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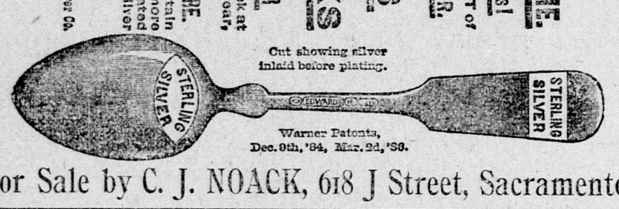

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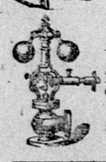

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Dated January 10, 1891.
CAROLINE GRAFMILLER, Executrix.
CHAUNCEY H. DUNN, Attorney for Executrix. ja10-5t-S

SUPREME COURT DECISIONS.

[Filed January 30, 1891.]

Appeal from Superior Court, Los Angeles County—Walter Van Dyke, Judge.

For appellants, Chapman & Hendrick.

For respondent, Galbreth & Morrison.

DEPARTMENT ONE.

HANNAH L. ROSENBERG, by her guardian, Plaintiff and Respondent, vs. R. D. AND CHARLES C. DURFREE, Defendants and Appellants. } No. 13,842

This action is to recover damages caused to the plaintiff, a child eight years of age, alleged to have resulted from the carelessness of the defendants, in negligently inducing and permitting her "to sit upon a sweep or narrow pole drawn by a horse to propel the machinery for pumping water, then being propelled by and under the control and for the use and benefit of defendants." (Tr. fol. 5.)

It is alleged further in the complaint that the "sweep in its circuit passed above and near to cogwheels and other portions of said machinery then in motion, thereby exposing plaintiff to the danger of being crushed and mangled therein if she accidentally fell or in any manner was dislodged" from the sweep, and was precipitated upon the machinery. That the defendants well knew of the danger to which the child of tender years was thus exposed, yet they knowingly, carelessly and negligently suffered her to remain alone on said sweep with no person to guard her, exposed to the danger aforesaid; and that by reason thereof plaintiff fell or was precipitated upon said machinery then in motion, and her left hand was caught, mangled and lacerated therein, causing the loss of three fingers therefrom, thereby maiming and crippling the plaintiff permanently." (Tr. fols. 6, 7, 8.)

The defendants demurred to the complaint. The demurrer was overruled, an answer filed, and upon the trial a jury returned a verdict for the plaintiff, and assessed her damages at $1,750 and costs.

Judgment was rendered upon the verdict, from which this appeal is taken, and an order denying defendants' motion for a new trial.

There is no dispute but that the child was injured, and suffered the loss of her fingers, while on the sweep and falling upon the machinery.

The defendants' counsel states that the child was seated upon the lever or sweep, and while riding around upon it, she lost her balance, and endeavoring to recover herself, threw her left hand into the cogwheel, "and unfortunately just at that moment it was passing under the smaller wheel, when it was caught and three of her fingers crushed so that they had to be removed." (Appellants' brief, p. 5.)

The defendant Charles Durfree, the son of the other defendant, was in charge of the machinery at the time of the injury; this the father knew, and also that the child was riding around upon the sweep.

A part of the testimony of the child is that: "I was sitting on the sweep. I was going around and lost my balance, and my hand got in the wheel. I was at the cow corral before I went on the sweep." (Trans., fol. 59.) "Question—How far away was that from the sweep? Answer—About half an acre, not as much as that. Charley (meaning young Durfree) called me and said come and take a ride. First I didn't hear him, and said, 'What?' Then he said it again. 'Come and ride, Hannah,' and I went over to the sweep, and I saw Mr. Durfree (meaning the father, the other defendant), and he had a shovel in his hand; he was standing there watching me go over. When I was getting on the sweep he said, 'Hannah, look out; there might be some danger to your hands and your arms,' and I said, 'Oh, no, there won't.' He was in the corn when he said that, and then I went on and had gone round several times, and I made the horse go when I was on there, and then I lost my balance. First I dropped my hat, and then I said, 'Charley, stop the horse; I want to get my hat.' And he said, 'Pick it up the next time round.' I tried to pick it up, and I lost my balance, and my hand caught in the wheel of the cog. I first got on the sweep near the horse, and Charley said, 'Move up toward the big wheel and machinery.' The way I happened to lose my hat was the wind blew it off. When I came round, and went to pick up my hat, Charley made some motion, and the horse jerked, and that is the way I lost my balance. The horse's name is Doc. My hand got caught in the wheel. I didn't fall off the sweep, and Charley took me off and carried me to the house. Some of the fingers were cut and the ends of the fingers dropped. Charley took me to the house. He didn't say anything that I remember. Mamma hollered and said, 'Charley, you have crippled my little girl for life.'" (Trans., fol. 59, *et seq.*)

The child is the daughter of a domestic servant of the defendants.

It is claimed by the defendants that the evidence is utterly insufficient to prove that the machinery is at all dangerous. That there is no proof that the defendants were guilty of any negligence. In this connection it is further said that the evidence of the child is contradictory, since upon a former trial she testified as to a material matter, differently from what she did on this trial, and that, therefore, her testimony is to be disregarded, and that of the defendants, in contradiction of it, received, in which event it is contended the verdict is unsupported by evidence.

We do not perceive any conflict in the child's evidence, as contended for. Her testimony on the last trial was somewhat fuller than upon the first, but there was no contradiction by one of anything in the other, and nothing to show any unreliability on her part; in fact she was in many respects sustained by the evidence of the defendants. It does appear from the evidence that the child was a favorite, both with the father and son, defendants, and that the want of care which they exercised in permitting a young child like this little girl to ride around upon the sweep and ride around upon it, involving a risk of her getting injured, was the result more than anything else of a desire to have the child's society by the son, and of a disposition by both father and son to be indulgent to her; but these motives, commendable as they may be in the abstract, cannot excuse them from exercising such care as the law requires to prevent the little girl from placing herself in danger and getting maimed for life.

We do not, therefore, think the verdict unsupported by evidence.

It is further claimed that the instructions asked for and granted were erroneous. One of them (T. fols. 125-126) is:

"The court instructs you that a child of such tender years and immature judgment as to be incapable of knowing, comprehending and measuring the danger to which it is exposed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to the threatened danger. In determining this proposition in connection with this case, you must consider the age, sex, and all the conditions surrounding the plaintiff at the date of the injury, as disclosed to you by the evidence."

We do not understand this instruction to say to the jury, as defendants contend that the court instructed the jury, that the machinery by which the plaintiff received her injury was dangerous. For, whether the danger to the child existed or not, they were told it was "as the evidence disclosed it." That is, existed or not as the evidence disclosed. There was nothing misleading in telling the jury that they were to consider all the conditions surrounding the plaintiff, including her age and sex, in determining from the evidence as to the danger she may have been exposed to, and her appreciation of it, as bearing upon the question of contributory negligence.

An objection is also made to an instruction, at folio 127 of the transcript, that the jury are instructed that if the plaintiff was in peril under certain circumstances, it would be evidence of negligence, thus, as is claimed, telling the jury that the injury while riding on the sweep was of itself evidence of negligence. The instruction is:

"If you shall find from the evidence that at the date of the alleged injury, the sweep referred to, in its relation to the machinery, was a dangerous place for the plaintiff to ride, and shall find that while the defendants were using said machinery, and the defendants had reason to know the same was dangerous, and they knowingly permitted the plaintiff to sit upon and ride said sweep, in dangerous proximity to said machinery, her parents or other guardians not being present, and you shall further find that because of the tender years and immature judgment of the plaintiff she was incapable of comprehending and guarding against the danger to which she was thereby exposed, and you shall further find that while she was riding under the conditions and circumstances stated, plaintiff's hand was caught and injured in and by said machinery, that it would be evidence of negligence."

As we understand the instruction, it informs the jury that if a certain state of facts exists, culminating in plaintiff's injury, such state of facts is evidence of negligence. We do not see that the clause objected to, in view of all the other portions of the instruction, and others given, would tend to mislead the jury as complained of.

Objection is also made to this instruction:

"And finding the facts as above stated, you should further find from the evidence that defendants were father and son, and that the son, while working the machinery for the father, invited, requested, induced or permitted the plaintiff to ride on said sweep, and that the father knew of her so riding, or had reason to know it was dangerous, and could have removed her, or caused her to be removed, therefrom, or could have stopped said machinery, or caused the same to be stopped, and did neither, but, on the contrary, both he and the son suffered her to remain, such facts would show negligence on the part of the defendants."

It is said that in this instruction it is not clearly stated how the jury were to determine as to the father's responsibility.

That the jury might have been impressed with the idea that the father was responsible for the son as his servant inviting the plaintiff to ride.

But we do not so understand the instruction. The first part of it is with reference to the state of facts under which it appeared in evidence that the son invited, permitted and induced the plaintiff to ride under circumstances of danger to her. The second, that the father, *aware* of the danger into which she had been placed by the conduct of the son, had yet permitted her to remain there thus exposed, when he could have prevented her.

The jury were correctly told that if the state of facts with reference to each, somewhat different, existed, that they were both responsible. But we do not understand that they are told that either is responsible for the negligence of the other.

We perceive no prejudicial error, and advise that the judgment and order be affirmed. FOOTE, C.

We concur:
VAN CLIEF, C.,
BELCHER, C.

THE COURT.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

[Filed January 30, 1891.]

Appeal from Superior Court, Los Angeles County—Lucien Shaw, Judge.

For appellants, Wells, Guthrie & Lee, J. A. Donnell.

For respondent, C. W. Pendleton, Anderson, Fitzgerald & Anderson.

DEPARTMENT TWO.

HARVEY, Respondent, vs. HADLEY AND BALDWIN, Appellants. } No. 13,961.

On July 8, 1887, the plaintiff and defendants entered into an agreement in writing, whereby the plaintiff agreed to sell to defendants a certain tract of land situate in the townsite, or projected town, of Whittier, in the County of Los Angeles, for the sum of $8,000, $3,000 of which had been paid before the commencement of this action. For the residue ($5,000) the defendants made their promissory note of even date with the contract, payable on or before June 7, 1888, with interest at ten per cent. per month, to be compounded semi-annually.

This action was brought to recover the amount due on the note, and to foreclose the vendor's lien upon the land.

The defense is that the defendants were induced to purchase the land by false and fraudulent representations of the plaintiff to the damage of the defendants. The court found that plaintiff made the representations charged, and that the greater portion of them were false and fraudulent to the damage of defendants in the sum of $3,000 and deducted this sum from the note, and rendered judgment for the plaintiff for the residue and interest, amounting to $2,595.

The defendants appeal from the judgment, on the judgment-roll, and contend that the finding of only $3,000 damages is inconsistent with the twelfth finding, by which, they say, it appears that the damages were $5,000. This is the only point made, and to dispose of it in favor of the respondent, I think it is only necessary to read the twelfth finding in connection with the eighth and thirteenth findings.

The twelfth finding is as follows:

"That the value of said land, without any prospect of a college or street-car line being built as represented by the plaintiff, and without any contract being let for the same, or either of them, was at the time of the purchase the sum of $3,000; that if the contract for the building of said street-car line along Hadley street to the southwest corner of said land to Painter avenue had been let as represented by plaintiff, said land would have been at the time of the purchase of the market value of $6,000; that if said plaintiff had in good faith intended to build said college and the Quakers had agreed or determined to build said college, and the contract for building said street-car line had been let at the time of making said contract, as represented by plaintiff, said land would then have been of the market value of $8,000; and that said land as it was, and with the prospect of the building of said college then existing, was of the market value of $5,000."

The court here finds what would have been the value of the land at the time of purchase under four different conditions of facts; (1) in case all the representations of the plaintiff had been entirely false; (2) in case the representation as to the contract for building the street-car, alone, had been true; (3) in case all the representations made by plaintiff had been true; and, (4) the value of the land, "*as it was*, with the prospect of the building of the college *then existing*," as appears in the eighth finding, wherein it is found, "there were general rumors afloat and a prospect that said college would be built as stated by plaintiff."

The value of the property in the first two supposed cases is immaterial, even according to the rule of damages claimed by counsel for appellant, viz.: "the measure of damage is the difference between the *actual value* of the property *at the time of purchase* and its value *if the property had been what it was represented or warranted to be.*" In order to estimate the damages by this rule only the third and fourth branches of the twelfth finding are necessary. The third finds that if the property had been what it was represented to be its value would have been $8,000. The fourth finds that the actual value of the property, as it was at the time of purchase (one part of plaintiff's representations then being true), was $5,000. Thereupon the court estimated defendant's damages to be $3,000, the difference between these two valuations.

Counsel for appellants are mistaken in assuming that the court found the representations of plaintiff to have been entirely false. The court found that a part of plaintiff's representations as to the college was true, and considered this in estimating the actual value of the property at the time of the purchase, but excluded it from the estimate (1) whereby the value was found to be $3,000.

I think the judgment accords with the findings of fact, and that it should be affirmed. VAN CLIEF, C.

We concur:
FOOTE, C.,
HAYNE, C.

THE COURT.

For the reasons given in the foregoing opinion the judgment is affirmed.

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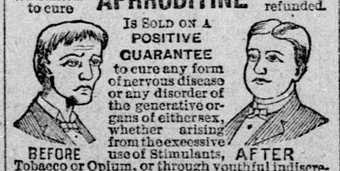

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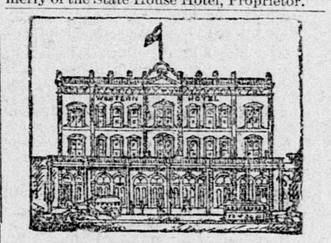

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A FIRST-CLASS LODGING HOTEL, CONTAINING 200 rooms; water and gas in each room; no better beds in the world; no guest allowed to use the linen once used by another; a large reading room; hot and cold water baths free. Price of Rooms—Per night, 50 and 75 cents; per week, from $2 upwards. Open all night. R. HUGHES, Proprietor.
☞At Market-street Ferry take Omnibus Line of street cars for Third and Howard. TTS

Banking Houses.

PEOPLE'S SAVINGS BANK,
Sacramento City.....California

Guaranteed capital.....	$410,000
Paid up capital.....	225,500
Reserve and surplus.....	56,000

Term and ordinary deposits received. Dividends paid semi-annually. Money loaned on real estate only.
☞To encourage children and people of limited means to save, deposits of $1 will be received and interest paid thereon. For further information address,
WM. BECKMAN, President.
GEO. W. LORENZ, Cashier.

NATIONAL BANK OF D. O. MILLS & CO.,
Sacramento, Cal.—Founded, 1850.
Saturday Hours.....10 A. M. to 1 P. M.

Directors and Shareholders:

D. O. MILLS.....	1,538 Shares
EDGAR MILLS, President.....	1,538 Shares
S. PRENTISS SMITH, Vice-Pres.	250 Shares
FRANK MILLER, Cashier.....	351 Shares
C. F. DILLMAN, Asst. Cashier....	125 Shares
Other persons own.....	1,198 Shares

Capital and Surplus, $600,000.
☞Chrome Steel Safe Deposit Vault and Time Lock.

FARMERS' AND MECHANICS' SAVINGS BANK
Southwest Corner Fourth and J streets, Sacramento, Cal.
Guaranteed Capital.....$500,000
LOANS MADE ON REAL ESTATE. INTEREST paid semi-annually on Term and Ordinary Deposits.
B. U. STEINMAN.....President
EDWIN K. ALSIP.....Vice-President
D. D. WHITBECK.....Cashier
C. H. CUMMINGS.....Secretary
JAMES M. STEVENSON.....Surveyor
DIRECTORS:
B. U. STEINMAN, EDWIN K. ALSIP, C. H. CUMMINGS, W. E. TERRY, SOL. RUNYON, JAMES MCNASSER, JAS. M. STEVENSON.

CALIFORNIA STATE BANK
And Safe Deposit Vaults,
SACRAMENTO, CAL.
Draws Drafts on Principal Cities of the World.
Saturday Hours, 10 A. M. to 1 P. M.
OFFICERS:
President.....N. D. RIDEOUT
Vice-President.....FRED'K COX
Cashier.....A. ABBOTT
Assistant Cashier.....W. E. GERBER
DIRECTORS:
C. W. CLARKE, JOS. STEFFENS, GEO. C. PERKINS, FRED'K COX, N. D. RIDEOUT, J. R. WATSON, W. E. GERBER.

SACRAMENTO BANK.
THE OLDEST SAVINGS BANK IN THE city, corner of Fifth and J streets, Sacramento. Guaranteed capital, $500,000; paid up capital, gold coin, $300,000; loans on real estate in California, July 1, 1890, $2,898,442; term and ordinary deposits, July 1, 1890, $2,709,394. Term and ordinary deposits received. Dividends paid in January and July. Money loaned upon real estate only. The Bank does exclusively a savings bank business. Information furnished upon application to W. P. COLEMAN, President.
ED. R. HAMILTON, Cashier.

CROCKER-WOOLWORTH NATIONAL BANK,
322 Pine street, San Francisco.
PAID-UP CAPITAL, $1,000,000. SURPLUS, $250,000.
DIRECTORS:
CHARLES CROCKER.....E. H. MILLER, JR.
R. C. WOOLWORTH.....President
W. E. BROWN.....Vice-President
W. H. CROCKER.....Cashier

Business Cards.

ARCHITECTS.
N. D. GOODELL AND F. H. SCHARDIN have associated themselves together as Architects and Builders. Office, Pioneer Hall, Seventh street, between J and K, Sacramento, Cal. Consultation and estimates made free of charge.

MRS. MARION STIRLING, M. D.,
LATE LADY PRINCIPAL OF DUFFERIN Medical College for Women, and Superintendent of Women's Hospitals and Dispensaries in Northern British India. Diseases of women and children a specialty. OFFICE—Room 7, Odd Fellows' Temple.

H. F. ROOT. ALEX. NEILSON. J. DRISCOL.
ROOT, NEILSON & CO.,
UNION FOUNDRY—IRON AND BRASS Founders and Machinists, Front street, between N and O. Castings and machinery of every description made to order.

Attorneys-at-Law.

D. K. TRASK,
LAWYER, FULTON BLOCK, LOS ANGELES, Cal. Attends to business in Southern California for non-residents and attorneys. Practices in all courts. Letters promptly answered. ja31-1y

CHARLES H. OATMAN,
ATTORNEY AND COUNSELOR AT LAW. Office—420 J street, Sacramento, Cal. Notary Public.

A. L. HART,
ATTORNEY-AT-LAW—OFFICE: SOUTHwest corner Fifth and J streets. Rooms 12, 13 and 14, Sutter Building.

THOMAS W. HUMPHREY,
ATTORNEY AND COUNSELOR AT LAW. Southwest corner Seventh and J streets; Notary Public. Collections. Sacramento, Cal.

Dentistry.

F. F. TEBBETS,
DENTIST, 914 SIXTH ST., between I and J, west side, opposite Congregational Church.

DR. W. C. REITH,
DENTIST, LINDLEY BUILDing, southeast corner Seventh and J streets, Sacramento, Cal.

C. H. STEPHENSON,
DENTIST, CORNER SEVenth and J streets, over Lyon's Dry Goods Store.

H. H. PIERSON DENTIST, 511½ J ST SAC.

Fruits, Seeds, Produce, Etc.

W. R. STRONG COMPANY,
—HEADQUARTERS FOR—
Alfalfa Seed, Etc.
☞Oregon Potatoes in Lots to Suit.

CULTIVATED WHITE WILD OATS
And ALFALFA SEED in lots to suit.
W. H. WOOD & CO.,
WHOLESALE PRODUCE,
Nos. 117 to 125 J Street, Sacramento.

S. GERSON & CO.,
—WHOLESALE—
Fruit, Produce and Commission Merchants,
SACRAMENTO, CAL.
P. O. Box 170.

CURTIS BROS. & CO.,
GENERAL COMMISSION MERCHANTS,
Wholesale Dealers in Fruit and Produce,
308, 310, 312 K st., Sacramento.
Telephone 37. Postoffice Box 335.

EUGENE J. GREGORY. FRANK GREGORY.
GREGORY BROS. CO.,
SUCCESSORS TO GREGORY, BARNES & CO., Nos. 126 and 128 J st., Sacramento, wholesale dealers in Produce and Fruit. Full stocks of Potatoes, Vegetables, Green and Dried Fruits, Beans, Alfalfa, Butter, Eggs, Cheese, Poultry, Etc., always on hand. Orders filled at LOWEST RATES.

Liquors, Wine, Beer, Etc.

Finest Lunch House in the City,
CAPITAL ALE VAULTS, NAGELE & SVENSSON, Proprietors. Lunch from 11 A. M. to 2 P. M. Clam Chowder and Mussel Soup every evening from 6 to 12 o'clock. Finest brands of Wines, Liquors and Cigars.
KELLEY. FAWCETT.

"THE PLAY,"
METROPOLITAN THEATER BUILDING,
423 K Street.
CHAMPAGNE, CIGARS, LIQUORS.
f4-1m

CONCORDIA BEER HALL,
No. 1021 Fourth Street.
HAVING MADE EXTENSIVE IMPROVEments the public are now cordially invited to a first-class resort. Sandwiches of all kinds. Buffalo Beer on draught and in bottles. The finest Wines, Liquors and Cigars on hand. H. KOHNE, Proprietor.

EBNER BROS.,
116-118 K Street, Front and Second, Sacramento,
IMPORTERS AND WHOLESALE DEALers in Wines and Liquors. Agents for the celebrated Pommery and Greno Champagne.

M. CRONAN,
230 K St., and 1108-1110 Third St., Sacramento, Cal.,
IMPORTER AND WHOLESALE DEALER in Fine Whiskies, Brandies and Champagne.

JAMES WOODBURN,
No. 417 K Street, Sacramento, Cal.,
IMPORTER AND WHOLESALE DEALER in fine Whiskies, Brandies, Wines and Liquors. Thanking my old friends and patrons for their former patronage, I solicit a continuance of the same. All orders will be promptly and carefully filled.

Railroad Time Table.

SOUTHERN PACIFIC COMPANY.

PACIFIC SYSTEM.

January 19, 1891.

Trains Leave and are due to Arrive at Sacramento.

LEAVE	TRAINS RUN DAILY.	ARRIVE
6:15 A	Calistoga and Napa	11:40 A
3:05 P	Calistoga and Napa	8:40 P
12:50 A	Ashland and Portland	5:55 A
4:30 P	Deming, El Paso and East	7:00 P
7:30 P	Knights Landing	7:10 A
10:50 A	Los Angeles, Ogden and East—Second Class	9:35 A
12:05 P	Central Atlantic Express for Ogden and East	2:25 A
11:00 P		8:15 A
3:00 P	Oroville	10:30 A
3:00 P	Red Bluff via Marysville	10:30 A
10:40 A	Redding via Willows	4:00 P
2:25 A	San Francis