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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."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

TORT—LIABILITY FOR DEATH OF, OR INJURY TO, ONE SEEKING TO EFFECT A RESCUE<sup>1</sup>

Although liability for "misfeasance" may extend to any person to whom harm may reasonably be anticipated as a result of the defendant's conduct, for "nonfeasance"

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1. Cases involving exposure to danger in order to save property are not included in this note, the same principles not necessarily applying as in cases of attempts to save life. For those cases see RESTATEMENT OF TORTS (1934) § 472, Missouri Annotations (1936). Nor does the note include cases where there was no attempt to rescue another from peril, but merely an act in an emergency to save one's

the moral obligation of common decency to assist another human being who is in danger.<sup>2</sup> The law stated generally is that one owes no duty to rescue where another is in a position of peril due to no fault of the other, the remedy in such cases being left to the "higher law" and the "voice of conscience."<sup>3</sup> Despite the fact that such it is more difficult to find some definite relationship between the parties, of such a character that social policy justifies the imposition of a duty to act. Because of this reluctance to countenance "nonfeasance" as a basis of liability, and the difficulty of establishing a relationship imposing a duty to act, the law has not recognized decisions are revolting to one's moral sense, and the fact that they have been denounced with vigor by legal writers,<sup>4</sup> these cases have been justified by some, on the grounds that the difficulty of making any working rule to cover possible situations where fifty people might fail to rescue one, make a contrary decision impossible. In some situations a relationship sufficient to impose an obligation to give assistance to those in danger, although that danger is not the result of misconduct by the defendant, is not much more than a moral obligation. It has been held that a carrier is required to take reasonable steps to aid a passenger in peril,<sup>5</sup> and that an employer his employee injured in the course of his employment,<sup>6</sup> and a ship its seaman who has fallen overboard.<sup>7</sup> The "implied contract" seized upon by the courts in these cases is but a tool, to wedge into our law, liability for a breach of the moral obligation to aid another where aid can be given by one with little inconvenience. In many

own life. Although some of the principles, of course, involved in the cases in the present note, are involved also, in the other class of cases, such as the doctrine that one need not adopt the least hazardous course when called upon suddenly to act in a dangerous situation, created by the negligence of another. For that type of case see *Twomley v. Central Park N. & E. R. R. Co.*, 69 N. Y. 159, 25 AM. REP. 162 (1877). Nor does the note purport to treat the question of proximate cause, even though it arises in the class of cases under consideration, except so far as the question is somewhat distinctive with this class. Nor does the note deal with the question of voluntary assumption of risk as opposed to rescue. For an excellent discussion of that problem see Goodhart, *Rescue and Voluntary Assumption of Risk* (1934) 5 CMB. L. J. 192.

2. The expert swimmer, with a boat at hand, who sees another drowning before his eyes, may sit on the dock, smoke his cigarette, and watch him drown. *Osterlind v. Hill*, 263 Mass. 73, 160 N. E. 301 (1928). A physician is under no duty to answer the call of one who is dying and might be saved. *Hurley v. Eddingfield*, 156 Ind. 416, 59 N. E. 1058 (1901). Nor is any one required to play the part of a good Samaritan and bind up the wounds of a stranger who is bleeding to death. *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810 (1900); see also, RESTATEMENT OF TORTS (1934) § 314.

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

4. Ames, *Laws and Morals* (1908) 22 HARV. L. REV. 97, 112; Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. OF PA. L. REV. 217, setting out a very comprehensive discussion of the problem on page 316; Warner, *Duty of a Railroad Company to Care for a Person Rendered Helpless* (1919) 7 CAL. L. REV. 312; CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928) 25.

5. *Layne v. Chicago & Alton R.*, 175 Mo. App. 34, 157 S. W. 850 (1913).

6. *Hunicke v. Meramec Quarry Co.*, 262 Mo. 560, 172 S. W. 43 (1914).

7. *Harris v. Pennsylvania R. Co.*, 4 Cir. 1931, 50 F. (s) 866; *Courtes v. Baltimore Insular Lines*, 287 U. S. 367, 53 S. C. 173 (1932) (sick seaman).  
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states, the "hit and run driver" statutes<sup>8</sup> may perhaps be construed to impose civil liability for failure to stop and aid a person injured without fault in the defendant in an automobile accident.

Undoubtedly the tendency will be to find relationships not previously recognized to form a basis upon which to predicate a duty to give assistance in certain instances. Thus the North Carolina court in the case of *Whitesides v. Southern R. Co.*<sup>9</sup> found no difficulty in holding that if the defendant's train without fault knocked the intestate off the trestle, and the employees knew it had done so, and went on without stopping to look after and care for him on a cold winter night, it was negligence sufficient to make the defendant liable. In *L. S. Ayres & Co. v. Hicks*<sup>9a</sup> a six year old boy accompanied his mother on a shopping tour of the defendant's department store and, while riding on the escalator, fell and caught his hands in moving parts of the machine. The clerks and agents of the defendant who were but a few feet from the accident delayed three to five minutes in shutting off the machine although there was a switch upon each floor that would stop the machine instantly. The court held the defendant liable, although the invitor-invitee relationship generally does not impose a duty on the invitor to go to the rescue of the invitee who, through no fault of the invitor, places himself in a dangerous position. In instances of this character it should be noted, to distinguish them from other types, that the defendant controlled the machine which produced the harm although there was no negligence in the operation of the machine. It was the defendant's operation of the machine, although non-negligently operated, which made a rescue necessary.

On the other hand, the law encourages the performance of moral obligation to rescue. The rule is well settled that one who sees a person in imminent and serious peril through the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life, or serious injury to himself in attempting to effect a rescue provided the attempt is not recklessly or rashly made. All of the cases agree that the fact that the injury is sustained in attempting to save human life is a proper element for consideration upon the question of contributory negligence and that the latter question ordinarily is one for the jury, and not for the court. Thus in *Clark v. Famous Shoe Co.*<sup>10</sup> it was held that when a mother who falls into an open hatchway in a sidewalk while endeavoring to prevent her infant child, who had stumbled, from falling into it, is not, as a matter of law, guilty of contributory negligence although it appears that the hatchway was guarded so as to prevent a person exercising reasonable care, from falling into it. Likewise the weight of authority in case of an injury in attempting to rescue another, the antecedent negligence of the person rescued is not imputable to the rescuer.<sup>11</sup> The

8. MO. REV. STAT. (1939) § 8401.

9. 128 N. C. 229, 38 S. E. 878 (1901).

9a. 41 N. E. (2) 356 (Ind. 1942); (1943) 8 Mo. L. REV. 205, at 207-212.

10. 16 Mo. App. 463 (1885).

11. In *Bond v. Baltimore & O. R. Co.*, 82 W. Va., 557, 96 S. E. 932, 5 A. L. R. 201 (1918), the defendant negligently failed to maintain a lookout at a railroad crossing. A passenger, also negligent, stepped in front of an approaching train. The

Missouri Supreme Court in *Donahoe v. Wabash Railway Co.*<sup>12</sup> seems to have gone even further and held that the contributory negligence of a parent in allowing a child to get into a position of danger will not preclude a recovery for injury received by the parent in attempting to rescue the child. In that case it appeared that in attempting to save her child, which was on the defendant's tracks, from being killed by an approaching engine, the plaintiff received the injuries complained of. In an action to recover damages for such injuries, the court held that the parent's contributory negligence in permitting her child to be on the railroad track would not prevent her from recovering damages for the injury sustained in attempting to rescue.<sup>13</sup>

However, before the rescuer is authorized to act on the ground that another is in imminent peril, there must be more than a mere suspicion that accident to some person may follow if he does not act; there must be some one actually in peril, or at least, the situation must be such as to induce a reasonable belief that some person is in imminent peril; and one who attempts to assert the original negligence of a defendant toward another person who is in peril must show that there was some one in peril, or that he reasonably had the right to so assume or believe.<sup>14</sup> Therefore, in order to justify one in risking his life, or serious injury, in rescuing another person in danger, the danger threatened to the latter must be imminent and real, and not merely imaginary or speculative.

It should be noted, however, that the doctrine applicable to relieve from the charge of contributory negligence of one who voluntarily exposes himself to danger in order to rescue another person in a perilous situation does not apply where the rescuer has himself solely brought about the danger. The Illinois<sup>15</sup> court held that it is a humane provision of the law that negligence which precluded a recovery

plaintiff grabbed her and threw her out of the path of danger, but in doing so was struck and injured by the pilot beam of the defendant's engine. It was held that the right of a person to rescue another from danger of any kind, though voluntarily exercised, is a perfect and complete as any other personal right, and the fact that the danger springs from a negligent act of a third person does not in any way affect or impair the right of rescue, or the moral obligation to exercise it.

12. 83 Mo. 560, 53 AM. REP. 594 (1884).

13. "If the defendant's servants were guilty of negligence, after Mrs. Donahoe got upon the track, in not stopping or checking the speed of the train, that cancels her prior contributory negligence and takes that question out of the case, if it was ever properly in it. Their contributory negligence in permitting the child to be on the track would not prevent a stranger from recovering damages for an injury sustained in attempting its rescue, and we are inclined to the opinion that the mother or father would have the same right and certainly a much greater inclination to save its life. No negligence is imputable to a child as young as the one killed by this train."

14. *Eversole v. Wabash Railway Co.*, 249 Mo. 523, 255 S. W. 419 (1913). An employee of one railroad sought to recover for personal injuries from another, received by him in voluntarily trying to stop a runaway car of the other. It was held that the mere fact that the volunteer saw a person on or near the track ahead of the run away cars was not sufficient to induce belief that some person was in imminent peril.

15. *White v. Chicago*, 120 Ill. App. 607 (1905).

is not imputed to one who voluntarily exposes himself to danger in an attempt to save the life of another, but that there is an exception to that rule where it is the party injured who alone was negligent in bringing about the perilous situation.<sup>16</sup>

Both the New York Courts<sup>17</sup> and the Montana Courts<sup>18</sup> have held that the law has so high a regard for human life that not only will they not impute negligence to one who attempts to save it, unless the attempt is made under such circumstances as to constitute rashness in the estimation of prudent persons, and that it is broad enough to cover not only an attempt to save life under spontaneous impulse, aroused by sudden and unexpected perception of the peril, and without thought or calculation of the chances of injury or loss of life to the one making the attempt, but they have extended this doctrine to attempts made after such calculation of the circumstances permitted the rescuer to act under the conclusions that he could save life without the loss of his own. So the fact that the rescuer has time to deliberate upon his course of action, and that he does not act spontaneously or impulsively in attempting to effect the rescue, has been held not to break the causal connection between the defendant's negligence and the rescuer's injury, sustained in making the attempt.

In a large percentage of the cases of rescue the rescuer was an employee of the person or corporation on account of whose negligence in bringing about the perilous situation the recovery is sought. It is assumed, in general, that the mere fact that one is an employee of the defendant will not preclude recovery.<sup>19</sup> Thus the Kansas Court<sup>20</sup> said that the exposure of life by an employee, to save life, is neither wrongful nor negligent, when attempted within the scope of the employee's duty, provided it is made under such circumstances as do not constitute rashness in

16. The court held that the plaintiff's negligence had created the dangerous situation in which her child was placed, and that she could not, therefore, recover from a municipality for injury caused by falling from planks which spanned a depression three feet deep between the roadway and sidewalk, where, instead of taking safe and convenient cross walks, as she might have done in going upon an errand, she attempted a short cut across the planks in the middle of the block, and upon her return, when near the planks, the child who accompanied her left the mother's side and started over the planks alone, and the mother in endeavoring to overtake the child, lost her balance and fell, sustaining the injury in question. Cf. *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 58 N. E. 367, 52 L. R. A. 655 (1900), where the court held that a mother was not chargeable with negligence as a matter of law, in letting loose of the hand of her four year old child while pausing on a city street to speak to a friend, and that she was not necessarily precluded from recovery for injury from being struck by a street car when she was attempting to rescue the child, when she saw it upon the track in front of an approaching street car, on the ground that she was responsible for creating the dangerous situation in which she was injured.

17. *Wagner v. International R. R. Co.*, 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1 (1921); *Eckert v. Long Island R. Co.*, 43 N. Y. 502 (1871).

18. *Da Rin v. Casualty Co. of Am.*, 41 Mont. 175, 108 Pac. 649 (1910).

19. As to the right of employee to compensation under workmen's compensation acts, for injuries received while acting in an emergency, including injuries sustained while attempting to rescue another, see *Baum v. Industrial Comm.*, 288 Ill. 516, 123 N. E. 625, 6 A. L. R. 1242 (1919).

20. *Condiff v. Kansas City Ft. S. & G. R. Co.*, 45 Kan. 256, 25 Pac. 562 (1891).

the judgment of prudent persons.<sup>21</sup> However, where the rescuers' actions are so foolhardy or unusual that they cannot be regarded as any normal part of the risk they will be considered as superseding cause or intervening force that will preclude his recovery.<sup>22</sup>

On the other hand, it is an elementary rule of the Law of Torts that there is no negligence on the part of the defendant unless a duty is owed to the person affecting the rescue. Prosser in his treatise on torts<sup>23</sup> says:

"The conception of an absolute wrong remains in the criminal law, and in the field of intentional torts, where the doctrine of 'transferred intent' makes any one who attempts to injure another liable to any stranger whom he may injure instead. But when negligence began to take form as a separate basis of tort liability, the courts developed the idea of duty, as a matter of some specific relation between the plaintiff and the defendant, without which there could be no liability."

Duty arises from a relationship. The classic statement in determining where there is a relationship upon which to predicate a duty was set out by Lord Esher in *Heaven v. Pender*.<sup>24</sup> The test is that of anticipation<sup>25</sup> of harm to the plaintiff if reasonable care is not exercised by the defendant. Thus, before the defendant can be held to be liable to the rescuer, he must have been able to anticipate the rescue. The mere fact that one in going to the rescue of another person, who is in imminent peril, is not guilty of negligence in so doing will not of course entitle him to recover for an injury sustained in so doing unless negligence is shown on the part of the defendant in bringing about the dangerous situation or in failing to exercise due care toward the rescuer.<sup>26</sup>

21. But see *Saylor v. Parsons*, 122 Iowa 679, 98 N. W. 500 (1904), where the court held that where an employee rescues a fellow workman from a position of peril and is injured in so doing he cannot recover from either the fellow workman or the master, since the rescue was unusual and could not be anticipated.

22. The courts are vague as to what constitutes rashness in the light of the broad allowance they make for an excited frame of mind, but see: *Atchinson, T. & S. F. R. Co. v. Calhoun*, 213 U.S. 1 (1909), injuring child in hopeless effort to catch train; *Central Wis. Trust Co. v. Chicago & N. W. R. Co.*, 232 Wis. 536, 287 N. W. 699 (1939), conductor rushing into danger with no apparent reason; cf. *Wright v. Atlantic Coast Line R. Co.*, 110 Va. 670, 66 S. E. 848 (1910), where the court held that the injured plaintiff could not excuse her act of staying on the railroad track until injured on the ground that she was attempting to stop the train in order to rescue from danger her mother who, though later killed, was not in danger at the time the plaintiff went upon the track to flag the train.

23. PROSSER, TORTS (1941) p. 179.

24. L. R. 11 Q. B. D. 503 (1883).

25. "That whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognize that if he did use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

26. *Donahoe v. Wabash, St. Louis & Pac. Railway Co.*, 83 Mo. 560 (1884): "It is to be observed that it is only when the railroad company, by its own negligence, created the danger, or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such

The cases involving injury to rescuers generally fall into two classes. The first being where the force endangering the rescued is the same as the force endangering the rescuer. The second being where the force endangering the rescued is spent and a new and different force endangers the rescuer.

Under the first class the largest number of cases of attempted rescue is found in that group of decisions involving danger to persons on or near railroad tracks, in front of approaching trains. The Missouri Court in *Sherman v. United Railways Co.*<sup>27</sup> in affirming a judgment for the death of a mother who rushed in front of an approaching car to rescue her two year old child running towards her from the opposite side of the street, said that under the circumstances it would be highly unreasonable to require deliberate judgment on the mother's part, and that her act could not be termed willful, reckless, or wanton, within the meaning of the doctrine indicated so as to preclude recovery under the "last clear chance" doctrine.<sup>28</sup> By the same token the law does not require engineers in charge of trains to leave their posts when danger is threatened, in order to save themselves; and they cannot be charged with negligence in remaining as long as there is hope, however faint, of averting disaster to others.<sup>29</sup>

In various cases it has been held that persons who remained on or near a railroad track in an attempt to remove a hand or push car from the track in order to prevent its collision with an approaching train were not guilty of negligence as a matter of law, but that the question was one for the jury, in view of the probable danger to human life from a collision.<sup>30</sup> This same view apparently has been followed by the courts generally in cases of attempts to stop runaway cars.<sup>31</sup> Likewise in a Louisiana case where a bridge foreman, believing a bridge to be unsafe for the passage of a train, and in order to stop the train, went to center of the bridge and attempted to flag the train, but upon the failure of the engineer to heed the warning in time was struck by the engine and killed.<sup>32</sup> The court in these cases has required strict adherence to the rule that the danger must be imminent and not merely

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person and recover for an injury he may sustain in that attempt. For instance, if a man is lying on the track of railroad intoxicated or asleep, but in such a position that he could not be seen by the men managing an approaching train and they had no warning of his situation, and another, seeing his danger, should go upon the track to save his life and be injured by the train, he could not recover, unless the trainmen were guilty of negligence, with respect to the rescuer, occurring after the beginning of his attempt. . . . In other words, the negligence of the company, as to the person in danger, is imputed to the company with respect to him who attempts the rescue, and if not guilty of negligence as to such person, then it is only liable for negligence occurring with regard to the rescuer, after his efforts to rescue the person in danger commenced."

27. 202 Mo. App. 39, 214 S. W. 223 (1919).

28. *Donahoe v. Wabash Railway Co.*, *supra*, in accord.

29. *Central R. Co. v. Crosby*, 74 Ga. 737, 58 AM. REP. 463 (1885).

30. *Schroeder v. Chi. & A. R. Co.*, 108 Mo. 322, 18 S. W. 1094 (1892).

31. *Dean v. Kansas City & S. R. Co.*, 156 Mo. App. 634, 137 S. W. 603 (1911); but see *Eversole v. Wabash R. Co.*, *supra*.

32. *Bourdier v. La. Western R. Co.*, 131 La. 131 La. 689, 60 S. 78 (1912).



imaginary or speculative.<sup>33</sup> This same reasoning has been applied in cases where the injury was received while attempting to stop a runaway team,<sup>34</sup> or from the dangers from vehicles negligently driven,<sup>35</sup> or from the dangers from fire.<sup>36</sup>

An interesting application of the same reasoning is found in the case of *Doody v. California Woolen Mills Co.*<sup>37</sup> There the plaintiff and another workman were directed to move a carboy containing sulphuric acid, and in so doing the other employ fell and the acid splashed into the plaintiff's face and eyes, causing the injury in question. It was held that an instruction was properly refused to the effect that if the plaintiff by letting go of the carboy could have prevented the injury to himself, it was his duty to do so, and if the jury believed that he could thus have protected himself, but failed to do so in order to protect a fellow workman from probable injury, their verdict should be in favor of the defendant. The court said the plaintiff, at the time contemplated in this instruction, was in imminent danger, and his conduct in trying to save his fellow workman would not be attributed to him as culpable.

Few cases have involved the second type of situation where the force endangering the rescued is spent and a new and different force endangers the rescuer. The problem appears to have been first raised in the New York Court of Appeals in 1921, in the case of *Wagner v. International R. R. Co.*<sup>38</sup> where the defendant railroad company was held liable for damages for injuries suffered by a passenger, whose cousin was injured by falling off a crowded train of the defendant railroad company, as the train rounded a curve on a trestle bridge. The plaintiff rescuer left the train after it had stopped and walked back along the track to find the body of his cousin. In the darkness he fell off the trestle and was injured. The case is the leading authority for the proposition that one going to the rescue of another, put in peril by the negligence of a third, having time to make deliberate choice for incurring the peril, does not affect the liability to him of the negligent person. It further sets forth the doctrine generally adopted by the American courts, that the defendant's act is not only a wrong to the person imperiled but also to the rescuer, on the reasoning that the wrongdoer ought to have foreseen that his act would cause the rescuer to take the risk.

In contrast to the case with which the New York Court was able to establish a duty on the part of the defendant toward the rescuer on the theory of expanding the negligence concept to include the rescuer, other courts in later cases have es-

33. *Wright v. Atlantic Coast Line R. Co.*, 110 Va. 670, 66 S. E. 848 (1910); *Blair v. Grand Rapids & I. R. Co.*, 60 Mich 124, 26 N. W. 855 (1886); see also note 22.

34. *Manthey v. Rauenbuehler*, 71 App. Div. 173, 75 N. Y. Supp. 714 (1902); *Dixon v. N. Y., N. Y. & H. R. Co.*, 207 Mass. 126, 92 N. E. 1030 (1910).

35. *Muhs v. Fire Ins. Salvage Corp.*, 89 App. Div. 389, 85 N. Y. Supp. 911, (1903).

36. *Williams v. U. S. Incandescent Lamp Co.*, 173 Mo. App. 87, 157 S. W. 130 (1913).

37. 216 S. W. 531 (Mo. 1919).

38. 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1 (1921).

established such a duty only after considerable difficulty. Thus the Saskatchewan Court of Appeals, in the case of *Dupuis v. New Regina Trading Co. Ltd.*,<sup>39</sup> denied recovery to the widow of a rescuer because it could not establish a duty owing from the defendant to the rescuer. In that case an elevator operator employed by the defendant failed to close and lock the elevator door before the car moved from the landing, at a time when there were no passengers in the elevator. As a result, her feet were caught between the floor of the elevator and the grill work which protected the elevator shaft, and when the elevator moved she became suspended head down in the elevator shaft, the door of the grill remaining open. In response to her screams for help, the deceased in his efforts to rescue her fell down the elevator shaft and was killed. There the issue was whether carelessness jeopardizing one's own self could give rise to a cause of action on the part of the rescuer, against the rescued whose negligence produced the need for rescue.<sup>40</sup>

The court relying upon the American case of *Saylor v. Parsons*,<sup>41</sup> held that the "rescue" doctrine as a part of the law of England,<sup>42</sup> Canada, and the United States applies to the extent that the defendant is guilty of negligence towards the endangered person, or towards the rescuer after the latter has proceeded to the rescue. Hence in this case the court held that the defendant's liability depended upon the liability of the imperiled person to himself and, since one cannot be negligent to himself as no one owes a legal duty to himself to use care even if a risk of injury may be foreseen, there was no basis for a duty to the rescuer.

The same problem was before the Michigan court in *Brugh v. Bigelow*.<sup>43</sup> In that case the defendant in negligently driving across an intersecting highway, collided with another's automobile, resulting in the defendant's car turning over on its side and pinning the defendant and his passenger beneath it. The plaintiff, after rescuing the passenger and in effecting the defendant's rescue, lifted the car

39. 4 D. L. R. 275 (1943).

40. While the action was against the employer of a servant who imperiled herself, the principle of vicarious liability—in the absence of any personal negligence on the part of the employer—would seem to require a finding that the employee was under a liability for which the employer must respond.

41. 122 Iowa 679, 98 N. W. 500 (1904). A servant who sprang forward from a safe position to prevent the fall of a brick wall on his master, who was undermining it, was denied a recovery from the master for the injury which resulted to him, there having been no negligence toward him for the master owing no legal duty to protect himself.

42. The English courts have taken a somewhat narrower view in the "rescue" cases, finding liability only under special circumstances as in *Haynes v. Harwood*, 1 K. B. 146 (1935), where a policeman stopped a runaway horse. The court held the driver of the horse liable because the plaintiff as a police officer had a special duty to protect the public safety. The decision seemed to imply that a mere passer-by having no such duty might not recover. However, in the more recent English case of *Morgan v. Allen*, 1 All. E. R. 439 (1942), the plaintiff was permitted to sue for injuries sustained when he leaped in front of the defendant's motorcycle to rescue a child though he was not a public officer, thus indicating a possible trend toward the American view.

43. 16 N. W. (2d) 688 (Mich. 1944).

and, while in the act of removing the defendant, was struck and injured by the car when it righted itself and rolled backwards. The court held that the rescuer could recover, not upon the theory of expanding the original negligence to include the rescuer, but upon the theory that the defendant owed a duty directly toward the rescuer, since the accident took place upon a public highway where the "defendant was bound by the laws of Michigan to exercise due care for the safety of others . . ."

Thus the court, contrary to *Saylor v. Parsons* said that a rescue was not an unusual thing, but rather that it could be anticipated. The Michigan court distinguishes this case from the *Saylor* case in that in the latter ". . . the plaintiff was proceeding at his own risk on private property where the safety of others would not necessarily be involved."

In the same year that the *Braugh* case was decided, the Court of Appeals of Georgia,<sup>44</sup> reached a similar conclusion in passing upon the sufficiency of the appellant's petition. The petition stated that the plaintiff's ambulance was struck by a gasoline truck at an intersection where the view was obstructed by the defendant's transfer truck which was improperly parked. It stated further that the plaintiff (who though owner, was not an occupant of the ambulance) on a bitterly cold morning before daylight went to the aid of the injured, and himself suffered physical injuries caused by overexertion in effecting rescue. It was held that the lower court erred in sustaining the demurrer to the petition and in dismissing the action. However, Judge Parker, in a strong dissent after stating that "the risk reasonably to be previewed defines the duty to be obeyed . . . and foresight of the consequences involves the creation of the duty," asks the question:

"Could the driver of the defendant's truck, when parking it allegedly in violation of the rules of the Public Service Commission, have reasonably foreseen that the plaintiff at home in bed would arise following a collision of his ambulance with a moving truck (a collision allegedly the result of the defendant's illegal parking, and not any active negligence by it) and go to the scene of the casualty, become hysterical from the sight to such an extent that his loss of ordinary reason would cause him to overestimate his physical strength in attempting to move injured persons, and sustain physical injuries on account of the strain?"

While the question of foreseeability of injury to a rescuer may have been answered differently when applied to various facts once the anticipation of rescue liability has been recognized, assuming in these cases that the coming of the rescuer could be anticipated, a further question presents itself as to whether the type of injury suffered by the rescuer must be anticipated. Where the force endangering the rescuer is the same as that which endangers the rescued, a definite type of harm could be more easily anticipated than the type of harm suffered by the rescuer where the force endangering the rescued is spent and a new and different force endangers the rescuer.

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44. *Blanchard v. Reliable Transfer Co.*, 71 Ga. App. 843, 32 S. E. (2d) 420 (1944).

Thus if *A* negligently wrecks his car and pins himself beneath it, and *B* in coming to his rescue cuts his hand upon the broken windshield glass, in all probability such injury could clearly have been anticipated. If, however, *B*'s hand is bitten by a rattlesnake in effecting rescue it would be equally clear that such injury could not have been anticipated. The more difficult cases are those that come in between the two extremes, as where *B* suffers from injuries from over-exertion in lifting the automobile.

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*Greer v. McCrory*<sup>1</sup>

Plaintiff was a laundress in the home of the defendants, husband and wife, and, although engaged by the wife, was employed in "the operation and maintenance of their home in which plaintiff was their joint employer,"<sup>2</sup> the wife managing the operation, and the husband furnishing the funds therefor. Due to the negligence of the wife in leaving a mop handle protruding across the basement stairway, plaintiff was injured by falling to the bottom of these steps and into a post situated nearby. Plaintiff had judgment against both the husband and wife in the lower court, and the main contention upon appeal was that the husband, by virtue of a Missouri Statute<sup>3</sup> relieving a husband of liability for the torts of his wife unless he would be responsible therefor irrespective of the marital relation, should not have been found liable for his wife's negligent act not committed in his presence or upon his direction. The Court found, however, that in spite of the relief given a husband by the aforementioned statute, he remained accountable for any torts of his wife committed within the scope of a "joint undertaking"<sup>4</sup> with her, that the maintenance and operation of the home was such a joint undertaking, and that the unique nature of the marital relationship itself could not be utilized to exempt its participants from the legal liabilities attendant thereto.

The fundamental issue involved here is whether or not a "home" is to be considered a joint enterprise of its makers in which substantive tort law will impute to one party the negligence, and consequent liability, of the other for acts occurring within the scope of that enterprise. As was noted by the Court,<sup>5</sup> this is a case of first impression in this jurisdiction, and there is little or no precedent in any jurisdiction on this particular aspect of the general problem of a husband's liability for his wife's torts.

The unquestioned rule at common law was that a husband was liable, either jointly or solely, for all torts committed by his wife during coverture.<sup>6</sup> Various theories have been proposed as the reason for the attachment of this millstone

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1. 192 S. W. (2d) 431 (Mo. 1946).
  2. *Id.* at 442.
  3. MO. REV. STAT. (1939), § 3680.
  4. See *infra* for discussion of the court's use of this phrase.
  5. 192 S. W. (2d) 431, 438 (Mo. 1946).
  6. 2 KENT COMM. 149.

upon the neck of a man entering the holy bonds of matrimony. (1) Bracton is alleged to have originated the vogue of entity in husband and wife—that they were one, and thus the wife was not capable of being separately liable.<sup>7</sup> (2) The duty of a husband to protect and provide for his wife, in return for her services to him, has been said to include the acceptance of the liability for her torts.<sup>8</sup> (3) A more practical contention seems to be that since a wife had no separate estate at common law, from which successful litigants could recover judgments, the husband should be a necessary party to the otherwise fruitless suit.<sup>9</sup> (4) And another logical suggestion appears to be that the rule arose from a procedural necessity, that of joining the husband in an action against the wife, since at common law a married woman could not sue or be sued in her own name, which procedural maxim itself quite probably arose from the venerable entity theory.<sup>10</sup> Whatever the rule's source, however, or whoever its progenitor, the husband's liability for his wife's torts was a broad one, coextensive with the torts themselves.<sup>11</sup> And the common law rule was not different in Missouri.<sup>12</sup>

With the wide enactment, in substantially all jurisdictions, of the commonly designated Married Women's Property Acts, after the initial act in England in 1870, by virtue of which women were given power to hold ownership of property and to enter self-binding contracts during coverture, many new breaches were found in the old common law rule making the husband liable for his wife's torts, and a large number of courts eagerly followed the apparent intention of the acts and interpreted them as a complete abrogation of the rule.<sup>13</sup> The result in a particular jurisdiction seems to have been dependent largely upon the exact wording of the pertinent statute, and upon the extent to which the particular court was willing to advance beyond those words themselves and recognize that the necessity which

7. 6 Bracton, *De Legibus Angliae* (1883) 392. "A husband and wife are as if were one person, being one flesh and one blood."

8. See note (1926) 74 U. OF PA. L. REV. 305.

9. See note (1930) 5 Wis. L. REV. 444.

10. *Kowing v. Manly*, 49 N. Y. 192 (1872).

11. See *Edwards v. Wessinger*, 65 S. Car. 161, 43 S. E. 518 (1903) for a succinct summary of the extent of a husband's liability.

12. In recognition of the frequent inequitableness of this rule of absolute liability without fault, the courts themselves made some inroads upon its application, following the usual formula of taking cognizance of exceptions to it. Thus, in England, in the case of *Edwards v. Porter*, (1925) A. C. I., 94 L. J. K. B. 65, it was held that a husband was not liable in tort for an intentional fraudulent inducement by the wife in the procurement of a contract. And this exception received broader assertion in other cases, such as *Cole v. De Trafford*, 1 K. B. 911 (1917), and *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422 (1854), which reserved a husband's vicarious liability to instances of "pure torts" or "torts simpliciter," those which were in no way connected with a contract. The same tendencies also were exhibited by courts in the United States, and that Missouri was not outdone in this judicial liberalization of the strict common law rule is evidenced by *Merrill v. St. Louis*, 12 Mo. App. 466 (1882), and *Wirt v. Dinan*, 44 Mo. App. 584 (1891).

13. See full citation of cases in notes, 20 A. L. R. 528 (1922), 27 A. L. R. 1218 (1923), 59 A. L. R. 1468 (1929).

gave rise to the common law rule had been dissipated and swept away, leaving the maxim no longer supported by reason. Thus, in England itself, in the first important perusal of the question, the property acts were held to be without effect as to the common law liability of a husband for his wife's torts.<sup>14</sup> And in spite of a strong dissent and much legal controversy, this holding was reiterated some years later, leaving, as the only road open for the abrogation of the common law dogma, that of express statutory enactment.<sup>15</sup>

Missouri seems to have followed this strict interpretation of its Married Women's Property Act for a number of years.<sup>16</sup> But in 1914, it abruptly changed its view of the problem, overruled these previous cases, and decided that the necessity for the old common law rule had been obviated by the property acts, and that it should therefore no longer be recognized as in existence.<sup>17</sup>

The pros and cons of these two interpretations of same or similar statutes are many and varied.<sup>18</sup> But a number of jurisdictions in the United States have followed the way pointed by the strict English interpretation, and have passed legislation which expressly provides that a husband is not to be held for the torts of his wife in which he does not participate in some manner.<sup>19</sup> The Missouri legislature in 1915 enacted the statute which is the crux of the controversy in the principal case, stating that "For all civil injuries committed by a married woman, damages may be recovered against her alone, and her husband shall not be responsible therefor, except in cases where, under the law, he would be jointly responsible with her if the marriage did not exist."<sup>20</sup>

There is substantial unity in the interpretation of these later statutes, which leave little need for inference as to their intended purpose. Thus, in Missouri, it has repeatedly been held that this enactment, without doubt, abolished the common law doctrine and absolved the husband of his wife's torts, except where he would have been liable independently of their relationship.<sup>21</sup> It is only in cases falling within this one exception, then, where the old common law rule remains

14. *Seroka v. Kattenburg*, 17 Q. B. D. 177 (1886).

15. *Edwards v. Porter*, A. C. 1, 94 L. J. K. B. 65 (1925).

16. *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947 (1898); *Aronson v. Ricker*, 185 Mo. App., 528, 172 S. W. 641 (1915).

17. *Claxton v. Pool*, 182 Mo. App. 13, 167 S. W. 623 (1914), *aff'd* 197 S. W. 349 (Mo. 1917). This decision, undoubtedly, was greatly influenced by the pendency before the Missouri legislature at that time of the measure pertinent to the principal case.

18. See note (1926) 11 CORNELL L. Q. 425, 427, which contends that "the better view, from the point of view of social expediency, is that the husband should not be liable for the torts of his wife." But note (1926) 74 U. OF PA. L. REV. 305, says that, "Notwithstanding the evident desirability of a change from the old rule, the courts are not the proper agencies to bring it about. The remedy lies with the legislature, and were the courts to attempt it they would be guilty of 'judicial legislation'."

19. See references cited *supra* note 15.

20. MO. REV. STAT. (1939) § 3680.

21. *Moore v. Doerr*, 199 Mo. App. 428, 203 S. W. 672 (1918); *Deake v. Rowan*, 216 Mo. App. 663, 272 S. W. 101 (1925).

applicable, and the exception is no broader in extent than the corresponding rules of liability established by ordinary tort law. These rules deal with the liability of a principal or master for the torts of his agent or servant, joint and several liability of joint tort-feasors, and the imputation of liability as between members of a joint enterprise.

It may be noted that the Court in the principal case evinces a slight indecisiveness as to the exact meaning of this term "joint enterprise," and as to the existence of a distinction between it and a "joint adventure," although its limits and extent appear to be well recognized and are referred to frequently under the appellation of "joint undertaking". The Court is not at all without company in its indecision.<sup>22</sup> However, although several of the distinguishing characteristics of joint enterprise and a joint adventure are the same, such as a community of interest in the undertaking, and a joint right in its control, the former seems to be a creature of substantive tort law, used to describe those instances in which the law will impute to one person the acts, and liabilities therefor, of another person.<sup>23</sup> The latter, on the other hand, is grounded in contract law, and requires a contractual relationship, either express or implied, for its very existence.<sup>24</sup> It is utilized to describe those instances in which, although falling short of a full corporate or partnership legal status, at least some of the incidents of a mutual principal-agent relationship will be recognized, as is done in a partnership. It is frequently, although not exclusively, defined as a partnership which is limited in scope (to a single undertaking or project) and in duration (for a definite time of reasonably short duration), and which has as its aim some business or commercial profit. The important difference to be noted here, however, between a joint adventure and its tort cousin, joint enterprise, is that the latter is broader in extent, and while it may include all cases of joint adventure, however technically defined, it may also include other cases where there is no contractual relation at all as to the common undertaking.

The emphasis, then, under the type of statute found in Missouri, has passed from the finding of exceptions to a rule of absolute liability in the husband for his wife's torts, to searching for exceptions to a general rule of non-liability in the husband. Such exceptions have been allowed, and such liability has readily been imposed upon the husband, when it has been determined that the tort committed by the wife was done in her capacity as an agent or servant of the husband.<sup>25</sup> This principle very frequently has found application in the "family automobile" cases (once the principal-agent relation has been sufficiently stretched and mutilated to render it applicable) under which a husband is held liable for his wife's negligent driving of the family car.<sup>26</sup> There would appear to be little difficulty in disposing of the principal case upon this basis, since a wife is commonly regarded as the

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22. See 30 AM. JUR., JOINT ADVENTURE, § 3, where the terms are mingled almost synonymously.

23. RESTATEMENT, TORTS (1934) § 878.

24. *Arnold v. De Booy*, 161 Minn. 255, 201 N. W. 437 (1924).

25. *Plasch v. Fass*, 144 Minn. 44, 174 N. W. 438 (1919); *Vannett v. Cole*, 41 N. D. 260, 170 N. W. 663 (1919).

agent of her husband in her performance of the domestic duties relative to the maintenance and operation of their home.<sup>27</sup> Two of the cases used as authority by the Court were dealt with solely upon this theory.<sup>28</sup> The only problem involved, then, would seem to be whether or not the particular act of negligence in question was committed within the scope of the wife's agency as manager of the home.

The result as to the husband's liability is the same when it is determined that he has acted jointly with the wife in the commission of the tort.<sup>29</sup> His liability in this case is predicated upon exactly the same rules of law which are applicable to a situation involving wholly unrelated joint tort-feasors. And one of the authorities quoted by the Court in the principal case, and quite similar in facts to it, appears to pass upon this basis, that is, the negligence of both husband and wife in failing to provide for the domestic servant safe premises upon which to perform her duties.<sup>30</sup> Thus it appears that this is a second authoritative and well-traveled path over which the court might have reached its decision in the instant case.

There is, similarly, no doubt but that a husband may be held liable for those of his wife's torts which are committed by her within the scope of the purposes of a joint enterprise in which she and the husband are engaged, whether it be a partnership, a joint adventure, or a wholly non-contractual enterprise, since such comes under the express provision of the statute here involved. And the Court in the instant case had chosen this third avenue, falling within the purview of the exception to the statute, as its means of imposing liability upon the husband. To put the case upon the smooth surface of this approach, however, the Court has first to traverse the rocky road of classifying the maintenance and operation of a home by a husband and wife as a joint enterprise, or, in the words of the Court, a "joint undertaking," with its attendant imputed tort liabilities.

The Court's logic in reaching this conclusion appears to have been that, although there are certain "factual differences between the operation of a home by husband and wife, and the operation of other joint undertakings," such considerations do not "present any exception to the settled principle that one party to a joint adventure or joint enterprise is liable for the torts of another committed within the scope of its purpose and object. To make a distinction in behalf of a home maintained by husband and wife would necessitate consideration of the marriage status, the very element which the statute specifically excludes in exonerating the husband for his wife's torts where his liability would otherwise exist."<sup>31</sup>

In this process of deduction the Court uses as analogy, in addition to the principal and agent cases and the joint tort-feasor case which were noted and distinguish-

26. See note, 64 A. L. R. 844, 876 (1929).

27. 1 *MECHEM, LAW OF AGENCY* (2d ed. 1914) 115.

28. *Lemon v. Lonker*, 97 Pa. Super. 240 (1929); *Dahlgren v. Coe*, 311 Mass. 18, 40 N. E. (2d) 5 (1942).

29. *Moore v. Doerr*, 199 Mo. App. 428, 203 S. W. 672 (1918); *Bryant v. Smith*, 187 S. C. 453, 198 S. E. 20 (1938).

30. *Eaton v. Wallace*, 287 S. W. 614 (Mo. 1926), where a laundress fell down a basement stairway due to its insufficient lighting.

31. 192 S. W. (2d) 431, 442 (Mo. 1946).



ed *supra*, the case of *Gehlhar v. Konoske*,<sup>32</sup> in which persons other than husband and wife were engaged in a joint adventure, and in which was involved the performance of domestic household duties as in a home. However, there appears likewise to be a distinction between that case and the instant one, in that the enterprise which was classified as a joint adventure there was not the operation of the home itself, but was the prosecution by the sister and her two brothers, pursuant to an express agreement, of an effort to acquire the ownership of a certain farm and to obtain the rewards therefrom, with the sister's contribution for her one-third interest in the land, and profits thereby obtained, to be her performance of the designated household duties. The action involved was one to quiet her title to this one-third interest, and no tort problems were present. Thus, the status of the home itself as a joint adventure, with its resulting tort implications as a joint enterprise, was not passed upon by that court. No other cases have been discovered which do deal with this particular point.

In addition to this lack of precedent, in Missouri or elsewhere, for the conclusion of the Court here, there appear to be two principal barriers which the court's reasoning must surmount in order wholly to validate its results. The first of these deals with the actual factual differences between the usual joint enterprise and the operation of a home, and it is one which could exist even if cases were to be found recognizing the existence of a joint enterprise in the operation of a home by persons other than husband and wife. That the Court is fully cognizant of these differences is well evidenced by the opinion:

"In the usual joint adventure or joint enterprise a party may, with certain limitations, terminate his connection with the combination and thereby terminate his responsibility for the acts of the other members; no legal duty is imposed on him to embark upon the undertaking, nor to continue it in the interest of society. On the other hand, the home of a man and his wife is the very cornerstone of our civilization. It is the object of deep concern of the law which fosters and protects it. It provides the place, shelter, comfort, and wholesome environment for the rearing of children and the maintenance of the family relation. The home and family form such a vital part of society itself and is so essential to public welfare that the law of the land imposes upon the husband the duty, in so far as he is reasonably able to do so, to provide a home for and to support his wife and family. In such an institution it is the wife's duty to share the husband's responsibility for its maintenance by participating, to the extent that circumstances may require or permit, in the management and supervision of the household. There are legal, social, and moral obligations to continue such a joint undertaking. Only death or a decree of a court of competent jurisdiction can terminate the duty of the husband to continue his efforts to provide and maintain a home for his wife and family living with him, within the reasonable bounds of his financial and physical ability."<sup>33</sup>

insofar as preventing the existence of a joint enterprise relation is concerned, on  
However, the court chooses to disregard these noticeable factual distinctions,

32. 50 N. D. 256, 195 N. W. 558 (1923).

33. 192 S. W. (2d) 431 (Mo. 1946).

the grounds that all of these differences are really but attributes of marriage and the marital relationship, and thus are expressly to be disregarded under the terms of the statute here involved stating that the husband is to be responsible for his wife's torts only in a case where "he would be jointly responsible with her if the marriage did not exist." *Quaere*, however, as to whether this statute was not meant to eliminate consideration solely of the marriage tie itself and not of these factual differences which come as a result of the marriage. If this view of the enactment be accepted, the true analogy to the case of a home maintained and operated by a husband and wife, is the maintenance and operation of a home by unmarried persons upon whom are imposed the above noted legal, social, and moral obligations existing as to a husband and wife. That this may have been the intended interpretation of the statute seems rather weightily evidenced by the foregoing history of its origination and of the problem for which it was the intended solution. It is further indicated by the wording of statutes attacking the same problem in other jurisdictions. Thus, in New York, a husband is not held for his wife's torts "unless they were done by his actual coercion or instigation." In Maine and in Alabama, the husband is not liable for a tort of his wife in which he does not participate.<sup>34</sup> In these statutes, no mention whatsoever is made of the marital relation as such. It would appear then that the court could quite validly have interpreted the Missouri statute other than in the manner found in this case, and proceeded, then, clearly to consider the more basic question as to whether the operation and maintenance of a home, by a man and woman who are morally and socially, as well as legally, obligated to do so, is properly classified as a joint enterprise under the appropriate substantive tort law.

The second barrier confronting the court in its conclusion is one also dealing with the definition of a "joint enterprise" and which should be considered in the same manner as was done in the previous matter once the statutory interpretation was completed there—by resort to substantive tort law. The authorities are many as to the existence of two prime requisites of a joint enterprise. To constitute "joint enterprise" within the law of negligence, there must be "community of interest in the object and purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto."<sup>35</sup> There can be little doubt as to the community of interest in a husband and wife in regard to their home. With reference to the existence of the other factor, joint control, however, a conjecture may be raised—wholly in the absence of the slightest tinge of sarcasm. The court here does not place any emphasis upon this determination but, rather, establishes the fact that there are here two persons who are "maintaining a home for their joint use and benefit, one furnishing the funds therefor, and the other the management of the place, both jointly employing their servants, jointly supervising them, and jointly benefitting from such services," and

34. See note (1922) 20 A. L. R. 528, 531, for collection of these statutes.

35. *Mick v. Oberle*, 124 Neb. 433, 246 N. W. 869 (1933); *Landry v. Hubert*, 100 Vt. 268, 137 Atl. 97 (1927); *Jessup v. Davis*, 115 Neb. 1, 211 N. W. 190 (1926).

concluded without further comment that such constitutes plainly "a joint undertaking for mutual benefit with joint control."<sup>36</sup> Such premising facts may be sufficient for a conclusion as to the joint control in husband and wife over the servants hired by them, but this is not the point in question here, where it is the larger and more inclusive undertaking of the complete home relationship which must be found to possess the factor of joint control in its participants.

In the case of *Mack v. Mackiewicz*,<sup>37</sup> the New Jersey court interpreted a statute similar to the one involved in the principal case to mean that a husband was not responsible for the torts of his wife unless they occurred during the prosecution of a joint enterprise, and it proceeded then to deny that such a relationship existed, between a wife and a husband who jointly owned a home, with reference to the wife's sweeping of the attic of that home. Recovery against the husband for an injury caused to a child by the negligence of the wife in carrying out this domestic duty was denied, specifically upon the ground that in the absence of any proof of knowledge in the husband as to his wife's intention to clean out the attic, or right in him to direct or control to any extent the conduct of the wife in doing so, there was no joint enterprise which would make him liable under the particular statute. *Quaere*, then, as to the validity of the manner in which this second barrier has been passed in the instant case.

In view of the ease with which Mr. McCrory could have been held liable for the negligent care by Mrs. McCrory of her mop handle, if other theories of liability had been used, and of the difficulty of imposing that liability as it was done here, there would appear, perhaps, to be some objective to be obtained by acceptance of the latter alternative. The only difference to be found in the result is that under the former theories a several liability will be established, whereas the use of the joint enterprise theory will give a joint judgment against both the husband and the wife. Since Missouri recognizes a wife and a husband may hold property as an estate by entireties such estates are therefor impervious to judgments of creditors of either of the tenants severally.<sup>38</sup> This rule has been used to give protection against a several judgment under the Bankruptcy Act of Missouri.<sup>39</sup> A joint judgment against both tenants of such an estate, however, may be satisfied from the degree to which the rules of joint enterprise were broadened in the principal case corresponds closely, in an adverse way, to the degree of restriction placed upon the availability of property to satisfy judgments by the theory of estates by the entireties. And it should not be too rash a prediction to say that the theory of this case will likely be followed, to varying extents, in this and other jurisdictions where these estates are recognized.

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36. 192 S. W. (2d) 431, 440 (Mo. 1946).

37. 9 Misc. (N.J.) 1219, 157 Atl. 117 (1931).

38. *Stifel's Union Brewing Co. v. Saxy*, 273 Mo. 159, 201 S. W. 67 (1918).

39. *Dickey v. Thompson*, 323 Mo. 107, 18 S. W. (2d) 388 (1929), note in 43 HARV. L. REV. 312.

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*COMMENTS*

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The question may still be raised, though, as to whether even this laudable end fully justifies the means by which it was accomplished. There can be no doubt but that the decision has made new law.

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