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NOTES ON RECENT MISSOURI CASES

SUPERINTENDING POWER OF MISSOURI SUPREME COURT OVER COURTS OF APPEALS.—The Missouri system of appellate courts consists of one Supreme Court and three Courts of Appeals. The jurisdiction of the Courts of Appeals are prescribed by the Constitution and constitutional amendments and statutes made in pursuance thereof.[1] Generally speaking they have jurisdiction by appellate process of all civil cases, not involving constitutional questions, where the amount in dispute exceeds the sum of $7,500. Within the limits prescribed by the Constitution, amendments, and statutes their jurisdiction is exclusive. There is no appeal to the Supreme Court. The Constitution provides in certain instances, however, that decisions be certified to the Supreme Court for final adjudication, and also gives the Supreme Court a general superintending control over the Courts of Appeals by remedial writs. How effective these provisions have been in securing a uniform line of decisions it will be the object of this note to examine.

Section 6 of the constitutional amendment of 1884[2] provides: "When any one of said Courts of Appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said Courts of Appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the same term and not afterward, certify and transfer said cause or proceeding and the original transcript therein to the Supreme Court and thereupon the Supreme Court must rehear and determine said cause or proceeding, as in the case of jurisdiction obtained by ordinary appellate process; and the last previous ruling of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said Courts

1. See Art. VI, § 12 of the Constitution of Missouri; also Art. VI. Amendment 1884, § 5; Revised Statutes 1909, § 3937; Laws of 1911, p. 190 (amending § 3937, Revised Statutes 1909).
2. See Vol. 1, p. 101, Revised Statutes 1909.

of Appeals." Section 3, Article 6 of the Constitution of 1875 provides: "The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other remedial writs, and to hear and determine the same." Section 8 of the constitutional amendment of 1884 provides: "The Supreme Court shall have superintending control over the Courts of Appeals by mandamus, prohibition, and certiorari."

There have been several attempts by mandamus to compel the judges of a Court of Appeals to certify cases to the Supreme Court on the ground that one of the judges of the former court "deemed" its decision contrary to a former decision of the Supreme Court. In the first of these cases, *New York Life Ins. Co.* v. *Phillips*,[3] it was held that, where it becomes the duty of a Court of Appeals to certify to the Supreme Court, and they fail to do so of their own motion during the term mandamus will lie. However, it must be clear that one judge of the Court of Appeals in question "deems" that its decision is in conflict with a former decision of the Supreme Court, or of another Court of Appeals, and this must be set out in a separate opinion. But in that case the court found that there was not sufficient indication that any one of the judges of the Court of Appeals deemed that the decision in the case was in conflict with a former decision of the Supreme Court or of another Court of Appeals. *State ex rel. Giovanoni* v. *Rombauer*,[4] and *State ex rel. Lancashire Ins. Co.* v. *Rombauer*[5] were cases in which the Supreme Court was asked to issue writs of mandamus to a Court of Appeals on the ground that the decisions were in conflict with former decisions of the Supreme Court. The writs were denied on the ground that it did not appear that any judge had sufficiently indicated that he deemed that decision to be in conflict with former decisions. In *State ex rel. Third Nat. Bk.* v. *Smith*[6] it was again attempted to mandamus one of the Courts of Appeals. In this case one of the judges of the Court of Appeals had written a dissenting opinion and cited former decisions of the Supreme Court as being in conflict with the majority opinion. But the Supreme Court refused the writ, saying that this was not sufficient to indicate that this judge deemed the opinion from which he dissented in conflict with citations made in his dissenting opinion. It will be seen that, although all four of these attempts at mandamus failed, yet in all the court conceded that if one judge really "deems" the decision in conflict with a former decision mandamus will lie to compel the Court of Appeals, after the term has expired, to perform its duty and certify the case to the Supreme Court. For a judge to sufficiently indicate that he "deems" the decision of the majority in conflict with former decisions he must, it seems, use the exact words of the Constitution, or words so clear and unmistakable that they can be taken to have no other meaning. In a later case the Supreme Court went to an extreme length in saying that a judge of a Court of Appeals did not deem a decision in conflict with former decisions. In that case, *Smith* v. Mo. *Pac. Ry. Co.*[7] the Court of Appeals certified the case to the Supreme Court for determination but the Supreme Court refused to take jurisdiction. In the opinion of this case in the Court of Appeals Gill, J., said: "While concurring in the foregoing opinion of Judge Ellison I feel doubtful of whether or not the conclusion reached can be harmonized with *Louisiana Nat. Bank* v. *Laviele*[8] * * * and therefore it is ordered certified to the Supreme

3. (1888) 96 Mo. 570.
4. (1894) 125 Mo. 632.
5. (1897) 140 Mo. 121.
6. (1891) 107 Mo. 527.
7. (1897) 143 Mo. 33.
8. (1873) 52 Mo. 380.

Court for its determination." The Supreme Court held that Judge Gill had not sufficiently indicated that he "deemed" the decision in conflict with a former decision of the Supreme Court. On the other hand in *Clark* v. *R. R.*[9] a motion to remand a case that had been certified to the Supreme Court by a Court of Appeals on the ground that the decision of the Court of Appeals was not really in conflict with former decisions was overruled. The court said in that case that it was sufficient for purposes of their jurisdiction that one of the judges deemed the decision of the Court of Appeals in conflict with former decisions.[10]

The right to decide whether a particular decision is in conflict with a former decision of the Supreme Court or of another Court of Appeals has in several cases been conceded by the Supreme Court to the judges of the Courts of Appeals themselves.[11] In *State ex rel. Hobart* v. *Smith*[12] it was attempted by certiorari to review a decision of the Kansas City Court of Appeals on the ground that that court had not followed the last previous ruling of the Supreme Court. In the opinion of the Supreme Court it was said: "It is not for us to say, nor do we say, whether or not the Court of Appeals was correct in its conclusions; but whether right or wrong the case is not before us for review." Certiorari is said to reach only errors appearing on the face of the record which are jurisdictional in their nature, and if the Court of Appeals has jurisdiction its decisions cannot be reviewed by certiorari.[13] In the case of *M. K. & T. Ry.* v. *Smith*[14], however, it was said that the Court of Appeals, although having jurisdiction generally of a case might exceed its jurisdiction on any particular point, and that such error would be reviewed by certiorari. In *Manning* v. *Smith*[15] a Court of Appeals attempted to enter final judgment on an appeal from an order dissolving a temporary injunction. The Supreme Court on certiorari proceedings in that case said that the Court of Appeals, though having jurisdiction generally of the appeal from the order dissolving a temporary injunction, exceeded its jurisdiction in rendering final judgment on the Appeal.

The case of *Curtis* v. *Sexton* has had a long and varied legal career. It came first to the Supreme Court on appeal in 1906[16] and the court on that appeal held that there was evidence to go to the jury. A new trial of the case was had and a verdict found for the plaintiff. In the meantime the jurisdiction of the Courts of Appeals had been changed from cases involving $2500 to $7500 and on second appeal the case went to the Kansas City Court of Appeals.[17] That court in disposing of the case upon substantially the same testimony ruled that there was not sufficient evidence to go to the jury and that the defendant's demurrer to the evidence should have been sustained. The Supreme Court thereafter in the case of *State ex rel.* v. *Broaddus*[18] on certiorari proceedings quashed the judgment of the Kansas City Court of Appeals. This was on the ground that the Court of

9. (1911) 179 Mo. 66, 72.
10. Mandamus will lie from the Supreme Court to compel the Courts of Appeals to exercise their lawful jurisdiction. *State ex rel. C. R. I. & P. Ry. Co.* v. *Smith* (1903) 172 Mo. 446; *Stanberry* v. *Smith* (1903) 172 Mo. 618; *State ex rel. Hyatt* v. *Smith* (1891) 105 Mo. 6; *State ex rel.* v. *Broaddus* (1907) 210 Mo. 1. Prohibition will also lie to prevent the Courts of Appeals from exercising jurisdiction of cases in which they have no jurisdiction. *M. K. & T. R. R. Co.* v. *Smith* (1899) 154 Mo. 300.
11. *State ex rel.* v. *Broaddus* (1907) 207 Mo. 107; *Railroad* v. *Smith* (1899) 154 Mo. 300.
12. (1903) 173 Mo. 398.
13. *State ex rel. Teasdale* v. *Smith* (1890) 101 Mo. 174.
14. (1899) 154 Mo. 300.
15. (1905) 188 Mo. 167.
16. 201 Mo. 217.
17. (1909) 142 Mo. App. 179.
18. (1912) 238 Mo. 189.

Appeals in overruling a decision of the Supreme Court *in the same case* was exceeding its jurisdiction. It was said in that case that as to the point on which the Supreme Court had ruled the case was *res adjudicata* and that when the court passed upon a point in a case that it became the "law of that case." The case on motion was removed to the Supreme Court in pursuance of an act of the Legislature providing for cases not disposed of at the time the change was made in the jurisdiction of the Courts of Appeals. The Supreme Court on the last appeal in *Curtis* v. *Sexton*[19] was asked to reconsider its decision in the same case reported under the style of *State ex rel.* v. *Broaddus*,[20] but they reaffirmed the position taken in that case. The point of interest to us is the position taken in *State ex. rel.* v. *Broaddus*[21] and reiterated in the latest appeal to the Supreme Court under the style of *Curtis* v. *Sexton*,[22] that certiorari would lie to review the judgment of a Court of Appeals when in conflict with a former decision of the Supreme Court in the same case although none of the judges of the Court of Appeals deems that there is such a conflict. The case is put entirely on the grounds that a ruling in the same case by the Supreme Court is *res adjudicata*[23] or the "law of the case"[24] and that for the Court of Appeals to overrule it is an excess of jurisdiction which will be reviewed by certiorari. The case is of little value as a precedent as it will seldom happen that a case will go to the Court of Appeals on second appeal after having once been in the Supreme Court but the case contains a *dictum* which is worthy of note. Faris, J., in the course of the opinion says: "It may well be that our only power of enforcing the provisions of the last clause of said section 6,[25] and of making to wit, 'the last previous ruling of the Supreme Court on any question of law or equity * * * be controlling authority in said Courts of Appeals,' is derived from the broad power of 'superintending control' given by section 8 of this amendment.[26] A case of recalcitration, *which has never arisen* and will perhaps never arise, but which is readily supposable, might come up in which any one or more of the Courts of Appeals would utterly refuse to follow this court or to follow one another; absent the power of superintending control somewhere lodged, there would then be four Supreme Courts instead of one—*a thing unthinkable.*" It is submitted that this is in direct conflict with the class of cases represented by *State ex rel. Hobart* v. *Smith*[27] in which it is held that the question of whether a decision of a Court of Appeals is in conflict with a former decision of the Supreme Court or of another Court of Appeals is one for the judges of the Court of Appeals in which the decision is rendered.

Following out the *dictum* of Faris, J., above, there would seem to be no objection to saying that wherever the Court of Appeals renders a decision in conflict with former decisions of the Supreme Court of Missouri it exceeds its jurisdiction and that such excess of jurisdiction will, of course, be a question for the Supreme Court in certiorari proceedings. This would open the Supreme Court to a flood of cases and further clog their notably congested docket. But it is submitted that it would be better to allow this, and to increase the size of the Supreme Court rather

19. (1913) 159 S. W. 512.
20. (1912) 238 Mo. 189.
21. *Supra.*
22. *Supra.*
23. *May* v. *Crawford* (1899) 150 Mo. 504, 524; *Gracey* v. *St. Louis* (1900) 221 Mo. 165; Wells on Res Adjudicata and Stare Decisis, § 613.
24. For an interesting criticism of the doctrine of "The Law of the Case," see 67 Central Law Jour. 225; 34 L. R. A. 321-347 and cases cited.
25. Constitutional Amendment 1884 *supra.*
26. *Ibid.*
27. *Supra.*

than to have bodies of localized law growing up within our state. However it is to be noted that the remedy suggested by Faris, J., would be effective only in bringing about uniformity of decisions between the Supreme Court and the Courts of Appeals, and that it would not be effective to bring about a uniformity of decisions as between the Courts of Appeals themselves.[28] M. W.

LIABILITY FOR INJURY RESULTING FROM EFFORT TO SAVE LIFE ENDANGERED BY DEFENDANT'S NEGLIGENCE.—In negligence cases due care is defined as "that care which an ordinarily prudent and reasonable person would have exercised under the same or similar circumstances."[1] Breach of the duty to use such care is negligence,[2] and gives rise to a right of action in the person who thereby sustains injuries to recover for those injuries of which such negligence was the proximate cause, in the absence of contributory negligence or other valid defense.[3]

The proximate cause of an event has been defined as "that which in a natural and continuous sequence, unbroken by any new cause produces that event, and without which that event would not have occurred."[4] Cases where the problem has been viewed from another angle—that of consequence rather than of cause—adopt a slightly different definition of liability for injuries due to negligence—as, for instance, that, "A person charged with negligence may be held liable for anything which after the injury is complete, appears to have been a natural and probable consequence of his act."[5] Broaddus, P. J., in *Boyce* v. *Railway*.[6] reviews and comments upon previous definitions as follows: "I am free to say that the definition of proximate cause * * * is unfortunate and tends to create confusion in its application in many cases. Properly speaking proximate cause means a cause that immediately precedes and produces an effect, as distinguished from the remote, mediate or predisposing cause."

Although the relationship which must exist between defendant's negligence and plaintiff's injury may be expressed in these different ways, an examination of the Missouri cases shows that two elements are essential to a recovery: (a) A direct chain of causal connection between the negligent act and the injury; and (b) the absence of any independent, efficient, intervening cause.[7] Therefore, the doctrine of proximate cause as

28. As this issue goes to press proceedings are pending in the Supreme Court which will have important bearing on the subject under discussion, and which will be noticed in the next issue.

1. Halsbury, Laws of England § 630a, and cases cited; *Railway Company* v. *Barrett* (1896) 166 U. S. 619; *Tetherow* v. *Ry. Co.* (1888) 98 Mo. 74; *Cohn* v. *City of Kansas* (1891) 108 Mo. 387; *Reardon* v. *Ry. Co.* (1892) 114 Mo. 384; *Stanley* v. *Ry. Co.* (1892) 114 Mo. 606; *Lloyd* v. *Ry. Co.* (1895) 128 Mo. 595; *Felver* v. *Ry.* (1908) 216 Mo. 195, 207, where Lamm, P. J. says: "This definition may be said through venerable age and much use to have reached the dignity of a maxim."

2. *Blyth* v. *The Co.* (1856) 11 Exch. 781; *R. R. Co.* v. *Jones* (1877) 95 U. S. 441; *Wilkins* v. *Ry. Co.* (1890) 101 Mo. 93; *MacMahon* v. *ExpressCo.*(1895)132 Mo. 641; *Dean* v. *R. R.* (1906) 199 Mo. 386, 408.

3. *Ry.* v. *Kellogg* (1876) 94 U. S. 475; *McDonald* v. *Ry.* (1908) 219 Mo. 468; *Blair* v. *Ry.* (1886) 89 Mo. 334; *Morgan* v. *Cox* 22 Mo. 373; *Stanley* v. *Ry.* (1892) 114 Mo. 606.

4. Sherwood, J., in *Hudson* v. *Ry.* (1890) 101 Mo. 13. See also 15 Harvard Law Review 546, and cases cited note 3, *supra*; Am. and Eng. Ann. Cas., p. 436, note 3, and cases cited; *Dixon* v. *Ry.* (1894) 124 Mo. 140, 149; 32 Cyc. 745, note 77.

5. Lamm, P. J., in *MacDonald* v. *Railroad* (1908) 219 Mo. 468, 491; In *Anderson* v. *Miller* (Tenn. 1895) 33 S. W. 615, it is said that, "The definitions of the term [proximate cause] are easily given in general terms, but they are very difficult in practical application to the facts of each particular case."

6. (Mo. App., 1906) 96 S. W. 670, 671. It is curious that by accident or design this part of the opinion is omitted from the report in 120 Mo. App. 168.

7. *Harlan* v. *Ry.* (1877) 65 Mo. 22, 25; *Powell* v. *Ry.* (1882) 76 Mo. 80; *Henry* v. *Ry.* (1882) 76 Mo. 288; *Stepp* v. *Ry.* (1884) 85 Mo. 229; *Hudson* v. *Ry.* (1890) 101

adopted in Missouri, although the language in all cases is not reconcilable, seems to set the same limits to liability and recovery whether it is in fact expressed in terms of cause, or whether it is expressed in terms of consequence. This being true the language used in the recent case of *Williams* v. *United States Incandescent Lamp Co.*[8] seems unfortunate and likely to lead to confusion. In that case the plaintiff was employed as a charwoman by the defendants, who operated a factory for the manufacture of incandescent lamps. They had provided a stove to heat the place, and the proof showed that it had been negligently put up. As a result of this negligence the pipe fell and destruction of the building by fire seemed imminent, as the building was stored with highly combustible material used in the manufacture of lamps. The plaintiff saw that she and her fellow-employees, of whom about thirty were in adjoining rooms, were in great peril. She picked up the pipe and stepped upon a chair, attempting to replace the pipe and avert the disaster. While she was in this position, and endeavoring to push the pipe together, she fell backwards, striking against a desk, and sustained the injuries of which she complained. Plaintiff had a verdict, and appeal was perfected to the Supreme Court, which affirmed the judgment, Reynolds, P. J., stating the rule governing such a case as follows: "The negligence which puts a fellow-being in peril of life or limb is usually held to be the proximate cause of injury to one who attempts in a prudent manner, to rescue the person in danger."

We do not object to the result, which is certainly desirable, for "Sentiments of humanity applaud the act of the plaintiff, the law commends it, and if not extremely rash or reckless, awards the rescuer redress for injuries received, without weighing with technical precision the rules of contributory negligence or assumption of risk."[9] This view has received frequent approval in this country.[10] But we think the theory upon which that result is reached is unfortunate. It seems inconsistent with the conception of proximate cause accepted in Missouri,[11] which insists upon the absence of an intervening efficient cause, for, in cases of which the case under discussion is a fair example, that intervening cause will always be present. No one would contend that the act of the plaintiff here was involuntary. It can, therefore, only serve to add to the confusion surrounding our ideas of proximate cause, which confusion Broaddus, J., so justly condemns, while the same desirable result has been reached in other cases without so stretching the doctrine of proximate cause.[12]

The cases, last cited, proceed upon the theory that, although the plaintiff voluntarily subjects himself to the dangers of the defendant's negligence, he does not lose his right to recovery for injuries he sustains therefrom, since his purpose was one which the law regards with approval —the saving of human life. The rule is strictly limited to this class of cases and is based upon considerations of policy. Had the purpose of the plaintiff been to save property he could not have recovered.[13] "It

Mo. 13; *Dickson* v. *Ry.* (1894) 124 Mo. 140; *Harrison* v. *Kansas City Co.* (1906) 195 Mo. 629; *Dean* v. *Ry.* (1906) 199 Mo. 411; *Buckner* v. *Stockyards Co.* (1909) 221 Mo. 700.

8. (1913) 157 S. W. 130.

9. Brown, J., in *Perpich* v. *Mining Co.* (Minn., 1912) 137 N. W. 12.

10. *Eckert* v. *Long Island Ry.* (1871) 43 N. Y. 502; *Linnehan* v. *Sampson* (1879) 126 Mass. 506; *Donahoe* v. *Ry.* (1884) 83 Mo. 560; *Penn. Co.* v. *Langendorff* (Ohio, 1891) 28 N. E. 172; *Gibney* v. *State* (N. Y., 1893) 33 N. E. 142; *R. R. Co.* v. *Krayenbuhl* (1896) 48 Neb. 553; *Corbin* v. *Philadelphia* (Pa., 1900) 45 At. 1070.

11. See note 8, *supra.*

12. *Eckert* v. *Long Island R. R., supra; Donahoe* v. *Ry., supra; R. R. Co.* v. *Krayenbuhl, supra.*

13. *Morris* v. *Ry.* (1896) 148 N. Y. 182, citing *Eckert* v. *Ry., supra;* Burdick's Law of Torts, p. 438, note 78, and cases cited.

is to be observed that it is only when the railroad company is about to strike a person in danger through its negligence, that a third person can voluntarily expose himself to peril in an effort to rescue such person, and recover for an injury sustained in such attempt."[14]

These cases frankly recognize the doctrine, which allows a recovery under the circumstances above described, as an exception to the general rule requiring that defendant's negligence be the proximate cause of plaintiff's injury, such exception being dictated by considerations of public policy.[15] This method of dealing with the subject seems preferable to that of the Supreme Court of Missouri in *Williams* v. *Incandescent Lamp Co.*,[16] where, as we have seen, the court reaches a similar result, but attempts to justify it as an application of the proximate cause rule.

Sometimes proximate cause is given a broader definition than that which has been generally accepted in Missouri, as, for instance, "an unbroken connection between the defendant's wrongful act and the plaintiff's injury, so that the injury was a result naturally and reasonably to be expected, either as the sole consequence of that and other causes which might reasonably have been expected to be set in motion by it, *or to act in concurrence with it.*"[17] Under this definition defendant's negligence in the principal case was the proximate cause of plaintiff's injury, but it would also have been the proximate cause, under this definition, if plaintiff had intervened, let us say, to save his own property, and yet we have seen that recovery is nowhere allowed under such circumstances. So that the formulation of a definition of proximate cause broad enough to cover the principal case leads to a definition which lacks definiteness and precision, and to which also exceptions must at once be made.

G. C. W., Jr.

RIGHT TO RECOVER FOR PHYSICAL INJURY TO PLAINTIFF'S HUSBAND.—At common law a physical injury to the wife constituted two legal wrongs.[1] There was a right of action in the wife for the injury itself. She could not sue alone and her husband joined in the action keeping the proceeds.[2] There was a second right of action and this was in the husband alone.[3] His damages were largely measured by the loss of his wife's services and by expenses incurred, but he recovered also for loss of her society and comfort, known as the right of *consortium*. These two actions in the wife and husband were entirely distinct, and a recovery for one did not bar a recovery for the other.[4]

But physical injury to the wife was not necessary to give the husband a right of action. A husband was entitled to exclusive intercourse with his wife, and the invasion of this right gave rise to a cause of action for criminal conversation.[5] Obviously here the loss of *consortium* constituted

14. Henry, J., in *Donahoe* v. *Ry.* (1884) 83 Mo. 560, 563.
15. Other exceptions dictated by similar considerations are the rule as to common carriers, recognized in many cases, that the defense of act of God cannot be pleaded where the carrier's negligence has given an occasion for natural causes to operate to plaintiff's injury, *Nugent* v. *Smith* (1876) 1 C. P. D. 423, *Vail* v. *Ry.* (1876) 63 Mo. 230; *Gleeson* v. *R. R.* (1891) 140 U. S. 435; 3 Columbia Law Review 484; and the rule embodied in the English Sales of Goods Act, § 20, and the proposed American Sales Act, § 22 (b), to the effect that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred except for such fault.
16. *Supra.*
17. Burdick's Law of Torts (3d ed.) p. 110.

1. *Smith* v. *St. Joseph* (1874) 55 Mo. 456.
2. *McKinney* v. *Western Stage Co.* (1857) 4 Ia. 420; Schouler on Husband and Wife, § 140.
3. *Russell* v. *Come* (1703) 2 Ld. Raymond 103; *Smith* v. *St. Joseph, supra*; Schouler on Husband and Wife, § 143.
4. *Smith* v. *St. Joseph, supra; Mann* v. *Rich Hill* (1888) 28 Mo. App. 497.
5. 21 Cyc. 1626, and cases cited.

the entire injury. There was no loss of services. Another instance of actionable injury was enticing away the wife. Here there was a loss of services, but the enticing away was the primary ground.[6] Also the right of action for alienation of affection, which has been frequently recognized, is not based at all upon loss of services, nor is it necessary that the wife shall have left her home.[7]

The wife at common law had no corresponding right of action either where there was a physical injury to the husband or for criminal conversation or enticing away the husband.[8] Her identity was considered as merged in that of her husband, and thus she was denied these actions. And in cases of criminal conversation and alienation of affection there was the additional ground for refusing, that the husband would be allowed in effect to recover for his own wrong.

Then came the Married Women's Acts, generally, as in Missouri, giving the wife her own earnings and the right to bring action alone for any injury which "has grown out of any violation of her personal rights."[9] The statutes have been held not to affect the husband's right of action for criminal conversation and alienation of affection.[10] On the other hand it was early held that such statutes either vest similar rights of action in the wife, or give her the privilege of enforcing such rights which previously existed but were unenforceable. The reasons for formerly denying these rights of action no longer exist. So it has been held that the wife has a cause of action for the loss of *consortium* caused by the criminal conversation of another with her husband.[11] And so in alienation of affection suits brought by wives recovery has been allowed for loss of support and *consortium*.[12]

In cases of physical injury the conception of an injury to the wife constituting two wrongs generally still survives and the husband has a right of action for loss of *consortium*.[13] This is true in Missouri where it is held that the husband still is entitled to domestic services though the wife is entitled to the earnings of her separate labor.[14] In a very few jurisdictions it is held that, the Married Women's Acts having taken away all right of service from the husband he no longer has an action for loss of *consortium* where his wife receives physical injury[15]—a result that seems difficult to sustain on principle. Where the husband can recover for the loss of *consortium* it is clear he need not be deprived entirely of his wife's society. In *Furnish* v. *Mo. Pac. R. Co.*,[16] the court said, "But the answer to the first contention is that as her husband he was entitled to her society as she was when the negligence of the defendant impaired her strength, her health, and her usefulness as a helpmate."

There are also several cases, other than those dealing with alienation of affection and criminal conversation, where the wife has been allowed to recover for loss of *consortium* and support, caused by defendant's

6. Tiffany's Persons and Domestic Relations 75 to 78.
7. *Adams* v. *Main* 3 Ind. App. 232; *Rinehart* v. *Bills* (1884) 82 Mo. 534.
8. *Doe* v. *Roe* (1890) 82 Me. 503; 21 Cyc. 1512.
9. Revised Statutes 1909, § 8309.
10. *Cross* v. *Grant* (1883) 62 N. H. 675; *Hartpence* v. *Rogers* (1898) 143 Mo. 623; *De Ford* v. *Johnson* (1911) 152 Mo. App. 209.
11. *Noland* v. *Pearson* (1906) 191 Mass. 283.
12. *Bennett* v. *Bennett* (1889) 116 N. Y. 584; *O'Gorman* v. *Pfeiffer* (1911) 130 N. Y. Sup. 77; *Claw* v. *Chapman* (1894) 125 Mo. 101; *Nichols* v. *Nichols* (1898) 147 Mo. 387.
13. 21 Cyc. 1525, and cases cited.
14. *Womach* v. *St. Joseph* (1907) 201 Mo. 467; *Elliott* v. *Kansas City* (1908) 210 Mo. 576, 582; *Kirkpatrick* v. *Railway Co.* (1908) 129 Mo. App. 524.
15. *Bolger* v. *Boston Elevated R. Co.* (1910) 205 Mass. 420; *Marri* v. *Stanford Street R. Co.* (1911) 84 Conn. 9. But see *contra*: *Garrison* v. *Sun Printing Co.* (N. Y., 1912) 150 App. Div. 689, aff'd. 207 N. Y. 1.
16. (1890) 102 Mo. 669.

wilful act. *Handermeyer* v. *Cooper*[17] was a case in which the wife was allowed to recover for loss of support and *consortium* where the husband drove her away as a result of the slander of defendant. In *Westlake* v. *Westlake*[18] the wife recovered where the defendant, over the wife's protest, sold morphine to the husband, who was addicted to its use. In our own state in *Clark* v. *Hill*[19] the wife was allowed recovery for loss of support and *consortium* where the defendant by persistent threats drove the husband insane.

For a good many years no action reached an appellate court in which the wife sued for loss of *consortium* resulting from a negligent injury to the husband. Forty years after the wife was granted her action for personal torts in New York the action of *Goldman* v. *Cohen*[20] was brought on this theory of recovery. The court said little more than that the wife's interest in her husband's life and companionship is not a property interest, that actions were permitted in the case of wilful injury merely as a matter of punishment and that there being no precedent the action could not lie. The subsequent cases in the United States on this point are very few in number and all have refused to allow recovery.[21]

In this state the point recently came up almost simultaneously in the Kansas City and St. Louis Courts of Appeals in *Stout* v. *K. C. Terminal Co.*[22] and *Gambina* v. *Coal & Coke Co.*[23] in each of which the plaintiff wife sought to recover for loss of *consortium* caused by negligent injury to the husband. It is not surprising that each court refused to allow the action inasmuch as no attempt had ever been made before in Missouri to maintain such an action. However it seems difficult to appreciate the reasoning of the courts.

The case of *Stout* v. *K. C. Terminal Co.* is the more fully considered. The main ground there for refusing the action to the wife is that the husband's right to recover for loss of *consortium* is based on his right to his wife's services. *Marri* v. *Stamford*[24] is cited on this point. The court there does make that contention but cites no authority. That case came to the conclusion that neither husband nor wife could maintain an action for loss of *consortium*, "whether the allowance was for loss of what is termed service or society or both." In this it is undoubtedly not followed—certainly not in Missouri. The authorities seem to give little countenance to the assertion that the husband's right to recover for loss of society of the wife was dependant on his right to her services. Of course there is no escape from the fact that the husband had and has the right to his wife's services, and that physical injury to the wife deprived the husband of services as well as of *consortium*, but on the other hand we have seen that there were actions (e.g. alienation of affection and criminal conversation) in which the husband was allowed to recover for loss of *consortium* only.

The court further argues that for a mere impairment of society there is no recovery, but is this not conclusively answered by the many cases, of which *Furnish* v. *Mo. Pac. R. Co.*[25] is an example, in which the husband is said to be entitled to the society of the wife as she was before the injury? The court also argues that the damages to the wife are remote, but finds

17. (1912) 25 Ohio St. 327.
18. (1878) 34 Ohio St. 621.
19. (1897) 69 Mo. App. 541.
20. (1900) 63 N. Y. Supp. 459.
21. *Fenoff* v. *N. Y. etc. R. R. Co.* (1909) 203 Mass. 278; *Brown* v. *Kistleman* (Ind., 1912) 98 N. E. 631.
22. (1913) 157 S. W. 1019.
23. (1913) 158 S. W. 77.
24. (1911) 84 Conn. 9.
25. (1890) 102 Mo. 669.

that ground rather unsatisfactory, saying: "But as the reasoning as to remoteness of claim *may not be wholly in harmony with that allowing the husband an action* notwithstanding the married women's statute for loss of her services and society, it may be more satisfactory, in order to avoid an inconsistency, to put the ground of denial of the wife's action on the fact that, having no legal claim for damages for loss of the husband's services with which to connect a loss of conjugal affection and, social comfort, it leaves these nonpecuniary rights standing as her sole cause of action based on what has been termed the sentimental side or character of rights, rights more in the nature of a *consortium* which, standing alone, has never been regarded as capable of pecuniary estimate."

The basis of the decision of *Gambino* v. *Coal & Coke Co.* is this admittedly weak argument of remoteness but just why this is not true where the husband sues for loss of society and comfort is not made clear. The court recognized the fact that it is difficult to reconcile this holding with the case of *Clark* v. *Hill, supra*, in which the wife recovered where the husband was driven insane. Reynolds, J., in a separate concurring opinion, said that *Clark* v. *Hill* should be overruled. However *Clark* v. *Hill* is consistent with the other cases involving this point as is shown herein above. A. J.

SALE OF PART OF A MASS.—Three things are essential to a sale as distinguished from a contract to sell—namely, an ascertained, existing subject-matter,[1] a present intention to pass title,[2] and an agreed price.[3] The intention to pass title may be expressly stated, or there may be certain facts that give rise to a presumption that there was a certain intention.[4] To arrive at the intention of the parties, we must look at the terms of the contract, conduct of parties and the circumstances in each case.[5] This question is one of fact, and hence one generally for the jury.[6] But certain presumptions have come to be generally accepted as aids to the determination of the parties' intention. One of them is that where there is a contract for the sale of specific goods, but the vendor is to do something to put them in a deliverable state, the parties do not intend to pass title to the goods, in their existing condition, but to the goods after they have been changed.[7] But an expressed intention contrary to such presumption overrides it.[8]

In conformity to the rule that for a present sale there must be an ascertained and existing subject-matter it is held that there cannot be a present sale of goods to be procured, or to be manufactured by the vendor.[9]

1. English Sales of Goods Act, § 16; American Uniform Sales Act, § 17; *Hamilton* v. *Clark* (1887) 25 Mo. App. 428; *Allgear* v. *Walsh* (1887) 24 Mo. App. 134; *Benedict & Burhnam M'f'g Co.* v. *Jones* (1895) 64 Mo. App. 218, 223.

2. English Sales of Goods Act, § 17; American Uniform Sales Act § 18; *Ogg* v. *Shuter* (1875) L. R. 10 C. P. 159; *Ober* v. *Carson* (1876) 62 Mo. 209, 214, where Wagner, J., said that, "the question of transfer to, and vesting title in, the purchaser, always involves an inquiry into the intention of the contracting parties; and it is to be ascertained whether their negotiations and acts show an intention on the part of the seller to relinquish all further claim as owner and on the part of the buyer to assume such control with all liabilities" *England* v. *Mortland* (1877) 3 Mo. App. 490; *Kirkely & Gundestrup Seed Co.* v. *White* (1913) 168 Mo. App. 626. For an exhaustive collection of authority see 26 L. R. A. (N. S.) 7.

3. English Sales of Goods Act, § 8; American Uniform Sales Act, § 9; *Stout* v. *Caruthersville Hardware Co.* (1908) 131 Mo. App. 520.

4. *Ober* v. *Carson, supra.*

5. *Kirkely & Gunestrup Seed Co.* v. *White* (1913) 168 Mo. App. 628, 635.

6. Williston on Sales, § 262; *Merchant's National Bank of Cincinnati* v. *Bangs* (1869) 102 Mass. 291; *Clark* v. *Shannon & Mott Co.* (1902) 117 Iowa 645.

7. *Graff* v. *Belche* (1876) 62 Mo. 400 (oats to be threshed); English Sales of Goods Act, § 18, Rule 2; American Uniform Sales Act, § 19, Rule 2.

8. *Beck & Corbet Iron Co.* v. *Holbeck* (1904) 109 Mo. App. 179, 185.

9. American Uniform Sales Act, § 5 (3), and § 76 (1) containing definition of "future goods"; *Bennet* v. *Platt* (1830) 26 Mass. (9 Pick.) 558; English Sales of Goods Act, § 5 (3), and § 62 (1) containing definition of "future goods."

But less simple problems are presented when the parties use words of present sale with regard to a certain number of unseparated units of a larger mass. And in dealing with these problems we must distinguish between the cases where the goods in the mass are fungible,[10] and where they are not.

The English view of such a transaction is that title cannot pass even when the goods are fungible.[11] English courts construe such a contract literally, and say that the parties intended the passing of title to specific units of the mass; that, so long as there is no separation, the vendee cannot point out any specific units, of which he is owner; and that it is essential to the sale that the goods be individualized in order that the right of property may attach to a specific chattel. Granted the premise that the intention of the parties was the passing of title to specific units, the English courts are correct in their conclusion that there is no sale. Missouri and some other American states follow this view.[12]

A different view prevails in some states when the contract has to do with fungible goods.[13] The leading case of *Kimberly* v. *Patchin*[14] establishes the American doctrine that a title does pass when the parties purport to sell and buy a certain number of units of a uniform mass. The courts that follow this view construe the contract liberally, and try to give it an intelligent meaning. The American docrtine recognizes that it is impossible to transfer title to specific units in such a case, but that it is possible, by treating the buyer as tenant in common with the seller, to convey to him an undivided share of the mass equal to the number of units named. It seems no doubt the intention of the parties that, "The vendee was to have the same right to the ten tons [the units named] that the vendor retained in the remaining thirty tons; and conceding such to have been the intention of the parties to the contract, why should the law disappoint that intention by an arbitrary rule of law against it?"[15] The difference between the American and the English views is in their interpretation of the intention of the parties. The courts which follow the English view refuse to consider it the intention to transfer a fractional part and make buyer and seller tenants in common. They recognize that there can be a tenancy in common where there has been a confusion of goods,[16] and where goods of the same quality have been separated and poured back into the mass.[17] In the latter case they hold title passed on separation and cannot be divested by subsequent remingling. And the possibility of persons becoming tenants in common of personal property by the conveyance of a part interest is recognized by the English law,[18] but English courts strictly construe the contract where it says a sale of a certain quantity, holding that the parties intended a transfer of title to that quantity, and did not intend a tenancy in common to be created.

It is clear that courts following the English doctrine just discussed would refuse to recognize, as constituting a present sale, a contract which

10. Defined in American Uniform Sales Act, § 76, as "goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit."
11. *Busk* v. *Davis* (1814) 2 M. & S. 39: *Gillett* v. *Hill* (1834) 2 Cromp. & M. 530.
12. *Adam Roth Grocer Co.* v. *Clements* (1896) 69 Mo. App. 446; *American Metal Co.* v. *Daugherty* (1907) 204 Mo. 71; *Com. Bank* v. *Gillette* (1883) 90 Ind. 268; *Scudder* v. *Worster* (1853) 65 Mass. (11 Cush) 573.
13. *Hurff* v. *Hires* (1878) 40 N. J. L. (11 Vroom) 581; *Waldron* v. *Chase* (1854) 37 Me. 414.
14. (1859) 19 N. Y. 330; American Uniform Sales Act, § 6, codifies the doctrine of this case.
15. *Chapman* v. *Shepard* (1872) 39 Conn. 413, 422.
16. *Spence* v. *Union Marine Insurance Co.* (1868) L. R. 3 C. P. 427.
17. *Aldridge* v. *Johnson* (1857) 7 E. & B. 885; *Graff* v. *Belche* (1876) 62 Mo. 400; *Henderson* v. *Fauch* (1853) 21 Pa. (9 Harris) 359.
18. Litt., § 321; Williams on Personal Property (16th ed.) 415; Goodeve on Personal Property (5th ed.) 9.

purported to pass title to a certain number of units mixed in a mass composed of units of different kinds. All American courts also refuse to recognize such a contract as constituting a present sale, because it is not to be supposed that the vendee intended to become tenant in common of such nonfungible mass, but it is rather to be supposed that he intended to have the units described in his contract separated from the mass before taking title to them.[19]

In the recent Missouri case of *Langsdorff* v. *Meyers et al.*[20] the vendor sold his crop of fall and winter apples of grades number one and number two, and the vendee was to gather and grade them. The question was whether the title passed before the apples were gathered. It was held that title had not passed. The decision seems to be sound and accord with the foregoing principles.. According to either the American or the English view of the sale of part of a uniform mass, the decision would be the same, because this is not a sale of part of a uniform mass, as contended by the plaintiff. It was a contract to sell part of a mass of dissimilar units. The court in its opinion says, "* * * defendants were not to take a part of a larger mass of exactly like kind. They were to select a part of a larger mass of unequal quality, and until selection the title does not pass." W. B.

QUASI CONTRACTUAL RECOVERY FOR SERVICES RENDERED UNDER A BROKEN CONTRACT.—There is much difference of opinion as to what, if any, compensation shall be paid to one who has performed some service to the benefit of another, but who, either through his own wilful act or the wilful act of his employer, has failed to comply fully with the requirements on which he has agreed his compensation shall depend.

When the servant wilfully abandons his employment without just cause, it seems that he should be refused any compensation for the work he has done. He has seen fit to define his rights to compensation by the terms of a contract with his master, and should be required to comply with his contract in order to entitle himself to any compensation. The law should not raise a new obligation on the part of a master to pay his servant for part performance, when the servant has it in his power to comply with the contract and entitle himself to compensation under it. The rule in England has always been that there could be no recovery by the servant who wilfully breaches his contract.[1] Although such a rule is not universally followed in this country, it is followed by a majority of American jurisdictions.[2] The case of *Britton* v. *Turner*[3] represents the other view. That case allowed a recovery to the extent of the benefit derived by the master less any damage to the master because of plaintiff's breach. The case has won the approval of the courts of several states.[4] which consider that this rule more nearly does justice than the strict English rule. But, justice should not demand that a new remedy be created for a servant who has a complete remedy on his contract by fulfiling its terms. Such creation of a new remedy would be in direct

19. *Hutchinson* v. *Hunter* (1847) 7 Pa. (Barr) 140; *Foot* v. *Marsh* (1873) 51 N. Y. 288; Burdick on Sales (3d ed.) 54; Williston on Sales, § 159.
20. (1913.) 157 S. W. 85.

1. *Sinclair* v. *Bowles* (1829) 9 B. & C. 92; *Spain* v. *Arnott* (1817) 2 Starkie 256; *Turner* v. *Robinson* (1833) 6 C. & P. 15; *Amor* v. *Fearon* (1839) 9 A. & E. 548; *Turner* v. *Mason* (1845) 14 M. & W. 116.
2. *Housell* v. *Erickson* (1862) 28 Ill. 257; *Swanzy* v. *Moore* (1859) 22 Ill. 63; *Henderson* v. *Stile* (1853) 14 Ga. 135; *Stark* v. *Parker* (Mass., 1824) 1 Pick. 267; *Jennings* v. *Camp* (N. Y. 1816) 13 John 94; *Abernathy* v. *Black* (Tenn., 1865) 2 Coldw. 314.
3. (1834) 6 N. H. 481.
4. *Purcell* v. *McComber* (1881) 11 Neb. 209; *Dunbar* v. *Baker* (1878) 21 Kan. 99; *Pixlee* v. *Nichols* (1859) 8 Iowa 106; *Riggs* v. *Horde* (1860) 25 Tex. (Supp.) 456.

opposition to the agreement of the parties. Further, the doctrine of *Britton* v. *Turner* has a tendency to encourage wilful breaches of contract, a thing the courts should try to discourage.

Where the servant is discharged by his master for just cause there is a closer division of authority . There is little reason why a servant, who by his wilful misconduct gives his master cause to discharge him, should be allowed a quasi contractual recovery while a servant who wilfully abandons his employment is refused such recovery, but several courts make a difference in these cases.[5]

Where the master wrongfully and without just cause discharges the servant, or the servant quits for just cause, the courts almost universally allow a recovery for part performance by the servant,[6] but the recovery is upon different theories in England and the United States. English courts are strict in their requirement that so long as there is a contract in existence recovery must be on the contract. They require the act of the master to be such an act as to amount to a repudiation of the contract. This repudiation is treated by the courts as an offer of rescission, which may be accepted by the servant. The contract being thus rescinded the English courts feel themselves at liberty to allow a recovery in *quantum meruit.* Baron Parke states the English view in *Ehrensperger* v. *Anderson*[7] as follows: "In order to constitute a title to recover for money had and received, the contract on the one side must not only be performed or requested to be performed, but there must have been something equivalent to saying, 'I rescind this contract'—a total refusal to perform it, or something equivalent to that, which would enable plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'" The theory of the American courts is generally more liberal, allowing a recovery in quasi contracts against the master who wrongfully discharges his servant even though there is a contract in existence. This view allows an alternative remedy to the wronged servant without a consensual rescission, and is adopted in almost all states. The servant's recovery for breach of contract may be the same as that in *quantum meruit,* but it is based on a different theory. The recovery for the breach of the contract is the amount plaintiff has been damaged by being prevented from completing his contract. It is harder to determine such damage than to find the reasonable value of services rendered. Further, the defendant by breaking his contract has exhibited an intention to disregard the contract, and a recovery for services rendered best fulfils the intention of the parties, at least in part.

The Missouri law on these questions was considered by the Kansas City Court of Appeals in the recent case of *Franklin* v. *Kast.*[8] Defendant, being desirous of purchasing a new car if he could dispose of his old one, agreed with plaintiff that if he would sell defendant's old car, defendant would buy a new one. Plaintiff sold the old one but defendant refused to buy a new one. The court allowed a recovery in *quantum meruit* for the plaintiff's services in selling the old car. The court in a *dictum* said that, where a plaintiff under a special contract has performed a service

5. *Newman* v. *Reagan* (1879) 63 Ga. 755; (1880) 65 Ga. 512; *Abendpost Co. v. Hertel* (1896) 67 Ill. App. 501; *Hunter* v. *Litterer & Cabler* (Tenn., 1873) 1 Bax. 168. Compare with cases of same jurisdictions under note 2, *supra.*

6. *Emmens* v. *Elderton* (1853) 13 C. B. 495, 509; *Goodman* v. *Pocock* (1850) 15 Q. B. (A. & E.) 576; *Prickett* v. *Badger* (1856) 1 C. B. N. S. 296; *Planche* v. *Colburn* (1831) 8 Bing 14; *Britt* v. *Hays* (1857) 21 Ga. 157; *Old Dominion Mining & Smelting Co* v. *Andrews* (1899) 6 Ariz. 205; *James* v. *Parson* (1904) 70 Kan. 156; *Mullaly* v. *Austin* (1867) 97 Mass. 30; *Hemminger* v. *Western Assurance. Co.* (1893) 95 Mich. 355; *Welch* v. *Livingston* (1900) 67 N. Y. Supp. 149; *Colburn* v. *Woodworth* (N. Y., 1860) 31 Barb. 381.

7. (1848) 3 Exch. 148.

8. (1913) 157 S. W. 841.

which is of benefit to defendant, and has failed fully to comply with his contract, he can recover in *quantum meruit* the value, not to exceed the contract price, less damage caused by the breach.

As to the decision in that case there seems to be no question. There was a complete refusal to perform, which under the English rule would be sufficient to amount to a repudiation. Under the American view it constituted a substantial breach on the part of the employer, and gave the employee the right to elect to sue in *quantum meruit*, or for the breach of the contract. The earlier Missouri cases support the actual decision in the case (as distinguidshed from the *dictum*) whether the relation between plaintiff and defendant be that of master and servant,[9] or principal and agent,[10] when the agent has expended time and money in preparing for the performance of his agency.

In support of the *dictum* the court cites the case of *Yeats* v. *Ballentine*.[11] That case was one in which plaintiff agreed to do certain plumbing work according to specifications. He did not properly do the work and defendant refused to pay. Plaintiff was allowed a recovery in *quantum meruit*. Such a contract is generally classed as a building contract. There is a similar division of authority in such cases as was found to exist in the cases of service contracts, some courts allowing the breacher to recover, but probably the majority refusing to allow such recovery.[12] Missouri in a long line of cases has allowed the breacher of *such* a contract to recover for part performance.[13] The Missouri courts, however, have refused to apply the doctrine of *Britton* v. *Turner* in the case of service contracts.[14] The position of the Missouri courts with regard to service contracts was thus stated by Rombauer, J.:[15] "There is no hardship in parties being held to their contracts. Fair dealing between man and man seems to require that a person should be aware that a wilful violation of his own obligation releases the other party to the contract from corresponding obligations. No rule of ethics seems to demand that persons should be released from forfeiture wantonly and wilfully incurred. * * * To hold that a party in such event, can still recover would be to hold that the law raises an implied contract in direct opposition to the contract made by the parties themselves." The *dictum*, therefore, in *Franklin Motor Car Co.* v. *Kast* would seem to be in conflict with the established law in this state as to service contracts, being based upon authority with regard to the so-called building contracts, and so brings sharply to our attention the diametrically opposite results reached by the Missouri courts when breachers of these very similar kinds of contracts are seeking to recover quasi contractually.

K. B.

LIABILITY OF CITY FOR DEATH OF CHILD DROWNED IN UNGUARDED POND IN A CITY PARK.—Generally the owner of real estate is under no duty to keep his grounds in such condition as not to endanger the safety of trespassers.[1] His duty is "not to actively attack them, not to set

9. *Dictum* in *Ream* v. *Watkins* (1858) 27 Mo. 516; *Ehrlich* v. *The Aetna Life Ins Co.* (1885) 88 Mo. 249; *McCormick* v. *Fidelity & Guar Co.* (1905) 114 Mo. App. 460.
10. *Glover* v. *Henderson* (1893) 120 Mo. 367, 377.
11. (1874) 56 Mo. 530.
12. Woodward, Quasi Contracts, § 175.
13. *Lee* v. *Ashbrook* (1851) 14 Mo. 379; *Eyerman* v. *Cemetery Assn.* (1876) 61 Mo. 491; *Creamer* v. *Bates* (1872) 49 Mo. 525; *Marsh* v. *Richards* (1859) 29 Mo. 99, 105.
14. *Earp* v. *Tyler* (1881) 73 Mo. 617; *Linder* v. *Brewery & Ice Co.* (1908) 131 Mo. App. 680; *Strach* v. *McClintock* (1907) 128 Mo. App. 368; *Henson* v. *Hampton* (1862) 32 Mo. 408; *Aaron* v. *Moore* (1863) 34 Mo. 79.
15. *Gruetzner* v. *Aude Furniture Co.* (1887) 28 Mo. App. 263.

1. *Dobbins* v. *M. K. & T. R. Co.* (Tex., 1897) 41 S. W. 62; *West* v. *Shaw* (Wash., 1911) 112 Pac. 243; *Henry* v. *Diskow Mining Co.* (Mo. App., 1910) 128 S. W. 841;

traps for them, and not to subject them to harm through wilful and reckless misconduct."[2]

The landowner is liable to licensees only for gross negligence,[3] but is under a duty to use ordinary care towards those invited on his premises, either expressly or impliedly.[4]

In this latter division are those cases involving the so-called "turntable doctrine." As was well stated in a Kansas case,[5] "the common law does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human and animal kinds, without taking reasonable precautions to insure the safety of such as may be attracted thereby to his premises. To maintain in one's property enticements to the ignorant or unwary is tantamount to an invitation to visit, to inspect and to enjoy; and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place, follows as justly as though the invitation had been express."

This is the basis for the decisions in the so-called "turntable cases."[6] This doctrine, which is admittedly a very humane rule, though perhaps not strictly logical, has been applied in cases where the injuries were caused by agencies of a totally different character from turntables, or even from machinery of any kind. Thus an Illinois court has applied the doctrine to a case where a child fell into an unguarded pond on a lot controlled by the defendant.[7] In a Pennsylvania case[8] recovery was allowed where a loading platform fell on a child; and similarly a city was held liable in a Mississippi case,[9] in which it had not guarded an excavation which it had made.

But in a Missouri case[10] the doctrine was not applied where a child fell down a hay chute. Similarly an Iowa case[11] did not allow recovery where a child was injured in machinery in a canning factory annex. In a Michigan case[12] a street car left unguarded was held not to be so attractive to children that a child injured by it could recover, and a Missouri case[13] would not apply the doctrine where a child was injured by a lumber pile falling on him. A Tennessee case[14] would not allow a boy to recover

Klienberg v. *Schwem* (1909) 119 N. Y. Supp. 239; *Sutton* v. *West Jersey etc. Ry. Co.* (N. J., 1909) 73 Atl. 256; *Kelly* v. *Benas* (1909) 217 Mo. 1.

2. *McDermott* v. *Benke* (1912) 256 Ill. 401; *Butler* v. *Ry. Co.* (Mo. App., 1911) 136 S. W. 729; *Gordon* v. *Roberts* (Cal., 1912) 123 Pac. 288.

3. *Upp* v. *Darner* (Iowa, 1911) 130 N. W. 409; *Stelter* v. *Cordes* (1911) 130 N. Y. Supp. 688; *Hill* v. *President & Trustees* (Or., 1912) 121 Pac. 901; *C. C. C. & St. L. Ry. Co.* v. *Jones* (Ind., 1912) 99 N. E. 503; *Pentell* v. *P & R. Coal & Iron Co.* (1912) 256 Ill. 110.

4. *Newingham* v. *J. C. Blair Co.* (1911) 232 Pa. 511; *Reynolds* v. *Ry. Co.* (Mo. App., 1912) 142 S. W. 1097; *Christopher Co.* v. *Russell* (Fla., 1912) 58 So. 45; *Marston* v. *Reynolds* (1912) 211 Mass. 590; *Graham* v. *Shoe Co.* (Mo. App., 1912) 147 S. W. 165; *Petty* v. *Stiebins* (1911) 164 Ill. App. 439; *Purtell* v. *P. & R. Coal & Iron Co., supra.*

5. *Price* v. *Water Co.* (1897) 58 Kan. 551.

6. *Ry. Co.* v. *Stout* (1873) 17 Wall. 657; *Koons* v. *St. Louis, etc. R. R. Co.* (1877) 65 Mo. 476; *U. P. Ry. Co.* v. *Dunden* (1887) 37 Kan. 1; *San Antonio etc. Ry. Co.* v *Morgan* (Ind. Ter., 1898) 45 S. W. 141; *Berry* v. *St. Louis, etc. R. R. Co.* (1908) 214 Mo. 215; *Lewis* v. *C. C. C. & St. L. Ry. Co.* (Ind., 1908) 84 N. E. 23; *Stallery* v. *Cicero & P. St. Ry. Co.* (Ill., 1910) 90 N. E. 709. *Contra: Thomason* v. *Son. Ry.* (1902) 113 Fed. 80; *Turess* v. *N. Y. etc. & Western R. R. Co.* (1898) 61 N. J. L. 314; *Walker's Admrs.* v. *Potomac, etc. R. Co.* (Va., 1906) 53 So. 113; *Wheeling, etc. R. Co.* v. *Hawly* (Ohio, 1907) 83 N. E. 66; *Swarts* v. *Akron Water Works Co.* (Ohio, 1907) 83 N. E. 66; *Reid* v. *Harmon* (Mich., 1910) 125 N. W. 761; *Berg.* v. *Duluth etc. Ry. Co.* (Minn., 1910) 126 N. W. 1095.

7. *City of Pekin* v. *McMahon, Admr.* (1895) 154 Ill. 141.

8. *Hydraulic Wks. Co.* v. *Orr* (1877) 83 Pa. 332.

9. *Mackey* v. *Mayor etc. of Vicksburg* (1887) 2 So. 178.

10. *Marcheck* v. *Klute* (1908) 133 Mo. App. 280.

11. *Brown* v. *Rockwell City Canning Co.* (1906) 110 N. W. 12.

12. *Kammier* v. *City Elec. Ry. Co.* (1898) 116 Mich. 306.

13. *Kelly* v. *Benas* (1909) 217 Mo. 1.

14. *Louisville etc. R. Co.* v. *Ray* (1911) 134 S. W. 858.

who had fallen off a freight car on which he had climbed, and an Illinois case[15] held that a coal wagon in use was not an attractive object within the meaning of the "turntable doctrine."

A Utah case[16] would restrict the application of the doctrine to instances in which the machinery was at rest, "not being used in the course of business."

As we have seen, by some courts the doctrine has been applied to "places attractive to children,"[17] as distinguished from "machinery attractive to children," and such an application was attempted in the recent Missouri case of *Clapp* v. *City of St. Louis*.[18] In this case the plaintiffs sought to recover for the death of their minor son, who was drowned in a pool in Forest Park. The evidence was undisputed to the effect that the pool was unguarded. Woodson, J., in his opinion said, "The uncontradicted evidence shows that Forest Park was a public resort for men, women and children, and that thousands visited it daily, especially children, boys and girls; also that they were in the habit of * * * playing on and about the steps at the mouth of the sewer, where there was a pool of water from eight to twelve feet deep in the center. * * * This pool had existed for years, and unquestionably the city had knowledge of its existence. * * * The park being a public place, and containing this unguarded pool of water, and frequented by many children, young and indiscreet, at the invitation of the city, who we all know are greatly attracted by pools of water, bubbling brooks and running streams, made the situation highly attractive and dangerous to any and all children who might approach the place and play in or about the stream and pool." Thus the place was attractive to children. But as Woodson, J., points out, the turntable doctrine did not apply. He says in part: "That rule has no application whatever to this case or the class of cases to which it belongs. In this case the injury occurred, and of necessity must occur, at a place where the injured party had both the legal and moral right to be, while in the turntable cases the injury occurred, and of necessity must have occurred, on private property, a place where the injured person had no legal right to be, but was induced to go there by an attractive piece of machinery or other matters equally attractive to children." Thus since the deceased in the principal case was not a trespasser the turntable cases do not apply. But a city must use such care as a prudent person would in guarding such dangerous conditions as here existed,[19] and in the absence of such reasonable precautions the city is liable. Hence the case undoubtedly reaches the correct result in allowing a recovery.

C. B. R., JR.

15. *Scott* v. *Peabody* (1910) 153 Ill. App. 103.
16. *Smalley* v. *Rio Grande, etc. Ry. Co.* (1908) 34 Utah 423
17. *Kane* v. *Erie R. Co.* (1906) 96 N. Y. Supp. 810; *Ann Arbor R. Co.* v. *Kinz* (1901) 22 Ohio Cir. Clt. R. 227; *Gilmartin* v. *City of Phila.* (1902) 201 Pa. 518; *Brown* v. *Salt Lake City* (Utah, 1908) 93 P. 570; *Palmer* v. *Oregon Short Line R. Co.* (1908) 34 Utah 446; *Smalley* v. *Rio Grande Western Ry. Co.* (1908) 34 Utah 423; *Briscoe* v. *Henderson Lighting & Power Co.* (1908) 62 S. E. 600; *Anderson* v. *Fort Dodge, D. M. & S. R. Co.* (Iowa ,1911) 130 N. W. 391. *Contra. Del. L. & W. R. Co.* v. *Reich* (1898) 61 N. J. L. 635; *Coleman* v. *Roberst Graves Co.* (1902) 78 N. Y. S. 893; *Smith* v. *Jacob Dold Pack Co.* (1899) 82 Mo. App. 9; *Schmidt* v. *Kansas City Distilling Co.* (1886) 90 Mo. 284; *Stendal* v. *Boyd* (1898) 73 Minn. 53; *Smith* v. *Hopkins* (1902) 120 Fed. 921.
18. (1913) 251 Mo. 345.
19. *Carey* v. *Kansas City* (1905) 187 Mo. 715; *City of Denver* v. *Spencer* (1905) 34 Colo. 270.