Volume 18 | Issue 1

1-1913

Dickinson Law Review - Volume 18, Issue 1

DICKINSON LAW REVIEW

VOL. XVIII OCT., 1913 No. 1

EDITORS:
HARVEY HARBAUGH STECKEL
WALTER ROBISON SOHN
ARTHUR L. REESE

BUSINESS MANAGERS:
LOUIS EUGENE RENARD
JOHN SYDNEY FINE
WALTER MONROE TOBIAS

Subscription $1.25 per annum, payable in advance

AN EXAMINATION OF SANDERSON v. PENNSYLVANIA COAL COMPANY[1]

THE FACTS

The facts of this important case, were presented by Woodward, J., when it first appeared in the Supreme Court. In the year 1868, Mrs. Sanderson bought a tract of land in the city of Scranton, and began the erection of a house upon it which was finished in 1870. Before the purchase, a stream which ran through the tract, was examined and traced to its source by Mr. Sanderson. The existence of this stream was a leading inducement to buy and build. The brook had an average width of seven feet. The water was perfectly pure. Dams were built across it for a fish and ice pond, and to supply a cistern. Water was carried in pipes from the cistern to a ram, and thence to a tank in the attic of the house. After the improvements were completed, the defendants established a colliery, near the stream, about two miles above the Sanderson land. A drift was first made. A shaft was afterwards sunk. The water from the drift ran spontaneously out upon defendant's land, to the brook. The water of the shaft was pumped up, and likewise ran into the brook. The mine water thus introduced into the stream, corrupted it and made its water unusable. The attempt to use it was abandoned by Mrs. Sanderson in 1875. An action for damages was then brought by her.

THE FIRST TRIAL

The trial judge, Stanton, J., entered a compulsory non-suit on the ground (a) there was shown neither malice nor negligence, on the part of the Coal Company, (b) the corruption of the water of Meadow creek was the unavoidable consequence of the mining operations.

[1] 113 Pa., 126.

THE FIRST APPEAL—OPINION OF WOODWARD, J.

The Supreme Court, one Judge, Paxson, J., dissenting, reversed the non-suit, and awarded a *procedendo*. A brief syllabus of the opinion of Woodward, J., who spoke for the court is here given. (1) While the water had been in the defendant's land before the colliery existed, the drift and shaft collected it in such volume, and the mining operations made its ejection necessary in such a direction as to render it, previously harmless, a source of mischief. (2) The lawfulness of the business, viz. mining, the fact that a like business engages the capital and labor of many persons, does not delete the wrong. However laudable an industry, its managers are still subject to the rule that their property cannot be so used as to injure the property of their neighbor. (3) The absence of a malevolent intention to injure, does not justify the injurious act. (4) With exceptions, the duty of the owner of property is defined by the maxim *sie utere two ut alienum non laedas*. (5) The trial court could not say, as a conclusion of law, that the defendant is within any exceptions. (6) It is said that in more than a thousand collieries producing annually 20,000,000 of tons in the anthracite regions of the State, the mining of coal can be carried on only by pumping out the percolating water, which, when brought to the surface, must find its way by a natural flow, to some surface stream. But this consideration justifies only the insistence that the plaintiff should have suffered some "material and appreciable injury." The plaintiff must endure without redress "trifling and small inconveniences," but not injuries which sensibly diminish the comfort, enjoyment or value of the property affected. (7) The consequences of the adoption of the doctrine that even serious losses should be borne by the plaintiff if they are incident to the prosecution of a business by the defendant, which is like that prosecuted by a good many other persons in the State, and the prosecution of which is of great importance to the State, e. g. anthracite mining, would be depreciable. "One invasion of individual right would follow another, and it might be only a question of time when, under the operations of even a single colliery, a whole country side would be depopulated. Six of the seven judges of the Supreme Court agreed with the doctrine of this opinion.[2]

[2]Sanderson v. Penna. Coal Co., 86 Pa., 401.

DISSENTING OPINION OF PAXSON, J.

The dissenting opinion of Paxson, J.,[3] may be thus summarized. (1) No riparian owner has complained heretofore, during the half century of mining operations, although there is hardly a mountain stream in the mining region that is not affected as is Meadow creek. (2) Pennsylvania cases relied upon, Howell v. McCoy, 3 R. 256; Wheatley v. Chrisman, 24 Pa. 298; McCallam v. Water Co., 54 Pa. 40, are not apposite because in each of them injurious foreign substances had been artificially introduced into the water. (3) The only English case, Pennington v. Brinksop Hall Coal Co., which seemingly sustains the doctrine of the majority, is, as being English, of no authority here. It is the opinion of but one judge. In England, the country was occupied for centuries before coal mining began. In Pennsylvania, the country was a wilderness, when mining operations commenced. (4) The plaintiff has enjoyed the advantages which coal mining confers. There is then, no great hardship, in compelling her to accept the inconvenience resulting from the business. (5) The defendant did nothing to foul the water, which flowed from its mine into Meadow creek. (6)Some of this water flowed naturally into the creek; some was pumped out, but this was after the injury complained of had been done. (7) Defendant had a right to mine the coal, and, therefore, to free its mine from water, even by pumping if necessary. (8) Had defendant fouled the water which is discharged from its mine, it would be liable, but it has not. It has a right to let the water run into the streams. (9) If plaintiffs have a right to damages, they have a right to an injunction to prevent future pumping or permitting the flow of water. (10) The defendant could not be allowed to carry the water to the Lackawanna or some other stream, if it may not carry it to Meadow creek. (11) If an injunction against future mining should not be granted, the same result would be obtained if a judgment were entered in this case for the plaintiff, for even if the first verdict should be for a nominal sum the second and subsequent verdicts would empty the cash box of the coal company, and make mining impossible. (12) If the plaintiff may recover, all other property owners who are hurt by

[3]Printed in 113 Pa. St.. at page 156.

the pollution of streams from mining, may also recover. Mining in the future could not be carried on, except with the consent of the riparian owners. (13) The law regards some *damna* as being *absque injuria*. This *damnum* must be so regarded, although it is difficult to define the *damna* that shall be considered *cum injuria*, and those that shall be considered *absque injuria*. (14) The "trifling" inconvenience to particular persons must sometimes give way to the necessities of a great community.

SECOND TRIAL

The non-suit having been reversed by the Supreme Court, a second trial was had which resulted in a verdict of $250 for the plaintiff. With the judgment entered upon this verdict, both parties being dissatisfied, they severally appealed. Upon the appeal of the plaintiff, for errors which resulted in undue restrictions of the damages recovered, the judgment was reversed, in Sanderson v. Pennsylvania Coal Company, 102 Pa. 370. Upon the appeal of the company, the judgment was affirmed in Pennsylvania Coal Co. v. Sanderson, 94 Pa. 302, Gordon, J., writing the opinion. Paxson, J. and Sterrett, J. dissented. This decision was therefore that of five of the seven judges of the court.

OPINION OF GORDON, J.

The points made by Gordon, J., are (1) Mrs. Sanderson's right to have and use the waters of Meadow Brook, "pure and valuable for domestic purposes," is undoubted. (2) If the defendant is the cause of the injury, it should pay damages. The argument is fallacious, that the right of the plaintiff must yield, because the pollution of the brook results from coal mining and coal mining is "important to the welfare of this commonwealth." The defendant's operations are conducted purely for the purpose of private gain. Any lawful industry results in the general good. None, however important, can justly claim the right to take and use property of citizens without compensation. (3) The argument based on the alleged custom with respect to disposing of water pumped from mines in the Lackawanna and Wyoming coal regions is unconvincing. (a) As a local custom, it would be insufficient, because the defendant's colliery is the only one within the territory drained by Meadow Brook, and the pollution

of its water has occurred since the plaintiff purchased her property. (b) As a general custom, it lacks the necessary age, for the beginning of deep coal mining is within the memory of men yet living. Besides a custom to deprive one of his property for the advancement of the interests of the defendant corporation, is unreasonable and unlawful. (4) Though it is true that mining cannot be carried on without the outflow of acidulous water, and the necessarily consequent pollution of streams, it is also true that there could not be mining without roads, on which to transport the coal after it was mined. The mine owner cannot take the land of others without compensation for roads, nor can he the streams. (5) The 8th sect. of the 14th article of the Constitution requires that private property shall not be taken for a public use without compensation. *A fortiori* if it could be taken for a private use, at all, it could not be so taken, without compensation.

THIRD TRIAL

The judgment for $250 in favor of Mrs. Sanderson having been on her writ of error, reversed, and a new trial awarded in order that she might have an opportunity to obtain larger damages, the case was again tried, and it resulted in a verdict for $2872.74. The defendant then appealed intending to raise again the question of liability which had been twice determined by the Supreme Court against it. The reason for hoping for a different decision was the change in the composition of the court. Of the judges who united in the first decision, Agnew, Sharswood, Woodward, had ceased to be members of the court. Green and Clark had become members. Paxson, Sterrett, Green and Clark united in the opinion of the court, while Mercur, Gordon and Trunkey dissented. The opinion for the majority was written by Clark, J. This opinion we shall now examine.

OPINION OF CLARK, J.

(1) The action is for damages, But, if they are recovered, in a second action punitive damages might be recovered. A court of equity, too, would, after a recovery at law, enjoin against the continued pollution of the stream. But, the case of the defendant is that of all other coal mine operators. Hence mining could not be conducted, except with the general consent of all parties affected.

The naivetè of this suggestion is interesting. When A proposes to develop his own property in a mode in which it cannot be developed, without affecting the property of others, why should he not obtain their consent? Why is A to enrich himself by impoverishing B or C, or D? The coal in tract *m* is A's. It cannot be taken out by A, without using a road, as Gordon, J. suggested, over B's land or without destroying B's water supply. But B may withhold his consent to the use of the road, or of the water. Therefore, A must have the right to use it without B's consent!

Clark, J. refers to the number of persons engaged in the business of mining coal and the amount of coal annually mined in Pennsylvania. There are, he said, in 1886, 30,000,000 tons of anthracite, and 70,000,000 tons of bituminous coal produced yearly in the State. But, if this production would not sell for enough to pay for the expense of producing it, including a fair profit on the capital invested, would it be profitable to the miner or even to the State, to continue the business? Would the mine owner continue it, if it did not pay him? If he cannot carry it on without destroying streams of water, for which he would have had use, would he not expect to be reimbursed from the business as much for the destruction of the stream, as for the machinery and the land, which are consumed? And if he would expect reimbursement from the business, for the loss of the money and other property which he expended in it, belonging to himself, why should he not expect to reimburse himself for the losses which the business occasioned to others and which he should make good?

Mrs. Sanderson was made an unwilling partner in the business. Why was she not at least compensated for the value of her property that was taken without her consent,

It is surely not to the interest of the State to promote a vast aggregate of businesses which are not profitable enough to replace the losses of property consumed therein.

Many of the coal companies are making 10, 15, 20 per cent. upon the capital invested. Why should not those who suffer losses from their operations be requited, even if the result would be to reduce the dividend from 10 to 9, or from 20 to 18 per cent?

But should the companies be compelled to pay those whose

property they have destroyed, they would not pay a whit less dividends than they now pay. They would simply increase the price of the coal. They have increased the price of coal, by the amount of the tax lately imposed on coal by the State of Pennsylvania, thus casting from themselves upon the consumer, the burden. They would do the same, were the courts to hold that they must reimburse those whose property, without the owners' consent, they take, in the prosecution of their business.

It is too plain to be contested, that a business ought to be profitable enough to reimburse those whose capital is invested in it, and especially those if any, whose property is, despite themselves taken or destroyed. But, Clark, J., argues, as did Paxson, J., in his dissenting opinion, that, if actual damages are permitted to be recovered once, punitive damages would be recovered subsequently, damages so heavy as to prohibit the continuance of the business. Nay, a court of equity they say would after the first judgment at law, enjoin against the further pollution of the streams, and that would virtually be to enjoin against the continuance of the mining itself. But, who made the principle that in a second action for injury to property, the damages might be vindictive? Surely the courts, and if they made the principle, they have, it is to be hoped, not lost the power to qualify it, to make exceptions to it, to determine e. g. that when the injury is caused without malice, or negligence in the prosecution of a work that ought to be carried on, only compensatory damages shall, however frequent the action, be recoverable.

In cases in which property has been injured, by a little ingenuity a succession of actions has been avoided by allowing the jury to find that the damage is permanent[4] and by awarding compensation as for a permanent injury in the first suit. The court could easily have said, the mining is virtually permanent; the pollution of the water is virtually permanent. Therefore in one action, the damages assessable shall be compensation for the injuries that would be inflicted by the continuous and permanent pollution of the stream. There is a painful suggestion of imbecillity when a court refuses to compel compensation for a plain injury, on the pretext that under a rule of procedure, which its

[4]Good v. Altoona, 162 Pa. 493; Carpenter v. Lancaster, 212 Pa., 581; Thompson v. Traction Co., 181 Pa., 131; William v. Fulmer, 151 Pa., 405.

own will has brought into existence, or is perpetuating, the result of giving compensation in one case would be a prohibitive punition in a later case of the continuance of the injury. If the act which causes the injury is praiseworthy, why should it be prohibited, even if it inflicts damage? Why should the court not content itself with giving actual compensation, and no more, as often as loss is inflicted? The courts are already distinguishing between pollution of streams caused by the business of mining, and pollution caused by other businesses but instead of distinguishing in order to make those who prosecute the former, liable but once and for permanent damages, they have without reason, chosen to distinguish in order to hold them liable for no damage at all. Because the judges are unwilling to say that mine operators shall not be so far burdened with damages as to be disabled from mining altogether, they take the absurd position that the operators shall not be liable at all, helplessly declaring that there is no middle ground between total prohibition by punitive damages, or injunction and total immunity from liability towards those whom they injure, if the injury is unavoidable without ceasing to mine altogether.

The reference to the amount of coal extracted from the lands of Pennsylvania, made both by Paxson, J. and by Clark, J. reposes on the assumption that, if many people are engaged in many business enterprises of the same sort, enterprises by which wealth is produced in large measures for those who are engaged therein, those thus engaged may not only impose servitudes upon the property of others, but impose them without compensation. If only one, two, six or ten persons in the State had coal land and engaged in the business of extracting it, they severally would not be allowed to take, especially without compensation, the property of others, in order to make their business the more remunerative to them. Multiply the number of miners however by 100 or 1000. Then, each of these hundred or thousand miners acquires a right to forcibly expropriate his neighbor of some of his property. In some way, the "public" becomes interested in the business. Each miner is in a sense subrogated to the rights of this "public." This public has the right to be furnished with coal, or with the wealth that coal produces, at the expense of the riparian neighbors of the miner. Therefore each miner

has this right. In a learned opinion of Judge Endlich,[5] by which he justifies the enjoining of a fertilizer company from making fertilizers out of dead animals and butchers' refuse, he remarks, "I have not been able to find a case in which substantial injuries to property rights, to the rights of enjoying and possessing property, have been sanctioned by a final refusal to enjoin, on the mere ground that the public was interested in their continuance." He quotes from Broadbent v. Gas Co., 7 DeGex, M. & G., 436, where it was argued for the company that the injury inflicted on the plaintiff's property was slight in comparison with the manifest benefits conferred by the company on the public, and therefore, the court ought not to enjoin the manufacture of gas. Lord Cranworth, the Chancellor, said "I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on" and he added that to deny an injunction upon such a ground, and oblige the plaintiff to depend on a series of actions for damages "would be a disgraceful state of the law." Our own Gordon, J., has said[6] "A person cannot claim immunity on the ground that * * * the trade is a useful one and beneficial to the community, or to the nation, or that by bringing a large number of workmen into the community, it has enhanced the value of the plaintiff's property." If A, in developing his land has no right to injure his neighbor without compensation, how can he acquire that right, because B, and C, and D, and E, etc. severally in developing their lands, in a similar way, are inflicting similar injuries upon their respective neighbors?

(2) The mining was done by means of a drift of the deeper strata, by means of a shaft. The water poured from the drift upon the adjacent land and ran thereover down to Meadow Brook. The water that collected in the shaft, was pumped up to the surface of the land and then poured thereupon, thus flowing to the brook. Clark, J., holds that both modes of introducing the water to the creek were justifiable. The making of a shaft was as proper and necessary, as the making of a drift. The ridding of the shaft of the water by pumping was as neces-

[5]Evans v. Fertilizing Co., 160 Pa., 209.

[6]Pa. Lead Co.'s Appeal, 96 Pa., 116.

sary as the ridding of the drift by the unassisted force of gravitation. Hence he concludes, the corruption of the water by both modes, was equally convenient, equally exempt from civil responsibility.[7]

Thinking however, that there might be a difference as to justifiableness, between the two modes, Clark, J., remarks that the evidence in the case did not permit of the ascertainment of the quantity of pollution and damage, from the water that flowed from the drift, and of the quantity of pollution and damage from the water that came by pumping from the shaft. "The witnesses did not discriminate in their testimony, and the learned court did not instruct the jury to make any discrimination." The court tacitly assumes that if a man may without liability corrupt a stream so as to make its water unusable, by doing certain acts, his further corruption of it, by doing acts which he would have no right to do, will not be actionable, will be "an injury without damage." "The pollution of a clear stream might inflict an injury for which damages would be recoverable, but we cannot see how damages could be estimated for the pollution of a stream which had already become foul from other causes, for which the law gave no remedy."

The evidence was not distinct that the drift water had spoiled the brook *before* the shaft water had begun to be pumped up. That it had was tacitly assumed, for the court has hardly committed itself to the proposition that if two acts, one legitimate, the other illegitimate are done simultaneously, and simultaneously corrupt the water, there can be no recovery for the corruption flowing from the illegitimate acts.

(3) That there can be no mining without freeing the drifts and shafts of water, was probably proved to the satisfaction of the court, or was taken notice of without proof. This water would necessarily go somewhere. But, would it necessarily go into Meadow creek? At the hearing of the first case in the Supreme Court, it was argued[8] that the water might have been

[7] 113 Pa., 147, 148.

[8] 113 Pa., 161.

carried into the Lackawanna or some other stream, by a tunnel. At the hearing of the last case[9] it was suggested by Clark, J., that the coal company, which had created an "artificial water-course" upon its land from the mine openings to Meadow creek, could not have conducted the water to some other point of safety. "Where" he asks triumphantly, "where, short of the sea, might the sewer be discharged, that the same complaint might not be made." But is it an ascertained fact, that if water is conducted from a point it must be conducted to the sea? Are sewage disposal plants seas? Was it self-evident that pits or receptacles, wide and deep enough to hold the water from the mine, could not have been dug by the defendant? If they could have been, why was it not the duty of the defendant, not to stop mining, but to conduct the water from the mine, which the process liberated, to such receptacles?

Upon this subject the following principles have been elaborated since the decision in 113 Pa. 161. (a) The burden is upon the defendant to show that no device was practicable, by which the injury could have been averted, consistently with the prosecution of the mining.[10]

(b) The unavoidableness of the injury might result from the physical impossibility of employing any device, by which it could be prosecuted, *or* the excessive expense of such device as would be adequate. The absolute magnitude of the cost is not to be considered, but the ratio of the cost to the profitableness of the business. "If" says Mitchell, J., "the expense of preventing the damage from his act is such as practically to counterbalance the expected profit or benefit, then it is clearly unreasonable, and beyond what he could justly be called upon to assume. If, on the other hand however large in amount, it is small in proportion to the *gain to himself*, it is reasonable, in regard to his neighbor's rights,and he should pay it, to prevent the damage, or should make compensation for the injury done." The defendant is excused from incurring expense in devising ways of averting damage, only when "the expense required would so detract from the

[9]113 Pa., 148, 149.

[10]Pfeiffer v. Brown, 165 Pa., 267; McCune v. Pittsburg, etc. C. Co., 235 Pa., 83.

purpose and benefit of the contemplated act [e. g. the business of mining coal] as to be a substantial deprivation of the right to the use of one's own property."[11]

So far as the reports disclose, no effort was made by the coal company to show that no method of disposing of the acidulous water of the mine, other than allowing it to run into the brook, was practicable. It was not shown that the making of artificial receptacles for it was physically impossible; nor that the expense of making them, if possible, would be excessive, in relation to the profitableness of the business of the defendants. Would the outlay have reduced the annual dividend from 25 per cent. to 24? The court simply assumes without evidence, that the only alternative for the defendant was to refrain from mining altogether, or to ruin the brook for all riparian owners, and without compensation to them! Clark, J., states[12] the principle of the decision in such form as to eliminate altogether the consideration of avoidableness of the injury. "We do say that in the operation of mining, in the ordinary and usual manner he [a miner] may, upon his own lands, lead the water which percolates into his mine, into the streams which form the natural drainage of the basin, in which the coal is situate, although the quantity as well as the quality of the water in the stream, may thereby be affected." No duty to lead the water elsewhere, if it can be led at an expense not prohibitive, no duty to justify the pollution of the stream, by showing the unavoidableness of it, is imputed to the miner.

(4) Difficult it is to know exactly what the principle was, which the writer of the opinion in Pennsylvania Coal Co. v. Sanderson postulates. On page 149, we observe the statement "To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community." But, did the plaintiff suffer only a "trifling inconvenience?" The jury admeasured it by $2872.74. The "inconvenience" to Mrs. San-

[11]Pfeiffer v. Brown, 165 Pa., 267; Collins v. Chartiers V. Gas Co., 131 Pa., 143; McCune v. Pittsburg, etc. Co., 238 Pa., 83; Com. v. Russell. 172 Pa., 506, 521.

[12]113 Pa., 149.

derson was suffered, not to satisfy two or more "necessities" of a "great community" but the desire of the stockholders of the Pennsylvania Coal Company to make 25 per cent. dividends upon their invested capital. The "great community," if that be Pennsylvania, does not require or desire that it should be served or otherwise enriched with coal, which has been mined in part at the expense of Mrs. Sanderson, without any portion of the money for which the coal is sold, going to her.

(5) Woodward, J., in 86 Pa. 401, disapproving of the nonsuit which was entered by the trial court, cited a few cases, one of which was Fletcher v. Rylands, L. R., 1 Ex. 280, the doctrine from which was stated to be that if A brings something on his land which be it animate or inanimate, may escape, and get upon his neighbor's land, he is bound, apart from any negligence, to make good the damages which ensues, should it escape. This leads Clark, J., in four pages, to show, first that the doctrine of Fletcher v. Rylands is not sound, and has been repudiated by a few English and many American decisions, and secondly, that even if sound, it has no relevancy to the case before the court, because the water which escaped from the defendant's land had been put there, not by the defendant, but by the force of gravity. But, what have we learned, when we learn that cases are sometimes cited by eminent judges which have no relevancy to the facts? How is it edifying for one justice of the Supreme Court to compel us to see and to admit that another justice of the same court did not know, when he was talking so learnedly, what he was talking about?

It really cannot matter whether Fletcher v. Rylands was decided rightly or not. The question before the court was whether it was the duty of the defendant to abstain from mining altogether, if it could not avoid the destruction of the purity of the brook, to Mrs. Sanderson's material, (not "trifling") injury, or to make her a fair compensation.

With equal superciliousness, Clark, J. brushes aside Pennington v. Brinksop Hall Coal Co., 5 Ch. Div., 769, which had been cited by Woodward, J., in 86 Pa., 401, and of which that justice had said it "was decided so lately as last May, and it would seem that in England this branch of the law has been definitely and firmly settled." Clark, J., scornfully casts it out,

by the remark, "As the question now under consideration was neither discussed nor decided we cannot see how the case can be *supposed* [by Woodward, J., for example] to have any importance here."

(6) Clark, J., concedes, 113 Pa. p. 155, that a stream of water may not be fouled by the introduction into it of any foreign substance, to the damage and injury of the lower riparian owners. This principle however he remarks is without pertinence because the defendant introduced nothing into the water; the water flowed into Meadow Brook just as it was found in the mine; its impurities were from natural and not from artificial causes. The water that got into the mine, would have remained there but for the opening of the drift and the pumping from the shaft. There may be minds that see a vast difference between voluntary acidulation of the water and voluntary allowance of its escape by artificial means and "natural" acidulation, followed by voluntary allowance of its escape. Both acts are equally disastrous in result. Why there should be responsibility for the effects of one, and not of the other, is not so evident as to be unworthy of explication.

(7) The opinion of Clark, J., concludes with a suggestion from the dissenting opinion of Paxson, J. The population, wealth and improvements in the coal country are the result of mining alone. The plaintiff knew this, when she bought her land. There is no great hardhsip, therefore, in compelling her to suffer a loss of $2872.74, in order to maintain the high dividends paid from year to year by the Coal Company. Mrs. Sanderson before she bought her land and expended moneys in improving it, knew that the Meadow Brook's water was pure. She had reason to believe that upper riparian owners, by the law of Pennsylvania, were obliged to refrain from corrupting or polluting the waters of such a stream. When the question was presented by her to the Supreme Court, it declared, in 1878 that her apprehension of the law was correct. It renewed the declaration in 1880, and again in 1883. In 1886 she was stunned with the announcement that she had been wrong, the Supreme Court had been three times wrong and that she must not only suffer the loss of $2872.74, inflicted upon her by the defendant in the selfish pursuit of its own self-enrichment, but the additional loss involved

in the costs, and the attorneys' fees. This was the result of the invention by the court in 1886, of the principle that a man may develop his land, by a so-called natural use, e. g. may extract its stone, sand, coal, petroleum, although, in so doing, he causes the water in the streams to become unfit for use.

FUTURE REFERENCE TO THE CASE

A number of cases refer to the decision in 113 Pa. 126. Some of them state the doctrine believed to be taught by it, without criticism. Endlich, J., thought it was that the "natural" use of one's land, without negligence or malice, casts no liability for any loss that unavoidably follows to one's neighbor.[13] Fell, J. thought it was that when the defendant did not change the character of the water save by making a natural use of his land, when he brought nothing on the land artificially, when the water which corrupts the stream is the water which the mine "naturally" discharges, and the impurities of this corrupting water arise from natural and not artificial causes, there is no liability.[14] Williams, J. cites the decision in 113 Pa., 126, for the principle that the miner may mine in a proper manner, and he will not be liable merely because the drainage from the mines falls into and pollutes a stream, and thus injures lower riparian owners.[15] Paxson, J., the father of the Sanderson doctrine, thus explains it. The injuries complained of were the natural and necessary result of the development by the owner, of the resources of his own land. The flow of mine water was the natural and necessary result of the mining.[16] Paxson, J. again cites 113 Pa., 126, but merely as an illustration of the generalization that "mining rights are peculiar and exist from necessity, and the necessity must be recognized, and the rights of mine and land owners adjusted and protected accordingly"[17] an illuminating statement surely. Williams, J. explains[18] the Sanderson case thus: Coal

[13]Evans v. Fertilizing Co., 160 Pa., 209;

[14]Good v. Altoona, 162 Pa., 493.

[15]Elder v. Lykens Valley Coal Co., 157 Pa., 490.

[16]Hauck v. Pipe Line Co., 153 Pa., 366.

[17]Chartier's Block Coal Co. v. Mellon, 152 Pa., 286.

[18]Robb v. Carnegie, 145 Pa., 324.

land can be utilized only by bringing the coal to the surface. Subterranean veins of water are necessarily opened. The accumulating water must be brought to the surface. It then naturally finds its way to the streams and pollutes them. If this could not be done [legally] a great industry would be interfered with, the owner of the coal land denied the exercise of the rights of ownership, for the benefit of a lower riparian owner, whose title is no higher than his own. The maxim *sic utere tuo*, etc. was hence neither suspended nor modified in the Sanderson case. The harm done to Mrs. Sanderson was the least in amount consistent with the natural and lawful use of the coal land. So, speaks Williams, J. But, if Mrs. Sanderson's right was, to have the water uncorrupted by any upper riparian owner, the maxim *sic utere tuo* was plainly suspended or modified. What the Sanderson decision does, is to deny the existence of a right in the lower riparian owner to have the water uncontaminated. His right merely is, to have it exempt from contamination, *unless* that contamination is an unavoidable result of coal mining operations. Indeed, Williams, J., says plumply, quoting 113 Pa., 132, in support, "If in raising the mine water to the surface, for purposes of drainage, a surface stream is [unavoidably] corrupted and rendered unfit for use, those affected thereby cannot recover damages," i. e., suffer no wrong.[19] In Robertson v. Coal Co.,[20] Williams, J. refers to the Sanderson case, simply to say that it does not qualify the rule that a sale of all the coal in a tract is not, by implication a release to the vendee, of the right to surface support. Remarks by the same judge[21] upon the Sanderson case intimate that a borough or city, furnished with water from a stream, or the water company that furnished it might enjoin against the pollution of it by salt water drawn up to the surface, in pumping for coal oil, but his remarks leave uncertain whether the right to an injunction would not depend on proof that the oil operation could be so conducted, at a reasonable expense, as to avoid the pollution of the water at that part of the stream from which the borough's water supply was obtained. Clark, J., in

[19]Collins v. Chartier's V. Gas Co., 139 Pa., 111.

[20]172 Pa., 566.

[21]Com. v. Russell, 172 Pa., 506.

Del. & H. Canal Co. v. Goldstein,[22] adverts to the Sanderson case, as sustaining the principle that a canal company would not be liable for leakage from its canal basin into the plaintiff's premises, in the absence of malice or negligence. Paxson, J., in Penna. R. R. Co. v. Merchant[23] quotes from 113 Pa., 126, the doctrine that every man has a right to the natural use of his property, and is not liable for loss to his neighbors, arising without negligence or malice, from this use, "for the rightful use of one's land may cause damage to another, without any legal wrong." A bill being filed to restrain the defendants from using a gas pump in an oil well, the result of such use being the reduction of the supply of gas in the plaintiff's well, the court dismissing the bill, quoted from the Sanderson case that every man may make the ordinary and natural use of his property, may cut down forest trees, clear and cultivate his land, although in so doing, he dries up his neighbor's springs, or removes natural barriers against wind and storm. In sinking his well, he may intercept and appropriate the water which supplies his neighbor's well.[24] The Sanderson case is described by Green, J., as the mere flowage of natural water which was discharged by natural and irresistible forces, necessarily developed in the act of mining prosecuted in a perfectly lawful manner. The mine water, it was observed, caused no deposit [of culm, as in the case before the court] of any foreign substance on the plaintiff's land, and did not deprive her of its use.[25] In Strauss v. Allentown[26] Mitchell, C. J., laid down the principle that "Every man has the right to the natural, proper and profitable use of his own land, and if in the course of such use, without negligence, unavoidable loss is brought upon his neighbor, it is *damnum absque injuria*. This is the universal rule of the common law, and nowhere is it more strictly enforced than in Pennsylvania. After elaborate and repeated argument, and the most mature consideration, it was applied to a case admittedly of great hardship, difficulty and doubt, involving a serious choice of evils, in Pennslyvania Coal Co. v. Sanderson, 113 Pa.,

22125 Pa., 246.
23119 Pa., 541.
24Jones v. Forest Oil Co., 194 Pa., 379.
25Hindson v. Markle, 171 Pa.. 138.
26215 Pa., 96.

126." But, the writer of the opinion in the Sanderson case did not think he was making a "serious choice of evils," if that means, a choice between serious evils; serious evils to the coal company, if it was to be impeded in its mining operations; and serious evil to Mrs. Sanderson, if her pure water supply by means of the brook was to be destroyed. Clark, J., said "trifling inconveniences"[27] must sometimes be borne by individuals, in subordination to the necessities of a great community. The corollary that Mitchell, C. J., derived from the principle was, that the city of Allentown could grade streets with impunity, notwithstanding that the effect was to back water into a tail-race, and so greatly to decrease the value of the mill. In Commonwealth v. Emmers,[28] a prosecution for allowing sewage from water closets to pass into the Schuylkill river, the Sanderson case is quoted as supporting the principle, "when, in the development of the natural resources of the land, the water from a mine must necessarily and unavoidably pass into a stream, and that consequence could only be avoided by an expenditure which would amount to a practical prohibition of the development of the land, [and how would it be true that the water 'must necessarily and unavoidably pass,' etc., if its passing could be avoided by any expenditure whatever] the injury to a lower riparian owner resulting from such unavoidable mixture of the water of the mine with that of the stream, is a private injury for which there is no remedy." But, the Sanderson opinions say nothing about expenditures. In Bricker v. Conemaugh Stone Coal Co.,[29] where the cause of action was the deposit of sand in a stream to the injury of a grist-mill, the court denied the applicability of the Sanderson doctrine, because in that case, there was no deposit of any foreign substance on the land of the plaintiff, which deprived her of its use. Beaver, J., remarks that the Sanderson case "is exceptional and rests entirely upon its own facts." Every case we suppose rests entirely on its own facts. On whose facts could it rest; if it rests at all? To say that the case is exceptional may mean that actual cases of the same sort are few in number, and the occasions for applying its

[27] 113 Pa., 149.
[28] 221 Pa., 298, affirming 33 Super., 151.
[29] 32 Super., 283.

principle are therefore infrequent. The relevancy of the principle was denied in Welliver v. Irondale, etc. Co.[30] The defendant made an artificial water course on his land, for the purpose of supplying power for the manufacture of electricity, which was furnished to a borough for lighting. The action was to recover damages for injury to the plaintiff's land, caused by seepage and percolation of water through the embankment of the race. The water was artificially brought on defendant's premises. It was his duty to employ care in order to prevent its escape. A like refusal to concede the pertinence of the Sanderson doctrine, appears in Sullivan v. Steel Co.[31]. A blast furnace used "Mesaba" iron ore from which a prodigious amount of dust was carried upon houses and lands in the neighborhood. This ore was artificially brought to the furnace. In the Sanderson case nothing was brought on the land artificially. Hence, the further injury by the dust was enjoined.

McCUNE v. PITTSBURG, ETC. CO.

In McCune v. Pittsburg, etc. Co.[32] the court did not give damages, for injury to a stream of water flowing over the plaintiff's land by pumping mine water into it, but enjoined the continuance of the injury. Doty, J., states (1) a *prima facie* case for the plaintiff would have been made out by showing that a stream of pure water flowing through his lands, was polluted by the action of the defendant, in pumping mine water from a lower level. (2) The burden would then be on the defendant to show that carrying on mining made such injury unavoidable, even by reasonable care and expenditure. Here there could apparently have been adopted a drainage which would have avoided the injury and there was no attempt to show that this drainage would have been ineffectual, or unreasonably expensive.

AN EXTENSION OF THE PRINCIPLE

An action was brought against a coal company for the injury to the plaintiff's land by the settling over and upon it of coal

[30] 38 Super., 26.

[31] 208 Pa., 540.

[32] 238 Pa., 83.

dust from a neighboring breaker.[33] The defendant contended that the injury, was, according to the Sanderson case, *damnum absque injuria.* The court concedes that it had a right to mine coal. It had an equal right to break the coal into marketable sizes. As it could mine although the unavoidable effect was to pollute streams of water, and thus deprive riparian owners of the pureness and usableness of the water, so it could crush the coal, although in so doing dust was formed which would be swept by the wind over the lands of others, provided that it properly used the most effective and approved known appliances to control the dust. In order that there should be liability, it was necessary that the defendant should negligently omit to use available and practicable precautions against the diffusion of the dust, and the injury to the plaintiff must be more than "trifling;" must be "substantial." If no lack of care is imputable to the company, any injury, great or small, resulting from the operation of the breaker, is *damnum absque injuria.* The position of the defendant, apparently, differed from that of the court herein, that the former contended for immunity from liability irrespective of care to avoid the injury and the latter conceded it, only when such care appeared. The reference to 113 Pa., 126, in the beginning of the opinion is somewhat mystifying.

PUBLIC RIGHTS

The intimation is made, by Clark, J., that the pollution of a stream, by mining, might so affect "the general health and well being of the community," as to justify and require the suppression of the acts which corrupt the stream, even although such suppression would involve the cessation of mining operations. The justice refers to the fact that the city of Scranton, and Mrs. Sanderson are supplied with pure water from other sources. The pollution of Meadow Creek is not averred to affect the general health.[34] It is accordingly held, apparently,[35] that a water com-

[33]Harvey v. Coal Co., 201 Pa., 63.

[34]Penna. Coal Co. v. Sanderson, 113 Pa., 126, 149.

[35]Com. v. Russell, 172 Pa., 506.

pany, organized to furnish water to a borough, may enjoin the pumping of salt water, in the process of extracting oil, into the creek from which the water is obtained.

CARLISLE, PA.

August 31st, 1913

MOOT COURT

JONES v. BOROUGH

Playing Base-Ball on Streets—Liability of Borough

STATEMENT OF FACTS

For years boys had played baseball on the streets of the borough without interference by the authorities, altho frequent complaints had been made to the latter. While John Jones was walking on the street, a ball struck him, from the effect of which he died. This is an action by his widow against the borough.

Fry for the plaintiff.

Martin for the defendant.

OPINION OF THE COURT

FINE, J. The only question in this case that need occupy the attention of this court is, whether the accident, which resulted in the death of the husband of the plaintiff, was due to negligence in the exercise of the police power, or in the exercise of the borough's "housecleaning" powers (powers to keep the streets, etc., in good condition and free from obstructions).

If the negligence was due or fell under the former power, the plaintiff's case must of necessity fall; if under the latter power, the plaintiff has a very good peg upon which to hang her claim for damages.

Now, we must consider what powers, or what scope of things, this police power comprehends. In 8 Cyc. 863 police power is defined to be the "name given to that inherent sovereignty which it is the right and the duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of the society at large, regulations to guard its morals safety, health, order, or to insure in any respect economic conditions as an advancing civilization of highly complex character requires." It is further held that the legislature cannot, by any contract, divest itself of any police power, the maxim salus populi suprema lex necessarily applying. 8 Cyc. 865. It is plainly discernible then that the police power is lodged in the State and not in the municipal corporation.

Under the "housecleaning" powers of the borough, such corporation has the right to care for its streets; to see that they are free from obstruction; to build parks, etc.; and to maintain highways, sewers, and whatever. Borough of Norristown v. Fitzpatrick, 94 Pa., 191. Such power is conferred by court or by statute.

This court fails to see how the plaintiff can hold the defendant borough liable under the latter power, for under the former power she certainly has no redress against the borough and it is only under latter power she can be held if held at all.

When it is sought to render a municipal corporation liable for the acts of servants or agents, a cardinal inquiry is whether they are servants or agents of a corporation. If the corporation appoints or elects them; can control them in the discharge of their duties; can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of corporate powers and are for the peculiar benefit of the corporation in its local or special interest,—they may justly be regarded as the agents or servants and the maxim of respondeat superior applies. But if, on the other hand, they are elected or appointed by the corporation in obedience to the statute, to perform a public service not peculiarly local or corporate but because this mode of selection has been deemed expedient by the legislature in distribution of the powers of government; if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties,—they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of respondeat superior is not applicable. 2 L. R. A. 147, case note.

The police department of a municipal corporation derives its authority from the State and when such corporation is not expressly or by necessary implication authorized to do so, it can neither enlarge nor restrict duties of such department or its officers or agents, as defined by general assembly. Cleveland v. Payne, 72 Ohio St. 347, 74 N. E. 177.

Surely, the negligence complained of in this case falls under the police power, for it is neglect of the officers of the borough police department to stop the boys from playing baseball, that is alleged as the cause of the death. From what has been said heretofore, the plaintiff consequently has no case. However it might be advisable to cite a few more authorities which uphold our contention.

In the Borough of Norristown v. Fitzpatrick, 94 Pa. 121, it was held that the police officers cannot be regarded as servants or agents of the borough. Their duties are of a public nature and their appointment is devolved on borough as convenient mode of exercising public function, but this does not render them liable for their unlawful or negligent acts. Conservation of the peace is a public duty, put by the commonwealth into the hands of various public officers. Hand v. Phila., 8 C. C. R. 213; Butterick v. City of Lowell, 1 Allen (Mass.) 172; Elliot v. City of Phila., 75 Pa. 347, also uphold this doctrine. Cases somewhat similar may be found in Grant v. City of Erie, 69 Pa. 420; Carr v. N. Liberties, 11 Casey 324.

The chief burgess has the powers of a justice of the peace for the suppression of riots, tumults, and disorderly meetings. It is his duty to preserve order and maintain the peace. It does not follow, however, that borough is not liable for the non-feasance and misfeasance of its peace officers. Neither neglect of the policemen to enforce ordinances against coasting, resulting in the throwing down of a pedestrian by sled,

nor the failure of the borough to adopt an ordinance against coasting, would make borough actionable for consequent injury. Conservation of the peace is a great state duty and the borough in appointing police officers simply acts in aid of the state. Indeed, liability of a municipality for acts of its agents is confined in main, to cases of public works carried on under its direction and superintendence and to cases relating to construction and keeping in repairs of public highways. Trickett on Penna. Boro. Law, Vol. 1, pages 271-273.

It was held in Knight v. Phila., 15 W. N. C. 307, that a city was not liable for negligence of an employee of a fire department.

A very broad statement of the rule is laid down in Shepherd v. Inhabitants of Chelsea, 4 Allen (Mass.) 113, and Rowell v. Lowell, 7 Gray (Mass.) 100, which is as follows: "A city is not liable for injury caused by the combined effects of the unsafe condition of the highway and the unlawful or careless act of a third person, whereby the plaintiff was injured.

Upon the authorities above cited, we are urged to decide for the defendant, as the court can see no possible reason for taking this case from under the police powers of the state, when in similar cases for injuries caused by coasting down hills and by drunken men falling about the streets, the court held that such accidents were under the police power and no recover could be had against the municipality. Surely there is as much of an obstruction of the streets in one case as in the other. Judgment for the defendant.

OPINION OF THE SUPREME COURT

It is the duty of a borough, having laid out and opened, a street, to keep it in repair; a duty owed toward each of those who use it. If one of these suffers injury from the omission of the borough to perform this duty, it is bound to indemnify him.

A street may become unsafe for passengers, not merely by structural defects, but by the acts of individuals, as in making holes in it, putting ropes, wires, fences, across it, allowing a dead horse to remain upon it, Fritsch v. Allegheny, 8 W. N. C. 318, and for not effacing the effects of these acts of individuals, within a reasonable time, the borough becomes liable to such persons as are injured in consequence.

But, the use of a street may be rendered unsafe by the transitory acts of individuals; e. g., by cycling on the foot-walks, by firing off a cannon; by "coasting;" by "sledding;" by playing base-ball.

To prevent these acts would require the issue of a prohibition, in the form of an ordinance, and the enforcement of the ordinance. The question with which we must here deal, is must the borough exercise its preventive power, in order to avert the doing of these acts, by the enactment and execution of the appropriate ordinance?

In a majority of cases that have been considered, it is held that the municipality is not bound towards individuals to enact or enforce ordinances of this kind; e. g., such as prohibit sledding, Dudley v. City

of Flemingsburg, 115 Ky. 5; 1 Am. & Eng. Ann. C. 958; bicycling on the sidewalks; Jones v. Williamsburg, 97 Va. 722; the firing of cannon, Norristown v. Fitzpatrick, 94 Pa. 121.

The possession of the power to prohibit the running at large of dogs, does not make a borough or city liable to one whose child has died from rabies communicated to it by the bite of a mad dog. Smith v. Selinsgrove Borough, 199 Pa. 615. The putting of lights on a street, facilitates their use with safety by passengers, and the municipality has the power to place such lights on the street. Its omission to do so does not however, make it liable to one who has suffered an accident in colliding with a fire plug, with which sufficient light would have prevented a collision. Horner v. Philadelphia, 194 Pa. 542.

In Goodwin v. Town of Reidsville, (N. C.) 76 S. E. 232, the exact question presented in the case before us was considered. "The evidence tends" says Brown, J., the writer of the opinions "to prove that certain boys had a custom of collecting on the streets and playing ball in the evenings, frequently during the spring and summer months, which custom had been going on for over two years, and was known to the police officers of the town, and no effort had been made to stop it." Goodwin, while driving along the street was struck with a ball and injured so seriously that he died. It was held that there was no liability.

In following this decision, and affirming the judgment below, we do not desire to express approval of the decision and the logic that has conducted the courts to similar decisions in like cases. To say it is the duty of a municipality to keep obstacles to travel and to the safety of travel from streets, such as dead animals, ropes, wires, fences, but not to keep people by preventive ordinances, from themselves, by their presence, in large numbers, or by their acts, such as sledding, skating, playing base-ball, cycling, impeding travel or rendering it unsafe appears an arbitrary and futile distinction. To say that it would be unreasonable to hold a borough liable for not doing an act which it had not the power to do, is to say nothing of value. The power may be inferred from the duty. Much of the recognized power of boroughs and cities, has been created not by statute, but by judicial concession. We think it would be wise to hold that there is a power in a borough to prohibit whatever renders the use of its streets inconvenient or unsafe, and that, when the circumstances clearly indicate that this power should be exerted, the failure to exert it should, as negligence, expose the borough to a liability to indemnify those who suffer therefrom.

The playing of base-ball on a street is manifestly dangerous. Travelers should not be compelled, either to renounce their travel, or to take grave risks improperly imposed, and the borough is the most convenient instrument for defining the uses of streets which ought not to be made and for securing abstinence from such uses.

Affirmed.

COMMONWEALTH v. HUDSON

Challenge of Jurors

STATEMENT OF FACTS

Trial for murder. Several jurors when called upon were asked by the Commonwealth whether they would in the making of the verdict, express their own judgment as to the guilt or innocence of the accused, and not unite in a verdict to which their minds did not assent simply because a majority of the jurors agreed on it and it was desirable that an agreement on a verdict should be reached. The defendant excepted to the questions and the trial court rejected them. Hudson convicted appeals.

DECISION OF THE LOWER COURT

INGRAM, J. The question in this case was put by the plaintiff and the defendant objected to it and his objection was sustained. However the defendant asked for a new trial and upon its refusal he appealed the case. Since the objection to the question was sustained and the defendant appealed, it is evident that he thought the mere stating of the question was detrimental to his cause. Reason tells us that a defendant in a cause desires that the jurors shall not agree and thus not be able to render a verdict. In this case the contention of the defendant must be that the question as put by the Commonwealth tended to influence the jurors to reach a verdict by the fact that a majority opinion had been reached and the others should agree making it an unanimous decision, thus giving a verdict.

As we understand the case then we come to the conclusion that the contention of the defendant is that the jurors should not be influenced in their decision by the fact that the majority of the jury have come to the same conclusion. Logically then the contention of the plaintiff should be that the jurors should be influenced by the fact that a majority have come to the conclusion. After duly considering the question we sustain contention of defendant.

A verdict is the unanimous decision of a jury and to form a verdict of conviction the jurors must each and every one concur to the guilt of the accused. 34 Ohio State 228.

In all criminal proceedings the accused shall have the right to a speedy public trial by an *impartial jury*. 24 Cyc. 290. Asking improper questions to jurors tend to influence their decisions and thus render jury partial.

The defendant has a right not only to see and know that the whole jury is present assenting to the verdict but also by polling to demand face to face of each juror whether the verdict is his own verdict rendered according to his conscience or not. Temple v. Comm., 14 Bush 762.

Sadler's Criminal Procedure, page 397 states the inquiries on a voir dire must tend to show that ground for challenge for cause exists, and under such an examination it says that it is not proper to ask if any

impression has been formed as to the guilt or innocence, since only a fixed opinion would disqualify; also says it is improper if juror states that he has reached an opinion, to ask him what it is.

Comm. v. Van Horn, 188 Pa. 144 holds it is improper to ask a juror on his voir dire what he would do upon the whole of the testimony in a certain event or what his opinion would be as to the guilt of the defendant though the law presumed him innocent until proved guilty.

In 12 Cyc. 721, and in case of Cooper v. State, 103 Ga., it is stated "a new trial will be granted where it appears that communication, between the officers and jurors, of a character calculated to prejudice to the accused takes place."

It is the duty of a juror to weigh the evidence and other material facts of the case and render an impartial verdict and we think that giving a verdict merely because the majority have agreed on a verdict and to come to a conclusion is in no sense the duty of juror.

We think it reasonable to say that a majority rule verdict is bad. Such a verdict would be against public policy and sound legal principles, as making life depends upon an uncertainty.

Appeal sustained and v. f. d. n. awarded.

OPINION OF SUPREME COURT

The accused is entitled to exemption from punishment unless twelve men really agree in believing, in having, indeed, no reasonable doubt of, his guilt. That there is a tendency in some minds to yield to the authority of others; that from mental indolence, or fear of seeming obstinate and opinionated, some minds are disposed to acquiesce in the decisions of others, are facts too well known to need evidence. If then, a man on trial has a right to the judgment of twelve men, who will be honest and capable, that he has a right to test the candidates for the jury, in order to discover whether they possess these qualities, would seem to be a truism. The precise question before us, however, has been considered by the Supreme Court of Ohio. That court decides that it is error to allow the defendant to ask a juror whether he would stand by the opinion he should reach, after weighing all the evidence, and the arguments of counsel, and the discussions of his fellow jurors. Says O'Hara, J., "It is not proper however to submit hypothetical questions to the jurors in an effort to learn in advance what they will do in a supposed state of the evidence or on a supposed state of facts, and thus possibly commit them to certain ideas or views, when the case shall be finally submitted to them for their decision."

The object of all investigation into the proposed jurors is to learn something in "advance." It would surely be useless to learn their fitness or unfitness, after they had rendered their verdict.

There are certain views of duty, certain biases, or prejudices, certain fixed opinions, which prognosticate a failure of the juror's duty, and which should therefore be known to the parties to be affected by their decision. The juror may be asked whether he has, and he may be rejected if he says he has, a scruple against capital punishment. Comm.

v. Valsalka, 181 Pa. 17; Comm. v. Lesher, 17 S. & R. 155. The court properly rejects a juror who says that he has a repugnance to convicting and therefore could not, would not, convict on circumstantial evidence. Comm. v. Heist, 14 C. C. 239. It has even been held that a juror is properly rejected who says, on the *voir dire*, that he thinks insane any who would commit such an offense as the one for which the defendant is being tried, and that it would require evidence to change that opinion. Comm. v. Buccieri, 153 Pa. 535.

There are other decisions which it is difficult to harmonize with these. It was said to be proper to exclude a question designed to elicit a statement as to the effect on the juror's tendency to convict the defendant of murdering a woman with whom he illicitly cohabited, of the fact of such cohabitation. Comm. v. Van Horn, 188 Pa. 143. "As the inquiries" says Green, J., "simply related to the possible action of the juror upon hypothetical conditions, it is manifest that they should have been rejected." Yet, it is often allowed to question a juror as to his capacity to render a verdict upon evidence to be submitted, that would not be controlled by his present opinion concerning the guilt of the accused. Sadler Crim. Procedure, 398.

It is the duty of jurors not to unite in a verdict simply because a majority of jurors are ready to make it, or for the purpose of hastening the liberation of the jurors from an unpleasant confinement. We see no solid reason for refusing the opportunity to question the juror as to his fitness, or willingness to discharge this duty. The statements of Justice O'Hara seems wanting in substance. The questions concerning future behavior are always hypothetical. We see in the question proposed no effort to commit the juror in advance to certain ideas or views, to which he should not be committed, viz. that of voting, in the consultations, his own, and not his fellow-juror's opinion. To assert that one juror may properly vote, not his own view, but that of his fellows, is to deny to the defendant the right to be exempt from penalty until twelve men think, not say,—that he is guilty.

If a juror cannot know whether his verdict will express his own opinion, or that of other jurors, surely he is unfit to be a juror. We agree therefore with the decision of the learned court below.

Affirmed.

COMMONWEALTH v. HONSON

Insurance Against Liability for Negligence. Automobile

STATEMENT OF FACTS

Honson while negligently operating his automobile greatly injured X, a pedestrian on the street who subsequently recovered $5000 damages from Honson. The defendant had insured Honson against all liability

arising from the operation of the auto for three years.

This is an action on the policy for indemnity. Defense is that the insurance is against public policy as tending to lessen care of those who operate automobiles.

Bender for defendant.

Carroll for plaintiff.

OPINION

MOROSINI, J. The question in this case is whether this contract is void as being against public policy.

We shall now consider the defense contended for by the defendant. A contract of indemnity, the manifest object or tendency of which is the compounding of an indictable offense is illegal and void. 22 Cyc. 83. This contract in question has no such illegal purpose for its consideration as there is no particular illegal act contracted for. In construing a contract of indemnity no presumption will be raised that it is against public policy. 22 Cyc. 84.

In case in 97 Mass. 482, a contract had been made by the owner of a vessel to indemnify the master of the ship from all expenses which might arise from the chastisement of the crew. This contract was construed as a contract for legal expenses which he might incur in groundless suits and prosecutions against him. Therefore by following the rule of construction laid down in the above case, we must construe this contract in favor of the plaintiff and hold it as a valid contract and not as one against public policy. The defense is raised that such insurance would tend to lessen the care of those driving automobiles and for that reason is against public policy. But there are fire insurance policies which allow recovery even though the building was burned by the policy holder's own negligence. There are also life insurance policies allowing recovery even though the insured was killed by his own negligence. Do these policies not tend to lessen the care which the insured would ordinarily exercise and therefore are they not against public policy? Are they not then void? But we have seen that such policies have been enforced time and time again and are always upheld by our courts as legal and binding.

Then there is another form of insurance known as the employers' liability insurance which is an insurance which provides indemnity to employers against liability for accidents to their employees. There are also railroad liability policies in which the railroad company is indemnified against liability incurred on account of injuries inflicted to persons riding on its road or employed by them.

It will be seen that these contracts are of the same type as the one in question and yet they are in general use and are upheld as valid contracts.

In the case in 38 L. R. A. 97 cited in Cyc. 1036, note 5, it was held a policy indemnifying a common carrier against liability for injuries to passengers and employers is not void as being in contravention of public policy.

In the case in 158 Mass. 407, recovery was allowed on a policy insuring against accidental personal injuries to persons by the elevator of the assured or its appurtenances and for which he should become liable.

Case in 155 Mass. 404, recovery was allowed on an insurance policy insuring employer against claims for compensation for accidental personal injuries to others than employers caused by any horse, teams, or vehicles owned by the assured if engaged in his business or in charge of his employees.

11 American, 2 Eng. Cyc. of Law, 10, says on this subject "contracts of insurance in this class have been assailed as being contrary to public policy invirtually lessening the penalties which follow negligence on the part of the assured toward those to whom he owes a legal duty. But this view has not received judicial sanction." Therefore if insurance can be had in cases as cited above and the contracts are enforced as binding, why should recovery not be allowed in the case at hand? This case is like those cited above in all respects and we think it should be enforced as a legal and binding contract.

Verdict for plaintiff.

OPINION OF SUPERIOR COURT

The only objection to a recovery by the plaintiff, made by the defendant, is, that the contract of the latter to indemnify him for a liability under which he might fall, on account of his operation and his negligent operation of the automobile, is contrary to public policy and void.

That, after a man is indemnified in advance, against the results of his acts, even his negligent acts, he may be less likely to be careful, can hardly be gainsaid. It should be the object of the law to encourage people to be careful, with respect to acts which may affect the well-being of other persons.

The court below, however, has adverted to instances in which this object has not been allowed to prevent insurances of various sorts, against acts which have been negligent. Said Gibson, C. J., in Amer. Ins. Co. v. Insley, 7 Pa. 223, a marine insurance case, "public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means." Cf. Phoenix Ins. Co. v. Transportation Co., 117 U. S., 312. Strong, J., observed that a fire policy "is a protection against fire caused by the assured's own negligence, unless the negligence amounts to fraud." Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa. 419. The lower court's instruction to the jury that "if it [the fire] was occasioned by ordinary negligence, she [the plaintiff] may be entitled to recover in this case. If it was occasioned by gross negligence, such as no person should be guilty of, the misfortune is her own, and she cannot recover," resulted in a verdict and judgment for the plaintiff, which the Supreme Court approved. Bentley v. Ins. Co., 191 Pa. 276. In Gould v. Brock, 221 Pa. 38, the validity of an insurance of an automobile-owner, against liability to others for accidents, negligently caused, was assumed. It is unnecessary to investigate the subject further, and the judgment of the learned court below is affirmed.