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Notes on Recent Missouri Cases

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NOTES ON RECENT MISSOURI CASES

RELIGIOUS SOCIETIES—EFFECT OF SCHISM IN A CHURCH UPON PROPERTY OF THE CHURCH. HAYES V. MANNING.[1]—It is generally recognized that a court has no jurisdiction to pass upon purely ecclesiastical matters, i.e., where no property rights are involved, such being left exclusively to church tribunals.[2] When property rights are involved different questions are presented. The Supreme Court of the United States in the leading case of *Watson* v. *Jones*[3] divided the cases upon this subject into three classes. The first of these is when the property in controversy is "by the express terms of the instrument [conveying it] devoted to the teaching, support, or spread of some specific form of religious doctrine or belief." The second is "when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority." The third is when the congregation holding the property is but a subordinate member of a general church organization with a supreme judicatory having a general and ultimate power of control more or less complete. The classification, altho

1. (1914) 172 S. W. 897.
2. *Fussell* v. *Hail* (1908) 233 Ill. 73, 84 N. E. 43; *Marien* v. *Evangelical Creed Congregation* (1907) 132 Wis. 650, 113 N. W. 66; 24 L. R. A. N. S. 692.
3. (1871) 13 Wall. 679, 20 L. Ed. 666.

perhaps not logically sound in that the same basis of classification is not used thruout, is sufficiently accurate for the purposes of this discussion.

In regard to the first of these classes the Supreme Court in *Watson* v. *Jones* said that it was the duty of the court to see that the property was not diverted from the trust. Altho the task may be a difficult one, it is the duty of the court to investigate the teachings of the body holding the property to see that they are not so different from those to which it was dedicated as to defeat the objects of the trust. It may be that the court will be aided and influenced by the decision of a church judicatory on such matters, but the faction which must ultimately prevail must be the one which represents the original teachings and doctrines even tho the other faction is recognized by the regular organism of the society as the lawful successor to the original body. This principle has been frequently stated but there seems to be no case directly involving the question. If neither faction taught the doctrines and beliefs to which the property was dedicated the court might under the doctrine of *cy pres* give the property to another organization teaching the original doctrines and beliefs.

In the second class of cases the principles governing voluntary associations apply.[4] If the rule of the congregation is that the majority governs, the property of the congregation will pass with the majority and a minority who withdraw can claim no rights in the property. If the power of control and the government are vested in the officers of the congregation, the property will be in those who adhere to the regular organization. The conveyance of the property to the congregation vests it in the congregation subject to control according to the rules of the organization. Cases of this class have been before the Supreme Court of Missouri on several occasions. In *Prickett* v. *Wells*,[5] the proceeding was in equity to restrain interferences with property conveyed in trust for the use of the church, by defendant who was chosen pastor by elders who were not elected according to the rules of the congregation. The court granted the relief saying that the church could adopt such rules for the church government as it saw fit and the civil courts would give effect to them in adjusting claims to the use of church property. In *Fulbright* v. *Higginbotham*,[6] the court held that where the deacons of a church were given authority by the church to control the church property, they could exclude from use of it any member who refused to recognize the regular organization. In *Turpin* v. *Bagby*,[7] the terms of the grant were that the property was to be "used, kept, maintained, and disposed of as a place of divine worship for the use of the Ash Grove Baptist Church * * * while said church shall be governed by the rules, usages, and faith of the Missionary Baptist Churches of the State of Missouri." A minority of the Ash Grove congregation withdrew alleging that the teachings of

4. *Watson* v. *Jones* (1871) 13 Wall. 679, 20 L. Ed. 666.
5. (1893) 117 Mo. 502, 24 S. W. 52.
6. (1896) 133 Mo. 668, 34 S. W. 875.
7. (1897) 138 Mo. 7, 39 S. W. 455.

the majority were not in accord with those of the Missionary Baptist Churches of Missouri and claiming the property on the ground that they alone of the membership of the congregation taught the faith of the Missionary Baptist Churches of Missouri. The court held that the power to appoint trustees was in the congregation and that trustees appointed by the minority could not take the property "tho they may alone of the membership truly represent and be governed by the 'rules, usages, and faith of the Missionary Baptist Churches of the State of Missouri.'" Under a very liberal interpretation of the words of the grant it might have been found that the conveyance was on trust for the propagation of the teachings of the Missionary Baptist Churches of Missouri, but the courts require that the trust be clearly expressed. The words were perhaps more nearly words of condition which gave to the grantor a right of re-entry on a diversion of the property from the use of a congregation teaching the faith of the Missionary Baptist Churches of Missouri. This, however, would give no support to the claims of either party and was not raised in the case. The better view is, in accord with the Missouri cases just discussed, that continuity of organization rather than identity of doctrine is the criterion, the property being conveyed subject to the rules of the organization and not on a trust to propagate a particular faith.[8] A few jurisdictions require identity of doctrine.[9]

The facts of *Watson* v. *Jones* presented a case of the third class. Because of a protest against the pronouncements of the General Assembly of the Presbyterian Church of the United States on the subject of slavery and rebellion and the relation of the church thereto, a schism occurred in the Presbyterian Church of the United States by which the presbytery of Louisville was divided. A dispute between the factions of the Louisville presbytery over church property was taken before the Supreme Court of the United States in *Watson* v. *Jones*. That court decided in favor of the faction recognized by the General Assembly on the ground that the action of that body was conclusive upon a civil court. The court recognized that the question was as to the continuity of the organization and held that the determination of that question by the church judicatory was final. Whether the determination of the question by the church judicatory is final should depend on whether the rules of the church gave the judicatory authority to pass on that question, the property having been conveyed subject to such rules. In *State ex rel. Watson* v. *Farris*,[10] decided two years before *Watson* v. *Jones*, the Supreme Court of Missouri had held the action of the General Assembly conclusive in determining which of two factions, created under similar circumstances to those in *Watson* v. *Jones*, should have power to appoint trustees of a college. The case has

8. See the cases collected in the principal case and in 24 L. R. A. N. S. 692, note.
9. *Mt. Zion Baptist Church* v. *Whitmore* (1891) 83 Ia. 138, 49 N. W. 81; *Yanthis* v. *Kemp* (1908) 43 Ind. App. 203, 85 N. E. 976; *Smith* v. *Pedigo* (1893) 145 Ind. 361, 33 N. E. 777, (1896) 44 N. E. 363.
10. (1869) 45 Mo. 183.

been distinguished from *Watson* v. *Jones* and later Missouri cases in that the charter of the college provided that the trustees should be appointed by the presbytery "which is connected with the General Assembly of the Presbyterian Church of the United States." The opinion of the court, however, is in accord with *Watson* v. *Jones*. In *Watson* v. *Garvin*[11] on a motion for a rehearing which was passed upon after the decision of *Watson* v. *Jones*, the Supreme Court of Missouri refused to recognize the authority of *Watson* v. *Jones* in holding that the decision of the church judicatory was final in such cases. Adams, J., said that "the civil courts are presumed to know all the law touching property rights; and if questions of ecclesiastical law connected with property rights, come before them they are compelled to decide them. They have no power to abdicate their own jurisdiction and transfer it to other tribunals." He recognized that as to questions which are purely ecclesiastical the decision of a church judicatory is final, civil courts having no jurisdiction in such cases; but where property rights become involved by a schism, he would seem to require identity of doctrine. *Watson* v. *Garvin* can perhaps be justified on another ground which was suggested by the court. The General Assembly cut off the presbytery of St. Louis but did not excommunicate the members and they are entitled to the use of the church property as beneficiaries under deeds conveying to the use of the congregation. The views of the court in *Watson* v. *Garvin* were approved in *Boyles* v. *Roberts*[12] where Graves, J., declared that "there must be identity of doctrines and faith before a majority of a church organization can take the church property into another church." At another place he said, "The universal rule is that where there is a schism in a church, those remaining faithful to the tenets of the church at the time of the dispute, whether they are in the majority or the minority, are entitled to hold the property." In *Russie* v. *Brazzell*,[13] the court compared two confessions of faith to determine whether there was any change which resulted in a diversion of property held in trust for "The United Brethren in Christ," that church being subject to the control of higher church organizations. The three cases last discussed make identity of doctrine the criterion and then logically require the court to pass on the existence of the identity. A *dictum* in *Klix* v. *St. Stanislaus Parish*[14] made identity of doctrine to be the criterion but said the court would recognize as conclusive a decision of a church judicatory on the question. Such a position would be even more difficult to defend than the position taken in the cases last discussed. The Supreme Court of Missouri has held that in cases involving property of congregational churches, the test is continuity of organization. There is no reason why a different test should be applied to a church subject to a higher church authority. When property is conveyed to the local church

11. (1873) 54 Mo. 353.
12. (1909) 222 Mo. 613, 121 S. W. 805.
13. (1895) 128 Mo. 93, 30 S. W. 526.
14. (1909) 137 Mo. App. 347, 118 S. W. 1171.

in such a case, it is conveyed subject to the rules of the church. If the control and power of government is vested in a supreme church judicatory giving it power to determine the legal and regular successor to the original congregation, its decision should be final, the property being conveyed subject to the action of such judicatory. As already stated this was the result of *Watson* v. *Jones* and *State ex rel. Watson* v. *Farris* and represents the weight of authority. In *Barkley* v. *Hayes*,[15] the District Court of the United States for the western district of Missouri had a similar question before it and refused to follow *Boyles* v. *Roberts* saying it was contrary to the great weight of authority.

The recent Missouri case of *Hayes* v. *Manning*[16] arose under a state of facts essentially the same as in *Boyles* v. *Roberts* and the other cases hereinafter discussed. The cases grew out of the union of the Presbyterian Church of the United States and the Cumberland Presbyterian Church. The form of government of the two churches is practically the same. Each church is composed of local congregations called particular churches which are immediately governed by church sessions composed of certain members from the particular churches. Above the sessions are in order, presbyteries, synods, and the General Assembly which is the highest authority of the church. The Cumberland Presbyterian Church sprang from the Presbyterian Church of the United States in the early years of the nineteenth century. Repeated attempts were made to reunite them. In 1903 committees reported favorably on the question of union and their reports were adopted by the General Assembly and presbyteries of each church. In 1906 the General Assembly of the Cumberland Presbyterian Church formally declared that the union had been established and adjourned *sine die*. A minority opposed the union and organized another General Assembly which they contended was the only lawful General Assembly of the Cumberland Presbyterian Church. The schism extended thru the lower bodies of the church and resulted in contests as to the right to use the church property. In all the courts where cases were presented, except in Tennessee[17] and in Missouri[18], the claim of the Presbyterian Church of the United States was sustained. The Indiana Appellate Court in *Ramsay* v. *Hicks*[19] also decided in favor of the Cumberland Presbyterian Church but the decision was reversed when the case was taken before the Supreme Court of Indiana.[20] In the Tennessee case of *Landrith* v. *Hudgins* and in *Boyles* v. *Roberts* the courts base their decisions on two general grounds. The first is that the confessions of faith of the Presbyterian Church of the United States are materially different from those of the Cumberland Presbyterian Church and that the passage of the property of the Cumberland Presbyterian Church to the Presbyterian Church of

15. (1913) 208 Fed. 319.
16. (1914) 172 S. W. 897.
17. *Landrith* v. *Hodgins* (1907) 121 Tenn. 556, 120 S. W. 783.
18. In *Watson* v. *Garvin* and *Boyles* v. *Roberts*.
19. (1909) 44 Ind. App. 490, 87 N. E. 1091.
20. *Ramsay* v. *Hicks* (1910) 174 Ind. 428, 91 N. E. 344.

the United States depends on identity of doctrine and faith. The second is that the union was not brought about in accordance with the constitution of the Cumberland Presbyterian Church. As to the first it has already been pointed out that continuity of organization and not identity of doctrine is the criterion. The second depends on the facts of the case and involves a study and construction of the constitution of the Cumberland Presbyterian Church which is beyond the scope of this discussion. It is sufficient to point out that in only three cases[21] of the numerous ones involving the question has the contention been sustained that the union was not brought about in accordance with the constitution of the Cumberland Presbyterian Church. The principal case of *Hayes* v. *Manning* held, in accord with the weight of authority and sound principle, that continuity of organization was the test and that the union was in accordance with the constitution of the Cumberland Presbyterian Church. The court as an additional reason for its decision held that the minority who represented the Cumberland Presbyterian Church were estopped to set up their claim because they had acquiesced in the union for six months and taken a part in church affairs. The reasoning of the court on this point seems unsound. If the property was held in trust for the minority, nothing short of acquiescence for the period required by the statute of limitations should operate to transfer that right to the majority.

From the foregoing observations, it would seem that while the Supreme Court of Missouri had early laid down the correct principle involved in these cases, it had departed from its early ruling; and that the recent case of *Hayes* v. *Manning* re-establishes the early decision and leaves the law in this state in accord with the great weight of authority in requiring continuity of organization rather than identity of doctrine.

K. B.

CARRIERS—RELATION OF CARRIER AND PASSENGER. BLEDSOE v. WEST.[1]—The duties and liabilities imposed upon a carrier as to persons who are neither passengers nor employees are determined by the social obligation established in the common law that every person must so conduct his own affairs as not to injure or prejudice the rights of another. These duties are the basis for what may be called non-passenger rights. Hence, a person who is improperly refused permission to become a passenger has an action against the carrier.[2] This action is based upon a violation of the right to become a passenger and not upon the right of a passenger. In *Winscott* v. *Chicago & Alton R. R. Co.*,[3] the plaintiff was at the station to meet an incoming passenger; while on the platform he rested

21. *Landrith* v. *Hodgins* (1907) 121 Tenn. 556, 120 S. W. 783; *Boyles* v. *Roberts* (1909) 222 Mo. 613, 121 S. W. 805; *Ramsay* v. *Hicks* (1909) 44 Ind. App. 490, 87 N. E. 1091.

1. (1914) 171 S. W. 622.
2. *Harris* v. *Stevens* (1858) 31 Vt. 79.
3. (1910) 151 Mo. App. 378, 131 S. W. 749.

his hands upon the top board of the platform fence which was in a defective condition; the fence gave way, resulting in injury to the plaintiff: the court said that the plaintiff was neither a trespasser nor a mere licensee, but that "a person has a right to go on station premises for the purposes of escorting an outgoing passenger, or of meeting one whose arrival is expected. To such person the company does not owe the extraordinary care it owes a passenger, but it does owe him the duty of ordinary care, to maintain its station buildings and platforms in a reasonably safe condition for such purposes." So where a person goes upon a car with the knowledge of the carrier to assist a passenger to board or to alight, tho he is not a passenger he is performing a service in the common interest of the carrier and the passenger. It may well be held that his entry is upon an implied invitation which entitles him to demand ordinary care of the carrier.[4] Such rights as these, like the rights of persons who intend to become passengers, are incidental to the business of the carrier and derive their existence from actual or contemplated passenger rights.

Since a carrier is engaged in a public undertaking and "holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, and at a proper place to be carried,"[5] its responsibility as a carrier should properly begin upon the acceptance of the person who thus becomes a passenger. Thus it is conceived that the relation of carrier and passenger does not arise until there has been an offer to become a passenger and an acceptance of this offer by the carrier. This acceptance may be express, or it may be implied from an exact compliance with the terms of the carrier's offer. In *Lewis* v. *Houston Electric Co.*,[6] the plaintiff desiring to become a passenger on a car signalled the motorman who checked its speed. The plaintiff was injured in an attempt to board the car while it was in motion. Here the signal to the motorman was considered as the offer and the checking of the car as the acceptance which created the relation of carrier and passenger. It is often stated that the relation is contractual, expressly or impliedly.[7] The fact that a person goes aboard the vehicle of the carrier with the knowledge and consent of the one in charge is usually held to create a contract by operation of law. There is, however, no contract in fact for the cases hold that the payment of fare which would constitute the consideration for such contract is not essential.[8] Thus, in *Reynolds* v. *St. Louis Transit Co.*,[9] there was no evidence that the plaintiff paid any

4. *Doss* v. *Missouri, etc. R. R. Co.* (1875) 59 Mo. 27; *Bond* v. *Chicago, etc. R. R. Co.* (1906) 122 Mo. App. 207, 99 S. W. 30.
5. *Webster* v. *Fitchburg R. R. Co.* (1894) 161 Mass. 298, 37 N. E. 165.
6. (1905) 39 Tex. Civ. App. 625, 88 S. W. 489; *McDonough* v. *Met. R. R. Co.* (1884) 137 Mass. 210.
7. *Schepers* v. *Union Depot Railroad Co.* (1894) 126 Mo. 665, 29 S. E. 712; *Schaefer* v. *St. Louis & Suburban Railway Co.* (1895) 128 Mo. 64, 30 S. W. 331; *Reynolds* v. *St. Louis Transit Co.* (1905) 189 Mo. 408, 88 S. W. 50. See *O'Donnell* v. *Kansas City, St. L. etc. R. R. Co.* (1906) 197 Mo. 110, 95 S. W. 196.
8. *Buck* v. *People's Street Ry., etc. Co.* (1891) 108 Mo. 179, 18 S. W. 1090; *Albin* v. *C. R. I. & P. R. R. Co.* (1903) 103 Mo. App. 308, 77 S. W. 153.
9. (1905) 189 Mo. 408, 88 S. W. 50.

fare or that fare was demanded. The court said that "if he was received in the vehicle of a public carrier and was being carried in the manner of a passenger at the time the accident occurred, and nothing else appears, those facts are sufficient to support the inference that he was there under the implied contract that created the relation of passenger and carrier between him and the company." While it was stated that the relation of passenger and carrier grows out of contract either express or implied, it seems that the decision amounts simply to a recognition of the relation as consensual, treating the act of the plaintiff in offering himself as a passenger and the acceptance of him by the carrier as such, as sufficient to create the relation. When the relation is once established the duties and liabilities with which the carrier is charged are based upon considerations of public policy.

There is a class of persons to whom no duty is owed except to abstain from wilfully or wantonly injuring them. That is to say, there is no affirmative duty of care and such persons must take the premises as they find them. Thus, a carrier may decline to receive on its premises a person who desires shelter merely and it has been held that a railroad company is not bound to keep its station open after the last train has left in order to shelter a passenger who having missed the train is waiting for a street car.[10] Similarly, one who steals a ride on a vehicle of the carrier is not regarded as a passenger and the carrier owes him no duty of care, tho of course it must refrain from inflicting wilful injury.[11] It is only in so far as the interest of the passenger requires it, that service can be demanded. So a carrier owes no duty to one who comes to a station out of curiosity. Thus where the person injured had come to the station in order to see the President of the United States who was a passenger on the train, the court said that "the plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feeling. The defendant had nothing to do with that."[12]

The relation having once commenced will ordinarily continue until the passenger has reached his destination, yet it may be terminated by the wrongful act of the passenger such as a failure to comply with the reasonable regulations of the carrier,[13] or by disorderly conduct.[14] It may also be terminated by the voluntary act of the passenger in leaving the vehicle of the carrier. If the relation is consensual it would seem to be properly terminated when such facts appear as would constitute an intention to terminate the relation on the part of the passenger and an acquiescence on the part of the carrier. Thus in a recent Missouri case[15] where a passenger left the chair car and went into another car which required the payment of additional fare which was not paid by him, the

10. *Heinlein* v. *Boston & P. R. R.* (1888) 147 Mass. 136.
11. *Farber* v. *Mo. Pac. Ry. Co.* (1893) 116 Mo. 81, 22 S. W. 631; *Feeback* v. *Mo. Pac. Ry. Co.* (1902) 167 Mo. 206, 66 S. W. 965.
12. *Gillis* v. *Pennsylvania R. R. Co.* (1868) 59 Pa. 129.
13. *Martin* v. *Rhode Island Co.* (1905) 32 R. I. 162, 78 Atl. 548.
14. *Smith* v. *Louisville, etc. R. R. Co.* (1893) 95 Ky. 11, 23 S. W. 652.
15. *Siegel* v. *Illinois Central R. R. Co.* (Mo., 1915) 172 S. W. 420.

court held that he was still a passenger. This case may be placed on the ground that permission to ride by the one in charge of the conveyance without paying fare creates the relation of passenger and carrier.[16] In *Burbridge* v. *K. C. Cable Ry. Co.*,[17] where the plaintiff was injured by one of the defendant's trains after he had alighted, the court said that the plaintiff having been a passenger continued as such to the extent that on leaving the train he was entitled to protection against the negligent movement of the train: such liability may be put upon the failure to keep the premises in a safe condition rather than upon the violation of a right of the passenger. In *O'Brien* v. *St. Louis Transit Co.*,[18] where the propriety of certain instructions given at the request of the defendant was questioned, it was said *obiter* that "if after striking the conductor the man was trying to get off the car and the conductor was holding and beating him and thus followed him to the sidewalk and killed him the company would be liable." Such a liability may be put upon the ground of *respondeat superior* in the law of agency.[19]

In the recent case of *Bledsoe* v. *West* [20] the plaintiff went to the station of the defendant to purchase a ticket. The agent refused to return his change and upon being requested to do so struck the plaintiff with a metal stamp. The court held that the act of the agent in selling the ticket was within the scope of his employment and that "if as an incident thereto and as a result thereof, he committed a tort the master is liable."[21] It was also stated that "the plaintiff became a passenger when he went to the depot to take passage on the defendant's train and therefore the defendant owed him the duty of protecting him from unlawful assaults by strangers and its employees." The plaintiff here was in the relation of a customer to the carrier, upon the premises at the implied invitation of the carrier, and was entitled to demand ordinary care. The cases have failed to properly distinguish the duties of a carrier to persons upon the premises as passengers not being actually transported, to persons in the relation of customers, and to persons as passengers during actual transportation. The Missouri cases apply the rule that a carrier is charged with a high duty in the actual transportation of the passenger and that this duty of exercising extraordinary care devolves upon the carrier with respect to the safety of passengers getting on and off its cars.[22]

In many of the cases in which the relation of carrier and passenger is said to exist, the result reached can be made to depend on facts which form a basis for liability independently of such a relation. It is submitted that the principal case should be so explained.

R. BURNS.

16. *Drogmund* v. *Metropolitan St. Ry.* (1906) 122 Mo. App. 154, 98 S. W. 1091.
17. (1889) 36 Mo. App. 669.
18. (1904) 185 Mo. 263, 84 S. W. 939.
19. 8 Law Series, Missouri Bulletin, p. 33.
20. (1914) 171 S. W. 622.
21. Accord, *Winston* v. *Lusk* (Mo. 1914) 172 S. W. 76.
22. *O'Brien* v. *St. Louis Transit Co.* (1904) 185 Mo. 263, 84 S. W. 939; *Reardon* v. *St. Louis & S. F. R. R. Co.* (1908) 215 Mo. 105, 114 S. W. 961.

MASTER AND SERVANT—SCOPE OF EMPLOYMENT. EXCELSIOR PRODUCTS MANUFACTURING CO. v. KANSAS CITY SOUTHERN RAILWAY CO.[1]—While the liability of the master for acts performed by a servant within the scope of his employment has become well established, the application of the rule to particular situations presents a very troublesome problem. From the numerous adjudications the only deducible rule is that the "scope of the employment" includes all acts which are incident to, or naturally, proximately and causally related to the work which the servant is employed to do. This relation between the employment and the act done is the test of the master's liability rather than the questions as to whether the servant intended to benefit the master, whether his master's directions as to the means or manner of performing the service were complied with, or whether the act was done within the period or at the place of employment.[2]

The recent case of *Excelsior Products Manufacturing Co.* v. *Kansas City Southern Railway Co.* calls for the application of the foregoing principles. Laborers, employed by the defendant company in the construction of a subway and living in bunk cars provided by the company, built a fire upon the right of way and permitted it to spread and to damage the plaintiff's factory. The laborers, who were off duty at the time, built the fire for the purpose of drying their clothes. Their duties included only their work upon the subway and outside of the time they were so engaged they were free to come and go as they pleased. Under this state of facts, the court held that the workmen, in kindling the fire, were acting without the scope of their employment and recovery was therefore denied.

The case presents three questions with reference to the scope of employment: first, is the fact that the servants were off duty when the negligence occurred decisive of the master's non-liability? Second, has the fact that the workmen lived upon the right of way in cars provided by the master any bearing upon "the scope of employment?" Third, may the washing of clothes be considered as an incident to the employment, so as to render the master liable for the servant's kindling of the fire for that purpose?

It may be stated as a general rule that the master is not liable for an act committed by a servant while at liberty from the service and pursuing his own ends exclusively.[3] A servant may have certain duties to perform for the master outside of the regular period of employment, however, and for a default in the commission of such duties the master is liable. Where an employee of a railway company, when off duty and engaged primarily in his own pursuits, negligently left a gate open, the company was held liable, it appearing that it was the duty of the employee at all times to

1. (1914) 172 S. W. 359.
2. Mechem, Agency (2d ed.) §§ 1874-1884.
3. 6 Labatt, Master and Servant (2d ed.) § 2283; *Garretson* v. *Duenckel* (1872) 50 Mo. 104; *Cousins* v. *Hannibal & St. Joseph R. R. Co.* (1877) 66 Mo. 576; *Long* v. *Nute* (1906) 123 Mo. App. 204, 100 S. W. 511.

give attention to anything that he saw amiss.[4] In the principal case, the workmen had no duty whatever to perform in addition to their regular day's work, and their act of building the fire was not within the scope of their employment unless the matters embraced within the last two questions mentioned above alter the situation.

May it be said that the railroad company, by providing the laborers with bunk cars and allowing them the use of the right of way for carrying on the ordinary processes of living with a view to facilitating the performance of the work, broadens the scope of the laborers' employment and brings within it all acts incidental to the ordinary processes of living? In *Southern Railway Co.* v. *Power Fuel Co.*,[5] it was held that a member of a construction gang of a railroad, who after his day's work was over had returned to a car provided by the company for that purpose to sleep, was not an employee so as to make the company liable for a fire originating thru his negligence. The court declared that he was performing no business of his employer but was simply making use of facilities allowed him by his employer for his own purposes. The case seems properly decided and its reasoning applies to the principal case. The liability of the company as master should not be affected by its having permitted the servants to live upon the right of way. Conceivably the opposite conclusion might be reached, were the laborers required to occupy the quarters provided by the company. Whether the company would be held liable in the principal case for a nuisance or for negligence in placing the cars where they did, is another matter not intended to be dealt with here.

It seems, then, that in the principal case recovery can be had against the master, if at all, only upon the ground that the act of the workmen was "incidental" to the employment. Some courts, particularly the English, have been inclined to hold the master responsible for acts which are incidental to the employment in the sense that while performed by the servant for primarily personal purposes, they are necessitated by the physical wants and conveniences of the servant arising out of the service. A suggestion of such a class of cases was first made in the English case of *Stevens* v. *Woodward*.[6] A clerk, when leaving work, went into his master's lavatory to wash his hands and negligently left the water running. The clerks were provided with a room for washing their hands and were expressly forbidden to use the master's lavatory. The liability of the master for the clerk's negligence was denied, but the decision turned upon the presence of the element of trespass and it was taken for granted that the master would have been responsible had the negligence occurred in connection with the lavatory provided for the clerks. This implication was confirmed in *Ruddiman* v. *Smith*[7] where, under facts distinguishable from those of *Stevens* v. *Woodward* only by the absence of the element of

4. *Chapman* v. *New York Central R. R. Co.* (1865) 33 N. Y 369.
5. (1907) 152 Fed. 917, 82 C. C. A. 65.
6. (1881) 6 Q. B. D. 318.
7. (1889) 60 L. T. N. S. 708.

trespass, the master was held responsible. Lord Coleridge expressly drew a distinction between acts which are within the scope of employment strictly speaking and those which are incident to the employment, and decided that while it may not have been within the scope of the clerk's employment to wash his hands, it was clearly an incident to the employment. The only suggestion as to the content of the field of "incidents" is to be found in his further statement: "In such houses there is generally some place for the clerks to hang up their coats, some place to hang their hats, and a lavatory, and so on; all these things are incident to the employment * * *."

A review of American cases discloses little inclination on the part of the courts to extend the master's liability so as to include personal acts having an incidental connection with the employment. In *Hopkins* v. *Western Pacific R. R. Co.*,[8] the court denied the master's liability for a nuisance created by its servants in using a culvert under the railway near the plaintiff's house for the purposes of a privy. In the celebrated Minnesota case of *Morier* v. *St. Paul, etc. Ry. Co.*,[9] section men engaged in repairing the track built a fire upon the right of way while off duty during the noon hour for the purpose of warming their coffee. In so doing they were, according to the court, acting without the scope of their employment in the pursuit o their own ends exclusively and the railway company was held not liable. While this decision has met frequent criticism because of the court's refusal to take judicial notice that the duties of section men included keeping the track clear of fires, its authority upon the point of chief importance in this connection seems never to have been questioned. In *Walton* v. *N. Y. C. Sleeping Car Co.*,[10] a sleeping car porter, who was allowed to keep articles of his own personal property in the car, threw from the car a bundle containing his personal effects and injured a bystander. This act was held not to be imputable to the master. In *McLaughlin* v. *Cloquet Tie Co.*,[11] servants engaged in driving a raft downstream were obliged to wade into the stream to cut out a stump which impeded their progress. They then kindled a fire upon the bank for the purpose of drying their clothes. The court held that in so doing they did not, as a matter of law, depart from the course of their employment.

While the decided cases involving the point under discussion are few, numerous situations may be supposed where a personal act of a servant might with some show of reason and without opposing the current of authority be imputable to the master. Where the act with respect to which negligence is charged is done in satisfying a physical want arising out of the service, the master's responsibility might be supported upon the ground that the satisfaction of such a need was essential to the performance of the work entrusted to the servant and hence within the scope of the employ-

8. (1875) 50 Cal. 190.
9. (1884) 31 Minn. 351, 17 N. W. 952.
10. (1885) 139 Mass. 556.
11. (1912) 119 Minn. 454, 138 N. W. 434.

ment. As an example, suppose the servant is entrusted with work of such a nature that a satisfaction of thirst or hunger during the period of employment becomes essential to the continuance of the work. The servant goes upon neighboring land for the purpose of satisfying his desire and in so doing is guilty of negligence. In such a case the servant might be considered as acting within the course of his employment, tho such a view is probably opposed to *Hopkins* v. *Western Pacific R. R. Co.*, mentioned above. Probably a better view is, however, that the master's liability would have to be based, if at all, upon the personal negligence of the master in failing to provide conveniences rather than upon the imputed negligence of the servant. In cases where the servant is required to do certain personal acts preparatory to beginning work, it seems that the master's liability might be plausibly urged. For instance, suppose an elevator boy, who is required by his employer to wear a certain uniform is negligent in changing his ordinary clothes for the required livery, preparatory to going on duty. Perhaps the master should be held responsible since the act with respect to which negligence occurred was required by and made a part of the service. As stated in the beginning, the test as to the scope of employment should be whether the given act has a direct, proximate and causal connection with the service entrusted to the servant. Some acts, tho done with a primarily personal end in view, may nevertheless satisfy this requirement and for such acts the master should be held responsible.

In the principal case, however, it seems that in no view of the situation can the act of the servants in kindling a fire for the purpose of washing their clothes be said to have such a relation to the employment as to fasten liability upon the master, and the conclusion seems entirely proper that there was no liability. D. H. L.

DISCRIMINATION IN RAILROAD RATES FOR MILITIA. STATE EX REL. BARKER v. M. K. & T. RY. CO.[1]—A Missouri statute[2] provides that whenever it shall be necessary for the organized militia of the state to travel on any railroad between points wholly within the state, on military duty ordered by the Governor, the rate charged shall not exceed one cent per mile for each man. The constitutionality of the statute was attacked in *State* v. *M. K. & T. Ry. Co.*,[3] and it was held that the provision of the Missouri Constitution[4] requiring the General Assembly to pass laws to prevent unjust discrimination in the rates of tariffs on the different railroads in the state, renders the statute unconstitutional since the converse of the requirement forbids the legislature to pass any law which will effect an unjust discrimination.

1. (1914) 172 S. W. 35.
2. Revised Statutes 1909, § 8396.
3. (1914) 172 S. W. 35.
4. Constitution of 1875, Art. 12, § 14.

That the statute effected a discrimination in that it favored one class of persons over others is plain. Whether that discrimination was proper depends upon whether "the difference in rates is based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate."[5] Whether the discrimination was unjust in that the rate was confiscatory, depends upon the effect upon the railroads' earnings. The Missouri court held that there was not a proper basis for the discrimination and that it was also unjust because not a reasonable rate.

In the Minnesota case of *State* v. *C. M. & S. P. Ry. Co.*,[6] a statute similar to the Missouri statute was involved. Minnesota has no such constitutional provision as Missouri has, and the ground of attack was that the statute violated the fourteenth amendment to the Constitution of the United States in that it was a denial of equal protection of the law. There was an express waiver of inadequacy of compensation as a ground of unconstitutionality. It was held that there was a proper basis for the classification. It was said that it has been considered expedient to organize and make effective state militia, that the men constituting this force must be assembled for instruction, that the very existence of the state or nation may depend upon the efficiency of this force which must of necessity be transported by the railroads in the state; that all these things serve to place such troops in a class by themselves. In the Kansas case of *In re Gardner*,[7] it was contended that a one-cent militia fare statute violated the fourteenth amendment to the Constitution of the United States. Relative to the basis for classification the court said: "The times when members of the National Guard will travel are as uncertain as for other people. The number who will travel at any particular time is indefinite. They occupy the same space and have the same privileges as other persons." The Kansas court concluded that there were no circumstances to distinguish the militia from the general public and that the classification was without a proper basis. The Missouri court in *State* v. *M. K. & T. Ry. Co.* concurred in the view of the Kansas court on that point.

The Minnesota court relied upon *Wilcox* v. *Consolidated Gas Co.*,[8] in which it was held that a discrimination in gas rates in favor of a municipality was not illegal. The Kansas court relied chiefly upon *Lake Shore Ry. Co.* v. *Smith*,[9] which held that a Michigan statute requiring railroads to furnish thousand-mile tickets to passengers at a reduced rate, took the property of the railroad without due process of law and failed to afford to the railroads equal protection of the law.[10] The Minnesota

5. *Interstate Commerce Commission* v. *Alabama Ry. Co.* (1897) 168 U. S. 144; *Interstate Commerce Commission* v. *Chicago etc. Ry. Co.* (1907) 209 U. S. 108; *Commonwealth* v. *Interstate Street Ry. Co.* (1905) 187 Mass. 436, 73 N. E. 530, 11 L. R. A. N. S. 973.

6. (1914) 118 Minn. 380, 137 N. W. 2, 41 L. R. A. N. S. 524.

7. (1911) 84 Kansas 264, 113 Pac. 1054, 33 L. R. A. N. S. 956.

8. (1908) 212 U. S. 19, 48 L. R. A. N. S. 1134.

9. (1898) 173 U. S. 684.

10. The decision in *Lake Shore Ry. Co.* v. *Smith* has been followed in other states: *Beardsley* v. *Railroad Co.* (1900) 162 N. Y. 230, 56 N. E. 488; *State* v. *Great Northern*

court thought *Lake Shore Ry. Co.* v. *Smith* not in point because the Michigan Legislature had given a reduction to all who were willing to pay for a thousand-mile ticket, which created an uncertainty in the earnings of the railroads so that the maximum rate established might be too low and hence confiscatory of the carrier's property.

Besides holding the classification improper the Missouri court in *State* v. *M. K. & T. Ry. Co.* also held the discrimination unjust on the ground that if two cents per mile per passenger as fixed by statute[11] in 1907 was a reasonable maximum rate then, in the absence of some change in conditions one cent per mile per passenger was not reasonable in 1909 when the statute in question was passed, and is not now. Such reasoning is open to the objection that the rate of two cents per mile established in 1907 was a reasonable *maximum* rate and that in the absence of evidence it is not to be presumed that one cent per mile would be unreasonable. Granting that it is unreasonable, the decision is not inconsistent with the decisions in other states. L. W.

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS. BOONE COUNTY LUMBER CO. v. NEIDERMEYER.[1]—Diversity exists in common law jurisdictions as to the right of a beneficiary of a contract to sue on it. The term beneficiary in this connection has come to have a technical meaning, referring to one for whose benefit a contract to which he is not a party is made, who is not a promissee and who advances no consideration. Contracts from which persons not parties thereto receive benefit may be grouped under three heads. The first comprises those contracts wherein the third person was not considered nor intended to be benefited, but from which he would derive some advantage if the contract were carried out; e.g., A contracts with B to make an improvement on B's lot which would ultimately increase the value of C's lot. C is an incidental beneficiary and cannot maintain an action on the contract in any jurisdiction.[2] A second class of cases comprises those in which a contract is made for the benefit of some third person to whom neither party has any obligation; such a third person is called a gift beneficiary. In the third type the contract is for the benefit of one to whom the promisee owes a legal obligation, the third person being called a payment beneficiary. In England it is now well settled that beneficiaries of a contract have no right of action at common law.[3] In the United States the contrary is

Ry. Co. (1908) 17 N. D. 370, 116 N. W. 89; *Commonwealth* v. *Atlantic Coast Ry. Co.* (1906) 106 Va. 61, 55 S. E. 572, 7 L. R. A. N. S. 1086.

11. Revised Statutes 1909, § 3232.

1. (1915) 173 S. W. 57.

2. *Jones* v. *Miller* (1849) 12 Mo. 408; *Gordon* v. *Livingston* (1882) 12 Mo. App. 267; *Lampert* v. *Laclede Gaslight Co.* (1883) 14 Mo. App. 376; *Mann* v. *Chicago, etc. Ry. Co.* (1885) 86 Mo. 347; *St. Louis Packet Co.* v. *Mo.P. Ry. Co.* (1889) 35 Mo. App. 272; *Roddy* v. *Mo. P. Ry. Co.* (1891) 104 Mo. 234, 15 S. W. 112; *Porter* v. *Woods* (1897) 138 Mo. 539, 39 S. W. 794. *Thomas Mfg. Co.* v. *Prather* (1898) 65 Ark. 27, 44 S. W. 218; *Burton* v. *Larkin* (1887) 36 Kan. 246.

3. *Gurrin* v. *Kopera* (1865) 3 H. & G. 694; *Dashwood* v. *Jermyn* (1879) 12 Ch. D. 776; *Re Rotherham Alum Co.* (1883) 25 Ch. D. 103; *Lilly* v. *Hays* (1836) 5 A. & E.

held in almost all jurisdictions.[4] A few states refuse to allow a payment beneficiary to recover,[5] and in some states no recovery is allowed the gift beneficiary.[6]

The Missouri courts make no distinction between the gift and payment beneficiary types of contracts. Recovery is allowed in both cases.[7] A few decisions to the contrary must be regarded as overruled.[8] There are some cases which appear to be exceptions to the rule, but they may be distinguished on the ground that there was no intent to benefit the plaintiff.[9] An early case[10] contained *dicta* to the effect that if the contract was under seal the beneficiary could not recover thereon unless he was a party to the deed. The more recent decisions both in Missouri and other jurisdictions make no distinction between sealed and unsealed agreements.[11] As private seals have been generally abolished by statute, this question is of very little importance today.[12]

In applying the rule allowing a third person to sue upon a contract entered into for his benefit, no distinction is made between written and oral contracts. The cases are uniform in holding that an agreement be-

548; *Gresty* v. *Gibson* (1886) 1 Exch. 112; *Evans* v. *Hooper* (1875) 1 Q. B. D. 45; *Price* v. *Easton* (1833) 4 B. & Ad. 433; *Tweedle* v. *Atkinson* (1861) 1 B. & S. 393.

4. *Alabama Dev. Co.* v. *Short* (1898) 121 Ala. 333, 13 So. 385; *Starbird* v. *Cranston* (1897) 24 Colo. 20, 48 Pac. 657; *Brenner* v. *Luth* (1882) 28 Kans. 581; *Blakely* v. *Adams* (1902) 113 Ky. 392, 68 S. W. 393; *Michaud* v. *Erickson* (1909) 108 Minn. 356, 122 N. W. 324; *Elscherd* v. *Baker* (1901) 112 Wis. 129, 88 N. W. 52.

5. *Morgan* v. *Randolph-Clowes Co.* (1900) 73 Conn. 396, 47 Atl. 658; *White* v. *Mt. Pleasant Mills* (1899) 172 Mass. 462, 52 N. E. 632; *Hand* v. *Evans Marble Co.* (1898) 88 Md. 226, 50 Atl. 899; *Bliss* v. *Plummer's Estate* (1894) 103 Mich. 181, 61 N. W. 263; *Hunt* v. *Fire Association* (1895) 68 N. H. 305, 38 Atl. 145; *Woodcock* v. *Bostic* (1896) 118 N. C. 822, 24 S. E. 362; *Delp* v. *Brewing Co.* (1888) 123 Pa. 42, 15 Atl. 871; *Natl. Bank* v. *Grand Loage* (1878) 98 U. S. 123.

6. *Baxter* v. *Camp.* (1898) 71 Conn. 245, 41 Atl. 803; *Marston* v. *Bigelow* (1889) 150 Mass. 45, 22 N. E. 71; *Linneman* v. *Moross* (1893) 98 Mich. 178, 57 N. W. 103; *Jefferson* v. *Asch* (1893) 53 Minn. 446, 55 N. W. 604; *Curry* v. *Rogers* (1850) 21 N. H. 247; *Hostetter* v. *Hollinger* (1888) 117 Pa. 606, 12 Atl. 741; *Fugure* v. *Mut. Soc.* (1874) 46 Vt. 360; *Land Co.* v. *Newberry* (1897) 95 Va. 111, 27 S. E. 897; *Shoe Co.* v. *Dancel* (1903) 119 Fed. 692.

7. Payment Beneficiary: *Doane* v. *Newman* (1864) 10 Mo. 70; *Corl* v. *Riggs* (1849) 12 Mo. 430; *Rogers* v. *Gosnell* (1875) 58 Mo. 589; *Buffalo Forge Co.* v. *Cullen Mfg. Co.* (1904) 105 Mo. App. 484, 79 S. W. 1024; *Davis* v. *Dunn* (1906) 121 Mo. App 490, 96 S. W. 226; *Beattie Mfg. Co.* v. *Clark* (1907) 208 Mo. 89, 106 S. W. 29; *Atkinson* v. *Hardy* (1908) 128 Mo. App. 349, 107 S. W. 466; *St. Louis Lumber Co.* v. *Banks* (1909) 136 Mo. App. 44, 117 S. W. 611; *Leckie* v. *Bennett* (1911) 160 Mo. App. 145, 141 S. W. 706; *O'Connell* v. *Trust Co.* (1912) 165 Mo. App. 398, 147 S. W. 841; *Gate City Bank* v. *Chick* (1913) 170 Mo. App. 343, 156 S. W. 743; *Ulrich* v. *Globe Surety Co.* Mo., 1914) 166 S. W. 845; *Boone County Lumber Co.* v. *Niedermeyer* (Mo. 1915) 173 S. W. 57.

Gift Beneficiary: *Weinreich* v. *Weinreich* (1885) 18 Mo. App. 364; *Market* v. *W. U. Telegraph Co.* (1886) 19 Mo. App. 80; *Barbaro* v. *Occidental Grove* (1877) 4 Mo. App. 429; *St. Louis* v. *Von Phul* (1895) 133 Mo. 561, 34 S. W. 843; *Devers* v. *Howard* (1898) 144 Mo. 671, 46 S. W. 645; *Crone* v. *Stinde* (1900) 156 Mo. 262, 55 S. W. 863; *Glencoe Lime Co.* v. *Wind* (1900) 86 Mo. App. 163; *Scheele* v. *Lafayette Bank* (1906) 120 Mo. App. 611, 97 S. W. 621.

8. *Thornton* v. *Smith* (1841) 7 Mo. 86; *Jones* v. *Miller* (1849) 12 Mo. 408; *Page* v. *Becker* (1862) 31 Mo. 466; *Hicks* v. *Hamilton* (1898) 144 Mo. App. 495, 46 S. W. 432, overruled by *Crone* v. *Stinde* (1900) 156 Mo. 262, 55 S. W. 863; *O'Connell* v. *Trust Co.* (1912) 165 Mo. App. 398, 147 S. W. 841.

9. *Phoenix Ins. Co.* v. *Water Co.* (1890) 42 Mo. App. 118; *Howsmon* v. *Waterworks Co.* (1893) 119 Mo. 304, 24 S. W. 784; *Houck* v. *Cape Girardeau Waterworks Co.* (1908) Mo. App. 114 S. W. 199.

10. *Robbins* v. *Ayres* (1847) 10 Mo. 538.

11. *Dean* v. *Walker* (1883) 107 Ill. 540; *Emmett* v. *Brophy* (1884) 42 Oh. St. 82; *Bassett* v. *Hughes* (1877) 43 Wis. 319; *Rogers* v. *Gosnell* (1873) 51 Mo. 466; *Fitzgerald* v. *Barker* (1884) 85 Mo. 13; *St. Louis* v. *Von Phul* (1895) 133 Mo. 561, 34 S. W. 843.

12. Revised Statutes 1909, § 2773.

tween two parties on a valid consideration may be enforced, whether oral or written, by the person for whose benefit it was made even tho he was not named in the contract and was not a privy to the consideration.[13] The obligation to pay the beneficiary is a primary one, hence not within the statute of frauds.[14]

The code provision requiring suits to be brought in the name of the real party in interest[15] has been referred to in many Missouri cases as conferring upon the beneficiary of a contract the right to maintain an action it.[16] The contrary view has been taken by Professor Clark in an article in a previous number of the Law Series of this Bulletin.[17]

Payment beneficiary cases usually involve an undertaking to pay another's debt. Several cases in this state hold that in order for the third person to recover on the contract there must be some duty owed by the promisee to that person.[18] This would seem to preclude a recovery in the gift beneficiary cases, but in *St. Louis* v. *Von Phul*[19] the court enforced a promise where no such duty existed and *Crone* v. *Stinde*[20] stands squarely for the proposition that no duty need be owed to the third person. In the latter case A bought mortgaged lands without assuming the mortgage debt. On selling them to B, B promised A that he would pay C, the mortgagee, and C was allowed to recover upon the contract as the one for whose benefit it was made. "We know of no reason," said the court, "why under our rulings he [C] is not entitled to sue for and recover judgment for the same notwithstanding A was under no obligation either legal or equitable to pay the debt."

The recent case of *Boone County Lumber Co.* v. *Neidermeyer*[21] involves the right of one for whose benefit a contract is made, to sue thereon. One Torbitt wishing to build some houses executed certain notes and trust deeds to the defendant who agreed to raise money thereon and pay the plaintiff for such lumber as Torbitt should purchase from it. Torbitt bought lumber from the plaintiff who sued the defendant on the latter's agreement with Torbitt. It will be noticed that this case is not exactly similar to the payment beneficiary cases which have arisen. The agreement here was not to pay an existing debt as in the usual cases, but to pay a debt to be created in the future. At the time of making the promise Torbitt owed no obligation to the plaintiff. The court, however, allowed

13. *Leckie* v. *Bennett* (1911) 160 Mo. App. 145, 141 S. W. 706.
14. *Robbins* v. *Ayres* (1847) 10 Mo. 538; *Besshears* v. *Rowe* (1870) 46 Mo. 501; *Flanagan* v. *Hutchinson* (1871) 47 Mo. 237; *Beardslee* v. *Morgner* (1877) 4 Mo. App. 139; *Duerre* v. *Rediger* (1895) 65 Mo. App. 407; *Heddin* v. *Schneblin* (1907) 126 Mo. App. 478, 104 S. W. 887; *Leckie* v. *Bennett* (1911) 160 Mo. App. 145, 141 S. W. 706.
Contra: *Nunn* v. *Carroll* (1899) 83 Mo. App. 135.
15. Revised Statutes 1909, § 1729.
16. *Rogers* v. *Gosnell* (1873) 51 Mo. 466; *Ellis* v. *Harrison* (1891) 104 Mo. 270.
17. 4 Law Series, Missouri Bulletin, p. 30.
18. *Ins. Co.* v. *Waterworks Co.* (1890) 42 Mo. App. 118; *Howsmon* v. *Waterworks Co.* (1893) 119 Mo. 304; 24 S. W. 784; *Hicks* v. *Hamilton* (1898) 144 Mo. 495, 46 S. W. 432; *Devers* v. *Howard* (1898) 144 Mo. 671, 46 S. W. 625; *Street* v. *Goodale* (1898) 77 Mo. App. 318; *Harberg* v. *Arnold* (1899) 78 Mo. App. 237.
19. (1895) 133 Mo. 561.
20. (1900) 156 Mo. 262, 55 S. W. 863.
21. (Mo. 1915) 173 S. W. 57.

recovery but treated it as a strict payment beneficiary case similar to *Lawrence* v. *Fox*.[22] In deciding the case the court did not discuss the fact that the debt was not in existence at the time the contract was made. But in allowing recovery the court was not advancing a new principle as at first appears. In *Street* v. *Goodale*,[23] the defendant agreed with one Manard to pay any checks which the latter might give for certain contemplated purchases. The defendant subsequently refused to pay and the plaintiff, payee of the checks, brought an action against the defendant on his agreement with Manard. The court held that tho no debt existed until sometime after the contract was made, there was no reason why the promise might not attach and become effective and the plaintiff was allowed a recovery.[24] The case of *Boone County Lumber Co.* v. *Niedermeyer* is clearly in accord with the great weight of authority in the United States as well as in Missouri, and goes the full length in allowing payment beneficiaries to recover on contracts entered into for their benefit.

G. L. D.

MASTER AND SERVANT—DUTY OF EMPLOYER TO FURNISH MEDICAL AID TO INJURED EMPLOYEE. HUNICKE V. MERAMEC QUARRY CO.[1]—The common law recognized no duty to care for the sick or injured. But where a relation existed such as that of parent and child, a duty of providing medical aid was imposed upon the parent. A few early cases in England indicated that a master was under a legal obligation to provide for his sick or injured servant,[2] but such a duty was never enforced except in cases of domestic service and its existence has been very generally repudiated since Lord Mansfield's decision in *Newby* v. *Wiltshire*.[3]

A master is under a legal obligation to provide necessary medical attention for his sick or injured apprentice.[4] But the relation of master and apprentice is more nearly analogous to that of parent and child than to the relation of master and servant. In admiralty it is well established that, except where the sickness or injury is the result of the seaman's own gross negligence, seamen are entitled to medical attention at the expense of the ship and the shipowner.[5] The right constitutes a part of the contract for wages and is a material part of the compensation for labor and services of the seaman.[6] The owner is liable for the consequences of

22. (1859) 20 N. Y. 268.
23. (1898) 77 Mo. App. 318.
24. Acc., *Bank of Laddonia* v. *Commission Co.* (1909) 139 Mo. App. 110, 120 S. W. 648.

1. (1914) 172 S. W. 43.
2. *King* v. *Hales-Owen* (1718) 11 Mod. 278; *Rex* v. *Christ Church* (1760) Burrow Sett. Cas. 494; *Rex* v. *Wintersett* (1783) Cald. 298.
3. (1782) 2 Esp. 739.
4. *Easley* v. *Craddock* (1826) 4 Rand. (Va.) 423; *Regina* v. *Smith* (1837) 8 Car. & P. 153, 4 L. R. A. N. S. 50, note.
5. *Chandler* v. *Grieves* (1792) 2 H. Bl. 606; *Harden* v. *Gordon* (1823) 2 Mason 541; *The City of Alexandria* (1878) 17 Fed. 390; *The Explorer* (1884) 20 Fed. 135; *The W. L. White* (1865) 25 Fed. 503; *The Neptune* (1887) 30 Fed. 925, 4 L. R. A. N. S. 68, note.
6. *Harden* v. *Gordon* (1823) 2 Mason 541.

failure to provide medical treatment.[7] The officers and seamen are considered fellow servants and the owner is only liable in damages for injuries caused by the unseaworthiness or defective appliances of the ship.[8] However, maritime law and the common law governing employment on land grew up under very different conditions and customs. Because of the nature of the business of navigation, the distances covered, and the perils and hardships encountered, it is easy to see that the seaman is necessarily more dependent upon the shipowner than any other employee.

The relation of master and servant has not been treated as like that of parent and child, shipowner and seaman, or master and apprentice. It is almost the universal rule that an employer is not under a legal duty to provide medical aid to an employee injured in his service.[9] But because in many instances the strict application of this rule would reach harsh and unhumanitarian results the courts have hesitated to apply it. Thus in many cases a subordinate official or employee has been allowed to bind his employer for physician's services[10] to an injured fellow servant. Some courts suggest that the employer should act as agent of the employee in calling aid. In *B. & O. R. R. Co.* v. *State*[11] it was said that the employer performs his duty when the injured man is carried to the nearest place where he can get help. A South Carolina statute imposes upon employers the duty of notifying a physician of an employee's injury.[12] Where employees for special purposes have been allowed to bind their employer for medical services to an injured employee there has been in several jurisdictions a tendency to limit the doctrine to railroads,[13] Altho no case is put upon the analogy to the admiralty cases, the modern railroad, taking its employees far from their homes and to deserted sections of the country where it is difficult to get aid without the assistance of the company, does occupy a position analogous to that of the shipowner. In cases where railway employees have been injured far from their homes, perhaps it is because of the existence of situations and reasons similar to

7. *The Vigilant* (1887) 30 Fed. 288; *Petersen* v. *Swan* (1884) 50 N. Y. Super. Ct. 46; *The City of Carlisle* (1889) 39 Fed. 807; *The Scotland* (1890) 42 Fed. 925; *The City of Alexandria* (1883) 17 Fed. 390.

8. *Grimsley* v. *Hawkins* (1891) 46 Fed. 400; *The Lizzie Frank* (1887) 31 Fed. 477; *The Noddleburn* (1886) 28 Fed. 855; *The City of Alexandria* (1883) 17 Fed. 390.

9. *Wennall* v. *Adney* (1802) 3 Bos. & P. 247; *Makarsky* v. *Canadian Pacific Ry. Co.*, 15 Manitoba L. R. 53; *Sevier* v. *Birmingham, etc. Ry. Co.* (1890) 92 Ala., 258, 9 So. 405; *D. & R. G. Ry. Co.* v. *Iles* (1898) 25 Colo. 19, 53 Pac. 222; *Sweetwater Mfg. Co.* v. *Glover* (1859) 29 Ga. 399; *Toledo, W. & W. Ry.* v. *Rodrigues* (1868) 47 Ill. 188; *Vorass* v. *Rosenberry* (1899) 85 Ill. App. 623; *Atlantic & Pacific Ry. Co.* v. *Reisner* (1877) 18 Kan. 458; *Union Pac. Ry. Co.* v. *Beatty* (1886) 35 Kan. 265, 10 Pac. 856; *Clark* v. *Mo. Pac. Ry.* (1892) 48 Kan. 654, 29 Pac. 1138; *Lithgow Mfg. Co.* v. *Samuel* (1903) 24 Ky. 1590; *Jesserich* v. *Walruff* (1892) 51 Mo. App. 270; *Spelman* v. *Gold Coin Min. & Mill. Co.* (1901) 26 Mont. 76, 66 Pac. 597; *Malone* v. *Robinson* (Miss., 1893) 12 So. 709; *Voorhees* v. *N. Y. Central Ry. Co.* (1909) 114 N. Y. Sup. 242, 92 N. E. 1105; *King* v. *I. C. St. Ry. Co.* (1902) 23 R. I. 583, 51 Atl. 301.

10. It is within the powers of a corporation to provide medical aid to employees. *Toledo, W. & W. Ry. Co.* v. *Rodrigues* (1868) 47 Ill. 188; *Toledo W. & W. Ry. Co.* v *Prince* (1869) 50 Ill. 26; *Bedord Belt Ry. Co.* v. *McDonald* (1897) 17 Ind. App. 492, 46 N. E. 1022.

11. (1874) 41 Md. 268.

12. South Carolina Civil Code 1912, § 3228.

13. *Meisenbach* v. *Cooperage Co.* (1891) 45 Mo. App. 132; *Goodshaw* v. *Stuck Bros.* (1900) 109 Ky. 285, 58 S. W. 781; *New Pittsburgh Coal Co.* v. *Shaley* (1900) 25 Ind. App. 282; *Swazey* v. *Union Mfg. Co.* (1875) 42 Conn. 556.

those which gave rise to the admiralty doctrine, that the courts first compelled railways to pay for medical aid to their employees and that the cases show a tendency to limit the liability to such employers. It is said in *Chaplin* v. *Freeland*,[14] where the court refused to hold a manufacturing company liable to a physician called by an employee for services rendered to an injured employee, that "a railroad occupies a peculiar position with reference to such matters, conveying their employees necessarily to places remote from their homes and subjecting them to unusual hazards and dangers." Other courts have gone a little further and suggested that the doctrine should be limited to companies engaged in a business dangerous to their employees,[15] while still others apply it to all but individual employers.[16] However, the employee's authority is difficult to sustain upon legal theory and if the power exists in any employees on principles of agency, it is not easy to see why it should not exist in all.[17] The employee's authority is put upon various grounds such as that damages are kept down;[18] that the interests of the company are subserved since the injury of trained men to some extent retards the operation of the road;[19] that the moral obligation of the company gives its agents implied power to so bind it;[20] that the highest agent of the company represents the company in the emergency and can do what it could;[21] and that the emergency imposes a legal duty upon the company to provide medical aid.[22] Such decisions show that there is a growing public demand for corporations to care for their employees and that the courts are attempting to cause them to do so by every means possible without going so far as to overthrow the common law rule and assert that there is a positive duty. Many corporations have met this by maintaining a hospital or relief fund with money deducted from employee's wages.[23] By doing so a company binds itself to furnish medical attention when reasonable[24] and transportation to the hospital.[25] But a custom of a company to pay for medical services rendered to employees injured in its service is not binding until it is shown to be so general as to raise a presumption that the services were rendered with reference to it.[26]

14. (1893) 7 Ind. App. 676, 34 N. E. 1007.
15. *Holmes* v. *McAllister* (1900) 123 Mich. 493, 83 N. W. 220; *Salter* v. *Neb. Tel. Co.* (1907) 79 Neb. 373, 112 N. W. 600; *Spelman* v. *Gold Coin Min. & Mil. Co.* (1901) 26 Mont. 76, 66 Pac. 597.
16. *Holmes* v. *McAllister* (1900) 123 Mich. 493; *Malone* v. *Robinson* (Miss., 1893) 12 So. 709.
17. Mechem, Agency (2d ed.) §§ 341, 994.
18. *U. P. Ry. Co.* v. *Beatty* (1886) 35 Kan. 625, 10 Pac. 845.
19. *Atlantic & P. Ry. Co.* v. *Reisner* (1877) 18 Kan. 458.
20. *Toledo, W. & W. Ry. Co.* v. *Rodrigues* (1868) 47 Ill. 188; *Sevier* v. *B. S. & T. River Ry. Co.* (1890) 92 Ala. 258, 9 So. 405.
21. *Evansville, etc. Ry. Co.* v. *Freeland* (1892) 4 Ind. App. 207, 30 N. E. 803; *Louisville, N. A. & C. Ry. Co.* v. *Smith* (1889) 121 Ind. 353, 22 N. E. 775; *Toledo, St L. & K. C. Ry. Co.* v. *Mylott* (1893) 6 Ind. App. 438.
22. *T. H. & I. Ry. Co.* v. *McMurray* (1884) 98 Ind. 358; *O. & M. Ry. Co.* v. *Early* (1895) 141 Ind. 73, 40 N. E. 257.
23. *Beck* v. *Penn. R. R. Co.* (1899) 63 N. J. L. 32. It is not *ultra vires* for a corporation to maintain such a fund.
24. *Southern Pac. Co.* v. *Mauldin* (1898) 19 Tex. Civ. App. 166, 46 S. W. 650.
25. *Gulf, C. & S. F. Ry. Co.* v. *Harney* (Texas, 1899) 45 S. W. 791.
26. *M. & M. Ry. Co.* v. *Jay* (1878) 61 Ala. 247.

The only jurisdiction holding that an employer must furnish medical aid is Indiana. The duty is imposed where there is an emergency in which the employee is unable to help himself. This is plainly an exception to the individualistic rule of the common law. There are several cases which expressly negative such a duty even tho there is an emergency,[27] while many others state without qualification that an employer is under no duty to provide medical aid.[28] The Indiana cases are put entirely on the ground of humanity and moral obligation.[29]

In the recent case of *Hunicke* v. *Meramec Quarry Co.*, the Supreme Court of Missouri held that the plaintiff in an action under the death statute stated a cause of action when he alleged that his intestate, an employee of the defendant corporation, was so badly injured by cars moving into the defendant's yards that a sudden emergency was created which required the immediate attention of a physician and that the corporation negligently allowed the employee to bleed to death before any effective aid was furnished him.[30] In short the employer's negligence in not giving aid makes him liable for the employee's death. There is no workman's compensation act or other statute in Missouri on this point.

The decision would hardly be expected in view of the earlier Missouri cases, some of which are emergency cases, holding that there is no such duty[31] and that an employee or officer of a company cannot bind the company for physician's services unless authorized to do so.[32] The Missouri court relies chiefly upon the Indiana cases, but puts the duty on the ground that because of general custom and the nature of the relation of master and servant, it has come to be required by law, just as the duty of supplying a safe place to work and safe appliances to work with has come to be required. Woodson, J., compares the duties of providing safe appliances and of furnishing medical aid and says that the latter

27. *Voohrees* v. *N. Y. Central R. R. Co.* (1909) 114 N. Y. Sup. 242, 92 N. E. 1105; *Peninsular Ry. Co.* v. *Gary* (1886) 22 Fla. 356; *Meisenbach* v. *Cooperage Co.* (1891) 45 Mo. App. 232.

28. *Newby* v. *Wiltshire* (1782) 2 Esp. 739; *Wennall* v. *Adney* (1802) 3 Bos. & P. 247; *Davis* v. *Forbes* (1898) 171 Mass. 548, 51 N. E. 20; *U. P. Ry. Co.* v. *Beatty* (1886) 35 Kan. 265, 10 Pac. 845; *Jesserich* v. *Walruff* (1892) 51 Mo. App. 270; *Toledo, W. & W. Ry. Co.* v. *Rodrigues* (1868) 47 Ill. 188.

29. The court in *T. H. & I. Ry. Co.* v. *McMurray* (1884) 98 Ind. 358 says that "if it be conceded that honesty and fair dealing require that medical assistance should be furnished then the law requires it, for the law always requires honesty and fair dealing." "Before this broad principle bare pecuniary considerations become things of little weight. There may be cases in which a denial of the right of the conductor to summon medical aid to one of the trainmen would result in suffering or death, while on the other hand, the assertion of the right can at the most never do more than entail upon the corporation pecuniary loss."

30. The result of the case might be justified on the ground that the defendant's manager undertook to care for him but did so negligently and actually prevented another, who wished to bind the wound to stop the flow of blood, from aiding him and thus made his condition worse than if he had left him alone.

31. *Jesserich* v. *Walruff* (1892) 51 Mo. App. 270.

32. *Tucker* v. *St. Louis K. C. & Northern Ry. Co.* (1873) 54 Mo. 177; *Brown* v. *M. K. & T. Ry. Co.* (1877) 67 Mo. 122; *Meisenbach* v. *Southern Cooperage Co.* (1891) 45 Mo. App. 232. In *Evans* v. *Marion Mining Co.* (1903) 100 Mo. App. 670, 75 S. W. 178; and *Weinsberg* v. *Cordage Co.* (1908) 135 Mo. App. 553, 116 S.W. 461, the president of a corporation was allowed to bind the company for physician's services because it was for the general benefit of the company.

"has ripened into law from wise and humane usages and customs that are so old that the memory of man runneth not to the contrary." While the customs are without doubt old, the earlier decisions do not warrant the statement that they had ripened into law.

If we adopt such a doctrine what would its limitations be? Since it is founded upon the broad grounds of humanity and moral obligation the necessity of strict limitation is apparent. The cases make the duty an emergency duty which arises and expires with an emergency where death or great bodily harm will result if the injured man is unattended. It is required that he be attended until the emergency ceases,[33] or until he can be turned over to the public authorities.[34] These limitations seem reasonable and proper, but limiting the liability to railroads or any other particular class of employers seems illogical. Since the relation of seaman and shipowner imposes the duty to provide medical aid on the ground of implied contract, because of the peculiar nature of the business it would be more logical to impose the duty upon an employer whose business is closely analagous.

If the employer is to be under a duty to give aid, it would seem to follow that he should be liable for the negligence of the physician employed. This is stated in *Hunicke* v. *Meramec Quarry Co.*, and the Indiana courts intimate that they would approve such a rule. But of course the general rule is the other way,[35] except where the employer is negligent in selecting or keeping the physician,[36] unless there is a benefit fund kept up by deducting from the wages of the employees.[37]

But it is difficult to see why a doctrine based on humanity, moral duty and fair dealing should be limited to employers and employees. One who injures a trespasser or stranger and leaves him unattended is certainly as reprehensible morally as an employer who does not care for an employee. Surely, too, the relation to a man one injures is almost as close as that of an employer to an employee injured by his own negligence. The common law recognized no duty to an injured trespasser.[38] But as in the case of master and servant, we find a court going so far as to disregard the common law rule[39] and other authorities making statements inconsistent with it. In *Northern Central Ry.* v. *Price*[40] where a trespasser had been run

33. *O. & M. Ry. Co.* v. *Early* (1895) 141 Ind. 73; *Evansville, etc. Ry. Co.* v. *Freeland* (1892) 4 Ind. 207, 30 N. E. 803.

34. *Salter* v. *Neb. Tel. Co.* (1907) 79 Neb. 373.

35. *Maine* v. *C. B. & Q. Ry. Co.* (1897) 109 Iowa 260, 80 N. W. 315; *Southern Pac. Ry. Co.* v. *Mauldin* (1898) 19 Tex. Civ. App. 166, 46 S. W. 650; *Union Pac. Ry. Co.* v. *Artist* (1894) 60 Fed. 365; *A. T. & S. F. Ry. Co.* v. *Zeiler* (1894) 54 Kan. 340.

36. *M. K. & T. Ry. Co.* v. *Freeman* (1904) 97 Tex. 394, 79 S. W. 9; *Wabash Ry. Co.* v. *Kelly* (1898) 153 Ind. 119, 52 N. E. 152; *P. C. C. & S. L. Ry. Co.* v. *Sullivan* (1895) 141 Ind. 83, 40 N. E. 138; *Cummings* v. *Chicago & N. W. Ry. Co.* (1900) 89 Ill. App. 199.

37. *Texas & P. Coal Co.* v. *Connaughton* (1899) 20 Tex. Civ. App. 642, 50 S. W. 173; *Sawdey* v. *Spokane Falls & N. Ry. Co.* (1902) 30 Wash. 349, 70 Pac. 972.

38. *Union Pac. Ry. Co.* v. *Cappier* (1903) 66 Kan. 649, 72 Pac. 281.

39. *Whitesides* v. *Southern Ry. Co.* (1901) 128 N. C. 229, 38 S. E. 878. A trespasser was run over by a train and left unattended. The railroad was held liable for his death by leaving him unattended tho it might not have been liable for his injury.

40. (1868) 29 Md. 420.

over by a train, the court said that "it was the duty of the servants of the company, when the man was found on the pilot of the engine in a helpless and insensible condition, to remove him and do it with a proper regard to his safety and the laws of humanity." This case is cited by Beech in support[41] of his statement that "under certain circumstances a railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped and the injured person looked after and when it is necessary removed to a place of safety and carefully nursed until other relief can be brought to the disabled person." Surely this could not be objected to on grounds of humanity and moral obligation.

The possible and proper limitations of the doctrine that an employer must provide aid for his injured employee would undoubtedly be difficult to determine since it is clearly a departure from the common law rule. It is evident, tho, that there is a tendency today for the law to become more humanitarian and this is especially true in regard to employers' liability. Recent statutes, some of which provide for medical attention to employees,[42] indicate, as do recent cases, the development in this field of the law. Furnishing medical aid, like furnishing a safe place to work and safe appliances to work with, is a matter which is peculiarly within the power of the employer and is something over which the employee has no control. Since under modern labor conditions and methods of business the employer must be trusted in such matters, it is submitted that on principle it is entirely reasonable to place upon employers the duty to give emergency treatment to employees injured in their service. L. M. H.

NEGLIGENCE—LEGAL EFFECT OF VIOLATION OF SPEED ORDINANCE UPON THE LIABILITY OF RAILROADS. HUNT V. ST. LOUIS & SAN FRANCISCO R. R. Co.[1]—At common law a railroad is not limited to any particular rate of speed; whether a given rate is negligence, is ordinarily a question of fact depending upon the circumstances.[2] There being no rule of general application courts read into statutes giving municipalities authority to abate nuisances and provide for the public welfare, the right to regulate the rate of speed at which railroads may be operated within the corporate limits. Usually, therefore, each municipality under such police powers for the better protection of life and property within its

41. Beech, Contributory Negligence (3d ed.) § 215.
42. South Carolina Civil Code 1912, § 3228; Illinois Revised Statutes 1913, p. 1209.

1. (1915) 171 S. W. 64.
2. *Goodwin* v. *Chicago, R. I. & P. R. R. Co.* (1881) 75 Mo. 73; *Main* v. *H. & St. Joe Ry. Co.* (1885) 18 Mo. App. 388; *Haley* v. *Mo. Pac. Ry. Co.* (1906) 197 Mo. 15, 93 S. W. 1120; *Central R. R. Co.* v. *Ingram* (1893) 98 Ala. 395, 12 So. 801; *Chicago B. & Q. R. R. Co.* v. *Campbell* (1905) 34 Colo. 380, 83 Pac. 138.

limits, has passed an ordinance fixing the maximum rate of speed.[3] Such ordinances do not affect the ordinary rules as to liability for negligence. A violation of the duty of care thus prescribed can be made the foundation of an action only in favor of those intended to be benefited; but since such speed ordinances do not designate any particular class, they are of general application[4] as contrasted with legislative enactments where those coming within their designation are necessarily restricted.[5] The imposition of a fine for a violation thereof does not relieve the company from civil liability for injuries resulting from such violation,[6] and the existence of the maximum limit does not relieve the railroad from the ordinary duty to use care which duty may in some circumstances require a rate of speed below the maximum.[7]

Courts are at variance as to whether a violation of an ordinance which is the direct and proximate cause of an injury is negligence *per se*, or simply evidence of negligence to go to the jury.[8] The great weight of authority makes it negligence *per se*.[9] In *Stotler* v. *Chicago & Alton R. R. Co.*,[10] Lamm, C. J., states that this "doctrine somewhat shaken at one time but never exploded, may now be taken as so buttressed by both reason and authority as to withstand any (but a legislative) assault."

The difference between the two rules first set out above seems to be this: according to the first view, evidence of failure to comply with the ordinance is sufficient to establish negligence conclusively; according to the other, the wrongful act or omission is but an evidential fact tending to prove negligence. However, they appear to accord in that evidence of a violation of the ordinance is usually held sufficient to warrant the jury in finding the railroad company guilty of negligence.[11] No matter which

3. *Prewitt* v. *M. K. & T. Ry. Co.* (1896) 134 Mo. 615, 36 S. W. 667; *Jackson* v. *K. C. Ft. S. & M. Ry. Co.* (1900) 157 Mo. 621, 58 S. W. 32; *Sluder* v. *St. Louis Transit Co.* (1905) 189 Mo. 107, 88 S. W. 648; 2 Redfield, Railways (5th ed.) 564.

4. *Backenstone* v. *W., St. L. & Pac. Ry. Co.* (1885) 23 Mo. App. 48; *Bluedorn* v. *Mo. Pac. Ry. Co.* (1891) 108 Mo. 439, 18 S. W. 1103; *Loring* v. *K. C. Ft. S. & M. Ry. Co.* (1895) 128 Mo. 349, 31 S. W. 6; *Jackson* v. *K. C. Ft. S. M. Ry. Co.* (1900) 157 Mo. 621, 58 S. W. 32; *Omaha St. Ry. Co.* v. *Duval* (1894) 37 Neb. 52, 58 N. W. 531.

5. *Bell* v. *Hannibal & St. Joseph R. R. Co.* (1880) 72 Mo. 50; *Glazer* v. *Rothschild* (1909) 221 Mo. 180, 120 S. W. 1.

6. *Fath* v. *Tower Grove & Fayette Ry. Co.* (1891) 105 Mo. 537, 16 S. W. 913.

7. *Holden* v. *Missouri R. R. Co.* 177 Mo. 456, 83 S. W. 992; *Story* v. *St. Louis Transit Co.* (1904) 108 Mo. App. 424, 83 S. W. 992.

8. *Baltimore City Passenger Co.* v. *McDonnell* (1875) 43 Md. 534; *Harrison* v. *Sutler St. Ry. Co.* (1897) 116 Cal. 156, 165, 47 Pac. 1019; *Caswell* v. *Boston Ry. Co.* (1906) 190 Mass. 527, 77 N. E. 380.

In at least two jurisdictions a violation is no evidence of negligence. *Rockford City Ry. Co.* v. *Blake* (1898) 173 Ill. 354, 50 N. E. 1070; *Ford's Adm'r* v. *Paducah City Ry. Co.* (1907) 124 Ky. 488, 99 S. W. 355. In the latter case it was held not to be prejudicial error to refuse to allow proof of an ordinance regulating the operation of street cars, the court saying that "the violation of an ordinance is no more evidence of negligence than obedience to its provisions would be evidence of due care."

9. *Keim* v. *Union Ry. & Transit Co.* (1886) 90 Mo. 314, 2 S. W. 427; *Murray* v. *Mo. Pac. Ry. Co.* (1890) 101 Mo. 236, 13 S. W. 817; *Hutchinson* v. *Mo. Pac. Ry. Co.* (1900) 161 Mo. 246, 61 S. W. 635; *Meyers* v. *St. Louis Transit Co.* (1903) 99 Mo. App. 363, 73 S. W. 379; *Moore* v. *St. Louis Transit Co.* (1906) 194 Mo. 1, 92 S.W. 390; *Tobey* v. *Burlington C. R. & N. R. R. Co.* (1895) 94 Iowa 256, 62 N. W. 761; *Pittsburg C. C. R. R. Co.* v. *Lightheizer* (1904) 163 Ind. 247, 71 N. E. 218; *Memphis St. Ry. Co.* v. *Haynes* (1904) 112 Tenn. 712, 81 S. W. 374.

10. 200 Mo. 107, 121, 98 S. W. 509.

11. *Baltimore Passenger Co.* v. *McDonnell* (1875) 43 Md. 534; *Atlanta Ry. & Power Co.* v. *Owens* (1904) 119 Ga. 835, 47 S. E. 213, 214.

of the foregoing rules is accepted, the company is not liable if such violation is not the proximate cause of the injury.[12] Nor does the fact that defendant had been running at a rate forbidden raise a presumption that the injury was caused by such excessive speed.[13] In determining liability most of the cases seem to indicate that the Missouri courts apply the "but for" test of causation.[14] The negligence of the railroad may in some cases become so remote as to be no longer properly considered the proximate cause. The question should always be, whether the plaintiff's injury was the natural and probable consequence of defendant's negligence.[15]

As a method of raising this question the ordinance should be pleaded, for otherwise a violation thereof is not negligence *per se* even in those jurisdictions following the prevailing view. In other jurisdictions evidence of a violation of such an ordinance is inadmissible for showing negligence unless the ordinance is pleaded.[16] The general rule is that tho the ordinance is not pleaded, its violation may be proved as a fact bearing upon the question of negligence.[17] Courts will not take judicial notice of such ordinances.[18]

Even where the majority view obtains that the violation of a speed ordinance is negligence *per se*, it is usually held that it does not affect such defenses as contributory negligence.[19] It is a well-recognized principle of law, however, that the doctrine that contributory negligence defeats recovery has no application in cases of wilful, wanton, or reckless torts;[20] and where the violation of the ordinance is flagrant, but neither wilful nor wantonly reckless, the courts require the proof of contributory negligence to be *clearly* made out.[21]

12. *Braxton* v. *H. & St. J. R. R. Co.* (1883) 77 Mo. 455; *Moore* v. *St. Louis Transit Co.* (1902) 95 Mo. App. 728, 75 S. W. 699; *Murray* v. *St. Louis Transit Co.* (1904) 108 Mo. App. 501, 83 S. W. 995.

13. *Evans & Howard Fire Brick Co.* v. *St. Louis & San Francisco Ry. Co.* (1885) 17 Mo. App. 624; *Bluedorn* v. *Mo. Pac. Ry. Co.* (1893) 121 Mo. 258, 35 S. W. 943; *Battles* v. *United Rys. Co.* (1913) 178 Mo. App. 596, 161 S. W. 614.

14. *Bergman* v. *St. Louis, I. M. & S. Ry. Co.* (1886) 88 Mo. 678; *Hanlon* v. *Mo. Pac. Ry. Co.* (1891) 104 Mo. 381, 16 S. W. 233; *Lloyd* v. *St. Louis, I. M. & S. Co.* (1895) 128 Mo. 595, 31 S. W. 110; *Hutchinson* v. *Mo. Pac. Ry. Co.* (1901) 161 Mo. 246, 61 S. W. 852.

15. *Poepper* v. *M. K. & T. Ry. Co.* (1878) 67 Mo. 715; *Tobey* v. *McMahon* (1905) 114 Mo. App. 442, 90 S. W. 113; *Hegberg* v. *St. Louis & S. F. R. R. Co.* (1912) 164 Mo. App. 514, 552, 147 S. W. 192; Sherman and Redfield, Negligence (4th ed.) § 26.

16. *Putman* v. *Detroit United Rys. Co.* (1911) 164 Mich. 342, 129 N. W. 860, and cases cited.

17. *Robertson* v. *Wabash, St. Louis & Pac. Ry. Co.* (1884) 84 Mo. 119; *Riley* v. *W. St. L. & P. Ry. Co.* (1885) 18 Mo. App. 385; *White* v. *Atchison, Topeka & Santa Fe R. R. Co.* (1900) 84 Mo. App. 411, 418; *Shell* v. *Mo. Pac. Ry. Co.* (1908) 132 Mo. App. 528, 535, 112 S. W. 39; *San Antonio St. Ry. Co.* v. *Mechler* (1894) 87 Texas 467, 29 S. W. 202; *Norfolk & P. Traction Co.* v. *Forest's Adm'x* (1909) 109 Va. 658, 64 S. W. 1034.

18. *Cox* v. *City of St. Louis* (1848) 11 Mo. 431; *Keane* v. *Klausman* (1886) 21 Mo. App. 485. Cf. *Norfolk & P. Traction Co.* v. *Forest Adm'x* (1909) 109 Va. 658, 64 S. E. 1034.

19. *Weller* v. *Chicago, Milwaukee & St. Paul Ry. Co.* (1894) 120 Mo. 635, 25 S. W. 532; *Paine* v. *C. & A. Ry. Co.* (1895) 129 Mo. 405, 31 S. W. 885; *Stotler* v. *C. & A. Ry. Co.* (1907) 204 Mo. 619, 103 S. W. 1.

20. *Rosenfeldt* v. *St. Louis & Suburban Ry. Co.* (1903) 180 Mo. 554, 565, 79 S. W. 706; *Abbott* v. *K. C. Elevated Ry. Co.* (1906) 121 Mo. App. 582, 97 S. W. 198.

21. *Bluedorn* v. *Mo. Pac. Ry. Co.* (1891) 108 Mo. 439, 449.

The question of reliance upon the observance of an ordinance often becomes important as affecting contributory negligence. It appears to relieve the plaintiff of the imputation of contributory negligence, as where one could have crossed a railroad track in safety providing the train had been running within the lawful rate prescribed.[22] In *Rissler* v. *St. Louis Transit Co.*,[23] one injured at a railroad crossing was allowed to recover on the presumption that he anticipated and relied upon a compliance with the ordinance regulating the speed of cars. Tho it did not appear that he knew of such ordinance, his apparent omission of care was attributed to this presumptive reliance. More recent cases, as illustrated by *Voelker Products Co.* v. *United Rys. Co.*,[24] refuse to follow this doctrine unless it appears that the injured party approaching the track knew of the ordinance and relied upon it, or knew of the usual rate of speed at that point and acted upon such knowledge. The evidence in *Voelker Products Co.* v. *United Rys. Co.* showed a course of action that might have been either careful or negligent, depending on whether plaintiff relied upon the defendant's compliance with the ordinance. The plaintiff offered no evidence to prove that he knew of the ordinance or relied upon it, and it was held that the directed verdict for defendant in the court below was proper. The court concluded, however, that an exception to the rule still obtains where a person approaching a track has been killed or rendered incapable of speaking upon the subject at all. Where the party injured survives and goes upon the stand, no presumption to the above effect is indulged. If the plaintiff fails to show that he was familiar with the provisions of the ordinance, or that he relied upon it, t will not be presumed in excuse of contributory negligence that he did rely thereon.[25] Evidence of such an ordinance is admissible to relieve the plaintiff of the effect of contributory negligence tho the ordinance is not pleaded.[26]

In *Powers* v. *St. Louis Transit Co.*,[27] the presumption that a pedestrian before crossing the track did look and listen and was therefore in the exercise of due care was held not to be rebutted by testimony of the motorman that the deceased "did not seem to look or notice anything," and of the conductor "that she did not look back at all." Such presumption was held to be rebutted however in *Porter* v. *Mo. Pac. Ry. Co.* where it appeared that deceased "had he looked *must* have seen it [the

22. *Kellny* v. *Mo. Pac. Ry. Co.* (1890) 101 Mo. 67, 13 S. W. 806; *Sullivan* v. *Mo. Pac. Ry. Co.* (1893) 117 Mo. 214, 23 S. W. 149; *Hutchinson* v. *Mo. Pac. Ry. Co.* (1900) 161 Mo. 246, 61 S. W. 635; *Riska* v. *Union Depot R. R. Co.* (1903) 180 Mo. 168, 79 S. W. 445.

23. (1905) 113 Mo. App. 120, 124, 87 S. W. 578. Cf. *Gratiot* v. *Mo. Pac. Ry. Co.* (1893) 116 Mo. 450, 21 S. W. 1094.

24. (1914) 170 S. W. 332. Cf. *Barret* v. *Delano* (1915) 174 S. W. 181, 183.

25. *Paul* v. *United Rys. Co.* (1911) 152 Mo. App. 577, 134 S. W. 3.

26. *Meng* v. *St. Louis & Suburban Ry. Co.* (1904) 108 Mo. App. 553, 84 S. W. 213; *Denver City Tramway Co.* v. *Martin* (1908) 44 Colo. 62, 98 Pac. 83.

27. (1907) 202 Mo. 267, 282, 100 S. W. 655. See also *McKenzie* v. *United Rys. Co.* (1909) 216 Mo. 1, 115 S. W. 13; *Northern Pac. Ry. Co.* v. *Spike* (1903) 57 C. C. A. 384, 121 Fed. 44; *Davenport, Rock Island & Northwestern Ry. Co.* v. *De Yaeger Adm'x* (1903) 112 Ill. App. 537.

train] in time to have avoided the collision."[28] It seems difficult to appreciate the reasons for such an artificial and arbitrary distinction. It appears that where the injured person survives, the burden of showing a freedom from contributory negligence is placed upon him contrary to our well-settled rule that contributory negligence is a matter of defense to be pleaded and proved by defendant. The rule of procedure is that such burden is upon defendant. A presumption obtains that the injured party was in the exercise of ordinary care at the time. It would seem that *Voelker Products Co.* v. *United Rys. Co.* is in conflict with well adjudicated principles, for before the defendant is entitled to a directed verdict after proof of negligence conduct on the part of plaintiff not reasonably consistent with due care should be proved.

Even after proof of contributory negligence the plaintiff can still recover if he brings his case within the operation of the "last clear chance" doctrine.[29] The plaintiff's negligence is then no bar to his recovery unless it was a directly contributing cause to the injury as distinguished from a mere condition in the absence of which the accident would not have happened.[30] Ordinarily to make the defendant liable under the "last clear chance" rule, it must be shown that he failed to exercise due care after the discovery of the plaintiff's peril. Yet where there is reason to anticipate that the track is not clear, liability is not limited to the want of care after the discovery of the danger.[31] The same rulings apply as to trespassers.[32] The statute declaring that persons who walk upon the tracks are to be deemed trespassers in any action brought by them on account of their injury,[33] does not lessen the company's duty or impair the general rule above stated.[34]

The foregoing principles were involved in the recent case of *Hunt* v. *St. Louis & San Francisco R. R. Co.*[35] The evidence indicated that deceased after having become voluntarily intoxicated, had lain down upon defendant's track. Defendant's train was running at a high rate of speed in violation of a city ordinance, and tho the engineer saw deceased, he was unable to stop in time to avoid striking him. It was proved however that he could have stopped if the train had not been running at a rate in excess of that prescribed. The defendant's motion for an instructed verdict was overruled and the question of contributory negligence was

28. (1906) 199 Mo. 82, 97, 97 S. W. 880. Cf. *Weller* v. *Chicago, Milwaukee & St. Paul R. R. Co.* (1901) 164 Mo. 180, 64 S. W. 141.

29. *Guenther* v. *St. Louis, I. M. & S. Ry. Co.* (1891) 108 Mo. 18, 18 S. W. 846; *Matz* v. *Mo. Pac. Ry. Co.* (1908) 217 Mo. 275, 117 S. W. 584; *Gumm* v. *K. C. Belt. Ry. Co.* (1909) 141 Mo. App. 306, 125 S. W. 796; 1 Law Series, Missouri Bulletin, p. 37.

30. *Oates* v. *Metropolitan St. Ry. Co.* (1902) 168 Mo. 535, 68 S. W. 936.

31. *Koenig* v. *Union Depot Ry. Co.* (1903) 173 Mo. 698, 73 S. W. 698; *Moore* v. *St. Louis Transit Co.* (1905) 194 Mo. 1, 92 S. W. 390; *Everett* v. *St. Louis & S. F. R. R. Co.* (1908) 214 Mo. 54, 112 S. W. 486; *Murphy* v. *Wabash R. R. Co.* (1910) 228 Mo. 56, 128 S. W. 481; *Dyrcz* v. *Mo. Pac. Ry. Co.* (1911) 238 Mo. 33, 141 S. W. 861.

32. *Barker* v. *H. & St. J. R. R. Co.* (1888) 98 Mo. 50; *Scullin* v. *Wabash R. R. Co.* (1904) 184 Mo. 695, 83 S. W. 760; *Eppstein* v. *Mo. Pac. Ry. Co.* (1906) 197 Mo. 720, 94 S. W. 967; *Hall* v. *Mo. Pac. Ry. Co.* (1908) 219 Mo. 553, 118 S. W. 56.

33. Revised Statutes 1909, § 3145.

34. *Ahnefeld* v. *Wabash R. R. Co.* (1908) 212 Mo. 280, 111 S. W. 95.

35. (1915) 171 S. W. 64.

submitted to the jury and found in plaintiff's favor. The majority of the court held this was error since on the admitted facts deceased was negligent as a matter of law. Lamm, C. J., dissenting[36] held that where it is shown that the accident could have been avoided by the use of ordinary care had the train been running at a rate of speed not prohibited by ordinance, the question of contributory negligence is immaterial.

It is admitted that the violation of an ordinance, tho negligence *per se*, does not deprive the offender of any of the common law defenses. Without a clear expression to that effect there should be no disposition so to penalize him. But there are present in this particular case the material facts that intestate was unconscious of his peril and that if the train had not been running at a rate in excess of that prescribed the accident could have been averted. These facts were absent in *Weller* v. *Chicago Milwaukee & St. Paul Ry. Co.*,[37] *Paine* v. *C. & A. Ry. Co.*,[38] and *Stotler* v. *C. & A. Ry. Co.*,[39] in each of which the plaintiff was denied recovery because of contributory negligence. If then the defendant in the principal case could have averted the collision by complying with the ordinance the deceased's negligence was but a condition, and the defendant's act the direct and efficient cause of the injury. This view was advanced in the early case of *Maher* v. *Atlantic & Pac. R. R. Co.*,[40] where the court suggested that altho railroad servants use every effort to avoid the injury after discovering the peril of the person injured and find it impossible to do so, still that will not excuse the company where it has been "guilty of negligence which created the impossibility."[40] When an instruction to that effect was asked to be approved in *Guenther* v. *St. Louis, I. Mt. & S. Ry. Co.*,[41] *Kellny* v. *Mo. Pac. Ry. Co.*,[42] *Dlauhi* v. *St. Louis I. Mt. & S. Ry. Co.*,[43] and *Sullivan* v. *Mo. Pac. Ry. Co.*,[44] the court in each case clearly refused to accept this doctrine. It was cited with approval however, in *Murrel* v. *Mo. Pac. Ry. Co.*[45] The court then in the principal case either overlooked the later decisions or else intended to reassert the ruling of *Sullivan* v. *Mo. Pac. Ry. Co.*, as the case was cited as authority for its conclusion.

The manifest purpose of the speed ordinance is to make it possible to avoid injuring one in a position of peril. Unless it is shown that the party injured would have been struck tho the train had been running at the lawful rate prescribed by the ordinance, his negligence should be

36. Walker, J., also dissented.
37. (1894) 120 Mo. 635, 25 S. W. 532.
38. (1895) 129 Mo. 405, 31 S. W. 885.
39. (1907) 204 Mo. 619, 103 S. W. 1.
40. (1876) 64 Mo. 267, 276. In this case there was no question of a violation of an ordinance.
41. (1888) 95 Mo. 286, 8 S. W. 371.
42. (1890) 101 Mo. 67, 13 S. W. 806.
43. (1891) 105 Mo. 645, 16 S. W. 281.
44. (1893) 117 Mo. 214, 23 S. W. 149.
45. (1904) 105 Mo. App. 88, 94, 79 S. W. 505. To the same effect, *Koenig* v. *Union Depot Ry. Co.* (1902) 173 Mo. 698, 724, 73 S. W. 637.

considered as no part of the legal cause. And tested by that rule the facts of the principal case would seem to have authorized a recovery.

J. C. S.

DAMAGES—RECEIVER'S LIABILITY FOR EXEMPLARY DAMAGES. COOK v. LUSK.[1]—A master's liability for exemplary damages for the acts of his servant irrespective of previous authorization or subsequent ratification was not settled in this state until the decision in *Canfield* v. *Chicago, R. I. & P. Ry. Co.*[2] A year previous to that decision, the opposite view which had been taken in *Rouse* v. *Metropolitan St. Ry. Co.*[3] and announced in other earlier cases[4] had been clearly repudiated *obiter* in *Haehl* v. *Wabash R. R. Co.*[5] The liability is the consequence of a strict application of the principle of *respondeat superior*, and it seems that it will be enforced without discrimination against individual masters[6] as well as corporation masters. This principle is now so firmly fixed[7] that it is no longer susceptible to effective attack; but it seems to ignore the objects of punitive damages, to punish wrongdoers and to deter repetitions of the wrongful act. To punish on the basis of *respondeat superior* is to misapply that doctrine, for when we seek "to inflict punishment we enter the domain of personal responsibility which must be founded on the act of the wrongdoer *in fact*, and the punishment [should be] inflicted on the perpetrator alone."[8] Nor does such exaction of exemplary damages seem to have any deterring effect since it punishes persons who are not in a position to avoid a recurrence of the wrongful acts. The rule has been justified as to corporation principals on the ground that "all attempts * * * to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is 'entirely fruitless,' and only tends to confuse the mind and confound the judgment."[9]

This position does not represent the view which obtains in the majority of American jurisdictions where the master must be connected with the

1. (1915) 172 S. W. 81.
2. (1894) 59 Mo. App. 354.
3. (1890) 41 Mo. App. 298.
4. *Perkins* v. *M. K. & T. R. R.* (1874) 55 Mo. 201, 214; *Graham* v. *Pacific R. R. Co.* (1877) 66 Mo. 536, 545; *Randolph* v. *Hannibal & St. Joseph Ry. Co.* (1885) 18 Mo. App. 609, 614.
5. (1893) 119 Mo. 325, 24 S. W. 737. The action was brought for the wrongful killing of the plaintiff's husband under Revised Statutes 1889, §§ 4426 and 4427, which provided expressly that in assessing the damages, the jury might have regard "to the mitigating or aggravating circumstances, attending such wrongful act" of the servant, agent, or employee of the corporation. With some modifications, these are now Revised Statutes 1909, §§ 5425—5427.
6. See *Leahy* v. *Davis* (1893) 121 Mo. 227.
7. *McNamara* v. *St. Louis Transit Co.* (1904) 182 Mo. 676, 81 S. W. 880; *Williams* v. *St. Louis, Memphis & S. E. R. R. Co.* (1906) 119 Mo. App. 663, 96 S. W. 307; *Knight* v. *Quincy, Omaha & K. C. R. R. Co.* (1906) 120 Mo. App. 311, 96 S. W. 716; *White* v. *Metropolitan St. Ry. Co.* (1908) 132 Mo. App. 339, 112 S. W. 278; *Wehmeyer* v. *Mulvihill* (1910) 150 Mo. App. 197, 130 S. W. 681; *Cathey* v. *St. Louis & San Francisco R. R. Co.* (1910) 149 Mo. App. 134, 130 S. W. 130. See a limitation in these railroad cases in *Boling* v. *St. Louis & San Francisco Ry. Co.* (1905) 189 Mo. 219, 88 S. W. 35; *Glover* v. *A. T. & S. F. Ry. Co.* (1907) 129 Mo. App. 563, 108 S. W. 105.
8. Ellison, J., in *Rouse* v. *Metropolitan St. Ry. Co.* (1890) 41 Mo. App. 298, 305.
9. *Goddard* v. *Grand Trunk Ry.* (1869) 57 Me. 202. Quoted with approval by Gill, J., in his dissent in *Rouse* v. *Metropolitan St. Ry. Co.* (1890) 41 Mo. App. 298, 314.

malicious tort of the servant by some act of participation, either by way of authorization or ratification, or by fault in the employment or retention of the servant.[10] Many jurisdictions have distinguished between corporations and private individuals, holding the former responsible without any act of participation, on the theory that since a corporation can only act thru servants their acts are in fact the acts of the corporation.[11]

The recent case of *Cook* v. *Lusk*[12] has extended this liability of the master to the receiver of a railroad. Two hundred and fifty dollars actual and five hundred dollars punitive damages were recovered from the federal receiver of the St. Louis and San Francisco Railroad for the mistreatment of a woman passenger by a conductor. The court affirmed the judgment without discussing the receiver's liability for punitive damages. This would seem to indicate either that the point was not presented by counsel or that the court deemed it unworthy of discussion. It is urged, however, that this is an unnecessary and unwarrantable extension of the above-stated doctrine.

A receiver of a railroad is a public officer. He is appointed and directed to act by a court, and does act under its supervision "as an arm of the court." Except for an injury which is attributable to a personal act of neglect,[13] the fact that he is a public officer shields him from personal responsibility for injuries inflicted in the management of the railroad.[14] The receiver's compensatory liability even in his official capacity was frequently questioned in the early cases; immunity from such liability was limited in *Little* v. *Dusenberry*[15] to "those who are strictly public officers, who are parts of the governmental agency of the state, entirely distinct from individual gain or profit, such as state, county, municipal and township boards and officers, discharging duties imposed upon them by law, with none behind them but the public, whom they represent, and no funds to answer for damages except those that must be taken from the public treasury." Compensatory responsibility is placed upon a receiver because in conducting his activity he is in the same position as any other employer and so subject to the principle of *respondeat superior*. It is accordingly held without exception that the fact that the defendant is a receiver, appointed by a court and subject to its supervision, is not a good defense to an action against him in his official capacity for breach of duty as a common carrier.[16]

10. *Burns* v. *Campbell* (1882) 71 Ala. 271; *Lake Shore & M. S. Ry.* v. *Prentice* (1893) 147 U. S. 101; *Staples* v. *Scmid* (1893) 18 R. I. 224, 26 Atl. 193; *Eviston* v. *Cramer* (1883) 57 Wis. 570, 15 N. W. 760; *Haines* v. *Schultz* (1888) 50 N. J. L. 481, 14 Atl. 488; *Rowe* v. *Brooklyn Heights Ry. Co.* (1902) 75 N. Y. S. 893, 71 App. Div. 474; *Mutual L. I. Co.* v. *Hargus* (1907) 99 S .W. (Tex.) 580; *Davis* v. *Hearst* (1911) 160 Cal. 143, 116 Pac. 530. For other cases, see Sedgwick, Damages (9th ed.) § 378.

11. Sedgwick, Damages (9th ed.) § 380, note 229.

12. (1914) 172 S. W. 81.

13. *Kirk* v. *Kane* (1901) 87 Mo. App. 274; *Erwin* v. *Davenport* (1871) 9 Heisk. (Tenn.) 44.

14. *Averill* v. *McCook* (1900) 86 Mo. App. 346; *Camp* v. *Barney* (1875) 4 Hun (N. Y.) 373; *Cordat* v. *Barney* (1875) 63 N. Y. 281; *McNulta* v. *Ensch* (1890) 134 Ill. 46; *Vasele* v. *Grant Street Electric Ry. Co.* (1897) 16 Wash. 602, 48 Pac. 249.

15. (1884) 46 N. J. L. 614.

16. Cf. *Heath* v. *M. K. & T. Ry. Co.* (1884) 83 Mo. 617; *Kinney* v. *Crocker* (1864) 18 Wis. 80; *Blumenthal* v. *Brainerd* (1866) 38 Vt. 401; *Paige* v. *Smith* (1868) 99 Mass.

Capable of being sued then by a third person for his own or the negligent act of the servant, the receiver is held to the same degree of care as the ordinary common carrier.[17] Protection to the public would seem to demand this. Tho appointed by a federal court, the law of the state in which the railroad is operated prevails to determine his liability.[18] State statutes of a police nature imposing liability upon "railroad companies"[19] and "railroad corporations"[20] have been liberally construed so as to include receivers. This construction has been followed even tho the statutes are in derogation of the common law.

The language of the cases, however, does go further than to place merely compensatory liability upon the receiver. In his official capacity he is said to be "amenable to the same rules of liability that are applicable to the company when it is operating the road by virtue of the same franchise."[21] But in none of these cases was the question of exemplary damages before the court for a decision. The entire doctrine of exemplary damages is based on the notion that it punishes a wrongdoer civilly for an intentional wrongful act.[22] This punishment is sought to be inflicted by the enforced payment of money damages, additional to those that would compensate for the injury. It cannot be doubted that this imposition would not accomplish its object unless the funds from which payment comes, belong to the wrongdoer. The appointment of a receiver to take charge and manage a railroad, while it does not dissolve the corporation, does displace it. The corporation is ousted from its possession and control of the assets of the railroad and the receiver is substituted, whose possession is not that of the corporation, but of the court which appointed him.[23] The corporation cannot be sued for torts committed by the receiver or his servants in the management of the railroad,[24]

395; *Klein* v. *Jewett* (1875) 26 N. J. Eq. 474; *Fuller* v. *Jewett* (1880) 80 N. Y. 46; *Winbourne's Case* (1886) 30 Fed. 167; *Pope's Case* (1886) 30 Fed. 169; *Brockert* v. *Central Iowa Ry. Co.* (1891) 82 Ia. 369, 47 N. W. 1026; *Union Pac. Ry. Co.* v. *Smith* (1898) 59 Kan. 80, 52 Pac. 102; *Louisville So. Ry. Co.* v. *Tucker's Adm'r* (1899) 105 Ky. 492, 49 S. W. 314.

17. *Fullerton* v. *Fordyce* (1893) 121 Mo. 1.

18. U. S. Compiled Statutes 1913, § 1047; *Pierce* v. *Van Dusen* (1897) 78 Fed. 693.

19. *Lamphear* v. *Buckingham* (1886) 33 Coun. 237; *Hornsby* v. *Eddy* (1893) 56 Fed. 461, construing a Kansas statute; *Pierce* v. *Van Dusen* (1897) 78 Fed. 693, construing an Ohio statute. See also *Sloan* v. *Central Iowa Ry. Co.* (1883) 62 Ia. 728; *Texas & Pac. Ry. Co.* v. *Cox* (1891) 145 W. S. 593, where the federal court of Texas applied a death statute of Louisiana. *Contra, Henderson* v. *Walker* (1875) 55 Ga. 481.

20. *Central Trust Co.* v. *Wabash, St. L. & P. Ry. Co.* (1886) 26 Fed. 12, construing a statute of Missouri, Revised Statutes 1879, § 809, now Revised Statutes 1909, § 3145; *Powell* v. *Sherwood* (1901) 162 Mo. 605, 63 S. W. 485, construing the "Fellow-Servant Act," now Revised Statutes 1909, § 5434; *Mikkelson* v. *Truesdale* (1895) 63 Minn. 137, 65 N. W. 260; *Hunt* v. *Connor* (1901) 26 Ind. App. 46, 59 N. E. 50. *Contra, Campbell* v. *McCook* (1894) 86 Tex. 630, 26 S. W. 486.

21. *McNulta* v. *Lockridge* (1891) 137 Ill. 270, 27 N. E. 452. See *Melendy* v. *Barbour* (1884) 78 Va. 544, 556, and cases cited in 63 L. R. A. 231.

22. See instructions approved in the following cases: *Stoneseifer* v. *Sheble* (1860) 31 Mo. 243; *Green* v. *Craig* (1870) 47 Mo. 90; *McNamara* v. *St. Louis Transit Co.* (1904) 182 Mo. 676, 685, 81 S. W. 880; *Williams* v. *St. Louis Memphis & S. E. R. R. Co.* (1906) 119 Mo. App. 663; 96 S. W. 307.

23. High, Receivers (3d ed.) 394; *Ohio & Miss. R. R. Co.* v. *Davis* (1864) 23 Ind. 553, 661; *Memphis & Little Rock Ry. Co.* v. *Stringfellow* (1884) 44 Ark. 322; *Ohio & Miss. R. R. Co.* v. *Anderson* (1882) 10 Ill. App. 313.

24. *Turner* v. *Hannibal & St. Joseph R. R. Co.* (1881) 74 Mo. 602; *Stevens* v. *A. T. & S. F. Ry. Co.* (1901) 87 Mo. App. 26; *Metz* v. *Buffalo, etc. R. R. Co.* (1874)

nor without an express assumption of the obligation is it responsible, if it resumes control, for any liability incurred during the receiver's control.[25] It has already been pointed out that the receiver's liability is an official, not a personal one. A judgment can be satisfied only from the funds held by him in his official capacity.[26] The assessment then of exemplary damages against him either for his own or the tort of his servant, while it seeks to punish, strikes at property which does not belong to the wrongdoer. Pardee, J., in *Pope's Case*,[27] an early federal decision defining the scope of receivers' responsibility, remarked "altho as officers of the court, they may not be liable for punitory or exemplary damages." It is submitted that to impose liability for exemplary damages upon a receiver is to lose sight of the object of such damages. It is to be regretted that the point was not discussed in *Cook* v. *Lusk*.

To determine the applicability to receivers of statutes imposing a penalty upon a "railroad company" or "railroad corporation" involves merely a question of statutory construction. The Missouri court held in *Farrell* v. *Union Trust Co.*,[28] that "railroad corporations" in a statute where double damages were provided for the failure to erect fences, gates and cattle guards, included receivers. Since *Boyd* v. *Mo. Pac. Ry. Co.*[29] and *Johnson* v. *Chicago, Milwaukee & St. Paul Ry. Co.*,[30] it seems settled that $2000 of the recovery under the Missouri death statute[31] is penal. Whether such a penalty can be recovered against a receiver has not been decided. By its terms, the statute applies to "corporations, individual or individuals." Unless these words be deemed a clear expression of legislative intent to include receivers and *Farrell* v. *Union Trust Co.* is a binding analogy, the principles presented in the foregoing analysis should affect the construction of that statute so as to exclude receivers from the imposition of the penalty.[32]

R. BURNETT.

58 N. Y. 61; *Ohio & Miss. R. R. Co.* v. *Anderson* (1882) 10 Ill. App. 313; *Hicks* v. *I. & G. N. Ry. Co.* (1884) 62 Tex. 38; *Gableman* v. *Peoria, D. & E. Ry. Co.* (1895) 82 Fed. 790; *Chamberlain* v. *N. Y., L. E. & W. R. R. Co.* (1897) 71 Fed. 636.

25. *Davis* v. *Duncan* (1884) 19 Fed. 477; *Godfrey* v. *Ohio & M. Ry. Co.* (1888) 116 Ind. 30, 18 N. E. 61; *M. K. & T. Ry. Co.* v. *McFadden* (1896) 89 Tex. 138, 33 S. W. 853.

26. *Davis* v. *Duncan* (1884) 19 Fed. 477; *McNulta* v. *Ensch* (1890) 134 Ill. 46, 24 N. E. 631; *McNulta* v. *Lockridge* (1891) 137 Ill. 270, 27 N. E. 452, affirmed in 141 U. S. 327.

27. (1886) 30 Fed. 169.

28. (1883) 77 Mo. 475, construing Revised Statutes 1879, § 809, now Revised Statutes 1909, § 3145. *Central Trust Co.* v. *Wabash, St. L. & P. Ry. Co.* (1886) 26 Fed. 12, is an interpretation of the same statute. See also *Brockert* v. *Central Iowa Ry. Co.* (1891) 82 Ia. 369, 47 N. W. 1026.

29. (1913) 249 Mo. 110, 155 S. W. 13.

30. (1913) 174 Mo. App. 16, 160 S. W. 5.

31. Revised Statutes 1909, §§ 5425—5427.

32. *Lamphear* v. *Buckingham* (1866) 33 Conn. 237; *Texas & Pacific Ry. Co.* v. *Cox* (1891) 145 U. S. 593 (construing a Louisiana statute); *Hunt* v. *Conner* (1901) 26 Ind. App. 46, 59 N. E. 50. Each of these cases construed a death statute to apply to receivers as well as to corporations. It is to be noted that the statute in each case was construed as remedial and compensatory thruout, rather than penal.