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# Notes on Recent Missouri Cases

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# NOTES ON RECENT MISSOURI CASES

TORT LIABILITY OF AN AUTOMOBILE OWNER. HAYS v. HOGAN.[1]—This was an action against the defendants, father and son, to recover for a death caused by the negligence of the defendant son in operating an automobile. The machine was owned by the defendant father who had purchased it for general family use. The son lived with his father's family and was permitted to use the machine for his own pleasure and was so using it when the accident occurred. The Springfield Court of Appeals decided that the son was the agent and servant of his father operating the machine in his father's business and that the latter was therefore liable for the acts of the son.[2]

*Is a father, the owner of an automobile kept for and used by his family, liable for the torts of a member of the family committed while operating the automobile purely for his own pleasure and in the father's absence?*

1. (1914) 165 S. W. 1125.
2. Plaintiff had a verdict in the circuit court but a new trial was awarded by the trial judge on two grounds, one of which was, that he was not clear as to the liability of the father under the law and evidence. Upon appeal the Springfield Court of Appeals reversed the order for a new trial and directed judgment to be entered for the plaintiff, but Sturgis, J., upon a motion for a rehearing changed his views and had the case certified to the Supreme Court.

The relation of parent and child does not in itself involve the relation of master and servant.[3] And the father is not liable because of having entrusted a dangerous instrumentality to another.[4]

"The authorities are in accord in holding that in an action based on the negligent running of an automobile the owner of the car who was not present at the infliction of the injury cannot be held liable except it be shown that the person in charge not only was the agent or servant of the owner but also was engaged, at the time, in his master's business."[5] There are three classes of cases involving a parent's liability in which this rule is applied: first, where an injury has occurred to the plaintiff through the negligence of a hired chauffeur, acting at the request of a member of the owner's family whose directions he has been accustomed to obey; second, where an injury occurs while a member of the family is acting as chauffeur for other members of the family whose directions he has been accustomed to obey; and, third, where there is a permissive use of a family car by a member of the owner's family for his own pleasure during which the injury occurs.

I. The father-owner is liable in the first class of cases.[6] The court in *Winfrey* v. *Lazarus*,[7] held, in such a case, that the chauffeur was acting within the scope of his employment since the evidence showed that the owner had left his machine and chauffeur at his daughter's disposal and that her orders were equivalent to the master's. *Cohen* v. *Borgnecht*,[8] and *Moon* v. *Matthews*,[9] are in accord with the Missouri case. These cases are based on the proposition that one may delegate the direction of his servants to another, and when the servants act under those directions they are obeying their master's orders and engaged in his business. However the cases in this first class are to be distinguished from *Hays* v. *Hogan* and other cases of the third class.[10]

3. *Needles* v. *Burk* (1884) 81 Mo. 572; *Basset* v. *Riley* (1908) 131 Mo. App. 676; 111 S. W. 596. Nor does the relation of husband and wife create the relation of master and servant. *Farley* v. *Stroch* (1896) 68 Mo. App. 85; *Thompson* v. *Kehrman* (1895) 60 Mo. App. 488. Of course, if an automobile owner entrusts his car to an incompetent person, he is liable for resulting injuries for the owner's act in that case constitutes negligent use of the machine. See cases cited in note 5.

4. It is universally held that an automobile is not, *per se*, a dangerous instrumentality. See cases cited in note 5.

5. *Daily* v. *Maxwell* (1911) 152 Mo. App. 415, 133 S. W. 351; *Stewart* v. *Baruch* (1905) 93 N. Y. S. 161; *Clark* v. *Buckmobile Co.* (1905) 94 N. Y. S. 771; *Reynolds* v. *Buck* (1905) 127 Iowa 601; *Jones* v. *Hoge* (1906) 47 Wash. 663; *Patterson* v. *Kates* (1907) 152 Fed. 481; *Cunningham* v. *Castle* (1908) 111 N. Y. S. 1057; *Howe* v. *Leighton* (1910) 75 N. H. 601.

6. Cases in the first and second classes are often cited in cases of the third class as holding the father-owner liable under the facts of the third class.

7. (1908) 148 Mo. App. 388, 128 S. W. 276.

8. (1910) 144 N. Y. S. 388. The decision was put on the ground that the chauffeur was not only in the employ of the defendant and subject to his control but was also acting in obedience to his general orders.

9. (1910) 227 Pa. St. 488.

10. In *Winfrey* v. *Lazarus*, the decision was rested squarely on the ground of delegated authority. In *Cohen* v. *Borgnecht* (1910) 144 N. Y. S. 388, 400,

II. In *McNeal* v. *McKain*,[11] a son of the owner was acting as chauffeur for his sister and a family guest. It was held that the son was not performing a service independent of his father but that he was a servant acting under his master's orders, just as the hired chauffeur in the first class of cases, and that the father-owner was liable. *Stowe* v. *Morris*,[12] and *Smith* v. *Jordan*,[13] are in line with *McNeal* v. *McKain*. The father is liable because the request by a member of the family, under the facts, is equivalent to a direction by the owner to his son, as his hired man, to perform for him a service. The cases of this class are also to be distinguished from *Hays* v. *Hogan* and other cases of the third class.[14]

III. By way of *dictum* in *Daily* v. *Maxwell*,[15] it was said, "Should we regard the relationship between the two defendants (father and son) merely as that of owner and chauffeur—master and servant—the owner should not be held liable for the negligence of the chauffeur since the evidence shows beyond question that the latter was using the machine merely for his own pleasure." Continuing, the court said the boy was more than a mere chauffeur; that he was the son of the owner using the car with his consent and for one of the uses for which the vehicle was kept; and concludes, "that in running the car with the consent of his father and within the scope of family uses, [the boy] was the agent and servant of his father." The same court in *Marshall* v. *Taylor*,[16] apparently approved the *dictum* of *Daily* v. *Maxwell*, but it might well have relied upon the defendant's failure to discharge the *prima facie* case made by the plaintiff and have reached the same result.[17]

it was said, "While the authorities hold that where even a member of the owner's family or an employee borrows an automobile and uses it for his own purpose the owner cannot be held liable, I am of the opinion that said authorities do not apply to the case at bar."

11. (1912) 33 Okla. 449, 126 Pac. 742.
12. (1912) 147 Ky. 386, 144 S. W. 52.
13. (1912) 211 Mass. 269, 97 N. E. 761.
14. In *McNeal* v. *McKain*, the court indicates the distinction in this statement, "We are not to be understood as here approving the length to which the rule is extended in that case [*Daily* v. *Maxwell*, which holds the father-owner liable in a case of the third class] for it is not essential to determine that question in order to dispose of this case." *Stowe* v. *Morris* does not distinguish the cases but might well have done so. It is said in *Smith* v. *Jordan*, "If the act is not done by the son in furtherance of his father's business but for his own pleasure the father is not liable."
15. (1911) 152 Mo. App. 415, 133 S. W. 351.
16. (1913) 168 Mo. App. 240, 153 S. W. 527.
17. In *Shamp* v. *Lambert* (1909) 142 Mo. App. 567, it was held that the plaintiff made out a *prima facie* case against a vehicle owner by showing his ownership, and the burden is then on the defendant to show that it was not being used in his business. Therefore, since the evidence in *Marshall* v. *Taylor* failed to show that the son was using the machine for his own pleasure, the father might well have been held liable without relying upon *Daily* v. *Maxwell*. This doctrine of *prima facie* case by proof of ownership, was mentioned by the court in *Hays* v. *Hogan*, but it is inapplicable to that case because the undisputed evidence was that the son was using the automobile for his own pleasure. If the jury disbelieved it, as the court intimated in order to bring the case within the rule of *Shamp* v. *Lambert*, still the trial judge could properly grant an order for a new trial because he thought the *prima facie* case rebutted by the defendant's evidence.

In *Doran* v. *Thomsen*,[18] the father-owner was held not liable and in disapproving an instruction that the jury should regard the pleasure of the family as the business of the father, in a case of the third class, the court said, "It bases the creation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons, that such use must be in the furtherance and not apart from the master's service and control, and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs." *Maher* v. *Benedict*,[19] *Reynolds* v. *Buck*,[20] *Tanzer* v. *Read*,[21] *Parker* v. *Wilson*,[22] and *Heissenbuttel* v. *Meagher*,[23] are in line with *Doran* v. *Thomsen* and *contra* to *Hays* v. *Hogan* and *Daily* v. *Maxwell*. *Davis* v. *Littlefield*,[24] *Birch* v. *Abercrombie*,[25] and *Keyser* v. *Van Neat*[26] hold the father-owner liable.

The statement from *Doran* v. *Thomsen*, above-quoted, points out the fallacy of the Missouri cases. The creation of the relation of master and servant should not be based upon the purpose which the parent had in mind in buying the automobile and the permissive use by a member of his family. One might keep an automobile for the use of the members of a club, the students of a certain school, the residents of a certain town, or for the general public; yet who will say in case he permits such persons to use the machine and they injure a third party, that the relation of master and servant existed, and that in using the automobile for one of the purposes for which it was bought, the club-man or the student, or a member of the general public was in the business of the owner and that he is, therefore, liable for their acts?[27]

If public interest demands that ownership coupled with a permissive use of an automobile by a member of the owner's family be made a basis of liability for injuries to third parties,[28] this result can be reached only by a departure from the established law of agency.

18. (1908) 76 N. J. L. 754.
19. (1908) 108 N. Y. S. 228.
20. (1905) 127 Iowa 601.
21. (1914) 145 N. Y. S. 708.
22. (Ala., 1912) 60 So. 151. In this case the authorities are reviewed and the classes herein made recognized. In commenting on *Daily* v. *Maxwell* (third class), *Stowe* v. *Morris* (second class) and *Moon* v. *Matthews* (first class) the Alabama court said, "The first case is closely in point and clearly holds for appellant. In the second, there were members of the family other than the driver in the machine. The third may be discriminated on the very substantial ground that the machine was being operated by a driver regularly employed for the purpose." The court then adopts the rule of *Doran* v. *Thomsen* holding the father-owner not liable.
23. (1914) 162 N. Y. App. Div. 752.
24. (S. C., 1914) 81 S. E. 487.
25. (1913) 74 Wash. 486, 133 Pac. 1020.
26. (Minn., 1914) 146 N. W. 1091.
27. See 28 Harvard Law Review 734.
28. 75 Central Law Journal 43.

It is submitted that Sturgis, J., was right in holding *Hays* v. *Hogan* in conflict with *Walker* v. *Wabash Railroad*,[29] and *Garretson* v. *Duenckel*.[30] L. W.

HUSBAND'S LIABILITY FOR WIFE'S TORTS. CLAXTON V. POOL.[1]—As a consequence of the common law conception of husband and wife as a unity, the husband was made liable for all torts of the wife, whether committed before or during coverture. When committed under the husband's coercion or when, the act being done in the husband's presence, the law would raise a presumption of coercion, the husband alone was liable; when committed with the authorization of the husband, but in his absence, both were jointly liable; when committed in the husband's absence, and without his direction or instigation, or when the presumption arising from his presence was rebutted, the husband and wife were liable together, though the tort was considered that of the wife alone.[2] Various incidents of the marriage relation have been assigned as reasons for this doctrine, such as the husband's absorption of the wife's property,[3] his power and duty to control the wife,[4] and the wife's legal incapacity to sue and be sued.[5]

In some jurisdictions, statutes have expressly abrogated or limited the common law rule.[6] Generally, however, the rule exists, except in so far as it is impliedly affected by the statutory conferment upon the wife of the capacity to sue and be sued as a *femme sole*, and of the ownership and control of her separate property. In a number of jurisdictions, it is held that such statutes have impliedly abolished the rule of the husband's liability by taking away the reasons which supported it.[7] Perhaps the more generally accepted view, however, is that the courts, in accordance with the principle of strict construction of statutes in derogation of the common law, should refuse to infer the abolition of the long-established rule, the precise reasons for which are uncertain.[8] But most authorities agree that the husband is

29. (1894) 121 Mo. 575, 26 S. W. 360.

30. (1874) 50 Mo. 104. This and the case of *Walker* v. *Wabash Railroad* follow the well-established rule of agency that the agent must be engaged in the business of his master else the master is not liable for his acts.

1. (1914) 167 S. W. 623.

2. Schouler, Domestic Relations, § 75; *Dailey* v. *Houston* (1874) 58 Mo. 361; *Merrill* v. *City of St. Louis* (1882) 12 Mo. App. 466.

3. *Martin* v. *Robson* (1872) 65 Ill. 129; *Norris* v. *Corkill* (1884) 32 Kan. 409; *Schuler* v. *Henry* (1908) 42 Col. 367, 94 Pac. 360.

4. *Nichols* v. *Nichols* (1898) 147 Mo. 387, 48 S. W. 947; *McQueen* v. *Fulgham* (1864) 27 Tex. 463.

5. *Capel* v. *Powell* (1864) 17 C. B. (N. S.) 744.

6. See 1 Stimson, American Statute Law (Supp.) § 6404, and cases cited in 14 L. R. A. (N. S.) 1003.

7. *Martin* v. *Robson* (1872) 65 Ill. 129; *Norris* v. *Corkill* (1884) 32 Kan. 409; *Lane* v. *Bryant* (1896) 100 Ky. 138, 37 S. W. 584.

8. *Nichols* v. *Nichols* (1898) 147 Mo. 387, 48 S. W. 947; *Morgan* v. *Kennedy* (1895) 62 Minn. 348, 64 N. W. 912; *Seroka* v. *Kattenberg* (1886) L. R. 17 Q. B. D. 177. Upon the general subject of this paragraph, see collection of cases in 14 L. R. A. (N. S.) 1003 and 25 L. R. A. (N. S.) 840.

no longer liable for such torts of the wife as are directly connected with the care and management of her separate estate.[9]

The Missouri courts have refused to infer the abolition of the common-law rule from statutes[10] giving the wife the ownership and control of separate property, and permitting suit against her alone and the enforcement of judgments against her separate property.[11] In *Nichols* v. *Nichols*,[12] the court, in reaching this conclusion, construed the statute[13] exempting the husband's property from "debts and liabilities" incurred by the wife before marriage as having relieved the husband of liability for ante-nuptial torts, and declared that this partial abrogation of the common law rule negatived an intention to abrogate the whole; it was asserted that the husband's common law liability rested not alone upon his absorption of the wife's property, but also upon his power and duty to control the conduct and actions of the wife, and that, this reason remaining, the rule was not without foundation. This case and later ones[14] approving it leave no doubt as to the continuance of the general rule of the common law in Missouri.

A novel exception to the rule is now introduced by the Springfield Court of Appeals in the case of *Claxton* v. *Pool*,[15] which has been certified to the Supreme Court on the dissent of Robertson, P. J. Judgment was rendered in the circuit court against the defendants, husband and wife, for the alienation of the affections of the plaintiff's husband. The evidence showed that the defendant wife had maintained improper relations with the plaintiff's husband, which resulted in the latter's separation from the plaintiff. Rumors of his wife's misconduct had reached the defendant husband, who, protesting his wife's innocence, gave them no credence. The Court of Appeals affirmed the judgment as to the wife but reversed it as to the husband. The evidence was insufficient to hold the latter except upon the husband's common-law liability for the wife's torts, and he was exempted from that liability on the ground that his wife's conduct had violated her marital duties and had thereby inflicted upon the husband an injury equal to or greater than any done the plaintiff. The court declared that "a husband is not liable and has never been held liable at common law for the wrongs of his wife to a third person by reason of her conduct where such conduct is also a violation of her marital duties to her husband."

9. *Rowe* v. *Smith* (1871) 45 N. Y. 230; *Wolff & Co.* v. *Lozier* (1902) 68 N. J. L. 103, 52 Atl. 303; Pomeroy, Remedies and Remedial Rights, §§ 320, 321, and cases cited; *Flesh* v. *Lindsay* (1892) 115 Mo. 1, 21 S. W. 907, cited in 14 L. R. A., *supra*, as opposed to this rule.
10. Revised Statutes 1909, §§ 8304, 8309.
11. *Wirt* v. *Dinan* (1891) 44 Mo. App. 583; *Nichols* v. *Nichols* (1898) 148 Mo. 387, 48 S. W. 947; *Taylor* v. *Pullen* (1899) 152 Mo. 434, 53 S. W. 1086; *Bruce* v. *Bombeck* (1899) 79 Mo. App. 231.
12. (1898) 148 Mo. 387, 48 S. W. 947.
13. Revised Statutes 1909, § 8310.
14. Supra, note 11.
15. Supra, note 1.

Admitting, as does the court, that the husband's liability is well settled in this State as a general principle, it seems that neither reason nor justice demands an exception simply upon the ground of equal or greater damage to the husband. If the basis of the general rule is, as announced in *Nichols* v. *Nichols*, the husband's duty to control the wife, should he be any less responsible to a third person for her conduct simply because that conduct resulted in injury to himself as well as to the third person? Suppose a wife slanderously accuses her husband and a woman, A, of having had improper relations. Apparently, the same principle would exempt the husband, in an action for slander brought by A, since he had suffered equal injury with A. Yet no reason that may be advanced in support of the general rule will permit of an exception in such a case; nor does it seem just that the husband should be allowed to set up his damages against those of the plaintiff so as to deprive the latter of a remedy she admittedly would have, had she been the only one harmed by the wife's wrongful act. Other cases might be supposed which would work a more palpable injustice to injured third parties. If it is a hardship upon the husband to hold him liable in such cases, the remedy lies in the repudiation of the general rule, rather than in the making of seemingly arbitrary exceptions.

The court, to support the principle of its decision, invokes the aid of cases holding that the husband is not liable for necessaries supplied the wife while she is living apart in adultery.[16] There does not seem to be as good reason for holding that the violation by the wife of her marital duties should excuse the husband from liability for her torts as for holding that it relieves him from liability for necessaries. The latter liability is imposed chiefly to insure the performance of the husband's duty to the wife,[17] while the liability for torts is imposed primarily for the protection and benefit of third persons, and should not be cut off by the wife's breach of duty, so long as the legal relation of husband and wife exists. But it is not necessary to decide this point in the principal case. For though it be admitted that the analogy drawn is sound, the facts will not allow its application. It is not shown that the wife's conduct afforded the husband a ground for divorce or that it violated her marital duties; the husband was cohabiting with the wife when the conduct occurred that wronged the plaintiff; he was not deprived, so far as appears, of any of his marital rights, and consequently was not relieved of any of his marital obligations; he admitted no damage, but protested all the while his wife's innocence

16. *Atkyns* v. *Pearce* (1857) 2 C. B. (N. S.) 763; *King* v. *Flintan* (1830) 1 B. & Ad. 227.

17. *Sauter* v. *Scrutchfield* (1887) 28 Mo. App. 150; *Black* v. *Bryan* (1857) 18 Tex. 467; *Bergh* v. *Warner* (1891) 47 Minn. 250, 20 N. W. 77; *Shelton* v. *Pendleton* (1847) 18 Conn. 417; Peck, Domestic Relations, § 3.

of any wrongful conduct. These facts seem to preclude the application of the principles laid down by the majority, even if the principles themselves are tenable. D. H. L.

RECOVERY FOR MENTAL ANGUISH. WALL V. ST. LOUIS, ETC. R. R. CO.[1] —Where mental anguish alone has resulted from a purely negligent act of the defendant, no jurisdiction allows recovery. Where the defendant is acting negligently and not intentionally, there can be no compensation for mental pain disconnected from bodily injury.[2] The reason for this rule is the opportunity for fraud in the proof of the suffering and the supposed unreasonableness of requiring one merely negligent to guard against fright and its consequences.

This rule raises the question as to how far recovery may be had where there is no physical injury inflicted by the defendant's negligent act, but where fright occasioned by his negligence results in sickness. When recovery is permitted it is based on the physical injury caused by negligence and not on the intervening mental disturbance.[3] The fright must be the natural and proximate consequence of the defendant's negligent act.[4] The rule as stated in Sedgwick on Damages,[5] is that where the negligence of the defendant causes fright, and as a natural and proximate consequence bodily ills follow, or if fright produces nervous disturbances, and these in turn physical ailments, defendant is liable for the physical results though there was no actual external injury at the time of the accident. But this is not the rule in Missouri. No damages are recoverable for mental anguish caused negligently apart from physical impact,[6] though such damages would be recoverable for injuries received in connection with that impact. This is a purely arbitrary distinction. If the courts allow a passenger in a railroad collision who has a finger mashed to recover for all mental anguish sustained as a result of the wreck, there is no good reason why a passenger in a similar situation should not recover who has suffered no physical injury, but who from fright has become so ill as to be confined in a hospital for several months. *Crutcher* v. *The Big Four Ry. Co.*[7] holds that there can be no recovery for physical injury caused solely by mental distress, since such is not the natural and proximate consequence of defendant's act. Where on the other hand, mental suffering results from physical injury such as a battery inflicted by the defendant, the universal rule is that special damage is

1. (1914) 168 S. W. 257.
2. *Strange* v. *Mo. Pac. R. R. Co.* (1895) 61 Mo. App. 586; *Deming* v. *Chicago, etc. Ry. Co.* (1899) 80 Mo. App. 152; *Grayson* v. *St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730; *Harless* v. *S. W. Elec. Co.* (1907) 123 Mo. App. 22, 99 S. W. 793.
3. *Purcell* v. *St. Paul R. R. Co.* (1892) 48 Minn. 134, 50 N. W. 1034.
4. *Hill* v. *Kimball* (1890) 76 Tex. 210, 13 S. W. 59.
5. (9th ed.) § 43h.
6. *Shellabarger* v. *Morris* (1906) 115 Mo. App. 566, 91 S. W. 1005.
7. (1908) 132 Mo. App. 311, 111 S. W. 891.

not necessary to maintain the action, and anguish of mind so produced is a proper subject of recovery.[8] Several Missouri cases intimate that even future mental anguish may be considered in cases where the injury complained of has resulted in the loss of an eye or limb, or in some external physical injury that mars the beauty or symmetry of the body.[9]

Besides battery, there are other torts which require no special damage, such as libel,[10] assault,[11] false imprisonment,[12] and trespass to realty.[13] In all such cases recovery may be had for all damage which the plaintiff may prove including mental suffering. But in torts requiring special damage, such as slander not actionable *per se* and deceit, mental anguish alone is not such special damage as to be a basis for recovery. If, however, the defendant intentionally causes mental anguish, a recovery is allowed for such suffering.[14]

There are a few cases involving rights in property in which such a consideration becomes necessary. As a general rule personal property is not of such character that injury to it would result in mental anguish to the owner.[15] For this reason the courts have seldom allowed recovery for mental suffering in cases involving personal property.[16] In Missouri the matter resolves itself into a question of the nature of the tort. Whether the injury be to real or personal property, recovery may be had for mental anguish resulting therefrom, if the injury be inflicted in a wilful, malicious manner.[17] Thus in actions for unlawful eviction recovery is allowed for mental anguish.[18] The same is true in cases of unlawful and malicious disinterment of dead bodies,[19] and also where there is unlawful and malicious mutilation of dead bodies.[20] Although there are few cases in point,[21] we may assume from the language of the cases above cited that no recovery may be had if the injury to the body was merely negligent.

The law of contracts furnishes a close analogy here to the law

8. *Butts* v. *Nat'l Ex. Bank* (1903) 99 Mo. App. 168, 72 S. W. 1083; *Kennedy* v. *St. Louis Transit Co.* (1903) 103 Mo. App. 1, 78 S. W. 77; *Waechter* v. *St. Louis, etc. R. R.* (1905) 113 Mo. App. 270, 88 S. W. 147.

9. *McGuire* v. *St. Louis Transit Co.* (1903) 103 Mo. App. 459, 78 S. W. 835; *Berger* v. *C. & A. R. R. Co.* (1902) 97 Mo. App. 127, 71 S. W. 102; *Kennedy* v. *St. Louis Transit Co., supra; Batten* v. *St. Louis Transit Co.* (1903) 102 Mo. App. 285, 76 S. W. 727.

10. *Baldwin* v. *Boulware* (1899) 79 Mo. App. 5.

11. *Happy* v. *Prichard* (1905) 111 Mo. App. 6, 85 S. W. 655.

12. *Hawk* v. *Ridgway* (1864) 33 Ill. 473.

13. *Bessemer Land Co.* v. *Jenkins* (1895) 111 Ala. 135, 18 So. 565.

14. *Houston* v. *Wolley* (1889) 37 Mo. App. 15.

15. *White* v. *Dresser* (1883) 135 Mass. 150; *Henry* v. *Southern R. R. Co.* (1912) 93 S. C. 125, 75 S. E. 1018.

16. *Yoakum* v. *Kroeger* (1894) 27 S.. W. 973 (Tex.).

17. *Carter* v. *Oster* (1908) 134 Mo. App. 146, 112 S. W. 995.

18. *State* v. *Weinel* (1883) 13 Mo. App. 583.

19. *Meagher* v. *Driscoll* (1868) 99 Mass. 28; *Bessemer Landw Co.* v. *Jenkins* (1895) 111 Ala. 135, 18 Southern 565.

20. *Larson* v. *Chase* (1891) 47 Minn. 307, 50 N. W. 238; *Hasard* v. *Lehane* (1911) 128 N. Y. Supp. 161; *Koerber* v. *Patek* (1905) 123 Wis. 453, 102 N. W. 40.

21. *Freely* v. *Andrews* (1906) 91 Mass. 313, 77 N. E. 766.

of torts. Special damage is never necessary in order to maintain an action for breach of contract; whether there can be compensation for mental anguish will depend entirely upon whether it is a proximate consequence of the breach. In the great majority of contracts, mental anguish is not the proximate consequence and recovery is not allowed. This is on the theory previously stated that there can be no recovery for mental suffering apart from physical injury.[22] In recent times a broader rule is being adopted which the Missouri courts are following. In the Tennessee case of *Wadsworth* v. *The Western Union*,[23] the court says, "When other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to ascertain the damages flowing from the breach." It is true that pecuniary loss only is contemplated as a breach of most contracts, but where it is clear that mental anguish will result from the breach, such anguish is made the basis for further recovery.[24] Where the contract naturally involves mental suffering in case of breach, as in breach of promise of marriage,[25] and contracts to preserve a dead body [26] damages may be recovered for such suffering.[27] Missouri follows this rule and allows recovery when the contract is of such nature that the breach would cause mental anguish as a natural result.[28] But this rule is not extended to telegraph cases. No recovery is allowed for mental anguish resulting from the late delivery of a telegram.[29] In several states such recovery is allowed.[30]

While the general rule obtains in this state that a recovery for mental anguish must generally be connected with personal injury, any number of cases show that where an act is accompanied by malice, insult, or wilfulness, a recovery may be had though there is no physical injury.[31] The recent Missouri case of *Wall* v. *St. Louis & S. F. R. R. Co.*[32] clearly illustrates this rule. In this case the agents of the defendant wilfully and maliciously threw a trunk upon the box and casket containing the remains of plaintiff's mother. Plaintiff, who was present at the

22. *Trigg* v. *St. Louis R. R. Co.* (1881) 74 Mo. 147; *Schmitz* v. *St. Louis R. R. Co.* (1893) 119 Mo. 256, 24 S. W. 472; *Shellabarger* v. *Morris* (1906) 115 Mo. App. 566, 91 S. W. 1005.
23. (1888) 86 Tenn. 695, 8 S. W. 574.
24. *Renihan* v. *Wright* (1890) 125 Ind. 536, 25 N. E. 822.
25. *Wilbur* v. *Johnson* (1875) 58 Mo. 600.
26. *Renihan* v. *Wright, supra.*
27. *Smith* v. *Leo* (1895) 36 N. Y. Supp. 949; *Galveston R. R. Co.* v. *Rubio* (1901) 65 S. W. 1126 (Tex.).
28. *Carter* v. *Oster, supra; Shellabarger* v. *Morris, supra.*
29. *Newman* v. *Western Union* (1893) 54 Mo. App. 434; *Burnett* v. *Western Union* (1890) 39 Mo. App. 599; *Connell* v. *Western Union* (1893) 116 Mo. 34, 22 S. W. 345.
30. *Western Union* v. *McNair* (1898) 120 Ala. 99, 23 So. 801; *Western Union* v. *Fisher* (1900) 107 Ky. 513, 54 S. W. 830; *Graham* v. *Western Union* (1903) 109 La. 1069, 34 So. 91.
31. *Trigg* v. *St. Louis R. R. Co., supra; Schmitz* v. *St. Louis R. R. Co., supra; Deming* v. *R. R. Co.* (1899) 80 Mo. App. 152; *Snyder* v. *Wabash R. R.* (1900) 85 Mo. App. 495; *Hickey* v. *Welch, supra; Rawlings* v. *Wabash R. R.* (1903) 97 Mo. App. 511, 71 S. W. 535; *Harless* v. *Elec. Co.* (1907) 123 Mo. App. 22, 99 S. W. 793.
32. (1914) 168 S. W. 257.

time, suffered great mental anguish due to the breaking of the casket and bruising of the body. It was held that while a corpse is not property in the commercial sense, the courts have come to recognize and declare what is termed a quasi-property right which entitles the husband or wife or next of kin to the possession or control of the body.[33] On this view one may recover for injury or indignity to a corpse as though he had a property right to it.[34] "There are torts," said the court, "of which mental distress alone is the natural and proximate result and for which damages may be assessed when it appears that the tortfeasor's conduct is inhuman, insulting, and malicious, and the tortious act was wilfully and wantonly done. This rule obtains alike in the case of the wilful and intentional abuse of, or an indignity committed upon a dead body in the presence of plaintiff or next of kin.[35] The case is clear—the whole recovery for mental anguish alone rests upon the nature and quality of the tort. If wilful, malicious, and inhuman, recovery is invariably allowed for mental anguish resulting therefrom. G. L. D.

FAILURE OF RECORD TO SHOW ARRAIGNMENT AND PLEA. STATE v. O'KELLEY.[1]—The conference of judges[2] has frequently recommended to the legislature of Missouri to pass a positive law to the effect that the failure of the record in a criminal appeal to show an arraignment and plea shall not be a ground for reversal. Such a statute has not been passed. No doubt, "the inherent power of the court, which originated the doctrine to satisfy seeming requirements of the social state, which no longer exist, may properly be used to lay it aside as a legal curiosity."[3] In May, 1914, the Supreme Court in *State* v. *O'Kelley* unanimously affirmed the decision of the Springfield Court of Appeals,[4] that a conviction will not be reversed for this omission in a misdemeanor case. This departure from the once orthodox doctrine shows the force of the re-action against the inviolability that has in the past century been accorded to a defendant's rights and privileges.

A great many other states, with a line of decisions and statutes similar to those in this state, have preceded our courts in taking this step. Georgia, seemingly the first state, took it in 1866.[5] Since that time, sixteen other states have made similar rulings.[6] In a few

33. *Litteral* v. *Litteral* (1908) 131 Mo. App. 306, 11 S. W. 872; *Wilson* v. *St. Louis R. R. Co.* (1912) 160 Mo. App. 649, 142 S. W. 775.
34. *Larson* v. *Chase* (1891) 47 Minn. 307, 50 N. W. 238; *Douglas* v. *Stokes* (1912) 149 Ky. 506, 149 S. W. 849.
35. *Wilson* v. *St. Louis, etc. R. R. Co., supra.*
1. (1914) 167 S. W. 980.
2. Revised Statutes 1909, § 3892.
3. Marshall, J., in *Hack* v. *State* (1910) 141 Wis. 346, 124 N. W. 492, 498.
4. (1914) 173 Mo. App. 169, 157 S. W. 1055.
5. *Bryans* v. *State* (1856) 34 Ga. 323. The decision was made without statute on the analogy to a waiver in a civil case.
6. *Ark.*: *Moore* v. *State* (1880) 51 Ark. 130, 10 S. W. 22.
*Ill.*: *Spicer* v. *State* (1882) 11 Ill. App. 294. *Dictum* in a misdemeanor case.

jurisdictions, the ruling has been limited to misdemeanor cases; [7] in most, it includes the lesser degrees of felonies; while some courts have extended it to capital cases.[8] The misdemeanor cases are rested upon the principle, that never, as in felonies, has the same strictness in procedure been required, while the further extensions of the rule are, almost without an exception, placed upon the ground that the statute limiting reversals in criminal cases to prejudicial errors has impelled the decision.

The real function accomplished by the arraignment and plea is the making of an issue to be tried by the judge or jury. The incidental function of the arraignment, to officially notify the defendant of the offense he is charged with, is quite generally held susceptible of being waived either by expression or conduct.[9] The formation of an issue, however, is a matter of substance and cannot be dispensed with.[10]

*State* v. *O'Kelley* was a prosecution for an illegal sale of liquor under the local option law.[11] When the case was called for trial, both sides announced "ready for trial." After the jury was sworn and the information read and before the introduction of any testimony, the counsel for the defendant for his statement to the jury, said, "we plead not guilty." The record on appeal from a conviction in the lower court, failed to show an arraignment and plea.

Such an error had been held fatal by the Missouri courts since the decision of *State* v. *Andrews* [12] in 1858. Cases of this sort came up with such frequency that the Supreme Court disposed of *State* v. *Williams* [13] in 1893 with the summary remark, "There was no arraignment of defendant before he was put on trial, and, of course, this

*Ind.*: *John* v. *State* (1886) 104 Ind. 557, 4 N. E. 153.
*Iowa*: *State* v. *Greene* (1885) 66 Iowa 11, 23 N. W. 154.
*Ky.*: *Meece* v. *Commonwealth* (1880) 78 Ky. 586.
*Kan.*: *State* v. *Cassady* (1874) 12 Kan. 423.
*Mass.*: *Commonwealth* v. *McKenna* (1878) 125 Mass. 397. Verity was not imputed to the record in this case.
*Mich.*: *People* v. *Weeks* (1911) 165 Mich. 362, 130 N. W. 697.
*Neb.*: *Allyn* v. *State* (1887) 21 Neb. 593, 33 N. W. 212.
*Miss.*: *Bateman* v. *State* (1887) 64 Miss. 233, 1 So. 172.
*N. Y.*: *People* v. *Osterhout* (1884) 34 Hun 260.
*Okla.*: *Wood* v. *State* (1910) 40 Okla. Cr. Rep. 436, 112 Pac. 11.
*S. C.*: *State* v. *Moore* (1889) 30 S. C. 69, 8 S. E. 437.
*S. D.*: *State* v. *Reddington* (1895) 7 S. D. 368, 64 N. W. 170.
*Wash.*: *State* v. *Straub* (1896) 16 Wash. 111, 47 Pac. 227.
*Wis.*: *Hack* v. *State* (1910) 141 Wis. 346, 124 N. W. 492.
*Fed.*: *U. S.* v. *Malloy* (1887) 31 Fed. 19 (misdemeanor). But see *Crain* v. *U. S.* (1896) 163 U. S. 625 (felony).

7. Illinois, Indiana, S. Carolina and Circuit Court of the U. S., citations in note 6.
8. Kentucky, Oklahoma, S. Dakota and Washington, citations in note 6.
9. For a good collection of cases on this point, see *People* v. *Weeks* (1911) 165 Mich. 362, 130 N. W. 697.
10. In *Crain* v. *U. S.*, *supra*, it was stated by way of *dictum* that a statute denying the right of arraignment and plea to a defendant would violate the fourteenth amendment.
11. Revised Statutes 1909, § 7246.
12. 27 Mo. 267.
13. 117 Mo. 379, 22 S. W. 1104.

cause must be reversed for that reason." The only indication of reluctance in applying this rule is in *State* v. *Vanhook*,[14] the court remarking, "after the jury is sworn and the trial proceeds and all the testimony relates to the guilt or innocence of the accused, in a misdemeanor case, it looks like trifling with justice to reverse the judgment because the record fails to show an arraignment and plea of not guilty."

In the principal case, no weight can be given to the statement of the counsel to the jury, "we plead not guilty," for the plea must be made before the jury is sworn.[15] Nor can the fact that it is a misdemeanor explain the decision, for it has been repeatedly held that an arraignment and plea is as essential in misdemeanors as it is in felony cases.[16] The case, then, in point of fact being absolutely irreconcilable with past decisions,[17] if explainable at all, must rest on statute.

There are two statutes which are clearly applicable. Section 5165[18] of the Revised Statutes of 1909, provides that upon arraignment, "in all cases when he does not confess the charge to be true, a plea of not guilty shall be entered, and the same proceedings shall be had, in all respects, as if he had formally pleaded not guilty." The second statute deals with reversals for defects not appearing upon the face of the indictment. It is part of the statute of jeofails[19] and provides that proceedings in a criminal case shall not be held invalid "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." To conclude, however, that the failure of the record to show an arraignment and plea is an unprejudicial error, it must appear from the record that in substance the defendant was accorded an arraignment and plea, since the record in a criminal case is unimpeachable,[20] and a plea and arraignment is a matter of substance.

By the first of these statutes, "not guilty" catches all conduct save a confession of the charge.[21] The record in *State* v. *O'Kelley* is silent as to a confession; the announcement of "ready for trial" and the trial itself are consistent with nothing but a plea of not guilty. The record, then, shows in substance a plea of not guilty and such a plea waives the necessity of a formal arraignment.[22] It does seem, there-

14. (1885) 88 Mo. 105.
15. *State* v. *Weber* (1855) 22 Mo. 321.
16. *State* v. *Geiger* (1891) 45 Mo. App. 111; *State* v. *Mikell* (1907) 125 Mo. App. 287, 102 S. W. 19; *State* v. *Moss* (1912) 164 Mo. App. 379, 144 S. W. 1109.
17. See *State* v. *Geiger, supra,* for a prosecution under the same statute, with practically the same record, where the omission was held reversible error.
18. Originally passed in 1835. Revised Statutes 1835, p. 485.
19. Revised Statutes 1909, § 5115. Added to the statute of jeofails in 1879.
20. *State* v. *Clevenger* (1887) 25 Mo. App. 655; *State* v. *Blunt* (1892) 110 Mo. 322.
21. *State* v. *Andrews, supra; State* v. *King* (1881) 74 Mo. 612.
22. *State* v. *Braunschweig* (1865) 36 Mo. 397; *State* v. *Grate* (1878) 63 Mo. 22; *State* v. *Weeden* (1895) 133 Mo. 70.

fore, that the oversight of the regular arraignment and plea is but a "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." [23] Though the Missouri courts have for thirty-five years overlooked the combined effect of these two statutes, this is their logical result, and it prevailed immediately in other states.[24]

As to the extension of this rule, on sound principle, it should include all crimes, for in the highest degree of crime, an arraignment and plea accomplishes no more nor less than in the lightest misdemeanor. Faris, J., however, in his *dicta*, has stopped short of capital crimes. R. BURNETT.

LEGAL CONSEQUENCES OF FAILURE OF A FOREIGN CORPORATION TO COMPLY WITH STATUTORY REQUIREMENTS AS TO ADMISSION INTO THE STATE. BRITISH AMERICAN PORTLAND CEMENT CO. v. CITIZENS' GAS CO.[1] —The power of the state to exclude a foreign corporation from its limits, or to exact conditions for allowing the corporation to do business in the state, is generally recognized.[2] Most states have seen fit to impose some restrictions on the power of foreign corporations to do business within their jurisdiction. Differences in the wording of the statutes have necessarily led to different views in the various states.[3] Revised Statutes 1909, § 3037 provides that "before" any foreign corporation shall be allowed to transact business, or continue in business, in this state, it must establish an office in the state and comply with certain other requirements therein stated. § 3039 provides that foreign corporations, "now or hereafter doing business in this state, shall file with the secretary of state" certain papers and pay a license tax and obtain a license to do business. § 3040 provides a penalty for failure to comply with the preceding sections, and in addition to the penalty, provides that no non-complying corporation "can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort." [4]

The thing intended to be prevented by this statute is the doing of business by a foreign corporation in this state without having complied with the conditions set out in the statute. The only rights of

23. *State* v. *West* (1884) 84 Mo. 440, was the first case to arise after the introduction of this passage. The error was held fatal, without a consideration of this statute.

24. See dates of cases in note 6.

1. (1914) 164 S. W. 468.

2. *Silver Mining and Milling Co.* v. *Pennsylvania* (1888) 125 U. S., 181; *State ex inf. Hadley* v. *Standard Oil Co.* (1906) 194 Mo. 124, 91 S. W. 1062; 3 Cook, Corporations (7th ed.) §§ 696-700.

3. See Beale, Foreign Corporations, Chap. VII, where the statutes of the various states are collected.

4. These sections were first enacted in 1891. Laws of Mo. 1891, p. 75. Identical provisions are in force in other states. Hurd's Illinois Statutes (1903) p. 486, chap. 32, §§ 67b, 67c, 67d; Burns' Annotated Indiana Statutes (1901) §§ 3461a, 3461b, 3461c.

the corporation which are affected, if any, are those arising out of the conduct of business in the state.[5] The first case to arise under the Missouri statute was *Williams* v. *Scullin*,[6] decided three years after the statute was passed. The St. Louis Court of Appeals, on a motion for rehearing, said that a contract growing out of the business of a non-complying corporation was "voidable" and "could not be enforced anywhere, if its enforcement was resisted."[7] The Kansas City Court of Appeals, when the question came before it in 1897, held the contract to be "invalid."[8] In 1898 that court held that the contract of the non-complying corporation was "void."[9] The court relied entirely on what is now § 3037, saying that the section prohibited the carrying on of business in this state by a foreign corporation which had not complied with the requirements of the section, and that any contract made in doing an act prohibited by the statute was void. In view of the fact that § 3037 provides that "before" any corporation shall be authorized to do business it must establish an office in this state, etc., the reasoning of the court would be justifiable but for § 3040.[10] The question came before the Supreme Court in *Tri-State Amusement Co.* v. *Amusement Co.*,[11] where it was held that the contract of the non-complying corporation was void. The court said the statute prohibited a foreign corporation's doing business in this state until it had complied with the requirements stated in the statute and, thereby, made contracts entered into in carrying on such business "void."[12]

In *Handlan-Buck Mfg. Co.* v. *Wendelkin Construction Co.*,[13] the St. Louis Court of Appeals held that, as between two claimants in interpleader, the validity of a bill of sale of the property in controversy to one of them by a non-complying foreign corporation could not be questioned. The Supreme Court in *Roeder* v. *Robertson*[14] held that in such an attempted sale the title to the property remained in the

5. *State ex rel.* v. *Grimm* (1911) 239 Mo. 135, 143 S. W. 483 (semble); *Roeder* v. *Robertson* (1906) 202 Mo. 522, 100 S. W. 1086; *Tri-State Amusement Co.* v. *Amusement Co.* (1905) 192 Mo. 404, 421, 90 S. W. 1020; *United Shoe Machinery Co.* v. *Ramlose* (1910) 231 Mo. 508, 538, 132 S. W. 1143.

6. (1894) 59 Mo. App. 30.

7. This case is cited in *Ehrhardt* v. *Robertson*, *infra*, and *Tri-State Amusement Co.* v. *Amusement Co.*, *infra*, as holding the contracts invalid. The court does use the word "invalid" once but the statement given above would seem to show that the courts used "voidable" in its strict technical sense.

8. *Blevins* v. *Fairley* (1897) 71 Mo. App. 259.

9. *Ehrhardt* v. *Robertson Bros.* (1898) 78 Mo. App. 404.

10. As to the effect of § 3040 see *infra*, p. 45 and note 20.

11. (1905) 192 Mo. 404, 90 S. W. 1020.

12. Expressly followed in *Chicago Mill and Lumber Co.* v. *Sims* (1906) 197 Mo. 507, 95 S. W. 344; *Wilson-Moline Buggy Co.* v. *Priebe* (1907) 123 Mo. App. 521, 100 S. W. 558.
The contracts were also held void in *Roeder* v. *Robertson* (1906) 202 Mo. 522, 100 S. W. 1086; *First Nat'l Bank* v. *Leeper* (1906) 121 Mo. App. 688, 97 S. W. 636; *Amalgamated Lead & Zinc Co.* v. *Bay State Zinc Mining Co.* (1909) 221 Mo. 7, 120 S. W. 31; *United Shoe Machinery Co.* v. *Ramlose* (1907) 210 Mo. 631, 109 S. W. 567, (1910) 231 Mo. 508, 132 S. W. 1143.

13. (1907) 124 Mo. App. 349, 101 S. W. 702.

14. Note 11 *supra*.

corporation. If the title never passed out of the corporation, it is difficult to understand how the court could sustain the claim of one who relied solely on such an attempted transfer of title. The decision is not in accord with the previous holdings of the Missouri courts as to the validity of the contracts of non-complying corporations.[15]

Still another phase of this question was presented in *Central Coal & Coke Co.* v. *Optimo Lead & Zinc Co.*[16] A foreign corporation, which had not complied with the laws of Missouri, made a deed of trust to defendants. While the trustee's sale was pending, plaintiffs, who were judgment creditors of the non-complying corporation, filed a bill in equity to have the deed of trust set aside. The court considered at length the intention of the legislature in passing §§ 3037-3040. It concluded that it was not the intention of the legislature to prevent an innocent party who contracted with a foreign corporation which had not complied with the statute from enforcing the contract; and refused relief to plaintiffs.[17] The case in this regard does not seem to be in accord with previous Missouri decisions.[18] It has, however, a sound basis in estoppel. The plaintiffs claimed under the corporation, and acquired no more rights than it had. The corporation by contracting represented that it was capable of making the contract and the other party had reasonably acted upon that representation to his damage. The doctrine of estoppel has been recognized in Missouri.[19]

The question is one of statutory construction. It is not surprising that the courts should differ. As the cases just discussed indicate, the Missouri Courts have construed the intention of the legislature to be that any contract made by a non-complying corporation is void, and on this construction, the cases are sound. But the construction of the statute is subject to criticism. "The legal presumption is that the legislature specified all penalties it intended to impose, and it is not in the province of the court to inflict more by construction.[20] . . . The invalidity of such contracts is inconsistent with these terms of the statute, because, if they are void, neither party can maintain a suit upon them, and the prohibition of the maintenance of such suits by the foreign corporation was futile. . . . The evident intention of the legislature and the legal effects of the statute, were, in accordance with the plain words it contains, to leave such contracts valid, enforcible in all the courts by the parties to them

15. See cases cited in note 11 *supra*.
16. (1911) 157 Mo. App. 720, 139 S. W. 525.
17. See discussion of similar construction *infra*.
18. Cases cited in note 11 *supra*.
19. The court in *Central Coal & Coke Co.* v. *Optimo Lead & Zinc Co.* (p. 728) mentions this as another possible basis for its decision and cites *Young* v. *Guad* (1908) 134 Mo. App. 166, 113 S. W. 735, which is in point.
20. See *Blodgett* v. *Lanyon Zinc Co.* (Kan., 1903) 120 Fed. 893 and cases there cited. See also *Columbus Ins. Co.* v. *Walsh* (1853) 18 Mo. 229; 9 Michigan Law Review 51; *Downing* v. *Ringer* (1841) 7 Mo. 585 (*contra*).

other than the unqualified foreign corporations, but unenforcible in the state by them, and to subject them to a penalty of $1000." [21]

Further, the failure to comply with the corporation laws is an offense against the state and not against private persons. A defendant sued by a corporation upon a contract made with it cannot question the right or authority of the corporation to make the contract, or to transact business in the state in which it is made. The ouster or dissolution of the corporation, or an injunction against its proceeding at the suit of the state is the only remedy available.[22]

The constitutionality of § 3040, in so far as it provides that no suit can be maintained, was discussed in the recent case of *British American Portland Cement Co.* v. *Citizens' Gas Co.*[23] The court [24] in *dictum* [25] said that if it was the intention of the legislature to close the doors of the courts of this state to any litigant, a citizen of the United States,[26] it would be unconstitutional (1) under Section 10 of Article 2 of the Constitution of Missouri,[27] and (2) under "the due process of law" clause of the Constitution of the United States,[28] and (3) under the "privileges and immunities clause" of the fourteenth amendment.[29] Such a statute would clearly violate Section 10 of Article 2 of the Constitution of Missouri. A corporation is a person.[30] It may have certain valid and enforcible demands, which do not arise out of business carried on in this state. To deprive it of the right to use the courts of the state to enforce such demands would be a clear violation of Section 10 of Article 2 of the Constitution of Missouri. It would not be depriving the corporation of its property with-

21. *Dunlap* v. *Mercer* (Minn., 1907) 156 Fed. 545, 557; to the same effect is *Blodgett* v. *Lanyon Zinc Co.* (Kan., 1903) 120 Fed. 893.

22. *Blodget* v. *Lanyon Zinc Co., supra; Iowa, etc., Gold Mining Co.* v. *United States F. & G. Co.* (Iowa, 1906) 146 Fed. 434, 440 and numerous authorities cited there; 9 Michigan Law Review 53 and collection of authority given there.

23. (Mo., 1914) 164 S. W. 468.

24. Brown, Walker, and Graves, JJ., dissenting.

25. It was *dictum* because under the facts as stated by the court no contract was ever entered into. The company then did not give up title to the $10,000 in the hands of Campbell, who was in fact the agent of the company to pay over the money to the Gas Co. on the happening of certain conditions. The corporation then under *Roeder* v. *Robertson, supra,* had a right to sue in the state court and recover its property. The court in *British-American, etc. Co.* v. *Citizens' Gas Co.* mentions this on page 478. As to the $2000 paid in Oklahoma, the corporation, clearly, could recover, the statute not applying. See note 4, *ante.*

26. The court uses the term "citizen" throughout the opinion as including a corporation. Such is not the generally accepted view as to the meaning of that term. See note 31, *infra.*

27. Art. 2, Sec. 10: "The courts of justice shall be open to every person and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

28. Const. U. S. Amend. 14, § 1.

29. Const. U. S. Amend. 14, § 1.

30. *Santa Clara Co.* v. *So. Pac. Ry. Co.* (1885) 118 U. S. 344, 396; *Smyth* v. *Ames* (1897) 169 U. S. 466, 522; *Daggs* v. *Oriental Ins. Co.* (1896) 136 Mo. 382, 391; 3 Cook, Corporations (7th ed.) §§ 696-700.

out due process of law.[32] The corporation still has the rights but cannot enforce them in Missouri. It would not be a law "abridging the privileges and immunities of citizens of United States" or denying to citizens of each state the privileges and immunities of citizens of the several states, a corporation not being a citizen.[31]

As we have seen, however, the interpretation of the statute in Missouri is not that it excludes the foreign corporation from the courts entirely, but that contracts made in carrying on business in the state before compliance are void. No rights accrue to the corporation under such a contract, and it has no reason to invoke the aid of the courts. On any demand not arising out of business in the state, the courts are open to the foreign corporation.[33] It is equally clear that making the contracts void does not deprive the corporation of its property without due process of law. The corporation is left in the same position it was in before it attempted to make the contract. If it has parted with its property under the void contract, the courts are open to it to recover it.

Not being a citizen, it cannot attack the constitutionality of the law as denying the citizen of one state the privileges and immunities of citizens of the several states, or as "abridging the privileges and immunities of citizens of the United States." To hold otherwise would be to give to a foreign corporation all the rights of corporations in the other state without complying with any regulations of such state. Such is unquestionably not the rule.[34]

The court in *United Shoe Machinery Co.* v. *Ramlose*[35] suggested that if the statute prohibited any suit by the foreign corporation it would be unconstitutional under the provision of the Constitution of the United States which provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws."[36] Under the interpretation assumed or under the interpretation given the statute by Missouri courts, the statute could not come under the prohibition of that provision of the constitution. The statute prohibits doing business, and denies the foreign corporation the right to come "within the jurisdiction" until it has complied. The corporation

31. *Oriental Ins. Co.* v. *Daggs* (1898) 172 U. S. 557; *Daggs* v. *Oriental Ins. Co.* (1896) 136 Mo. 382, 392, 38 S. W. 85; *Paul* v. *Virginia* (1868) 8 Wall. 168; 3 Cook, Corporations, §§ 696-700; *State ex rel. Ins. Co.* v. *Blake* (1911) 241 Mo. 100, 109, 144 S. W. 1094. The loose use of the term citizen is perhaps responsible for the erroneous conclusion on this clause in *British American Portland Cement Co.* v. *Citizens' Gas Co.*

32. A corporation is a person within the meaning of the Constitution. *Covington Turnpike Co.* v. *Sanford* (1896) 164 U. S. 578, 592, and authorities cited there; *Smyth* v. *Ames* (1897) 169 U. S. 466, 522; 3 Cook, Corporations (7 ed.) §§ 696-700.

33. *Roeder* v. *Robertson, supra; United Shoe Machinery Co.* v. *Ramlose, supra.*

34. See note 2, *supra*, and *Paul* v. *Virginia* (1869) 8 Wall. 168. This assumes that the state allows incorporation of corporations similar to the foreign corporation.

35. (1910) 231 Mo. 508, 538.

36. Const. U. S. Amend. 14, § 1.

not being within the jurisdiction, the statute is not in conflict with the constitutional provision guaranteeing to persons within the jurisdiction equal protection of the laws.[37]

From the foregoing considerations, we may conclude that in Missouri any demand of a non-complying corporation arising out of its business in the state is void, and that the *dictum* in *British American Portland Cement Co.* v. *Citizens' Gas Co.* in so far as it concerns Section 10 of article 2 of the Constitution of Missouri is sound, but that under the Missouri construction of the effect of the statute, it is constitutional. K. B.

EMPLOYER'S LIABILITY. MCINTYRE V. TEBBETTS.[1]—The principle of the common law that a master is not bound to indemnify a servant who is injured through the misconduct or negligence of a fellow-servant is well established.[2] Three limitations have been engrafted upon this rule. One class of cases holds that employees of different grades, the superior having the right of superintendence, direction and control over the inferior, are not fellow-servants; this is referred to as the superior servant doctrine.[3] Another class of cases holds that a laborer in one department of service is not a fellow-servant of a laborer in another separate and distinct department of service; [4] this limitation arises out of the fact that servants are not so associated and related in the performance of their work that they can observe and influence each other's conduct and report delinquencies to a correcting power. The third limitation, and that which extends the master's liability most effectively, is the dual capacity doctrine. It permits the same person to act as a fellow-servant and a vice-principal; *i. e.*, while he is engaged as a laborer with other laborers he is a fellow-servant, but while he directs and controls others he represents the master and is a vice-principal.[5]

The earlier decisions of Missouri categorically rejected the superior servant doctrine.[6] In *Marshall* v. *Schricker*,[7] the Missouri decisions were reviewed, and the court decided that the power of superintendence and control is not the test of a vice-principal. The law regulating

37. *State ex rel. Atl. Horse Ins. Co.* v. *Blake* (1912) 241 Mo. 100, 144 S. W. 1094.

1. (1914) 165 S. W. 757.

2. *McDermott* v. *Pacific Ry. Co.* (1860) 30 Mo. 115; *Rohback* v. *The Pacific R. R.* (1869) 43 Mo. 187; *Priestly* v. *Fowler* (1837) 3 M. & W. 1; *Murray* v. *The South Carolina Railroad Co.* (1841) 1 McMullan (S. C.) 385; *Farwell* v. *The Boston and Worcester Railroad Co.* (1842) 4 Met. (Mass.) 49.

3. *Schroeder* v. *The C. & A. R. R. Co.* (1891) 108 Mo. 322, 183 S. W. 1094; *Dowling* v. *Allen* (1876) 61 Mo. 528; *Foster* v. *Mo. Pac. Ry. Co.* (1892) 115 Mo. 165, 21 S. W. 916; *Russ* v. *Wabash Western* (1892) 112 Mo. 45, 20 S. W. 472.

4. *Koerner* v. *St. Louis Car Co.* (1907) 209 Mo. 141, 107 S. W. 481.

5. *English* v. *Roberts, Johnson & Rand Shoe Co.* (1909) 145 Mo. App. 439, 122 S. W. 747.

6. *McDermott* v. *Pacific Railroad Co., supra; Rohback* v. *Pacific R. R., supra.*

7. (1876) 63 Mo. 308.

the liability of the master remained the same up to 1881, when, in *Dowling* v. *Allen*,[8] the rule was changed to an acceptance of the superior servant doctrine. This decision marks a complete discontinuance of the theory of the earlier cases, although it had been observed in *McGowan* v. *St. L. & I. M. R. R. Co.*[9] that, "there was no proof that the conductor had the superintendence or control over the men or the work, or the power to provide or replace machinery." A similar observation had been made in *Marshall* v. *Schricker*.[10] These observations may be said to have foreshadowed the decision of *Dowling* v. *Allen*, which was followed consistently until 1900, when *Grattis* v. *K. C. P. & G. R. R. Co.*[11] determined the master's liability by the authority of the vice-principal to represent him as to the so-called personal or non-delegable duties toward the servant.

The departmental doctrine has not been accepted by our courts in the broadest sense, and *Grattis* v. *K. C. P. & G. R. R. Co.* criticised it upon the ground that it was impractical in its application, since it is impossible to define the limits of departments within the meaning of the doctrine. But in *Koerner* v. *St. Louis Car Co.*,[12] the court refused to subscribe to this criticism of the departmental doctrine. The later cases apply it without defining just what are departments of service, saying, "the rule itself must remain general and its application specific as the cases arise." [13]

The last stage in the development of this phase of the employer's liability is the adoption and application of the dual capacity doctrine or dual service theory. The earlier decisions in Missouri refused to recognize this doctrine,[14] although the principal was first stated in *Harper* v. *Indianapolis R. R. Co.*,[15] the court saying that a "superintendent may also labor like any other co-laborer, and when acting only as a laborer may be likened to that of any other." This was repeated in *Rowland* v. *Mo. Pac. Ry. Co.*,[16] however, *Dayharsh* v. *Hannibal & St. J. R. R. Co.*[17] refused to apply it, and in *Hutson* v. *Mo. Pac. Ry. Co.*,[18] the court expressly rejected it, saying, "that in this case we have the unusual fact that the injury was directly inflicted by the foreman himself while engaged in the work as a co-laborer with

8. (1881) 74 Mo. 13.
9. (1876) 61 Mo. 528.
10. (1876) 63 Mo. 308.
11. (1900) 153 Mo. 380, 55 S. W. 108.
12. (1907) 209 Mo. 141, 107 S. W. 481.
13. *Koerner* v. *St. Louis Car Co., supra.* To the same effect, *McMurray* v. *St. L., I. M. & S. R. R. Co.* (1909) 225 Mo. 272, 125 S. W. 751; *Schumaker* v. *K. C. Breweries Co.* (1912) 247 Mo. 141, 152 S. W. 13; *Tabor* v. *St. L., I. M. & S. R. R. Co.* (1907) 210 Mo. 385, 109 S. W. 764.
14. *Hutson* v. *Mo. Pac. Ry. Co.* (1892) 50 Mo. App. 300; *Houghlett* v. *Ozark Lumber Co.* (1892) 53 Mo. App. 87.
15. (1871) 47 Mo. 580. See also *Moore* v. *Wabash R. R. Co.* (1885) 85 Mo. 588.
16. (1886) 20 Mo. App. 463.
17. (1890) 103 Mo. 570, 15 S. W. 554.
18. (1892) 50 Mo. App. 300.

plaintiff. Does this fact alter the relation of the parties or interfere with the master's liability? Our opinion is that it does not." *Fogarty* v. *St. Louis Transfer Co.*[19] is referred to as the leading opinion in this state on the dual capacity doctrine[20] although the court there expressly applied the law of Illinois and not of Missouri. In the latter case, the court said, "if the negligence complained of consists of some act done or omitted by one having such authority which relates to his duties as a co-laborer with those under his control, and which might just as readily have happened with one having no such authority the common master will not be liable, but when the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable."

The most recent application of this doctrine is found in *McIntyre* v. *Tebbetts*,[21] where it was held that the driver of a wagon which the plaintiff was assisting to load and unload, whose act in suddenly starting the wagon caused the plaintiff's injury, was a fellow-servant of the plaintiff, though he had several hours before the accident employed the plaintiff to assist in loading and unloading the wagon. The dual capacity doctrine is invoked with peculiar force in this case since the alleged vice-principal was charged with two-fold duties; he was a co-worker with the wagon crew in addition to his power to supervise and control the laborers under him; however, the main part of his task was to drive the team and wagon in the capacity of a common laborer. In determining that the master was not liable in this case it may be admitted that the employee's general relation was that of vice-principal, since it is the character of the act being done at the time of the injury which determines whether two employees are fellow-servants. At the instant of starting the team the employee was performing an act which clearly pertained to his express duties as a co-laborer, and might just as readily have happened had he had no such general authority.

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19. (1903) 180 Mo. 490, 79 S. W. 664.
20. *Stephens* v. *Deatherage Lumber Co.* (1904) 110 Mo. App. 398, 86 S. W. 481; *Depuy* v. *Chicago, R. I. & P. R. R. Co.* (1904) 110 Mo. App. 110, 84 S. W. 103; *Radtke* v. *St. Louis Basket & Box Co.* (1905) 229 Mo. 1, 129 S. W. 508; *Hollweg* v. *Bell Telephone Co.* (1905) 195 Mo. 149, 93 S. W. 262; *Neves v. Green* (1905) 111 Mo. App. 634, 86 S. W. 508.
21. (1914) 165 S. W. 757.