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Notes on Recent Missouri Cases

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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, Collected Legal Essays, p. 269.

NOTES ON RECENT MISSOURI CASES

ROBBERY—ANIMUS FURANDI—FORCIBLE COLLECTION OF DEBT. *State* v. *Culpepper.*[1]

Wallace Culpepper was convicted of robbing Frank McGrath. Both were real estate agents in the town in which they lived. In addition, Culpepper was city marshal. As agents they had some joint operations. Culpepper claimed that McGrath was his debtor in the sum of one hundred and seventy-five dollars by virtue of two real estate transactions.

McGrath testified that Culpepper called him into his (Culpepper's) house and by threats of death compelled McGrath to draw a cheque for one hundred and seventy-five dollars. McGrath did this and Culpepper indorsed the cheque and apparently sent his wife to a bank where the cheque was cashed. Upon her return McGrath was permitted to leave the house.

The Supreme Court of Missouri ruled that if Culpepper acted in good faith in compelling the payment of what he supposed was a valid obligation he could not be guilty of robbery because of the absence of *animus furandi.* The court followed an earlier decision in *State* v. *Brown*[2]

1. (1922) 238 S. W. 801. See note in 13 A. L. R. 139, 147.
2. (1891) 104 Mo. 365, 16 S. W. 406. See dictum in *State* v. *Carroll* (1901) 160 Mo. 368, 60 S. W. 1087.

which finds support in a number of decisions.[3] However, there are a number of decisions to the contrary.[4]

The point of view of the latter decisions is best expressed in *Fannin* v. *State*:[5]

> ". . . . . but no man has a right, as we understand the law, to take the law in his own hands, and at the point of a six shooter, putting his debtor in fear of his life or serious bodily injury, collect a debt, however just, and then defend against it on the ground that the property was not fraudulently taken because appellant owed him the money and would not pay him. This is more than a simple trespass, and it will be a dangerous doctrine to hold that a man can thus collect his debts."

The debate resolves itself into the proper definition of the term *animus furandi.* To state that this requires a felonious intent makes no advance and misleads. The term felony, properly used, has no meaning except by way of classifying crimes. To state that *animus furandi* requires a fraudulent purpose is better but still unsatisfactory, for the term fraud is as vague as any legal term.

A good discussion of the term appears in Pollock and Wright's Possession in the Common Law.[6] It is there stated that *animus furandi* embodies two notions: (1) an intention of deprival and appropriation (2) in the defiance of the will of the owner.

If this is correct then it would follow that the collection of a debt against the will of the debtor with the intention of permanently appropriating the thing taken is at least larceny.

There should be no difficulty in distinguishing the above problem

3. *State* v. *Hollyway* (1875) 41 Iowa 200; *Crawford* v. *State* (1893) 90 Georgia 701, 17 S. W. 628, 35 Am. St. R. 242; *Johnson* v. *State* (1883) 73 Ala. 523 (larceny); *Wolf* v. *State* (1883) 14 Tex. App. 210 (larceny); *Barton* v. *State* (1921) 227 S. W. 317, 13 A. L. R. 147; *Regina* v. *Hemmings* (1864) 4 F. & F. 50; *Young* v. *State* (1896) 37 Tex. Cr. Rep. 457 (larceny—the decision may be justified on theory that there was no defiance of the will of the owner); *State* v. *Reilly* (1877) 4 Mo. App. 392 (embezzlement—*semble*); *Regina* v. *Bodan* (1844) 1 C. & K. 395. Bishop, Criminal Law, 8th ed., favors the doctrine of the above cases—sec. 849, vol. II. Wharton, Criminal Law, 11th ed., sec. 1122 is not decisive.

4. *Commonwealth* v. *Stebbins* (1857) 74 Mass. 492 (opinion unsatisfactory—seems to draw distinction between taking with honest claim to *specific* money and honest claim to any money to apply on debt.) *Gettinger* v. *State* (1882) 13 Nebraska 308, 312, 14 N. W. 403 (larceny); *McKenzie* v. *State* (1910) 8 Ga. App. 124, 68 S. W. 622 (memorandum opinion); *People* v. *Solomon* (1896) 42 N. Y. Supp. 573 (*dictum*); *Fannin* v. *State* (1907) 51 Tex. Cr. 41, 100 S. W. 916, 10 L. R. A. (n. s.) 745, 123 Am. St. R. 874 (disapproved in *Barton* v. *State* (1921) 227 S. W. 317); *Butler* v. *State* (1878) 3 Tex. App. 403. See note in 13 A. L. R. 151.

5. See note 4, *supra.*

6. Page 223 ff. The author does not seem to have considered *Regina* v. *Hemmings,* note 3, *supra.*

from the accepted doctrine[7] that one is not guilty of larceny or cognate crime if he takes a *specific* thing under a claim of right to that *specific* thing. Naturally, one does not have the actual intent in such a case to defy the will of the owner. He believes that he himself is the owner.

In the final event, however, the correct solution of the problem probably cannot be determined through logical processes alone. What is socially expedient? That must be the ultimate test of any rule of criminal law. Is it desirable to announce that it is no crime if one without violence or putting in fear obtains property of another without consent and with intent to deprive merely because that is his way of obtaining what is due him? Is it desirable to have it known that if a man is strong enough or violent enough he may enter judgment for his claim and proceed to execute his judgment and not be guilty of robbery? Why should a premium be placed upon violence and mere strength?

The rule announced in the Missouri cases and probably in the majority of decisions seems to the writer to be the negation of justice obtained by orderly processes.[8]

G. E. W.

MISFEASANCE AND NONFEASANCE—DUTY TO THIRD PERSONS. *Hamm* v. *C. B. & Q. R. Co. et al.*[1]

Roy Hamm, while driving an auto truck, was struck by a train at a crossing. He sued the railroad company, Millard F. Hughes (the engineer of the train), and others. He obtained judgment against the defendants. On appeal the Kansas City Court of Appeals reversed the judgment as to Hughes.

In *Stuart* v. *Standard Oil Co.*[2] the plaintiff was injured while attempting to "shimmer out" of a steel condenser box. The working foreman, Charles Hawkins, was also a defendant. The jury returned a verdict against the corporation defendant but in favor of defendant Hawkins. The Kansas City Court of Appeals denied that the verdict was "contra-

7. *State* v. *Williams* (1888) 95 Mo. 247, 8 S. W. 217; *Brown* v. *State* (1873) 28 Ark. 126; *Glenn* v. *State* (1906) 49 Tex. Cr. Rep. 349, 92 S. W. 806; *People* v. *Hughes* (1895) 11 Utah 100, 39 Pac. 492. See citations in *Barton* v. *State* (1921) 227 S. W. 317. The distinction is made in *Fannin* v. *State* (1907) 51 Tex. Cr. 41, 100 S. W. 916, 123 Am. St. Rep. 874. See a note in 135 Am. St. Rep. 486.

8. The conduct herein discussed does not seem to come under the notion of extortion at common law; but some statutes have given a broader meaning to that crime. See *State* v. *Coleman* (1906) 99 Minn. 487, 110 N. W. 5, 116 Am. State Rep. 441 (note), R. S. Mo. 1919, secs. 3309, 3311, 3492.

1. (1922) 245 S. W. 1109.
2. (1922) 244 S. W. 970.

dictory and self-destructive" and affirmed the judgment upon the verdict rendered.

In the *Hamm* case apparently the only negligence charged against the engineer was his failure to ring the bell or give other warning. There was sufficient evidence of this failure but the court held that this neglect was only *nonfeasance* and that Hughes was not responsible to Hamm for that.

In the *Stuart* case the allegations were that Hawkins (1) ordered plaintiff to "shimmer out" of the condenser box, and (2) refused to furnish the plaintiff a ladder with which he might get out of the box. The case was submitted to the jury as against the defendant company on the second allegation only. As to Hawkins the trial court apparently thought that he was not responsible under the second allegation even if it were true. Anyway, the jury was directed to consider whether Hawkins ordered plaintiff to "shimmer out" and was told that if he did not give such an order then the verdict should be in his favor. In other words, the trial court apparently proceeded upon the alleged distinction between *nonfeasance* (for which Hawkins would not and the company would be responsible to plaintiff) and *misfeasance* (for which both would be responsible to plaintiff).

The nonfeasance test of a servant's liability is vague, and is also misleading unless it be applied with some discrimination as to the sort of duty which the servant has omitted to perform in the particular case.

Nonfeasance is defined by Bouvier as "the non-performance of an act that ought to be done". It is not an absolute term but relates to some duty not performed. In the case of a master and servant relationship there are three classes of duties to regard. First, the servant is under duties to his master growing out of their contract and relationship. Second, the master is under duties to third persons. He is under the usual duty incumbent upon those who act, or have actions done in their behalf, to refrain from injuring others. In addition to this he may be under some peculiar duty to a third person arising from contract or occupation. Third, the servant is under duties to third persons. As a member of society he is bound to respect the rights of his fellow beings. These duties are not added to or subtracted from by his situation as a servant.

The nonfeasance by a servant of a duty which falls in the first or second of the above classes does not *ipso facto* make him liable to a third person. That should be obvious from the nature of the duty neglected. As will be pointed out later the *dicta* which gave rise to our nonfeasance test were uttered with reference to these classes of duties. If the test had not been misunderstood it would have been harmless and perhaps helpful. The harm came when the test was without discrimination applied to the third class of duties mentioned above, viz, those which

the servant owed to third persons. There is no reason for absolving a servant from his usual duties to fellow beings; nor should there be any occasion to speculate as to whether his breach of those duties constitutes mis-, mal-, or nonfeasance.

The doctrine that a servant is not liable for nonfeasance harks back to *dicta* uttered by Chief Justice Holt and a bit of argument by Lord Coke.

A proper respect paid to the memory of these great jurists requires us to note that they never meant to deny that a servant is under the same duties that rest upon other members of society. In *Lane* v. *Cotton*[3] the action was against the postmaster general to recover the value of exchequer bills contained in a letter delivered to one Breese, a clerk in the post-office, which letter was lost from the post-office. There was no claim that Breese was remiss in any way. The postmaster general was held not liable. Holt, C. J., in the course of a dissenting opinion uttered the following *dicta*:

> "It was objected at the Bar, that they have this remedy against Breese. I agree, if they could prove that he took out the bills, they might sue him for it; so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer."

It should be borne in mind that the duty involved in the case, and the one that the Chief Justice must have had in mind when he uttered these *dicta,* was the duty to guard and forward the letter. He was of the opinion that such a duty rested upon the postmaster general but was overruled as to this. Much less did any such duty rest upon Breese who was merely a servant. No such duty rested upon him as a member of society and he was in no relation with the plaintiff that would create such duty. Holt did not mean that a servant is not liable for neglect of duties that rest upon him. He meant merely that the servant is not liable for neglecting some one's else duties.

In *Marsh* v. *Astrey*[4] the action was against an under-sheriff for not returning a writ and by this omission injuring plaintiff. Lord Coke argued for the defendant "that this action being for nonfeasance, i. e., for not returning the writ, the action lieth not against the under-sheriff, but ought to be brought against the sheriff himself; for he is responsible for

3. (1701) 12 Mod. 472. See also 3 Col. L. R. 116.

4. (1588) 1 Leonard 146.

all things concerning the office". Lord Coke was simply arguing that neglect of the sheriff's duties would not *ipso facto* make the under-sheriff liable. The facts in the case, however, showed that the under-sheriff was himself remiss. He received the writ, accepted pay in advance for executing it, and then deceitfully failed to return the writ. The court held him liable and thus the case is clear authority that a servant is liable for nonfeasance of his duties. It seems that this bit of argument uttered by the great Lord Coke has had greater currency and influence than the actual decision. Moreover, Lord Coke did not argue that a servant is not liable for neglecting his own duties.

Story says that the agent "is not in general (for there are exceptions) liable to third persons for his own nonfeasance or omissions of duty in the course of his employment".[5] If Story meant by nonfeasance duties owed by the servant to his master or those owed by his master to the third person his statement is rational. But his statement has been given a larger meaning and one that is not rational.[6] It has been construed to mean that a servant may neglect his own duties with impunity.

The servant's status as such should have but little bearing on the question of his liability. His employment merely explains how he happens to be engaged in the acts complained of. In the *Hamm* case, Hughes' employment is a plausible reason for his driving the locomotive along the track, but is not a reason for increasing or decreasing his duty to be careful. If Hughes had owned the railroad and locomotive he would doubtless have been held liable under the circumstances of the injury; and there would have been no speculation as to whether omitting to ring the bell was nonfeasance. It is not ownership of apparatus, however, that creates the duty to exercise care in using it. Anyone driving a locomotive ought to do so carefully. He ought to ring the bell when he approaches a crossing, whether he happens to be driving as an owner, trespasser, licensee, or servant. This is his personal duty running directly to persons who are endangered by his driving.

While it is not possible to reconcile all the opinions which have been rendered on the responsibility of an agent or servant to others than his principal or master yet some general tendencies have been noticed.

The formula is that "an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done, the agent, in the latter case, being liable to his principal only".[7]

It is obvious, of course, that this solvent may be applied in a very

5. Story on Agency, 9th ed. sec. 308.

6. See Mechem, Agency, 2nd ed., secs. 1466 ff. See *May* v. *Chicago B. & Q. R. Co.* (1920) 225 S. W. 660, l. c. 665, where Goode, J., writes of it as a "decried doctrine".

7. *Delaney* v. *Rochereau* (1882) 34 La. Ann. 1123, 44 Am. Rep. 456.

rigid way. One may look narrowly at the particular thing and if that particular thing is the failure to take some action it is possible to apply the magic formula and hold the servant or agent without responsibility to a third person. Such is the treatment given the facts in the recent opinions of the Kansas City Court of Appeals. In one case the engineer failed to ring a bell. This fact was detached from the other facts in the case. Undoubtedly, the one fact was a *nonfeasance*. The formula was applied to that and the result was no liability on the part of the engineer to the person injured. In the other case, the same analysis was made apparently by the trial court and this was approved on appeal.

Another point of view refuses to look so narrowly at a particular fact but rather looks at all the facts and with a broad vision determines whether a person was acting or was merely in a state of non-action. Mr. Mechem[8] has expressed this point of view thus: "It would seem to need no argument to show that the mere not-doing of a particular act which is in itself but a mere incident in the larger act of doing, ought not to be regarded such a nonfeasance as will excuse the agent within any proper meaning of that term."

There is a third point of view that is as arbitrary as the first but leading to a different result in many cases. It was first stated, apparently, by Gray, C. J., in *Osborne* v. *Morgan*:[9] "It is often said in the books that an agent is responsible to third persons for misfeasance only and not for nonfeasance, and it is doubtless true that if an agent never does anything toward carrying out his contract with his principal but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly." Emphasis is here laid upon the time of the happening of an act and not upon the quality or character of that act.

A review of the Missouri decisions fails to disclose that any theory has been followed consistently.

In *Harriman et al.* v. *Stowe*[10] the plaintiff alleged that she was injured by falling through a hatchway constructed by defendant and by him

8. Mechem, Agency, 2nd ed., sec. 1474. Mr. Mechem admitted that not all of 'the cases were in harmony with the quoted statement.

9. (1881) 130 Mass. 102, 39 Am. Rep. 437. See also Mechem, Agency, 2nd ed., secs. 1471 ff.

10. (1874) 57 Mo. 93.

"left insecure and unprotected". This would appear to be an allegation of nonfeasance, if there is anything in the term. It was admitted that the house wherein the hatchway was built belonged to the wife of defendant. Defendant alleged that he built the hatchway as agent for his wife. The evidence was not satisfactorily set forth but the trial court instructed the jury that in order to find for plaintiff they must find that defendant negligently constructed the hatchway "or so left it". This instruction would seem to make defendant liable for either misfeasance or nonfeasance. Finally, the court stated that it appeared as if defendant was not an agent but was acting for himself. So, the decision contains at most only an abstract statement of the *dicta* of Lord Holt as perpetuated by Story.[11]

In *Lottman* v. *Barnett*[12] the plaintiff sued for the death of her husband who was killed in the collapse of a building which was being raised. The defendant was the superintending architect and the jury evidently found that he gave negligent directions for raising the building or else that he knew or should have known that a certain column (which he had constructed) was of defective construction. In either event he was held liable. In no event, moreover, did the court think that the doctrine concerning nonfeasance was applicable to him.

The plaintiff's petition in *Steinhauser* v. *Spraul*[13] alleged that the defendant was the agent of her husband. Over two years before the injury defendant had hired plaintiff as a domestic servant and had exercised control over her. On the particular occasion plaintiff, at direction of defendant, made use of a ladder to enter a pigeon house. The ladder was too long and plaintiff fell. The court was of the opinion that plaintiff had stated a good cause of action because defendant's conduct was misfeasance. It also thought that the facts would justify a jury in finding that defendant was a principal and liable for her conduct as such.

On a second appeal of this case[14] there was a divided court, a majority holding that judgment for plaintiff should be reversed, and her petition dismissed. Those constituting the majority did not entirely agree in their reasons. Sherwood and Robinson, JJ., in an opinion by Sherwood, J., apparently thought (1) that the defendant owed no duty to furnish a ladder of proper length, and (2) that her direction to use the ladder was not equivalent to a physical act and was of no consequence for that reason. It would seem that it may be conceded that defendant (being a

11. In *Lottman* v. *Barnett* (1876) 62 Mo. l. c. 168 it is stated: "Negligence in leaving open a trap door was not considered nonfeasance by this court in *Harriman* v. *Stone* (57 Mo. 93)." Compare 127 Mo. l. c. 555, where Sherwood, J., seemed to think that the damage was caused by "defectively constructing the trap door".

12. (1876) 62 Mo. 159.

13. (1893) 114 Mo. 551, 21 S. W. 515.

14. (1895) 127 Mo. 541, 28 S. W. 620.

wife) had no duty to furnish a ladder. However, plaintiff was seeking to recover because plaintiff was directed by defendant to use an unsuitable ladder. The second point suggested by Sherwood, J., seems novel and doubtful.[15] In his opinion Sherwood, J., also justified his conclusion upon the basis of assumption of risk and this was apparently agreed to by all constituting the majority of the court. Brace, C. J., Gantt, and Burgess, JJ., dissented without opinion. No doubt they agreed with the opinion that had been rendered by Burgess, J., on the former appeal but apparently repudiated by Sherwood and Robinson, JJ. The opinion by Sherwood, J., is interesting because it reviews many of the well known cases dealing with nonfeasance and misfeasance and for the apparent attempt to twist what was held to be misfeasance (on the first appeal) to nonfeasance. The cases cited in the opinion well illustrate how unreal is the orthodox rule.[16]

McGinnis v. *C. R. I. & P. Ry. Co.*[17] is an interesting decision. Plaintiff sued the company, Welsh, and French. The latter two were fellow servants with plaintiff. The trial court eliminated Welsh. The jury gave a verdict against the company and in favor of French. The injury occurred while the persons mentioned were engaged in loading a tool car. The object was to place a rubble car on top of some timber and turn it over on its back. In doing so they lifted it on its edge. Then (according to plaintiff) French gave the car a shove and stood back. This caused plaintiff to fall to the ground. Graves, J., after stating the orthodox doctrine concerning nonfeasance and misfeasance, declared: "We have quoted at length from the evidence for the reason that in the brief, counsel for plaintiff undertakes to argue that the act of French in lifting and pushing the rubble car in the way he did was misfeasance, but, his act in failing to assist in letting down the car was nonfeasance. This will not do. The thing to be done was to turn over a rubble car. French participated in that work and if he was guilty of negligence in doing the work, it was misfeasance."

The writer agrees with Graves, J., that it is not desirable to attempt to refine a job into its elements as was suggetsed. In the words of Mr. Mechem, the failure of French to assist in letting down the car was "a mere incident in the larger act of doing". But it would seem that the Kansas City Court of Appeals did refine in this very way when it de-

15. See Mechem, Agency, 2nd ed., sec. 1477, n. 34 where this decision is said to be one "in which the doctrine of non-liability for alleged nonfeasance is carried to the extreme."

16. Even Story recognized this: "The distinction, thus propounded, between misfeasance and nonfeasance, between acts of direct, positive wrong and mere neglects by agents as to their personal liability therefor, may seem nice and artificial, and partakes, perhaps, not a little of the subtility and over-refinement of the old doctrines, of the common law." . . . . . Story on Agency, 9th ed., sec. 309.

17. (1906) 200 Mo. 347, 98 S. W. 590.

clared that the failure of an engineer to ring a bell (being only one of many things connected with driving an engine) was nonfeasance for which he was not responsible to a third person.[18]

Orcutt v. *Century Building Co.*[19] presents a difficulty in that the facts are not sufficiently set out to make it clear what was the cause of the injury. The Mississippi Valley Trust Company was agent for the Century Company in operating an office building. Plaintiff was a passenger in an elevator which fell. The cause of falling is not clear. The Mississippi Valley Trust Company argued that it was not liable to plaintiff for nonperformance of the duties to its principal. The argument was denied and it was held by Graves, J.: "When it undertook the management of this building from its principal, it undertook to do for the principal a particular work, and after it entered upon the performance of that work, any act which it did, whether by omission or commission, was misfeasance. After making this contract, had it stood aloof and refused to take the management of the building, and in so doing, thereby failed to do something which resulted in injury to a third person, it would not have been liable, because we would thus have mere nonfeasance."

This language is a devolepment of the viewpoint expressed by Graves, J., in the *McGinnis* case, *supra.* Indeed it is an adherence to the third point of view set forth in the first part of this note, viz., the rule of Gray, C. J., in *Osborne* v. *Morgan.*[20] This is different from the reasoning in the previous Missouri cases and the two recent rulings of the Kansas City Court of Appeals seem to conflict with it.

For the purpose of this note the ruling in *Jewell* v. *Bolt and Nut Co.*[21] is that when one Sturges ordered plaintiff "to perform his duties as catcher or quit his job" despite the existence of a peril it was "a positive wrong or misfeasance on the part of Sturges" for which he would be liable to plaintiff even though he was only an employe of the defendant company.[22]

John O'Neil was injured by the fall of an elevator and he sued the C. V. Young and Sons' Seed and Plant Company and John Young. One question was whether John Young (the president and manager of the corporation) was liable individually. Two of three judges held that he

18. The reference is to *Hamm* v. *C. B. & Q. R. Co. et al.* (1922) 245 S. W. 1109. Compare *Southern Ry. Co.* v. *Grizzle* (1906) 124 Ga. 735, 53 S. E. 244, where an engineer was held to be responsible to a third person for a failure to comply with the requirements of the blow-post law.

19. (1907) 201 Mo. 424, 99 S. W. 1062.

20. This seems to be so not only because *Osborne* v. *Morgan* is cited in the opinion but there is extensive quotation from Clark & Skyles, Law of Agency. This text advocates the third point of view. See 2 Clark & Skyles, secs. 594 ff.

21. (1910) 231 Mo. 176, 132 S. W. 703.

22. It is interesting to compare this decision with *Steinhauser* v. *Spraul, supra.*

was not,[23] asserting that if he was negligent in failing to inspect the elevator, or if he inspected it negligently, he was guilty only of nonfeasance for which he would not be liable to plaintiff. Bond, J., (the third judge) thought that Young should be liable to plaintiff for "ordering him" to use an elevator, the unfit condition of which he might have known by ordinary diligence. Thus it is that there is a difference in the result depending upon the thing upon which attention is concentrated. Two judges thought of the inspection and came to one conclusion; the other judge thought of the order that was given and came to another conclusion. Furthermore, there would seem to be a difficulty in justifying the majority opinion on the basis of the reasoning in *Orcutt* v. *Century Bldg., Co., supra.*

In *Carson* v. *Quinn*[24] the defendant, as agent of the owner of residence property, had a hole dug in a court for a trap to a sewer. Then granitoid was laid over the entire court except this hole. Plaintiff, a tenant, stepped into the hole which (according to plaintiff) had been left uncovered by defendant who had entire charge of the premises. Plaintiff had verdict which was affirmed. The St. Louis Court of Appeals quoted from *Osborne* v. *Morgan, supra,* and other opinions but finally stated:

> "In these circumstances, the omission to cover the hole was not mere nonfeasance but a violation of the *duty defendant owed the plaintiff* and other tenants; it was a positive wrong for which he is liable." (Italics supplied.)

It is submitted that the germ of the true doctrine is contained in this quotation. Instead of attempting to apply some magical formula or rule of thumb why not hold ourselves to the question whether the defendant even though an agent or servant owed a duty to the plaintiff. This question will be answered by the application of general principles of the law of torts. No formula will solve the problem just as there is no way of knowing whether anybody else owes a duty except by a study of the law as it has been developed for centuries of Anglo-Saxon civilization. Such a method of administering justice at least has vitality and adaptability to changing conditions. It is believed that this is the correct way of explaining *Schmidt* v. *Rowse*,[25] and *Zweigardt* v. *Birdseye*.[26]

If this broad proposition is accepted does it not seem wholly undesirable to hold that an engineer for a railroad owes no duty to a traveller to ring a bell? There must be something wrong with a rule of law that holds that he does not.

23. *O'Neil* v. *Young* (1894) 58 Mo. App. 628.
24. (1907) 127 Mo. App. 525, 105 S. W. 1088.
25. (1889) 35 Mo. App. 288.
26. (1894) 67 Mo. App. 462.

Whether the broad proposition above suggested be accepted or not, the latest known rulings of the Kansas City Court of Appeals seem to be a strict application of an arbitrary rule of thumb contrary to the views of Mechem and Clark and Skyles,[27] and, it is submitted, certain opinions by Missouri courts.

C. E. CURTIS[28]

27. For other comments see 3 Col. L. R. 116, 9 Harv. L. R. 356, 16 Harv. L. R. 301.

28. Student, School of Law, University of Missouri.