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Notes on Recent Cases

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LAW SERIES

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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 some profound interstitial change in the very tissue of the law."—MR. JUSTICE HOLMES, *Collected Essays*, p. 269.

NOTES ON RECENT CASES

AUTOMOBILE OWNERS OR OPERATORS—THEIR DUTY TO GUESTS —STATUTES. *Kaley v. Huntley et. al.*¹

This was an action for damages suffered from an injury received by plaintiff while riding with the defendants in the latter's automobile as a gratuitous guest. Judgment for defendants was set aside and a new trial ordered on the ground of error in instructions. Defendants appealed from that order. The instruction given was that defendant owed plaintiff the duty to exercise ordinary care, and the court had refused an instruction offered by plaintiff hypothesizing the highest degree of care as the measure of defendant's duty. It was held that the driver of an automobile owes a higher degree of care under the statute than ordinary care and that since no exception is made from this general rule it applies in gratuitous transportation of guests. The rule as here established by the statute makes it the duty of a person operating a motor vehicle to exercise the highest degree of care as to persons riding in the car.

Many cases dealing with the duty owed by automobile owners or operators to their guests have been decided in recent years. The general rule is well established that the owner or operator has a duty to an invited guest to exercise reasonable care in the operation of the car so as not to unreasonably expose him to danger and injury by increasing the hazard of travel.² However, there are some jurisdictions which

1. 333 Mo. 771, 63 S. W. (2d) 21 (1933).

2. Cases collected in 20 A.L.R. 1014; 26 A.L.R. 1425; 40 A.L.R. 1338; 47 A.L.R. 327; 51 A.L.R. 581; 61 A.L.R. 1252; 65 A.L.R. 952.

follow a well defined minority rule which requires the showing of gross negligence in order to hold the owner or operator liable for an injury to an invited guest.³

This minority rule has sometimes been followed by the courts through a falsely based feeling of sportsmanship, and a desire to protect one who primarily, because of his hospitality, is faced with a pecuniary loss. But where the safety of persons is at stake the operator of a car should not be excused from ordinary care simply because another man, his guest, has not paid him. Ordinary reasonable care is a duty imposed by law and not one raised upon the payment of a fare.⁴

Under the decisions and under the statutes one who accepts a ride in any vehicle without giving compensation in any manner is a guest. There are two types or classes of guests—invited guests and permitted guests i. e., guests at sufferance. In a very few cases a distinction has been made between these two classes as to the duty owed them by the owner or operator of the automobile in which they are riding.⁵

In a few cases it has been held that guests at sufferance were only licensees, and that a defendant owed them only the duty of refraining from wantonly or willfully injuring them.⁶ But it has been pointed out that there is no real basis for the distinction: "It seems to us that the only sensible and humane rule is that an owner and driver of an automobile owes a guest at sufferance the duty of using reasonable care so as not to injure him. The rule as to trespassers and licensees upon real estate . . . is not to be applied to one riding in an automobile."⁷ The reason for not treating a guest only as a licensee is that the driver takes the guest's life in his hands when he starts the car in motion. A licensee upon land knows that the land will remain stationary, his fate is not placed in the hands of another as it is when he enters a motor car, and as the Indiana case continues, "The law exacts of one who puts a force in motion that he shall control it with skill and care in proportion to the danger created. This rule applies to a guest at sufferance as well as to a guest by invitation."

It has been this class of guests, guests at sufferance, that is largely responsible for statutes in some of our states which take the question of degree of care required out of the hands of the courts. These legislatures have attempted to protect owners and operators from the growing army of hitch-hikers. These statutes release the owner or driver from liability for injuries to guests, excepting usually those caused by the intoxication of the driver, or by intentional or wanton misconduct, and by gross negligence.⁸ Although such statutes have been held to be constitutional they are not desirable. Not only are they based upon the same false reasoning of sportsmanship and a desire to protect hospitality as are the decisions following the minority rule (as pointed out earlier in this note), but their results are questionable

3. Cases collected in 20 A.L.R. 1018; 26 A.L.R. 1427; 40 A.L.R. 1339; 47 A.L.R. 328; 51 A.L.R. 582; 61 A.L.R. 1254; 65 A.L.R. 954.

4. In *Siegrist v. Arnot*, 10 Mo. App. 197 (1881), the St. Louis Court of Appeals aptly shows the basis of the general rule when they in substance say, that there are no degrees of negligence where the subject of the bailment is human life, and where one gratuitously carries another an omission to use that skill which his situation implies is imputed to him is gross negligence.

5. Cases collected 20 A.L.R. 1025; 26 A.L.R. 1428; 40 A.L.R. 1340; 47 A.L.R. 329; 51 A.L.R. 584; 61 A.L.R. 1260; 65 A.L.R. 956.

6. *Lutvin v. Dopkus*, 94 N. J. L. 64, 108 Atl. 862 (1920).

7. *Munson v. Rupker*, 148 N. E. 169 (Ind. App. 1925).

In *Mitchell v. Raymond*, 181 Wis. 591, 195 N. W. 855 (1923), the court held that "the owner or driver of a vehicle upon a public highway owes to a gratuitous guest the duty of exercising ordinary care to avoid personal injury, and upon a breach of such duty is liable for resulting damages whether the guest asked for the favor or is invited by the host."

8. Cases collected in 20 A.L.R. 1021; 51 A.L.R. 583; 61 A.L.R. 1255; 65 A.L.R. 954.

because the safety of the public is diminished and all that is accomplished is an advantage to negligent hosts and liability insurance companies.⁹

The language of our own statute causes much confusion for it is difficult to determine just what the legislature intended from the wording of the statute. By using the words "highest degree of care", is something more than reasonable care required? The statute of 1907 states, "All persons owning, operating or controlling an automobile . . . shall use the highest degree of care that a very careful person would use, under like or similar circumstances. . . ."¹⁰ In a note in this BULLETIN¹¹ the writer, citing a number of cases, shows that our courts at that time applied the statute as meaning reasonable care under the circumstances. The same writer in a later issue of the BULLETIN¹² explains that this interpretation of the statute by the courts was embodied in the statute of 1911. There the statute reads: "Every person operating a motor vehicle on the public highways of this state shall drive the same in a careful and prudent manner, and at a rate of speed so as not to endanger the property of another or the life or limb of any person. . . ."¹³ In 1921 our present statute was enacted which provides that, "Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person. . . ."¹⁴

In recent years the tendency of legislatures in other states has been to lessen the burden upon the driver host. Certainly our own legislature has not moved in that direction. On the contrary, in the light of the statutes of 1911 and 1921 it appears that our statute holds a driver to a higher degree of care than that of a reasonable man. And such was the effect given the statute by the court in the instant case. The court felt there was no room for construction of the language and felt themselves bound by the statute to hold a driver to the highest degree of care. In *Alley v. Wall*,¹⁵ the St. Louis Court of Appeals held that it was the duty of an automobile owner and driver to use reasonable care in its operation. The court in the instant case says concerning that case, "If by reasonable care was meant ordinary care—and those terms are sometimes, though inaccurately by way of definition, used interchangeably, but neither of which is a sufficient designation of the highest degree of care—that holding is disapproved."

It is no doubt desirable to hold the driver to at least reasonable care towards his guest as do the great majority of the courts. However, is it desirable to go beyond this and demand a higher degree of care? But our legislature has spoken and the court cannot put other than the obvious meaning upon the statute.

LAWRENCE ROBERT BROWN

9. (1929) 14 IOWA LAW REVIEW 243.

10. Laws 1907, p. 73; Mo. R. S. (1909) sec. 8523.

11. (1920) 18 U. OF MO. BULL. LAW SER. 48.

12. (1920) 19 U. OF MO. BULL. LAW SER. 51.

13. Laws 1911, pp. 329-330, sec. 12 par. 9; Mo. R. S. (1919) sec. 7585.

14. Laws 1921, p. 91 sec. 19; Mo. R. S. (1929) sec. 7775.

15. 272 S. W. 999 (Mo. App. 1925).

EXEMPTIONS—INSURANCE PROCEEDS INVESTED IN PROPERTY
—*Bank of Brimson v. Graham*.¹

The defendant widow received \$2,037 from an assessment plan life insurance policy issued upon the life of her husband in which she was named as beneficiary. Out of this money she paid off \$800, the principal indebtedness and some interest, against the forty acres in question, leaving it clear of indebtedness. Its value did not exceed this amount. Later the widow signed as security for her son, Claire, the note upon which the plaintiff sued her and obtained judgment, this note being a renewal of a note signed by her husband in his lifetime as security for Claire. The \$1500 note to Hughes and the conveyance herein sought to be set aside were executed and delivered by her after she signed the note to the plaintiff and before the judgment was obtained against her thereon. The defendant claims exemption of the land under section 5752, R. S. 1929,² in that the exemption of the insurance money extended and attached to the property on which the encumbrance had been paid off with this money as against the plaintiff's debt contracted subsequently. It is not a claim of exempt funds being reinvested in other property exempt under statute or that the land was exempt as a homestead. The court said the majority of the courts held that such exemption statutes "applied to insurance money only before it has been paid over to the beneficiary, and thereafter did not exempt from garnishment money which had been paid as a benefit to the beneficiary and had been deposited in a bank". This rule has been liberalized by some courts "to the extent that such exempt money, though received and deposited in the bank by the beneficiary, is still held exempt". But there is "no persuasive authority holding that under such a statute the money may be invested in other property not exempt and such statutory exemption be extended thereto". If the legislature so intended, it might easily have said so.

Cases on the precise question involved here are rare. In Kansas³ and Kentucky⁴ the exemption given by statute to the proceeds of a life insurance policy in the hands of the beneficiary does not extend to the property purchased with it and the decisions in these two states are thus in accord with the principal case. But the contrary rule prevails in Iowa⁵ where it was stated in the case of *Cook v. Allee* that to hold otherwise "might, and often times would, destroy the benefits the statute intended to confer." Some courts limit the operations of various acts exempting insurance money to obligations incurred before payment,⁶ or give protection only until it has reached the hands of the beneficiary.⁷ Exemption statutes even in these narrow limits accomplish good results and are well worth while.

The problem presented in this case is analogous to the exemption of proceeds of insurance on property itself exempt and of proceeds of a voluntary sale of a homestead. By some statutes it is expressly provided that the proceeds of insurance

1. 76 S. W. (2d.) 376 (Mo. 1934).

2. Mo. R. S. (1929) Section 5752, "The money or other benefit, charity, relief or aid to be paid, provided or rendered by any corporation authorized to do business under this article, shall not be liable to attachment or other process, and shall not be seized, taken, appropriated, or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a policy or certificate holder, or any beneficiary named in a policy or certificate."

3. *Pelfy v. Reynolds*, Kan. 115 105, 222 Pac. 121 (1924).

4. *J. S. Merrel Drug Co. v. Dixon*, 131 Ky. 212, 115 S. W. 179 (1909).

5. *Booth v. Martin*, 158 Iowa 434, 139 N. W. 888 (1913); *Cook v. Allee*, 119 Iowa 226, 93 N. W. 93 (1903).

6. *Reiff v. Armour & Co.*, 79 Wash. 48, 139 Pac. 633, note, L.R.A. 1915 A, 1201 (1914).

7. *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408 (1882); L.R.A. 1915 A, 1204; 6 A.L.R. 610.

on property, itself exempt from execution, shall also be exempt.⁸ In the absence of a statute expressly extending exemptions to proceeds of insurance, a minority group of the courts has held that the exemption did not extend to such proceeds due or paid.⁹ But the great weight of authority is to the effect that in view of the purpose for which exemption statutes are enacted, an exemption of certain property extends to the proceeds of insurance due or paid for its destruction, and this is irrespective of whether the property destroyed was personal property in general, homestead property, or public property.¹⁰ This view seems to be the reasonable one, with the insurance money just representing or standing in the place of the property itself.¹¹ The purpose underlying all these exemption statutes is to secure to the unfortunate debtor who is the head of the family, the means to support and to secure the necessities of life for himself and his family,¹² the protection of the family being the main consideration.¹³ In some jurisdictions this general rule has been qualified by the words "for a reasonable time" or by other words of similar import.¹⁴ The insurance money itself is exempt only to the same extent as was the property,¹⁵ but such money is exempt from liens upon the property itself at the time of its destruction.¹⁶

As a general rule the purchase price of homestead property is not exempt from the claims of creditors, in the absence of express statutory provisions as to such proceeds.¹⁷ The cases that hold the proceeds of the voluntary sale of a homestead to be exempt refer to explicit statutory provisions granting such exemption, usually for a limited period.¹⁸ The Missouri cases hold that a homesteader can dispose of one homestead and, with the proceeds, acquire another, and the new homestead will be exempt from execution as fully as the old one was. A reasonable time must be allowed to make a change of residence, depending upon the circumstances of each case.¹⁹ The new homestead must be purchased within a reasonable time, and it is

8. See *Gardenshire v. Glasser*, 26 Ariz. 503, 226 Pac. 911 (1924); *Purless Pacific Co. v. Burckhard*, 90 Wash. 221, 155 Pac. 1037 (1916); *Ketcham v. Ketcham*, 269 Ill. 584, 109 N. E. 1025 (1915); *Fletcher v. Staples*, 62 Minn. 471, 64 N. W. 1150 (1895).

9. *West Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 74 Fla. 220, 77 So. 209 (1917); *Smith v. Ratcliff*, 66 Miss. 683, 6 So. 460 (1899); *Monniea v. German Ins. Co.*, 12 Ill. App. 240 (1882); *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128 (1873).

10. See *Wabash R. Co. v. Bowring*, 103 Mo. App. 158, 77 S. W. 106 (1903); *Sorenson v. City Nat. Bank*, 293 S. W. 638 (Tex. Civ. App. 1927); *Booker v. First Nat. Bank*, 117 Okla. 179, 245 Pac. 881 (1926); *Armstrong-Turner Millinery Co. v. Round*, 106 Kan. 146, 186 Pac. 979 (1920); *Bayer v. Sack*, 66 Misc. 536, 121 N. Y. Supp. 1122 (1910); *Chipman v. Carroll*, 53 Kan. 163, 35 Pac. 1109 (1894); *Reynolds v. Haines*, 83 Iowa 342, 49 N. W. 851 (1891); *Probst v. Scott*, 31 Ark. 652 (1877).

11. *Booker v. First Nat. Bank*, *supra* note 10; *Chipman v. Carroll*, *supra* note 10; *Reynolds v. Haines*, *supra* note 10; *Continental Ins. Co. v. Daly*, 33 Kan. 601, 7 Pac. 158 (1885); *Probst v. Scott*, *supra* note 10.

12. *Megehe v. Draper*, 21 Mo. 510, 64 Am. D. 245 (1855); *Anderson v. Canaday*, 37 Okla. 171, 131 Pac. 697 (1913); *Allison v. Brookshire*, 38 Tex. 199 (1873); *Wilcox v. Hawley*, 31 N. Y. 648 (1864).

13. *Schooley v. Schooley*, 184 Iowa 835, 169 N. W. 56 (1918); *Grant v. Phoenix-Jellico Coal Co.*,

155 Ky. 585, 159 S. W. 1161 (1913); *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 466, 39 Pac. 962 (1895); *Reynolds v. Haines*, *supra* note 10; *Wilcox v. Hawley*, *supra* note 12.

14. *Sorenson v. City Nat. Bank*, *supra* note 10; *Walter Connally & Co. v. Hopkins*, 195 S. W. 656 (Tex. Civ. App. 1917), *aff'd* 221 S. W. 1082 (1920); *Bayer v. Sack*, *supra* note 10; *Reynolds v. Haines*, *supra* note 10; *Continental Ins. Co. v. Daly*, *supra* note 11.

15. *Wallins Nat. Bank v. Turner*, 221 Ky. 562, 299 S. W. 194 (1927); *Rulo v. Murphy*, 21 Ky. L. Rep. 295, 51 S. W. 312 (1899); *Bernheim Bros. v. Davitt*, 9 Ky. L. Rep. 229, 5 S. W. 193 (1887).

16. *Walter Conally & Co. v. Hopkins*, *supra* note 14; *Chipman v. Carroll*, *supra* note 10; *Cameron v. Fay*, 55 Tex. 58 (1881).

17. *Fred v. Bramen*, 96 Minn. 484, 107 N. W. 159 (1906); *Womack v. Stokes*, 12 Tex. Civ. App. 648, 35 S. W. 82 (1896); *Giddens v. Williamson*, 65 Ala. 439 (1880).

18. *Kinberlin v. Gordon*, 139 Mo. App. 464, 122 S. W. 1144 (1909); *Zollinger v. Dunnaway*, 105 Mo. App. 236, 78 S. W. 666 (1904); *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414, 67 N. W. 309 (1896); *Watson v. Saxer*, 102 Ill. 585 (1882). See Mo. R. S. (1929) section 616.

19. *Rose v. Smith*, 167 Mo. 81, 66 S. W. 940 (1902); *Goode v. Lewis*, 118 Mo. 357, 24 S. W. 61 (1893); *Creath v. Dale*, 84 Mo. 349 (1884).

immaterial whether the money going into it was the proceeds of a mortgage on the old homestead or from the sale of it.²⁰ The Missouri statute only exempts the homestead and the proceeds thereof invested in another homestead and not the proceeds invested in property not acquired for a homestead.²¹ This is consistent with the holding in the principal case.

HENRY TIFFIN TETERS

LL.B., '35.

HUSBAND AND WIFE—CONSPIRACY TO ALIENATE AFFECTIONS.
*Grubb v. Curry.*¹

This was an action against plaintiff's father-in-law and mother-in-law for damages for the alienation of the affections of plaintiff's wife. A verdict was rendered against the father-in-law alone and he appealed. The petition alleged that "the defendants. . . did wrongfully, wickedly, and maliciously entice, influence and induce plaintiff's wife to leave and abandon him. . ." A demurrer to the evidence on the ground that the petition charged a conspiracy between the defendants, and that the evidence in behalf of plaintiff was insufficient to support that allegation, was overruled. The St. Louis Court of Appeals held that the case was properly submitted to the jury, because "the gist of the modern civil action of conspiracy is the damage and not the combination. . ." and ". . . ordinarily a verdict may be rendered against one of the defendants, even though no conspiracy is proved."

Conceding that a conspiracy was actually charged here, which seems very doubtful, the court's ruling on this point is in accord with what seems to be the unanimous holding of other jurisdictions in the United States as to alienation of affection cases,² and also as to other civil conspiracies.³ The cases make no attempt to distinguish between a conspiracy to alienate affections, and a conspiracy to commit any other tort. In both they are content to settle the question merely by saying that the liability of joint tort-feasors is joint and several, that the allegation of conspiracy is only surplusage, or matter of inducement, and that the damage, not the combination, is the gist of the action. Typical language is used in the Minnesota case of *Huot v. Wise*: "The conspiracy alleged is not the gist of the action. . . But

20. *Martin v. Cox*, 199 S. W. 185 (Mo. 1917); *Klotz v. Rhodes*, 240 Mo. 499, 144 S. W. 791 (1912).

21. *Osborne & Co. v. Evans*, 185 Mo. 509, 84 S. W. 963 (1904); *State ex rel v. Hull*, 99 Mo. App. 703, 74 S. W. 888 (1903).

1. 72 S. W. (2d) 863 (Mo. App. 1934).

2. *Huot v. Wise*, 27 Minn. 68, 6 N. W. 425 (1880); *Huling v. Huling*, 32 Ill. App. 519 (1889); *Heisler v. Heisler*, 151 Iowa 503, 131 N. W. 676 (1911); *Smith v. Smith*, 42 S. Dak. 205, 173 N. W. 843 (1919); *Boom v. Boom*, 206 Iowa 70, 220 N. W. 17 (1928); *Dunbier v. Mengedoht*, 230 N. W. 669 (Neb. 1930); *Ramsey v. Ramsey*, 156 Atl. 354 (Del. 1931); *Falk v. Falk*, 181 N. E. 715 (Mass. 1932).

3. *Hutchins v. Hutchins*, 7 Hill 104 (N. Y. 1845); *Laverty v. Vanartsdale*, 65 Pa. 507 (1870); *Rundell v. Kalbfus*, 125 Pa. 123, 17 Atl. 238 (1889); *Van Horn v. Van Horn*, 56 N. J. Law 318, 28 Atl. 669 (1894); *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459 (1901); *Hansen v. Nicoll*, 40 App. D. C. 228 (1913); *Dickson*

v. Lights, 170 S. W. 834 (Tex. 1914); *Harbison v. White*, 56 Okla. 566, 156 Pac. 335 (1916); *Jahr v. Steffen*, 187 Iowa 168, 174 N. W. 109 (1919); *Dixon v. City of Reno*, 43 Nev. 413, 187 Pac. 308 (1920); *Swartz v. Kay*, 89 W. Va. 641, 109 S. E. 822 (1921); *Boesch v. Kick*, 97 N. J. Law 92, 116 Atl. 796 (1922); *Goble v. Am. Ry. Express Co.*, 124 S. C. 19, 115 S. E. 900 (1923); *Kile v. Anderson*, 182 Wis. 467, 196 N. W. 762 (1924); *Silliman v. Dobner*, 165 Minn. 87, 205 N. W. 696 (1925); *Faust v. Parker*, 213 N. W. 794 (Iowa 1927); *Pyles v. Armstrong*, 275 Pac. 753 (Mont. 1929); *Gabriel v. Collier*, 29 Pac. (2d.) 1025 (Ore. 1934). But cf. *Landau v. Hostetter*, 266 Pa. 7, 109 Atl. 478 (1920).

the case stands like any tort alleged to have been committed jointly by two or more defendants."⁴

Another case from the St. Louis Court of Appeals⁵ is in accord with the principal case, but the Missouri law is apparently unsettled, since there are no Supreme Court cases directly in point, and since the Kansas City Court of Appeals in *Fronk v. Fronk*⁶ held that the plaintiff having charged a conspiracy could recover only on proving it. An earlier case, *Leavell v. Leavell*,⁷ also indicated that the jury must find a conspiracy, but elsewhere in the case the court said that the plaintiff could have recovered against one of the defendants alone, if he were solely responsible for the damage. The court in *Fronk v. Fronk* might have meant to continue the doctrine of *Leavell v. Leavell* and say that for both defendants to be held, there must be proof of a conspiracy, but that the plaintiff would be allowed to recover from one defendant if that one caused the injury. However, there is nothing in the case to indicate that the court meant other than that if the plaintiff charged a conspiracy, he must prove it in order to recover at all. Such a holding is decidedly against the weight of the decisions of other courts, both in Missouri and elsewhere, but it is not entirely without merit. Although in an action charging a conspiracy to alienate affections, as well as in an action charging a conspiracy to cause some other injury to a person or his property, the courts say the gist of the action is the damage, and the charge of conspiracy is surplusage, it seems that a distinction might be made between the two. In an ordinary tort action the fact that several persons co-operated to produce the injury causes no more damage to the plaintiff than the sum of the individual efforts of all the participants. But in an alienation of affections case, a concerted effort on the part of several members of a family is likely to have a much greater psychological effect in producing the estrangement than would be the case if each of those persons had acted alone. It seems possible that a court might take this into consideration, and hold that if a plaintiff charges a conspiracy, he must prove it in order to recover.

If the Missouri Supreme Court wishes to follow the case of *Fronk v. Fronk*, the way is open, for in the only case by that court touching the question, *Miller v. Busey*,⁸ it was said that "while the petition. . . used words which are ordinarily used in charging a conspiracy, we do not consider. . . (that) it was in fact intended to charge a conspiracy."

Even the cases cited by the court in the instant case fail to uphold its position, provided we distinguish alienation of affection cases from other conspiracy cases, since five of the cases it relies on have nothing to do with alienation of affection.⁹ The other two cases it refers to are *Miller v. Busey*, which as we have seen was not decided on the ground of a conspiracy, and *Raleigh v. Raleigh*,¹⁰ which merely holds that it was not necessary to plead a conspiracy in order to recover, and which cites *Miller v. Busey*.

WILLIAM L. NELSON, JR.

4. 27 Minn. 68, 6 N. W. 425 (1880).

5. *Barton v. Barton*, 119 Mo. App. 501, 94 S. W. 574 (1906). This case says that an "essential fact to be proved was that the defendants co-operated together with the intention of bringing about the separation," but it goes on to say "because the nature of the case is such that the defendants are not *jointly* (italics ours) liable unless they co-operated."

6. 159 Mo. App. 543, 141 S. W. 692 (1911).

7. 114 Mo. App. 24, 89 S. W. 55 (1905).

8. 186 S. W. 983 (Mo. 1-16).

9. *Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210 (1890) (conspiracy to profit from city's purchase of land); *Van Horn v. Van Horn*, 52 N. J. Law 284, 20 Atl. 485 (1890) (conspiracy to drive a trader out of business); *Winn v. K. C. Belt Ry. Co.*, 245 Mo. 406, 151 S. W. 98 (1912) (negligence in operating train); *Boehm v. General Electric Co.*, 179 Mo. App. 663, 162 S. W. 723 (1913) (armature falling and injuring plaintiff); *Schultz v. Ins. Co.*, 151 Wis 537, 139 N. W. 386 (1913).

10. 5 S. W. (2d.) 689 (Mo. App. 1928).

TORTS—LANDLORD AND TENANT—LIABILITY FOR NEGLIGENCE OF AN INDEPENDENT CONTRACTOR IN MAKING REPAIRS OR IMPROVEMENTS. *Bloecher v. Duerbeck*;¹ *Vitale v. Duerbeck*.²

The defendant landlord employed an independent contractor to install an Arcola hot water heating plant in the rented premises, the tenant agreeing to pay a higher rent. About a month after the work was completed the plant exploded and injured the tenant and an invitee of the tenant, who are the plaintiffs herein. The court, handing down the two decisions concurrently, held that the fact that the work was done by an independent contractor did not exonerate the landlord from liability for the injuries caused by the failure to use reasonable care in installing the heater.³

If a lessor of land has covenanted to make repairs on the premises, the authorities hold the landlord liable to the lessee and persons on the land with the latter's consent, for personal injuries or damages to property on the premises due to failure to exercise reasonable care in making the repairs, although the landlord employed an independent contractor to do the work.⁴ There is very little Missouri authority on this question.⁵ The first time the St. Louis Court of Appeals had the case of *Ebersson v. Continental Investment Co.*⁶ before it, the court said that the covenant in the lease to repair was a personal one and the duty arising under it could not be delegated. At the second trial of the case before the same court the landlord was held liable on the ground that the repairs were dangerous unless special precautions, which were omitted, were taken.⁷ In the absence of unusual dangers inherent in the work, this court, in *dictum*, indicates that the lessor would not be liable.⁸

If the repairs are gratuitously undertaken by the lessor, the cases are far from being in accord, but the weight of authority seems to be that the lessor cannot relieve himself from liability by entrusting the work to an independent contractor.⁹ The Missouri cases are not in harmony on this question.¹⁰ The Missouri Supreme Court held the landlord not liable in the case of *Wiese v. Remme*.¹¹ But in the more

1. 62 S. W. (2d) 553 (Mo. 1933).

2. 62 S. W. (2d) 559 (Mo. 1933).

3. In the first case the court said: "The defendant's nonliability in the present case on the ground of an independent contractor is denied on the ground that the defendant's duty in using or seeing that reasonable care was used in installing this heating plant could not be delegated to a contractor, at least so far as the result of the contractor's labor was concerned."

In the second case the court said: ". . . when a landlord undertakes to make repairs or improvements to his own building for his own, or his own and his tenant's joint benefit, he is not relieved of liability for the negligent or defective performance of the work itself. . . by reason of having intrusted the work to an independent contractor."

4. *Mumby v. Bowden*, 25 Fla. 454, 6 So. 453 (1889); *Prescott v. LeConte*, 83 App. Div. 482, 82 N. Y. Supp. 411 (1903); *Peerless Mfg. Co. v. Bagley*, 126 Mich. 225, 85 N. W. 568 (1901); *Blumenthal v. Prescott*, 70 App. Div. 560, 75 N. Y. Supp. 710 (1902), 72 App. Div. 620, 76 N. Y. Supp. 1009 (1902); *Nahm & Friedman v. Register Newspaper Co.*, 120 Ky. 485, 87 S. W. 296 (1905); RESTATEMENT OF THE LAW OF TORTS, Tentative Draft No. 6 (Am. L. Inst. 1931) §289; (1921) 15 A. L. R. 975; (1924) 29 A. L. R. 763.

5. *McCleary, Liability of an Employer for the Negligence of an Independent Contractor in Missouri* (1933) 18 ST. LOUIS L. REV. 289, at 301.

6. 118 Mo. App. 67, 93 S. W. 297 (1906).

7. 130 Mo. App. 296, 109 S. W. 62 (1908).

8. In the first appeal the court said: "The general rule is that a proprietor. . . who lets a contract for work to a competent person exercising an independent employment. . . is not answerable for negligence in performing the work, unless it is subject to unusual danger if precautions are not taken."

9. *Wilbur v. Follonsbee*, 97 Wis. 577, 72 N. W. 741 (1897); *Wertheimer v. Saunders*, 95 Wis. 573, 70 N. W. 824 (1897); *Bancroft v. Godwin*, 41 Wash. 253, 83 Pac. 189 (1905); *Doyle v. Franek*, 82 Neb. 616, 118 N. W. 468 (1908); *M. Michael & Bro. v. Billings Printing Co.*, 150 Ky. 253, 150 S. W. 77 (1912); *Covington Co. v. Masonic Temple Co.*, 176 Ky. 729, 197 S. W. 420 (1917); *Van Dam v. Doty-Salisbury Co.* 218 Mich. 32, 187 N. W. 285 (1922); RESTATEMENT OF THE LAW OF TORTS, *op. cit. supra* note 4, §290; (1921) 15 A. L. R. 975; (1924) 29 A. L. R. 763. *Contra*: *Louthan v. Hewes*, 138 Cal. 116, 70 Pac. 1065 (1902); *Bains v. Dank*, 199 Ala. 250, 74 So. 341 (1917); *Schatzky v. Harber*, 164 N. Y. Supp. 610 (1917).

10. *McCleary, op. cit. supra* note 6, at 303.

11. 140 Mo. 289, 41 S. W. 797 (1897).

recent case of *Galber v. Grossberg*¹² the Court found the landlord liable, stress being laid on the idea that the landlord, in having the improvements made, had violated the tenant's right to the quiet and peaceable enjoyment of the premises. The Kansas City Court of Appeals in *Noggle Wholesale & M. Co. v. Sellers & Marquis Roofing Co.*¹³ held that the landlord was not liable for the negligence of the independent contractor. But two years later the same court decided in *Vollrath v. Stevens*¹⁴ that the landlord was liable. In the case of *Burns v. McDonald*¹⁵ the St. Louis Court of Appeals held the landlord not liable for the negligence of the independent contractor.

The cases under discussion seem to fall between the two classes of cases mentioned above. There was no covenant to repair, but neither was the work done gratuitously, for the landlord received a consideration in the form of increased rent. There are no Missouri cases directly in point, but since the court lays no emphasis on the fact that the landlord was receiving a new consideration for the installation, this decision may clarify the Missouri law as to gratuitous repairs and improvements. In holding the landlord liable in the present cases the court mentions the fact that the work had been completed and accepted by the landlord before the explosion occurred.¹⁶ It seems evident from the language of the court, that the cases would have reached the same result had this fact not been present.

W. L. NELSON, JR.

NEGLIGENCE—RES IPSA LOQUITUR. *Harke v. Haase*.¹

Plaintiff alleged that the defendant so negligently operated an automobile that it ran up on the sidewalk. There was evidence to show that the defendant's automobile skidded from the icy street to the sidewalk behind the defendant and injured him. Since no specific negligence was alleged or proved the case can only be supported on the theory of *res ipsa loquitur*. The trial court and supreme court held that the doctrine was applicable to this case on the grounds that "the injured person is not in a position to know the cause of the mishap" while the driver should be, and since "such occurrence does not usually happen in the absence of negligence on the part of the one in control of the automobile." The court, emphasizing the former reason, draws an analogy between this case and one involving injuries to a passenger resulting from the derailment of a train.²

The *res ipsa loquitur* doctrine applies when the following factors are present: (1) occurrences resulting in an injury which do not ordinarily happen if due care is used; (2) the instrumentalities are under the management and control of the defendant; and (3) defendant possesses superior knowledge or means of information concerning the occurrence.³

Assuming the evidence showed that there was no other car involved in the accident to cause the defendant's car to skid up on the sidewalk, the second and third

12. 324 Mo. 742, 25 S. W. (2d) 96 (1930).

13. 183 S. W. 659 (Mo. App. 1916).

14. 199 Mo. App. 5, 202 S. W. 283 (1918).

15. 57 Mo. App. 599 (1894); *cf.* *Finer v. Nichols*, 158 Mo. App. 539, 138 S. W. 889 (1911); *Patton v. Eveker*, 232 S. W. 762 (Mo. App. 1921).

1. 75 S. W. (2d) 1001 (Mo. 1934).

2. However, the case was reversed by the supreme court on an error in the instructions given by the trial court.

16. In the first case the court said: "For this defective and dangerous condition which inhered in the completed work, we think the landlord should be held liable notwithstanding he caused the work to be done by an independent contractor."

3. *McCloskey v. Koplal*, 329 Mo. 527, 46 S. W. (2d) 557 (1932).

factors would be present.⁴ Sole control would be in the defendant driver. The defendant would be better able to prove due care on his part or explain away or justify the accident than would the plaintiff to prove a specific negligent act, since he could not have seen the events leading up to the accident. Therefore, the problem is whether the situation presented in this case is such that the jury may infer the negligence from proof of its mere happening. The skidding does not, of itself, constitute evidence of negligence on the part of the driver so as to permit the application of the *res ipsa loquitur* doctrine.⁵ Thus the question is narrowed to whether the fact that a car leaves the street and injures a pedestrian on the sidewalk is an occurrence which would not happen in the exercise of due care.

The cases in the main declare that when the driver permits the car to be diverted from the street to the sidewalk with consequent injury to the plaintiff, it indicates that he is negligent and establishes a *prima facie* case under the doctrine of *res ipsa loquitur*.⁶ In fact, there is authority which holds that where a front wheel rolled off the axle of a moving car and struck the plaintiff on the sidewalk, the doctrine of *res ipsa loquitur* was correctly applied.⁷ Thus the principal case does not take an extreme position and the result is justified since all the elements necessary to support the application of the doctrine are present.

Moreover, it has been stated that the situation where an automobile leaves the highway and turns into a ditch is analogous to a derailment in which type of case an inference under *res ipsa loquitur* is raised.⁸ Such a comparison justifies the analogy drawn in the principal case and gives further foundation for the result.

But assuming the evidence showed that the defendant's car skidded up on the sidewalk as a result of being struck by another car, it cannot be said that the *res ipsa loquitur* doctrine is controlling.⁹

It is not absolutely clear from the case which set of facts was accepted. But the supreme court states that the above testimony was not definitely enough set out to take the case out of the *res ipsa loquitur* rule and therefore seems to interpret the facts as under the first assumption.

HERBERT JACOB

LL.B., '35.

4. *Smith v. Hollander*, 85 Cal. App. 535, 259 Pac. 958 (1927); *Scovanner v. Folke*, 119 Ohio St. 256, 163 N. E. 493 (1928).

5. *De Antonio v. New Haven Dairy Co.*, 105 Conn. 663, 136 Atl. 567 (1927); *Osborne v. Charbenedu*, 48 Wash. 359, 218 Pac. 884 (1928); Note (1929) 64 A. L. R. 261.

6. See *Ivans v. Jacob* 245 Fed. 892, 893, 895 (E. D. Pa. 1917); *Goss v. Pacific Motor Co.*, 85 Cal. App. 455, 259 Pac. 455 (1927); *Smith v. Hollander*, *supra* note 4; *Brown v. Des Moines Steam Bottling Works*, 174 Ia. 715, 156 N. W. 829, 1 A. L. R. 835

(1916); *Bailey v. Fisher*, 11 La. App. 187, 123 So. 166 (1929); *Scovanner v. Folke*, *supra* note 4; Note (1931) 75 A. L. R. 562.

7. *Gates v. Crane Co.* 107 Conn. 201, 139 Atl. 782 (1928). But see *Mass. Bonding Co. v. Park*, 197 Mich. 142, 163 N. W. 891 (1917).

8. *Lawrence v. Pickwick Stages, Northern Division*, 68 Cal. App. 494, 229 Pac. 885 (1924).

9. *Staples v. Blinn Lumber Co.*, 97 Cal. App. 505, 275 Pac. 813 (1929) (Injury done to property); *McDonald v. Cantley*, 214 Cal. 40, 3 Pac. (2d) 552 (1931) (Injury to workman on side of highway).

DISREGARDING THE CORPORATE FICTION. *In re Burntside Lodge, Inc. Cook v. Miller.*¹

In this case, the bankrupt was organized in the name of three dummy directors. One share of stock was issued to each of the dummies; ninety-five shares were issued to Cook and his wife, who were the real promoters of the corporation and managers of the business, in return for the transfer of property which they had purchased for the intended use before the incorporation; and one hundred and forty shares were issued to Cook's aunt for a loan by her to Cook. Cook was voted a salary of \$3,600.00 per year as manager, and his wife was voted a salary of \$2,400.00 per year as assistant manager. No credit for these salaries was ever entered on the books, but advances were made to the Cooks from time to time and their personal expenses were paid from the funds of the company. During the failing years of the corporation, the Cooks did not draw any salaries in any form. When the corporation went into bankruptcy, Cook and his wife filed claims for these unpaid back salaries, and the aunt filed a claim for loans to the corporation. The court disallowed all three claims, holding that Cook could not make a claim since the corporation was his mere instrumentality, and to allow the claim would be to allow a bankrupt to collect on a claim against his own bankrupt estate; and that the aunt loaned the money to Cook and stands in the same position as Cook.

It is well-settled that stockholders and directors can become creditors of the corporation so long as there is fair dealing.² Such debts may even be secured by mortgages running from the company to the stockholders or directors.³

The only factor in the principal case which might take it out of the operation of this general rule is that in the principal case Cook is a sole stockholder. Because of this fact, the court here disregarded the corporate fiction and refused to allow the claim. It is submitted that such a holding is not justified.

The law confers certain advantages, such as limited liability, upon incorporated businesses. Cook here acted as the law directed to secure these advantages. Therefore he should have the protection which the law promised him and he should not be penalized for seeking in good faith that which was offered by the state.⁴ And by so incorporating, a separate and distinct legal entity comes into existence.⁵ In all cases where the corporate entity is disregarded, it must appear that there is some element which would make it unjust and inequitable to consider the corporation attacked a separate entity.⁶

Had an outsider been hired as manager, there could be no doubt but that he could recover for his unpaid salaries. And a sole stockholder cannot be distinguished from an outsider, since each is distinct from the corporation. It is therefore submitted that a similar result should be reached where a sole stockholder does the same work. He does not owe a duty to the corporation to work for it, and hence is entitled to compensation for his work.⁷

It might have been contended in the principal case that the withdrawals were not tabulated, and that therefore it would be impossible to say what the balance

1. 7 F. Supp. 785 (1934).

2. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 589; *McKee v. Bruns*, 243 F. 370, 156 C. C. A. 150 (1927); *Stevenson v. Sickelsteel Lumber Co.*, 219 Mich. 18, 188 N. W. 449 (1922); *La Salle St. Trust & Savings Bank of Chicago v. Topeka Milling Co.*, 101 Kan. 446, 167 P. 1036 (1917), *L. R. A.* 1918 A., 574; *Hunter v. Chicago Lumber & Coal Co.*, 156 La. 19, 100 So. 35 (1924).

3. *In re Pratt Laundry Co.*, 1 F. (2d) 982 (1924); *Stuart v. Larson*, 298 F. 223 (1924); *Geisenberger & Freidler v. Robert York & Co.*, 262 F. 739 (1919).

4. *Solomon v. Solomon & Co., Ltd.*, (1897) A. C. 22; *Dollar Cleaners & Dyers, Inc. v. MacGregor*, 161 Atl. 159, (Md., 1932).

5. *Solomon v. Solomon & Co., Ltd.*, *supra*, Note 4; 1 *Fletcher on Corporations* (Perm. Ed.), 90; *Vennerbeck & Chase Co. v. Juergens Jewelry Co.*, 164 Atl. 509, (R. I., 1933).

6. *U. S. v. Milwaukee Refrigerator Transit Co.*, 142 F. 247.

7. *Vennerbeck & Chase Co. v. Juergens Jewelry Co.*, *supra*, Note 5; *Glynn v. Columbus Club*, 21 R. I. 534, 45 Atl. 551 (1900).

owing, if any, was.⁸ But such facts are not clearly set forth in the principal case and no reliance was made thereon either by the creditors or by the court.

The foregoing discussion has been based on the assumption that there was no fraud practiced upon creditors by Cook in the principal case. This assumption seems justified since no allegation of fraud is made, nor does the court rely upon the presence of fraud in reaching its decision. But supposing fraud to be present, it is submitted that even then the court would not be justified in disregarding the fiction. It is true that courts are prone in the case of fraud to disregard the fiction and to consider the corporation and the sole stockholder as one.⁹ But the writer believes that such a solution puts the status of the corporate entity in doubt and is unnecessary in order to avoid inequitable results. So in the principal case, if it can be shown that Cook has been guilty of practicing some fraud on the creditors of the corporation, such as issuing financial statements which were misleading in that they did not reflect the debt owing to Cook, Cook would be estopped as to the creditors who relied upon the representation so made, to claim that the debt was owing.¹⁰ Where advances are made or money is loaned for the purpose of establishing a fictitious credit for the bankrupt and so enables him to defraud others, the whole transaction is contaminated by the fraud, and the court of bankruptcy will not aid the conspirators by allowing claims for such advances.¹¹ This solution would avoid disregarding the corporate fiction and would fully protect the bona fide creditors.

SOLBERT M. WASSERSTROM

LL.B., '35.

INTENT TO DEFAME AS AN ELEMENT IN LIBEL. *Becker v. Brinkop.*¹

In ruling on a demurrer to a libel petition, the court said: "To make defendants liable for the publication of the libelous circular, it must appear that the defendants were aware that the circular was, or probably might be libelous. . . . These elements must appear, for the reason that, if defendants could prove that they were wholly ignorant of the contents of the circular, and had no reason to suppose that it contained libelous matter, they could not be held liable for it because it could not then be said that they had consciously published a libel."

The language quoted indicates that the plaintiff in a libel suit must fail unless there is some showing that the defendant published the libel in question intentionally, or was to some extent negligent in not knowing that the matter was libelous. This is *contra* to the rule announced by prior Missouri cases² and the weight of authority in other jurisdictions. While the question has been discussed but rarely in Missouri, the cases found enunciate the majority rule with clarity and emphasis. In *Jones v. Murray*,³ the court held, "if the publication is false, and the plaintiff has suffered actual damages, he is entitled to recover such damages, no matter how innocently, or

8. *Gordon v. Baton Rouge Stores Co., Inc., et al.*, 168 La. 248, 121 So. 759 (1929).

9. *U. S. v. Milwaukee Refrigerator Transit Co.*, *supra* Note 6.

1. 78 S. W. (2d) 538 (Mo. App. 1935).

2. *Farley v. Evening Chronicle Publishing Co.*, 113 Mo. App. 216, 87 S. W. 165 (1905); *Jones v. Murray*, 167 Mo. 25, 66 S. W. 981 (1902); *Morris v.*

10. See *In re Desnoyers Shoe Co.*, 210 F. 533, 32 Am. Banker Rep. 51.

11. *In re Friedman*, 164 F. 131, 21 Am. Bankers Rep. 213; *In re Royce Dry Goods Co.*, 133 F. 100, 13 Am. Bankers Rep. 257.

Sailer, 154 Mo. App. 305, 134 S. W. 98 (1911); *McGinnis v. Knapp, & Co.*, 109 Mo. 131, 18 S. W. 1134 (1891).

3. *Supra* note 2

with what purpose, intent, or motive the defendant acted." In *Farley v. Evening Chronicle Publishing Company*,⁴ it was said that "a libel is a tort, and, generally speaking, neither the intention with which the tortfeasor acted, nor the state of his feelings towards the person injured or mankind at large lessens his responsibility for injuries actually caused by his wrongful act." In *Morris v. Sailer*,⁵ the court affirmed the rule: "But, conceding that defendant really did not intend to charge libelous matter, that will not excuse him." A few cases from other jurisdictions support the view of the principal case.⁶ In *Smith v. Ashley*⁷ it was said that "if the defendant had no knowledge that the article published was libelous, he has been guilty of no wrong, and is not responsible by law although the plaintiff has been injured." On the other hand, the overwhelming weight of authority supports the view expressed in the Missouri cases cited,⁸ and a defendant in a libel suit is held to answer for the consequences of his publication regardless of his intention or of his use of due care. NEWELL ON SLANDER AND LIBEL⁹ says that "in actions for defamation it is immaterial what meaning the speaker intended to convey." ODGERS ON LIBEL AND SLANDER¹⁰ says that "the law looks to the tendency and consequences of the publication, not at the intention of the publishers." It is interesting to note that the court in the principal case cited Odgers as authority for the rule it laid down.¹¹ While it is true that Odgers does enunciate a similar rule, he carefully restricts its application to a case in which, as he says, ". . . the defendant is not himself the author, writer or printer of a publication, or in any way connected with or responsible for its being composed, written or printed." Apparently the court overlooked the fact that the rule it announced was taken from a section in Odger's book devoted to the liability of a mere disseminator, such as the vendor of a newspaper or magazine, and cites the rule as applying in all libel cases.

*S. RUSSELL VANDIVORT

*LL.B. '35.

4. *Supra* note 2.

5. *Supra* note 2.

6. *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856 (1893); *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392 (1895); *Smith v. Ashley*, 52 Mass. (11 Metf.) 367, 45 Am. Dec. 216 (1846); *Smart v. Blanchard*, 42 N. H. 137 (1860).

7. *Supra* note 6.

8. *Laudati v. Stea*, 44 R. I. 300, 117 Atl. 422, 26 A. L. R. 450 (1922); *Peck v. Tribune*, 214 U. S. 185, 29 Sup. Ct. 554, 16 Ann. Cas. 1075 (1909); *Hatfield v.*

Gazette Printing Co., 103 Kan. 513, 175 Pac. 382 (1918); *Bennet v. Stockwell*, 197 Mich. 50, 163 N. W. 482, Ann. Cas. 1918E 1193, L. R. A. 1917F 761 (1917); *Butler v. Every Evening Printing Co.*, (C. C. D. Del. 1905) 140 Fed. 934, *aff'd.*, 144 Fed. 916 (C. C. A. 3d, 1906); *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530 (1911); *Corrigan v. Bobbs-Merrill Co.*, 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662 (1920).

9. (4th ed. 1924) 301.

10. (5th ed. 1911) 341.

11. (5th ed. 1911) 158.

