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Notes on Recent Missouri Cases

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NOTES ON RECENT MISSOURI CASES

CONTRIBUTORY NEGLIGENCE—ASSUMING RISK TO SAVE EMPLOYER'S PROPERTY. *Hill* v. *East Saint Louis Cotton Oil Co.*[1] In this case the Court of Appeals has again laid down the rule, several times expressed in Missouri, that if one puts himself into a position of danger in order to save property, which has been endangered by the negligence of defendant, and is injured in such attempt he is guilty of contributory negligence, and cannot recover.

Plaintiff was a workman employed in a cotton gin of defendant. The defendant negligently caused wet cotton to be run thru the machinery, and this fact, combined with defendant's negligent use of a worn and defective brush wheel (a part of the gin machinery), caused the wet cotton to catch fire from friction and to endanger the entire property. The plaintiff, in order to save his master's property, thrust his gloved hand into a narrow space in close proximity to certain knives to draw out the burning cotton before it set fire to the property. In so doing plaintiff's hand was caught in the knives and he was injured. Witnesses testified that the act of plaintiff in placing his hand where he did was

1. (1919) 214 S. W. 419.

dangerous and likely to cause him an injury. Plaintiff had judgment in the trial court. The Springfield Court of Appeals reversed the judgment, Bradley, J., dissenting. On rehearing the case was remanded.

The decision seems to be well supported by the Missouri cases. A line of decisions beginning with a *dictum* in the famous Eckert case in New York has laid down the proposition that one may not put himself into peril in order to save property merely. If he does so he precludes his recovery for an injury so received notwithstanding the fact that the property was so endangered by the original negligence of the defendant.[2] The rule is applied not only as against a volunteer,[3] but also against the owner of the property endangered,[4] or his servant.[5]

The case well illustrates the fact that a question which was originally, and as a matter of common sense is, one of fact, to be settled in each instance by a jury, tends to become a question of law for the court.[6] On first impression the question whether any given set of facts constitutes negligence ought to be decided by the jury. It will be readily granted that no act can be deemed negligent apart from the surrounding circumstances. Whether or not a man acts negligently in certain premises depends on the question, "What would the ordinary, reasonable individual

2. *Eckert* v. *Long Island Railroad Company* (1871) 43 N. Y. 502. The rule which has been followed by the Missouri courts was here stated in the following form: "A person voluntarily placing himself, for the protection of property, merely, in a position of danger, *is negligent*, so as to preclude his recovery for any injury so received." This statement was *obiter dictum* since the court allowed recovery on the theory that the plaintiff was endeavoring to save human life. This *dictum* has been followed in *Donohoe* v. *Railroad* (1884) 83 Mo. 560; *McManamee* v. *Railroad* (1896) 135 Mo. 440, 37 S. W. 119; *Slinkard* v. *Lamb Construction Company* (1919) 212 S. W. 61; and the principal case. In the McManamee case the court approved the following instruction: "Even tho the jury believe that the deceased's horse and wagon was exposed to a collision with defendant's train, this would not excuse or justify him precipitating himself in front of the train, and *if you find that he did so* in order to save his said horse and buggy, then your verdict must be for the defendant." Thus the jury was not permitted to pass on the question whether the plaintiff's act was one which a reasonable man would suppose to be dangerous, or whether it was in fact negligent under the circumstances.

3. *Eversole* v. *Railroad* (1913) 249 Mo. 523, 155 S. W. 419.

4. *McManamee* v. *Railroad* (1896) 135 Mo. 440, 37 S. W. 119.

5. The principal case. The court admits that "some weight" may be given to the fact that the plaintiff was attempting to rescue the property of his master, but in refusing to allow the jury to consider any question other than whether the plaintiff put himself into a dangerous place it is not seen how this modification of the rule can be of any benefit to the plaintiff.

6. This tendency is well pointed out by Prof. Terry in his Principles of Anglo-American Law, sections 75 and 195. He says that there can be no such thing as "negligence *per se*" or "reasonableness *per se*." The party is called on to act or to make a choice and in so doing he must take into account the circumstances which make up his situation.

have done in those same premises?" When the question has been repeatedly put to a jury on any set of circumstances and the jury has uniformly found that those circumstances do or do not constitute negligence, then it is conceivable that a rule of law has been established, i. e., that when similar circumstances arise the court may take judicial notice of such uniform finding of juries. This process probably accounts for the establishment of the stop, look, and listen rule[7] which has gained rather wide acceptance. Likewise it is generally held that the act of pointing a loaded gun at a person is negligent,[8] or even standing on a platform of a moving train.[9] In jurisdictions adopting the above rules the question of negligence is not submitted to the jury at all. If the evidence shows clearly that the facts exist, then there is no question for the jury. Such circumstances constitute negligence.

A great many courts and writers have pointed out peril in such a process of reasoning, however. In the first place circumstances are never alike. The standard man test applied to questions of negligence always takes into account as one of the surrounding circumstances the peculiar knowledge or lack of knowledge of the particular man in question. The form of the question is not simply, "What would the ordinary, prudent man have done?" but, "What would the ordinary, prudent man have done situated as this man was and having the knowledge that he had?" Now it is conceivable, for instance, that a particular man may never have heard of a railroad or a fire-arm. In such a case he might reasonably be supposed to cross a railroad track without stopping, looking or listening or he might handle a gun in such a manner as to endanger bystanders. To make these acts negligence is to require all persons to act at their peril irrespective of whether they are in fact negligent. This is a possible solution, and may even be good public policy, but if that is to be the basis of the rule it should be so stated and it should not be confounded with any question of negligence. It is difficult at best to make the ordinary jury understand what they are to decide when negligence is in issue. When to this question we add a requirement that the jury shall distinguish simple negligence, gross negligence and recklessness, as is done in many jurisdictions, it is highly probable that we have made the task utterly impossible. Nor do we avoid the difficulty by taking the question from the jury, that is, by telling them that if they find certain facts then they must find negligence, when, as a matter of fact, such a finding conflicts with common sense. There is no surer way of bringing the law and the courts into disrepute.

7. This rule was approved incidentally in the case of *McManamee* v. *Railroad, supra.*

8. Cases collected in Terry, Principles of Anglo-American Law, section 200.

9. (1864) 8 Allen (Mass.) 234.

Even at this late date it is submitted that the doctrine laid down in the principal case is contrary to the weight of authority in America,[10] and that it runs directly counter to reason and justice and complicates an already difficult and confused question. With all respect for the learning of the many courts in accord with the principal case the doctrine there laid down rests on a fundamental misconception of the nature of negligence. It is not true that "voluntarily placing one's self in a position of danger" is negligence. The cases all admit this by recognizing that one may assume great peril and still not be "deemed negligent" where the purpose is to save life.[11] Obviously, a reasonably prudent man will assume greater risk in order to save human life than to save property. In other words a given act is not negligent where life is in danger, and yet the identical act might be grossly negligent if property only be at stake. The ordinary jury can understand that. But what can a jury be expected to derive from such an instruction as the following: "A man may be negligent in order to save life, so long as he is not reckless, and still not defeat his right to recover for defendant's negligence. But he may not place himself in any position of risk or danger in order to save property. If he does run any risk for such a purpose he is deemed to be contributorily negligent and his recovery is precluded?" The cautious man will run no risk when it is unnecessary to do so. Certain risks must constantly be taken, however, in the ordinary conduct of life. A servant who would refuse to run any, even the slightest, risk in order to save his master's property from inevitable loss would certainly not be doing his duty. If the risk were very slight and the danger to the property very great it seems he might even be discharged for neglect of duty. If this is true is it not a monstrous proposition to refuse him any remedy in an action for injury, caused by his master's negligence, for the reason that he placed himself in some danger, when it was his clear duty to assume such danger?

The Court of Appeals justifies the rule which it lays down by saying: "The most potent fact in favor of this rule is that the servant has no right to endanger the master in a far greater risk than that which he sought to avert."[12] True, he has no right to do so negligently, but must he refrain at his peril from so doing and ought he not to be allowed to go to the jury on the question of whether under the circumstances he was negligent in so endangering his master?

Further, after holding the law to be as stated in the decision in the principal case, it is not seen what possible good will come to the litigants

10. Shearman and Redfield, Negligence, Section 85d; 20 Ruling Case Law, section 110, page 133. The cases are there collected and the statement made that the great weight of authority is against the *dictum* in the Eckert Case.

11. Note 10.

12. The Principal case, page 422.

from further proceedings. In remanding the case the court limits the finding of the jury to the question of whether there was "inherent and necessary danger attending plaintiff's action." Suppose the jury finds that the plaintiff took a risk, even the slightest risk, in a dangerous emergency, the plaintiff will be thereby precluded from recovery, even tho the jury might have found, had the question been submitted, that he did nothing that a prudent and cautious employe would not have done under similar circumstances.[13]

JESSE E. MARSHALL.[14]

But it is submitted that the decision in the principal case can be justified on the theory that the conduct of the plaintiff was so clearly negligent that reasonable minds could not differ about it and that, therefore, there was no question for the jury.

K. C. S.

SURVIVOR OF CAUSE—DEATH OF DEFENDANT. *Ryan et al* v. *Ortgier*.[1]—It was held in the principal case that a cause of action for death from injury caused by the defendant's negligence did not, under Rev. St. 1909, sections 105, 106, 5426, and 5438, survive the death of the defendant.

At common law a cause of action for a purely personal tort was extinguished upon the death of either party to the action.[2] Applying the maxim *actio personalis*[3] *moritur cum persona*,[4] causes of action for

13. The Missouri court has already held that where a servant is required to act in an emergency he need not exercise "the perfection of judgment" and his recovery for an injury to himself is not precluded by the fact that he might have acted in such a way as to have avoided the injury. In the case of *Dean* v. *Railroad* (1911) 156 Mo. App. 634, 137 S. W. 603, the plaintiff, in endeavoring to stop a freight car which had broken loose and was running down hill ran under a gang plank which fell on him and injured him. The evidence showed that he might safely have stopped the car by going around to the other side with no risk to himself. The court allowed plaintiff to recover, saying that it was his duty to act to save his employer's property, and that in so doing he was "not required to exercise the perfection of judgment."

14. Assistant Professor of Law, School of Law, fall term, 1919.

1. (1919) 208 S. W. 856.

2. *Hambly* v. *Trott* (1776) 1 Cowp. 371; *Baker* v. *Bolton* (1808) 1 Camp. 493; *Higgins* v. *Breen* (1845) 9 Mo. 497, 498; *Kingsbury* v. *Lane* (1853) 21 Mo. 115; *Stanley* v. *Vogel* (1880) 9 Mo. App. 98, 99; *Baker* v. *Crandall* (1883) 78 Mo. 584, 587; *Stoeckman* v. *Terre Haute, etc. Ry. Co.* (1884) 15 Mo. App. 503, 507; *Davis* v. *Morgan* (1888) 97 Mo. 79, 80; *Bates* v. *Sylvester* (1907) 205 Mo. 493, 496, 104 S. W. 73, 11 L. R. A. (N. S.) 1157; *Gantt* v. *Brown* (1912) 244 Mo. 271, 302, 149 S. W. 644.

3. It has been suggested that the word *"Personalis"* is a misreading for *"poenalis."* See Pollock, Torts, 9th ed. p. 64, note (g).

4. 1 Woerner, American Law of Administration, 2 ed. sec. 290. For the origin and history of this rule see Goudy, Two Ancient Brocards, in Oxford Legal Essays, p. 216.

death did not survive the death of the person injured or that of the tort-feasor.[5] The reason for this rule may be found in the vindictive and quasi-criminal[6] character of suits for personal injuries in early law, but once the notion of punishment[7] and vengeance[8] is abandoned and that of compensation substituted as the principal element in the measure of damages in torts, this rule seems wholly inapplicable to modern conditions. Nor is there any reason why the heirs and legatees of a deceased tort-feasor should not take the estate subject to actions *ex delicto* as well as actions *ex contractu*. That this view has obtained to some degree is shown by the inroads made upon the principle both at common law[9] and by statute.[10] While the strict rule of the maxim has been modified without the aid of a statute with respect to certain tort actions, it has required a statute to prevent the abatement of an action for personal injuries which result in death.

The most important modification of the law in England in this respect is known as Lord Campbell's Act,[11] giving an action to the ex-

5. *McNamara* v. *Slavens* (1882) 76 Mo. 329, 330; *Gibbs* v. *Hannibal, etc.* (1884) 82 Mo. 143; *Vawter* v. *Mo. Pac. Ry. Co.* (1884) 84 Mo. 683; *Hegerick* v. *Keddie* (1885) 99 N. Y. 258, 1 N. E. 787; *Davis* v. *Nichols* (1891) 54 Ark. 358, 15 S. W. 880; *Bates* v. *Sylvester* (1907) 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157.

6. Lord Mansfield said: "All private criminal injuries or wrongs as well as all public crimes, are buried with the offender." *Hambly* v. *Trott* (1776) 1 Cowp. 371, 373. The court said in *Mitchell* v. *Hotchkiss* (1880) 48 Conn. 16; "But all private as well as public wrongs and crimes are buried with the offender. The executor does not represent or stand in the place of the testator as to those, or as to any acts of misfeasance or malfeasance as to the person or property of another . . . . . ."

7. In *Weiss* v. *Hunsicker*, 3 Penn. Dist. R. 445, 14 Pa. Co. Ct. Rep. 398, it was said: "The right of action is regarded in the nature of a punishment of the wrong-doer, and, the moment death supervenes, the action, altho commenced before, abates."

8. "A process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man's estate, an impersonal abstraction . . . . . .", Pollock, Torts, 9th ed. p. 64. For a criticism of the common law theory see 17 C. J. note 4, p. 1183.

9. It was early established that an executor could be made to answer for some actions not founded on contract where the estate in his hands was benefited by the tort. See historical note on the classification of the Forms of Personal Actions, F. W. Maitland, in Pollock, Torts, 9th ed. Appendix A. p. 577, 582. See also, *Hambly* v. *Trott* (1776) 1 Cowp. 375; *Higgins* v. *Breen* (1845) 9 Mo. 497, 498. The action was permitted on the doctrine of quasi contracts and the tort action was transmitted into a contract action which would survive as against the executor.

Originally there was no survival of action for the breach of a simple contract, the notion being that such breach was a tort. It was not until 1611 that it was definitely held that assumpsit would lie against an executor. See *Pinchon's Case* (1511) 9 Co. Rep. 86b; *Wheatley* v. *Lane* (1668) 1 Wm. Saunders 216 a.

10. Rev. St. 1909 secs. 105, 106, 5426, 5438.

11. 9 and 10 Vict. c. 93, amended by 27 and 28 Vict. c. 95.

ecutor and administrator for the death of one killed thru the wrongful act, negligence, or default of another, provided such person could have maintained an action had he lived. Similar statutes have been adopted in most of the states in this country,[12] and the subject is covered in Missouri by section 5426.[13] It is held that this provision does not extend to the representative of the wrong doer.[14] Also section 105,[15] providing for the survivor, by and against personal representatives, of actions for wrongs done to "property, rights or interests" does not apply to a cause of action for personal injury.[16] Section 5438,[17] which gives a right of action for personal injuries "not resulting in death" against the personal representative of a tort-feasor, did not change the common law as to actions for personal injuries resulting in death.[18] Under the con-

12. See table of statutes, Tiffany, Death by Wrongful Act. 2 ed. p. XX.

13. Rev. St. 1909. "Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." (Sec. 5426.)

14. *Hegerick* v. *Keddie* (1885) 99 N. Y. 258, 1 N. E. 787; *Hamilton* v. *Jones* (1890) 125 Ind. 176, 25 N. E. 192; *Davis* v. *Nichols* (1891) 54 Ark. 358, 15 S. W. 880; *Bates* v. *Sylvester* (1907) 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157; *Gilkerson* v. *Mo. Pac. Ry. Co.* (1909) 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844.

15. Rev. St. 1909. "For all wrongs done to property, rights, or interests of another, for which an action might be maintained against the wrong doer such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrong doer, and, after his death, against his executor or administrator, in the same manner and with like effect, in all respects, as an action founded on contract." (Sec. 105.)

16. *Stanley* v. *Vogel* (1880) 9 Mo. App. 98; *Gibbs* v. *Hannibal etc.* (1884) 82 Mo. 143; *Hegerich* v. *Keddie* (1885) 99 N. Y. 258, 1 N. E. 787; *Bates* v. *Sylvester* (1907) 205 Mo. 493, 104 S. W. 73, 11 L.R.A. (N. S.) 1157; *Gilkerson* v. *Mo. Pac. Ry. Co.* (1909) 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844; *Showen* v. *Metropolitan Ry. Co.* (1912) 164 Mo. App. 41, 46, 148 S. W. 135; *Greer* v. *St. Louis I. M. and So. Ry. Co.* (1913) 173 Mo. App. 276, 284, 158 S. W. 740.

17. Rev. St. 1909. "Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries, other than those resulting in death whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both such parties, such cause of action shall survive to the personal representative of such injured party, and against the person, receiver or corporation liable for such injuries and his legal representative, and the liability and the measure of damages shall be the same as if such death or deaths had not occurred." (Sec. 5438.)

18. *Bates* v. *Sylvester* (1907) 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157; *Gilkerson* v. *Mo. Pac. Ry. Co.* (1909) 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844; *Showen* v. *Met. St. Ry. Co.* (1912) 164 Mo. App. 41, 47, 148 S. W. 135; *Greer* v. *St. Louis I. M.*

structions which have been placed upon sections 105, 106, 5426, and 5438, of our statutes, the principal case is in accord with the clear weight of authority in Missouri and other states.

The result is that the common law rule that actions for personal injuries resulting in death abate with the death of the wrong doer still obtains in Missouri. Following this rule, if the party injured dies from a cause other than the injury caused by the willful act or negligence of the tort-feasor, and the suit has been instituted because of the tort before the death by independent cause, the action survives to his representative under section 5438 as against the estate of the deceased wrong doer; but if death results from the injury caused by such wrong doer, the action abates upon the wrong doer's death. Since compensation to the widow, children, parents, next of kin, etc., rather than punishment of the wrong doer is the fundamental reason for permitting an action for death, it is submitted that the action for injury resulting in death should survive against the estate of the tort feasor. However, the remedy for what has been termed a "barbarous rule" [19] does not lie with the courts, but is necessarily left with the legislature.

J. C. B.

This note leaves open the question as to whether a cause of action will survive under section 5438 in the event that the person injured dies from an *independent cause* before it has been possible for him to institute a suit.

K. C. S.

INSURANCE—MURDER OF INSURED BY THE BENEFICIARY. *Markland* v. *Modern Woodmen of America*.[1]—The beneficiary of a life insurance contract who murders the insured thereby forfeits his interest in the insurance.[2] It would be against public policy to permit him to profit by his own crime. The interest of the beneficiary is essentially equitable in nature, and his unclean hands would bar him from recovery;[3] while the rights of an heir are strictly legal, and equitable principles would not intervene to prevent him from taking from an ancestor whom he had murdered.[4]

The insurer by the prevailing authority is required to pay the amount

& *So. Ry. Co.* (1913) 173 Mo. App. 276, l. c. 284, 158 S. W. 740.

19. Pollock, Torts, 2nd ed. p. 64.

1. (1919) 210 S. W. 921.

2. *Filmore* v. *Metropolitan Life Ins. Co.* (1910) 82 Oh. St. 208, 92 N. E. 26; *Murchison* v. *Murchison* (1918) 203 S. W. (Tex.) 423. A beneficiary who had caused death of insured through negligence and had been convicted of manslaughter was permitted to recover insurance in absence of a showing that the killing was intentional as well as felonious in *Schreiner* v. *High Court I. C. O. F.* (1889) 35 Ill. App. 576.

3. See note: Murder of the Insured by the Beneficiary, 24 H. L. R. 227.

4. *Shellenberger* v. *Ransom* (1891) 31 Neb. 61, 47 N. W. 700, 25 L. R. A. 564 and note. *Contra*: *Riggs* v. *Palmer* (1889) 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340 and note; *Perry* v. *Strawbridge* (1908) 209 Mo. 621, 108 S. W. 621.

forfeited by the beneficiary to the estate of the insured.[5] The theory of recovery is not settled. The beneficiary alone is entitled to sue on the contract.[6] The theory adopted in *Cleaver* v. *Association*,[7] an English case, was that upon the forfeiture by the beneficiary a trust resulted to the estate of the insured. An early Iowa case, *Schmidt* v. *Northern Life Association*,[8] was decided on the same reasoning. This view has been criticised in that no specific fund is set aside as a trust *res*. Another theory suggested that the obligation of the insurer is quasi contractual for unjust enrichment.[9] The case is analagous to that where the designated beneficiary is of an ineligible class or later becomes ineligible.[10]

Confusion arises when the murdered is both beneficiary of the insurance and heir of the insured. In *Murchison* v. *Murchison*[11] the anomalous result is reached that the murderer could take the insurance as sole heir of the insured but could not recover as beneficiary. The court in *McDonald* v. *Mutual Life Ins. Co.*[12] refused recovery to the estate of the insured because the offending beneficiaries were also the heirs, but intimated that there might be a recovery of sufficient assets to satisfy creditors of the insured. The difficulty was obviated in *Sharpless* v. *Grand Lodge A. O. U. W.*[13] by permitting the next of kin of the insured after the beneficiary to take the insurance as if the beneficiary had predeceased the insured.

The heirs of the insured are not barred from taking because they happen to be the heirs of the offending beneficiary.[14] This situation frequently presents itself where children take from an insured parent who has been slain by the beneficiary parent. There is *dictum* in *Greer* v. *Supreme Tribe of Ben Hur*[15] to the effect that to permit the children to take in such a case would be a temptation to the father to kill his wife to secure to their children the benefit of her insurance. This argument

5. *Cleaver* v. *Mutual Reserve Fund Life Association* (1892) 1 Q. B. 147; *Schmidt* v. *Northern Life Association* (1900) 112 Ia. 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; *Anderson* v. *Life Ins. Co. of Va.* (1910) 152 N. C. 1, 67 S. E. 53; *Knights of Honor* v. *Menkhausen* (1904) 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. Rep. 239; *Equitable Life Assurance Soc.* v. *Weightman* (1916) 160 Pac. (Okla.) 629; *Sharpless* v. *Grand Lodge A. O. U. W.* (1916) 159 N. W. (Minn.) 1068; *Murchison* v. *Murchison, supra. Contra*: *Mutual Life Ins. Co.* v. *Armstrong* (1886) 117 U. S. 591, 6 Sup. Ct. Rep. 877.

6. *Mutual Life Ins. Co.* v. *Armstrong, supra.*

7. (1892) 1 Q. B. 147.

8. (1900) 112 Ia. 41, 83 N. W. 800.

9. Murder of the Insured by the Beneficiary, 14 H. L. R. 375.

10. *Order of Railway Conductors* v. *Koster* (1893) 55 Mo. App. 186; *Shea* v. *Benefit Association* (1893) 160 Mass. 289; *Knights of Honor* v. *Menkhausen* (1904) 209 Ill. 277, 283; 14 H. L. R. 376.

11. (1918) 203 S. W. (Tex.) 423.

12. (1916) 160 N. W. (Iowa) 289.

13. (1916) 159 N. W. (Minn.) 1068.

14. *Knights of Honor* v. *Menkhausen, supra.*

15. (1917) 195 Mo. App. 336, 190 S. W. 72, 74.

is soundly criticised in *Knights of Honor* v. *Menkhausen*,[16] and it is not believed that a Missouri court would give serious consideration to such reasoning.

In *Markland* v. *Modern Woodmen of America* the wife who was the beneficiary of her husband's insurance died by her own hand a few hours before her husband whom she had murdered.. Their children claimed the insurance as heirs of the insured under a provision in the certificate which designated the heirs of the insured as beneficiaries in event the beneficiary named therein did not survive the insured. The plaintiffs contended that the provision in the contract that the certificate and all payments made thereon should be forfeited to the defendants if the beneficiary should cause the death of the insured did not apply since the wife dying before her husband never became the beneficiary, but the court held that the person named as beneficiary therein was contemplated and death by her hand was an excepted risk. *Greer* v. *Supreme Tribe of Ben Hur, supra,* which was decided upon a similar contract provision, was cited with approval.

The result in these two cases and in the similar case, *Griffith* v. *Mutual Protective League*,[17] was properly reached upon the peculiar provisions of the contract of insurance, but the *dictum,* which appears in the Greer case to the effect that recovery should not be had even in the absence of such stipulations, is unfortunate. *Anderson* v. *Life Ins. Co. of Va.*,[18] a case exactly in point with the principal case except for the unfavorable contract provisions, correctly held, it seems, that the heirs of the insured were entitled to the insurance. While in the principal case the action was brought on the contract of insurance by the heirs of the insured as beneficiaries, in the Anderson case the action was apparently brought on a quasi-contractual obligation against the administrator of the beneficiary and insurer.

It would seem that, in the absence of stipulations in the policy or benefit certificate to the contrary, when the beneficiary forfeits his interest by murdering the insured, the estate of the insured should be allowed to recover upon a quasi-contractual obligation for unjust enrichment. The disposition thereof would be controlled by the laws of inheritance. It is for the legislature to determine the rights of an heir to the property of an ancestor whom he has murdered.

R. E. H.

16. (1904) 209 Ill. 277, loc. cit. 280. The court there said: "Human experience teaches that those willing to commit murder and assume the risk of punishment for the benefit of others are so few in number that consideration thereof becomes well nigh inconsequential."

17. (1918) 200 Mo. App. 87, 205 S. W. 286. See also, *Grand Circle Women of Woodcraft* v. *Rausch* (1913) 24 Col. App. 304, 134 Pac. 141.

18. (1910) 152 N. C. 1, 67 S. E. 53.

WITNESS—IMPEACHMENT—SUPPORT BY CHARACTER WITNESSES. *Orris* v. *Chicago, Rock Island and Pacific R. R. Co.*[1]—As a witness in his own behalf the plaintiff was impeached by proof of prior inconsistent statements in a deposition and in a signed statement to the company doctor. He was further subjected to a rigid and searching cross examination tending to reflect on his veracity. The Supreme Court held that it was not error to reject testimony as to his reputation for truth and veracity offered to rehabilitate him. The rule of the Missouri Courts of Appeals[2] admitting such testimony was expressly overruled, the court saying that the alleged impeaching matter in these instances went to the credit to be given his testimony rather than to his character and that the value of the testimony as to character would not outweigh the confusion of issues.

Miller v. *St. Louis R. R. Co.*[3] seems the first of the overruled Courts of Appeals' decisions to say that after proof of prior inconsistent statements or after a cross examination tending to impugn veracity evidence of character for truth and veracity could be introduced to support the witness. This decision followed the Vermont Case, *Paine* v. *Tilden*,[4] based in turn, upon the rule of Phillips and of Greenleaf who rely on the Nisi Prius case of *Rex* v. *Clarke*.[5] There the complainant in a rape case, on cross examination, admitted that she had been twice sentenced to the house of correction for theft. But she was allowed to state that she had later been an inmate of the home for the destitute and upon discharge had received an award for good conduct. Holroyd, J., held it proper to permit the superintendent of the latter institution to testify to her good character while there. Courts[6] denying the rule admitting the testimony have criticised Phillips and Greenleaf as not being supported by *Rex* v. *Clarke*. This criticism seems well taken. The prosecutrix was impeached by her own admissions and the only effect the evidence of the superintendent could have had was to show a subsequent reform. This is entirely different from the present question.[7]

Six prior decisions of the Supreme Court are cited in support of the rule excluding the evidence. Five of these[8] hold that evidence of the

1. (1919) 214 S. W. 124.

2. *Miller* v. *R. R. Co.* (1878) 5 Mo. App. l. c. 481; *Walker* v. *Ins. Co.* (1895) 62 Mo. App. l. c. 220; *Berryman* v. *Cox* (1897) 73 Mo. App. l. c. 74; *Browning* v. *R. R.* (1906) 118 Mo. App. l. c. 451, 94 S. W. 315; *Brandom* v. *R. R.* (1908) 134 Mo. App. l. c. 89, 114 S. W. 543; *Gourley* v. *Callahan* (1915) 190 Mo. App. l. c. 666, 176 S. W. 239; *Ross* v. *Pants Co.* (1913) 170 Mo. App. 291, 156 S. W. 92.

3. (1878) 5 Mo. App. l. c. 481.

4. (1848) 20 Vt. 554.

5. (1817) 2 Starkie's Cases 241.

6. *Stamper* v. *Griffin* (1853) 12 Ga. 450; *Brown* v. *Mooers* (1856) 6 Gray (Mass.) l. c. 453.

7. 2 Wigmore's Evid. sec. 1117.

8. *Gutzwiller* v. *Lackman* (1856) 23 Mo. l. c. 172; *Rogers & Gillis* v. *Troost's Admin.* (1873) 51 Mo. l. c. 476; *Dudley* v. *McClurer* (1877) 65 Mo. 241; *Vawter* v. *Hultz* (1892) 112 Mo. 633, 20

character of a party *as a party* in a civil suit may not be introduced unless involved in the issue and is not relevant to the question of testimony to support the character of a party in *the role of witness.* This distinction is pointed out in *Alkire Groc. Co.* v. *Tagart.*[9] The remaining case of *Bank* v. *Richmond*[10] denied the right to introduce rehabilitating evidence as to the character of a witness whose statement had been contradicted by other witnesses and does not involve the instant question.

A statement out of court contradictory to his testimony under oath may impeach the veracity of the witness or it may only establish a bias, interest or defect of memory. In either case an inference arises that his testimony is unreliable. If the discrepancy is due to a defective memory, bias or interest it is beside the issue to introduce testimony as to his reputation for truth speaking. Since such testimony only tends to rehabilitate the witness in one of several possible defects the question is whether the end attained would justify the necessary multiplication of issues. The rule forbidding the introduction of such testimony is supported by reason and is approved by one of the best writers on the subject.[11]

It is clear that the supporting testimony should not be admitted merely to enable the jury to decide whether the witness had in fact made a prior inconsistent statement (he denying it) since mere contradiction among witnesses will not allow such support.[12]

The witness should of course be allowed opportunity to explain the inconsistency if he is able.[13] If only part of a statement or conversation has been introduced he is entitled to have the whole presented to establish that in its entirety it was not inconsistent.[14] Furthermore, the Supreme Court in the case of *State* v. *Sharp*[15] allowed support thru the medium of prior consistent statements.

A somewhat different question is presented where the witness has been impeached by the character or type of cross examination used. This is not the case of a witness who on his cross examination admits prior misconduct. In that instance there is no logical ground for character witnesses to sustain him. A score of witnesses in support of his *character* could not erase the misdeed *which stands admitted.* Nor is it the case of a predicate laid in cross examination for his impeachement. The Supreme Court has denied the right to support in the case where the only impeaching matter has been laying of a predicate.[16]

S. W. 689; *Black* v. *Epstein* (1909) 221 Mo. l. c. 305, 120 S. W. 754.

9. (1898) 78 Mo. App. l. c. 168.

10. (1911) 235 Mo. l. c. 542, 139 S. W. 352.

11. 2 Wigmore's Evid. Sec. 1108.

12. *Bank* v. *Richmond* (1911) 235 Mo. l. c. 542,

13. 2 Wigmore's Evid. sec. 1044-6.

14. *Wilkerson* v. *Eilers* (1892) 114 Mo. 245, 21 S. W. 514. *State* v. *Phillips and Ross* (1857) 24 Mo. l. c. 485.

15. (1904) 183 Mo. l. c. 735, 82 S. W. 134.

16. *State* v. *Cooper* (1880) 71 Mo. l. c. 442.

That this type of impeachment goes to character and not credit is recognized by the court in the instant case where it speaks of a "cross examination tending to reflect on the *veracity* of the plaintiff."

The Supreme Court of Tennessee in *Richmond* v. *Richmond*,[17] after a cross examination which it said was clearly meant to be a demonstration to the jury against the veracity of the witness, allowed testimony as to his reputation for truth. Louisiana,[18] Vermont,[19] and Virginia[20] follow this doctrine. A similar result has been reached in Texas,[21] and Connecticut[22] where the witness is a stranger at the place of trial.

The question again is: Should the harm done a party thru the imputation placed on his witness outweigh the harm of an increase of issues attendant on the admission of supporting evidence?

Such a cross examination is a direct attack upon character. In the hands of skillful counsel it is a dangerous weapon and may leave a lasting impression in the mind of the jury. The introduction of supporting evidence in the case of prior inconsistent statements did not solve the difficulty because it might have been the inconsistency of a veracious witness due to a defective memory. In this case the introduction of evidence as to character meets squarely the imputation placed on character.

Much of the effect of impeachment by this type of cross examination depends on the setting, on gesture, on emphasis, which cannot be incorporated into the record for review by an appellate tribunal. Where support is allowed to the impeached witness it would seem logical to make it discretionary with the trial judge.

J. A. W.

ALLOWING PUNITIVE DAMAGES FOR WRONGFUL DEATH—INSTRUCTIONS TO THE JURY. *State ex rel* v. *Ellison*.[1]—Georgia B. Griggs brought an action under Section 5425 R. S. 1909,[2] for the death of her husband whom she alleged was killed by the negligence of the receivers of the Metropolitan Street Railway Co. in operating their street car.

The court instructed the jury that in ascertaining the amount of the damages they were to consider (a) the pecuniary loss to the plaintiff and (b) the facts constituting negligence. The receivers admitted that it was proper for the jury to consider the facts and circumstances surrounding the death of Charles Griggs in order to determine the ques-

17. (1837) 10 Yerg (Tenn.) 343.

18. *State* v. *Johnson* (1895) 47 La. Ann. 1225, 17 So. 789.

19. *Paine* v. *Tilden* (1848) 20 Vt. 554.

20. *George* v. *Pilcher* (1877) 28 Gratt. (Va.) l. c. 316, 26 Amer. Rep. 350.

21. *Harris* v. *The State* (1906) 49 Tex. Cr. l. c. 339, 94 S. W. 227.

22. *Rogers* v. *Moore* (1833) 10 Conn. l. c. 15.

1. (1919) 213 S. W. 459.

2. "Whenever any person . . . .

tion of liability but contended that it was not proper to consider the nature of the negligent acts to enhance the damages. The supreme court, *en banc,* upheld this contention.

The basic principle of the law of damages is compensation to the plaintiff for an injury which he has suffered from the defendant's wrongful act.[3] In addition to allowing the plaintiff compensatory or remedial damages, the common law also recognizes another class of damages known variously as punitive or exemplary damages or smart money. Punitive damages are not allowed in all tort actions, but only in those done in a wanton, willful or malicious manner.[4] This rule is an anomaly, but it has found a firm and abiding place in our system of jurisprudence.[5] The supposed justification for the rule is to punish the defendant for his wrongful act in order that he may be restrained from repeating the offense and to make an example of him in order that others may be deterred from perpetrating similar offenses.[6] Such reasoning seems to lose sight of the essential justification of all damages, i. e. that he who has been injured shall be recompensed. If the defendant has committed a crime he should be brought before the proper criminal tribunal. The plaintiff has no rightful claim to such damages for, in theory at least, he has been fully recompensed when actual damages are allowed.

The relief granted is not commensurate with the damages suffered if the plaintiff may obtain punitive damages. Indeed, leaving out cases where special damages are recoverable it is hard to understand how the plaintiff sustains a greater loss if her husband has been maliciously killed than she would had he been killed only because of the defendant's negligence.

The wrongful death statute[7] in Missouri which preceded the statute involved in the principal case had been construed to provide for punitive damages. The courts have held that this statute had both compensatory and penal features, but that the penal features overshadowed

shall die from injury resulting or occasioned by the negligence, unskillfulness, or criminal intent of any . . . . . agent, servant, or employee, whilst running, conducting or managing . . . . any street, electric, or terminal car or train of cars . . . . . the corporation . . . . . in whose employ any such . . . . . agent, servant, employee . . . . . shall be at the time such injury is committed . . . . . shall forfeit and pay as a penalty for every such person . . . . . the sum of not less than two thousand, and not exceeding ten thousand dollars, in the discretion of the jury."

3. Greenleaf, Evidence, vol. 2, sec. 253 to 266; Sedgwick, Damages, Sec. 584.

4. *Ickenroth* v. *St. Louis Transit Co.* (1903) 102 Mo. App. 597, 77 S. W. 162; *Gray* v. *McDonald* (1891) 104 Mo. 1. c. 314, 16 S. W. 398.

5. Sedgwick, Damages, sec. 466.

6. *Whipple* v. *Walpole* (1839) 10 N. H. 130.

7. Sec. 2864 R. S. Mo. 1899 ". . . the corporation . . . in whose employ . . . the employee . . . shall be at the time any injury is received . . . shall forfeit and pay . . . five thousand dollars . . ."

the other element so that the plaintiff had always to bring suit for the maximum sum which was $5,000.[8] Thus, in a recent Missouri case the court in discussing this statute said: "The Legislature intended that the perpetrator of mischief sought to be prevented should pay the full penalty levied and did not intend that the private citizen should fritter away that penalty provided by virtue of the police power of the state for the purpose of preventing wrongs."[9] In interpreting this act the court in *Gray* v. *McDonald*[10] said that "aggravating and mitigating circumstances were well known to the law when used by the Legislature, so that the statutes . . . must mean that in these actions . . . the party suing may recover not only actual, but also exemplary, damages." In the light of these decisions and in view of the fact that it was difficult to tell just what part of the sum recoverable was penal and what actual damages, the circumstances of the act appear to have been proper facts for consideration by the jury on the question of damages.

Section 5425 R. S. Mo. 1909 changed the original act and allowed the injured party to recover not less than $2,000 and not more than $10,000 in the discretion of the jury. No express provision is made for considering the aggravating or mitigating circumstances of the offense. The earlier decisions interpreted this act as being wholly penal[11] and in support of this theory quite properly refused to allow any evidence to be introduced to show how much loss the plaintiff had sustained. But the circumstances of the offense were considered in determining the quantum of damages.[12] In the Boyd case[13] these earlier decisions were overruled and the court held that this statute was penal as to $2,000 but that any sum in excess of this sum was compensatory damages. This decision which has since been approved[14] was also followed in the principal case. To recover $2,000 the plaintiff need only show that the defendant committed the offense. To prove liability was to make a proper case for the granting of the penal sum but in excess of this sum the plaintiff must show actual damages.

Since it had been decided that the sum of $2,000 was penal there was no necessity for considering the circumstances of the defendant's act to affect this sum. Nor would it seem proper to consider the act in

8. *Philpott* v. *Railroad* (1884) 85 Mo. 164; *King* v. *Railroad* (1889) 98 Mo. 235, 11 S. W. 563; *Casey* v. *Transit Co.* (1907) 205 Mo. 721, 103 S. W. 1146.

9. *Johnson* v. *C. M. and St. P. Ry. Co.* (1916) 270 Mo. 418, 193 S. W. 827.

10. (1891) 104 Mo. 314, 116 S. W. 398.

11. *Young* v. *Railroad* (1909) 227 Mo. 307, 127 S. W. 19.

12. *Ervin* v. *Railroad* (1911) 158 Mo. App. 1, 139 S. W. 498; *Pratt* v. *Railroad* (1909) 139 Mo. App. 502, 122 S. W. 1125.

13. *Boyd* v. *Railroad* (1912) 249 Mo. 110, 155 S. W. 13.

14. *Johnson* v. *C. M. & St. P. Ry. Co.* (1916) 270 Mo. 418, 193 S. W. 827.

15. *Sarazin* v. *Union Ry. Co.* (1899) 153 Mo. 485, 155 S. W. 92.

order to enhance the actual or compensatory damages for the character of the act would seem to bear no relation to the actual loss suffered. The court in the principal case intimates, but does not decide, that it would never be proper under this section to go into the facts of the wrongful death to enlarge or decrease the actual damages. Since this intimation is sound in principle it is hoped that it will prevail.

C. E. C.

AUTOMOBILES—DEGREE OF CARE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE. *Threadgill* v. *United Railways Company of St. Louis.*[1]—Laws 1911, p. 330, par. 12, subsec. 9, provides that automobiles shall be driven with "the highest degree of care that a very careful person would use under like or similar circumstances, to prevent injury or death to persons, on" etc.

In *England* v. *Southwestern R. R. Co.*,[2] the Springfield Court of Appeals said that tho the plaintiff (the driver of an automobile struck by a locomotive belonging to the defendant) was contributorily negligent in that he had not used *reasonable care,* the above mentioned statute placed him under the duty of using the highest degree of care. The remark with reference to the statutory duty was *dictum.*

In *Advance Transfer Co.* v. *Chicago, R. I. & P. Ry. Co.*,[3] and *Hopkins* v. *Sweeney Automobile School,*[4] the Kansas City Court of Appeals held that the driver of an automobile was under duty to use reasonable care to protect himself and that the statutory duty was the duty owed other persons, distinguishing *England* v. *Southwestern R. R. Co., supra.* In *Hopkins* v. *Sweeney Automobile School, supra,* the court said that the statute, being in derogation of the common law, was to be strictly construed.

In *Stepp* v. *St. Louis-S. F. Ry. Co.*,[5] the Springfield Court of Appeals followed the doctrine of the Kansas City Court of Appeals as set forth in the two last mentioned cases, endorsing the distinction the latter court had made of *England* v. *Southwestern R. R. Co., supra.*

In *Threadgill* v. *United Railways Company of St. Louis, supra,* the Supreme Court of Missouri evidently took the position that the automobile driver must exercise the highest degree of care whether he was charged with negligence or contributory negligence. Graves, J. said, l. c. 165: "'The person driving a motor vehicle has a rule of conduct prescribed for him by this statute. That rule of conduct is the 'highest degree of care'". But in *State ex rel* v. *Ellison,*[6] Graves, J. said: "We

1. (1919) 214 S. W. 161.
2. (1915) 180 S. W. 32.
3. (1917) 195 S. W. 566.
4. (1917) 196 S. W. 772.
5. (1919) 211 S. W. 730.
6. (1919) 213 S. W. 459, l. c. 461.

have no degrees of negligence in Missouri, so far as the right to recover for negligence is concerned," which statement he limited to the "case in hand" which was under a statute not requiring the "highest degree of care".

It is submitted that there is but one degree of care applicable to all cases involving recovery for negligent acts or the defense of contributory negligence; that statutes and judicial opinions differentiating between *highest degree, slight* and *ordinary* are but prolific breeders of litigation, as shown by the above cited cases; and that the amount of care legally required is *due care under the circumstances,* the variance possible in the latter being infinite.

Authority for this is almost unlimited. In the Supreme Court of the United States it was said that "ordinary care in certain circumstances may be gross negligence under different circumstances."[7] The same theory was announced in Maine in the case of *Raymond* v. *Portland R. R. Co.*,[8] citing two Missouri cases[9] among a large collection of authorities; in Massachusetts (the case involving the duty of a carrier to a passenger),[10] in Pennsylvania,[11] Alabama,[12] California,[13] Illinois[14] and in the Federal Courts.[15] The injuries in the above cases were caused by various instrumentalities from cattle to railroad trains.

On the question of the care required of the drivers of automobiles the New York court said: "The driver of an automobile is under a duty to use reasonable care but . . . . it is manifest that what would be reasonable care and safe conduct in the case of a light and slow moving wagon often times would not amount to such conduct in the case of heavy and rapidly moving cars."[16] The South Carolina court took "judicial notice that automobiles have a tendency to frighten animals" and said the "duty arises to use due care to prevent accidents but what is due care in

7. *Holladay* v. *Kennard* (1870) 12 Wall. 254, 20 L. Ed. 390; *Star of Hope* (1873) 17 Wall. 651, 21 L. Ed. 719; *Grand Trunk R. R. Co.* v. *Richardson* (1875) 91 U. S. 454, 33 L. Ed. 356; *Grand Trunk R. R. Co.* v. *Ives* (1891) 144 U. S. 408, 36 L. Ed. 485, 12 S. Ct. Rep. 679.

8. (1905) 100 Me. 529, 62 Atl. 602, 3 L. R. A. (N. S.) 94.

9. *McPheeters* v. *Hannibal etc. Ry. Co.* (1869) 45 Mo. 22; *Reed* v. *Western U. T. Co.* (1896) 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 A. S. R. 609.

10. *Cayzer* v. *Taylor* (1857) 10 Gray 274. But see *Dodge* v. *Boston & B. S. S. Co.* (1889) 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 A. S. R. 541.

11. *Penn. R. R. Co.* v. *Ogier* (1860) 35 Pa. 60, 78 Am. Dec. 322.

12. *Matson* v. *Maupin & Co.* (1885) 75 Ala. 312.

13. *Fox* v. *Oakland C. St. Ry.* (1897) 118 Cal. 55, 50 Pac. 25, 62 A. S. R. 216.

14. *Chicago, R. I. & P. R. R. Co.* v. *Hamler* (1905) 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 A. S. R. 187, citing *McPheeters* v. *R. R., supra.*

15. *Smith* v. *Day* (1898) 86 Fed. 62, *Carter* v. *Kansas City C. Ry. Co.* (1890) 42 Fed. 37.

16. *Mark* v. *Fritsch* (1909) 195 N. Y. 282, 88 N. E. 380.

one case may not be in another."[17] The Delaware court in *Hannigan* v. *Wright*,[18] after holding owners of automobiles and owners of other vehicles on the streets must each use reasonable care, said: "In determining therefore, the degree of care that the operator of an automobile should have used the jury must take into consideration its speed, size, appearance, manner of movement, the amount of noise it makes, and anything else that indicates unusual or peculiar dangers" and "the driver must take into consideration the character of his machine and its tendency to frighten horses."

In *McFern* v. *Gardner*,[19] the St. Louis Court of Appeals (before the passage of Laws 1907, p. 73, incorporated in R. S. Mo. 1909, sec. 8523) said: "We can see no reason why the chauffeur in charge of an automobile, traveling on a public highway in a populous city should not be held to the same degree of care in respect to pedestrians and other vehicles upon the street as is a motorman in charge of a street car running on a public street." In *Hall* v. *Compton*[20] the Kansas City Court of Appeals, resting the matter squarely on the common law duty, said that the defendant was not liable if he was using due care, but that the possession of a powerful and dangerous vehicle imposed on the defendant the duty to use care commensurate with the danger to others engendered by the presence of his vehicle on the streets, citing with approval *McFern* v. *Gardner* and quoting the above excerpt. In *Haake* v. *Davis*,[21] the same court, making no reference to a statute, said: "It was the duty of defendant in running his car to exercise care commensurate with the exigencies of the situation - - -. An ordinarily careful and prudent person in his position would have realized the danger of running thru a large, noisy, mixed crowd in any but the most cautious manner. In such cases the greatest care is only ordinary care."

The St. Louis Court of Appeals in the case of *Bongner* v. *Ziegenhein*[22] cited *McFern* v. *Gardner, supra,* and *Hall* v. *Compton, supra,* as showing the correct duty as to the amount of care, tho the case came up under sec. 8523 R. S. Mo. 1909, requiring the highest degree of care that a very careful person would use under like or similar circumstances, the indential words of the statute[23] under which the Kansas City Court of Appeals decided *Hopkins* v. *Sweeney Automobile School*.[24] The latter

17. *Rochester* v. *Bull* (1907) 78 S. Car. 249, 58 S. E. 766.

18. 5 Pennewill's (Del.) Reports, 537, 63 Atl. 234, cited with approval in *Tudor* v. *Brown* (1910) 152 N. Car. 441, 67 S. E. 1015, the court saying the "duty is measured by the exigencies of the situation."

19. (1906) 121 Mo. App. 1, 97 S. W. 972.

20. (1908) 130 Mo. App. 675, 108 S. W. 1122.

21. (1912) 166 Mo. App. 249, l. c. 255, 148 S. W. 450.

22. (1912) 165 Mo. App. 328, 147 S. W. 182.

23. Laws 1911, p. 330.

24. (1917) 196 S. W. 772.

court in *Ginter* v. *Donohue*,[25] an automobile injury case arising under sec. 8523 R. S. Mo. 1909, said that the "measure of care varies" and is "to be determined according to the exigencies of the situation," citing *Bongner* v. *Ziegenhein, supra,* and *Haake* v. *Davis, supra.* In *Meenach* v. *Crawford*[26] the Supreme Court of Missouri cited *McFern* v. *Gardner, supra,* (which held that a defendant must exercise ordinary care) as showing the duty under laws of 1911, p. 330, par. 12, subsec. 9.

Custom and habit are often of more force than logical principles. The confusion which has arisen is due to failure to recognize once for all that it is thoroughly impracticable to decide tort liability on the basis of different degrees of care. No doubt the courts are to blame for the legislature embodying within the statute the phrase "highest degree of care." But it would have been simple to have said that the legislature only intended to require that standard of care which is scientifically sound i. e. the care that a reasonably prudent person would exercise under the same circumstances. If the problem had been approached from that angle the Kansas City Court of Appeals would not have found it necessary to have said that the Statute under consideration was in derogation of the common law.[27]

Professor John Chipman Gray in his "The Nature and Sources of the Law" says: (sec. 367) "A statute is the expressed will of the legislative organ of society, but until the dealers in psychic forces succeed in making of thought transference a working controllable force (and the psychic transference of the thought of an artificial body must stagger the most advanced ghost hunters), the will of the legislature has to be expressed by words, spoken or written."

Mr. Justice Holmes[28] says: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Thus, statutes must be interpreted by courts to give them meaning and they are interpreted thru the mind of the court. If the court think, as in the present case, that the statute logically covers the duty of a motor vehicle driver in all cases tho the statute does not specifically cover all cases, that is the law and as reasonable and sensible as an interpretation of a burglary statute, that provides for punishment of all persons, to exclude children under, say, five years of age. The court is "clear" in the latter case that the legislature "intended" their exclusion.

25. (1915) 179 S. W. 732.

26. (1916) 187 S. W. 879.

27. *Hopkins* v. *Sweeney Automobile School* (1917) 196 S. W. 772. See also sec. 8523 R. S. Mo. 1909 using the same words as the present statute to describe the degree of care required of automobile drivers.

28. *Towne* v. *Eisner* (1917) 245 U. S. 425.

If the legislature use other words, e. g. highest degree of care, which are shown to mean only the care of a reasonable and prudent man in the circumstances why need the courts endeavor to find for them an impossible meaning?

The viciousness lies, of course, in their use in instructions, for as soon as a jury is told that the duty of an automobile driver is to use *the highest degree of care that a very careful person would use,* and it is impressed upon them by a zealous advocate that this is "not just ordinary care" etc., immediately the automobile driver becomes an insurer for the other person's safety.

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