

LIABILITY OF WATER COMPANIES FOR LOSSES BY FIRE

New cases continue to be brought by citizens whose property has been destroyed by fire because of a failure of the water supply. In the recent Florida case of *Woodbury v. Tampa Waterworks Co.*, 49 So. 556; 21 L. R. A. (N. S.) 1034, it was held that where a water company, engaged in the public service of supplying water for public and private use, had contracted with a city to furnish water for the putting out of fires, it was liable to a citizen for a loss caused by the company's failure to live up to its contract. This decision has been rather severely criticised,¹ and it is contrary to the great weight of authority, numerically counted. The liability of the company has two possible bases, its contract with the city and its public duty as a public service corporation. These will be considered separately.

LIABILITY *ex contractu*.

Of course there is no privity of contract between the citizen and the water company.² Privity of contract may be defined as the relation existing between a promisor and a promisee. The citizen is not a promisee. After a period of doubt about the matter, it came to be believed in England that only a promisee can enforce a promise by action at law.³ In Massachusetts the contrary was held originally, but in recent years the Massachusetts court has adopted the English view. A few other States have followed the example; and even in the States not doing so, the English doctrine has clouded the ideas of the judges and has caused them to limit the rights of beneficiaries in various logical or illogical ways.

It is beyond question that the courts have power to recognize and enforce duties in favor of persons who are not promisees. In early times, a parol promise conferred no rights enforceable at law, even in favor of the promisee. But the common law was changed by judicial action, and such promises are now so closely

¹ *Case and Comment*, November, 1909.

² The city is not acting as an agent in making the contract for the individual citizens as principals. *Ancrum v. Camden W. Co.* (So. Car.) 21 L. R. A. (N. S.) 1029; *Allen v. Shreveport W. Co.*, 113 La., 1091.

³ *Tweddle v. Atkinson*, 1 B. & S. 393.

interwoven into our commercial life that the profession is unaware that they ever were unenforcible. Again, under the guise of an "implied" contract, the courts have enforced numberless duties where there was no privity of contract; the "implied" contract was a mere fiction, and has now been rechristened a quasi-contract. The Lord Chancellor, sitting in the seat of his ecclesiastical forebears and following their example, found no difficulty in permitting a beneficiary to enforce a trust, though there was no privity between him and the trustee. The duty of the trustee arises out of his taking possession of specific property; but if the courts could construct and enforce a duty thus arising, at the suit of the beneficiary, there is no reason why they cannot construct and enforce, at the beneficiary's instance, a duty arising out of a binding executory promise to a third person. In the case of the trust, it was the moral duty that the courts recognized, and the fact that *specific* property was involved is an immaterial thing unless the courts arbitrarily make it material. If the courts could recognize the moral duty in cases where there was a specific *res*, but no privity whatever, by the same token they can recognize and enforce a moral duty arising out of an executory promise. If they could once *create* in favor of a stranger a right *in rem*, they can to-day if they choose create in favor of a stranger a right *in personam*. If a court of equity could do this once, it can do so to-day. If a court of law could once attach an obligation to parol promises in favor of a promisee, it can do so to-day in favor of a beneficiary. The sufficient proof of this is the fact that the courts have done so in nearly every State within the last fifty years. If a court of law can turn moral duties into legal duties by calling them quasi-contracts, it can add another quasi-contract to their number by enforcing a promisor's duty to a beneficiary.

It must be remembered that there is such a thing as equity jurisdiction to-day, and that in no respect has the chancellor's power been allowed to die that legal death of disuse and oblivion. And as, under the codes, most of our courts have equitable as well as legal jurisdiction, our judges should have a lively realization that they are chancellors as well as judges. The English judges have been so far from having this realization, and the barristers found it so hard to amalgamate legal and equitable principles, that it has been necessary to perpetuate the old dual system by having separate Chancery and King's Bench divisions of the High Court. This is not desirable or necessary in the

American courts, but our courts should not deny a beneficiary a remedy, merely because former courts of common law did so.

That it is generally felt by the courts that the beneficiary of a contract between two others should have a remedy, is amply attested by the decisions. From Professor Williston's analysis and classification of the decisions,⁴ it appears that everywhere, England and Massachusetts included, the beneficiary of an insurance policy may sue on the policy. Of course there is no privity, but the beneficiary *ought* to have a remedy, and is given one in spite of that fact. A logical distinction is drawn between a *sole* or *donee* beneficiary and a *creditor* or *obligee* beneficiary, depending upon whether the promisee owed the beneficiary any legal or equitable duty. The above mentioned classification shows that there are sixty-six decisions in twenty-five jurisdictions allowing a *sole* beneficiary to sue, not counting insurance policy cases. A *creditor* beneficiary has been allowed to maintain an action in 232 cases in thirty-five jurisdictions, not counting suits by mortgagees. A mortgagee may sue the grantee of the mortgagor on a promise made to the mortgagor to pay the debt. This appears to be the law in 126 decisions in twenty-nine jurisdictions. For individual variations and for a discussion of underlying theories, Professor Williston's chapter should be read. Enough has been said here to show that we need no longer to be worried by the absence of "privity."

Notwithstanding such general recognition of the right of a beneficiary, it is generally held that a water company is not liable to a citizen whose property has been burned. This is, of course, strictly consistent in those jurisdictions where the rights of no beneficiary are recognized and enforced.⁵ In Connecticut, however, a mortgagee is allowed to sue, as explained above, and so is the beneficiary of an insurance policy. The decisions in these jurisdictions should be no authority in States that have abandoned the requirement of privity. The Connecticut water company case, indeed, was decided on the insufficiency of the pleadings, and should not be regarded as settling the Connecticut law on the subject.⁶ However, decisions in other States have been largely based upon the two cases cited above.

⁴ *Wald's Pollock on Cont.*, Williston's Ed., pp. 237-278.

⁵ *Atkinson v. Waterworks Co.*, L. R., 2 Ex. D. 441; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn., 24; perhaps also Louisiana; *Allen v. Shreveport W. Co.*, 113 La., 1091.

⁶ The same may be said of *Hone v. Presque-Isle W. Co.*, 104 Me., 217.

In three States the rule has been definitely adopted that the citizen has a remedy against the water company.⁷ In twenty-three jurisdictions, besides Connecticut and England, the opposite has been held.⁸ Of these the decisions in Alabama, California, Idaho, Indiana, Iowa, Illinois, Wisconsin, and Federal Reporters merely follow more or less blindly, the numerical majority. They add little weight, other than numerical, to that majority. In three decisions, those in Kansas, 113 Louisiana, and 79 Iowa, it is said that the city had no power to make a contract for the benefit of its citizens.⁹ This looks unreasonable, but if correct, it is a good defense against the citizen, for a beneficiary always must take subject to such infirmities as originally existed in the contract when made.

Texas alone suggests that the company's default is not a proximate cause of the citizen's loss—or, rather, the court says: "So, injury resulting from a failure on the part of the water company, would not be proximate, but remote, as a cause." This is evidently considerably mixed. The pregnant admission that

⁷ *Woodbury v. Tampa Waterworks*, 21 L. R. A. (N. S.), 1034; *Paducah Lumber Co. v. Paducah W. Sup. Co.*, 89 Ky., 340; *Gorrell v. Greensboro W. Sup. Co.*, 124 N. C., 328; and see *Planters' Oil Mill v. Monroe W. & L. Co.*, 52 La. Ann., 1243, later overruled.

⁸ *Lovejoy v. Bessemer W. Co.*, 146 Ala., 374; *Town v. Ukiah W. & Imp. Co.*, 142 Cal., 173; *Fowler v. Waterworks Co.*, 83 Ga., 219; *Bush v. Water Co.*, 4 Ida., 618; *Peck v. Sterling W. Co.*, 118 Ill. App., 533; *Fitch v. Seymour W. Co.*, 139 Ind., 214; *Davis v. Clinton W. Co.*, 54 Iowa, 59; *Becker v. Keokuk Waterworks*, 79 Iowa, 419; *Mott v. Water Co.*, 48 Kan., 12; *Allen v. Shreveport W. Co.*, 113 La., 1091; *Hone v. Presque-Isle W. Co.*, 104 Me., 217; *Wilkinson v. Water Co.*, 78 Miss., 389; *Howsman v. Trenton W. Co.*, 119 Mo., 304; *Phoenix Ins. Co. v. Trenton W. Co.*, 46 Mo. App., 118; *Eaton v. Fairbury Waterworks*, 37 Neb. 546; *Ferris v. Carson W. Co.*, 16 Nev., 44; *Wainwright v. Queens Co. W. Co.*, 78 Hun., 146; *Blunk v. Dennison W. Co.*, 71 Ohio St., 250; *Beck v. Kittanning W. Co.* (Pa.), 11 Atl., 300; *Ancrum v. Camden W. Co.*, (So. Car.), 21 L. R. A. (N. S.), 1029, 64, S. E., 151; *Foster v. Lookout W. Co.*, 3 Lea (Tenn.), 42; *House v. Houston W. Co.*, 88 Tex., 233; *Britton v. Green Bay W. Co.*, 81 Wis., 48; *Boston Safe D. & T. Co. v. Salem W. Co.*, 94 Fed., 238; *Met. Trust Co. v. Topeka W. Co.*, 132 Fed., 702.

⁹ *Contra: Ancrum v. Camden W. Co.* (So. Car.), 64 S. E., 151, 21 L. R. A. (N. S.), 1029. The dictum in *Allen v. Shreveport W. Co.*, 113 La., 1091, 1098, that the city cannot be given power to make a contract for the benefit of its citizens unless it also has the power to bind them individually to perform promises on their part, is absolutely incorrect on principle.

the injury results from the failure of the company readily prepares us to believe that such *injury* is not the proximate *cause* of the company's failure.

Four decisions¹⁰ hold that the payment of a special water tax by the citizen creates no privity between him and the company. This is probably correct, but likewise immaterial in States that have abandoned the requirement of privity, as all four of these States have largely done. But one who pays a special water tax can scarcely be said to be a "stranger to the consideration."

Pennsylvania says that the plaintiff's interest is too remote to raise a privity. But the courts of that State do not know whether privity is necessary or not, as appears from Professor Williston's citations. They certainly allow a mortgagee to sue on a promise not made to him and for which he paid nothing.

The decisions in Kansas, Idaho, 113 Louisiana, Mississippi, Nebraska, South Carolina, and Texas say that the contract was not made for the plaintiff's benefit, though in the Kansas case the contract expressly states that it was made for the benefit of the citizens. This is a good defense, perhaps, if it is true *in fact*. The terms of the contract made with the city are different in the different cases. In some of them a reasonable argument certainly was made, to show that the citizens were not beneficiaries.¹¹ But an express provision should put it beyond doubt. It may be that no moral duty arises from a contract in favor of a party whose interests the contracting parties did not have in mind. Yet all of these States allow a creditor beneficiary, such as a mortgagee, to sue, though the contracting parties rarely have the creditor's interests in mind. Professor Williston apparently adopts the view of these courts, for he says: "Though the town or district which is the promisee, not being itself liable for the lack of water or for the destruction of the building, has no pecuniary interest in the performance of the promise, yet it may be doubted whether the stipulation was exacted for the benefit of such people as might have their buildings destroyed from lack of water. It is a more reasonable construction that the object of the promise is to benefit the community as a whole. Whatever may be the reason, the plaintiff is not usually allowed to recover

¹⁰ 48 Kan., 12; 79 Iowa, 419; 37 Neb., 546; 104 Me., 217.

¹¹ See *Ancrum v. Camden W. Co.* (So. Car.), 21 L. R. A. (N. S.), 1029, and *Allen v. Shreveport W. Co.*, 113 La. 1091.

in such cases.”¹² It is difficult to see how the community as a whole can be benefited except through the individuals that compose that community. And it is a very hollow benefit that is conferred by a contract for breach of which no one can collect damages—not the city, for, as Professor Williston says, it has no pecuniary interest^{12a}—not the community at large, for they are too indefinite, and only one of them has been injured—and not the individual injured, for it is said the contract was not for his benefit. The reasoning of the Louisiana court is strongly persuasive against this view:

“But it is not so clear that the waterworks company, having contracted with the city to supply water adequate to the fire necessities of the town, and failing to do so, is not liable to citizens for losses directly traceable to its failure. Many authorities in other jurisdictions are cited by counsel for defendant to show non-liability, but it is not certain they are applicable here, considering the provisions of our codes and statutory law. This contract, as made by the city of Monroe, was intended by both parties to inure to the benefit of the inhabitants of the town. The stipulations therein made as to a water supply for use in case of fires was in their favor. Art. 1890 of the Civil Code declares that ‘A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked.’ The property taxpayers of Monroe, by voting a special tax in aid of the waterworks contracted for by the city, and subsequently paying it, signified their assent to accept the provisions of the contract which were designed to inure to their benefit. . . . If there be in this contract no express stipulation in favor of the citizens and taxpayers that a sufficient supply of water to extinguish fires would be furnished, does not such stipulation result by necessary implication? It would seem that the waterworks company, by reason of having accepted the obligations imposed by the city ordinances and by the contract it

¹² *Pollock on Contracts*, Williston's Ed., p. 254.

^{12a} *Town v. Ukiah W. & Imp. Co.*, 142 Cal. 173, carries this to the extreme of holding that even the town has no right of action for damages caused by the burning of municipal property. That is, the town as a corporation, as well as the town as composed of individuals, must be content with those ethereal benefits to be derived by everybody but by nobody.

had entered into, had a public duty to perform which embraced in its benefits every property owner in Monroe. And it would further seem that the contract it entered into was not made more for the benefit of the municipality itself than for the benefit of the inhabitants of the town. . . . Municipal governments, while legal entities, are no more than convenient regulations instituted by the people that they may act in their aggregate character to secure their larger protection and happiness. Municipalities are the people acting in their corporate capacity. It was the people's money that was paid to the water company. It was for the benefit of the people that the promise was made on the part of the company to supply water for extinguishing fires. If it were to the public that the promise of the contract was made, then it was to 'the public as composed of individual persons.' The municipality was but the agent of the public as thus composed. Its acts in the matter of the contract under consideration were chiefly fiduciary. The beneficiaries are the corporators. It will not do to say that the water company owes them no duty."¹³

The code provisions cited by the court in the above opinion do not distinguish the case from cases in other States, for the court used those provisions merely to do away with the necessity of a direct relationship or privity; they do not affect in the least the question of fact as to whether the contract was made for the benefit of the citizens. Georgia has a similar code provision, and twenty-one of the other States denying the plaintiff a remedy have in very numerous judicial decisions declared that privity is not always required. Hence, the Louisiana code merely puts Louisiana on the same footing as these other States.¹⁴

It is probably true that the general code provision permitting the real party in interest to sue in his own name, was not intended to apply to contracts for the benefit of a third person. That code provision was intended to affect procedure only, in cases where there was an already recognized right, as where the assignee of a chose in action had to sue in the assignor's name

¹³ *Planters' Oil Mill v. Monroe W. & L. Co.*, 52 La. Ann., 1243. This case was expressly overruled later in *Allen v. Shreveport W. Co.* 113 La., 1091, and this reasoning was disapproved, greater weight being put upon the legal personality of a municipal corporation. The court also seemed to adopt the requirement that privity is necessary. The question of liability *ex delicto* was expressly excluded from consideration.

¹⁴ But see the preceding note.

or where the owner of an equitable interest could bring no suit whatever at law. It was not intended to create or to confirm the substantive right itself. The question of the beneficiary's right to sue is as to whether a contract can confer a substantive right upon a third person. If it *does*, then no doubt the code from vision will authorize him to sue in his own name.

The greater number of decisions denying a remedy against the water company are based upon the doctrine that a beneficiary cannot sue unless he is a person to whom the promisee owes some legal or equitable duty,—that is, a creditor beneficiary may sue, but a donee or sole beneficiary may not. This rule probably originated in the accident that in the case of *Lawrence v. Fox*¹⁵ the promisee Holly was indebted to the plaintiff Lawrence. Later cases assumed that such a relation of indebtedness was essential to the plaintiff's right, and it was definitely laid down as the law in *Vrooman v. Turner*.¹⁶ But in fact, there is much less reason or necessity for allowing a creditor beneficiary to sue than for allowing a sole beneficiary to sue. The creditor already has an adequate remedy against his obligor, the promisee. And the promisee has a financial interest in the performance of the promise, and so may get full damages from the promisor in case he breaks his contract. In the case of a sole beneficiary neither of these things is true. Furthermore, if the creditor beneficiary may sue, it is somewhat probable that the promisor will be subjected to two suits on the same promise. This is not nearly so likely if the beneficiary is the *sole beneficiary*, for then the promisee, not being financially interested, is not at all likely to sue and can get only nominal damages if he does sue. For this reason alone the United States Supreme Court held that a creditor beneficiary cannot sue, at the same time laying down the dictum that a *sole beneficiary* may.¹⁷ In a late decision¹⁸ the New York Court of Appeals has not followed the rule laid down in *Vrooman v. Turner*, though not expressly overruling it. In this case, the plaintiff was in fact a sole or donee beneficiary. Of course it is impossible to say whether the New York court will adhere to its latest opinion.

¹⁵ 20 N. Y., 268.

¹⁶ 69 N. Y. 280.

¹⁷ *National Bank v. Grand Lodge*, 98 U. S. 123.

¹⁸ *Buchanan v. Tilden*, 158 N. Y., 109.

Of the cases holding that a citizen has no remedy against a water company, cited above in note 8, those of the following States rest their decision upon the rule in *Vrooman v. Turner*, in most of them that case being expressly cited: Georgia, Iowa, Illinois, Missouri, Nebraska, Nevada, New York (Hun), Ohio, Tennessee, Texas, and 94 Federal. They do not deny that the citizen was a beneficiary intended, nor do they deny that the loss is due to the water company's breach of contract or duty; but they say that the citizen cannot sue because he is not an obligee or creditor—he could not have sued the city. It is true the city owes him no duty to supply water, for breach of which it can be sued by him.¹⁹ But if that fact is immaterial, if the rule in *Vrooman v. Turner* is bad law and has in effect been abandoned by the very court originating it, then the above cases based on it must fall for lack of a foundation, however numerous they may be, and should not be followed elsewhere. The individual property owners are in fact the sole beneficiaries of the promise of the water company to supply sufficient water to put out fires in private property. If they have no remedy against the water company, they have no remedy against anybody; they have paid their water tax merely in return for the pleasure of supposing that they would get water when the peril comes; and the water company may break its contract without being liable to pay substantial damages to anybody.²⁰ There is no doubt that a *sole* beneficiary should be given a right of action, as he has actually been given in at least sixty-six decisions in twenty-five jurisdictions,²¹ including the States of Georgia, Illinois, Indiana, Kansas, Missouri, Nebraska, New York, Ohio, South Carolina and Wisconsin, who inconsistently deny a remedy against a water company, and four of whom inconsistently cite *Vrooman v. Turner*.

LIABILITY *ex delicto*.

In the recent Florida case, the liability of the water company is based upon principles of tort as well as upon contract. This

¹⁹ *Fire Ins. Co. v. Village of Keeseville*, 148 N. Y., 46; *Planters' Oil Mill v. Monroe*, 52 La. Ann., 1243.

²⁰ "We recognize that the absence of a remedy by suit for damages for failure by a water company to furnish water for fire purposes, according to its contract with the city, leaves the subject in an extremely unsatisfactory condition." *Lovejoy v. Bessemer W. Co.*, 146 Ala., 374.

²¹ *Pollock on Cont.*, Williston's Ed., p. 249. This is not including insurance policy cases.

part of the decision has been more severely criticised than the former part.²² It is said that the legal duty of the company is founded solely upon "implication of law," and that this is much the same as the rule of determining cases by the "length of the chancellor's foot." It is alleged that "the court is enacting a law which is entirely beyond its power to enact," and that it is the province of the legislature and not of the courts to make law. The plaintiff is declared to be a mere "volunteer," the doctrine is "startling," its result will be an "overwhelming amount of disaster and litigation," and it subjects the obligations of public service corporations to "indefinite expansion at the whim of the courts."

It has long been the idea of the uninformed that the courts merely find the law already made and apply it, but that they do not create it. To the historical student of our common law, that proposition is the merest fiction. Judges are indeed great if they possess great ability to apply already established general principles to new specific cases, by process of deductive reasoning. But the greatest judges of all are those seers like Lord Mansfield and James Kent, who can go into the great human field of individual cases and by inductive investigation and comparison discover a new general principle. Sometimes a new and beneficial principle merely grows, like Topsy, in spite of the judges, and it may be because of their very ignorance. The rule that the beneficiary of a contract may sue is perhaps an example of such a growth. But the whole common law is the creation of the bench and the bar, and now is not the time for an unenlightened denial of that fact. Principles of the "law merchant" may indeed have originated with the merchants of the seas, though even *they* were more probably discovered by the "prudhommes," some wise old Bellario or instructed young Portia, to whom disputes were submitted for settlement and whose wise words were "recorded for a precedent" and became the law. It is chiefly the action of the bench that has fastened these principles upon the English speaking nations, and the judges could pick and choose among them at will. Lord Holt was well within his prerogative when he decided that bills of exchange were negotiable at common law, but that promissory notes were not. However wrong he may have been from the standpoint of sound public policy, his decision was the law until reversed. It is so with us to-day, even in the domain

²² *Case and Comment*, November, 1909.

of constitutional law. By the fiat of the Supreme Court, United States Notes are legal tender to-day, though they were not yesterday; and Congress could pass a valid income tax law yesterday, without regard to population, though it cannot do so to-day. A search for the origin of that "legal duty," the breach of which is a tort, will result in the discovery that it is a *legal* duty merely because some judge or judges believed it to be a generally recognized moral duty and gave a remedy for its breach. The legislature has had little to do with the law of torts.

Every branch of law proves in innumerable instances that the judges have created and changed the law. Once a parol contract was unenforceable. Later the judges said breach of a promise was a deceit, and allowed an action on the case. The result was a legal revolution. A new right and a new obligation had come into existence, with a flood of new doctrines, extensions, and limitations, with myriads of glosses on them. The doctrine of consideration was slowly and painfully evolved. None can gainsay that it is the creation of the courts, though its exact parentage and the date of its birth are uncertain, and though the courts do not even yet agree as to all the attributes of their offspring. By legal fictions and self-deception, the courts have turned such a multitude of supposedly moral obligations into legal obligations, that they must now be placed in a new category—quasi-contracts.

A striking illustration of a legal duty founded on moral duty is found in *Queen v. Instan*.²³ A helpless old lady was allowed to go without food or nursing, and death was accelerated. A niece who lived with the old lady was held guilty of manslaughter, by mere neglect. Am I my brother's keeper? At least I may be my aunt's. Cases of *first impression* are often said to be determined by the *jus naturae*—akin to the *jus naturalc* of the Roman law.²⁴ Witness also the doctrine of *aequum et bonum*.

"In the absence of statute or some principle adopted from the civil or canon law, moral obligations carry with them legal or equitable rights, only when judges, balancing considerations of justice and right with considerations of public convenience, practical expediency, and common sense, come to the conclusion that it is well to give them legal efficacy."²⁵

²³ (1893). 1 Q. B., 450, opinion by Coleridge, L. C. J.

²⁴ See *Bradford Corp. v. Ferrand* (1902), 2 Ch. 655 (underground watercourse, no riparian rights); *Bird v. Holbrook* (1828), 4 Bing., 628 (spring-guns, liability to trespasser based on humanity).

²⁵ A. H. F. Lefroy in 22 *Law Quar. Rev.*, 302.

"Private justice, moral fitness, and public convenience, when applied to a new subject, make common law without a precedent."²⁶

"Where there is no governing precedent, direct or indirect, justice and other principles of right and wrong, the fitness of things, convenience, and policy, make case-law."²⁷

"Whence then do the courts derive those new principles, or *rationes decidendi*, by which they supplement the existing law? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense. Judges are appointed to administer justice—justice according to law, so far as the law extends, but so far as there is no law, then justice according to nature. Where the civil law is deficient, the law of nature takes its place, and in so doing puts on its character also. But the rules of natural justice are not always such that he who runs may read them, and the light of nature is often but an uncertain guide. Instead of trusting to their own unguided instincts in formulating the rules of right and reason, the courts are therefore wisely in the habit of seeking guidance and assistance elsewhere. In establishing new principles, they willingly submit themselves to those various persuasive influences which, though destitute of legal authority, have a good claim to respect and consideration. They accept a principle, for example, because they find it already embodied in some system of foreign law. For since it is so sanctioned and authenticated, it is presumably a just and reasonable one. In like manner the courts give credence to persuasive precedents and to judicial *dicta*, to the opinions of text writers, and to any other forms of ethical or judicial doctrine which seem good to them. There is, however, one source of judicial principle which is of special importance, and calls for special notice. This is the analogy of pre-existing law. New rules are very often merely analogical extensions of the old. . . . It is surprising how seldom we find in judicial utterances any explicit recognition of the fact that in deciding questions on principle, the courts are in reality searching out the rules and requirements of natural justice and public policy. The measure of the prevalence of such ethical over purely technical considerations is the measure in which case law develops into a rational and tolerable system as

²⁶ Willes, J., in *Millar v. Taylor*, (1769) 4 Burr. 2303.

²⁷ Lord Mansfield in *S. C.*

opposed to the unreasoned product of authority and routine. Yet the official utterances of the law contain no adequate acknowledgment of this dependence on ethical influences. 'The very considerations,' it has been well said (Holmes, *Common Law*, 35), 'which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life.'"²⁸

Common-law principles can be changed or created at will by the highest court, especially in a State without a long judicial history of its own, in so far as the constitutions do not limit them. Nor is such court usurping power in so doing. The common law is the result of centuries of such judicial action, as we all very well know. That is the common-law system of making law at the same time it is applied to a specific case, just as it was the civil-law system. That it is the wise system, no instructed person doubts. When our constitutions and our people adopted the common law, they adopted that system of making law, and the judges are no usurpers. And so when the Florida court holds a water company liable to a citizen for negligent failure to supply sufficient water to put out a fire, and decides that such a company is under a public duty the breach of which is a tort, it is not usurping authority. The correctness of its decision is to be tested by principles of justice, expediency, and public policy.²⁹ It is not the "whim" of the judge, though all losing clients and their attorneys say the judge's *whim* defeated them. Nor is it measuring by the "chancellor's foot," unless reason, justice, public policy, experience, and training of mind are as uncertain and arbitrary as are the sizes of shoes. It is true they are uncertain, but they are the best we have. In fact, they are *all* we have; and that judge, who while deciding a case denies their authority, is himself following their light to the best of his unwitting ability.

With the question of the expediency and justice and policy of the Florida rule, this article cannot undertake to deal exhaustively; but it is believed that the rule is consistent with them all and that the contrary rule is not. Here, too, the numerical

²⁸ John W. Salmond, 16 *Law Quar. Rev.*, 389.

²⁹ The correctness of this reasoning is fully admitted in *Hone v. Presque Isle W. Co.*, 104 Me. 217, but the court believed policy and expediency are against holding the water company. Had it believed with the Florida court on that matter, it would have held the same way without thinking itself guilty of usurpation.

weight of authority is against it. Of the cases cited heretofore, the liability in tort was either not discussed or not decided in the following: Alabama, Iowa, Kansas, 113 Louisiana, Missouri, Nebraska, Nevada, Pennsylvania and Tennessee. The cases holding that there is no liability in tort, usually content themselves with saying that there is *no duty*, either contractual or legal.³⁰ Such cases are those cited from Connecticut, Georgia, Indiana, Mississippi, New York, and Texas. On this point, also, the Connecticut case turned largely on the defects in the pleading. The United States Supreme Court has shown that it is willing to follow the North Carolina court in holding that the failure of the water company to supply water may be a tort.

"It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences and omit making other or personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for tort."³¹

The analogies of the law really support, rather than weaken, the Florida decision. That water companies are public service corporations is beyond question. They have a necessary monopoly, are given valuable privileges, and must be subject to public control through both the legislatures and the courts. In the past the courts have imposed certain special duties upon persons engaged in the public service, as, for example, common carriers and innkeepers. We may be certain that in the future new public services will be undertaken by individuals and corporations. The courts will have the same power to impose duties on them, in accordance with the character of the service undertaken, that the

³⁰ The case in 104 Me. 217 discusses the matter at much greater length, and with force.

³¹ *Guardian Trust Co. v. Fisher*, 200 U. S. 57, by Brewer, J.

courts have had in the past. A passenger or shipper has definite rights against a common carrier, and these rights are not limited by his contract. In some respects the courts will not permit them to be abridged by contract. It is true the carrier is liable to no one with whom it has not had some personal relation. But the citizen who relies upon a water company for service and protection, and who pays taxes for such service and protection, is in such a personal relation. The company's mains and pipes run through his property, or near enough to serve him. The *carrier* owes a duty alike to all who are upon its trains, even though there may not be an individual contract, or even in spite of an individual contract. The *water company* owes a duty to all the inhabitants from whom its privileges and compensation are derived, who rely upon it for public service, as it perfectly well knows, and whom it has undertaken to serve.^{31a} The common law is quite capable of imposing duties and enforcing them in damage suits and otherwise, in favor of injured individuals.

Of course, if such public regulation should seem too heavy for a self-willed public servant to bear, he has the option of retiring from the public service. But there has been as yet no public outcry that water companies are fleeing from Florida, Kentucky or North Carolina, or that they have been meeting overwhelming disaster and litigation in those States. Perhaps instead they have been supplying the agreed amount of water. The rule adopted will merely have the effect of compelling a water company to perform its contracts with diligence. In the absence of such a rule, it can break its contract with impunity, and can fail to render its public service without liability.

It is said in the Kentucky case, "The water company did not covenant to prevent the occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the standpipe."³²

The Florida rule is said to be new and startling. But the reply of Barrister Henderson to Lord Coleridge³³ fits this case to a T, though said in a case of a different sort: Lord Coleridge, "It is

^{31a} See *Guardian Trust Co. v. Fisher*, 200 U. S., 57, 67.

³² *Paducah Lumber Co. v. Paducah W. Sup. Co.*, 89 Ky. 340.

³³ *Henderson v. Folkestone W. Co.*, 1 *Law Times Rep.*, 329.

surely a startling result." Henderson, "It may be startling to water companies, but to the plaintiff and their other customers it may not seem so."

Now that there are more than fifty jurisdictions independently determining rules supposed to be part of the common law, turning out thousands of decisions every year, many of which are in direct conflict, it can certainly no longer be said that a court is bound by precedents in other jurisdictions. If it is bound authoritatively by these precedents, by which one, pray? In fact, the highest court of a State is bound by no precedent, except so far as the doctrine of *stare decisis* is applied to its own former decisions. Even this doctrine will in time be honored as much in the breach as in the observance, for a court's own decisions are becoming as babes lost in the pulpy woods of a thousand mighty tomes and gently but everlastingly concealed among a million leaves.

Herein lies the salvation of the common law as a system. Our multitudes of jurisdictions and our myriads of decisions are bound to weaken the authority of precedent. The common law can still grow. Courts will be bound to find the reason underneath the rule; for there is no rule, there are fifty rules. With a hundred thousand minds at work, it will go hard if the reason be not found. The term "Common Law" was once no misnomer, for it was applied to the king's law, as laid down by his one court, the *Curia Regis*, in one country, one jurisdiction. There is not for us to-day, and there cannot be, a *common* law. If in early times courts could create new writs and new remedies, thus actually creating new substantive legal rights, but later believed themselves tied down by precedent to certain common forms, they are once more set free by the statutory abolition of forms and the substitution of the civil action. Mr. Maitland has said that though we have buried the common-law forms of action, they still rule us from their graves. A wider and deeper outlook historically, giving us a true understanding of what common law was, and what it is and is not to-day, and what is the character of its growth, will now free us from the rule of the dead hand.

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