

state court, and that court being against the defense which is set up, it comes to the conclusion that it will leave the state court and try the federal court, and thereupon files its bond and petition, and asks for the removal of the cause. There has been the August term, the September term, the October term, and the November term before the application was made for the removal of the cause on the twenty-fourth of December. I think it comes too late; and it seems to me that the case itself furnishes a strong reason why the court ought to require the exercise of reasonable diligence on the part of the applicant for removal, otherwise, unless, as in this case, the plaintiff sought to force the issue, the defendant might lie by indefinitely, as I before said, and then after the lapse of a dozen terms might ask for the removal of the cause. I do not think that was the meaning of the act of 1875, therefore I shall remand this cause.

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SMITH v. BAKER.

*Circuit Court, S. D. New York. July 5, 1884.*

NEGLECTENTLY SPREADING CONTAGIOUS DISEASE—BOARDING-HOUSE—ACTION FOR DAMAGES.

Defendant took his children when they had whooping-cough, a contagious disease, to the boarding-house of plaintiff to board, and by reason of his negligence her child, and the children of other boarders, contracted the disease, whereby she was put to expense, care, and labor in consequence of her child's sickness, and sustained pecuniary loss by reason of boarders being kept away. *Held*, that defendant was liable for damages.

At Law.

*Francis S. Turner*, for plaintiff.

*Wheeler H. Peckham*, for defendant.

WHEELER, J. The defendant took his children, when they had whooping-cough, a contagious disease, to the boarding-house of the plaintiff to board, and exposed her child and children of other boarders to it, who took it. The jury have found that this was done without exercising due care to prevent taking disease into the boarding-house. She was put to expense, care, and labor in consequence of her child's having it, and boarders were kept away by the presence of it, whereby she lost profits. Words which import the charge of having a contagious distemper are, in themselves, actionable, because prudent people will avoid the company of persons having such distemper. *Bac. Abr. "Slander," B 2.* The carrying of persons infected with contagious diseases along public thoroughfares, so as to endanger the health of other travelers, is indictable as a nuisance. *Add. Torts, § 297; Rex v. Vantandillo, 4 Maule & S. 73.* Spreading contagious diseases among animals by negligently disposing

of, or allowing to escape, animals infected, is actionable. Add. Torts, (Wood's Ed.) 10, note; *Anderson v. Buckton*, 1 Strange, 192. A person sustaining an injury not common to others by a nuisance is entitled to an action. Co. Litt. 56a. Negligently imparting such a disease to a person is clearly as great an injury as to impute the having it; and negligently affecting the health of persons injuriously as great a wrong as so affecting that of animals.

It is objected that the jury may have awarded damages for what the plaintiff might have prevented by sending the children away. But the jury were instructed not to give damages for anything that the plaintiff might, by the exercise of the reasonable care of a prudent person, have avoided, and it is not to be presumed that they did. The evidence was somewhat conflicting; and it does not appear that any of the findings are without evidence to support them, or are against the substantial weight of evidence; nor that the jury were actuated by any improper motives. There must be, therefore, a judgment for the plaintiff on the verdict.

Motion overruled, and stay of proceedings vacated.

### UNITED STATES *v.* HAYS, *alias* McELFRESH, and others.

(Circuit Court, W. D. Missouri. May Term, 1884.)

#### 1. PENSIONS—SECOND MARRIAGE—FIRST HUSBAND LIVING.

A second marriage by a deserted wife who imagines her first husband dead, and her continuing to live with the other party to such marriage after discovering her husband to be alive, precludes her from claiming a pension, such husband having meantime entered and died in the service of the United States.

#### 2. MARRIAGE—LEGAL INTENT—PRESUMPTION FROM CONTINUED INTERCOURSE.

The presumption of the legal intent, with which parties innocently entered into on marriage, continues after the discovery of a prior husband of the woman, still alive; and their continuing living together and holding themselves out to the world as husband and wife constitute a relation to which the law attaches all the legal rights, obligations, and disqualifications which flow from a marriage entered into according to the forms of law.

#### 3. SAME—LAW OF THE PLACE—ACT OF CONGRESS OF 1882.

The act of congress of 1882 provides that, in determining the fact of marriage, the law of the place controls.

At Law.

*Mr. Warner*, U. S. Dist. Atty., for the United States.

*Waters & Wyn*, for defendants.

KREKEL, J. The United States brings this suit to recover of defendants the sum of \$1,887.06 paid to Lucinda Hays, as widow of Milton Hays, on account of pension moneys. The testimony in the case tends to show that Lucinda Hays, in 1840, was married in the state of Illinois, to Milton Hays; that after said marriage they lived together as husband and wife until 1859, when Hays abandoned his family.