University of Missouri Bulletin Law Series

Volume 48 *January 1935* Article 5

1935

Masthead

LAW SERIES

Published four times a year by the University of Missouri School of Law.

JANUARY 1, 1935

"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 some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, Collected Legal Essays, p. 269.

NOTES ON RECENT MISSOURI CASES

WILLS—EFFECT OF UNDUE INFLUENCE EXERTED IN THE PROCUREMENT OF ONE LEGACY ONLY. *McCarthy v. Fidelity National Bank.*[1]

This was a suit to contest a will. A demurrer to the petition was sustained in the lower court, and plaintiff, having refused to plead further, final judgment was entered, upholding the will. The petition alleged that all of the provisions except a bequest to one Kane expressed the true will of the testatrix; that Kane's legacy was procured by undue influence; and that the residuary legatees had assigned to the plaintiff any interest they might have in any addition to the residuary estate caused by the rejection of Kane's legacy. The prayer of the petition was that an issue be made up whether the instrument constituted the last will of the deceased and that same be declared as not her will. The trial court construed the petition as seeking to set aside Kane's legacy only, leaving the remainder of the will to stand as such, and sustained the demurrer to the petition on the ground that an action based upon such a petition was not one to contest a will within the meaning of Section 525, R. S. Mo. (1919). The Supreme Court, on appeal, affirmed the judgment of the trial court, taking the position that the only issue before the court in a suit to contest a will is the issue wheth-

1. 30 S. W. (2d) 19 (1930).

2. "Since our statute (section 525, Rev. St. 1919) requires that, in a will contest case, an issue shall be made up whether the writing produced be the will of the testator or not; the writing so produced must be shown to be the testator's will in its entirety or it is not his will at all. When there is undue influence on the part of one legatee, which results in a provision of the purported will beneficial to said legatee, such undue influence vitiates the entire will and renders it invalid in its provisions as to other beneficiaries, although they did not participate in bringing undue influence to bear upon the testator." McCarthy v. Fidelity National Bank & Trust Co. 30 S. W. (2) 19 (1930).

er the instrument presented for probate, in its entirety, is or is not the last will of the testator.[2] The case, therefore, raises the question whether undue influence in the procurement of one legacy only avoids the entire will.

Comment is directed to this decision because the problem which the case presents has never before been specifically presented and decided by a Missouri court, and because the decision is *contra* to what has been generally regarded as the common law rule, namely, that undue influence by one legatee does not vitiate the entire will unless the entire will is the product of undue influence[3].

It will be noted that the provision of the Missouri Statute, " that an issue shall be made up whether the writing produced be the will of the testator" applies in terms only to a suit to contest the will. It may be helpful to inquire whether in the original probate proceeding undue influence affecting part of a will only results in a denial of probate to the instrument in its entirety. When an instrument is presented for probate, it is the function of the probate court to determine (a) whether the instrument is testamentary in character, (b) whether it was executed with testamentary intent, (c) by a competent testator, (d) pursuant to and in compliance with the formalities required by law, (e) uninbuenced by fraud, and (f) whether the will, if valid as such, has been revoked. The general rule is that the legal construction and effect of the various clauses of the will are not in issue in the probate proceeding[4]. In the main, the Missouri decisions are in accord[5]. One Missouri case[6] has declared that where a will is properly executed and proved, it must be admitted to probate, though it contains not a single provision capable of execution or valid under the law.

Undue influence bears upon the issue of testamentary intent . . . If the entire will was procured by undue influence, the testator intended no part to be his will, and it should not be probated. If only one legacy was procured by undue influence, that legacy was not intended as a part of the will, and is not entitled to probate; but the testator intended the remainder of the instrument to be his will, and it seems that the remainder should be probated. Moreover, it does not seem consistent with the principles of justice that innocent legatees ought to be punished indiscriminately with those who were guilty of undue influence. However, it must be admitted as stated by one

3. Florey Exrs. v. Florey, 24 Ala. 241 (1854); Lyons v. Campbell, 88 Ala. 462, 7 So. 250 (1889); Eastis v. Montgomery, 93 Ala. 293, 9 So. 311 (1890); Henry et al v. Hall, 106 Ala. 84, 17 So. 187 (1894); Councill v. Mayhew, 172 Ala. 295, 55 So. 314 (1911); Zeigler v. Coffin, 219 Ala. 586, 123 So. 22, 63 *A. L. R.* 942 (1929); Snodgrass v. Smith, 42 Colo. 60, 94 Pac. 312 (1908); Appeal of Harrison, 48 Conn. 202 (1880); Old Colony Trust Co. v. Bailey, 202 Mass. 283, 88 N. E. 898 (1909); Petition of McGuire; In re McCaffrey's Will, 173 N. Y. S. 392, 105 Misc. of ep. 433 (1918); In re Koller's Estate, 116 Neb. 764, 219 N. W. 4 (1928); Trimlestown v. D'Alton, 1 Dow & Clark 85 (1827); Page, Wills (2d ed. 1916) 342; see also Lilly v. Tobbein, 103 Mo. 477, 487, 15 S. W. 618 (1890); Morris v. Stokes, 21 Ga. 552, 569 (1857); Ogden v. Greenleaf, 143 Mass. 349, 9 N. E. 745 (1887); Black v. Smith, 58 N. D. 109, 224 N. W. 915 (1929); Steadman v. Steadman, 10 Sadler (Pa.) 539, 14 At. 406 (1888).

4. Dudley v. Gates, 124 Mich. 440, 86 N. W. 959 (1900).

5. Kenrick v. Cole, 61 Mo. 572 (1876). (Proceeding to establish a clause of a will, which clause had been stricken out of the probate as void, it being a bequest which was forbidden by the state constitution, the court declared in affirming a judgment against the clause: "Redfield says that it is customary, in the English practice, to exclude portions of the will from probate when they do not legitimately belong to the instrument. As, for instance, where they are illegal or fraudulent; and he is of the opinion that there is no reason why the same course should not be pursued here".) *Contra*: Cox v. Cox, 101 Mo. 168, 13 S. W. 1055 (1890), See Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129 (1903).

6. Cox v. Cox, *supra* note 5.

writer[7] that it is not commonly practicable to separate the valid and the invalid clauses, for undue influence is usually found to have permeated the whole disposition and thus defeated the testamentary intent of the testator. Of course if the entire will is procured by undue influence, though exerted only by one legatee, no part of the will is entitled to probate. Thus it has been unformly held that when the execution of the will, as distinguished from any particular provision or provisions, is procured by undue influence exercised by one of the legatees, the whole will must fail and the innocent legatees suffer in common with the guilty[8]. Direct decisions to the effect that a legacy procured by undue influence may be omitted and the remainder of the instrument probated are meager; but several courts have by way of dicta approved such a procedure[9].

A closely related question is whether the probate court has power to eliminate from the instrument words put in by mistake. The English courts have repeatedly held that the probate court may strike from the instrument words inserted by mistake whose presence was unknown to the testator[10]. These courts have said, however, that if the testator read the will, or if it was read to him, he must be taken to have been familiar with the contents and to have intended the entire document to be his will. Under no circumstances can the probate court add words to a will, for the statute requires that a will be in writing and signed by the testator; but in striking words out of a will inserted by mistake the court is merely finding that the testator signed as his will the paper presented minus the words omitted from probate. The court is in no sense changing the testator's will, but is merely excluding certain words from probate because as to them there is no testamentary intent. Few American cases have directly passed upon the propriety of striking out words mistakenly inserted, but the dicta in several of the cases and such authorities as are available seem to be in accord with the English decisions.[11] There is language in the opinion in *Cox v. Cox*[12] which seems to indicate it to be the view of the Missouri court that words inserted by mistake may be omitted from probate.

The cases in which a legatee obtains a legacy by fraud seem to be different on principle from the cases of mistake and undue influence.[13] If there be undue influence, the mind of the testator is so overmastered that another will is substituted for his own; whereas if the will is procured by fraud the testator is a free agent but is deceived into acting upon false data. If one legacy only is procured by fraud that legacy is not entitled to probate; but inasmuch as the testator intended the entire instrument, including the legacy obtained by fraud, to be his will, it seems difficult to say that he intended to sign as his will the instrument minus the legacy. Thus if the principle case had been one of fraud it might find more ready support because of the lack of testamentary intent as to the rest of the will. In general, however, the cases have made

7. SCHOOLER, WILLS, EXRS. & ADMS. (6th ed.) Sec. 259.

8. Gott v. Dennis, 296 Mo. 66, 246 S. W. 218 (1922); Morris v. Stokes, *supra* note 3; In re Wagner's estate, 289 Pa. 361, 137 At. 616 (1927).

9. Harrison's Appeal; Eastis v. Montgomery; Florey v. Florey; Lyons v. Campbell, all *supra* note 3.

10. Morrell v. Morrell, L. R. 7 P. & D. 68 (1882); Goods of Oswald, L. R. 3 P. & D. 162 (1874); Guardhouse v. Blackburn, L. R. 1 P. & D. 109 (1866); Goods of Duane, 2 S. W. & T. R. 590 (1862).

11. O'Connell v. Dow, 182 Mass. 541, 552, 554, 66 N. E. 778 (1903); Sherwood v. Sherwood, 45 Wis. 357 (1878).

12. *Supra* note 5.

13. In re Snowball's estate, 157 Cal. 301, 107 Pac. 598 (1910).

no distinction in this regard between fraud and undue influence, and have allowed probate of the proffered instrument minus the legacy procured by fraud.[14]

So much for the jurisdiction of the court in the probate proceeding. To what extent, if any, do different considerations apply in the suit to contest the will?

It has been generally regarded that the proceeding in the circuit court to contest a will is in the nature of an appeal from the judgment of the probate court. The effect is to transfer the whole matter to the circuit court for trial *de novo,* and to render void the action of the probate court in relation to the will.[15] Conceivably it might be argued that the circuit court has jurisdiction to inquire merely whether the instrument which the probate court found to be the last will of the testator is in fact the last will. On this theory, if the circuit court found that the testator had testamentary intent, as to part only of that instrument, it should sustain the contest as to the entire instrument. But the question properly involved in the contest of a will is whether the instrument produced is the will of the testator, which is the issue in the probate proceeding. No case has been found suggesting that the circuit court passes upon an issue different from that adjudicated by the probate court. The proper rule would seem to be that, for the purposes of the particular case, the circuit court is converted into a court of probate and that the proceeding is in effect one to probate the will in solemn form.[16]

Therefore, it would seem that in the suit to contest a will, the court should, unless some statute provides otherwise, have the power to omit words or legacies put in by mistake or undue influence and to declare the remainder to be the will of the testator.

The decision in the principal case was the result of a construction placed by the court upon that portion of Section 525, R. S. Mo. (1919) which provides that in a will contest suit an issue shall be made up whether the writing produced be the will of the testator or not. Previous Missouri cases had interpreted this statute to mean, that in the will contest proceedings, the only issue was whether the writing produced was the will of the testator, and the province of the jury was simply to determine, under the instructions and evidence, whether or not the instrument was a valid will.[17] But this issue would seem to be nothing more than the common law issue of *devisavit vel non,* namely, "is the instrument in question the last will of the testator," which has previously been considered as the issue before the court in the probate proceeding. A number of states appear to have statutes similar to the Missouri statute. In some of these jurisdictions this provision has been held to mean that the will must stand or fall as an entirety, and undue influence affecting one legacy only invalidates the en-

14. See Lilly v. Tobbein, *supra* note 3, in which the Missouri court says. "Where a particular clause has been inserted in the will by fraud or forgery, it may, in such suit, be rejected for the reason that it is no part of the will; but when a particular clause is found to be a part of the will the whole must be probated, and this, too, though the particular clause can not be enforced."

15. Johnson v. Brewn, 277 Mo. 392, 210 S. W. 55 (1919); State ex rel Hamilton v. Guinotte, 156 Mo. 513, 57 S. W. 281, 50 *L. R. A.* 787 (1900); Lilly v. Tobbein, *supra* note 3; Lamb v. Helm, 56 Mo. 420 (1874); Harris v. Hays, 53 Mo. 90 (1873); Benoist v. Murrin, 48 Mo. 48, (1871).

16. KELLY'S PROBATE GUIDE (5th ed. 1926) Sec. 60.

17. Cox v. Cox, *supra* note 5; Tingley v. Cowgill, 48 Mo. 291 (1871); Benoist v. Murrin, *supra* note 15.

tire will.[18] In Ohio, however, which has a statute similar to the Missouri statute, the courts have intimated that a part of the instrument may be rejected in a suit to contest the will and the remainder held valid and entitled to probate.[19]

The language in the prior Missouri cases interpreting the statute, to the effect that the only issue is whether the instrument presented is the will of the testator, can perhaps be taken to mean merely that the court will not inquire into the invalidity or legality of the particular clauses of the will.[20] The statute does not expressly state that the issue shall be whether the writing, in its entirety, is the will of the testator. It would seem proper for the court to determine how much of the writing produced spoke the will of the testator. It would seem therefore that the statute should not limit the jurisdiction of the court or the scope of the inquiry, either in the probate proceeding or in the suit to contest the will.

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LARCENY—CONSENT OF THE OWNER. *State v. Perrin*[1]

The manager of a wholesale house received, over the telephone, an order for cigars, purporting to come from a certain drug store, the caller stating that he would send a messenger for the same. The manager of the cigar company checked the order by calling the drug store, and thereby ascertained that it was spurious. However, he directed that the cigars be made up for delivery and that the package be addressed to the drug store from which the order supposedly came. That having been done, when one of the defendants called for the package, it was handed over to him in the usual manner by the manager of the wholesale house, and the defendant signed a receipt therefor. The defendant was arrested as he left the premises with the package. The court held that the manager voluntarily delivered the package to the defendant, and that this constituted a consent to the taking. The court stated further that where the criminal design originates with the accused and the owner of the goods merely facilitates its execution, that is not such legal consent as would negative a trespass. But to voluntarily hand over to a pretender, goods fraudulently ordered by him in the name of another, knowing the order to be fictitious, is more than facilitation; it is a delivery of the property and a consent to the taking.

18. In California several cases held that Code provisions would not permit a portion of a will to be probated and the rest denied probate, and in consequence a will could not be invalidated against one legatee and upheld as to the others. In re Lavinburg's estate, 161 Cal. 536, 119 Pac. 915 (1911); In re Phorr's estate, 144 Cal. 121, 77 Pac. 825 (1904); In the matter of Freud, 73 Cal. 555, 15 Pac. 135 (1887). *Contra*: (As to legacies obtained by fraud) In re Carson's estate, 184 Cal. 437, 194 Pac. 5 (1920). In Illinois it is assumed rather than actually decided that the invalidity of one portion of the will would result in the invalidity of the entire will. Teter v. Spooner, 279 Ill. 39, 116 N. E. 673 (1917); Gum v. Reep, 275 Ill. 503, 114 N. E. 271 (1916); Weston v. Tewfel, 213 Ill. 291, 72 N. E. 908 (1904). But in Snyder v. Steele, 304 Ill. 387, 136 N. E. 649, 28 *A. L. R.* 1 (1922) the question was specifically decided by the Illinois Supreme Court who said: "Under the statute the issue before the jury is whether or not the purported will is the will of the testator, and the question is as to the validity of the will as a whole. Testimony which defeats one defendant, one devisee, or one legatee, defeats all, and a judgment against one is necessarily a judgment aganist all".

19. Mears v. Mears, 15 Ohio St. 90 (1864); Johnson v. Ramsey, 18 Ohio App. 321 (1923).

20. Cox v. Cox, *supra* note 5.

1. 229 S. W. 54 (Mo. 1927).

Larceny at the common law was defined as a taking, stealing, and asportation of the goods of another.[2] The term taking was loosely construed to imply a trespass, which was a necessary element of the offense. The taking must be against the will of the owner, or, to state the same proposition in different words, there can be no trespass with the contest of the owner, and hence there can be no larceny with the owner of the goods concurring in the taking.[3] The law of larceny in its subsequent development remains unchanged, and a taking without the consent of the owner is still essential to the consummation of the offense.[4] In Missouri the statute dealing with this crime is but declaratory of the common law,[5] and the cases in this state are in accord therewith in holding that the taking, in order to constitute larceny, must be against the will of the owner, and that the consent of the owner vitiates the trespass so that there can be no larceny.[6]

Thus having determined that the non-consent of the owner is a necessary part of the offense of larceny, it is next important to determine what consent is, and when it is such as will render a trespass impossible. The cases are in accord to the effect that there is no larceny where the owner personally, or through an agent, solicits the taking of which he complains.[7] No doubt this is a sound principle in the law, since such conduct on the part of the owner amounts to, or at least comes dangerously near to, entrapment, which the courts have perhaps rightfully condemned. Hence, these cases are probably justifiable both on the basis that historically larceny was regarded as a crime of violence tending to resistance, retaliation and consequent breaches of the peace, and also on the basis that the purpose of prevention of crime by punishment is not well served where the moving party to the prosecution has instigated the act and abetted its commission. On the other hand, if the original criminal intent arose in the accused and the intended victim does not actually urge him on to the commission of the crime, the mere fact that he facilitates the execution of the scheme, or that his agents appear to cooperate in its execution, will be no defense to the accused.[8] But it is at this point that the cases make the distinction exemplified in the principal case. The courts advance the proposition that where there is actual delivery by the owner or his authorized agent, that such delivery exceeds mere facilitation and amounts to consent.[9] The case of Regina v. Lawrence[10] clearly illustrates the principle in question and vividly demonstrates the fine differentiation made in the cases. In that case the court held that where the agent, in connivance with the owner of the goods, delivered them into the prisoner's hands, the indictment for larceny could not be sustained,

2. 9 Laws of Eng. 628-636.

3. *Supra,* note 2, sec. 1285.

4. Bishop on Criminal Law, Vol. II, sec. 881.

5. Sec. 4064 R. S. of Mo. 1929.

6. State v. Gray, 37 Mo. 463 (1865); State v. Storts, 138 Mo. 127 (1897); State v. West, 157 Mo. 309 (1900); State v. Waller, 174 Mo. 518 (1903); State v. Waghalter, 177 Mo. 676 (1903); State v. James, 133 Mo. App. 300 (1908); State v. Court, 225 Mo. 615 (1910); State v. Loeb, 190 S. W. 299, 16 Law Series, 34 (Mo. 1910); Topelewski v. State, 109 N. W. 1037 (Wis. 1910); 7 L. R. A. (ns) 756.

7. State v. Hayes; State v. Waghalter; State v. Loeb, *supra* note 6. Also see Conner v. People, 18 Colo. 373 (1893); 25 L. R. A. 341.

8. State v. West, *supra* note 6; State v. Duncan, 8 Rob. (La.) 562 (1844); Alexander v State, 12 Tex. 540 (1854); Lowe v. State, 4 Fla. 449 (1902); People v. Smith, 251 Ill. 18 (1911).

9. State v. Loeb, *supra* note 6; Regina v Lawrence, 4 Cox C. C. 438 (1850); Love v People, 43 N. E. 710 (Ill. 1896); Topelewksi v State, *supra* note 6; Edmonson v. State, 89 S E. 189 (Ga. 1916).

10. *Supra* note 9. Here the prisoner applie to the clerk of the prosecutor to procure him deed which was in the possession of the latter In connivance with the master the clerk deliver ed the deed to the prisoner. The court held tha the indictment for larceny could not be sus tained because the delivery by the agent amount ed to the consent of the owner.

but, by way of dictum, it is asserted that where he merely placed the goods where they were easily accessible to the defendant, who took them, that that was not consent, and that the defendant was guilty of larceny. The case of State v. Loeb[11] presents a slightly different perspective on the question of delivery and consent. In that case there was no actual manual delivery. A prisoner contractor, after learning that some of the goods from the prison factory had been fraudulently billed out by a convict employee, permitted them to be shipped as consigned for the purpose of apprehending the one that was receiving them. The court held that they thereby consented to the taking and that the transaction was therefore divested of the elements necessary to constitute larceny. This seems to be the logical result of the proposition that no prosecution for larceny can be predicated on a taking with the consent of the owner. The distinction between purposely exposing the property to the taker or otherwise facilitating the taking, and where there is actual delivery seems purely arbitrary and highly technical, because it seems that the consent of the owner is present in both instances. What difference should it make that in the latter case it is manifested by actual delivery? Yet such a distinction seems to be firmly imbedded in the law of larceny.

In the case of State v. Perrin both justice and public policy would seem to require the amercement of the defendant since he has done everything in his power to steal the property of the cigar company. But in view of the state of the law today, no doubt the decision of the court in this case is sound, although it has resulted in an apparent miscarriage of justice since the defendant went unpunished. Thus having determined that the defendant cannot be properly indicted for larceny, we are next concerned with the question of whether he is guilty of any offense. It is submitted that the defendant is guilty at least of an indictable criminal attempt. At the common law it was a misdemeanor to attempt to obtain property by false pretenses, and where the false pretenses were discovered prior to the delivery such was the offense. It makes no difference that for some reason beyond the control of the defendant the completed crime was an impossibility.[12] Likewise a statute in Missouri prescribes that any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, shall be punished as follows . . . . .[13] An attempt is an overt act directly related to the commission of the crime, and which is accompanied by the criminal intent to perpetrate the same.[14] In the case at hand the defendant has done everything in his power to consummate the offense, but the completed crime cannot reach fruition because of the plaintiff's discovery of the defendant's artifice; and as already pointed out, the offense cannot be larceny because, after the discovery of the plot, the owner manually delivered the goods, and this is held to amount to a consent to the taking. Therefore it seems that the defendant is guilty of a criminal attempt.[15] At least it would seem that the defendant should be indictable for a conspiracy to commit the crime. At the common law where two persons conspired together to obtain the property of another in such a manner, such a conspiracy was an indictable misdemeanor.[16] By statute in this state it is provided that if two or more persons shall agree, conspire, combine, or confederate . . . . . to cheat and defraud any person of any

11. *Supra* note 6.
12. 9 Laws of Eng. 703.
13. R. S. of Mo. 1929, sec. 4442.
14. Bishop on Criminal Law, Vol. I, sec. 729; State v. West, 35 Mo. 500 (1865); State v. Williams, 30 Mo. App. 43 (1890); State v. Davidson, 172 Mo. App. 356 (1912); State v. Lourie, 12 S. W. (2d) 43 (Mo. 1928).
15. Regina v. Cheeseman, 9 Cox C. C. 100.
16. 9 Laws of Eng. 708; Bishop on Criminal Law, Vol. II, sec. 198.

property by any means, which, if executed, would amount to a cheat, or to obtaining money or property under false pretenses . . . . . shall be deemed guilty of a misdemeanor.[17] Here Perrin and the other defendants have conspired to obtain a quantity of cigars by representing themselves to be a certain drug store, and they have done all in their power to carry their plans to completion. Certainly that amounts to a criminal conspiracy within the meaning of the statute.

Thus we see that in State v. Perrin the indictment charging the defendant with larceny was improperly brought, since the delivery of the goods amounted to a consent to the taking, and prevented the act from being larceny. However where there is no manual delivery the present trend of the law is to the effect that it would be larceny. No doubt the element of non-consent is essential, but where that consent is for the purpose of apprehending the taker it is suggested that that consent should not be operative to prevent the act from being larceny. The court in a Texas case[18] advanced the proposition as a matter of dictum that the owner of the goods in such cases only consented to the taking in so far as was necessary to apprehend the taker. The soundness of such a proposition is questionable since the consent of the owner is given regardless of the motivating circumstances for that consent. On the other hand it would seem that in such cases as State v. Perrin, where the criminal intent originates with the defendant, and the owner consents to the taking only to apprehend him therein, that there should be some statutory provision whereby the defendant might be indictable for larceny regardless of the doctrine of consent, which is so deeply rooted in the criminal law.

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MAY A MOTHER SUE HER MINOR CHILD IN TORT. *Wells v. Wells et al.*[1]

This was an action to recover damages for personal injuries alleged to have been sustained as the result of negligence of the defendants. The plaintiff is the mother of both defendants. One of the defendants, Russell T. Wells, was a minor, seventeen years of age at the time of the trial, and living with his father and mother. He was driving the car at the time the injury occurred, with the permission and under the supervision of his brother, the owner of the car, who was 27 years of age. The Kansas City Court of Appeals held that a mother might sue her minor child in tort, and affirmed the judgment in favor of the plaintiff.

The question involved in this case is rather new, having been passed on in only three very late decisions.[2] However, a very similar situation, that of a child suing the parent in tort has often been before the courts, and there is quite extensive authority upon that question. The great and overwhelming number of the cases have held

17. R. S. of Mo. 1929, sec. 4243.

18. Jarrott v. State, 1 S. W. (2d) (Tex. 1928).

1. 48 S. W. (2d) 109 (Mo. App. 1932).

2. Schneider v. Schneider, 160 Md. 18, 152 Atl. 498 (1930); Lo Galbo v. Lo Galbo, 246 N. Y. Supp. 565 (1930); and Wells v. Wells, *supra*, note 1.

that a child may not sue its parent in tort.[3] A few cases, notably *Lusk v. Lusk*,[4] *Dunlap v. Dunlap*,[5] and *Fidelity & Causualty Co. v. Marchard*,[6] have held otherwise. As can be seen from these authorities the rule in this country is very definitely crystalized, with the exception of *Lusk v. Lusk*[7] and *Dunlap v. Dunlap*,[8] that a minor child may not sue its parent in tort. These courts that have held that a parent may not sue a minor child in tort have based their decisions entirely upon the ruling that a minor child may not sue the parent in tort. They reason that if the child cannot sue the parent then the converse is also true and the parent may not sue the child.[9] But does that necessarily follow, especially when there is great doubt in the minds of many, that the reasons behind the rule that a child cannot sue its parent, are no longer present in our modern society, with greatly changed family ideals and accident liability insurance. In order to determine this question it is necessary to examine those reasons and determine whether, if they should have any weight at all, we should go so far as to say that they should also apply in the situation where the child is being sued by the parent.

Seven reasons have been advanced by the courts in support of the doctrine that a child has no cause of action for a personal injury inflicted by the parent and they are as follows:[10]

(1) Danger of fraud.[11] This reason is only applicable in a case where the injured minor does not sue until he becomes of age. Those courts presenting that argu-

3. Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929); Smith v. Smith, 81 Ind. App. 566, 142 N. E. 128 (1924); Miller v. Pelzer, 153 Minn. 375, 199 N. W. 97 (1924); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Goldstein v. Goldstein, 4 N. J. Misc. 711, 134 Atl. 184 (1926); Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 551 (1928); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198 (1925); McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927); Zutter v. O'Connell, 200 Wis. 601, 229 N. W. 74 (1930). See also a further collection of the cases in (.....) 31 A. L. R. 1157; (1926) 52 A. L. R. 1123; and (1930) 71 A. L. R. 1071. See McCurdy, *Torts Between Persons in Domestic Relations* (1930) 43 Har. L. Rev. 1030; and Notes in (1930) 44 Har. L. Rev. 135; (1930) B. U. L. Rev. 584; (1930) Tenn. L. Rev. 62; (1930) 6 Wis. L. Rev. 106; (1930) 15 Minn. L. Rev. 126; (1931) 31 Col. L. Rev. 507; (1931) 16 Corn. L. Q. 386; and (1930) 79 U. of Pa. L. Rev. 80. See also, *Burdick, The Law of Torts,* (4th ed. 1926) 162, 163.

4. 166 S. E. 538 (W. Va. 1932); (1933) 1 Duke B. A. Jour. 51; (1933) 33 Col. L. Rev. 360.

5. 150 Atl. 905 (N. H. 1930).

6. 4 D. L. R. 157 (1924).

7. *Supra,* note 4.

8. *Supra,* note 5.

9. Lo Galbo v. Lo Galbo, *supra,* note 2. There the court said: "The broad rule of the common law, that a minor child could not recover against its parents for injuries received through the latter's tort, was based upon grounds of public policy, and for the reason that to hold otherwise would tend to destroy the family relationship: if the parental act were criminal, resort could be had to the Penal law. It would be easy to state situations where absolute adherence to this rule in negligence cases might result in a situation which would be little less than barbarous. Assume that a father of ample means had, through his negligence, maimed for life his son, destroyed for life his earning power, and that, after the child so maimed had reached maturity, the father disposed of all his property by will without making provision for his maimed son; there would be a case where the resort to public policy would work against a sound public policy; and it is possible that, out of consideration of such an instance and of the changed conditions arising out of the use of automobiles, the Court of Appeals gave such hesitant support to the old common law rule. In any event the decision goes no farther than to hold that a minor unemancipated child may not maintain an action grounded in negligence to recover damages against his parent. It follows that the converse of the rule must also be true—that a parent may not maintain an action against an unemancipated child to recover damages for injuries caused to him by the negligence of the child."

10. McCurdy, *Torts Between Persons in Domestic Relations, supra,* note 3.

11. Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 577 (1901).

ment fear, because of the lapse of time in bringing the suit, that if the minor was allowed to sue he might possibly make up his case. The reasoning does not seem to be strong.[12] Even if it has some weight where the child is suing the parent, it is impossible to see how it could apply where the parent is suing the child.

(2) Possibility of succession.[13] The courts presenting this argument reason if the child recovers from the parent, that the parent will take from the child, if the child dies, and therefore such a suit would be useless. The same argument would also apply where the parent is suing the child. But is that possibility sufficient to deny either the parent or the child the enforcement of one of their primary rights? It seems that in making such an argument that the court is endeavoring only to justify an end

(3) Family exchequer.[14] This reasoning here is if the child recovers from the parent then the family fund which is for the benefit of all is depleted for the benefit of one. However, there may be no others.[15] Anyway, would such a reason apply where the parent is suing the child?

(4) Analogy to actions between husband and wife.[16] This reason, however, is entirely inapplicable in either situation because the relationship between parent and child is not like that between husband and wife.[17]

(5) Domestic tranquility.[18] This is possibly the strongest contention in favor of the well established rule. However, the only fault to be found with it is if there has been an action giving grounds for a suit, then that tranquility has already been surely disturbed. And also, it must be remembered, where the parent is suing a minor child or even where the child is suing the parent, the one sued may be protected by accident liability insurance, and, therefore, a recovery will not disturb the tranquility of the family.[19]

(6) Domestic government.[20] Under present day conditions, while it may remain in theory it is in reality nothing more than a fiction.

(7) Parental discipline and control.[21] This reason is probably sound enough from the standpoint of the child suing the parent; but how could the fact that the parent is suing the child affect the parents discipline and control over that child.

While it cannot be said that the reasons back of the common law rule do not exist today, yet there is much room for argument that they are not as important as they formerly were. And if that is the case, why should we necessarily have to say, since the child cannot sue the parent, that the converse is also true and the parent cannot sue the child, when the majority of the reasons back of the former rule do not fit when applied to the latter.

But admitting that the same rule should apply in both situations, and admitting that the reasons behind the common law rule are justifiable, should that rule be applied in all cases, or are there certain situations where we may and should make an exception? It seems that such an exception may well be made in a case where the child is protected by insurance, or where he may be considered as acting as an agent for some other person. It seems that the Missouri court in *Wells v. Wells*[22] had both of these situations in mind.

12. Dunlap v. Dunlap, *supra* note 5.
13. Roller v. Roller, *supra* note 3.
14. *Ibid.*
15. Dunlap v. Dunlap, *supra* note 5.
16. Roller v. Roller, *supra* note 3.
17. Dunlap v. Dunlap, *supra* note 5.
18. Wick v. Wick, *supra* note 3; Schneider v. Schneider, *supra* note 2.
19. Dunlap v. Dunlap, *supra* note 5; Lusk v. Lusk, *supra* note 4.
20. Matarese v. Matarese, *supra* note 3.
21. Wick v. Wick, *supra* note 3.
22. *Supra*, note 1.

Where the child is protected by liability insurance it seems there that all the reasons behind the well established rule fail. The court in *Dunlap v. Dunlap*[23] held the old rule inapplicable as did the court in *Lusk v. Lusk*[24] and allowed a recovery by the child where the parent was protected by insurance. But most courts have held that the fact that there is insurance should make no difference. They proceed upon the assumption that the insurance company should not be liable unless the insured would be liable.[25] The same view is followed by the courts in analogous situations such as husband and wife, and servant and principal.[26] However, it seems they overlook the fact that the one being sued is protected by doctrines which are not applicable where that party is protected by insurance.

In the instant case there is also the question of agency. The court makes the statement that "notwithstanding the fact that Russell T. Wells was a minor, he could act as the agent of his brother in operating the automobile." Now the reasons that exist where the child is a minor are no longer present where the child is an adult. It has been held in California[27] and Mississippi[28] that a parent might bring an action against an adult child in tort. The court in the instant case intimated that the minor child is acting as the agent of his adult brother, which fact probably had great weight in allowing a recovery.

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APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR AGAINST ONE OF TWO JOINT TORT FEASORS. *Zilcher v. St. Louis Public Service Co.*[1]

This case is a suit for personal injuries sustained by the plaintiff in a collison between the defendant's street-car and a motor truck, the owner of which was also joined as defendant. The plaintiff alleged specific acts of negligence against the owner of the truck, and general negligence against the street-car company. The plaintiff then called the motorman and the truck driver as witnesses, on the assumption that the jury must believe one; and if the jury believed the motorman, then the plaintiff would recover from the truck company; and if the jury believed the truck driver, then the plaintiff would recover from the street-car company. The jury found for the truck company, but assessed damages against the street-car company which now appeals. The Supreme Court held for affirmance, stating that *res ipsa loquitur* was applicable.

However, the statement by the court can only be considered *dictum*. The question is not raised on the pleadings, since a general allegation of negligence is sufficient unless tested by a motion to make specific. Nor was the question raised on the sufficiency of the evidence, since the jury received proof of negligence by the defendant

23. *Supra,* note 5.

24. *Supra,* note 4.

25. Small v. Morrison, *supra* note 3; Elias v. Collins, 237 Mich. 175, 211 N. W. 88, 52 A. L. R. 1118 (1926).

26. Notes (1930) 28 Mich. L. Rev. 774; (1930) 29 Mich. L. Rev. 257; Crane, *Personal Injuries to Occupants of the Family Car* (1929) 3 S. Cal. L. Rev. 38; *contra* (1933) 27 Ill. L. Rev. 955; Keller v. Industrial Commission, 350 Ill. 390, 183 N. E. 237 (1932).

27. Ledgerwood v. Ledgerwood, 114 Cal. A. 538, 300 Pac. 144 (1931).

28. Weyen v. Weyen, 139 So. 608 (Miss. 1932).

and hence were not necessarily forced to rely upon the presumption of negligence arising from the application of *res ipsa loquitur*. It is, therefore, necessary to examine other cases in order to determine the law in Missouri on this proposition.

There are two questions presented by the principal case in connection with the application of *res ipsa loquitur*: (1) whether a presumption under the doctrine may arise as a matter of evidence when there are two tort-feasors, neither having exclusive control and management of the agencies causing the accident; (2) whether, conceding the first point, the form of the pleadings makes the doctrine unavailable to the plaintiff.

As to the first question, *res ipsa loquitur* is a rule of evidence making a *prima facie* showing of negligence against the defendant, arising from the fact of the collision and the attendant circumstances. It apparently has its justification upon these bases: (1) it is reasonable to presume that the defendant has been negligent, since the situation must be such that no accident would ordinarily occur in the absence of negligence; (2) it is necessary to give this aid to the plaintiff, since he usually has no knowledge or means of getting information concerning the causes or attendant circumstances of the accident, while the defendant is usually in a position to know the facts of the situation.

It is well settled that *res ipsa loquitur* applies to actions for personal injuries brought by a passenger against a carrier, where the carrier is in sole control and management of the agency or agencies causing the accident. But a different situation is presented in the principal case, since the carrier is not in sole control and management. Whether this factor is sufficient to make the doctrine inapplicable is the subject of the present inquiry. In this situation, many jurisdictions,[2] in addition to Missouri, hold that *res ipsa loquitur* remains applicable. These courts emphasize the basis of the doctrine referred to, namely, that the plaintiff has no means of getting knowledge or information as to just what caused the accident.[3] The rule is established in Missouri by many decisions.[4] And the same result was reached upon facts identical to those in the principal case, in *Gibson v. Wells*,[5] *and in Cecil v. Wells*.[6]

1. 59 S. W. (2d) 654 (Mo. 1933).

2. Biddle v. Riley, 118 Ark, 206, 176 S. W. 134 (1915); Robinson v. McAlister, 13 Pac. (2d) 926 (Cal. 1932); Housel v. Pac. Electric Ry. Co., 167 Cal. 245, 139 Pac. 73 (1914). The California decisions attempt to distinguish the situations here presented from the one in Harrison v. Sutter St. Ry., 134 Cal. 549, 66 Pac. 787 (1901), 55 A. L. R. 608, where the *dictum* was opposed to the present California view. Interstate State Lines v. Aylers, 42 F. (2d) 611 (C. C. A. 8th, 1930); Crozier v. Hawkeye Stages, 209 Iowa 313, 228 N. W. 320 (1929); Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578, 6 S. W. 441 (1888); Dawson v. Toye Bros. Yellow Cab Co., 15 La. App. 326, 131 So. 716 (1931); Plumb v. Richmond Light & R. Co., 233 N. Y. 285, 135 N. E. 504 (1922), 25 A. L. R. 685, reversed what was previously stated to be the prevailing rule in New York, and returned to the rule of Loundown v. Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988 (1900); Hodge v. Sycamore Coal Co., 82 W. Va. 106, 95 S. E. 808 (1918).

3. This is well pointed out in Plumb v Richmond Light & R. Co., *supra* note 2.

4. Stauffer v. Met. R. R., 243 Mo. 305, 147 S. W. 1032 (1912) (leading case); Chlanda v St. Louis Transit Co., 213 Mo. 244, 112 S. W 249 (1908); Olsen v. Citizens R. R. Co., 152 Mo 426, 54 S. W. 470 (1899); Clarke v. Chi. & A. R Co., 127 Mo. 197, 29 S. W. 1013 (1895); Peters v. Matthews-Thomas Freight & Express Co. et al., 51 S. W. (2d) 139 (Mo. App. 1932); Cecil v. Wells, 214 Mo. App. 193, 259 S. W. 844 (1924); Gibson v. Wells, 258 S. W. 1 (Mo. App. 1924) (leading case); Moran v. K. C. R. R. Co., 232 S. W. 111 (Mo. App. 1921); Yates v. United R. R., 222 S. W. 1034 (Mo. App. 1920); Nagel v. United Ry. of St. Louis, 169 Mo. App 284, 152 S. W. 621 (1912); Augustus v. Chi & R. I. R. R. Co., 153 Mo. App. 572, 134 S W. 22 (1911); Williamson v. St. Louis & M. R R. Co., 133 Mo. App. 375, 113 S. W. 23 (1908).

5. *Supra*, note 4.

6. *Supra*, note 4.

But there are numerous jurisdictions taking the opposite position.[7] This point of view is well expressed in the leading case of *Chicago City Ry. v. Rood.*[8] The court there said that the presumption of negligence under *res ipsa loquitur* arises not from the accident itself but from the attendant circumstances. Where the defendant has sole control and management, there is a reasonable presumption that the defendant was negligent based on common human experience. But where there is no sole control and management, the facts are equally consistent with a theory of unavoidable accident or negligence by a third party as with a theory of negligence by the defendant. Further, no longer is the defendant's knowledge necessarily better than that of the plaintiff. It is, therefore, improper to throw the burden of proof on the defendant.[9]

It would seem that the position of the *Rood case,* which is *contra* to that taken by the Missouri courts, represents the better position. As pointed out above, *res ipsa loquitur* rests upon two bases. Missouri and other jurisdictions emphasize that of convenience to the plaintiff. But no rule of law can stand solely on the ground that it aids one of the parties. A presumption can only be raised because it is an extremely strong, if not close to a necessary, inference. Such inference can be drawn where the defendant is in sole control and management, and where accidents of this nature do not ordinarily happen unless he has been negligent. But as pointed out by the *Rood case,* that inference is all but destroyed when the defendant does not have sole control and management. Moreover, in addition to the fact that the convenience of the plaintiff is not supported by a reasonable inference of negligence, there is another reason for not allowing the plaintiff the advantage of the doctrine. Although it is true that the plaintiff does not have knowledge of the facts, it is also true that the defendant does not necessarily have any better means for knowing the facts since he did not have exclusive control of the situation and, therefore, cannot be said reasonably to know facts possibly pertaining wholly to acts and omissions of a stranger, the other defendant. Therefore, there is a close approximation to equality of convenience; and in such case, the plaintiff as the moving party should carry the burden of proof.

But assuming the Missouri rule in reference to the general application of *res ipsa loquitur* to the situation of the principal case, do the pleadings make the doctrine unavailable?

It is well settled in Missouri that if the plaintiff pleads specific acts of negligence, he is confined to proof of those allegations and can not resort to the

7. Harrison v. Sutter St. Ry., *supra* note 2; Yellow Cab Co. v. Hodgson et al, 14 Pac. (2d) 1081 (Colo. 1932), 83 A. L. R. 1156 (a recent case treated by the Colorado court as a matter of first impression); Chicago City Ry. v. Rood, 163 Ill. 477, 45 N. E. 238 (1896) (leading case); Union Traction Co. v. Alstadt, 195 Ind. 389, 143 N. E. 879 (1924); Elliot v. Brooklyn Heights R. Co., 127 App. Div. 300, 111 N. Y. Supp. 358 (1908) (stating a rule *contra* to that now said to prevail in New York, *supra* note 2.); Cox v. Scott, 104 N. J. L. 371, 140 Atl. 390 (1928); Kurts v. Pa. Rapid Transit Co., 224 Pa. 179, 90 Atl. 525 (1914); Fagan v. R. I. Co., 27 R. I. 51, 60 Atl. 672 (1905); Weston v. Hillyer, 159 S. E. 390 (S. Car. 1931); Riggsby v. Tritton, 129 S. E. 493 (Va. 1925); Hawkins v. Front St. Cable Co., 3 Wash. 592, 28 Pac. 1021 (1892).

8. *Supra,* note 7.

9. There is a third view set forth by a few courts including Massachusetts and Michigan. By this view, the fact of management and control is only a feature of the collision, the nature of which determines the application of *res ipsa loquitur* thereto. It seems to be the settled law in Michigan that the burden of proving negligence rests on the plaintiff throughout, and that an inference of negligence cannot be drawn from the mere fact of the accident itself (as is done under the doctrine of *res ipsa loquitur*); but if the accident is attended by unusual circumstances of such a nature that the accident could not well have happened if the defendant had been in the exercise of due care, then those circumstances may justify an inference of negligence. Thurston v. Detroit United Ry. Co., 137 Mich. 231, 100 N. W. 395 (1904).

presumption arising from *res ipsa loquitur*. This is on the theory that the plaintiff has evidenced a knowledge of the facts and, therefore, does not need the aid of the presumption.[10] So if, in the principal case, the plaintiff had pleaded specific acts of negligence against the street-car company, *res ipsa loquitur* would have become unavailable. The question now arises, whether the pleading of specific acts of negligence against the motor truck company (one joint tort feasor) in the principal case will have the same effect as if pleaded against the street-car company (the other joint tort feasor).

Upon this point, the principal case says: "A plaintiff should not be compelled to confine his action to one tort-feasor only in order to be accorded the rights which the law gives him. The negligent acts of each defendant in order to make a joint liability, must of course, be concurrent and contribute to the plaintiff's injury, but they need not be, and generally are not, identical. The proof of one may be quite different from the proof of the other." In the cases of *Gibson v. Wells*[11] and *Cecil v. Wells*,[12] the pleadings were in the same form as in the principal case. Although in those cases the court did not discuss the question from the viewpoint of pleading, apparently the court felt that the form of the pleadings presented no obstacle, since the doctrine of *res ipsa loquitur* was applied.[13]

The view of the principal case in this respect seems sound. It seems that each count in the principal case should be treated separately and the doctrine should not be waived as to the count wherein the charge is general, since each count constitutes a separate cause of action against separate defendants.

This view is also supported by other reasoning. The allegations of the plaintiff against the truck company have not the dignity of official pleadings against the street-car company. The only use to which these allegations may be put is as *evidence* against the street-car company on the theory that they show a position inconsistent with the one the plaintiff now takes and, therefore, constitutes an admission. The rule in Missouri, laid down by the leading case of *Price v. Metropolitan St. Ry. Co.*,[14] and followed by the succeeding cases, is that an unsuccessful effort by the plaintiff to prove specific negligence by introduction of evidence does not make the doctrine of *res ipsa loquitur* unavailable to the plaintiff. Since the pleadings by the plaintiff against the truck company are no more than evidence in the cause against the street-car company, the doctrine is therefore still available to the plaintiff.

It is submitted that the facts do not warrant the application of *res ipsa loquitur* to the principal case, although such application undoubtedly follows the Missouri decisions and substantial authority in other jurisdictions. But it is further submitted that if the doctrine is said to be applicable to this situation, then the rule of the principal case is correct in so far as the pleadings should not make the doctrine unavailable.

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10. (1928) 40 U. of Mo. Bull. Law Ser. 41.
11. *Supra*, note 4.
12. *Supra*, note 4.
13. Peters v. Matthews-Thomas Freight & Express Co. et al, *supra*, note 4.
14. 220 Mo. 435, 119 S. W. 932 (1909).