packed in barrels, and under the short-haul rates. The emptied barrels, sometimes with the emptied packages, are returned to Columbia, and this process is repeated several times during the year. But the question always remains, does this rate pay the cost of transportation? Is it remunerative? If it be not, then the increase of business increases the loss. On the other hand, reduction of rates on one article does not necessarily reduce income. Railroad Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. Rep. 400. Nor is there anything stated and admitted in the record from which the court could say that this change or reduction or new classification, call it as we may, reduces the income of the petitioners below the remunerative point. In this preliminary proceeding this may have been impossible.

It is ordered, that for this case R. W. Shand, Esq., be appointed special master. That he take testimony as to whether the charge complained of in this record is just and reasonable in the sense indicated in this opinion; that is to say, is it a just and reasonable reward to the petitioners for the service rendered? Does the rate proposed affect the income of the petitioners? In what way, and to what extent?—with leave to report any special matter.

CENTRAL TRUST CO. OF NEW YORK v. WABASH, ST. L. & P. RY. CO., (HANES et al., Interveners.)

(Circuit Court, D. Indiana. September 15, 1893.)

No. 7,935.

1. WATER COURSES—OBSTRUCTION BY RAILROAD EMBANKMENT—VIS MAJOR.
In 1855 or 1856 a railway company constructed an embankment, with a substantial stone culvert, over a stream dry at times in summer, but at times of heavy rains discharging a large quantity of water. In 1876 the railway was sold under foreclosure to another company, which in 1877, consolidating, formed the defendant company. Subsequently one of the intervening petitioners erected a mill above, and the other placed a lumber yard below, the embankment. On several occasions the capacity of the culvert was overtaxed for a short time, but in May, 1886, in consequence of a heavy rain storm following a cyclone, the water backed up and flooded the mill, and in July, 1888, as the result of unusual, extraordinary, and unprecedented rainfalls, the embankment broke, the mill was again flooded, and the lumber and lumber yard destroyed. *Held* that, as the causes of the injuries complained of were such as could not be anticipated or guarded against by the exercise of ordinary and reasonable foresight, care, and skill, the defendant was not liable.

2. SAME—CONTRIBUTORY NEGLIGENCE.
The conduct of the petitioners in constructing the mill, and placing the lumber yard where, if the culvert and embankment were insufficient, injury would certainly result, should be considered in determining the responsibility of defendant.

3. SAME—CONTINUING NUISANCE.
The mere continuance of the culvert and embankment was insufficient to charge the defendant with liability, in the absence of knowledge or notice that they constituted a nuisance.

4. APPEAL—REVIEW OF FINDING ON CONFLICTING EVIDENCE.
The court refused to disturb the master's finding on conflicting evidence that the rainfalls and floods were unprecedented, as a careful study of the testimony failed to create such a clear and abiding conviction as would justify a modification or setting aside the report.

5. SAME—SUFFICIENCY OF EXCEPTIONS.
Exceptions to a master's report, which distinctly point out the findings of fact and conclusions of law excepted to, are sufficient to present such findings and conclusions for review, where the evidence accompanies the report, though such exceptions may be inartistically drawn. Story v. Livingston, 13 Pet. 359, followed.

6. SAME—AWARDING JUDGMENT WITHOUT REGARD TO EXCEPTIONS.
If upon facts to which no exceptions have been filed either party would be entitled to judgment without regard to the findings excepted to, the exceptions may be disregarded or overruled, and judgment awarded upon the undisputed findings of fact.

In Equity. Petitions by Hanes & Porch and by A. R. Colburn, interveners, against John McNulta, receiver of the Wabash, St. Louis & Pacific Railway Company, appointed in an action by the Central Trust Company of New York against said railway company, claiming damages for injuries sustained by a flood caused by an alleged insufficient culvert.

J. McCabe & Son, for petitioners.
Stuart Bros., for defendant.

BAKER, District Judge. The intervening petitioners Hanes & Porch claim that they were damaged by a flood which, by reason of an insufficient culvert, caused such an accumulation of water as to submerge and injure their flour mill and property situated on the up-stream side of the railway. The intervening petitioner A. R. Colburn claims to have been damaged by the insufficiency of a culvert under the railway, which caused such an accumulation of water as to wash away the embankment, and to damage and destroy his lumber and lumber yard situated on the down-stream side of the railway. These petitions were referred to the master to hear the evidence, and to report his findings of fact and conclusions of law thereon. The master, after hearing the evidence and the arguments of counsel, filed his report containing his findings of fact and conclusions of law thereon, and recommending that both claims be disallowed.

The facts found and reported are, in substance, as follows: The embankment and culvert were built by the Toledo, Wabash & Western Railway Company in 1855 or 1856, where the railway crosses a small stream called the "Fall Branch," which runs through the town of Williamsport, Ind. The embankment is about 20 feet high above the bed of the stream. The culvert is arched, and built of stone, in a substantial manner. The stream is dry during the summer, when there are no rains. In times of heavy rains it discharges a good deal of water, draining several square miles of rolling land. Hanes & Porch are the owners of a mill on the west side of the railway. Colburn owned a lumber yard, which was on the west branch of Fall branch, east of the railway, and under its

embankment. Fall branch passed under the embankment, through a large culvert, a short distance southwest of the mill and lumber yard. The top of the arch of the culvert was 8¾ inches lower than the engine room floor in Hanes & Porch's mill. In May, 1886, there was a heavy rainfall. The water of Fall branch, not finding a sufficient outlet through the culvert, backed up, and flooded the mill of Hanes & Porch. The backwater damaged the mill, machinery, engine, boiler, and other property of Hanes & Porch to the extent of $600. In July, 1888, there was another flood, and the backwater again damaged the mill and personal property of Hanes & Porch to the extent of $700. This last flood broke the railway embankment opposite the lumber yard of the intervener Colburn, and swept away a large quantity of lumber. Colburn was thereby damaged to the extent of $5,000. The mill of Hanes & Porch was erected in 1879. The culvert is what is called by engineers a "full center-arched culvert," of 9½ feet diameter, with walls 4 feet high under it, making an effective water way of about 73 feet. The culvert and embankment were built by the Toledo, Wabash & Western Railway, which was sold under foreclosure of a mortgage in 1876, by decrees of the United States circuit courts of Illinois, Indiana, and Ohio. The purchasers organized as the Wabash Railway Company in 1877, and that company was consolidated with the St. Louis, Kansas City & Northern Railway Company, and formed the Wabash, St. Louis & Pacific Railway Company, and the receiver here is the receiver of that company.

During 36 years that have elapsed since the building of the embankment and culvert in question, the waters of Fall branch have been backed up by the embankment on two occasions in such a way as to inflict serious damage. On several occasions the capacity of the culvert has been overtaxed for a short time, but, with the exceptions of the floods in May, 1886, and in July, 1888, no serious damage was done. While there is some conflict in the evidence, the receiver has shown by a clear preponderance of the evidence that the flood of May, 1886, following in the path of a cyclone of the day previous, and the flood of July, 1888, resulted from unusual, extraordinary, and unprecedented rainfalls. The fact that the interveners located the mill where they did 30 years after the railway embankment and culvert were built, with full knowledge, or with abundant opportunities for knowing, the extent of country drained by Fall branch, and the effect of ordinarily heavy rains upon it, shows that they at least supposed then, as the builders of the railway supposed, that the culvert was sufficient. Upon these facts the master found and reported that the receiver was not liable for the damages suffered by the interveners Hanes & Porch in May, 1886, and in July, 1888, nor for the damages sustained by the intervener Colburn in July, 1888.

To this report and finding, the interveners Hanes & Porch filed exceptions as follows: (1) The master has not correctly recited in his report the facts established by the evidence he reports, wherein he says that "during 36 years since the building of the em-

bankment and culvert in question the waters of Fall branch have been backed up on two occasions." The evidence reported by him shows, on the contrary, that it was backed up very many times more than "two occasions" during such period, and this without any conflict in the evidence. (2) For that what the master terms in said report "the floods of 1886 and 1888," and which he reports resulted from unusual, extraordinary, and unprecedented rainfalls, is not sustained by, and is contrary to, the evidence which he reports. Said rains were not unprecedented, as said evidence shows. (3) For that the finding upon the foregoing ground that the receiver is not liable for the damages, to wit, $1,300, which he correctly finds Hanes & Porch sustained by the flooding of their mill on said two occasions, is contrary to equity, and contrary to law and the evidence. (4) For that the master very erroneously finds by way of recital at the conclusion of said report that Hanes & Porch located their mill 30 years after the embankment and culvert were built, with full knowledge, or abundant opportunities for knowing, the extent of country drained, and the effect of ordinarily heavy rains. It shows, says said report, that they supposed then, as the builders of the railway supposed 30 years before, that the culvert was sufficient. (5) They except to the finding of the master that the flood which occasioned the injuries to petitioners was extraordinary, and the act of God. (6) They except to the conclusion that the injuries to petitioners were caused by the act of God. (7) They except to the finding that the petitioners were guilty of contributory negligence. (8) They except to the conclusion that the claims of petitioners be disallowed. The exceptions filed by the intervener Colburn are substantially a duplicate of the above.

Counsel for the receiver insist that the exceptions are not sufficiently formal and specific to authorize or require the court to review the findings of fact and conclusions of law reported by the master.

In my opinion, the exceptions are sufficient in form and substance to present for review the findings of fact and conclusions of law contained in the master's report. The report is accompanied by all the evidence on which the findings of the master are based for the very purpose of enabling the court to re-examine the questions of fact, as well as of law, involved in the case. In Foster v. Goddard, 1 Black, 506, where the exceptions were certainly no more formal and precise than those filed in this case, the court held them sufficient to bring up for examination all questions of fact and law arising upon the report of the master. The court says:

"All that is necessary is that the exception should distinctly point out the finding and conclusion of the master which it seeks to reverse. Having done so, it brings up for examination all questions of fact and law arising from the report of the master relative to that subject. The exceptions in this case are sufficiently full. They are in accordance with the experience of each member of the court in the administration of equity jurisprudence elsewhere."

While the exceptions are not artistically drawn, I think they are sufficient to raise the questions of law and fact argued by counsel for the exceptants. Story v. Livingston, 13 Pet. 359; 14 Amer. & Eng. Enc. Law, 947.

It is contended by counsel for the exceptants that the finding of the master that the injuries complained of resulted from unusual, extraordinary, and unprecedented rainfalls, without negligence on the part of the railway company or its receiver, is contrary to the evidence. This contention is met by counsel for the receiver with the assertion that the evidence touching the character of the rainfalls is conflicting, and in case of such conflict that the court cannot, or rather ought not to, review the evidence, and find the fact otherwise than reported by the master, even if the court should be of the opinion that the master's finding was contrary to the clear weight of the evidence. The conclusions of the master, depending on the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. Rep. 177; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. Rep. 894; Paddock v. Insurance Co., 104 Mass. 521; Richards v. Todd, 127 Mass. 167. The finding of facts by the master will be regarded as prima facie correct, and will not be set aside or modified unless it clearly appears from the evidence reported that there has been a material error or mistake made by him. Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. Rep. 351. The finding need not be wholly unsupported by the evidence to justify the court in modifying or setting aside his report. If the great preponderance of the evidence is in conflict with his finding, it ought not to be accepted by the court as binding upon it. His report, however, ought not to be modified or set aside for light or trivial reasons, nor unless, upon a careful review of the testimony, the court feels a clear and abiding conviction that some prejudicial error or mistake has been committed. After a careful study of the testimony, I am in doubt whether the master ought to have found that the rainfalls and floods in question were unprecedented, yet I do not feel such a clear and abiding conviction that he has fallen into error as would justify me in modifying or setting aside his report. He saw the witnesses face to face, he heard them testify, and he had an opportunity to form a more accurate judgment than I can from the testimony reported of their intelligence and candor, and their knowledge of the matters about which they testified. The master's finding that the rainfalls and floods resulting in the damages complained of were unusual and extraordinary is unquestioned.

It is, however, insisted that the receiver is responsible for damages from floods occasioned by unusual and extraordinary rainfalls, because they might have been foreseen and guarded against by the exercise of ordinary and reasonable foresight, care, and skill in the construction of a sufficient culvert and embankment.

A railroad company, acting in pursuance of legislative authority, is only required to exercise reasonable diligence and precaution in constructing passageways for the water through its bridges and embankments, and is entitled to select a safe and massive structure, in preference to a lighter one, which would less obstruct the water. It is not liable to an action for damages if it fails to construct a culvert or bridge so as to pass extraordinary floods. Bellinger v. Railroad Co., 23 N. Y. 42; McCleneghan v. Railroad Co., 25 Neb. 523, 41 N. W. Rep. 350; Railway Co. v. Gilleland, 56 Pa. St. 445; Baltimore & O. R. Co. v. Sulphur Spring Independent School-Dist., 96 Pa. St. 65; Sullens v. Railway Co., 74 Iowa, 659, 38 N. W. Rep. 545; Moore v. Railway Co., 75 Iowa, 263, 39 N. W. Rep. 390; Noe v. Railway Co., 76 Iowa, 360, 41 N. W. Rep. 42; Railway Co. v. Schaffer, 26 Ill. App. 280; Banking Co. v. Kent, 84 Ga. 351, 10 S. E. Rep. 965; Railway Co. v. Holliday, 65 Tex. 512; Railway Co. v. Pomeroy, 67 Tex. 498, 3 S. W. Rep. 722; Mills v. Railway Co., 13 S. C. 97; Railway Co. v. Adamson, 114 Ind. 282, 15 N. E. Rep. 5; Gray v. Harris, 107 Mass. 492; Mayor, etc., v. Bailey, 2 Denio, 433; Bailey v. New York, 3 Hill, 531. If, after all precautions have been made, excluding the idea of negligence, the overwhelming power which is technically called the "act of God" intervenes and works injury, the party is not responsible. It was so held where, after one had collected large pools of water on his land, a sudden and extraordinary rainfall, amounting to vis major, swelled the feeding stream, and swept away the embankments, resulting in damage to another. Bish. Non-Cont. Law, § 841; Nichols v. Marsland, L. R. 10 Exch. 255; Railway Co. v. Carvatenagarum, 9 Moak, Eng. R. 289. In Railway Co v. Carvatenagarum, 9 Moak, Eng. R. 289, it was held by the judges of the privy council that where it is the duty of the zemindar to maintain the tanks on his zemindary, which are a part of a national system of irrigation, recognized by the laws of India as essential to the welfare of the inhabitants, and the banks of a tank are washed away by an extraordinary flood without negligence on his part, he is not responsible for any damage occasioned by the overflow of the water. The court, distinguishing this case from Rylands v. Fletcher, infra, were of the opinion that the storing of the water in tanks for the purposes of irrigation was a lawful use, and, in such case, that the law only imposed upon the zemindar the duty of reasonable care and diligence in the construction and maintenance of the tanks; and, if the banks of a tank were washed away by an extraordinary flood, without concurring negligence, no right of action accrued to another who suffered damages occasioned thereby. The character of the storm causing the accumulation of water which breached the banks of the tank is thus described in the findings of the trial court:

"It is clearly proved that for three or four days before the bursting of the tanks there had been heavy rains, and for seventeen or eighteen hours before the accident there was a tremendous downpour of rain. Some of the witnesses said that they had not known such a fall of rain in twenty

years, and the plaintiff's third witness admitted from the time the breaches occurred until the Sunday before his examination, he had never seen such a downpour for a period of nearly five years."

On this state of facts it was held to have been such an extraordinary flood that the law would not charge the zemindar with negligence in failing to foresee and guard against it.

In the case of Rylands v. Fletcher, L. R. 3 H. L. 330, referred to, supra, the plaintiffs, owners of a mine, sued for damages the defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through disused mining works into the plaintiffs' mine, and flooded it. It was held by the exchequer chamber and by the house of lords that the plaintiffs were entitled to damages against the defendant. The principle on which the judgment was rested is thus stated by Lord Cranworth:

"If a person brings and accumulates on his land anything, which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precaution he may have taken to prevent the damage; and the doctrine is founded in good sense, for when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound 'sic uti suo ut non laedat alienum.'"

As applied to water, the doctrine of this case has not passed unchallenged. Cooley, J., in Upjohn v. Board, 46 Mich. 542, 549, 9 N. W. Rep. 845, pointedly observes:

"If withdrawing the water from one's well by an excavation on adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure and no negligence. The one act destroys the well, and the other does no more; the injury is the same in kind and degree in the two cases."

But, in any event, the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for an injury done to another person, has been held inapplicable to rights conferred by statute. This distinction was acted upon in Vaughan v. Railway Co., 5 Hurl. & N. 679, where it was held by the exchequer chamber that a railway company was not responsible for damage from fire kindled by sparks from its locomotive engine, in the absence of negligence, because it was authorized to use locomotive engines by statute. Chief Justice Cockburn observes:

"Where the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that, if damages result from the use of such a thing, independently of negligence, the person using it is not responsible."

On the same principle, in the case of Blyth v. Water Works Co., 25 Law J. Exch. 212, it was decided that a waterworks company laying down pipes by a statutory power was not liable for damages occasioned by water escaping in consequence of a fire plug being forced out of its place by a frost of unusual severity. On the other *hand*, in Jones v. Railway Co., L. R. 3 Q. B. 733, it was held that a

railway company which had not express statutory power to use locomotive engines was liable for damage done by fire proceeding from them, though negligence on the part of the company was negatived. The culvert and embankment in question were built by virtue of statutory power, so that the doctrine of Rylands v. Fletcher, and other cases following, is inapplicable to the present case.

The rule is perfectly well settled in this country that the owner of a dam or embankment must use ordinary and reasonable foresight, care, and skill in so constructing and maintaining it that it will not be the means of injuring another, either above or below, by throwing the water back, or being incapable of resisting it in times of usual, ordinary, and expected floods; but his liability extends no further, and he is not held responsible for inevitable accidents, nor for injuries occasioned by extraordinary floods, which could not be anticipated or guarded against by the exercise of ordinary and reasonable foresight, care, and skill. Lapham v. Curtis, 5 Vt. 371; Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., 4 Rawle, 9; Bell v. McClintock, 9 Watts, 119; Navigation Co. v. Coon, 6 Pa. St. 379; Lacy v. Arnett, 33 Pa. St. 169; Casebeer v. Mowry, 55 Pa. St. 419; Knoll v. Light, 76 Pa. St. 268; Mayor, etc., v. Bailey, 2 Denio, 433; Inhabitants of Shrewsbury v. Smith, 12 Cush. 177; Inhabitants of Wendell v. Pratt, 12 Allen, 464; Smith v. Canal Co., 2 Allen, 355; Gray v. Harris, 107 Mass. 492; Inhabitants of China v. Southwick, 12 Me. 238; Hoffman v. Water Co., 10 Cal. 413; Everett v. Tunnel Co., 23 Cal. 225; Proctor v. Jennings, 6 Nev. 83; Ames v. Manufacturing Co., 27 Minn. 245, 6 N. W. Rep. 787; Hydraulic Co. v. Boyer, 67 Ind. 236.

There is no liability when a suitable culvert or embankment, which has been properly constructed and kept in repair, breaks, or proves otherwise insufficient, and causes injury to lands above or below, because of an extraordinary flood or other act of God, or when, in consequence of great and exceptional floods, without concurring negligence, it injures a landowner above or below, unless liability may arise from the terms of a statute by which the work is expressly authorized. Livingston v. Adams, 8 Cow. 175; Noyes v. Shepherd, 30 Me. 173; Pollett v. Long, 56 N. Y. 200; Tenney v. Ditch Co., 7 Cal. 335; Campbell v. Mining Co., 35 Cal. 683; Wolf v. Water Co., 10 Cal. 541; Frye v. Moor, 53 Me. 583; Fraler v. Water Co., 12 Cal. 555; Weiderkind v. Water Co., 65 Cal. 431, 4 Pac. Rep. 415; Wright v. Holbrook, 52 N. H. 120; Washburn v. Gilman, 64 Me. 163; McArthur v. Canal Co., 34 Wis. 139. The owner of a culvert or embankment erected on his own land is responsible for all injury done by it to the land or property of his neighbor arising from the usual and ordinary and expected freshets occurring in the stream; but he is not responsible for damage occasioned by those great and sudden visitations of wind or water or other convulsions of nature, whose occurrence cannot be anticipated, and whose devastating force cannot be guarded against by the exercise of ordinary foresight, care, and skill. McCoy v. Danley, 20 Pa. St. 85, 57 Amer. Dec. 680, and note; Rodgers v. Railroad Co., 67 Cal. 607, 8 Pac.

Rep. 377; Young v. Leedom, 67 Pa. St. 351; Moore v. City of Los Angeles, 72 Cal. 287, 13 Pac. Rep. 855; Brown v. Atlanta, 66 Ga. 71; Verran v. Baird, 150 Mass. 141, 22 N. E. Rep. 630; Rich v. Improvement Co., 56 Wis. 287, 14 N. W. Rep. 191; Railroad Co. v. Reeves, 10 Wall. 176. The measure of diligence required by the law is that the character and size of the stream, the extent and situation of the adjoining country drained by it, and the nature of the rainfalls and floods affecting it shall be ascertained and provided for so far as the exercise of ordinary foresight, care, and skill can accomplish them. Ordinary care and skill does not require the occurrence of cyclones, cloud-bursts, or earthquakes to be foreseen or guarded against, though it is known that they have many times happened, and that they will certainly recur. In every case of injury by floods it is not so much the question whether like floods have occurred, as it is whether the particular flood was so sudden and overwhelming as to sweep away such structures as prudent and skillful men exercising ordinary care and foresight have found by experience to be sufficient to resist all such floods as are liable to occur. The culvert and embankment in question had stood for more than 30 years, without causing serious injury, or causing complaint. The conduct of these claimants, the one in building his mill above, and the other in placing his lumber yard below, the embankment, when, if the culvert and embankment were insufficient, they were certain to suffer damage, is entitled to some weight in determining the responsibility of the receiver.

But it is said if the embankment had not been raised, or if the culvert had been constructed of the same width as the low land through which the stream flowed, the rainfall and consequent flood might not have occasioned the damage complained of. The embankment and culvert may have been one of a series of causes to which the injury may have been indirectly ascribed. Their connection, however, was fortuitous, and resulted from an extraordinary and unusual state of things. Neither the rainfall nor the cyclone nor the cloud-burst was caused by the embankment or culvert. These had continued unimpaired without causing serious injury for more than 30 years preceding the accident. Such tremendous and extraordinary downpours of rain as resulted in the washing away of the embankment, with the consequent damage, could not have been foreseen or guarded against by the exercise of ordinary foresight, care, and skill. It would be carrying the doctrine of liability to a most unreasonable length to run up a succession of causes, and hold each responsible for what followed, especially where the connection was casual and unexpected, and where that which is attempted to be charged was in itself innocent and lawful. The law affords no encouragement to speculations of this sort. It rests upon the maxim, "causa proxima non remota spectatur."

Another reason is urged why judgment ought to be entered for the receiver, as recommended by the master, even if his finding should be held to be erroneous on the question hereinbefore dis-

cussed. The master finds and reports that the embankment and culvert were built by the Toledo, Wabash & Western Railway in 1855 or 1856; that this railway was sold by decree and order of the United States circuit courts of Illinois, Indiana, and Ohio to certain purchasers, who organized the railway so purchased as the Wabash Railway, and that that company consolidated with the St. Louis, Kansas City & Northern Railway Company, and formed the Wabash, St. Louis & Pacific Railway Company, of which last-named company the respondent herein is the receiver. Notwithstanding exceptions have been filed to portions of the master's report, still if, upon the facts to which no exceptions have been filed either party would be entitled to judgment without regard to the findings excepted to, the exceptions ought to be disregarded or overruled, and judgment awarded on the undisputed findings of fact. Is the receiver of the Wabash, St. Louis & Pacific Railway Company liable to respond to the claimants for damages resulting from the construction of an insufficient culvert and embankment by the Toledo, Wabash & Western Railway Company, a remote owner of the railway? Assuming, without deciding, that the receiver is answerable for whatever damages the Wabash, St. Louis & Pacific Railway Company would have been liable if there had been no receivership, the question still recurs, can the railway be held responsible for damages resulting from the failure of its remote grantor to construct a sufficient embankment and culvert over Fall branch? The nuisance, if there was one, had been erected before the conveyance of the railway to its present owners, by a previous owner, and all that the receiver or the railway he represents has done is merely to continue the culvert and embankment as they were at the time the title was acquired. The subject has been fully considered by the courts both in England and in this country, and, while there is not entire harmony in the views expressed by them, the rule to be deduced from their decisions is that an action on the case for a nuisance lies both against the person who originally committed it and against the person in the occupation or possession of the premises, who suffers it to continue, for the reason that the continuance of that which was originally a nuisance is a new nuisance; but, as the purchaser of land might be subject to great injustice if made responsible for the consequences of a nuisance of which he was ignorant, and for damages which he never intended to occasion or continue, it has been held ever since Penruddock's Case, 5 Coke, 101, that where a party was not the original creator of the nuisance, he must have notice of it, and a request must be made to remove it, before any action can be brought. McDonough v. Gilman, 3 Allen, 264; Woodman v. Tufts, 9 N. H. 88; Noyes v. Stillman, 24 Conn. 15; Conhocton Stone Road v. Railroad Co., 51 N. Y. 573; Pinney v. Berry, 61 Mo. 359; Dickson v. Railroad Co., 71 Mo. 575; Pillsbury v. Moore, 44 Me. 154; Pierson v. Glean, 14 N. J. Law, 36; Carleton v. Redington, 21 N. H. 291; Add. Torts, § 280, p. 242; Wood, Nuis. § 822; Ror. R. R., p. 707; Nichols v.

City of Boston, 98 Mass. 43; West v. Railway Co., 8 Bush, 404, 408; Cooley, Torts, p. 611; Walter v. Commissioners, 35 Md. 385; Dodge v. Stacey, 39 Vt. 558; Thornton v. Smith, 11 Minn. 15, (Gil. 1;) Slight v. Gutzlaff, 35 Wis. 675; Groff v. Ankenbrandt, 124 Ill. 52, 15 N. E. Rep. 40; Ray v. Sellers, 1 Duv. 254; Grigsby v. Water Co., 40 Cal. 396. It therefore follows that the mere continuance of the alleged nuisance on the railway company's land, without any finding of such knowledge or notice of its existence as to charge the company or its receiver with fault for its continuance, is not sufficient to create any right of action against the company or its receiver.

The exceptions will therefore be overruled, and judgment will be entered on the master's report in favor of the receiver and against the exceptants for costs.

ENGLISH et al. v. SPOKANE COM. CO.

(Circuit Court of Appeals, Ninth Circuit. July 24, 1893.)

No. 82.

1. SALE—WARRANTY—EVIDENCE.
   Defendant, in Spokane Falls, telegraphed plaintiffs in Omaha: "Wire price car strictly fresh eggs, new cases." Plaintiffs replied: "Car fresh eggs, 16. Track here for immediate acceptance." Defendant answered: "If eggs strictly fresh, 14 cents. Answer if accepted." Plaintiffs replied: "Offer eggs accepted." *Held*, that plaintiffs warranted the eggs to be strictly fresh at Omaha, and was not liable for deterioration naturally resulting during transportation.

2. SAME.
   Defendant, in Spokane Falls, telegraphed plaintiffs, in Omaha, inquiring the price of five car loads of "good potatoes," and, after some disagreement as to price, the sale was made, and the potatoes shipped to defendant. *Held*, that plaintiffs gave an implied warranty that the potatoes were of good, merchantable quality when shipped.

3. SAME—WAIVER OF WARRANTY.
   Plaintiffs shipped potatoes from Omaha to defendant at Spokane, with an implied warranty of their quality when shipped. When they arrived, defendant, at its own request, was allowed to inspect them before acceptance. *Held*, that the inspection was not a waiver of the warranty.

4. SAME—REMEDY OF BUYER UNDER WARRANTY.
   Defendant, on finding the potatoes damaged, could return them, and rely on the warranty, or keep them, and dispose of them in good faith, and hold plaintiffs responsible for his damages; but it was his duty to notify plaintiffs promptly of the defect.

5. DAMAGES—MEASURE OF—PROFITS.
   In such a case the profits defendant would have made on a resale are not recoverable as damages.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

At Law. Action by Paul A. English and Arthur F. English, copartners, against the Spokane Commission Company, for payments alleged to be due upon a contract of sale. Defendant alleged a breach of warranty, and set up a counterclaim. Judgment was

given for plaintiffs, but a motion for a new trial was granted, (48 Fed. Rep. 196,) and judgment thereafter given for defendant. Plaintiffs bring error. Reversed.

Aylett R. Cotton, (H. C. Brome, on the brief,) for plaintiffs in error.

George Turner, (Turner, Graves & McKinstry, on the brief,) for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The plaintiffs in error brought this action to recover of and from the defendant in error the sum of (1) $2,180.20 for goods, wares, and merchandise sold and delivered to defendant, consisting of potatoes and cheese; (2) $121.49 expenses incurred in preparing the cars in which the potatoes and cheese were shipped; (3) $6.80 advanced for defendant; making a total of $2,308.49.

The defendant admits the correctness of these amounts, and pleads as a counterclaim thereto (1) damages in the sum of $995.25 for breach of contract in delivering a car load of strictly fresh eggs at the price of 14 cents per dozen; (2) damages for breach of contract in delivering potatoes, in the sum of $2,325.41; and prayed judgment for $3,300.66.

A jury trial resulted in a verdict in favor of the defendant for the sum of $992.17.

The plaintiffs are commission merchants, residing at Omaha, Neb. The defendant is a corporation engaged in business as a produce and commission merchant at Spokane Falls, Wash.

The contracts between the parties in relation to the eggs and potatoes, which are the only articles in dispute, were made by telegrams, as follows, viz.: On January 24, 1890, the defendant sent a telegram from Spokane Falls to the plaintiffs at Omaha: "Wire price on five cars good potatoes in burlap sacks. Car strictly fresh eggs, new cases." On January 25, 1890, plaintiffs sent a reply telegram: "Five cars good potatoes, burlap sacks, twenty-eight. Car fresh eggs, new cases, sixteen. Track here for immediate acceptance. Answer." On January 30, 1890, the defendant answered: "If eggs strictly fresh, fourteen cents; potatoes twenty-five cents. Answer if accepted." January 31, 1890, plaintiffs answered: "Offer eggs accepted. Will ship same route. Will consider offer potatoes." The price of potatoes was subsequently agreed upon. The car load of eggs was consigned to the plaintiffs at Spokane Falls, the shipping bill reading: "English Bros. Notify Spokane Com Co.;" and the eggs were paid for upon delivery. When the potatoes arrived at Spokane Falls the defendant telegraphed plaintiffs: "Wire bank Spokane to deliver us bills of lading. Must inspect potatoes before paying drafts." The bills of lading, in pursuance with this request, were delivered by plaintiffs' order to the defendant, and the potatoes were

inspected by the defendant when taken off the cars at Spokane. The testimony upon the part of the plaintiffs tended to show that the eggs were strictly fresh, and the potatoes sound and good, when placed in the cars at Omaha, and that the eggs were liable to be injured while being transported on the railroad. The testimony offered upon the part of the defendant tended to show that the eggs were rotten and unmerchantable when delivered at Spokane, and that the potatoes were of poor quality when shipped, were poorly packed and were frozen and unmerchantable when they arrived at Spokane.

The assignments of error, which are quite numerous, relate principally to alleged errors of the court in instructing the jury in relation to the warranty of the goods by plaintiffs, and the rule as to the measure of damages. The instructions in relation to the warranty were to the effect that there was an express warranty upon the part of the plaintiffs that the eggs should be strictly fresh at the place of delivery, to wit, at Spokane Falls, and that there was an implied warranty that the potatoes should be of good, merchantable quality, delivered at Spokane. Upon the question of damages the court instructed the jury (1) as to the eggs, that, "if there was any such negligence in the selection of the eggs to be shipped as amounted to a breach of warranty, so that the per cent. loss was greater than ought to have been if due care had been exercised in shipping the goods, then the plaintiffs are liable to the defendant for the price which they received for the eggs, and, in addition to that, for the expenses that were incurred by the defendant in re-sorting and candling them, and separating the good from the bad, and whatever expense they incurred in the way of hauling to and from their customers, and the loss of profit which they would have made on the eggs if they had been good and according to the contract;" and (2) as to the potatoes: "You will include in whatever damages you may allow the defendant for the potatoes the full contract price, the amount of the freight or expenses incurred by the defendant in hauling, assorting, separating them, and any other expenses incurred in connection with the potatoes by reason of the bad condition of them. Add a loss of profits which they could have made by a resale of the potatoes if they had been good."

1. What was the contract in relation to the eggs? We are of opinion that the warranty expressed in the telegrams related to the condition of the eggs placed on board the cars at Omaha. The plaintiffs would not be liable for any deterioration of quality rendering them unmerchantable at Spokane, where they were delivered to the defendant, if such deterioration resulted necessarily from the transit. Bull v. Robinson, 10 Exch. 342; Mann v. Everston, 32 Ind. 356; Leggat v. Brewing Co., 60 Ill. 158; 2 Schouler, Pers. Prop. § 355; 2 Benj. Sales, (8th Ed.) § 944, note 15; Id. § 991. It was therefore erroneous to instruct the jury that plaintiffs "were obliged by the terms of their contract that the eggs should be strictly fresh at the place of delivery." The telegrams referred

to the price at Omaha by the car load. The eggs were to be strictly fresh. Defendant first asked the price of "car strictly fresh eggs, new cases," wishing, of course, to know at what price the plaintiffs were willing to sell a car load of strictly fresh eggs at Omaha. The answer to this inquiry gave the price at 16 cents per dozen. Then came the offer from the defendant that if the eggs were strictly fresh it would give 14 cents. This offer was accepted. The only controversy was as to the price. The words, "track here for immediate acceptance," found in one of the telegrams, may be considered somewhat obscure and indefinite. They were perhaps intended to imply that the plaintiffs had the goods then on hand in cars on the track at Omaha, for immediate acceptance; but, be that as it may, the words have no special significance as to the meaning of the contract between the parties. It is perfectly clear that the warranty, as expressed by the plaintiffs and as understood by defendant, had reference to the condition of the eggs in the car at Omaha. In the very nature of things, this must have been the intention and understanding of both parties. Eggs transported by rail, however fresh when placed upon the cars, are liable to deteriorate to some extent upon the journey. The plaintiffs contracted to ship a car load of "strictly fresh eggs" from Omaha, the eggs to be properly packed in new cases, and placed in the car so to be safely transported to the defendant at Spokane; and for any breach in this respect, if there was any, they would be liable in damages. They cannot be held liable for any loss in the quality of the eggs except such as arose by a breach of their contract. They are not liable for the ordinary and necessary shrinkage in quality incident to the handling of the eggs, and the deterioration which would naturally occur in their transportation to the place of delivery.

In Bull v. Robinson, supra, the court said:

"A manufacturer who contracts to deliver a manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration; but we think that the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other; or, in other words, that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission."

In Mann v. Everston, supra, which was an action for breach of warranty in the sale of a quantity of kiln-dried corn meal, for shipment from Indiana to New Orleans, the court sustained an instruction given to the jury, that, if the meal was sold for shipment to a southern market, a warranty would be implied that it was properly packed and fit for such shipment, and such as was contemplated by the purchase, but not that it would continue sound for any particular or definite length of time.

2. We are of opinion that there was an implied warranty that the potatoes should be of good, merchantable quality when shipped from Omaha. Benj. Sales, (8th Ed.) §§ 988, 989, 993; Schouler, Pers. Prop. § 354 et seq.; Bridge Co. v. Hamilton, 110 U. S. 114, 3

Sup. Ct. Rep. 537, and authorities there cited; Pease v. Sabin, 38 Vt. 432. The court properly instructed the jury that:

"The circumstances under which the contract was made placed upon the plaintiffs the obligation to use due care in the selection of merchantable potatoes, and to ship to defendant only sound, merchantable articles. There was no express warranty that the potatoes were of any particular quality, but the manner in which the contract was made placed the obligation upon the plaintiffs to ship only such potatoes as were sound, and fit for sale, and not frozen. The potatoes being shipped and tendered to the defendant at Spokane Falls, or at Walla Walla, which is about the same thing, under the circumstances of this case, will be considered as a tender on the part of the plaintiffs of performance on their part of the contract; and that tender, made under the circumstances shown, entitled the defendant, in case the potatoes were not really good, to an option either to reject the tender entirely, and rescind the contract, or the right to take the potatoes, and make the best they could out of them, by sorting them, the good from the bad, and accept the part that were good and claim damages for the loss sustained for the breach of the contract as to those that were bad. In accepting or receiving the potatoes, after learning that part of them were frozen or unfit for sale, if they were, the defendant was obliged to act fairly with the plaintiffs, to have the goods sorted with the least amount of expense for which it could reasonably be done, have them fairly sorted, and allow the plaintiffs credit for all that were good. They were also obligated to act fairly in the matter of notifying the plaintiffs promptly of the condition in which they found them. And in this connection there is a dispute between the parties as to whether the potatoes were bad or not. The conduct of the defendant in giving full information, and giving it promptly or otherwise, is a circumstance to be taken into account along with the other question in determining the quality of the potatoes. If the defendant received the potatoes, and remained silent as to the frozen ones, that would be a strong circumstance against their pretense that they were bad. If, in giving plaintiffs notice, they failed to give as full information as they should have done, or delayed in giving the information, that would be a circumstance to be taken into account in determining what the fact is as to whether it is a breach of warranty by reason of the potatoes being frozen."

The contention of plaintiffs that because defendant, upon the arrival of the potatoes at Spokane, was, at its own request, permitted to inspect the potatoes before paying for them, there was no implied warranty; that the inspection was a waiver of the warranty; that under the facts of this case the defendant must be held to have accepted the potatoes at Spokane in fulfillment of the plaintiffs' contract; and that the rule of caveat emptor applies,—cannot be sustained. The general rule of law is that, where a buyer of personal property, goods, wares, and merchandise has an opportunity to inspect the same at the time of purchase, caveat emptor applies. "No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of caveat emptor applies." Barnard v. Kellogg, 10 Wall. 388; Bridge Co. v. Hamilton, 110 U. S. 113, 3 Sup. Ct. Rep. 537. But wherever the seller has given an express warranty, or the law implies a warranty from the circumstances, or the buyer can bring fraud home to the party from whom he purchased, the doctrine of

caveat emptor fails of application. Schouler, Pers. Prop. 322. The contract for the potatoes was made by telegrams. The defendant had no opportunity to inspect them at the time of the purchase. The contract was executory. The secretary of the defendant testified, among other things, in answer to questions, as follows:

"Question. What was the purpose of your sending that telegram asking the right to inspect? Answer. We wished to know whether we were getting what we were buying. Q. Did you send that telegram with a view of rejecting the entire car load if they were not what you ordered? A. No, sir; because we had four or five hundred dollars invested in each car."

There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the warranty, some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found upon examination to be unsound, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled that, in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable in whole or in part, the vendee has the option either to reject them or receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods. 2 Schouler, Pers. Prop. §§ 581--583; 2 Benj. Sales, § 977, note 29 et seq.; Id. §§ 1353, 1354, 1356, note 11; Babcock v. Trice, 18 Ill. 420; Best v. Flint, 58 Vt. 543, 5 Atl. Rep. 192; Polhemus v. Heiman, 45 Cal. 573; Hege v. Newsom, 96 Ind. 431; Lewis v. Rountree, 78 N. C. 323; English v. Commission Co., 48 Fed. Rep. 197, and authorities there cited.

3. This brings us to the question of damages as set forth in the last clause of the instructions of the court, that the jury had the right to add a "loss of profits" which the defendant could have made by a resale of the eggs and potatoes if they had been good. We are of opinion that the court erred in adding this clause to the instructions, that the error was prejudicial to the plaintiffs, and that for this error a new trial should be granted. The general rule of damages for breach of warranty as to quantity or quality applicable to the facts of this case is the difference between the actual value of the goods at the time of the sale and what the value would have been if the goods had conformed to the warranty. The authorities in support of this rule are very numerous, and many of them are cited in 2 Suth. Dam. § 670; 2 Sedg. Dam. (8th Ed.) § 762; 2 Schouler, Pers. Prop. § 585. As the sale was made at Omaha, and the goods were to be delivered at Spokane, the defendant was entitled to recover the difference between the contract price and the value of the goods in the market at Spokane at the

time of the delivery. The object of the law in awarding damages is to make the injured party whole. The damages must be shown with certainty, and not left to speculation or conjecture. The law excludes uncertain and contingent profits. "The measure of damages recoverable for breach of warranty of quality is, in general," as stated in Schouler's Personal Property, supra, "the difference in value between the article actually furnished and that which should have been furnished under the contract at the time and place agreed upon. * * * The rule of damages for breach of warranty is the difference between the sound value of the thing as warranted and its actual value. Such reasonable expenses as the buyer has incurred in consequence of the breach may be added in making up the estimate. * * * The buyer may recover not only for the direct and natural consequence of the seller's failure to perform according to agreement, but for such damages besides as both parties might reasonably be supposed to have foreseen, at the time of the contract, would flow from such breach. * * * The price at which the goods were sold at the place of delivery may be evidence tending to show the amount of damages, but it does not furnish the decisive test." The authorities cited in support of the instructions of the court are cases where the vendor of the goods knows at the time of sale that the purchaser has a contract for a resale at an advanced price, and that the purchase of the goods is made to fill such contract, and the sale is made by the vendor to enable the purchaser to comply with his contract. In such cases it is held that the profits which would accrue to the purchaser upon a resale may fairly be said to have entered into the contemplation of the parties in making the contract. Messmore v. Lead Co., 40 N. Y. 422; Thorne v. McVeagh, 75 Ill. 81; Carpenter v. Bank, 119 Ill. 352, 10 N. E. Rep. 18.

4. The objections urged as to the ruling of the court in admitting certain exhibits in evidence are of such a character as are not liable to arise upon a retrial, and will not, therefore, be considered.

The judgment of the circuit court is reversed, and cause remanded for a new trial.

JONES et al. v. SHAPERA.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1893.)

No. 110.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—SUIT BY ASSIGNEE OF NOTE.
Under the provision of the judiciary act of 1887–88, that the circuit courts shall not have jurisdiction of any action on a promissory note or other chose in action in favor of an assignee, unless such suit might have been maintained if no assignment had been made, the jurisdiction is to be determined according to the status at the time the suit is brought; and hence an assignee of a promissory note may sue on the same in the federal courts if the payee or first holder is then a resident of a different state from defendant, although he was a resident of the same state when the assignment was made.