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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Recent Cases

CONSTITUTIONAL LAW—STATE AID TO SECTARIAN SCHOOLS UNDER THE FOURTEENTH AMENDMENT

Everson v. Board of Education[1]

Under a New Jersey statute authorizing local school districts to make rules and contracts for the transportation of children to and from schools,[2] a township

1. 67 Sup. Ct. 504 (1947).
2. N. J. Laws, 1941, c. 191, p. 581.

board of education provided by resolution "for the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier." The statute and resolution were attacked by a taxpayer as being violative of the Fourteenth Amendment.[3] The primary objection was that expenditures of tax-raised funds for the purpose of transporting parochial pupils to church schools constitutes support of a religion by the State, and is therefore a "law respecting an establishment of religion," which is prohibited by the Amendment. The statute and resolution were upheld by the Supreme Court in a five to four decision. The Court, while admitting that a state cannot, consistently with the Fourteenth Amendment, contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church, stated that here the State was making no contribution to the schools' support. Its legislation, as applied, provided only a general program to help parents get their children, regardless of their religion, to and from accredited schools, and therefore it was no law "respecting an establishment of religion."

Justices Jackson, Rutledge, Frankfurter and Burton dissented, Justices Jackson and Rutledge writing separate dissenting opinions. The tenor of Mr. Justice Jackson's argument is that discrimination exists, in that the act provides for payment of costs of transportation to public or private Catholic schools but that aid is denied to private secular schools or private religious schools of other faiths. However, the appellant had never raised the issue of equal protection and there was nothing in the record indicating that there were schools or students being denied this aid, so there seems no basis for his allegation.

Mr. Justice Rutledge in his opinion brought out more clearly the conflict between the majority and dissenting views. The fundamental difference of opinion concerns the part that this particular cost plays in carrying on an educational program. The majority felt that the student and not the school received the support so that religion was not being aided. A similar decision had been reached in *Cochran v. Louisiana State Board of Education*,[4] where an injunction was sought, in order to prevent purchase of school books for children pursuant to a statute providing that the board "supply to the children of the State" the necessary books. The injunction was denied on the ground that the students and not the schools were being benefited, the same basis used for the decision in the principal case. Those dissenting however looked upon the aid as going to the school, even though the students and not the school would be the direct recipients of the money paid out. This, Mr. Justice Rutledge believes, violates the concept of freedom of religion established by the First Amendment.

Nowhere, prior to the Constitutional Convention, was the meaning of freedom of religion more vehemently argued or more eloquently pleaded than in Virginia before the passage in 1786 of Jefferson's Bill for Establishing Religious Freedom.[5] An

3. The Fourteenth Amendment made the First Amendment applicable to the states. The First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

4. 281 U. S. 370, 50 Sup. Ct. 335 (1930).

5. 12 HENING, STATUTES OF VIRGINIA (1823) 84; COMMAGER, DOCUMENTS OF AMERICAN HISTORY (1934) 125.

Assessment Bill had been introduced in 1784 which was a taxing measure for the support of religion, designed to revive the payment of tithes, suspended since 1777. The bill gave the taxpayer the privilege of choosing which church should receive his tax payment and if no choice was made the fund was to be used for establishing seminaries of learning.[6] This bill was violently opposed by Jefferson and especially by Madison, who opposed any authority that could enforce a contribution of even "three pence"[7] for the support of any religious establishment. To prevent its passage Madison wrote his historic Memorial and Remonstrance, setting forth his concept of religious freedom. His objection was to any tithes whatsoever, however small.[8] He opposed every form and degree of official relation between religious and civil authority, discriminatory or not. The problem was not to insure equal support of any or all churches or religions but, as Jefferson stated it, to erect a "wall of separation between Church and State." The Assessment Bill was defeated and that, along with the passage of Jefferson's bill was a double victory for Jefferson and Madison, marking the acceptance in Virginia of their concept of absolute freedom from interference in religion by the State.

The Congressional debates on the First Amendment were not nearly so stormy as had been those of Virginia, because the essential issues were considered settled. That is, it was agreed that there should be complete separation of Church from State, the State neither restricting nor supporting any or all religious activities. As a member of the Constitutional Convention, Madison had the task of obtaining ratification of the Constitution by Virginia. He obtained it only after giving his pledge that a specific guaranty of religious freedom would be inserted. Within three years he had proposed the first Article of our Bill of Rights and it had become a part of our Constitution. He, whose concept of religious freedom had prevailed in Virginia, was the craftsman who forged the establishment of religion clause. Thus the struggle for religious freedom in Virginia, with what it meant to those men, was at once the background and the meaning of the First Amendment. And with the writing of the Amendment Madison was sure in his own mind "that there is not a shadow of right in the general government to intermeddle with religion."[9]

The questions raised by the principal and Cochran cases are, first, whether a line can, consistently with the meaning of the First Amendment, be drawn between aiding the student and helping support the school; and secondly, if it can be drawn, is this particular expenditure aid to the student or does it aid the school. The majority of the Court in the principal case thought that aid to the student could be distinguished from aid to the school, and that transportation cost aided only the student. It is not entirely clear whether Mr. Justice Rutledge feels that there is no valid distinction, or that the distinction might be made but that transportation costs are a

6. 2 WRITINGS OF JAMES MADISON (ed. by Hunt, 1901-1910) 113.
7. Madison, *Memorial and Remonstrance,* Par. 3, appended to the principal case: 67 Sup. Ct. at 535.
8. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910) 105.
9. 5 WRITINGS OF JAMES MADISON (ed. by Hunt, 1901-1910) 176.

part of school costs. But if any help given the student in obtaining an education is so inseparably connected with aid to the school that a distinction cannot be made, then the holding of the principal case is not compatible with the meaning of the First Amendment. If the program must inevitably be of benefit to the school, it will be "intermeddling with religion" by the State.

A school must mean more than the physical plant at which a person may acquire an education. It is an institution, a process or method by which a student is matured and led or directed along certain ways of thought. It is a means to an end. It is because of this that the Roman Catholic Church insists upon maintaining church schools, not because their buildings or physical establishments are different than public schools, or the caliber of their teachers any higher. To support a school does not necessarily mean aiding in physical construction alone. Anything that helps the school in its purpose to direct the student's education is support for the school and its educational program. The school as a means to a desired end is certainly made more effective if there is some provision whereby the students can be brought into its range, that is, where it can operate. Until this is done there can be no school—the buildings and teachers alone are not enough. Therefore to help the student in his desire to be educated at the particular school of his choice must necessarily help that school. On the other hand any program that benefits the school, at least in theory, will also benefit the student since any betterment of educational opportunities will directly affect his schooling.

It is submitted that any line between student and school aid is too tenuous to be capable of distinction. The mere determination that it is the student who is given assistance cannot mean that the school is not supported. To attempt to aid the student alone must result in aiding the school he attends. Any such aid to a religious institution, even though indirectly given and available to all, is aiding in the "establishment of religion." The First Amendment was not meant to insure fairness or freedom from restraint but to insure an absolute cleavage between State and Church. A proposal by a state to pay any cost of the educational program, be it for transportation, text books, or school buildings, must ignore that cleavage. This is the very thing that Jefferson and Madison believed they had erected a wall of separation against and that the government had not a "shadow of a right" to do. It is believed that the decision in the principal case is based on a false premise in that no valid distinction can be made between student and school aid. New Jersey's statute does violate the First Amendment because it is a "law respecting the establishment of religion."

J. KEITH GIBSON.

TORTS—MALICIOUS PROSECUTION—PRIOR CONVICTION OF JUDGMENT AS CONCLUSIVE EVIDENCE OF PROBABLE CAUSE

Ripley v. Bank of Skidmore[1]

In an action for malicious prosecution, brought by the administrator of the estate of John A. Ripley against the Bank of Skidmore, the Supreme Court of Missouri

1. 198 S. W. (2d) 861 (Mo. 1947).

found that a judgment in favor of the Bank in a previous action, rendered by default in an ex parte proceeding against one who was at the time insane and in his last illness, was not conclusive evidence of the existence of probable cause for bringing the action. The plaintiffs were subjected to continuous litigation for 11 years, from 1932 to 1943, by the defendant bank in an effort to collect on a note signed by John A. Ripley, without consideration. A default judgment was rendered in an ex parte proceeding against Ripley and, after his death, the bank obtained an order for sale of his farm to satisfy the claim. The heirs of Ripley (plaintiffs here) by a writ of error *coram nobis,* succeeded in having the default judgment set aside, the Kansas City Court of Appeals holding it to be void *ab initio.* All the suits terminated (either originally or on appeal) in judgment against the bank, but the defendant contended that the judgment for it in the first action, although set aside on appeal, was conclusive evidence of probable cause which would bar recovery in an action of malicious prosecution.

The majority of the courts, in dealing with the subject of probable cause in an action for malicious prosecution, have held that a prior conviction or judgment in a lower court against the present plaintiff is conclusive evidence of probable cause on defendant's part in prosecuting the original case.[2] However, there is a strong minority view that such a prior conviction or judgment is not conclusive evidence of probable cause, but merely prima facie evidence of such a factor, rebuttable by any competent evidence which may clearly overcome the presumption arising from the fact of the conviction in the first instance.[3] The Minnesota court, in *Skeffington v. Eylward,*[4] divided the cases into three classes: (1) Those which held that a conviction is conclusive evidence of probable cause, notwithstanding a reversal on appeal;[5] (2) those in which it was held that a judgment of conviction, notwithstanding a reversal on appeal, can be impeached only by evidence that it was procured by fraud or perjury;[6] (3) those which held that a judgment or conviction when reversed on appeal, is only prima facie evidence, which may be rebutted by any competent evidence which clearly overcomes the presumption arising from the effect of the conviction in the first place.[7] However, whether such evidence is de-

2. Crescent City Live Stock Co. v. Butchers Union Slaughter House Co., 120 U. S. 141 (1887); 38 C. J. 415; 11 L. R. A. (NS) 664 (1908); RESTATEMENT, TORTS (1938) § 667.

3. Goodrich v. Warner, 21 Conn. 432 (1852); Moffatt v. Fisher, 47 Iowa 473 (1877); Olson v. Neal, 63 Iowa 214, 18 N. W. 863 (1884); Maynard v. Sigman, 65 Neb. 590, 91 N. W. 576 (1902); Nicholson v. Sternberg, 61 App. Div. 51, 70 N. Y. Supp. 212 (4th Dep't 1901); Simmonds v. Sowers, 253 App. Div. 819, 1 N. Y. Supp. (2d) 339 (2d Dep't 1938); Lindsey v. Couch, 22 Okla. 4, 98 Pac. 973 (1908); Kennedy v. Burbridge, 45 Utah 497, 183 Pac. 325 (1919); Note (1939) 4 Mo. LAW REV. 225 (Previous conviction in police court as evidence of probable cause).

4. 97 Minn. 244, 105 N. W. 638 (1906).

5. COOLEY ON TORTS (2d ed. 1888) § 185.

6. 19 Ency. of Law 667.

7. Barber v. Scott, 92 Iowa 52, 60 N. W. 497 (1894); Ross v. Hixon, 46 Kan. 550, 26 Pac. 955 (1891); Bechel v. Pac. Ex. Co., 65 Neb. 826, 91 N. W. 853 (1902); Nehr v. Dobbs, 47 Neb. 863, 66 N. W. 864 (1896); Burt v. Place, 4 Wend. 591 (N. Y. 1830); 1 JAGGARD ON TORTS (1895) 618.

nominated conclusive, sufficient, or prima facie is immaterial, because under the various theories set out by the courts if a conviction is shown, although it was reversed on appeal, it is evidence of probable cause, which, in the absence of countervailing evidence of fraud, perjury, subornation, or other unfair means, prevents the maintenance of an action for malicious prosecution.[8] The main difference between the various views is, if such evidence is conclusive of probable cause, that the burden is on the plaintiff to prove fraud, conspiracy, *et cetera.* But if it is only prima facie evidence, the question of probable cause is "one for the jury upon all the evidence of the case."[9]

In dealing with civil prosecutions, the rule in Missouri, as set out in *Laughlin v. St. Louis Union Trust Co.*,[10] is "that such a judgment is conclusive evidence of probable cause for the bringing of the action, in the absence of a showing that the judgment was procured by fraud, perjury or other unfair means, or that the parties responsible for the prosecution did not believe the testimony which induced the judgment."

However, in cases such as the one under discussion, where there was a default judgment rendered in an ex parte proceeding, the question arises whether such a judgment will be considered conclusive evidence of probable cause where the defendant in the first action did not have an opportunity to present his case. The courts are more in accord in declaring that a judgment against the defendant in the original action is not conclusive evidence of probable cause where it was issued by default in an ex parte proceeding.[11] An action may be maintained for the wrongful initiation of ex parte proceedings without proving that they terminated in favor of the person against whom they were brought.[12] The courts have also held that where a temporary injunction is issued, but later upon a hearing of the case a permanent injunction was refused, the granting of such an injunction is not conclusive evidence of probable cause,[13] because "no judgment obtained by ex parte proceedings can be deemed conclusive evidence of probable cause unless it appears that such judgment was based on undisputed facts, or upon a statement of the cause fairly and honestly made."[14] The difficulty is that in an ex parte proceeding, the complainant makes out his own case, which in the face of the pleadings may fully authorize an injunction, but when the other side has an opportunity to meet it, there is no merit in the case made out by the complainant. Such an opinion

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8. (1935) 97 A. L. R. 1024, at 1028.
9. (1911) 34 L. R. A. (NS) 958.
10. 330 Mo. 523, 50 S. W. (2d) 92 (1932). But *cf.* Wilcox v. Gilmore, 320 Mo. 980, 8 S. W. (2d) 961 (1928).
11. Beatty v. Puritan Cosmetic Co., 236 Mo. App. 807, 158 S. W. (2d) 191 (1942); Bump v. Betts, 19 Wend. 421 (N. Y. 1834) (original suit for attachment).
12. 38 C. J. § 129; RESTATEMENT, TORTS (1938) § 674.
13. South Georgia Bldg. & Invest. Co. v. Mathews, 4 Ga. App. 489, 61 S. E. 293 (1908); Rieger Co. v. Knight, 128 Md. 189, 97 Atl. 358 (1916); Burt v. Smith, 181 N. Y. 1, 73 N. E. 495 (1905).
14. South Georgia Bldg. & Invest. Co. v. Mathews, 4 Ga. App. 289, 61 S. E. 293 (1908).

is not necessarily dependent upon the merits of the cause, but is granted on affidavits which may be untrustworthy.[15]

As the default judgment in the instant case was rendered against an insane person, it was declared by the Kansas City Court of Appeals to be "void ab initio."[16] Thus no conclusive effect could be given to such a judgment,[17] and consequently it could not be held to be evidence of probable cause.[18] No doubt the court was influenced by the added fact that the judgment was completely void. But the cases indicate that where a judgment is rendered against a person who did not have an opportunity to offer a defense, such a judgment will not be conclusive, but merely prima facie evidence, to be considered by the jury in deciding whether or not the proceedings were initiated with probable cause.

CLARENCE F. HOMAN

TORTS—RESCUE DOCTRINE—NEGLIGENT PERSON LIABLE TO HIS RESCUER

Carney v. Buyea[1]

Defendant owned but did not live on her farm, the farm being occupied and worked by one Barriger, under the employ of the defendant. Plaintiff had brought his wife and three of his brother's children to the farm for the purpose of visiting their grandparents, Barriger. Defendant, when leaving the premises, stopped her automobile on a steep incline, and went forward of the car to remove some soft drink bottles from the driveway. The car began to roll down the grade towards her and the plaintiff, who was near, called a warning and then rushed forward and pushed the defendant to safety and while so performing this act was struck by the car and was injured. The lower court gave judgment for the plaintiff and this judgment was affirmed on appeal, the appellate court saying that the defendant, without fault on the part of the plaintiff, negligently injured the plaintiff while he was engaged in rescuing her from the perilous position in which the defendant had placed herself.

The usual situation in which the rescue doctrine is applied by the courts is where the defendant has been negligent toward a third person and the plaintiff is injured while attempting to rescue the person so threatened. In cases where this is the fact situation, the courts have uniformly held the negligent defendant liable to the plaintiff rescuer.[2] The foreseeability of such a plaintiff rescuer is cov-

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15. Note (1903) 17 HARV. LAW REV. 61.
16. Bank of Skidmore v. Ripley, 84 S. W. (2d) 185 (Mo. App. 1935).
17. 34 C. J. § 1310.
18. Rosenblum v. Ginis, 297 Mass. 493, 9 N. E. (2d) 525 (1937); Horn v. Miss. Riv. & B. T. Ry., 88 Mo. App. 469 (1901).

1. 271 App. Div. 338, 65 N. Y. S. (2d) 902 (4th Dep't 1946), motion for leave to appeal to court of appeals denied. 68 N. Y. S. (2d) 446 (1947). Notes (1947) 16 FORD. L. REV. 139, (1947) 14 U. OF CHI. L. REV. 509.
2. Eckert v. Long Island Ry., 43 N. Y. 502 (1871); Corbin v. City of Philadelphia, 195 Pa. 461, 45 Atl. 1070 (1900); Bond v. B. & O. R. R., 82 W. Va. 557, 96 S. E. 932 (1918); Perpich v. Leetonia Mining Co., 118 Minn. 508, 137 N. W.

ered by the observation of Justice Cardoza, "The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man."[3]

In the principal case the fact situation differed from the usual rescue case in that the defendant placed herself in peril by her own negligence and the rescuer was injured in rescuing her. Here the defendant and the rescued were one and the same person. Very few cases have been found on this particular fact situation. *Saylor v. Parsons*[4] is the first case in point and was used by the defendant in the principal case in support of her defense. In the *Parsons* case the plaintiff was injured while attempting to save the defendant from harm when he removed a prop from a defective wall in attempting to prop up an adjacent wall that had been weakened by his careless conduct. Defendant in that case was the employer of the plaintiff. The Iowa court denied recovery, holding that a person cannot be legally guilty of neglecting himself. A more recent case is that of *Butler v. Jersey Coast News Co.*,[5] and while the New Jersey court expressly states that it is not a rescue case, the general pattern is the same. There, defendant's driver was speeding on icy roads and wrecked his truck against an electric light pole, breaking the wire and causing the pole and wire to sag across the highway. Plaintiff, also a motorist, arrived immediately after the accident, and was severely burned in attempting to aid the driver who was under the truck. The court allowed recovery by the plaintiff. The case of *Brugh v. Bigelow*[6] was cited by the court in the principal case in support of its decision in favor of the plaintiff. In that case the defendant negligently drove into an intersection, wrecking his car and pinning the defendant under the car. Plaintiff, a passer-by, went to the aid of the defendant and, as the car was being lifted off the defendant, it rolled back and injured the plaintiff. Plaintiff was allowed to recover.

The New York court, in deciding the principal case, had three prior decisions to use as precedents.[7] In the *Parsons* case,[8] the Iowa court was faced with the question of the liability of a possessor of land to those who enter upon the land. The relationship between defendant and plaintiff was that of master and servant and the court allowed no recovery. It would seem that this relationship would make it easier for a court to find the defendant employer liable. The New York court in the principal case also was pressed to consider the problem of the liability of a possessor of land to those coming on the land. The defendant drew the atten-

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12 (1912); Sarratt v. Holston Quarry Co. of South Carolina, 174 S. C. 262, 177 S. E. 135 (1934); Hatch v. Globe Laundry Co., 132 Me. 379, 171 Atl. 387 (1934); Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S. E. (2d) 420 (1944). Comment, *Liability for Death of, or Injury to, One Seeking to Effect a Rescue*, 11 Mo. L. Rev. 317 (1946).

3. Wagner v. International Ry., 232 N. Y. 176, 180, 133 N. E. 437, 438, 19 A. L. R. 1, 3 (1921).

4. 122 Iowa 679, 98 N. W. 500 (1904).

5. 109 N. J. L. 255, 160 Atl. 659 (1932).

6. 310 Mich. 74, 16 N. W. (2d) 668 (1944).

7. The court in the instant case did not cite or mention in its opinion the case of Butler v. Jersey Coast News Co., *supra*, note 5.

8. *Supra* note 4.

tion of the court to the analogy between this case and the *Parsons* case. Both concerned a plaintiff injured on the land of the defendant. In all probability the plaintiff in the principal case could best be classed in that group designated as gratuitous licensees.[9] However, the New York court rejected the analogy offered by the defendant and adopted the view of the Michigan court as set forth in the *Bigelow* case.[10]

In the Michigan and the New Jersey[11] cases, the accident and the resulting rescue happened on public highways, and those courts, in holding the defendant liable, had no trouble applying the analysis of the rescue doctrine. The Michigan court, in rejecting the rule of the *Parsons* case, expressly pointed out the difference in these fact situations between the two cases.

Thus the New York court had to choose between competing legal principles. They could have followed the theory of liability of a possessor of land to those entering upon that land and could have held defendant liable on this ground. Instead, they minimized this theory and adopted the principle of liability of the rescued on a public highway to his rescuer. Query, has this application opened the door to a more extended liability of a possessor of land to those injured on the land? Perhaps not in New York where the case was decided, as the courts of that state tend to lean to the position that a possessor of land is liable for foreseeable injuries to a gratuitous licensee resulting from known dangerous conditions on the land. But in those states where the possessor of land has only the duty to refrain from affirmative conduct toward such persons, the principal case, if followed as precedent, would give rise to a new duty.

C. B. FITZGERALD

9. Dixon v. Swift, 98 Me. 207, 56 Atl. 761 (1903); Woolwine's Adm'r. v. C. & O. R. R., 36 W. Va. 329, 15 S. E. 81 (1892); Gotch v. K. & B. Packing and Provision Co., 93 Colo. 276, 25 P. (2d) 719 (1933); Lange v. St. Johns Lumber Co., 115 Ore. 337, 237 Pac. 696 (1925); Ridley v. National Casket Co., 161 N. Y. Supp. 444 (Sup. Ct. 1916), *affirmed* without opinion in 178 App. Div. 954, 165 N. Y. Supp. 1109 (4th Dep't 1917); Poock v. Strahl, 237 App. Div. 842, 261 N. Y. Supp. 48 (2d Dep't 1932). These cases represent situations where the plaintiff entered the premises of the defendant for the purpose of visiting the employees of the defendant.

10. *Supra*, note 6.

11. *Supra*, note 5.