial that "one link in the chain of causation" is mental instead of physical.