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Contributors to the January Issue/Notes

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NOTES

NEGLIGENCE—"EMERGENCY"—THE EFFECT OF AN "EMERGENCY" IN THE REQUIREMENT OF ORDINARY CARE IN THE LAW OF NEGLIGENCE.—Does the existence of an *emergency* change the standard by which a person's conduct must be measured in determining whether or not he is guilty of negligence or contributory negligence? It is proper in considering this problem first to define an "emergency" and to discuss the various ways by which these predicaments arise, and then to consider and determine what the conduct of persons acting in these situations should be.

An "emergency" is defined as "a sudden or unexpected happening; an unforeseen occurrence or condition; specifically a perplexing contingency or complication of circumstances."¹ Also as Dean, J., said, in *Colfax County v. Butler County*,² "an 'emergency' is an event or occasional combination of circumstances calling for immediate action, pressing necessity, a sudden or unexpected happening." The *emergency* rule, in connection with negligence, is invoked by both plaintiffs and defendants. It is most frequently invoked in behalf of a plaintiff who relies on the sudden *emergency* to relieve him of the imputation of

¹ 3 Cent. Dict. 1897.

² 83 Neb. 803, 120 N. W. 444 (1909).

contributory negligence;³ but it is also pleaded by a defendant who seeks to be relieved of the negligence with which he is charged.⁴

An *emergency* may be created in three ways, by a plaintiff, as in *Brown v. Southwestern Bell Telephone Co.*,⁵ or by a defendant, as in *Queen v. Manheim*,⁶ or by a third person, as in *Stewart v. Central Vermont Ry. Co.*⁷ The general rule in all these situations is the same,—the person creating the *emergency* cannot avail himself of the existence of the sudden *emergency*, either to relieve himself of the imputa-

³ "Where by the negligence of another, one is compelled to choose instantly between two hazards, he will not be guilty of contributory negligence, although the one he selects results in injury and he might have escaped had he chosen the other or had he done nothing. However, in order to be free from negligence, one must exercise such care in the emergency as would be exercised under the same or similar circumstances by an ordinary prudent person." "Negligence," 45 C. J. 965. For a typical case, see *Betzold v. Rossi Floral Co. et al.*, 23 Pac. (2d.) 839 (Cal. 1933).

⁴ "Negligence," 45 C. J. 712, note 70. In *Filippone v. Reisenburger*, 119 N. Y. S. 632 (1909), the plaintiff and defendant were standing on a runway leading into an excavation when the defendant stepped on a barrel which caused him to lose his balance. In order to save himself from falling into the excavation he grabbed the plaintiff's legs causing the plaintiff to fall and injure himself. Held, that in either event, the injury was accidental and under the rule that an act done under pressing danger is presumed to have been done involuntarily, the defendant was not liable.

⁵ 274 S. W. 816 (Mo. 1925). In this case the defendant company dug a hole on the alley line just south of the plaintiff's barn. The plaintiff while trying to head off his calf from running by the barn, fell in the hole and was injured. Held, the plaintiff by his own conduct, i. e., attempting to stop the calf, plus the previous knowledge of the existence of the hole, had created the emergency and could not avail himself of the "emergency rule." See also: *Labatt v. Bell Cabs Inc.*, 145 So. 296 (La. 1933); *Hall v. St. Louis Ry. Co.*, 240 S. W. 175 (Mo. 1922); *Independent Oil Refining Co. v. Lueders*, 17 La. App. 154, 134 So. 418 (1931).

⁶ 120 So. 486 (La. 1928). In this case one of the defendants was driving at an excessive rate of speed, and through this negligence he threatened to collide with the other defendant who acting to avoid the collision drove his car on neutral ground and injured the plaintiff who was waiting for a street car. Held, the defendant who through his negligent conduct created the emergency which caused the other defendant to so act as to injure the plaintiff is solely liable. The actor in the emergency is not liable. See also: *Yates v. Morotti et al.*, 8 Pac. (2d.) 519 (Cal. 1932); *Isaacson v. Boston, Worcester and New York St. Ry.*, 180 N. E. 118 (Mass. 1932); *Godsey v. Cox et al.*, 10 Pac. (2d.) 871 (Kan. 1932).

⁷ 86 Vt. 398, 85 Atl. 745 (1913). In this case the defendant company's train was just moving away from the station when the conductor saw a man dash for the train, stumble, and fall to the edge of the platform some ten inches from the wheel. The conductor jumped aboard and pulled the emergency brake causing the train to stop suddenly and injuring the plaintiff, a passenger who as yet had not reached her seat. Held, the conductor acted in the emergency which had been created by a third person, as a man of ordinary prudence, thus the defendant company was not liable. See also: *Allen v. Schultz et al.*, 107 Wash. 393, 181 Pac. 916 (1919); *Donahue v. Kelly*, 181 Pa. 93, 37 Atl. 186 (1897).

tion of contributory fault or to excuse his negligence.⁸ In this regard an interesting situation arises. In the case of *Curtis v. Hubbel*⁹ the *emergency* was in fact created by a pedestrian walking along the highway, causing the defendant who pleaded the sudden *emergency* as a defense to the charge of negligence, to veer across the center of the road in to the on-coming plaintiff. The Ohio court *held*, that since the defendant was driving in violation of a statute,¹⁰ he himself created the *emergency*, was guilty of negligence *per se*, and could not excuse the results of his conduct by pleading the *emergency*. "In a sense the act was done in an emergency, but it is an emergency caused by the violation of a positive law of which he who violates the law cannot claim the benefit."

At the first superficial glance it may appear that since an *emergency*, as the very word connotes, arises suddenly and calls for hasty, unpremeditated, and often instinctive conduct, the general standard of the law of negligence, that of ordinary care, is inapplicable.¹¹ This, however, is an erroneous impression because the standard of care never varies, but is always the conduct of a "reasonable man" under like circumstances. One might misunderstand the language of the court in *Rosen v. Lloveras*:¹² "One suddenly confronted with an emergency is not held to exercise the presence of mind and judgment required of one apprehending the danger with sufficient time to realize and avert

⁸ "Sudden emergency rule will not apply if the emergency arises through the prior negligence of the person invoking its protection, which limitation applies to the one causing the injury and the injured party." *Casey v. Siciliano*, 165 Atl. 1 (Pa. 1933).

⁹ 182 N. E. 589 (Ohio App. 1932).

¹⁰ "No person shall operate a motor vehicle in and upon the public roads and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the road or highway and of any other conditions then existing, and no person shall drive any motor vehicle in and upon any public road or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead." Sec. 12603 Ohio Gen. Code (amended 1929) (113 Ohio Laws 283).

For similar statute, see Comp. Laws of Mich. (1929) § 4697. Interpreting this statute: *Bowmaster v. William H. De Pree Co.*, 252 Mich. 505, 233 N. W. 395. (1930).

¹¹ See charge to the jury in *Curtis v. Hubbell*, *op. cit. supra* note 9, at p. 591.

"It seems best to say that the standard of care is to be measured by the conduct of the ordinary man under similar circumstances." Chapin on Torts, p. 523. See also the expression of the rule by Prentice, J.,: ". . . [Negligence may be said to consist] in the failure to exercise that degree of care under given circumstances which a person of ordinary prudence would exercise under similar circumstances." *Stedman v. O'Neil*, 82 Conn. 199, 72 Atl. 923, 22 L. R. A. (NS) 1229. (Conn. 1909).

¹² 148 So. 734 (La. 1933). Similar statement is contained in *Central Georgia Ry. Co. v. Barnes*, 167 S. E. 217 (Ga. 1933).

it." So, too, the opinion given by Sharpe, J., in *Zehaver v. Koepfke*:¹³ "The law makes allowances for acts done in emergency and sudden peril." These two decisions, however, do not refute the doctrine of ordinary care, but merely fail to state in unequivocal terms, as it should always be stated, that the *emergency* is always to be considered as one of the circumstances in determining what the conduct should have been.

In any case where a person is suddenly confronted with an *emergency* and is forced to act hurriedly and without forethought, it cannot be said that his conduct is imprudent, merely because by hindsight it is learned it is mistaken. In *Austin v. Eastern Massachusetts Street Railway Co.*¹⁴ Field, J., said: "Though in retrospect it may appear that the plaintiff's choice of a course of action was mistaken, we cannot say as a matter of law that at the time he made the choice in view of the need of speedy decision and action, it was not a prudent one under the circumstances of the case." Holmes, C. J., expresses the same thought very tersely in *Kane v. Worcester Consolidated Street Railway*:¹⁵ "A choice may be mistaken and yet prudent." Nor is it important that the course chosen be the most judicious one. In *Betzold v. Rossi Floral Co. et al.*¹⁶ the court said: "One suddenly confronted with unexpected danger without fault on his part, is required to use only such means for avoiding the danger as would be used by a person of ordinary prudence, and need not choose the most judicious course of action."

It is readily understood that one will act differently in such situations where there are extenuating circumstances than he will in situations where there are no extenuating circumstances, but the mere fact that a person finds himself placed in such a predicament or *emergency* does not relieve him of the obligation of using ordinary care. "Being so placed does not relieve the actor of his duty to use ordinary care, but the emergency is merely one of the circumstances to consider to

¹³ 245 N. W. 490 (Mich. 1932).

¹⁴ 169 N. E. 484 (Mass. 1929).

¹⁵ 182 Mass. 201, 65 N. E. 54 (1902). See also: *Lemay v. Springfield Street Ry.*, 210 Mass. 63, 96 N. E. 79 (1911); *Fitch v. Bay State Street Railway*, 237 Mass. 65, 129 N. E. 423 (1921).

¹⁶ *Op. cit. supra* note 3.

"A person suddenly confronted with an unexpected danger, without any fault on his part is only required to use such means for avoiding the danger as would be used by a person of ordinary prudence, and he is not held to that strict accountability which would require that the course chosen be the most judicious one." *Carnahan v. Motor Transit Co.*, 65 Cal. App. 402, 224 Pac. 143 (1924).

determine if ordinary care has been exercised."¹⁷ Thus it can be stated unequivocally that an *emergency* does not change the requirement of ordinary care. It is as said in the headnote to *Curtis v. Hubbel*:¹⁸ "While acts or omissions of ordinarily careful and prudent persons would probably not be the same in a case where no emergency existed, the required degree of care is always 'ordinary care,' namely, that degree of care which ordinarily careful and prudent persons are accustomed to exercise under the same or similar circumstances."

The amount of care might change, but the degree or standard is always the same,—ordinary care,—the care that would be used by an ordinary prudent man under the same circumstances, *the emergency itself always being considered and weighed as one of the circumstances.*

There are other factors that have been considered by the common law as affecting the standard of due care. Where an actor takes charge of another whom the actor's non-tortious conduct has rendered helpless, the actor is under a duty to exercise *reasonable care* to give the other aid or protection; but the gratuitous nature of the services is an important factor in determining whether the actor has exercised reasonable care.¹⁹ Public utility may justify an otherwise impermissible risk, as where the legal rate of speed is exceeded in pursuit of a felon or in conveying a desperately wounded patient to a hospital; yet this does not mean that *due care* need not be exercised under the circumstances of the particular case.²⁰ Again, the common law makes allowance in case of one learning to drive an automobile. An error which would be inexcusable in a practiced driver may not be negligence on the part of a beginner.²¹

Maurice W. Lee.

NUISANCE — OVERHANGING BRANCHES — OWNERSHIP OF LINE TREES.—The recent case of *Luke v. Scott*¹ has re-awakened the old question of overhanging branches. In this case the plaintiff sued the defendant, a neighbor, for the latter's wrongful and malicious cutting of two "Trees of Paradise" on her land. The defendant pled that the

¹⁷ "Negligence," 45 C. J. 711, note 62.

"The existence of an emergency is merely one of the factors in the light of which the conduct of the actor must be judged. The standard of conduct does not vary in such cases. It must be reasonable." *Jones v. Boston, etc., R. Co.*, 139 Atl. 214 (N. H. 1927).

¹⁸ *Op. cit. supra* note 9.

¹⁹ Restatement of the Law of Torts § 197.

²⁰ Restatement of the Law of Torts § 172.

²¹ Restatement of the Law of Torts § 180.

¹ 187 N. E. 63 (Ind. 1933).

trees grew near to the boundary, and that some of the branches hung over his property and interfered with a line fence he was building and that therefore they were a nuisance which he had a right to abate. Judgment was rendered for the plaintiff, and the defendant appealed. But the decision of the lower court was upheld, the court finding that both the trees were on the plaintiff's land, and that "under such circumstances an adjoining owner has no right to cut or destroy the trunk of a tree which is entirely on the land of another, although it causes him personal inconvenience, discomfort or injury; and, if he cuts or destroys such tree he is liable in damages to the owner thereof."

This problem is a long-standing one. Properly speaking, there are three problems arising from the one situation: First, whether overhanging branches are a nuisance, and if so, what are the rights of the injured party?; Second, who owns whatever fruit the branches might bear?; Third, in the case of a "line tree," in whom should the ownership reside? The first case upon the subject, *Morris v. Baker*,² arose in 1616, holding that "If the branches of your tree grow over on my land, I can cut them off, but I cannot justify cutting them off before they grow over my land because of the fear of their so doing." The later case of *Lemmon v. Webb*³ first raised the question of whether or not overhanging branches were a nuisance, stating that "The result of the authorities seems to be this:—

"The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance.

"For any damage occasioned by this an action on the case would lie.

"Also, the person whose land is so affected may abate the nuisance if the owner of the tree neglects to do so. Whether he may do so without notice is not stated distinctly in any case; but on the whole . . . this is the meaning. . . . the true reading of *Pickering v. Rudd* [4 Camp. 219, 1 Stark. 56 (1815)] is, that he may do so without notice if he can do so without trespassing upon the land in which the tree grows. . . . it would be better if the law were, that before cutting a neighbor's trees notice should be given in order to afford to the owner of the trees an opportunity of removing the boughs which occasion a nuisance. Whether that is the law or not, no one but an ill-disposed person would do such an act without previous notice. There was no emergency in this case." An "emergency" would exist, under this doctrine, when the security of life or property is endangered by the nuisance.

² 3 Bulstr. 196 (1616).

³ [1894] 3 Ch. App. 1

The English common law seems to be that where a nuisance is occasioned by an act of commission the person injured may abate the nuisance without previously giving notice to him who actually committed the nuisance while he is in possession of the premises upon which the nuisance exists. There would probably be liability for any substantial damage in fact occasioned by such abatement. But where the nuisance is occasioned by omission, or created by a previous occupier of the premises upon which the nuisance exists, it is necessary to give notice to the present occupier of the premises as a condition precedent to the privilege to abate except in case of an *emergency*. There would probably be liability for substantial damage in fact occasioned by the abatement.

The question of notice was also raised in *Jones v. Williams*,⁴ but the court held that overhanging branches were such an "unequivocal nuisance" as to need no notice. The ruling of *Lemmon v. Webb* is the law in England today,⁵ with the exception that a tenant cannot recover when the overhanging branches of his landlord's trees have injured him.⁶

The American cases have followed *Lemmon v. Webb* from the first.⁷ Not only branches but protruding roots may be cut off.⁸ It was held in Illinois that a city has not the right to cut the trunk of an overhanging tree without compensation.⁹ *Grandona v. Lovdal*¹⁰ seems to be the leading American case in point. Here a long line of cotton wood trees were growing so close to the land of the plaintiff that they interfered with his plowing and growing of fruit trees. The court held that "the trees and overhanging branches, insofar as they were on or over his land belonged to the plaintiff and he could cut them off or trim them at his pleasure." There seems to be a split of authority as to whether an action for damages will lie against the owner of the tree without actual damage being caused by the overhanging branches. *Countryman v. Lighthill*¹¹ held that such an action is maintainable, and *Ackerman v. Ellis*¹² ruled to the contrary, although it did not deny the right of the injured party to abate the nuisance without notice.

⁴ 11 M. & W. 176 (1843).

⁵ *Smith v. Giddy* [1904] 3 K. B. 488.

⁶ *Cheater v. Cater* [1918] 1 K. B. 247.

⁷ *Lyman v. Hale*, 11 Conn. 177 (1836); *Buckingham v. Elliot*, 62 Miss. 296, 52 Am. Rep. 188 (1884).

⁸ *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939 (1895).

⁹ *Simpson v. City of Gibson*, 164 Ill. App. 147 (1911).

¹⁰ 78 Cal. 611, 21 Pac. 366 (1889).

¹¹ 24 Hun 405 (1881).

¹² 81 N. J. Law 1, 79 Atl. 883 (1911).

However, both English¹³ and American¹⁴ cases are in accord on the view that the injured party may not enter upon the defendant's land and cut down the tree itself, and that for such an action trespass will lie. In *Tanner v. Wallbrum*¹⁵ it was ruled that although the plaintiff could lop off branches overhanging his land he could not go to equity for a mandatory injunction to remove the tree, as the occasion was not one of pressing necessity. In the same line is the holding¹⁶ that an injunction will lie to restrain an adjoining land owner of a rural lot from cutting trees on the plaintiff's land. There is a Vermont case,¹⁷ however, which granted an injunction to restrain a railroad from planting willow trees near the boundary line as a fence, since the roots of the trees and the shade cast by them would injure a neighbor's land, and no necessity could be shown for that kind of fence.

There seems to be no controversy on the question of ownership of the fruit growing on overhanging branches. In 1616, *Millen v. Fawdry*¹⁸ ruled that "if trees grow in the hedge and the fruit falls into another's ground, the owner may go in and take it." This is still the English view. Apparently the first case in America was *Lyman v. Hale*¹⁹ where it was held that "a pear tree, standing wholly on plaintiff's land is, with its fruits, the sole property of the plaintiff, even though the branches overhang another's property." *Skinner v. Wilder*²⁰ went further and ruled that if one takes fruit from branches overhanging his land, he is liable to an action for either trespass or trover. A much-quoted case is that of *Hoffman v. Armstrong*.²¹ Here the plaintiff owned a fruit-bearing tree, the branches of which overhung the defendant's land. The plaintiff's sister was standing upon a line fence in order to pluck fruit from the overhanging branches, and the defendant pushed her off. He was adjudged liable for trespass, the court holding that since the fruit was perishable the plaintiff was privileged to trespass on the defendant's property to save his own. The defendant would have no right to nominal damages for the plaintiff's trespass. An interesting contrast may be made between the holding of this case and those of *Ploof v. Putnam*²² and *Vincent v. Lake Erie*

¹³ *Morris v. Baker*, 1 Rolle 393 (1616); *Masters v. Pollie*, 2 Rolle 141 (1620).

¹⁴ *Op. cit. supra* note 7; *Toledo, St. Louis, etc., R. R. Co., et al., v. Loop*, 139 Ind. 542, 39 N. E. 306 (1894).

¹⁵ 77 Mo. App. 262 (1898).

¹⁶ *Comfort v. Everhart*, 35 Wkly. Notes, Case 364 (1894).

¹⁷ *Brock v. Conn. & P. R. R. Co.*, 35 Vt. 373 (1862).

¹⁸ 1 Latch 119, 82 Eng. Rep. 304 (1616).

¹⁹ *Op. cit. supra* note 7.

²⁰ 38 Vt. 115 (1865).

²¹ 48 N. Y. 201 (1872).

²² 81 Vt. 471, 71 Atl. 188, 130 Am. St. Rep. 1072, 15 Am. Cas. 1151 (1908).

*Trans. Co.*²³ The substance of the last two rulings is that, while one has the privilege to trespass upon another's land to save his life or property he is liable for any damage in fact produced thereby, but would not be liable for nominal damages. And in *Beardslee v. French*²⁴ it was pointed out that a defendant who removed a nuisance placed in a highway by the plaintiff was liable to the latter for any *unnecessary* damage that he caused in abating the nuisance.

The third phase of the problem has the longest history. The Roman Law was given by Justinian in his *Institutes*²⁵ on the point of line trees: "So that if a tree of a neighbor borders so closely upon the ground of Titius as to take root in it and be wholly nourished there, we may affirm that such tree is become the property of Titius; for reason doth not permit that a tree should be deemed the property of any other than of him in whose ground it hath rooted; therefore if a tree planted near the bounds of one person shall also extend its roots in the land of another it will become common to both." Thus it will be seen that ownership was determined in the Roman courts by the position of the roots. The first English case of *Masters v. Pollie*²⁶ decided the question on the position of "the main part of the tree" and also upon the basis of where the tree was planted. This became known as the "tree follows the trunk" theory. It was followed in 1622 by an anonymous case²⁷ in 2 Rolle 255, which held: "If a tree grows in a hedge that divides the land of *A* and *B* and the roots take nourishment in the land of *A* and also that of *B* they are tenants in common of that tree." This was apparently the first appearance of the "tenants in common" theory in English courts in regard to *line* trees. However, this case was given little attention in the courts of the time, for *Masters v. Pollie* was the ruling until 1698, when *Waterman v. Soper*²⁸ opposed it with the "branches follow the roots" theory. In this case the court held: "If *A* plants a tree upon the extremest limits of his land, and the tree growing extends its roots into the land of *B* next adjoining, *A* and *B* are tenants in common of this tree. If all the roots grow into the land of *A* though the boughs overshadow the land of *B*, yet the branches follow the roots and the property of the whole is in *A*." There followed a long series of contentions over these two views.

²³ 109 Minn. 456, 124 N. W. 221, 27 L. R. A. (NS) 312 (1910).

²⁴ 7 Conn. 125 (1828).

²⁵ Cooper's Justinian, 79.

²⁶ *Op. cit. supra* note 13.

²⁷ "Si un arber cresce in un hedge que divide le terre de *A* & *B* et per les rootes prist nourishment in le terre de *A* & aussi de *B*, ils sont tennants in common de cest arbre."

²⁸ 1 Ld. Raym. 737 (1698).

The controversy appears to have been settled in England in *Holder v. Coates*,²⁹ wherein Judge Littledale said: "I remember another case upon this point, called *Waterman v. Soper* . . . I am of the opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*." However, the latter view is still offered in many litigations, although it is invariably overruled. In France the civil code provides that boundary hedges and trees within them are common property.³⁰

The two cases of *Lyman v. Hale*³¹ and *Skinner v. Wilder*,³² already referred to, held with the doctrine of *Masters v. Pollie*. In both cases the defendants continued the controversy begun in England by basing their cases on *Waterman v. Soper*. But in each case the court settled the issue by defining the term "extremest limits" used in *Waterman v. Soper* to allocate the position of the disputed tree as meaning *on the boundary line*, and by holding that *Waterman v. Soper* had not been decided on the position of the roots alone. *Relyea v. Barber*³³ held that a line-tree is owned in common, and pushed the doctrine further with the aid of the maxim "*Sic utere tuo ut non alienum laedes*," ruling that treble damages may be awarded to one co-owner where the other has cut the line-tree. A tenant in common has the right to cut his own half of the tree but, with true judicial humor, it was held that he could only do so in a manner that would not injure the other tenant's half. *Dubois v. Beaver*³⁴ ruled that trees standing on the line are owned in common, and that one co-owner may bring trespass if the other cuts the tree. This view is agreed with in *Musch v. Burkhart*,³⁵ and an interesting comparison is made with the English case of *Martin v. Knowlly*,³⁶ which held that one tenant in common could not maintain an action of waste against the other because the latter cut down trees of a proper age. The distinction was that in the English case the injured party was a tenant who had leased to another, the latter cutting down the tree. It was held that the plaintiff had suffered no loss, the tree being of proper age; he was awarded half of the price that the tree brought.

The American holdings are now unanimous in adopting the "tree follows trunk" theory; and it would seem from the *Scott* case, quoted in the beginning, that the *overhanging branch* question were at long last settled for all time. In summary, the rulings are: First, that the injured party has always the privilege, without giving notice, to cut

²⁹ M. & M. 112 (1827).

³⁰ Cf. *Skinner v. Wilder*, *op. cit. supra* note 20.

³¹ *Op. cit. supra* note 7.

³² *Op. cit. supra* note 20.

³³ 34 Barb. (N. Y.) 547 (1861).

³⁴ 25 N. Y. 123 (1862).

³⁵ 83 Iowa 301, 32 Am. St. Rep. 305 (1891).

³⁶ 8 T. R. 145 (1799).