

320. The doctrine of *Clark v. Manchester*, 62 N. H. 577, and *Frost v. Railroad*, 64 N. H. 220, has no application. What is there said is to be read in the light of the facts under consideration. There is a broad difference between the case of a trespasser meeting with an injury by reason of the dangerous condition of the defendants' premises, and that of an injury caused by the defendants' active intervention.

Instructions quite as favorable to the defendants as those last requested were given to the jury. They were correctly told that if the defendants exercised ordinary care to prevent the injury, the plaintiff though not a trespasser could not recover. There was no error in the instructions given.

Judgment on the verdict.

CHASE, J., did not sit; SMITH, CLARK, and WALLACE, JJ., concurred; DOE, C. J., and BLODGETT, J., were of opinion that the charge of the presiding justice as reported in the reserved case probably gave the jury to understand that the defendants' duty towards the plaintiff was the same whether he was or was not a trespasser upon their tracks at the time of his injury, and upon this ground wholly they dissented.

Grafton, }
June, 1894. }

STORRS v. STORRS.

In a libel for divorce for abandonment, the time during which the libellee has been insane cannot be included in computing the statutory period of three years.

LIBEL FOR DIVORCE, for abandonment, filed September 27, 1893. The parties were married January 1, 1878, and lived together until June, 1882, when the defendant abandoned the plaintiff without cause and without his consent. In the fall of 1882 the defendant became incurably insane and incapable of performing her marital duties. In February, 1883, she was placed in the asylum for the insane, where she has ever since remained. She appeared by a guardian *ad litem*.

Samuel B. Page, for the plaintiff.

CARPENTER, J. A libel may be maintained and a divorce decreed against an insane person for causes of divorce which arose and became complete before the defendant became insane.

Mansfield v. Mansfield, 13 Mass. 412; *Mordaunt v. Moncreiffe*, L. R., 2 Sc. & Div. App. 374. Insanity at the time of the commission of the acts constituting the ground of divorce is a full defence. *Broadstreet v. Broadstreet*, 7 Mass. 474; *Garnett v. Garnett*, 114 Mass. 379; *Nichols v. Nichols*, 31 Vt. 328.

Abandonment, to constitute a cause of divorce, must continue for three years together. P. S., c. 175, s. 5. The time during which the defendant has been insane cannot be included in computing the statutory period. But for her insanity, it may be that she would have repented and returned to her husband.

Libel dismissed.

CHASE, J., did not sit: the others concurred.

Grafton, }
June, 1894. }

68	119
72	131
72	467

MORSE v. GLOVER.

If A's cattle, escaping from his pasture into B's adjoining field through B's insufficient fence, are by B turned into a highway at a point where no fence intervenes between it and a railroad, and, straying thence upon the railroad, are killed by a locomotive, B is liable for their loss.

CASE, for killing the plaintiff's ox. Facts found by a referee. The plaintiff's ox and three of his other cattle strayed from his pasture to the defendant's adjoining field through the defendant's insufficient fence. Afterwards, the defendant in attempting to drive the cattle home left the ox in the highway, where it wandered upon a railroad track, and was killed by a locomotive under circumstances disclosed in the opinion. The plaintiff moves for leave to amend his declaration by filing a count in trespass.

Smith & Sloane, for the plaintiff.

William F. Westgate and *Bingham, Mitchell & Batchellor*, for the defendant.

WALLACE, J. The plaintiff's cattle, including the ox in question, came on the defendant's land in consequence of the defendant's neglect to keep in repair his portion of the division fence, and without any fault of the plaintiff. When the defendant found them under those circumstances, it was his duty