

what is necessary to have a valid marriage, the courts have not yet definitely determined just what, in legal parlance, constitutes marriage, and they seem to be unable to shake off the clinging terminology of the law of contract.

The danger in the decision lies in opening the door to collusive suites. Those who have no ground for divorce may be freed from a burdensome and foolish marriage by a suit for annulment, in which one party shall allege, and the other admit, that the latter entered into the marriage with the secret intention not to perform the essential obligations thereof, and thereafter refused to do so.

A. W. B.

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PROCEDURE: SUITS IN FORMA PAUPERIS.—The right to sue *in forma pauperis* was a part of the common law adopted in 1850 by the state legislature of California and has not been curtailed since 1850 by legislative enactment. Such is the decision in *Martin v. Superior Court of California, in and for the County of Alameda*.¹ The entire Supreme Court held that the power to excuse a poor plaintiff from paying fees was inherent in English common law courts, and was exercised before any statutes were enacted in the subject. A portion of the court (a majority) also held that the statute of Henry VII which embodied this power was a part of the common law adopted in 1850 by the legislature of California.

The question seems to have come before American courts but few times. Two courts have held squarely that the right to sue *in forma pauperis* exists only by statute,² a third has a dictum to the same effect.³ A dictum in a Texas decision seems to be the only American case contra.⁴ But Marshall speaks of an exemption from court fees "at common law" to the plaintiff who swore that he was unable to pay them⁵ and there is dictum among the English cases to the same effect. Chief Justice Tindal in *Brunt v. Wardle*⁶ said "After all, is the 11 Henry VII c. 12 anything more than confirmatory of the common law?" His associate, Justice Maule, seemed to be of the same opinion, and both justices referred to the report of a case, twenty years before the statute of Henry VII, where a common law court was using this power.

This authority, standing by itself, seems meagre, but there are

supra, n. 14; *Dickinson v. Dickinson*, supra, n. 8; *Dorgeloh v. Murtha*, supra, n. 6.

¹ (Oct. 11, 1917), 54 Cal. Dec. 422, 168 Pac. 135.

² *Hoey v. McCarthy* (1890), 124 Ind. 466, 24 N. E. 1038. *Campbell v. Chicago Ry.* (1868), 23 Wis. 490. See 11 Cyc. 200.

³ *Roy v. Louisville R. R. Co.* (1888), 34 Fed. 276.

⁴ *Hickey v. Rhine* (1856), 16 Tex. 576.

⁵ *Law of Costs*, p. 347.

⁶ (1841), 133 Eng. Rep. R. 1254.

analogies that strengthen this theory of the California court. The statute of Henry VII applied only to plaintiffs and cannot be construed to apply to defendants in criminal suits.⁷ Yet we find the English courts permitting the party indicted to defend as a pauper.⁸ Without statute, the New York courts have ordered the expenses of an appeal from the conviction of murder to be paid by the county⁹ and a Washington court has ordered a transcript of a record at the county's expense.¹⁰ According to the Indiana courts,¹¹ a defendant cannot ask the county to pay the expenses of appeal as of right, but the court has discretion to order it.

The Statute of Henry VII did not apply to suits in equity but courts of equity freely extended the right to sue *in forma pauperis* to poor suitors in chancery.¹² Without statutory right, poor persons suing in admiralty have long been allowed to sue without giving security for costs. "Suits *in forma pauperis*, or, using technical words in admiralty, upon a juratory caution, are recognized in District Courts of the United States. And this in courts in which there is an imperative rule requiring security for costs."¹³ Seamen suing for wages need not give security for costs.¹⁴ "The true reason," said the court in *Polydore v. Prince*, "is not because they have a claim to any special favor in this respect, but because they are usually unable to comply; whenever the same reason exists, the same indulgence is, by the ordinary practice of admiralty, shown to others."¹⁵

⁷ "... In behalf of the poor persons of this land, not able to sue for their remedy after the courts of common law. . . , Which poor subjects be not of ability nor power to sue . . . for redress of injuries and wrongs." The Encyclopedia of the Laws of England, vol. vii, p. 192, makes the following statement: "A suitor who from poverty is unable to avail himself of the ordinary forms of the court, has, from a very early period in the history of our law . . . been entitled to obtain an order for leave to sue *in forma pauperis*. This common law right was affirmed by 11 Statute Henry VII, c. xii." Cf. Y. B. 15 Ed. IV, 26b (1476): "Note that at the beginning of this term, one John Brown was present to be the presignator of the poor in the Common Pleas and, . . . it was said that if any poor man would swear to him that he was not able to pay for the entry of pleas . . . then he ought to enter the pleas without taking anything for his labor . . . and this was done by the advice of the justices." This is the case referred to by Justices Tindal and Maule in *Brunt v. Wardle*, supra, n. 6, and appears to be the only case in the year books which refers to the practice before 11 Henry VII c. xii.

⁸ Comyn's Digest, s. v. *Forma Pauperis*. 1 Chitty Cr. Law 413.

⁹ *New York v. Jones* (1885), 34 Hun. 620.

¹⁰ *State ex rel. Coella v. Fennimore* (1891), 2 Wash. 370, 26 Pac. 807.

¹¹ *In re Morgan* (1890), 122 Ind. 428, 23 N. E. 863.

¹² Daniell, Chancery Practice, §§ 37-44 and authorities cited.

¹³ *The Phoenix* (1888), 36 Fed. 272.

¹⁴ *The Arctic* (1871), Brown 347.

¹⁵ (1837), Ware 410. See also *Bradford v. Bradford* (1878), 2 Flip 280; *Thomas v. Thornwegan* (1886), 27 Fed. 400.

It would seem a narrow holding to say that courts of equity and of admiralty have an inherent power to permit a poor suitor to sue *in forma pauperis*, that a common law court could permit an indicted defendant to do so, and then hold that the common law court could not extend the privilege to a plaintiff suing in an ordinary suit at law. In view of these analogies, the decision in the principal case seems sound.

E. B. P.

TORTS: DISTINCTION BETWEEN NEGLIGENCE AND NUISANCE.—Legal liability for damage caused to adjoining property by explosives has been founded on several grounds. The doctrines of negligence, nuisance, and *res ipsa loquitur*, have all been applied. *Fernandez v. Western Fuse Company*¹ is the last of a series of cases that arose in this state out of the explosion of the powder magazine of the Western Fuse Company by a murderer who had taken refuge therein. The case was brought upon the theory that the magazine was a nuisance. But while it was pending, *Kleebauer v. Western Fuse Company*² decided that the magazine of the company was not a nuisance *per se*, and that there was not on the part of the defendant negligence *per se*. Thereupon the plaintiff obtained a verdict upon evidence that the magazine was negligently constructed. This was reversed as being irresponsible to the pleadings. Although not using the term, the California court, following other cases, apply the *res ipsa loquitur* doctrine, and hold that, inasmuch as powder does not ordinarily explode, there is the presumption of negligence when it does, and that the defendant must show that he was not lacking in the use of due care.³ Other courts have regarded the question as simply one of negligence.⁴ Others have held that the presence of explosives constitutes a nuisance.⁵ The doctrine of *Rylands v. Fletcher*⁶ seems not to have been applied to this class of cases.⁷

¹ (Aug. 10, 1917), 25 Cal. App. Dec. 231, 167 Pac. 900.

² (1903), 138 Cal. 497, 71 Pac. 617.

³ *Judson v. Giant Powder Co.* (1895), 107 Cal. 549, 40 Pac. 1020; *Kinney v. Koopman* (1897), 116 Ala. 310, 22 So. 593; *Tuckachinsky v. Lehigh Co.* (1901), 199 Pa. 515, 49 Atl. 308.

⁴ *Lounsbury v. Foss* (1894), 30 N. Y. Supp. 89; *People v. Sands* (1806), 1 Johns (N. Y.) 78; *Collins v. R. R. Co.* (1894), 104 Ala. 390, 16 So. 140; *Sowers v. McManus* (1906), 214 Pa. 244, 63 Atl. 601.

⁵ *Heeg v. Licht* (1880), 80 N. Y. 579; *McAndrew v. Collerd* (1880), 42 N. J. L. 189; *Henderson v. Sullivan* (1908), 159 Fed. 46.

⁶ (1868), L. R. 3 H. L. 330.

⁷ It has been applied to water in *Turpen v. Turlock Irrig. Dist.* (Oct. 17, 1903), 141 Cal. 1, 74 Pac. 295; and *Parker v. Larsen* 4 (1890), 86 Cal. 236, 24 Pac. 989; to oil in *Brennan Const. Co. v. Cumberland* (1907), 29 App. Cas. (D. C.) 554; to gas in *Evans v. Keystone Gas Co.* (1895), 148 N. Y. 112, 42 N. E. 513. See the limitation in *Ainsworth v. Lakin* (1901), 180 Mass. 397, 62 N. E. 746, and an article by Professor Bohlen 59 *University of Pennsylvania Law Review*, pp. 298, 423.

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