

BYRNE v. BOADLE. Nov. 25, 1863.—The plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop, and seriously injured him. Held sufficient *prima facie* evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by his negligence.

[S. C. 33 L. J. Ex. 13; 12 W. R. 279; 9 L. T. 450. Followed, *Briggs v. Oliver*, 1866, 4 H. & C. 407. Adopted, *Smith v. Great Eastern Railway*, 1866, L. R. 2 C. P. 11.]

Declaration. For that the defendant, by his servants, so negligently and unskillfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that by and through the negligence of the defendant, by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified.

Plea. Not guilty.

At the trial before the learned Assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follows:—A witness named Critchley said: "On the 18th July, I was in Scotland Road, on the right side going north, defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked [723] the plaintiff down. He was carried into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident." The plaintiff said: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight." (He then described his sufferings.) "I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling. I don't know how, but from defendant's." The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned Assessor was of that opinion, and nonsuited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with 50l. damages, the amount assessed by the jury.

Little, in the present term, obtained a rule nisi to enter the verdict for the plaintiff, on the ground of misdirection of the learned Assessor in ruling that there was no evidence of negligence on the part of the defendant; against which

Charles Russell now shewed cause. First, there was no evidence to connect the defendant or his servants with the occurrence. It is not suggested that the defendant himself was present, and it will be argued that upon these pleadings it is not open to the defendant to contend that his servants were not engaged in lowering the barrel of flour. But the [724] declaration alleges that the defendant, by his servants, so negligently lowered the barrel of flour, that by and through the negligence of the defendant, by his said servants, it fell upon the plaintiff. That is tantamount to an allegation that the injury was caused by the defendant's negligence, and it is competent to him, under the plea of not guilty, to contend that his servants were not concerned in the act alleged. The plaintiff could not properly plead to this declaration that his servants were not guilty of negligence, or that the servants were not his servants. If it

had been stated by way of inducement that at the time of the grievance the defendant's servants were engaged in lowering the barrel of flour, that would have been a traversable allegation, not in issue under the plea of not guilty. *Mitchell v. Crassweller* (13 C. B. 237) and *Hart v. Crowley* (12 A. & E. 378) are authorities in favour of the defendant. Then, assuming the point is open upon these pleadings, there was no evidence that the defendant, or any person for whose acts he would be responsible, was engaged in lowering the barrel of flour. It is consistent with the evidence that the purchaser of the flour was superintending the lowering of it by his servant, or it may be that a stranger was engaged to do it without the knowledge or authority of the defendant. [Pollock, C. B. The presumption is that the defendant's servants were engaged in removing the defendant's flour; if they were not it was competent to the defendant to prove it.] Surmise ought not to be substituted for strict proof when it is sought to fix a defendant with serious liability. The plaintiff should establish his case by affirmative evidence.

Secondly, assuming the facts to be brought home to the defendant or his servants, these facts do not disclose any evidence for the jury of negligence. The plaintiff was bound to give affirmative proof of negligence. But there [725] was not a scintilla of evidence, unless the occurrence is of itself evidence of negligence. There was not even evidence that the barrel was being lowered by a jigger-hoist as alleged in the declaration. [Pollock, C. B. There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in the case of railway collisions.] On examination of the authorities, that doctrine would seem to be confined to the case of a collision between two trains upon the same line, and both being the property and under the management of the same Company. Such was the case of *Skinner v. The London, Brighton and South Coast Railway Company* (5 Exch. 787), where the train in which the plaintiff was ran into another train which had stopped a short distance from a station, in consequence of a luggage train before it having broken down. In that case there must have been negligence, or the accident could not have happened. Other cases cited in the text-books, in support of the doctrine of presumptive negligence, when examined, will be found not to do so. Amongst them is *Carpue v. The London and Brighton Railway Company* (5 Q. B. 747), but there, in addition to proof of the occurrence, the plaintiff gave affirmative evidence of negligence, by shewing that the rails were somewhat deranged at the spot where the accident took place, and that the train was proceeding at a speed which, considering the state of the rails, was hazardous. Another case is *Christie v. Griggs* (2 Campb. 79), where a stage-coach on which the plaintiff was travelling broke down in consequence of the axle-tree having snapped asunder. But that was an action on the contract to carry safely, and one of the counts imputed the accident to the insufficiency of the [726] coach, of which its breaking down would be evidence for the jury. [Pollock, C. B. What difference would it have made, if instead of a passenger a bystander had been injured?] In the one case the coach proprietor was bound by his contract to provide a safe vehicle, in the other he would only be liable in case of negligence. The fact of the accident might be evidence of negligence in the one case, though not in the other. It would seem, from the case of *Bind v. The Great Northern Railway Company* (28 L. J. Exch. 3), that the fact of a train running off the line is not *prima facie* proof where the occurrence is consistent with the absence of negligence on the part of the defendants. Later cases have qualified the doctrine of presumptive negligence. In *Cotton v. Wood* (8 C. B. N. S. 568) it was held that a Judge is not justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. In *Hammack v. White* (11 C. B. N. S. 588, 594), Erle, J., said that he was of opinion "that the plaintiff in a case of this sort was not entitled to have the case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant." [Pollock, C. B. If he meant that to apply to all cases, I must say, with great respect, that I entirely differ from him. He must refer to the mere nature of the accident in that particular case. Bramwell, B. No doubt, the presumption of negligence is not raised in every case of injury from accident, but in some it is. We must judge of the facts in a reasonable way; and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence.] The law will not presume that a man is guilty of a wrong. It is consistent with the

facts proved that the defendant's servants were using [727] the utmost care and the best appliances to lower the barrel with safety. Then why should the fact that accidents of this nature are sometimes caused by negligence raise any presumption against the defendant? There are many accidents from which no presumption of negligence can arise. [Bramwell, B. Looking at the matter in a reasonable way it comes to this—an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury.] Unless a plaintiff gives some evidence which ought to be submitted to the jury, the defendant is not bound to offer any defence. The plaintiff cannot, by a defective proof of his case, compel the defendant to give evidence in explanation. [Pollock, C. B. I have frequently observed that a defendant has a right to remain silent unless a *prima facie* case is established against him. But here the question is whether the plaintiff has not shewn such a case.] In a case of this nature, in which the sympathies of a jury are with the plaintiff, it would be dangerous to allow presumption to be substituted for affirmative proof of negligence.

Little appeared to support the rule, but was not called upon to argue.

POLLOCK, C. B. We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is [728] the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the controul of it; and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

BRAMWELL, B. I am of the same opinion.

CHANNELL, B. I am of the same opinion. The first part of the rules assumes the existence of negligence, but takes this shape, that there was no evidence to connect the defendant with the negligence. The barrel of flour fell from a warehouse over a shop which the defendant occupied, and [729] therefore *prima facie* he is responsible. Then the question is whether there was any evidence of negligence, not a mere *scintilla*, but such as in the absence of any evidence in answer would entitle the plaintiff to a verdict. I am of opinion that there was. I think that a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast upon him to take care that persons passing along the highway are not injured by it. I agree that it is not every accident which will warrant the inference of negligence. On the other hand, I dissent from the doctrine that there is no accident which will in itself raise a presumption of negligence. In this case I think that there was evidence for the jury, and that the rule ought to be absolute to enter the verdict for the plaintiff.

PIGOTT, B. I am of the same opinion.

Rule absolute.