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THE LIABILITY OF A MUNICIPAL CORPORATION FOR NEGLIGENCE IN THE ADMINISTRATION OF ITS DUTIES.

Whether or not a city is liable for negligence in the administration of its duties depends entirely upon the nature of the duty being performed at the time of the negligence. The natural duties of a city are divided into two classes. There are those sovereign duties which it performs for the general public by virtue of its share in the sovereignty of the state from which it derives its existence. These are classified in the books as its governmental functions. On the other hand, the city has a private corporate side in the maintenance of which it is called upon to perform duties for itself. These are known as its ministerial duties. In the exercise of the first of these, it is exempt from civil liability for negligence while in the exercise of the second class of functions it stands on an equality with individuals and private corporations. *Denver v. Maurer,* 47 Colo., 179.

A municipal corporation is not impliedly liable to an action for damages either for the non-exercise of, or the manner in which in good faith it exercises discretionary powers of a public or

legislative character. But liability attaches when the duty ceases to be governmental and becomes ministerial. *2 Dillon on Municipal Corporations,* 1157, Sec. 949; *Gregg v. Hatcher,* 125 S. W., 1007 (Ark.).

The great trouble the courts have met has been in deciding where one duty ends and the other begins. It has been difficult for the courts to draw, clearly and accurately, the line of demarcation between public or governmental duties, and private or corporate duties. They have not experienced any difficulty in determining whether the corporation is or is not liable for a refusal to discharge a public duty or for the manner in which it is discharged. Perhaps the most difficult place to draw the line has been between the duty to preserve the public health, which is universally regarded as a governmental duty, and the duty to keep the streets in proper repair, which is just as generally regarded as a purely ministerial duty. The performance of duties that relate to the preservation of the public health and the care of the sick are governmental duties and the city is not liable for negligence in such duties. The care of streets is a private or proprietary duty. *2 Dillon on Municipal Corporations,* Sec. 980.

In a recent case in the Appellate Court of Kentucky this question came up: The appellant, Kippes, was injured by sickness resulting from a drenching which she received from a hose bursting while an employee of the City of Louisville was flushing the streets. The court set forth as the only question to be considered whether or not the flushing of the streets of the city was a public duty undertaken by the city in the exercise of its governmental functions, for the benefit of the people and the public generally, or a service performed by the municipality for private or corporate purposes, as distinct from its duty to the public generally. The court answered the question by laying down the rule that a city engaged in flushing its streets, in the interest of its inhabitants and of the safety of the general public, and making no profit for such service, is exercising a governmental duty; and hence a person receiving personal injuries from the negligence of its employes, or from defective hose used while flushing the streets, has no action against the city. *Kippes v. City of Louisville,* 131 S. W., 184. The courts of Kentucky recognize the distinction that has been pointed out above and agree that the care of streets is a city's ministerial duty. In the case of *Schwalk's*

Administrators v. The City of Louisville, 122 S. W., 860, the court says the rule that municipalities are liable for negligence in not keeping their streets in repair affords an exception to the general rule that municipalities are exempt from liability for negligence in the performance of a public governmental duty imposed upon them for corporate benefit, and for which they receive, in their corporate capacity, no pecuniary benefit. However, the Kentucky court is not without authority from other jurisdictions when it draws the line thus close to the border.

The Supreme Court of Georgia draws as close a distinction in the case of *Love v. Atlanta,* 95 Ga., 129. In this case, a mule attached to a garbage cart of the city and being driven by a small colored boy, ran away and ran into the plaintiff's buggy and injured him. The court declared that the duty of keeping the streets of Atlanta clear of offensive and dangerous matter devolves upon the city board of health. The functions of this department of the city government are purely governmental and not ministerial in their character. It follows that if in the exercise of such functions and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city.

In a Tennessee case where the driver of a city street sprinkler allowed it to collide with the buggy of the plaintiff, injuring his wife, the court decided in an action for damages against the city that a city is not liable for the negligence of the driver of a street sprinkler in colliding with and overturning a buggy and thereby injuring its occupant. The employee is, in such case, engaged in the performance of a governmental, not of a mere ministerial, duty. *Conelly v. Nashville,* 100 Tenn., 262.

The New York court disapproves these last two cases and their doctrine is perhaps opposed to the weight of authority. In the New York case, the plaintiff while attempting to board a street car was struck by a cart in the city street cleaning department and the court held the city liable for the negligence of the driver. It said the duty of removing the dirt accumulating in the streets and the ashes and garbage from the abbutting residences is no part of the city's governmental powers and hence it is liable for the torts of its agents while engaged in this work. Referring to the

Georgia and Tennessee cases above, it said (with the greatest deference to the learned courts by whom these decisions have been promulgated): "We think they proceed upon a fundamental misconception of the duty discharged by the municipality. That a city is not liable for actions of its health department, we concede to its fullest extent. But the work undertaken by the city in these cases is not at all a part of the governmental work or duty of the state in protecting the health of its citizens. * * * * These duties of removing ashes and garbage from the lots of private residences were formerly private duties and are only taken over by the city's cleaning department as has been the disposal of sewage by the public sewer system and furnishing of water by the city water works because of the complexity and restrictions of a crowded urban life." *Quill v. Mayor, etc., of N. Y.*, 55 N. Y. Supp.,889. The New York cases are collected in *Missano v. The Mayor*, 160 N. Y., 123. In this case the plaintiff's child was run over and killed by a horse attached to an ash cart of the city and the plaintiff was allowed to recover.

The Colorado court recognized that the general duty of a municipal corporation to preserve the public health is a governmental duty and the city is not liable for the negligence of its employes in the performance thereof, but it declared that the flushing of a storm sewer was but an act necessary to keep the streets in a reasonably fit condition and was a private corporate duty, although also done to remove a menace to the health of the people, and the court held the city was liable for the negligence of its employes in the performance of the work. *Denver v. Maurer*, 47 Colo., 179.

Where in the exercise of its corporate powers a municipal corporation creates or permits a nuisance by nonfeasance or misfeasance, it is guilty of a tort and liable to damages in a civil action to any person suffering special damages therefrom. *Brown v. Scruggs*, 141 Mo., 632; *Gordon v. Village of Silver Creek*, 112 N. Y. Supp., 54. A city is liable for maintaining a nuisance in the way of a dumping ground for garbage and refuse taken off the streets. In the case of *City of New Albany v. Slider*, 21 Ind. App., 392, the city maintained a dumping ground near the plaintiff's residence. Sickness was caused in his family as a result and the court awarded him damages, saying, a municipal corporation is liable in damages for maintaining a nuisance the same as an in-

dividual. The fact that the plaintiff was a resident of the city and the city committed the act complained of in an effort to keep its streets clean for the benefit of the public, will not destroy his right to maintain an action against the city for creating a nuisance. The city of San Antonio (Texas) was sued for trespass in driving its garbage wagons across a vacant lot belonging to the plaintiff. The court in awarding the plaintiff damages said, that a city in cleaning its streets and disposing of its garbage acts for the benefit of its own people, and not in the discharge of a duty to the general public, primarily resting on the state, and is liable for damages caused by the unlawful acts of its officers in so doing. *Ostram v. City of San Antonio,* 94 Tex., 523. These decisions are in line with the Federal court on this subject.

A railroad company permitted the city of Denver to maintain a dumping ground for the city's garbage on some of its waste lands. Fire broke out in the refuse and spread to the plaintiff's buildings destroying them. The court held that the gathering of refuse and waste by a city and the maintenance, establishment and operation of a dumping ground for its ultimate disposal, under the direction of the officers of the city health department, is a duty of local or municipal concern, not performed in the exercise of any governmental function; and hence the city is liable for the negligence of its officers and agents engaged in the performance of such work. *Denver v. Porter,* 126 Fed., 288.

A number of cases have discussed this question in the matter of lighting the streets of the city, under circumstances that seemed to mingle the corporate and the governmental duties of the city. A plaintiff's wife was injured by reason of driving into an excavation in the street which was not properly lighted and which was made by the city in putting in a city water works. The plaintiff was allowed to recover even though the city was engaged in constructing a municipal water plant. *Butler v. Bangor,* 67 Me., 385. A municipal corporation, which, by its charter, has the power to lay out, improve, light and keep its streets in order, is liable in damages at the suit of an individual who sustains injuries by reason of the neglect of the corporation to keep its streets in a proper and safe condition. *Noble and wife v. City of Richmond,* 31 Gratt. (Va.), 271. The Supreme Court of Illinois has held that a city is under no obligations to light its streets even when granted power by its charter to do so, but if it assumes the duty under a

discretionary power and does it in such a negligent manner as not to afford proper security from danger, and a person is injured by falling into an excavation in the night time it is liable for the injuries thereby sustained. *City of Freeport v. Isbel,* 83 Ill., 440; *City of Chicago v. Powers,* 42 Ill., 169.

From the cases cited it would seem that while there has been no difficulty on the part of the courts in classifying the powers and duties of municipal corporations, yet there has been difficulty in determining into which class certain specific acts would fall. And it seems farther that by the weight of authority the courts are disinclined to draw too strict a line so as to exempt a municipal corporation from liability to the detriment of private rights.

FEDERAL JURISDICTION,—HOW EFFECTED BY THE DUE PROCESS OF LAW CLAUSE IN THE STATE CONSTITUTIONS.

The jurisdiction of the federal courts is a question which has given a great field for learned and technical arguments, bringing forth a diversity of opinion as to its extent. The jurisdiction of these courts has been settled with respect to certain matters, but there are still some cases in which the jurisdiction is open to question, and which have not yet been decided by a court of last resort. Article three, section two, of the federal constitution, says, "that the judicial power of the U. S. shall extend to all cases in law and equity arising under this constitution." The fourteenth amendment to the constitution, in the first article, provides that, "no state shall deprive any person of life, liberty or property without due process of law." When the same clause, or one which in effect is the same, is found in the state constitution, the question is, must the complainant first exhaust his remedies in the state courts before the jurisdiction attaches to the federal courts? This question Circuit Court Judge Morrow answers in the affirmative, in a case decided February 6 in the Circuit Court of Appeals for the Ninth Circuit.

The case referred to above is that of the *Seattle, Renton and Southern Railway Co. v. The Seattle Electric Co.,* reported in the San Francisco *Recorder,* February 14, 1911. The case was one involving a grant of franchise to two railway companies over

the same streets. The complaining company had the prior right, but took its franchise under an express declaration, that it should "not be deemed exclusive," and a reservation by the City of Seattle of the right, "to grant to any other person or persons, company or companies, or to any commission, or itself to exercise the right to construct, lay down, maintain and operate a line or lines of railway over the streets" mentioned in the franchise. The city subsequently granted to the defendant company a franchise to operate over a portion of the route covered by the previous grant, but provided that if the original holder thereof "is entitled to compensation for damages occasioned thereby, such damages shall be ascertained and settled by the grantee, according to law." The complainant attacked the second franchise under the fourteenth amendment, on the sole ground that it deprived the complainant of its property, "without due process of law."

The lower court, the district court, granted an injunction restraining the defendant company from further proceeding with the work of laying its tracks. In this action to dissolve the injunction the court said in part, "The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect the complainant will have his remedy in an appeal from the highest court in the state to the Supreme Court of the United States. The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the action of state officers, done without authority of, or contrary to law. In such a case the complaining party must exhaust his remedies in the state courts by prosecuting his case in the state court of last resort for cases of that character; and until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the highest state court to which he can resort is adverse to him, he can then take his case on writ of error to the United States Supreme Court, upon the ground, not that the proceeding or action complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty or property without due process of law in violation of the fourteenth amendment, has at last received the sanction of the state, and, in effect, become the act of the state itself." The court held, where a state constitution guarantees to its citizens, in the language or the

substance of the fourteenth amendment to the Consitution of the United States, that "no person shall be deprived of his property without due process of law," the citizen has his remedy in the state court; and the federal courts have no jurisdiction and must not be invoked.

All of the state constitutions have a clause which, in substance, is the same as that in the fourteenth amendment, that "no person shall be deprived of his property without due process of law." And the question decided by the principle case, it seems, has never been squarely before a court of last resort. But the question is approached in the case of *Prentive v. The Atlantic Coast Line Co.*, 211 U. S., 210, where it was held, that when an appeal to the Supreme Court of the state, from an order of a state corporation commission, fixing railroad rates, is given by the state constitution, it is proper that dissatisfied railroads should take this matter to the Supreme Court of their state, before bringing a bill in the Circuit Court of the United States. A municipal ordinance not passed in accordance with legislative authority is not a law of a state within the meaning of the prohibitions of the Constitution of the United States; and a suit to enjoin the enforcement of an ordinance alleged to have been passed in violation of the requirements of the state law, presents no question arising under the constitution, which confers jurisdiction on the federal courts, on the ground that the enforcement of the ordinance will deprive the complainant of property without due process of law. *Mayor and City of Savannah et al. v. Holst et al.*, 132 Fed., 901.

In *Ozark-Bell Telephone Co. v. The City of Springfield*, 140 Fed., 666, it was held, that a bill by a telephone company to enjoin the enforcement of a city ordinance, fixing maximum rates, which alleges that the ordinance was passed in the exercise of the power to fix rates conferred upon the city by the act of the legislature, and that if enforced the complainant cannot make any net earnings, nor sufficient to pay its necessary expenses, and will be deprived of its property without due process of law, states a cause of action arising under the federal constitution, of which the federal courts have jurisdiction, although it further averred, as a legal conclusion, that the ordinance is also in violation of the state constitution. In *McCain et al. v. The City of Des Moines et al.*, 84 Fed., 726, where the validity of a state statute was involved, it was held that no federal question was thereby presented, although

the assessment of taxes under that statute, if valid, would be a taking of property without due process of law. But, in the *Nashville Car and Street Railway Co. v. Taylor et al.*, 86 Fed., 168, it was held that a federal question was involved under the fourteenth amendment to the federal constitution, where the question was as to the validity of a tax, even though the state constitution provided, "that all property shall be taxed according to its value, that value to be ascertained in such a manner as the legislature shall direct, so that the taxes shall be equal and uniform throughout the state."

Smith v. Bivens, 56 Fed., 352, held that a certain act deprived the plaintiff of his property without due process of law, and that therefore the federal court had jurisdiction. Where both parties are citizens of the same state, the grounds upon which a federal court can take cognizance of a suit, relating to the due process clause of the constitution, must be clear and distinctly stated. *Hanford v. Davies*, 163 U. S., 273. A suit to restrain the enforcement of an enactment of a city, passed in the exercise of its delegated legislative powers, on the ground, that they attempt to annul a contract made by a prior ordinance, without notice to the other party, or due process of law, involves a question under the Constitution of the United States, and is within the jurisdiction of a federal court, when the requisite amount is involved, regardless of the citizenship of the parties. *American Waterworks and Guarantee Co. v. The Home Water Co. et al.*, 115 Fed., 171. And where a city council passed a resolution declaring its intention to dispossess a company of the street by use of its police power, is a threatened violation of the constitutional rights of the company, which a federal court has jurisdiction to restrain. *Iron Mountain Railroad Co. v. The City of Memphis*, 96 Fed., 113.

But in the above cases the fact that the state constitutions had a similar clause, as that contained in the fourteenth amendment to the federal constitution, was not raised. The cases seem to indicate that it would make no difference even if such a clause is found in the state constitutions.

It was held in the *Consolidated Water Co. v. City of San Diego*, 93 Fed., 849, that a bill to annul a city ordinance, fixing rates to be charged by a water company, which are claimed to be so un-

reasonably low as to amount to a practical taking of the company's property, without due process of law, presents a federal question. *City Railway Co. v. Citizens' Railway Co.,* 166 U. S., 557. And where a city had a right to make a contract with a water company ,and it made such a contract, but subsequent legislation, both state and municipal, impair the contract rights of the water company, it was held that the cause presented a federal question under the constitution. *Vicksburg Water Works Co. v. Vicksburg,* 185 U. S., 65. And a suit enjoining the enforcement of an ordinance requiring a street railway company to carry, without pay, passengers, holding transfers from other lines, is within the jurisdiction of the federal courts, where the invalidity of the ordinance is alleged, on the ground that it deprives the company of its property without due process of law, in violation of the federal constitution. *Chicago City Railway Co. v. The City of Chicago and others,* 142 Fed., 844.

In the case of the *Indianapolis Gas Co. v. The City of Indianapolis,* 82 Fed., 285, a suit to restrain the enforcement of a city ordinance limiting charges for artificial gas, on the ground that it allows no profit to the gas company, and therefore deprives it of its property without due process of law, contrary to the federal constitution, is one involving a federal question, and a federal court has jurisdiction, regardless of the citizenship of the parties. *Southern Railway Co. v. North Carolina Railway Corporation Commission,* 97 Fed., 513. From these cases it would seem that the courts regard the passage of city ordinances as legislative acts of the state, but in *Huntington v. The City of New York et al.,* 118 Fed., 163, it was held that trespasses of public officers, professedly acting under authority of state law, but which was not only unauthorized by said law, but by fair construction of it, was prohibited, cannot be imputed to the state, so as to bring them within the constitutional inhibition, to deprive persons of property without due process of law, and on that ground to confer jurisdiction upon the federal courts.

But a federal court has jurisdiction to enjoin state taxing officers from enforcing collection of a tax upon shares of stock in a national bank, when the protection sought is based upon the ground, that the state statute, under which such officers are proceeding in making their assessment, is in violation of the fourteenth amendment to the federal constitution. *Third National*

Bank of Pittsburg v. Mylin, 76 Fed., 385. And no determination of the constitutional question involved in the making of a specific assessment, for street improvement by an administrative board can bar a suit in a national court, to test the question, whether by means of such determination the state has deprived the complainant of his property without due process of law. *White v. The City of Tacoma*, 109 Fed., 32.

In *Barney v. The City of New York*, 193 U. S., 430, it was held, where the jurisdiction of the Circuit Court is invoked on the ground of the deprivation of property without due process of law, in violation of the fourteenth amendment, it must appear at the outset, that the alleged deprivation was by act of the state. And where it appeared on the plaintiff's own statement of his case, that the act complained of was forbidden by the state legislature in question, the Circuit Court rightly declined to proceed further and dismissed the suit. When it is alleged in a petition for a writ of habeas corpus, that by the action of a judge of a police court of a city, a person has been deprived of his liberty without due process of law, and consequently against the Constitution of the United States, the federal court or judge thereof has jurisdiction to issue a writ of habeas corpus. *In re Monroe, In re Masquandt*, 46 Fed., 52. And where the legislature attempted to convey property from one person to another without due process of law it was held that the federal court had jurisdiction. *Crystal Spring Land and Water Co. et al. v. The City of Los Angeles*, 76 Fed., 148.

Therefore, from the cases cited, it would seem that the weight of authority is contrary to the doctrine enunciated in the principle case. But it must be born in mind that the precise question has not been passed on by any court of last resort, and if the question were to be presented, the doctrine of the principle case might be affirmed. By the authorities above cited and discussed, questions similar to it have been decided contrary to it, therefore it would seem that the doctrine therein set forth is not sustained by the weight of authority.

WHAT CONSTITUTES CRUEL AND INHUMAN TREATMENT.

One of the most confusing subjects in American divorce law to-day is, what constitutes cruel and inhuman treatment, under

statutes making such treatment grounds for divorce. The decisions in the several states are in a state of hopeless confusion, which it is hoped will be settled and laid at rest by some scheme of reform legislation, which may result from a movement now on foot, designed to accomplish such a needed and welcome reform. The law being in such a state of conflict, it is interesting to note the case of *Zweig v. Zweig,* 93 N. E. (Ind.), 234, recently decided by the Appellate Court of Indiana.

The statute of that state, *Burns' Annotated Statutes of* 1908, section 1067, provides that cruel and inhuman treatment shall be ground for divorce. The question was whether the defendant had been guilty of such treatment, within the meaning of the statute. The plaintiff and the defendant were married on November 12, 1904. After the lapse of six months from that date, and until February 16, 1907, the defendant refused to speak to or hold any conversation with the plaintiff, or to permit her to converse in any manner with him, and when she attempted to do so, he would say that he wanted to have nothing to do with her. He refused to visit the neighbors with her and would not permit the neighbors to call on her. The court sustained a divorce granted upon these facts, under the above mentioned statute.

In *Kuhl v. Kuhl,* 56 Pac., 629 (Cal.), the court held, evidence that, after the husband without cause, had deserted his wife, who was at the time sick, she missed her diamonds and her seal skin sacque, and reported to friends of his, that she thought he had taken them, is insufficient to entitle her to a divorce on the grounds of extreme cruelty. This is in accordance with the doctrine of the early cases, which define cruel treatment within the meaning of the statutes, making such treatment a ground for divorce, "as the wilful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb or health." *Ring v. Ring,* 118 Ga., 183. Therefore, under the above definition it was held, that the habitual and intemperate use of morphine is not such cruel treatment, unaccompanied by such conduct as laid down in the definition. The intention to wound is a necessary element of the cruel treatment for which a divorce is allowed. *Ring v. Ring, Supra; Odom v. Odom,* 36 Ga., 286.

Cruel and inhuman treatment within the meaning of a statute making such treatment a ground for divorce, is that kind of

treatment that indicates a settled aversion to the wife and permanently destroys her peace or happiness, and this character of cruelty may habitually manifest itself in various ways that fall short of assault or bodily injury. *Hooe v. Hooe,* 29 Ken. L. R., 113. And such conduct need not be attended with an apprehension of violence or danger. *Hooe v. Hooe, Supra.*

The tendency of the construction of modern statutes is to allow a liberal one, and the modern cases have departed from the earlier cases, which required the wilfull infliction of pain, bodily or mental. *Ring v. Ring, Supra.* In *Barnes v. Barnes,* 95 Cal., 171, the court said: "The tendency of modern decisions, reflecting the advanced civilization of the present age, is to view marriage from a different standpoint, than as a mere physical relation. It is now more wisely regarded as a union affecting the mental and spiritual life of the parties to a relation designed to bring to them the comforts and facilities of home life, and between whom in order to fulfill such design, there should exist mutual sentiments of love and affection. 'It was formerly thought that, to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence was necessary, but the modern and better considered cases have repudiated this doctrine, as taking too low and sensual a view of the marriage relation, and it is now very generally held, that any unjustifiable conduct of either the husband or wife which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the health, or such as ultimately destroys legitimate ends and objects of matrimony, constitutes extreme cruelty under the statutes.'"

The decisions do not confine the definition of extreme cruelty to physical violence, but the grievance whether mental or physical must be of the most aggravated nature in order to justify a divorce. *Cooper v. Cooper,* 17 Mich., 205. And profane, obscene and insulting language habitually used toward a person of sensitive nature and refined feeling may amount to extreme cruelty. *Bennett v. Bennett,* 24 Mich., 483. Mutual wrangling over money matters between husband and wife does not make out a case of extreme cruelty. *Beller v. Beller,* 50 Mich., 49. Where the complainant was intensely jealous of her husband without just cause, his application to have her adjudged insane, made in a *bona fide* belief that her statements attributing improper conduct

to him, were induced by an unbalanced mind, was not such cruelty as would entitle her to a divorce. *Reichert v. Reichert,* 24 Mich., 694. Since it is held that physical violence is necessary to constitute cruel and inhuman treatment, under the Illinois statute, refusal to co-habit is not extreme cruelty. *Severns v. Severns,* 107 Ill. App., 141. But in *Campwell v. Campwell,* 112 N. W., 481 (Mich.), it was held that the refusal of a wife for three years to co-habit with her husband was extreme cruelty under a similar statute. And in *Maddox v. Maddox,* 189 Ill., 152, where the defendant failed to supply the complainant and her children with food and a suitable place of habitation, it was held, that under the statute of that state cruelty, to be ground for divorce, must consist of acts of physical violence. But in no instance is a single act of physical violence sufficient ground for a divorce. *Werres v. Werres,* 102 Ill. App., 360.

In the case of *Rice v. Rice,* 6 Ind., 100, cold neglect was held to be cruel and inhuman treatment, and the court said with reference to an instruction, "We may remark of this instruction that it seems to contemplate an entirely physical, sensual view of the marriage relation, and if that relation has no aim to the social happiness and mental enjoyments of those united in it, the instruction should have been given. But if it be otherwise, if it be true that we are possessed of social, moral and intellectual natures, with wants to be supplied, with susceptibility of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight, then we think that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classified as cruel, and entitle the sufferer to relief."

While the earlier cases construe such statutes, making cruel and inhuman treatment ground for divorce, with strictness, requiring physical violence or acts putting the complainant in immediate apprehension of danger of life, limb or health, *Ring v. Ring, Supra,* the later and modern decisions seem to depart from that rule of construction, and apply a liberal construction, which makes it less difficult for parties to obtain a divorce. Therefore, it appears that *Zweig v. Zweig, Supra,* the principal case, although in conflict with the earlier decisions, is in accord with the modern authorities.

THE INVALIDITY OF SUNDAY CONTRACTS.

In the *Sentinel Co. v. A. D. Meiselbach Motor Wagon Co.*, 128 N. W., 861 (Wis.), the plaintiff alleged that the defendant company was indebted to them for advertising in the plaintiff's newspaper, which was published on week-days and Sundays, and the defendants offered as a defense the statute which prohibits labor, business, or working, except work of necessity and charity from being carried out on Sunday. The court decided that the plaintiff could recover on *quantum meruit* for the value of the advertising furnished on secular days, but could not recover for work done on Sunday.

In *Williams v. Paul*, 6 Bing., 653, which was decided a little over a century ago, it was held that where the defendant had purchased a heifer from a drover on Sunday and having made several subsequent promises to pay for and had kept the beast he was liable at all events on *quantum meruit*, notwithstanding the contract was performed on Sunday. It would seem that the learned judge in this case was willing to extend the bounds of the common law rule, which declares all contracts to be fully consummated on Sunday are void and establish a precedent.

In regard to newspaper advertisements to be published on Sunday, *Smith v. Wilcox*, 24 N. Y., 353, is directly in point, holding that inasmuch as a newspaper is merchandise when sold, a contract for the publication of an advertisement in a newspaper to be published and sold on Sunday is a servile task and therefore void. In *Sayles v. Smith*, 12 Wend., 57, although the facts are somewhat different, the effect is the same, for that case held that a contract made on Sunday for the publication of an advertisement on week-days is not void, inasmuch as the contract would not be performed on Sunday. In regard to a request for services made on Sunday to be given on a week-day, the same conclusion was reached in *Dickinson v. Richmond*, 97 Mass., 45, which held that such a contract was valid.

It seems that the states which have not adopted the common law rule have incorporated into their law by statute certain provisions which bring about the same result. Most statutes make an exception in the case of necessities and charities. *Flagg*

v. Inhabitants of Millbury, 4 Cush., 243, in discussing necessities held that what is meant by the word necessity as a work to be done on Sunday, is not meant a physical and absolute necessity, but any labor which is morally fit and proper to be done on that day under the circumstances of the particular case, is a work of necessity within the statute.

A newspaper is not, in the strict meaning of the word, a necessity, however; business associations which advertise to a great extent in newspapers and others who employ the columns of a newspaper to bring their names and professions before the public may regard a newspaper as a most valuable asset for bringing success, and a Sunday advertisement is as fruit-bearing as one published on a week-day. To publish a newspaper on Sunday and to claim that it is a necessity may be stretching the meaning of that word to the limit; however, in accordance with the laws of morality to-day, the publication of a Sunday newspaper is not generally regarded as an immoral act.

At the time the common law was invoked and most of the states formulated their laws, the Sabbath was more reverently kept than it is to-day, and Sunday newspapers were unknown. To consider the publication of a newspaper a fit occupation to be performed on Sunday would seem reasonable within the holding of *Flagg v. Inhabitants of Millbury, Supra,* under the present laws of morality.

Having considered the publication of a newspaper on Sunday valid, its contents must next be considered. One of the most important elements of a newspaper is its advertising, and if we consider the publication of a newspaper on Sunday as valid we must consider the newspaper as a unit and not detract any of its component parts, and so a contract to pay for Sunday advertising must also be considered as valid.

The law is not in the least flexible on the point of Sunday contracts and the courts cannot abandon it entirely, and thus establish precedents, but it would seem that such laws should be changed, so as to conform with the present-day life and in order that one may not profit by the labor of another.