

screamed, nothing could be done to save her. If, therefore, it would have been the defendant's duty to warn her of her danger or to drive her from its land, if its servants had known or ought to have known of her presence (*Hobbs v. Company*, 75 N. H. 73; *Buch v. Company*, 69 N. H. 257), the fact that it cannot be charged with that knowledge prevents the application of that doctrine, and shows that her injury is not attributable to its violation of any duty it owed to her. It had a right to burn the dry grass by the side of its track without keeping watch for casual trespassers who might possibly get into the flames and be injured. *Shea v. Railroad*, 69 N. H. 361. Whether, if it had known the deceased was present, it would have been its duty to protect her from being burned by the fire, on the ground that the fire was "active intervention" by the landowner, it is unnecessary to consider.

The exception to the exclusion of evidence of the declaration of the little girl an hour after the accident, explaining how she caught fire, presents no question of law for the court. The evidence may have been excluded by the court as a matter of discretion. "Much must be left to the discretion of the court in admitting or rejecting such testimony." *Dorr v. Railway*, *ante*, 160, 162.

Exceptions overruled.

All concurred.

Cheshire, }
April 2, 1912. }

CREIER v. FITZWILLIAM.

One who cares for a small-pox patient in quarantine cannot recover of the town therefor, unless he was employed by the officer in charge of the case, or the board of health has determined that such expense is a legitimate disbursement for the protection of the public.

A town is not liable for property destroyed by its health officers as a measure of public protection, in the absence of statutory liability.

ASSUMPSIT, for board, nursing, and bedding destroyed. Trial by the court. Transferred from the April term, 1911, of the superior court by *Mitchell, J.*

In December, 1907, one Hautaala, a boarder in the plaintiff's family, was taken sick with the small-pox. A physician, who was

also a member of the board of health of the defendant town, was first called to treat him, and subsequently the patient was quarantined by the board in the plaintiff's house. A nurse and medical treatment were provided. The plaintiff's wife assisted in caring for the patient, but the board made no contract with her or her husband to employ her, or to pay for her services. As the protection of the public required the destruction of the bedding used by Hautaula when he was taken sick, it was destroyed by the board. The court ruled that the plaintiff could not recover for the services of his wife or for the bedding destroyed, and he excepted.

Conrad W. Crooker, for the plaintiff.

Orville E. Cain (by brief and orally), for the defendants.

WALKER, J. The plaintiff cannot recover of the town for the care furnished by his wife to the patient, because she was not employed by the health officer in charge of the case and the board of health has not decided that any part of this expense should be "deemed a legitimate expenditure for the protection of the public health." Laws 1899, c. 100, ss. 1, 2; *Pettengill v. Amherst*, 72 N. H. 103.

When the officer destroyed the infected bedding he was not acting as the agent of the town, but as a public officer under legislative authority, for the benefit and protection of the public. He was as much a public officer as highway surveyors, police officers, and firemen (*Brown v. Vinalhaven*, 65 Me. 402; *Barbour v. Ellsworth*, 67 Me. 294; *Ogg v. Lansing*, 35 Ia. 495), for whose act while in the discharge of a public or governmental duty, even if wrongful, the town is not responsible, in the absence of a statute making it responsible therefor. *Edgerly v. Concord*, 62 N. H. 8; *Rhobidas v. Concord*, 70 N. H. 90; *O'Brien v. Derry*, 73 N. H. 198; *Gates v. Milan, ante*, 135. As no statute has been found making towns liable for property destroyed by health officers, the plaintiff cannot recover for this item of his specification.

Exception overruled.

All concurred.