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SOMETHING ABOUT NEGLIGENCE

When Negligence Is Not A Cause

A may complain of B's negligence, only when it has caused some injury to A's person or property. Being negligent mentally, acting negligently, is not reprehended, unless some injurious consequence can be traced to it. In A's action gainst B, therefore, a fundamental task is to show the casual bond between what B did, or failed to do, and the injury, as well as the negligent quality of such act or omission.[1] B, a mine owner, was negligent in permitting an electrically charged wire to be uninsulated for two months; A, employed in the mine was without negligence on his part, killed in the mine. No recovery by the widow was allowed because it was not shown "that the defendant's negligence was the cause of her husband's death, or that he died from electric shock."[2] When A would, had he been duly observant, have seen and heard an approaching trolley, with which he collided, its excessive speed would have been material, otherwise not, since it could not have conduced to the collision.[3] B contracted with A to maintain an electrical arrangement by which, if burglary were committed, warning would be given to B, who was at once to dispatch a man

[1]Erbe v. R. T. Co. 256 Pa. 567, Nirdlinger v. Am. Co. 245 Pa., 453. Wallace v. Auto Co. 239 Pa. 110. Glancy v. Borough; 243 Pa. 216.
[2]Caddy v. Coal Co. 261 Pa. 20.
[3]Jordon v. R. T. Co. 260 Pa. 275.

to the place to interrupt the burglar's work. B's neglecting to maintain the electrical connection, or to dispatch a man, on notice of the burglary, is not the cause of the loss arising from the theft. Stewart, J., finds, "Certainly there is nothing in the case from which a legal inference could be derived that the loss would have been averted, had the electrical alarm been in order."[4]

UNITY OF CAUSE

Occasionally remarks occur that the defendant, in order to be responsible, must have been the sole cause. "The burden," says Frazer, J.,[5] was on the plaintiff (in a case of collision with a trolley car,) to show that defendant's negligent act was the sole and proximate cause of the death of his wife, to the exclusion of other causes." There are no single causes of anything. In his Lectures on Metaphysics, Sir William Hamilton remarks,[6] "Of second causes, I say there must almost always be at least a concurrence of two to constitute an effect. Take the example of vapor. Here to say that heat is the cause of evaporation is a very inaccurate—at least a very inadequate expression. Water is as much the cause of evaporation as heat. But heat and water together are the causes of the phenomenon." In his Discussions on Philosophy, page 584, he again observes, "It would be here out of place to refute the error of philosophers, in supposing that anything can have a single cause:—meaning always by a cause, that without which the effect would not have been." But the author-

[4]Nirdlinger v. Tel. Co. 245 Pa. 453.

[5]Erbe v. Transit Co. 256 Pa. 567; 570. The burden is on the plaintiff to show that "the negligence of the defendant was the sole producing and proximate cause" of the injury; Glancy v. Borough, 243 Pa. 216; 219.

[6]Page 554. Negligence maybe the proximate cause of an injury of which it is not the sole or the immediate cause. Plymouth Township v. Graver, 125 Pa. 24; Burrell Township v. Uncapher, 117 Pa. 353.

ity of no philosopher, is necessary to support so obvious a principle. The law recognizes duality of causes, in its doctrine of contributory negligence. There are two negligences, that of the defendant, and that of the plaintiff, and they co-operate in the production of the one effect, the injury. The law speaks of proximate and remote causes, of causes, the results of which are foreseeable and of causes, whose results cannot be foreseen. Liability for a damage does not depend, then, on the doing of some thing which can be said to be the sole cause of that damage.

CO-OPERATING NEGLIGENCES

Two independent agents may do negligent acts, the confluence of whose effects, eventuates in injury to a third person. Either might be sued for the result. A trolley car is about to cross a railroad track. The watchman invites the motorman to cross by raising the safety gates. The car conductor running ahead of the car, also invites the motorman to advance. He does so, and is injured by an oncoming train. If he was influenced by both signals, or only by that of the watchman, both signals having been negligently given, he can recover from the railroad company.[7] If the negligence of a master concurs with that of a fellow-workman, in causing injury to A, he can recover from the master for the master's negligence though not for the fellow-servant's.[8]

NEGLIGENCE PER SE

Occasionally in certain defined circumstances, certain omissions or acts of certain persons, are legislatively declared to be negligent per se. The XI article of

[7]Siever v. Railway Co., 252 Pa. 1.
[8]Kaiser v. Flaccus, 188 Pa. 332; Weinschenk v. Bread Co., 258 Pa. 98.
[9]P. L. 177.

the Act of June 2d, 1891,[9] concerning anthracite mining, requires the owner, etc. of mines, on the request of miners for props, ties, etc. to furnish them at or near the miner's working place, and declares that the failure to do so shall be an offense, and taken to be negligence per se, on the part of the owner, etc., in action for the recovery of damages for accidents resulting from insufficient propping of the mine, through failure to furnish the required props. From this it follows that when an accident happens from the fall of coal, after unheeded notice to furnish props, the mere falling with injury to the miner, will warrant the inference that it was the result of the owner's negligence.[10] The Act of April 29th, 1909, P. L. 283, forbids the employment of boys under 16 years of age, unless the employer procures and keeps on file, an employment certificate, and two lists of minors under 16 years, one to be kept in the employer's office and one to be conspicuously posted. These lists not being kept and posted, if a minor under 16 is injured, while employed, the employer will be liable for the injury. The employment is the proximate cause of it.[11] The 11th sect. of the Act of May 2d, 1905 P. L. 355, provides that "Exhaust fans of sufficient power or other sufficient devises, shall be provided for the purpose of carrying off poisonous fumes and gases and dust from emery wheels, grind-stones and other machinery creating dust." The employer is liable to the workmen, who is injured by poisonous fumes, without negligence of himself, the requirements of this statute not having been obeyed by the employer.[12] Although the law forbids for automobiles a greater speed than 24 miles per hour, transgressing that limit will not make

[10]Kolalsky v. Del. and H. Co. 260 Pa. 357; Sudnick v. Coal Co., 257 Pa. 226; C. F. Kruflies v. Coal Co 2.49 Pa. 162.

[11]Chabot v. Glass Co. 259 Pa. 504. Apparently, contributory negligence is not imputable.

[12]Fritz v. Tanning Co. 258 Pa. 180.

the driver liable for injury from a collision, unless the excessive speed was the cause of the accident. The violation of the statute must be the "efficient cause of the injury."[13]

COURT-MADE DEFINITIONS OF NEGLIGENCE

It is negligence, per se, to cross a railroad track without stopping, and looking and listening for approaching trains.[14] It is not negligence per se for the driver of a team ascending a hill, with a heavy load, to descend from the wagon, walk behind, and from that place direct the movement of the horse, even though there is an unguarded declivity along the road, down which the vehicle slips and falls.[15] A high rate of speed of a trolley car, is not per se negligent.[16] A master who uses in his business machinery which is ordinarily used in such business is not negligent in so using it. Nor will the use of machinery different from that ordinarily used, ipso facto be negligent. It may be safer than the ordinary or equally safe, or less safe.[17] Leaving a horse unhitched and unattended upon a city street is presumptively negligent.[18]

CONTRIBUTORY NEGLIGENCE OF OTHER THAN PLAINTIFF

An injury may result from the combined action of the negligence of the defendant and another. Ordinarily, if the other is not the plaintiff, the fact that his

[13]Stubbs v. Edwards 260 Pa. 75.

[14]Nagle v. R. R. 88 Pa. 35; Cohen v. R. R. Co. 211 Pa. 227. But after getting on the tracks whether it is negligent or not. not to stop, look and listen, depends on circumstances, and is for the jury.

[15]Winegardner v. Springfield Township, 258 Pa. 496.

[16]Jerdon v. Rapid T. Co. 260 Pa. 275.

[17]Fullick v. Oi 1Co. 260 Pa. 4.

[18]Henry v. Klopfer, 147 Pa. 178; Stevenson v. Express Co., 221 Pa. 59.

negligence has co-operated in effecting the untoward result, does not exonerate the defendant wholly or even partially. He is liable to the whole extent of the damage. But, there are cases in which A claims compensation for the hurt of B. A widow[19] or child may demand it for the death of her husband, or its father. A father[20] or mother[21] may demand it for an injury to a minor child. In such cases, if the negligence of the deceased has made effective that of the defendant: i. e., if the deceased negligently contributed to the injury, there can be no recovery. If the parent has negligently allowed the irresponsible child to incur the risk which has eventuated in his injury, while the parent cannot recover from the defendant, the irresponsible child may.[22] A's horse and wagon is being driven by his son, who negligently crosses a railroad. The horse and wagon are injured by a train. The negligence of the son, who apparently is treated as agent of his father, prevents the son's recovery for injury to himself, and the father's recovery, for injury to the horse and wagon.[23]

THE LAST CLEAR CHANCE

Not every contributory negligence will defeat a claim for compensation for injury caused by the defendant. A may negligently place himself where he will be in imminent danger, if a certain machine is set in motion. If B, aware of A's situation, and of the risk arising from it and the operation of the machine, starts it, he will be liable for the consequence.[24] The doctrine that, although the plaintiff's negligence ex-

[19]Miller v. W. Jersey R. R. Co., 257 Pa. 517; Reigner v. Pa. R. R. 258 Pa. 257; Cazzulo v. Colscher, 261 Pa. 447.
[20]Faulk v. Duquesne Light Co., 259 Pa. 389.
[21]Corbin v. Philada 195 Pa. 461.
[22]Kuehne v. Brown, 257 Pa. 37. Injury of child by automobile.
[23]Borofsky v. R. R. Co., 65 Super. 389.
[24]Walsh v. Railway Co., 221 Pa. 463.

poses him to the risk of injury, if the injury is more immediately caused by the defendant's omission, after becoming aware of the risk, to use ordinary care for the purpose of avoiding it, the defendant is liable, seems to be approved.[25] If a wagon is advancing on a trolley track, in front of the trolley, and does not get off when it should, the motorman must take steps to avoid colliding with it.[26] Yet it is said that "no one has a right carelessly; (and purposely) to put himself in a position of danger, relying entirely on the assumption that another, who controls the sources of such danger will see to his protection."[27]

ANTICIPATING OTHERS' NEGLIGENCE

Negligence is not so common that one man is bound to expect it in another and adopt means to avert its consequence. Many illustrations may be found of this principle. The driver of an automobile, seeing a truck on a cross street approaching the crossing, has a right to assume that the truck will not come to the crossing at immoderate speed, and not under control so as to make a collision likely. No man is bound to anticipate the negligence of another.[28] A motor-cyclist may assume that the operator of an approaching automobile will exercise care to avoid a collision.[29] A man, standing near a wagon loaded with lumber, as his duty required, was injured by the unexpected discharge of the lumber. "A man," said Justice Walling, "is not required to so guard himself that he cannot be injured by the unexpected negligence of another."[30] It is not contributory negligence in a pas-

[25]Hess v. Kemmerer, 65 Super. 247. "More immediately" seems to have no meaning.
[26]Doyle v. Rapid T. Co., 261 Pa. 248. Dictum.
[27]Young v. Rapid T. Co., 248 Pa. 174.
[28]Bew v. Dailey, 260 Pa. 418.
[29]Bell v. Jacobs, 261 Pa. 204.
[30]Clark v. Lloyd Co., 254 Pa. 168.

senger on a train, in alighting, to rely on the aid of a brakeman, and not to foresee that he will suddenly let go his hand, causing his fall.[1] One about to cross a street, seeing a trolley coming, is not ordinarily bound to stop till it passes. He may assume that the car will approach the crossing with due care, with respect to speed.[2] A motorman has a right to assume that one driving a wagon along side of the track, in front of his car, will not drive on the track.[3] Wagon crosses the track of a trolley, at a street crossing. The driver is not bound to suspect that the car will approach the crossing at an excessive speed, and the motorman is not bound to anticipate that the driver will turn suddenly upon the track, in front of the car, without warning.[4]

ORDINANCES

In several cases where negligence is imputed to the defendant, ordinances of the city in which the alleged negligent act was done are put in evidence. Thus ordinances fixing the rate at which trains might run, in Lancaster[5], in Harrisburg[6], requiring vehicles to keep to the right, in Reading[7], in Philadelphia[8]. The ordinance is admitted not to show that by the infraction of it, ipso facto, a liability has been incurred, but as some evidence that the act by which it was infringed, was a negligent one. "It may" said the trial judge,[9] "be taken into consideration by the jury, with other evidence in ascertaining whether or not the cars on July 3d, 1891 (the

[1]Hager v. Pa. R. R. Co., 261 Pa. 359.
[2]Patterson v. Railways Co., 260 Pa. 214; Wagner v. Rapid T. Co., 252 Pa. 354.
[3]Doyle v. Rapid T. Co., 261 Pa. 248.
[4]Moses v. Railway Co., 258 Pa. 537.
[5]Lederman v. R. R. Co., 165 Pa. 118.
[6]Pa. R. R. v. Lewis, 79 Pa. 33.
[7]Bell v. Jacobs, 261 Pa. 204.
[8]Forte v. Amer. Product Co., 195 Pa. 190.
[9]Lederman v. Railroad, 165 Pa. 118.

date of the killing of plaintiff's child) were run at too high and dangerous a rate of speed where the accident occurred."[10] "While," said Walling J. in a case of collision from the violation by one of the colliding parties of the rule as to keeping to the right, "such ordinance is not per se evidence of negligence (he means sufficient, of itself to prove negligence) it may be considered in connection with the (other) evidence in the case."[11] When the city whose ordinance is put in evidence is the defendant, its admissibleness would be less questionable. A boy being injured by coming in contact with a wire which had become charged with electricity from a feed wire of an electric railway, in the action by him for damages, an ordinance of Philadelphia, and rules of the police department, relating to the inspection and use of the city wires, were put in evidence. This evidence, mildly says Mitchell, J., "though not important, was not incompetent. It merely tended to make more clear and definite the responsibility for due care, which existed outside of them."[12] To justify the use of the ordinance, a breach of it must be alleged. The ordinance is conceived to express a standard of care, to which the defendant has failed to conform. An ordinance of Philadelphia provided for inspection of elevators and required the owner, after its inspection to procure from the inspector a certificate that it is in good condition, and to expose this certificate to public view. In a suit in which violation of this ordinance was not the negligence charg-

[10]165 Pa. 118.

[11]Bell v. Jacobs, 261 Pa. 204; Foote v. Amer. Product Co., 195 Pa. 190. Although an ordinance of Philadelphia requires cars to stop at a certain corner, a motorcyclist may be negligent in assuming that a car will stop at this corner; di Orio v. Rapid T C.o., 260 Pa. 399.

[12]Herron v. Pitsburg, 204 Pa. 509. An ordinance of Philadelphia required freight elevators to have their hatch-ways surrounded by vertical windows and gates, and all gates to be self-closing. In suit for injury from an uninclosed elevator, this ordinance was admissible. Weinschenk v. Co., 258 Pa. 98.

ed, the ordinance should not be admitted. It would only confuse and mislead the jury. The alleged negligence was the employing upon the elevator a defective shifting rod for starting and stopping it."[13]

The justification of the reception of ordinances, as evidence that acts not conforming to them are negligent, is somewhat difficult to realize. They are said by Moschzisker, J., to be "introduced simply as an expression of municipal opinion" to aid the jury in its deliberations. But, the men whose opinion they express, are not experts, are not sworn, are not subject to cross-examination.

MAN AS A CAUSE

The soul of man sits within the periphery of his body and by its volitions, sets in action this body, or its mobile parts. By bodily action alone he may inflict damages upon his fellow, as when he impels his closed hand against the face of the latter. His arm is his implement. He may seize a piece of matter, external to his body, and wield it as a tool for the doing of hurt to others, as when he strikes another with a club, or, a more complex weapon, with the discharged contents of a rifle. He may cause damage, not to the bodies of other human beings only, but to their property, their horses. their utensils, their houses. These effects of a man's activity unwelcome to his neighbors, may have been imagined, and purposely produced. When a harm or injury to others, or the property of others is preconceived, willed, and done, there is ordinarily liability. But, in this article we are not concerned with the causation of harm or injury in this mode.

Harm can be inflicted by A on B, without intention. He may be aiming at the doing of a neutral or a praise-

[13]Ubelmann v. Amer. Ice Co., 209 Pa. 398.

worthy thing, and do it so heedlessly, so awkwardly, so unskillfully, as to produce collateral mischiefs which the state determines that he should be made to repair. He e. g. shoots at a fleeing murderer, does not hit him, by reason of his unskillfulness or rashness and kills an innocent bystander. He undertakes to convey X in an automobile to a certain place, and operates the vehicle so negligently as to cause it to overturn and as to injure X. He produces results which he did not imagine, against which, had he imagined them, he would have vehemently reluctd. For these untoward results of his activity he may be held responsible to the persons affected by them.

The case last supposed, is one of intended activity, where unintended collateral effects are produced. There are numerous cases in which inaction is regarded as a wrong to the persons who would have been benefited by action. A child needs food. It is said to be the duty of the parent to furnish food to it. Not to furnish it, that is, to do nothing, would be a breach of the duty which the state has imposed. Without food, the child will die. But, the parent is not responsible for that order of sequence. It has been established by the Demiurgus. His task is to change the antecedent—foodlessness, so as to avert the consequent, viz. starvation. Not only may nature ordain sequences which must be arrested; but men may do the same. The formation of a riot will result in injury to life or property. It may be the duty of a city, a county, particular officials, to prevent the mob, or to frustrate its violence. Not to do the required things at all, would expose to liability, and would often be called negligence, although it was deliberate and intended. To do them ineffectively and unwisely, would be negligence in a stricter sense. Negligence then, may be active, when it is the concomitant of the exercise of energy; and passive when it con-

sists in inaction, when the circumstances impose a duty of action.

SPECIMENS OF PASSIVE NEGLIGENCE

A is riding in an automobile operated by B. B's reckless management will probably produce disaster. A must do what could reasonably be done to change the conduct of B, or, if a collision happens, caused in part by B's method, A will get no redress from the other party to the collision.[14] A woman, riding in a motorcycle with a man, who was operating it, enters no protest against his running so recklessly as to threaten a collision with a street car. She could not recover damages from the transit company, because the operator was improperly taking the risk of driving in front of a running car, and the woman was a "volunteer in this hazardous undertaking and entered no protest against the driver's proceeding in front of a moving car."[15] Not restraining a child, from crossing a street and exposing it to danger, may be negligence in the father.[16]

PREVENTING OTHERS FROM INJURING THEMSELVES

Sometimes things are done or tolerated by X of which it is necessary that A should have notice, in order that he may avoid injury from them. There may spring a duty on X to give A information of the risk, or to adopt other measures to prevent his incurring it. An obstacle e. g. a fallen tree is in the highway. It may be actionable negligence in the city, not

[14]Hardie v. Barrett, 257 Pa. 42. But sometimes the passenger in an automobile, witnessing the recklessness of the chauffeur, may nevertheless, prudently abstain from interference. Vocca v. Pa. R. R., 259 Pa. 42. Wanner v. R. R., 261 Pa. 273.

[15]Volpe v. Rapid T. Co., 260 Pa. 402.

[16]Kuehne v. Brown, 257 Pa. 37.

[17]Rockett v. Philada., 356 Pa. 347.

to put out lights or adopt other means to prevent a collision with it.[17] Persons about to cross a railroad might be warned of an approaching train by whistle or bell or watchman the omission to use which would be negligent.[18] Boys will go for a lost ball. It falls into a pit, maintained by a city, at the bottom of which is poisonous gas. The city must know the tendency of boys and prevent, by warnings acting on their minds or by physical obstacles, their access to the bottom of the pit. If one without warning enters and is asphyxiated, his parent may recover for his death from the city.[19] A gas pipe in a street is broken. Gas escapes from it into an adjacent sewer. One who properly goes into the sewer, with a light, and is injured by an explosion of the gas, may recover from the gas company, for not repairing the pipe.[20] Not giving notice to a workman of a change in the operation of the machinery that would increase his risk[21] not instructing a miner as to danger from unexploded shots in the coal[22] not notifying a man who is near an engine, and whose hearing may be injured by the noise, unless he adopts precautions against it, of the intention to blow the whistle[23] may be negligent. Failing to notify a workman who heretofore has been handling washing soda, of the substitution of caustic soda, and whose injury would have been avoided had he known, is negligence[24] as is not disclosing to a conductor, who is to conduct a train on a track, that another train will be coming towards him on the same track.[25]

[17]Cento-fante v. R. R., 244 Pa. 255; Kobylis v. R. R., 201 Pa. 350.
[18]Corbin v. Philada., 195 Pa. 461.
[19]Oil City Gas Co. v. Robinson, 99 Pa. 1.
[20]Yeager v. Brewing Co., 259 Pa. 123.
[21]Jelie v. Jamison, 259 Pa. 447.
[22]Royer v. Pa. R. R., 259 Pa. 438.
[23]Solomon v. Packing Co., 256 Pa. 19.
[24]Kuhn v. Liganier Valley R. R., 261 Pa. 147.

THE PLAINTIFF'S CARE

In order to recover for injury resulting from the defendant's negligence, the plaintiff must have been free from a contributing negligence. His care, however, is presumed, until some evidence furnished either by himself or the defendant appears, of his negligence. The case which he makes out may disclose no want of care. The burden of proving it would then be on the defendant.[26] In a case of collision with a train at a crossing the plaintiff's saying that he stopped and looked, is not to be interpreted, as an assertion that he did not listen. That he did not listen, it would be for the defendant to prove.[27] The evidence of the plaintiff may be self-contradictory, one part implicating him in negligence, the other not. One witness for him may testify to facts which reveal care, and another, to facts which reveal want of care. In such cases it is not for the court to decide that the plaintiff was guilty of contributory negligence. The jury must determine which of the inconsistent assertions is true.[28]

NEGLIGENCE IN NOT CORRECTING NEGLIGENCE

Two persons may be responsible for an injury resulting from the same state of things, although they have not jointly produced it. A pavement in front of A's house in a borough, becomes and is negligently allowed by A to remain, icy. After a certain time, it will become negligence, on the part of the borough, if this condition is permitted to continue. An accident to a pedestrian occurs after this time has elapsed. The injured person may recover from the borough. The borough may then recover from A, what it has been obliged to pay, if its payment was justified. It may use

[26]Martin v. Traction Co., 261 Pa. 96; Ely v. Railway, 158 Pa. 233.

[27]Waltosh v. R. R. 259 Pa. 372.

[28]Ely v. Railway, 158 Pa. 233; Martin v. Traction Co., 261 Pa. 96.

the judgment against it, as the proof and the measure of A's liability, if A had received notice of the action against the borough, and of the opportunity to intervene therein, to make the defense.[29]

NATURAL CONSEQUENCE

There are no absolute beginnings. Every state or act of every thing is preceded by an endlessly regressing chain of states and acts. Each of these in turn is the forerunner of another endless chain developing in the future. In holding a man responsible for the effects of his act, it was felt to be preposterous to charge him with effects developing years after his act, and at widely separated points in space. Some criteria were sought, to distinguish the consequences for which a man should be made responsible, from those for which he should not be so made. One of the notes of a consequence for which a causer should be liable, is that it be the "natural" consequence.[30] But, what is natural? We may distinguish between the effects of human volition and other effects and agree to call the latter natural, while those others are artificial. There is no other intelligible distinction. But, is it true that a man is not liable for the consequences of his act which are mediated by the acts of other human beings? No! For results of the acts of other persons, which acts are induced by X, or, being preventible by him, are not prevented, X has in hundreds of cases been held responsible. A man can incur the responsibility of a murderer through the action of another. He is guilty of the negligent causation of another, in many cases, in which he fails by giv-

[29]Hollidaysburg v. Snyder, 258 Pa. 206.

[30]Pa. R. R. v. Hope, 80 Pa. 376. Cf. cases where sellers of liquor to intoxicated persons are held to be responsible, as causes, for the acts of the drunken man which are injurious to himself or others. Bier v. Myers, 81 Super. 158 is a speciman.

ing warnings of danger, to dissuade other persons from action; e. g. the man about to cross a track, who is not dissuaded by a blast of the whistle, or the ringing of the bell; or the boy who will, unless warned descend into a pit where lurks a noxious gas, and be asphyxiated.[1] An improper signal caused a train to be wrecked and cars to be thrown on an adjacent track. With these wrecked cars, another train collided. The jury was allowed to find that the giving of the signal was the responsible cause of the death of X in the collision.[2] In short, the word natural, in any appreciable sense, does not distinguish the events for which a causer is liable, from the other events. The definition of Orlady J.,[3] "the natural consequence of an act is the consequence which ordinarily flows from it," is not usual. No act is usually followed by a particular conquence, unless its concomitants, the co-operating or conditioning causes are usually the same. Usual would be a much better word than natural to describe the consequences, were this the thought intended to be expressed.

PROBABLE EFFECT

The word probable is usually linked with the word natural, in describing the effects for which an agent is liable. "The injury" says Agnew J., "must be the nat-

[1]Corbin v. Philada., 195 Pa. 461. A may do an act without concert with B, and B an act without concert with A. The union of the effects of their acts may cause damage to X. Both A and B may be jointly liable. Yet the damage is produced by A's act only through the mediation of B's, and vice versa; O' Malley v. Rapid T. Co., 248 Pa. 292.

[2]Thomas v. Central R. R., 194 Pa. 511. A township which has neglected to put guard rails where they should be, is responsible for the result, a horse being frightened, although it is frightened by the negligent act of another. Burrell Township v. Uncapher, 117 Pa. 353.

[3]Swanson v. Crandell, 2 Super. 85.

ural and probable consequence of the negligence,"[4] and he adds, "such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act."[5] When the event has been accomplished, what was its cause is a question of history. When the cause has just happened, what is going to be its consequence is a question of prophecy. The rule is intended to be one to regulate conduct, and conduct will be regulated only by the state of mind of the doer at the time of the act. By probable consequence must be meant then, a consequence not yet happened, but whose sequence may be thought about and expected. It is idle however to affirm that the particular consequence in a vast maority of cases, of the particular act of X may or should be anticipated. It would be hazardous to affirm that any consequence of the class to which it belongs should be susceptible of anticipation, in order to make the doer responsible. When event (a) has happened, event (x) is or is not going to follow from it. There is no midway position. There are no degrees of actuality of the causal bond. Probability is not in the events external to the mind but in the mind. There are degrees of belief and doubt as to certain facts, and the facts are styled improbable or probable or certain with respect to these subjective states.

Probable is distinguished from possible by Green J., "Things" he says[6] "which are possible may never happen, but those which are natural or probable, (those words are used apparently as synonyms) are those which do happen and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the

[4]Pa. R. R. v. Hope, 80 Pa. 370.
[5]Railway Co. v. Frich, 117 Pa. 390; Hoag v. R R.., 85 Pa. 293; Swanson v. Crandell, 2 Super. 85.

ordinary affairs of life precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared." The thing in question, viz, the falling from a car of a woman who was entering it, with one foot on the step, because of the sudden starting of the car: and who, thrust back on the street, was run over by a run-away horse, was possible, and actual. Before it happened it was not likely. The court thought that it was not natural or probable, and could not have been anticipated as a probable consequence of the starting of the car. Perhaps we may say, in order to limit the area of responsibility, that the doer of an act may be made liable for any consequences which are more or less in type, like consequences which the doer, if a man of ordinary imagination, with time to indulge it, would at the time of doing the act be likely to anticipate as likely to follow. The vagueness and arbitrariness of such a limitation are painfully evident in the decisions.[7]

PROXIMATE

Another epithet by which the results of an act for which the doer is responsible, are distinguished is the word proximate. But, to be proximate, the effect need not be realized in space, near the point at which the cause operates. A spark may cause a fire at (a). The fire spreads to (b), and (c), and (d), until it reaches buildings, etc., at (e) 600 feet from (a). The result at (e) is nevertheless proximate.[8] The capacity of the fire to spread so far, depended on the accidental presence

[6]Railway v. Trich, 117 Pa. 390.

[7]Agnew, C. J., says that if consequences must be deemed too remote when the result is "not within the probable foresight of the party whose negligence is alleged to have produced it." Pa. R. R. v. Hope, 80 Pa. 373.

[8]Pa. R. R. v. Hope, 80 Pa. 373.

along its course of combustible materials of various kinds, of dry grass, of fences, etc. As remoteness in space of the effect from the cause is not decisive that the effect is too remote for liability for it, so remoteness in time need not be decisive. The negligent act need not be "the nearest cause in the order of time." A limit to the length of the interval between the cause and the alleged effect, cannot be defined. Courts and juries will decide whether the permissible distance has been transcended in each case. The vanity of attempts to generalize a definition of proximateness, cannot be better illustrated than in the psendo scientific effort of the court in Wallace v. Keystone Auto Co.[10] It is there said that the proximate cause of an actionable accident is (a) "the dominant and efficient cause." But what kind of a cause is an inefficient one? Does it cause, or does it not? And what is a "dominant" cause. Every cause dominates (if the word is liked) its effect, by dragging it from non-existence to existence. The function of the word seems to be rhetorical rather than logical. But, (b) it is said the cause "acts directly or necessarily sets in motion other causes, not created by an independent agency, and which naturally and reasonably results in injury," which under the circumstances ought to have been anticipated in the nature of things by a man of ordinary intelligence and prudence, although in advance it might have seemed improbable, and the precise form in which the injury actually resulted could not have been foreseen." This seems to say that the responsible act may be immediate-

[9]Plymouth Township v. Graver, 125 Pa. 24; Burrell Township v. Uncapher, 117 Pa. 353; Eagle Hose Co. v. Electric Light Co., 33 Super. 581. In Wallace v. Auto Co., 239 Pa. 110, it is said that time or distance between the primary cause and the effect is not important, except as making the effect improbable. What is important is the unity of the series of events for the initial cause to the ultinate effect.

[10]239 Pa. 110.

ly followed by the injury, or that it may cause act or state (b); (b) may cause act or state (c); (c) may cause act or state (d), and (d) may cause the injury. But b,c,d must not be caused by an independent agency." But, does this mean that if they are caused by the concurrence of the "dominant and efficient cause," and other causes there is no responsibility for that cause? The universe is a plexus of forces, anastomosing with each other. A separate chain each link in which is single and discrete is a mere figment of the unschooled imagination.

The negligent cause for which one may be responsible must "naturally and reasonably result in injury." If it results it naturally results, unless it is meant to say that the result must not be due to the supervention on the negligent act of the volitional act of divine, angelic, satanic, or human beings, annexing to the act consequences which would not have happened otherwise. But to say that a man is not accountable for a negligent act that would not have produced the injury, if some other voluntary agent had not also acted, is to ignore multitudes of adjudications. Precisely what is meant by "reasonably" resulting in injury, only a process of divination can discover. The man who suffers the harm is apt to think that it has happened unreasonably.

The injury ought to have been anticipated in the nature of things by a man of ordinary intelligence. "In the nature of things," a phrase so often fondly used by indistinct thinkers means nothing. The injury should be anticipated, even if it seemed improbable. Though improbable, it was still possible or it would not have happened. A man must then have imagination enough to anticipate (to expect? to think likely? to think possible, though unlikely?) the mischief, even though the injury that has happened "could not have

been foreseen." But, if the thing which has happened, could not have been foreseen what it it which should have been anticipated? Is it something like the thing? How like? If a broken leg could have been anticipated, is there responsibility for a broken neck? If a bruise could have been imagined, will the anticipation make liable for a death? Of a wide class of injuries some one must have been susceptible of anticipation; then there will be liability for any other of this wide class, though it was not and, by the defendant could not have been, anticipated.

What has been said suggests that the possession of a criterion for determining for what negligences there shall be responsibility, is still a desideratum.

MOOT COURT

COMMONWEALTH vs. HUDSON

Cohen for plaintiff.
Davis for defendant.

STATEMENT OF FACTS

Hudson is on trial for murder of X. The State calls a witness to prove that 4 days after the shooting, X, expressing the conviction that he could not live, declared that he was shot by Hudson without provocation. X continued alive for seven days after the making of the declaration. The court admitted the evidence. Hudson is convicted.

OPINION OF COURT

FLEEGELMAN, J. It seems to this court that the question to be considered in this case is whether or not the statement made by X is a dying declaration and should be admitted as such.

The defendant contends that it is a mere supposition that X was in fear of death and since the actual fear was not proven that the statement of X should not be admitted.

This court takes the view that the actual fear of impending death need not be proven. The facts show clearly that X was in a hospital. He had been shot. The two facts coupled with the fact that he was very weak were sufficient to put that fear into his heart. The psychological effect of hospital surroundings made that impression even stronger.

The defendant argues that seven days elapsed between the making of the declaration and the exodus of X. But that make no difference. Greenleaf on Evidence (page 228) says that all that is necessary is fear of impending death. Furthermore in Kehoe vs. Commonwealth 85 Pa. 127 it was held that a dying declaration is always admissable when it is made under a sense of impending death and the time of death is irrelevant.

It is a well established fact that when a man senses impending death a fear of God is planted in his heart and the fear of leaving this earth with sin upon his soul opens up his heart in confession and it is an assumption that under these circumstances, he will tell the truth and the whole truth. For every man wants to face his Maker clean.

It appears that the case at hand fits all these facts. At the time X made the statement he thought he was going to die and he did die within a week. Under those circumstances this court holds that it was a proper dying declaration and as such was properly admitted in evidence.

OPINION OF SUPREME COURT

Declarations of facts, made out of court, out of the presence of persons to be affected by them, and not subject to cross examination, are generally inadmissible.

Statements are sometimes admitted, because accompanying relevant facts, and so intimately related as to be (as the phrase is) parts of the res gestae. The res gestae here, are the homicide. X's statement was made 4 days thereafter, and at a different place, and under different circumstances. It could not be admitted as a part of the res gestae.

A recognized exception to the principle that unsworn statements are inadmissible, is that of dying declarations. The declaration of one since dead, in a trial for his killing, is receivable under certain limitations. This is a trial for the murder of X, and X is the person whose declaration is offered.

The declaration concerns the killing. It alleges that X (a) was shot; (b) was shot by Hudson; and (c) was thus shot without provocation. These are the proper subject—matters of such a statement. Commonwealth v. Latampa, 226 Pa. 23; 2 Criminal Law, 277.

The declaration must be a "dying" declaration. This does not mean that it must be made in articulo mortis; that the process of dying must be far advanced, so that its consummation in death follows almost immediately. Here X continued alive, 7 days after making his assertion. That circumstance does not negative the "dying" character of the statement. See Commonwealth v. Birriolo, 197 Pa. 371, where life continued six days thereafter; 11 days thereafter; and Panna v. Stoops. Add. 381; 16 days thereafter.

The declarant must believe that his injuries are going to kill him in a short time. This belief is important as furnishing some guaranty that the declarant is endeavorng to tell the truth. The existence of this belief must be proved. The nature of the injury may at times, satisfy us that the injured party being aware of it, knew its mortal character. But, he may express his belief. 2 Grim. Law 973; Codmonwealth v. Latampa, 226 Pa. 23. In this case X exprsesed the conviction that he could not

live. This justified the reception of his declaration as made by one who was expecting soon to die of the injuries he had received.

There was no error in the trial, of which the defendant may properly complain.

Affirmed

ESTATE OF THOMPSON

STATEMENT OF FACTS

Thompson devised all his estate, $100,000, to a college for the increase of its endowment. His will was subscribed by two witnesses, both disinterested, and at the time, competent. Before the probate of the will, one of them, X, was convicted of perjury and was not allowed to testify. In a contest between the executor and the college, the latter claimed the estate, despite the act of April 26, 1855, 1 Stewart's Purdon, 595.

For plaintiff, H. J. Flannery.

For defendant, Wm. Jones.

OPINION OF COURT

DOMBRO, J. The question arises on the vagueness of the following act: "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body poltiic; or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the time, disinterested witnesses, at least one calandar month before the decease of the testator or alienor; and all dispositions of property contrary hereto, shall be void and go to the residuary legatee or devisee, next of heir or kin, according to law."

Must the witnesses be credible and competent at the time of the execution of the will or when offered for probate or both?

Interpreting the act, it would seem that the legislative intention was that the witnesses must be credible, not only at their attestation but also when the will is probated. It seems that a slight distinction was made between the time that they must be credible and when they must be disinterested for it expressly requires that the witness be disinterested at the time of his credibility.

Be that as it may, we can see no difficulty in decreeing that the credibility of X at the time of the probate is not necessary. the execution of the will and makes no such restriction as to

X's testimony is not necessary to make the will valid and legal. His attestation while he was credible and competent, is all that the act requires.

The act expressly states that the will must be attested by two credible and at the time, disinterested witnesses.

The devise of Thompson was attested by two credible and at the time, disinterested witnesses.

"The competency of the attesting witnesses is to be tested as of the date of the execution of the will and any incompetency arising subsequently does not render the attestation unvalid." Historical Sov. v. Kelker 2,26 Pa. 16.

There is no allegation on the part of the executor concerning the signature of the now incredible X. His signature can be proved by those familiar with his hand writing but this proof is not necessary as the executor does not contest this point.

Judgment for plaintiff.

OPINION OF SUPREME COURT

Thompson's devise of his estate, worth $100,000, was to a college, and therefore, it is alleged, to a religious or charitable use. The modern college iis not so related to religion, that a devise to it could be termed a devise to a religious use.

A devise to a college, however, may be to a "charitable use." A college, incorporated for the purpose of making profit for the incorporators, would not be a charity. Money can be made in various useful businesses, in baking bread, in making clothes, in imparting information, skill, etc. Food for the body is as necessary as food for the mind, and it is no more charitable to engage in the purveying of the latter, than of the former, if the purpose is to make money for the purveyor.

The ordinary college, however, does not exist in order to earn money for its trustees or share-holders. We may then well assume that the devise by Thompson to a college, was a device to a charity. Northampton Co. v. Lafayette College, 128 Pa. 132. The fact that the instructors in such an institution do not render their labor gratuitously but usually insist on obtaining the highest compensation attainable has no significance when the question is as to the charitable nature of the college itself.

Thompson's gift then was for a charitable use. The act of 1855 requires that the will containing it should be attested "by two credible and at the same time disinterested witnesses." Attestation occurs at the publication of the will, and it is at that time that the attesting witnesses must be credible and disin-

terested. No allegation is made that either of the witnesses was, or since is, interested.

The question is whether the witness must be credible both when he attests, and when the will is presented for probate. By "credible" is meant "competent." Whatever witness the law will allow to satisfy, it by that fact, proclaims to be credible.

One of these witnesses, has since the execution of the will been convicted of perjury. The 5th sect. of the act of 1887; P. L. 159, declares that a person who has been convicted of perjury "shall not be a competent witness for any purpose." This attesting witness then, is no longer credible. Does the loss since attestation of the will, of his credibility, make it ineffectual? It would be unaccountable, that the view that it would, should be adopted.

The loss by an attesting witness of one of his necessary attributes, viz: disinterestness, after the attestation does not render the bequest to a charity in the will inoperative. Historical Society, etc., v. Kelker, 226 Pa. 16. Why then should the loss of the other attribute, viz, credibility?

The death of the attesting witnesses renders their testimony at the probate impossible. Who would imagine that it made the will null? Proof of the signatures of the witnesses might also be impossible, yet surely, the will would not be avoided. Proof of those who recognize the handwriting of the testator would be available.

No importance can be attached to the phraseology of the act of 1855, insofar as it says "two credible, and at the time disinterested witnesses." "At the time" must be understood to qualify both "credible" and "disinterested."

Affirmed

THOMPSON v. HAWK

Statement of Facts

Hawk drew a check on the bank with which he made deposits, payable to Thompson, for $1500. This check was never presented to the bank, and never paid. Five years and eleven months after its date, Thompson brings suit against Hawk. The court said to the jury that, after such delay, there could be no recovery, unless Thompson proved that no loss had been caused to Hawk by the delay.

Moskovitz for plaintiff.
Roomberg for defendant.

OPINION OF THE COURT

S. C. WEAVER, J. A check is a written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named or bearer, or to such person or order, a named sum of money. A check is never due until presented and should be good at all times and under every circumstance. It would be very foolish and unfair to say that simply because a man does not present a check for payment immediately after receiving same---that he can never collect on it. Hawk's check was simply an instrument through which Thompson was to obtain from Hawk's bank the sum of $1500. The act of May 16, 1901 Public Laws, page 194, known as the Negotiable Instruments Act, provides in section 186, a check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. The fair inference to be drawn from this language is that if the drawer has suffered no loss by the delay, he will not be discharged, and the only way in which the drawer of a check would be liable to be injured by a failure to present it within reasonable time is where subsequent to its delivery andprior to its presentment the bank upon which it is drawn becomes insolvent. In such a case as I have quoted—in respect to the check, the drawer will only be discharged to the extent of the loss he has sustained thereby. In Flemming v. Denny, 2 Phila. 111. Judge Sharswood said, page 112. "To an action by a holder against the drawer of a check, it is no answer that the check was not presented in reasonable time, unless during the delay the fund has been lost by failure of the banker. Bradley v. Andrus, 107 Fed., page 196, also confirms the statement. In the present case there has been no loss of funds, whatever. It was not incumbent upon the plaintiff to show that Hawk suffered no loss. This is ably sustained in Spink and Keyes Drug Co. v. Ryan Drug Co., 72 Minnesota, 178, where Judge Mitchell said, It strikes us that loss by reason of negligent delay, either in making presentment or in giving notice of dishonor, is a matter of defence to be pleaded and proved by the drawer, instead of requiring the holder to allege and prove a negative as to a matter peculiarily within the knowledge of the drawer. Rosenbaum v. Hazard, 233 Pa. 206, also confirms this decision. Therefore in the absence or any allegation or averment of loss by the defendant Hawk, we think the court below erred, in holding that the burden of

proof was upon the holder of the instrument to show that the drawer had suffered no loss. Therefore we reverse the learned court below and order that judgment for the defendant shall be given for the full amount of the check.

OPINION OF SUPERIOR COURT

Hawk owed $1500 to Thompson. Not paying it from his purse or his strong box, he gave an order to his banker to pay it to Thompson. He presumably had a sufficient deposit in the bank to justify the request. To give a check, on a bank where there are no funds to meet it, is sometimes a crime. Not only does the drawer emphatically assert when he gives a check that he has at the time a right to expect the bank to pay it; but he impliedly promises that he will not change the duty of the bank towards the check-holder, by withdrawing his deposit.

In this case the check has not been presented to the bank, and hence has not been paid. The deposit against which it was drawn has, we must presume, continued in the bank, in order that it might be paid to the holder of the check on presentment.

If the bank has become insolvent, and thus the drawer has lost his deposit, while allowing it to await the presentment of the check, the holder of the check must bear the loss. By accepting it, he tacitly agreed to use diligence in presenting it, or, rather, not to occasion loss to the drawer by a delay in presenting it, and by a supervening insolvency of the bank. If the bank has failed and Hawk's deposit has been lost to him, it would be unfair to allow Thompson to recover the amount of the check from him.

If the bank is still solvent, the money is still there, and if Hawk pays the $1500 otherwise than through the check, he extinguishes the check, and he suffers no loss.

The question here is, must Hawk show that he has lost all or some of his deposit, through the bank becoming insolvent, while the check was in Thompson's possession, or will this loss be presumed, till Thompson rebuts it?

The cases are not harmonious. Randolph, in Commercial aper, Vol. IV, 1st edition, says, p. 94, "Injury will be presumed from the delay (in presenting the check) and must be disproved by the holder. But, although damages to the drawer are presumed from delay in making presentment, the presumption will be rebutted, if the drawer had no funds in the bank." He cites authorities sustaining this view, and also some to the contrary.

Rosenbaum v. Hayard, 233 Pa. 206, cited by the learned court below holds that the drawer of the check has the burden of showing that his deposit is irrecoverable. To that we must bow.

But, as to the interest? The presumption is that Hawk allowed his deposit to remain in bank in order to await the presentment o fthe check. He then did not have the uses of it. That Thompson, likewise, did not have the use of it is apparently the result of his choice. No interest then, can be allowed on the $1500 for any time prior to the bringing of the suit. No earlier time is indicated by the evidence, as the time when Thompson communicated his will to Hawk, not to make use of his check.

The judgment of the learned court below is well supported by its opinion.

Affirmed

COMMONWEALTH v. JUDSON

Judson was an employer of labor, having 20 women in his works. These he paid $7.00 per week wages. A Statute of the State forbade any employment of women at less than $9.00 per week, and made a violation of its prohibition a misdemeanor, punishable with a fine of $200.00. Judson disputes the constitutionality of the Statute.

Rockwell, for Plaintiff.

Dorio, for Defendant.

OPINION OF THE COURT

KATZ, J.: It seems to me that there are two questions involved in this case. First, Is the right claimed at bar a vested right? Secondly, What is a public business and is the business within the meaning of this case a public business?

In the case at bar the right to my mind is a "vested right." A right is vested when the right to enjoy, either present or future has become the property of some person or individual as a present interest. One of the most sacred rights is that of the individual ability to contract.

It expressly states in the Constitution of the United States, that no State shall impair the obligation of contract. In this case the right to enjoy such a privilege is taken away.

In the case cited by the counsel for the defense, Munn v. Illinois, the court said that if the business is one of a public nature and which affects the public to such a great extent as to be important, the State could fix a minimum or maximum rate, but in this case the business is not one of a public nature; at least it is not said to be one, by the facts of the case, and since it is not one of such character, State regulation of wages would be unconstitutional.

There are cases in Pennsylvania where the wages of school teachers are fixed by Statute, but that is of a public nature and can be regulated.

It has been argued by the counsel for the defense that since a State may regulate the hours of labor of female workers engaged in industry, the implied right is inherent with the State to regulate the wages for such labor. However the regulation of hours of labor and the regulation of wages for such labor differ. The State undoubtedly has the right to regulate the hours of female workers since the effect of overwork by long hours can easily be seen. In such a case the effect on the community would indeed be harmful since maternal obligations would be impaired in many respects.

In the case of wages as I said before, there would be no such far reaching, disrupting effect upon the community as a whole and therefore the State could not regulate it under the police powers.

However, the same argument may be set forth in arguing for the defense, provided the wage is so low as to be detrimental. It seems to me that the State could fix a "reasonable" minimum wage. However the question of what is a reasonable wage is a difficult one. I am therefore led to believe that under the conditions which are mentioned in this case and the arguments advanced by the counsel for the plaintiff, that the law is unreasonable and therefore unconstitutional.

I can see nothing relevant in the case of Munn vs. Illinois as cited by the counsel for defense.

Judgment for plaintiff.

OPINION OF SUPREME COURT

The state is interfering more and more with the volitions of its citizens. Of late years, legislation has limited the time during which women could make themselves useful by performing wage-earning, and therefore life-sustaining labor, and in a number of cases, this legislation has been held by the Supreme Court of the U. S., not to infringe the principle that no state shall deprive a person of liberty or property, without due process of law. To enact that, one shall not labor in a day, more than 8 or 10, or 12 hours, is plainly to deprive one of liberty. But is it to deprive him unduly? A law forbidding women working more than 10 hours in laundries, Muller v. Oregon 208 U. S. 412; or more than 10 hours in any manufacturing or mechanical establishment; Riley v. Massachusetts, 232 U. S. 671, or more than 8 hours in a hotel; Miller v. Wilson, 236 U. S. 373; or more than 8 hours as a pharmacistin a hospital, 236 U. S. 385, has been deemed constitutional by our highest court.

But, if states lessen the time during which people can perform paid labor, they lessen their earnings, their food, clothing, etc., unless at the same time, they supply from some source, the wages that could have been earned during the hours in excess of the prescribed maximum. This supplementary money might come from a fund raised by general taxation. But, to tax generally, for the benefit of the women whose earnings were reduced by the restriction of the hours of work would be unpopular. People are charitably desposed towards others, if the satisfaction of their sentiment can be accomplished at the expense of others.

Then, the plan becomes enticing, of becoming kind towards the workers, by compelling the employer so to increase the compensation of his employes, that they will get for 8 hours' work, what heretofore they have been getting only for 10 hours' work. From lessening the number of hours of labor, the step to increasing the wages per hour, at the cost of the employer, is short

and easy. The Supreme Court of Arkansas State v. Crowe, 130 Ark. 272; 197 S. W. 4, has sustained a law which prescribed a minimum rate of wages for women. Inadequate wages tend to impair the health and morals of women. With too small wages, they cannot get adequate food, clothing, shelter. The maintenance of their virtue, and vigor, is of vast importance to the state. Hence, the state's power to penalize the act of paying them less than a reasonable prescribed wage.

If this wage is so high that women's labor is unprofitable, the employer will dispense with their services, and either employ men or cease to maintain the business. Perhaps the next step of the kind-hearted state, will be to compel A or B, or C, to carry on the business, whether he wants to, or not, and to employ the women who demand work, and who, not employed, would suffer physical or moral ruin, and to pay the commanded wage.

But, in view of the tendency of the courts, we must say that the act in question was as respects the Federal Constitution, not unconstitutional.

Reversed.