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Recent Cases

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CONFLICT OF LAWS—DAMAGES FOR WRONGFUL DEATH OF RAILROAD EMPLOYEE RIDING ON FREE PASS—APPLICABILITY OF FEDERAL OR STATE LAW

Francis v. Southern Pac. Co.[1]

Jack R. Francis, an employee of the Southern Pacific Company, was killed while riding in interstate commerce on a pass issued to him without charge by virtue of his employment with the company. The accident occurred in Utah. The pass stipulated that the user assumed all risk of injury to person or property by negligence or otherwise and absolved the issuing company from liability therefor. The minor children of Francis brought suit in the federal district court for damages for his death. The issue of wanton negligence was submitted to the jury, but the trial court refused to submit the issue of ordinary negligence. A verdict for the defendant was affirmed by the circuit court of appeals and by the Supreme Court of the United States.

Under Utah law, the heirs of the decedent have an action for his wrongful death.[2] This action is distinct from any action the decedent might have had if he had lived,[3] but defenses available against the decedent are available against the heirs.[4] In Utah, a carrier is liable for injuries caused by ordinary negligence, even though such person is riding on a free pass which by its terms exempts the carrier from such liability.[5]

In 1898, in *Chicago, M. & St. P. Ry. v. Solan*,[6] the United States Supreme Court held that state law was applicable to determine the liability of a carrier for injury to a passenger, in this case a drover,[7] carried to interstate commerce. Subsequently, in *Northern Pac. Ry. v. Adams*,[8] it was held that under federal law a carrier could successfully exempt itself from liability for negligence by so stipulating

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1. 68 Sup. Ct. 611 (1948), *affirming* 162 F. 2d 813 (C.C.A. 10th 1947).
2. UTAH CODE, 1943, 104-3-11.
3. Mason v. Union Pacific R.R., 7 Utah 77, 24 Pac. 796 (1890).
4. Van Wagoner v. Union Pac. Ry., 186 P. 2d 293 (Utah 1947) (The right of the heirs is "to proceed against the wrongdoer subject to the defenses available against the deceased, had he lived and prosecuted the suit.") Opinion on rehearing, 189 P. 2d 701 (1948).
5. Williams v. Oregon Short-Line Ry., 18 Utah 210, 54 Pac. 991 (1898). Most states hold that a carrier can relieve itself of liability in this manner. See cases in 9 A.L.R. 501 (1920).
6. 169 U.S. 133 (1898), *affirming* 95 Iowa 260, 63 N.W. 692, 28 L.R.A. 718, 58 Am. St. Rep. 430 (1895).
7. A drover, traveling on a pass with a shipment of cattle, is a passenger for hire. New York Cent. v. Lockwood, 17 Wall. 357 (U.S. 1873).
8. 192 U.S. 440 (1904). See also Boering v. Chesapeake Beach Ry., 193 U.S. 442 (1904) (stipulation in free pass binding though passenger had no notice of it.)

in a free pass. Following the passage of the Hepburn Act,[9] it was held in 1914 that, under the Hepburn Act, a carrier could contract away its liability for negligence by providing therefor in a free pass, and that a pass issued to an employee without charge was actually a gratuity.[10] The previous year, however, in *Southern Pac. Co. v. Schuyler*[11] it was stated that the Hepburn Act does not deprive one who accepts gratuitions transportation of the protection of the laws of the state, even though the free transportation is given in violation of the Hepburn Act. In 1923, in *Kansas City So. Ry. v. Van Zant*,[12] federal law was held applicable in the situation of the instant case, when the supreme court ruled that limitations and conditions of use, as well as permission to issue free passes, are determined by the Hepburn Act, not by state law, saying:

> "The pass proceeded from the federal act; it is controlled necessarily in its incidents and consequences by the federal act to the exclusion of state laws and state policies. . ."[13]

This decision has been followed and federal law applied, albeit reluctantly, by at least one state court.[14] However, in passing on the question of a carrier's liability to a drover traveling on a drover's pass, the opposite view has been taken, both by the state courts and by the federal district court, and state law has been applied.[15] Missouri has expressed the view that, since neither the Interstate Commerce Commission nor Congress had dealt with the question of liability on a drover's pass, it was governed by the common law of the state.[16]

In the instant case, certiorari was granted in order to re-examine the question of whether state or federal law should be applied, in the light of the decision in *Erie R.R. v. Tompkins*.[17] By a 5-3 decision, federal law was held applicable. The

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9. June 29, 1906, c. 3591, 34 STAT. 584, 49 U.S.C. § 1 *ff.*, 49 U.S.C.A. § 1 *ff.* § 1 (7) permits the issuance of free passes to employees and their families.

10. Charleston & W.C. Ry. v. Thompson, 234 U.S. 576 (1914).

11. 227 U.S. 601 (1913) (Plaintiff, a railway mail employee, accepted and used a free pass in violation of the Hepburn Act. The court said the liability of the carrier rose out of local law, not out of the Hepburn Act).

12. 260 U.S. 459 (1923).

13. 260 U. S. 459, 469. On the same basis, it might be argued that prohibition of the issuance of passes to others is a regulation of the issuance of tickets, and therefore ticketholders are subject to federal, rather than local law.

14. Donnelly v. Southern Pac. Co., 18 2d 863, 118 P. 2d 465 (1941).

15. Clark v. Southern Ry., 69 Ind. App. 697, 119 N.E. 539 (1918). See also Dierickx v. Davis, 80 Ind. App. 71, 137 N.E. 685 (1922) *cert. denied* 263 U.S. 709 (1923). See also Wiley v. Grand Trunk Ry. of Canada, 227 Fed. 127 (1915) (state law held applicable to man traveling on drover's pass).

16. Edmondson v. Missouri Pac. R.R., 264 S.W. 470 (Mo. App. 1924), later appeal in 220 Mo. App. 294, 286 S.W. 439 (1926) and 8 S.W. 2d 103 (Mo. App. 1928).

Missouri has taken the view that any negligence of a carrier toward a passenger traveling on a free pass is gross negligence. Bryan v. Missouri Pac. R.R., 32 Mo. App. 228 (1888).

17. 304 U.S. 64, 114 A.L.R. 1487, 1500 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.").

majority opinion relies on the decisions in the *Adams, Thompson, and Van Zant* cases, with no mention of either the *Solan* or the *Schuyler* cases, and concludes that, because the Transportation Act of 1940[18] made no changes in the free pass provisions of the Hepburn Act, other than to broaden them, the old interpretation had become part of the "warp and woof" of the Hepburn Act, and that there is therefore no room for application of the *Erie* doctrine.

The dissenting opinion, written by Mr. Justice Black, strongly attacks the majority view. In the eyes of the minority, Utah law should govern this case, since Congress has never entrenched upon the power of all the states to provide damages for wrongful death. The decision is attacked as being a return to the "general commercial law" doctrine of *Swift v. Tyson.*[19] Even if federal law governs, the minority considers the decision wrong, thinking it is out of line with current social trends in that it denies the financal protection of damages for wrongful death to a class of people who need it badly.

The Court's "re-examination" of the question here involved does not seem entirely satisfactory. It is recognized that Utah law governs the persons who may bring an action, and, seemingly, that Utah law governs the defenses available against those persons. Yet a defense which Utah law would not allow is permitted to bar the plaintiffs' claim. This defense is allowed because of a decision—*Northern Pac. Ry. v. Adams*[20]—made under the now repudiated doctrine of "general commercial law;" a decision which was later said to be applicable under the Hepburn Act, but still at a time when the *Swift v. Tyson* doctrine was controlling. The Court makes no mention of cases which seemingly point in the opposite direction, nor of state decisions which apply state law to protect passengers riding on passes. This omission leaves some doubt as to the validity of the claim that the Court's interpretation has become part of the "warp and woof" of the Hepburn Act. It is submitted that, as claimed by the dissenting justices, this is an encroachment on the *Erie* doctrine. It is true that the federal government has complete control over interstate commerce. It is just as true, up until this time, the states have been considered to have control over actions for wrongful death. Congress has passed no federal wrongful death act. But, by this decision, the control of the states over wrongful death actions is partially denied, when, as stated by the California Supreme Court, there is nothing in the Hepburn Act conflicting with state rules on liability for negligence, and the Hepburn Act sets forth no objective that would be hindered by the application of state law.[21] The fact that one man is permitted by federal statute to ride "free," while another is not, seems a flimsy

18. Act September 18, 1940, 54 STAT. 898, 49 U.S.C.A. § 1.
19. 16 Pet. 1 (U.S. 1842).
20. *Supra,* note 8.
21. Donnelly v. Southern Pac. Co., *supra,* note 14.

excuse for denying to the former the protection which state law gives the latter[22] And it would seem that, as the dissenting justices argued:

> ". . . the very absence of a federal statute to take the place of local wrongful death statutes should be the equivalent of a loud congressional warning to courts to refrain from encroaching on state powers here."[23]

JOSEPH J. RUSSELL

CONSTITUTIONAL LAW—DUE PROCESS—ORDINANCE PROHIBITING OPERATION ON CITY STREETS OF SOUND TRUCKS EMITTING LOUD AND RAUCOUS NOISES DOES NOT VIOLATE FREEDOM OF SPEECH

Kovacs v. Cooper[1]

Kovacs operated his sound truck on the streets of Trenton, New Jersey, and was convicted for violating a city ordinance which provided:

> "4. That it shall be unlawful for any person . . . to play . . . upon the public streets . . . any device known as a sound truck . . . or any instrument of any kind which emits therefrom loud and raucous noises and is attached to and upon any vehicle. . . ."[2]

On appeal, Kovacs challenged the ordinance on the grounds that it was "so obscure, vague, and indefinite" as to violate the due process clause of the Fourteenth Amendment, and that it invaded his rights of free speech. His conviction was affirmed by the New Jersey Supreme Court,[3] the New Jersey Court of Errors and Appeals,[4] and the Supreme Court of the United States.

Division in the Supreme Court of the United States was five to four, with such a diversity of opinions being written that no one justice could properly be said to have spoken for the Court. Mr. Justice Reed delivered an opinion in which

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22. The statement has been made that, in the case of drovers' passes, the pass is not actually a gratuity, for the railroad received a benefit. See New York Cent. Ry. v. Lockwood, 17 Wall. 357 (U.S. 1873), and, also, Grand Trunk Ry. of Canada v. Stevens, 95 U.S. 655 (1877). If this is the test of whether a pass is a gratuity, it would appear that an employee's pass is not a gratuity, despite the statement made by the court in Charleston & W. C. Ry. v. Thompson, *supra,* note 10, that it is. The following statement, made during the debate of the Hepburn Act in the Senate, indicates that at least some senators did not consider an employee's pass a gratuity: "The matter of free transportation . . . enters partly into the consideration for their employment, and we have no moral right to deprive them of that privilege." 40 CONG. REC. 7981. See also, Sassaman v. Pennsylvania R.R., 144 F. 2d 950 (C.C.A. 3d 1944).

23. Francis v. Southern Pac. Co., 68 Sup., Ct. 611, 621 (1948) (dissenting opinion).

1. 69 Sup. Ct. 448 (1949).

2. Ordinance No. 430, pursuant to N.J. STAT. ANN. Tit. 40: 48-1 (8), authorizing the city "to prevent disturbing noises."

3. 135 N.J.L. 64, 50 A. 2d 451 (1946).

4. 135 N.J.L. 584, 52 A. 2d 806 (1947).

the Chief Justice and Mr. Justice Burton joined. Justices Frankfurter and Jackson wrote separate concurring opinions. Mr. Justice Black presented a dissenting opinion on behalf of himself and Justices Douglas and Rutledge. The latter also gave a separate opinion, and Mr. Justice Murphy dissented without opinion.

On the issue of whether or not the language of the ordinance was sufficiently clear and definite to be interpreted with reasonable accuracy,[5] the objection was based on the words "loud and raucous." Only Mr. Justice Reed commented on this argument. He thought that this contention "merits only a passing reference." That reference was to "obscene, lewd, lascivious, filthy, indecent or disgusting," which had been suggested as sufficiently clear because well understood as a result of long use in criminal law, while "massing stories to incite crime" was held to be unconstitutionally vague.[6] "Loud and raucous" were thought to be more like the former than the latter, Mr. Justice Reed merely saying, "We think the words of § 4 of this Trenton ordinance comply with the requirements of definiteness and clarity, set out above."[7] Evidently no member of the Court thought the words quoted furnished a basis for any valid objection.

The requirement of clarity and definiteness presents another problem, however, but one which, unfortunately, only Mr. Justice Rutledge discussed. He emphasized the fact that the members of the Court were not agreed on the interpretation which should be given the ordinance. Mr. Justice Reed and those for whom he spoke understood the New Jersey courts to have construed the ordinance as prohibiting only sound trucks and similar machines on the streets emitting loud and raucous noises. Justices Jackson, Black, Douglas, and Rutledge thought it clear that the New Jersey courts had read the ordinance as an absolute prohibition of all use of sound trucks within the city of Trenton. Justices Frankfurter and Murphy said nothing of the meaning of the enactment. In the face of these differing constructions, Mr. Justice Rutledge was of the opinion that the ordinance was clearly violative of due process regardless of any questions of freedom of speech. He commented, "No man should be subject to punishment

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5. The requirement was stated as follows in Musser v. Utah, 333 U.S. 95 (1948): "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." See annotations in 70 L. Ed. 322 and 83 L. Ed. 893.

6. Winters v. New York, 333 U.S. 507 (1948). "No person shall address any offensive, derisive, or annoying word to any other person . . ." was held sufficiently clear in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In United States v. Petrillo, 332 U.S. 1 (1947), a statute making it an offense to compel a broadcaster to employ more than the "number of employees needed," was held sufficiently definite, the court making the interesting comment, "Clearer and more precise language might have been framed by Congress. . . . But none occurs to us, nor has any better language been suggested. . . ." 332 U.S. at p. 7.

7. 69 Sup. Ct. at 450.

under a statute when even a bare majority of judges upholding the conviction cannot agree upon what acts the statute denounces."[8]

Another and related difficulty is discussed in the opinion of Mr. Justice Black. He argued that the ordinance was an absolute prohibition, that the charge filed against Kovacs made no reference to "loud and raucous noises," that the record contained no evidence tending to show that Kovacs' machine made loud and raucous noises, and that, therefore, the New Jersey courts convicted Kovacs simply for operating a sound truck on the streets of Trenton. But three of the majority in the Supreme Court understood the ordinance to prohibit only machines making loud and raucous noises, and approved the conviction on the theory that the ordinance was valid because not an absolute prohibition. Is it possible that an ordinance which generates all this confusion is still so clear and definite that it can be reasonably interpreted?[9] Commented Mr. Justice Black, "Affirmance here means that the appellant will be punished for an offense with which he was not charged, to prove which no evidence was offered, and of which he was not convicted, according to the only New Jersey court which affirmed with opinion."[10] How, in the midst of all this disagreement on its meaning, the ordinance could be upheld and Kovacs convicted is difficult to understand.

At least one important source of confusion is to be found in the opinions of the New Jersey courts. It is simply impossible to determine by a study of those opinions what the ordinance was construed to mean. The Supreme Court of New Jersey presented only one opinion. Near the beginning of that opinion, the court said, "The relevant provisions of the ordinance apply only to (1) vehicles (2) containing an instrument in the nature of a sound amplifier or any other instrument emitting loud and raucous noises. . . ."[11] But near the end of the same opinion the court said, "In simple, unambiguous language it prohibits the use upon the public streets of any device known as a sound truck, loud speaker or sound amplifier."[12] In the Court of Errors and Appeals, which affirmed by an equally divided court, there was no opinion for affirmation. One of the opinions for reversal argued that the ordinance was an attempt, ". . . to

8. 69 Sup. Ct. at 462.

9. Compare the action of the Court in Musser v. Utah, *supra*, note 5. Sec. 103-11-1, UTAH CODE ANN. (1943) condemned conspiracy to commit acts injurious to public morals, including conspiracy to counsel, advise, and practice polygamy. When argument before the Supreme Court raised the question of whether or not the statute was too vague and indefinite, conviction was vacated and the case remitted to the Utah court for construction of the statute.

10. 69 Sup. Ct. at 460. *Cf.* Cole v. Arkansas, 333 U.S. 196 (1948), in which both the defendant and the trial court construed the information as charging an offense under Sec. 2 of the relevant act. The Arkansas Supreme Court affirmed on the theory that the defendant had violated Sec. 1. Reversed without dissent, for deprivation of due process.

11. 50 A. 2d at 452.

12. *Id.* at 453.

prohibit . . . under all circumstances . . . the use of sound amplifying systems."[13] The other said among other things, "The prohibition is against the emitting of 'loud and raucous' noises. . . ."[14] As has been observed, both of these interpretations gained some currency in the Supreme Court of the United States. The only other apparent possibility appears to be that the ordinance defined sound trucks as necessarily emitting loud and raucous noises, and the Supreme Court was aware of that possibility too, as Mr. Justice Reed indicated in a footnote.

Under these circumstances, it would appear that the case might very well have been returned to the New Jersey courts so that they could clarify their construction of the ordinance. Unless the Supreme Court was willing to invalidate the ordinance or set aside the conviction for lack of due process, a return for construction of the ordinance would seem the only proper course, especially since the Court considers itself bound by the state court's interpretation of a state enactment.[15] That the suggested procedure is permissible seems clear. The court on occasion has remitted a cause to the state court for "reconsideration and amplification of the record."[16] It has also remitted a cause to the state court for construction of a statute questioned for lack of clarity.[17]

The Supreme Court also held that the ordinance did not unduly invade Kovacs' freedom of speech. On this point there was a clear thread of agreement among members of the court, at least in principle. The entire Court, with the exception of Mr. Justice Murphy, who dissented without opinion, expressly recognized that the problem was one of reconciling conflicting interests, one of achieving "wise accommodation between liberty and order. . . ."[18] The rights of

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13. 52 A. 2d at 809.
14. *Ibid.*
15. 69 Sup. Ct. at 452. Note the statement of the Court in Winters v. New York, 68 Sup. Ct. at 669 (1948), "This construction fixes the meaning of the statute for this case. The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature." Query: if the state court offers two constructions, is the Supreme Court free to accept that which preserves the validity of the statute? In construing Federal Statutes, the Court seeks to avoid invalidating them. "The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948), holding that Sec. 313, Federal Corrupt Practices Act, as amended in 1947, 2 U.S.C.A. § 251, "It is unlawful for . . . any labor organization to make a contribution or expenditure in connection with any election . . ." did not apply to a regular union periodical published to further the aims of the union, though that periodical expressed views on political proposals and candidates.
16. Kennedy v. Silas Mason Co., 334 U.S. 249 (1948). The following statement from the opinion in that case might not be inapplicable to the one under discussion. "While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance . . ."
17. Musser v. Utah, *supra,* notes 5 and 6.
18. Mr. Justice Frankfurter at p. 454. Compare the statement of the majority in Saia v. New York, 334 U.S. 558 (1948), invalidating an ordinance prohibiting the use of loudspeakers without a permit obtained from the Chief

the public to peace and order may be protected, but that protection must not result in a real interference with the rights of free speech. Accordingly, all members of the Court who expressed views would appear prepared to sustain some measure of regulation or control of such devices as sound trucks.[19]

How much or what kind of regulation might be upheld, however, is a difficult question. It is complicated by the rather indefinite doctrine of the "preferred position" of the freedoms of the First Amendment. The opinions of Mr. Justice Reed and Mr. Justice Rutledge recognized that doctrine without defining it in any way. Mr. Justice Frankfurter objected to it as an attempt to express "a complicated process of constitutional adjudication by a deceptive formula."[20] He purported to trace the evolution of the doctrine and to conclude that a majority of the Court has never accepted the idea that legislation touching the field of the First Amendment is to be presumed invalid.[21] It may be, as would appear, that the Court has never expressly stated that such legislation is to be presumed invalid, but there is no doubt that a majority of the Court has accepted the doctrine of some sort of "preferred position." Mr. Justice Roberts referred to it in *Schneider v. State of New Jersey*,[22] speaking for the entire Court with the exception of Mr. Justice McReynolds. And in *Saia v. New York*,[23] a majority of five expressed a belief in the "preferred position." About the only thing clear about the preferred position is that it is very indefinite. Perhaps it means, as would seem reasonable, that when legislation concerning the freedoms set out in the First Amendment comes before the Court there should be no presumption at all, rather than the usual presumption of validity attached to other types of enactments.[24]

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of Police, "Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position."

19. So also in Saia v. New York, *supra,* note 18, the five-justice majority which condemned the ordinance expressly suggested that abuses in the use of amplifiers might be controlled by "narrowly drawn statutes" directed, for example, to the volume of sound, or to the hours and place of operation.

20. 69 Sup. Ct. at 458.

21. The entire opinion of Mr. Justice Frankfurter is worth reading in this connection. He purported to find the origin of ideas now applied to freedom of speech in the opinions of Mr. Justice Holmes, who, he said, "was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics."

22. 308 U.S. 147 (1939).

23. 334 U.S. 558 (1948), *supra,* note 18.

24. It would seem that at least some of the statements on the subject could be interpreted as suggesting either a presumption of invalidity or no presumption at all. Note, for example, "They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 147 A.L.R. 674 (1943). ". . . the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." Schneider v. New Jersey, 308 U.S. 147 (1939), *supra,* note 22.

The problem of the degree and type of regulation permissible is also no doubt further complicated by the long series of adjudications involving other types of activity and means of communication. Should decision in cases of this type proceed upon analogy? If so, should sound amplifiers be treated as most like the publication of newspapers and magazines,[25] or the distribution of pamphlets and circulars,[26] or speaking without amplifiers to assemblies on the streets or other public places,[27] or parading in the public streets in expression of views on labor, politics, or religion?[28] Or is the amplifier more like the billboard, the advertising circular, or the poster on the outside of a truck operated on the public streets?[29] Perhaps the operation of a loudspeaker might more properly be compared with the beating of drums and the blowing of slide trombones.[30] Mr. Justice Reed seemed to think the use of the amplifier somewhat similar to addressing gatherings on the streets. Mr. Justice Black appeared to think that the problem should be approached on the same basis as that of any other means of disseminating ideas and information, as did Mr. Justice Rutledge. Mr. Justice Reed, however, was clearly of opinion that the use of loudspeakers was to be distinguished from the distribution of circulars or leaflets. Whatever analogy might be thought helpful, it seems clear that the use of amplifying systems is entitled to and will get some protection under the heading of free speech. Only Justices Frankfurter and Jackson appeared prepared to sustain an absolute prohibition of all use of such devices in the cities.

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25. Winters v. New York, *supra,* note 6. Craig v. Harney, 331 U.S. 367 (1947). Annotation in 35 A.L.R. 12 (1925), supplemented in 110 A.L.R. 327 (1937); 11 Mo. L. Rev. 197, 299-302 (1946). Note also, for example, Grosejean v. American Press Co., 297 U.S. 233 (1936), invalidating a tax on the selling of advertising in newspapers or other publications.

26. Annotations 127 A.L.R. 962 (1940); 141 A.L.R. 538 (1942), supplemented in 146 A.L.R. 109 (1943) and 152 A.L.R. 322 (1944). 11 Mo. L. Rev. 197, 311-314 (1946).

27. 62 A.L.R. 404 (1929).

28. Hague v. C.I.O., 307 U.S. 496 (1939), invalidated an ordinance requiring a license to hold a public assembly on the public streets. 40 A.L.R. 954 (1926).

29. Railway Express Agency v. New York, 69 Sup. Ct. 463 (1949), upheld a traffic regulation of the city of New York, which prohibited selling of space for advertising on the exterior of trucks operated on the city streets. Freedom of speech was not mentioned. See annotation, "Public regulation of sound truck or other forms of advertising by vehicles in streets or highways," 121 A.L.R. 977 (1939). Apparently the billboard cases also do not raise questions of free speech or press. 72 A.L.R. 465 (1931); 156 A.L.R. 581 (1945).

30. See 133 A.L.R. 1402, 1412 (1941), dealing with anti-noise legislation. Note the suggestions in the opinions of Justices Reed, Frankfurter, and Jackson in the case under discussion, that the soundtruck may be treated as something in the nature of a nuisance. In Maupin v. City of Louisville, 284 Ky. 195, 144 S.W. 2d 237 (1940), the Kentucky court upheld an ordinance prohibiting the use of sound trucks within the city limits unless by license of the police department. The question of freedom of speech apparently was not even raised. The Colorado court also proceeded on something like the nuisance theory in upholding an ordinance prohibiting the use of sounding instruments to advertise or to attract crowds, Hamilton v. City of Montrose, 109 Colo. 228, 124 P. 2d 757 (1942).

Probably analogies or formulae developed in connection with other means of communication do not furnish a satisfactory basis for determining how much or what kind of regulation is permissible as applied to such machines as sound trucks. There are obvious differences, for example, between a sound truck and a radio broadcasting station, or between a sound truck and a soapbox orator, or between a sound truck and the distributor of leaflets. As Mr. Justice Reed points out, a passer-by on the streets may refuse to accept a leaflet and walk on. One may also quickly put himself out of range of the soap-box orator. Normally he may turn off his radio. But when it comes to sound trucks, "On the business streets . . . such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions."[31] Mr. Justice Frankfurter thought that "Only a disregard of vital differences between natural speech . . . and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice," and Mr. Justice Jackson, both in this case and in *Saia v. New York,* thought that there wasn't even an issue of free speech.

Though it may be rash to attempt any conclusions from all these diversified opinions, it may be permissible to make a few cautious suggestions. The ordinance in question was, in effect upheld on the theory that it prohibited loud and raucous noises. As so interpreted, it would seem to be mild enough, and an ordinance clearly meaning just that would probably be upheld without too much question. Mr. Justice Black, for himself and Justices Douglas and Rutledge, clearly expressed the view that a reasonable restriction of volume, hours of operation, and place of operation would not violate freedom of speech. On the other hand, an ordinance clearly amounting to an absolute prohibition would almost surely be invalidated. It was on this interpretation of the ordinance in question that the dissenting Justices objected to it. Further, Mr. Justice Reed also expressed the view that an absolute prohibition would probably be unconstitutional. As already suggested, only Justices Frankfurter and Jackson seemed prepared to sustain an absolute prohibition. Finally, it is reasonable to suppose that an ordinance prohibiting the use of amplifiers without a license issued by some city official would be invalid as a previous restraint.[32] Both the opinion

31. In Maupin v. City of Louisville, *supra,* note 30, the Kentucky court also emphasized the distractions of travelers and the resulting dangers arising from such noises. In Hamilton v. City of Montrose, *supra,* note 30, the Colorado court pointed out that the evidence showed that the disturbance involved had lasted an hour or more and was so loud and distracting that business men in the vicinity were compelled to close all the windows of their establishments in order to transact their business. Likewise, Mr. Justice Jackson, dissenting in Saia v. New York, *supra* note 18, commented on the distractions and possible *injury* resulting from the operation of amplifiers in public places.

32. Saia v. New York, *supra,* note 18; the licensing provision was apparently all that rendered the ordinance invalid. 127 A.L.R. 962 (1940); 11 Mo. L. REV. 197, 311, 313 (1946).

of Mr. Justice Reed and that of Mr. Justice Black recognized this view. Justices Frankfurter and Jackson would probably approve even a licensing ordinance.[33] Of course, if a licensing ordinance were construed so that a citizen would have a clear right to a license on application, it would probably be valid, though perhaps of doubtful utility.[34]

OLEN W. BURNETT

DIVORCE—JURISDICTION TO DETERMINE CUSTODY OF CHILDREN BASED UPON PUBLISHED SERVICE

Beckmann v. Beckmann[1]

Plaintiff sued her defendant husband for divorce in the circuit court for the county of St. Louis, serving him by publication. Defendant, with the two children of the marriage, was temporarily residing in California. There was no personal appearance by the defendant at the trial, nor were the children ever present within Missouri during the proceedings. After deciding that the defendant and the children were still domiciled in Missouri, the circuit court awarded the plaintiff a divorce and the two children. Questioning the circuit court's jurisdiction to award the custody of the two children, the defendant appealed to the court in the instant case. This court upheld the award.

Since there is no precedent in Missouri for the problem posed, and very little authority elsewhere, the court interpolated the results of two similar Missouri cases. *Sanders v. Sanders*[2] held that where the children and wife were domiciled in Maryland, the wife being served by publication, the Missouri court awarding the husband a divorce had no jurisdiction to award him the custody of the children. However, the court interpreted *Laumeier v. Laumeier*[3] to hold that if both parents are personally before the divorce court, it may determine the custody of a child domiciled in another jurisdiction. Proceeding on the theory that the relationship between parent and child is a status, the court found the instant case to fall within the limits established by the above two cases. Both the defendant and the children were domiciled within this state, therefore, service by publication on the defendant brought the res before the circuit court.

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33. In Saia v. New York, *supra* note 18, Mr. Justice Jackson stated that he did not consider freedom of speech to be in issue. In the present case, Mr. Justice Frankfurter said, Sup. Ct. at 458, "Nor is it for this Court to devise the terms on which sound trucks should be allowed to operate, if at all."

34. Cox v. New Hampshire, 312 U.S. 569, 133 A.L.R. 1396 (1941).

1. 211 S.W. 2d 536 (Mo. 1948).

2. 223 Mo. App. 834, 14 S.W. 2d 458 (1929).

3. 308 Mo. 201, 271 S.W. 481 (1925). Note that the court there held the case to be a continuation of the original divorce action wherein all the parties, including the unborn child, were *domiciled* in Missouri and personally before the court; *Compare* language *with* State *ex rel.* Shoemaker v. Hall, 257 S.W. 1047 (Mo. 1924) in which defendant wife in the Laumeier case was denied a writ of prohibition.

There are only two reported cases with facts on all fours with the instant case, each of which is diametrically opposed to the other, both in result and in theory. In *Minick v. Minick,* [4] under a statute similar to the Missouri statute,[5] which provides that the court having jurisdiction to award the divorce, has jurisdiction to determine the custody of the children, it was held by the Florida Supreme Court that the lower court had power to award the custody of the children. Despite quoting from a case in which the defendant had been personally served,[6] the Florida court evidently proceeded on the same in rem theory as is used by the court in the instant case. On the other hand, the California Supreme Court in the case of *De La Montanya v. De La Montanya,*[7] by a four to three decision concluded that the relationship between parent and child is a personal one, and, therefore, may not be acted upon in an in rem proceeding. Further, the court said that assuming there were such status as alleged, the service by publication did not bring it before the court, but merely gave the defendant fair notice of hearing. By way of a much controverted dictum, the majority stated that if the children were actually present within California, whether domiciled there or not, the court could award their custody.[8] The strong and more logical dissent would reach the same result as the instant case on one of two theories. First, even if the majority were right in its analysis of the relation, still a domiciliary may have his personal rights adjudicated while he is outside the state if he is given substituted service.[9] Second, the relationship is not a personal one, but one in rem which may be brought before the court under the particular facts by substituted service.

The matter is yet to be decided by the Missouri Supreme Court, and due to the death of cases directly in point, it might be well to examine cases involving variant factual situations of the same general problem. It seems clear that where the children are in the custody of the plaintiff who is domiciled within the state, the court has jurisdiction in a divorce action to award their custody though the defendant is served by publication.[10] In the converse situation, where the children are in the custody of the defendant who is domiciled outside of the state, the courts are in agreement with *Sanders v. Sanders* in denying power to award

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4. 151 Fla. 513, 149 So. 483 (1933).

5. Mo. REV. STAT. § 1519 (1939): "When a divorce shall be adjudged, the court shall make such order touching . . . the care, custody and maintenance of the children . . ."

6. Anderson v. Anderson, 74 W. Va. 124, 81 S.E. 706 (1914).

7. 112 Cal. 101, 44 Pac. 345 (1896), noted 16 CALIF. L. REV. 147 (1928), apparently overrules *In re* Newman's Estate, 75 Cal. 213, 16 Pac. 887 (1888), which is cited in the opinion of the instant case.

8. Criticized in Beale, *The Statute of the Child and the Conflict of Laws,* 1 U. of CHI. L. REV. 13, 22 (1933).

9. *Contra*: *supra* note 1.

10. Kaestner v. Kaestner, 228 Mo. App. 1043, 58 S.W. 2d 494 (1933); Hicks v. Hicks, 193 Ga. 446, 18 S.E. 2d 754 (1942); Wakefield v. Ives, 35 Iowa 238 (1872); McGuinness v. McGuinness, 72 N.J. Eq. 381, 68 Atl. 768 (1908); Matthews v. Matthews, 247 N.Y. 32, 159 N.E. 713 (1928).

the custody of the children.[11] However, were such defendant to enter a personal appearance, the decisions are not uniform as to whether the court would have jurisdiction to award the custody of the non-domiciled children. There is some authority to support the interpretation placed on *Laumeier v. Laumeier* by the instant case that such court would have jurisdiction.[12] The general rule elsewhere is contra, and is so recognized by the court in the instant case, which cites numerous cases announcing that only the state of domicile of the children should decide their custody. Some cases hold that the *power* is not conferred by the personal appearance of the non-domiciled parent to determine custody of non-domiciled children, thus placing the result on the basis of lack of jurisdiction rather than on policy.[13] Still another twist is presented where the defendant and children are domiciled within the state at the time of service of process, but subsequently leave and are domiciled elsewhere at the time of the decree. In such case, it has been held that the court retains jurisdiction to award the custody of the children.[14]

The above situations amply serve to illustrate the confusion in legal theory involved herein without going into all of the many nuances of the problem. Nevertheless, some conclusions may be drawn. First, domicile seems to be the most stressed basis of jurisdiction for awarding custody of the children. Second, a good deal of the confusion is caused by attempting to label the relationship of parent and child either as one in rem or as one in personam between the parents. Third, the relationship does not conform to one or the other theory, but possesses characteristics of both—it has a double aspect. The court in the instant case took cognizance of this double aspect when it very ably summed up the decisions as follows: "Jurisdiction to award custody is a function of the state wherein the children are domiciled, except where both parents are personally before the court seeking an adjudication, on the theory that their personal rights are involved. But the courts of this state have jurisdiction to deal with the status of children domiciled within the state by reason of the interest of the state as parens patriae. In such case, the res is within the state, and may be subjected to the jurisdiction of the court in the same manner as the status of marriage. Service by publication on defendant brought before the court the relation of the children to their parents."

NEDWYN R. NELKIN

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11. *Supra* note 2; Oxley v. Oxley, 159 F. 2d 10 (App. D.C. 1946); Long v. Long, 194 So. 190 (Ala. 1940); Boens v. Bennett, 20 Cal. App. 2d 477, 67 P. 2d 715 (1937); Weber v. Redding, 200 Ind. 448, 163 N.E. 269 (1928); Callahan v. Callahan, 296 Ky. 444, 177 S.W. 2d 565 (1944); Thrift v. Thrift, 54 Mont. 463, 171 Pac. 272 (1918); Payton v. Payton, 29 N.M. 618, 225 Pac. 576 (1924); May v. May, 233 App. Div. 519, 253 N.Y. Supp. 606 (1st Dep't 1931); 19 C.J. *Divorce*, § 740.

12. Stephens v. Stephens, 53 Idaho 427, 24 P. 2d 52 (1933); *supra* note 6.

13. Giachetti v. Giachetti, 157 Fla. 259, 25 So. 2d 658 (1946); *see* Person v. Person, 172 La. 740, 747, 135 So. 225, 227 (1931).

14. Roberts v. Roberts, 300 Ky. 454, 189 S.W. 2d 691 (1945).

INSURANCE—APPLICATION OF THE "MISREPRESENTATION" STATUTE TO "DELIVERY-IN-SOUND-HEALTH" CLAUSES IN LIFE INSURANCE

Hendricks v. National Life & Accident Ins. Co.[1]

A policy was issued on the life of the plaintiff's wife on December 17, 1945, containing a provision that it was to be ineffective if insured was not in sound health upon the date of issue. The wife died less than a month later of pulmonary tuberculosis and pneumonia. The records were held by the Kansas City Court of Appeals to show conclusively that the wife had not been in sound health at the time of the issuance of the policy and that such ill health was the cause of her death. In so holding they reversed the trial court.

The holding is one of the most recent to assert the application of the "material misrepresentation" statute[2] to the "issuance or delivery-in-sound-health" clause found in life insurance policies. The case itself is sound as having at the root of the decision the materiality aspect as set forth in Missouri Revised Statutes, 1939, Sec. 5843 which is supported by the uncontradicted hospital records, but the application of the statute relied on to sound-health clauses is not always as satisfactory and invites some discussion.

The purpose of Sec. 5843, like that of similar legislation in a majority of the states, is to abolish the harshness and unjustness of the doctrine of warranties as it had grown and was applied in that phase of the law dealing with insurance.[3] The aim, it has been stated, was to reduce the common law warranty to the effectiveness of a common law representation.[4] If this was the end sought, it must be said that such legislation has been successful only in part in Missouri. It has been successful to the extent that the integration of a statement or answer into the policy as a warranty no longer makes such statement conclusively material. Any issue pertaining to the materiality of a statement finds its answer in the contribution to the contingency by force of Sec. 5843.[5] Thus a sound-health clause

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1. 210 S.W. 2d 706 (Mo. App. 1948).

2. Mo. REV. STAT. § 5843 (1939), providing:
"No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

3. Lynch v. Prudential Insurance Co. of Am., 150 Mo. App. 461, 131 S.W. 145 (1910); Reed v. Travelers Ins. Co., 227 Mo. App. 1155, 60 S.W. 2d 59 (1933); 6 Mo. L. REV. 338 (1941) (an excellent review of the entire scope of the statute).

4. VANCE, INSURANCE § 114. (2d ed. 1930).

5. *Id.* § 110, the authoritative writer states: "The rule heretofore discussed as determining the materiality of concealments applies equally to representations; that is, any statement is material which in any wise induced the insurer to make a contract which he otherwise would not have made, or would have made only on different terms. . . . The Missouri statute goes still further, and, in effect provides that a representatation shall not be deemed material unless it contributes

is no grounds for avoidance of an insurance contract unless it be shown by the insurer that the existing ill health was the proximate cause of the death.[6] That such a clause is made a part of and incorporated into the policy is no longer a matter of concern in resolving an issue involving materiality.

But in another respect the fact that a clause pertaining to the good health of the applicant is or is not inserted into the policy become very important. This is in regard to the intent with which the applicant made the statement as to his existing health. If we may assume an absence of the issue of materiality, whether the applicant knew himself in poor uninsurable health was thus engaged in practicing a fraud on the insurer or whether he in good faith believed himself in sound health, although in fact he was not, will make no difference as to his ability to recover if the statement referring to his sound health is integrated into the policy.[7] But if there be no question as to materiality and such a statement by the applicant is *not* made a part of the contract, then all the difference between recovery and failure to recover depends on the insurer showing that the statement was made by the applicant with fraudulent intent.[8]

The applicant who with good reason actually believes himself in sound health is subject to a manifest injustice when the insurer is allowed to avoid its obligation subsequently by a showing that there was in fact an existing illness which ultimately contributed to the death.[9] By the insertion of a sound-health clause the applicant makes his actual state of health—not what he believes his health to be—an operative condition having the same harsh consequences as formerly arose from the commonly supposed abrogated doctrine of common law

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to the loss or damage for which indemnity is claimed." *But see* Chambers v. Metropolitan Life Ins. Co., 235 Mo. App. 884, 138 S.W. 2d 29 (1940) where the court in setting forth the Missouri rule for materiality says it is whether the insurer would have assumed the risk had he known the truth; Yancey v. Central Mutual Life Ins. Ass'n., 77 S.W. 2d 149 (Mo. App. 1934).

6. There is little if any conflict on this point. Cases in support are collected in 6 Mo. L. REV. 338 (1941), note 26. The leading case on this point is Kirk v. Metropolitan Life Ins. Co., 336 Mo. 765, 81 S.W. 2d 333 (1935).

7. Hicks v Metropolitan Life Ins. Co., 196 Mo. App. 162, 190 S.W. 661 (1916); Clark v. National Life & Accident Ins. Co., 288 S.W. 944 (Mo. App. 1926); Hammers v. National Life & Accident Ins. Co., 292 S.W. 1064 (Mo. App. 1927); Bohannon v. Ill. Bankers Life Ass'n., 223 Mo. App. 877, 20 S.W. 2d 950 (1929); Smiley v. John Hancock Mut. Life Ins. Co. of Boston, 52 S.W. 2d 12 (Mo. App. 1932); Kirk v. Metropolitan Life Ins. Co., 336 Mo. 765, 81 S.W. 2d 333 (1935); Williams v. Washington Nat. Ins. Co., 91 S.W. 2d 131 (Mo. App. 1936); Fields v. Metropolitan Life Ins. Co., 119 S.W. 2d 463 (Mo. App. 1938); Lipel v. General Am. Life Ins. Co., 192 S.W. 2d 871 (Mo. App. 1946).

8. Houston v. Metropolitan Life Ins. Co., 232 Mo. App. 195, 97 S.W. 2d 856 (1936); De Valpine v. New York Life Ins. Co., 105 S.W. 2d 977 (Mo. App. 1937); Doran v. John Hancock Mutual Life Ins. Co., 116 S.W. 2d 172 (Mo. App. 1938); Schuetzel v. Grand Aerie Fraternal Order of Eagles, 164 S.W. 2d 135 (Mo. App. 1942).

9. No good faith applicant who is insured under a policy containing a sound-health clause can be certain that his policy will not be defeated after death on the basis of the holdings cited in note 7 *supra.*

warranty. In this respect it is indeed difficult to reconcile the purpose of the "material misrepresentation" statute with the existing state of the holdings.[10]

Another factor which adds to the provocation of the situation is that it is the insurer's physician who qualifies the applicant as an insurable risk. It is the insurer then who often stands in the better position to ascertain the true health of the applicant rather than the applicant himself. This, it is proposed, is a lengthy stride in answer to an argument that unless the insurer is allowed to insert a sound-health clause it is denied a certain freedom in selecting its risk.[11]

One solution suggested to this undesirable state of the law has been the abolition of sound-health clauses.[12] The adoption of such a suggestion would have at least the merit of giving the bona fide applicant a vested insurance coverage at the time the insurer wrote the policy and took the premium payment, whatever might be the other consequences.

Perhaps another solution would be possible through judicial recognition of the rather obvious fact that when an applicant for insurance states himself to be in good health he must be understood to mean and to intend only that he is in good health *as far as he knows.* It will be noticed that this is the effect of Missouri law where the applicant's statement is not a part of the policy, but to make it Missouri law where such is a part of the policy would involve overruling a long line of cases.[13]

JOE BEAVERS

LIBEL—PUBLICATION IN WILL—LIABILITY OF EXECUTOR OR ESTATE

Carver v. Morrow[1]

The principal case adds another decision to those few deciding whether or not an action may be sustained against the estate or the executor of the estate

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10. Such an attempt is made in 8 Mo. L. REV. 137, 139 (1943). In Kirk v. Metropolitan Life Ins. Co., 336 Mo. 765, 81 SW. 2d 333 (1935) the court reasons that the premium was fixed on the basis that the insurer agreed to assume liability only upon condition that the insured should be, not merely believe himself to be, in sound health at the time of the issue. Compare the reasoning of the federal court in Security Life Ins. Co. of Am. v. Brimmer, 36 F. 2d 176 (C.C.A. 8th 1929) *cert. denied* 50 Sup. Ct. 350 (1929) that "We are of the opinion that this statute (Sec. 5843) does not purport to create any defense to a suit upon an insurance policy, but that it destroys all defenses based upon misrepresentations concerning matters which do not contribute to the death of the assured, whether such statements be warranties or representations."

11. 8 Mo. L. REV. 137 (1943).

12. 12 Mo. L. REV. 97 (1947); 8 WIS. L. REV. 377 (1932) (note on the actual application of such a statute).

13. For a concise but clear presentation of the issue involved in this note and the practical application of it in Missouri read TRUSTY, CONSTRUCTION AND REVIEWING INSTRUCTIONS § 37 (Mo. ed. 1941). The most informative opinions will be found in De Valpine v. New York Life Ins. Co., 105 S.W. 2d 977 (Mo. App. 1937), *second appeal,* 131 S.W. 2d 349 (Mo. App. 1939).

1. 48 S.E. 2d 814 (S.C. 1948).

of one whose will contains a libel. The South Carolina Supreme Court followed the reasoning of the Georgia court in *Citizens' & Southern National Bank v. Hendricks*,[2] holding that where the alleged libeleous matter in the will was not published in testator's lifetime, the estate was not liable for the publication made by probating the will, since the executor was not the testator's agent for the purpose of consummating the tort but was a creature or agency of the law.

Of the four other cases involving this question two[3] in what each thought was a case of first impression allowed recovery on the theory that the common law maxim, *actio personalis moritur cum persona*,[4] did not apply as no cause of action existed before the testator's death, and predicated liability of the estate on an agency theory. Another case[5] completely ignoring the decisions of the previous cases denied liability on the theory that the alleged libel was privileged as part of a judicial proceeding. A New York case[6] allowed recovery on the basis that probate of the will constituted a publication and the legislature by statute[7] had provided that an action for libel should survive the tortfeasor's death.[8]

So of the six cases involving this problem in the United States, none allow recovery against the executor personally, three cases allow recovery against the testator's estate, and three allow no recovery, but the result in each case is reached through the application of more than one theory. None of the theories seems completely sound and the reasoning of the courts in most of the cases has been severly criticized.

Authorities[9] and all the cases seem to agree that libel in a will is unusually onerous. Since the will is a solemn instrument executed with thought and care the very nature of the act precludes the possibility that the testator did not mean to injure the person libelled. Also the will is a permanent record and will be perused actually by some and constructively by many. The libel will be conspicuous for years to come. For these reasons it would seem that common justice should give some sort of relief to the person so maliciously defamed. The problem has been upon what legal basis this can be done.

One of the greatest obstacles to recovery has been the common law maxim that a personal injury dies with the person, although a few courts have gotten around this difficulty.[10] In *Harris v. Nashville Trust Co.*,[11] the court seemed to think this old maxim out of date and inapplicable in modern day law. This view is further strengthened by the passage of statutes in some states providing for the

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2. 176 Ga. 692, 168 S.E. 313 (1933).
3. Gallagher's Estate, 10 Pa. Dist. 733 (1901); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584 (1914).
4. A personal action dies with the person.
5. Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934).
6. Brown v. Mack, 185 Misc. 368, 56 N.Y.S. 2d 910 (Sup. Ct. 1945).
7. N. Y. DECEDENT ESTATE LAW § 118 (1939).
8. *Supra*, note 4.
9. PROSSER ON TORTS 813-814 (1941).
10. *Supra*, note 3.
11. 128 Tenn. 537, 162 S.W. 584 (1914), *supra*, note 3.

survival of personal actions.[12] However, most statutes are like the Missouri statute, and allow for recovery in many personal actions after death but specifically except libel[13] and some other actions. In such cases the courts usually say the common law rule is still in effect as to those personal actions excluded.[14] Although many writers and cases seem to think allowing recovery is directly in conflict with the common law maxim,[15] others think it has no application and intimate that the maxim has outlived its usefulness anyway.[16] Allowing recovery on the theory that the executor is the agent of the testator for the purpose of publication has been severely criticized on several grounds.[17] Death terminates an agency; it does not create one. There was never an agency either during testator's life or after his death. The executor is a trustee of the estate, an officer of the probate court and responsible to it. He holds legal title to property himself and acts for himself as principal. His duties, rights and obligations are wholly incompatible with the theory of agency.

Another solution to this problem would be to follow the English view and allow the courts to omit from probate libelous or scandalous passages in the will.[18] Several criticisms of this solution can be made however. The libelous matter may be dispositive in nature and, if stricken, change the intended disposition of the testator's property. This is in direct conflict wth our policy in regard to wills and the courts would not have this power. Also, publication to a limited extent is necessary before a decision can be reached as to what should be deleted. And there is some doubt whether even non-dispositive matter can be deleted by the probate courts,[19] although a few American cases have done so.[20]

In conclusion it seems that justice and fair play demand that there be some protection from the great harm which can result from libel in a will. The best solution in view of the American cases denying courts the right to strike out or

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12. *Supra,* note 7.

13. Mo. Rev. Stat. §§ 98-99 (1939); Ohio Gen. Code § 11397 (Page, 1926); Penn. Stat. § 8555 (West, 1920).

14. Toomey v. Wells, 218 Mo. App. 534, 280 S.W. 441 (1926); More v. Bennett, 65 Barb. 338 (N.Y. 1873); Bryant v. American Surety Co., 69 Minn. 30, 71 N.W. 826 (1897).

15. See 48 Harv. L. Rev. 1027 (1935). This result is questionable, however, since at common law a tort action cannot accrue when the wrongdoer is dead. See 10 N.C.L. Rev. 88 (1931); 27 Harv. L. Rev. 666 (1914); 12 Mich. L. Rev. 489 (1914); 23 Yale L. J. 534 (1914).

16. See 62 U. of Pa. L. Rev. 643 (1914) (Harris v. Nashville Trust Co.); 23 Yale L. J. 534 (1914); 19 A.B.A.J. 301 (1933) (Gallagher's Estate). See also Pollock, Torts p. 64 (13th ed. 1929).

17. See 62 U. of Pa. L. Rev. 643 (1914); 12 Mich. L. Rev. 489 (1914); 23 Yale L. J. 534 (1914).

18. Gatley, Libel and Slander 458, n. 15 (2d ed. 1929); 2 Redfield, The Law of Wills 43 (3rd ed. 1866); In the Goods of Honywood [1871] L.R. 2 P. & D. 251, 252.

19. See Woodruff v. Hundley, 127 Ala. 640, 29 So. 98 (1900); In re Pforr's Estate, 144 Cal. 121, 77 Pac. 825 (1904); In re Meyer, 72 Misc. 566, 131 N.Y. Supp. (Surr. Ct. 1911).

20. In re Bomar's Will, 44 N.Y. St. Rep. 304, 18 N.Y. Supp. 214 (Surr. Ct. 1892); In re Speiden's Estate, 128 Misc. 899, 221 N.Y. Supp. 223 (Surr. Ct. 1926).

delete libelous portions of the will and those denying recovery against the estate would seem to be to let the legislature give the courts authority to expunge from the will any libelous matter not dispositive and allow recovery against the estate for libelous matter which is dispositive or which is published before deletion by the court.

GENE S. MARTIN

NEGLIGENCE—NO DUTY TO LOOKOUT OWED TO PERSONS SITTING ON PIER OF RAILWAY BRIDGE

Hoops v. Thompson[1]

Respondents while sitting on a pier of a bridge on appellant's railway were scalded and burned by the emission of hot water and steam from one of appellant's engines. There was abundance of testimony that for a number of years many persons used the bridge to walk from one side of the river to the other. There was some evidence that at times persons sat upon the piers at the side of the bridge. The railroad maintained warning signs at each end of the bridge stating that "trespassing upon the tracks, bridge and right-of-way is positively forbidden," but there was testimony that the sign was not up at the east end of the bridge on the day respondents were injured. Respondents contended that the emission of steam at this point was negligence on appellant's part and introduced in evidence a rule of appellant's stating that "blowing of locomotive boilers not equipped with blow-off cock mufflers is prohibited" at specified places, including bridges. They also contended, although there was no proof that the trainmen actually saw respondents on the pier, since the engineer testified that he always did look for persons on the bridge and the only reason he did not see respondents was because they were not there, that he is held to have seen all that he should have seen for "to look is to see." Appellant, on the other hand, contended that although the evidence of user of the bridge by pedestrians was sufficient to cast upon the trainmen the duty to keep a look-out for persons on the track, there was no duty to look for persons sitting on the piers as such persons were trespassers.

The lower court gave judgment for the plaintiff which was reversed on appeal. The upper court held that although the evidence was sufficient to require the railway to keep a look-out for pedestrians crossing the bridge, the testimony did not show such open and continuous user and for such length of time as to apprise the railroad employees that they should expect persons to be upon the pier. Therefore, respondents were trespassers on the pier and as such no duty was owed them unless it was proved that engineer actually saw them. Conceding that such could be done by circumstantial evidence, it was not so done in this case. The contention of respondent's that "to look is to see" was rebutted by respondent's own pictorial evidence and the concomitant circumstances, *i.e.* that it was night, the

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1. 212 S.W. 2d 730 (Mo. 1948).

position of the pier and lack of proof that the headlight would have illuminated the spot where respondents were sitting.

The law in Missouri concerning the duty owed by a railroad to trespassers upon its track is well established. It is that a railroad generally has the exclusive right to the use of its track[2] and no duty is owed to the trespasser except to refrain from willfully and wantonly injuring him after he is seen.[3] "Succinctly stated, this doctrine is that a railroad company is not liable for injury to a trespasser upon its track or grounds, if no duty or care in his favor is omitted, after becoming aware of his danger, or unless its servant could have avoided injuring him by the exercise of reasonable care, after discovering his exposed position. It follows that it will not be enough to charge the railroad company with liability under this rule that the trespasser *might have been* seen by the engineer in time to have avoided injuring him, but it must be made to appear that he *was* so seen."[4]

There are two accepted bases for imposing liability on a railroad for injuries to a seen or known trespasser known as the Michigan and Massachusetts rules. Under the Michigan rule the railroad is liable for negligence after the trespasser is known, while under the Massachusetts rule it is liable only for willful and wanton misconduct directed toward the injured party.[5] Missouri, as does a majority of the jurisdictions, uses the language of the Massachusetts rule but arrives at the conclusion that any negligence constitutes willful and wanton misconduct.[6]

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2. Isabel v. Hanibal & St. J. R.R., 60 Mo. 475 (1875); Burde v. Chicago, B. & Q. Ry., 123 Mo. App. 629, 100 S.W. 509 (1907); Ervin v. St. Louis, I. M. & S. Ry., 158 Mo. App. 1, 139 S.W. 498 (1911).

3. Shaw v. Missouri Pac. Ry., 104 Mo. 648, 16 S.W. 832 (1891); Voorhees v. Chicago, R. I. & P. Ry., 325 Mo. 835, 30 S.W. 2d 22, 70 A.L.R. 1106 (1930); Heiter v. East St. Louis Connecting Ry., 53 Mo. App. 331 (1893); Fox v. City of Joplin, 297 S.W. 449 (Mo. App. 1927).

4. THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE § 1709 (2d ed. 1901).

5. For an interesting discussion of these rules see Peaslee, *Duty to Seen Trespassers*, 27 HARV. L. REV. 403 (1914).

6. James N. Everett v. St. Louis & S. F. R.R., 214 Mo. 54, 85, 112 S.W. 486, 494 (1908) (". . .it is wholly immaterial whether they recklessly and wantonly ran the engine against her or not. That doctrine only applies to cases where the injured party was a trespasser upon the track at the time of the injury, and at a place where the agents and servants in charge of the train had no notice or reason to apprehend that any person would be present at the place where the injury occurred. The mere fact that the petition charges that the injury was willfully and wantonly caused by the agents and servants in charge of the train will not prevent a recovery, provided the evidence shows that the injury was the result of their negligence and carelessness. The charge of willfullness is sustained by proof of negligence.") *Accord*, Graham v. Pacific R.R., 66 Mo. 536 (1877); Neilon v. Kansas City, St.J. & C. B. Ry., 85 Mo. 599 (1885); Owens v. Kansas City, St.J. & C. B. Ry., 95 Mo. 169, 180, 8 S.W. 350 (1888); Engelking v. Kansas City, Ft.S. & M. R.R., 187 Mo. 158, 86 S.W. 89 (1905); Frye v. St. Louis, I.M. & S. Ry., 200 Mo. 377, 98 S.W. 566 (1906); Lange v. Missouri Pac. Ry., 208 Mo. 458, 106 S.W. 660 (1907); Cole v. Metropolitan St. Ry., 121 Mo. App. 605, 612, 97 S.W. 555 (1906).

Although a majority of jurisdictions holds with Missouri that there is no duty of lookout owed to trespassers, in a number of jurisdictions it is said that a lookout is required for any and all kinds of obstructions on the track, including trespassers, and in the absence of contributory negligence a failure to keep a lookout renders the railroad liable for a resulting injury.[7]

An outstanding exception to the usual rule is that where and when persons may reasonably be expected to be on the railroad premises, the company employees have a duty of keeping an active lookout for such persons, including trespassers.[8] It will be noted that under circumstances like this the trespasser is considered as having become a licensee[9] because of what might be termed the tacit consent of the railroad. Eminent authority has pointed out the fallacy of implying a license in the case of tolerated intruders to whom no semblance of permission has been given.[10] "Many if not the majority of jurisdictions hold that, if there has been intrusion sufficiently habitual to make its repetition not merely possible but probable, upon a definite area by a class sufficiently numerous to make the danger substantial, the public interest in the preservation of its most valuable asset, the life and limbs of its members, requires the owner to forego his privilege to consider only the safety of those to whom he throws open his land and demands that he shall refrain from doing, without notice, acts outside of his ordinary and normal use of his land, which create new and concealed dangers thereon. This duty may be similar or identical in extent to that owed to persons actually permitted to come on the premises for their own purposes. But it does not arise from the owner's consent but from the probability of injury so likely and so serious that public policy requires that it be prevented even at the cost of trenching upon the traditional privileges of landowners."[11]

This rule of "waiver" of the right to expect a clear track has been confined in Missouri to places of limited extent such as are for access to shops, mines, industries and work camps, or outside of cities or concentrations of population.[12]

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7. 52 C.J. 579, § 2141 (b); St. Louis, A. & T. Ry. v. Sharp, 3 Tex. App. Civ. Cas. (Willson) 394 (1887) (plaintiff injured by emission of steam).

8. RESTATEMENT, TORTS §§ 329, 330 and 341 (1934).

9. Easley v. Missouri Pac. Ry., 113 Mo. 236, 20 S.W. 1073 (1892) (If a railroad company habitually permits the public to use its track passways at places other than public crossings, such persons become licensees, to whom the railroad owes a higher degree of care to avoid injury that it owes to a mere trespasser.) *Accord,* Stevens v. Missouri Pac. Ry., 151 Mo. App. 300, 131 S.W. 712 (1910); Ervin v. St. Louis, I. M. & St. Ry., 158 Mo. App. 1, 139 S.W. 498 (1911); Featherstone v. Kansas City Terminal Ry., 174 Mo. App. 664, 161 S.W. 284 (1913); 52 C.J. 543, § 2112.

10. BOHLEN, STUDIES IN TORTS 168 (1926).

11. *Id.* at 179; RESTATEMENT, TORTS § 334 (1934) ("A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.")

12. English v. Wabash Ry., 341 Mo. 550, 108 S.W. 2d 51 (1937), noted in 3 Mo. L. REV. 423 (1938); Cochran v. Thompson, 347 Mo. 649, 148 S.W. 2d 532 (1941), noted in 7 Mo. L. REV. 320 (1942).

It is further restricted to the place of user and does not extend to other portions of the railroad property.[13] It is generally considered to be a question for the jury whether the injured party was in a place where the servants of the railroad should have expected to find him.[14] In order to show that the public has impliedly been given a license by a railroad company to use its track as a passway, it is necessary to show the public use itself, the knowledge of the company thereof, and its consent thereto. The latter elements ordinarily cannot be established by direct proof, but must be inferred, if they exist, from other facts, as, for example, the long acquiescence of the company in the open, known, free, continuous, and extensive use of its track by the public as a footway.[15] In such case, however, it is only necessary to bring knowledge of such use home to the railroad company. It may or may not be notorious.[16]

If, because of constant user of the railroad property by the public, the railroad owes a duty of lookout, and there is ample evidence that there was nothing to obstruct the view of the railroad's servants, such servants are held to have seen that which they could and should have seen.[17] In the instant case, however, it was established that there was no duty to look for respondents on the pier and it was not evident that the engineer could have seen them at that precise point and under the circumstances.[18]

JOHN W. INGLISH

13. Crossno v. Terminal Ry. Ass'n of St. Louis, 333 Mo. 733, 62 S.W. 2d 1092 (1933); Shelton v. Metropolitan St. Ry.. 167 Mo. App. 404, 151 S.W. 493 (1912).

14. Hufft v. St. Louis & S.F. R.R., 222 Mo. 286, 121 S.W. 120 (1909); Friemonth v. Kansas City, St. L. & C. R.R., 180 S.W. 1063 (Mo. App. 1915).

15. Rice v. Jefferson City Bridge & Transit Co., 216 S.W. 746 (Mo. 1919). *Contra,* McCoy's Adm'r. v. Williamson & P. C. R. R., 174 Ky. 186, 192 S.W. 45 (1917) ". . .it may now be stated as the established rule in this state that members of the public who use a railroad bridge for their own convenience are trespassers, and that their status as such cannot be changed to that of licensees by the frequency of extent of such trespassing."

16. Rice v. Jefferson City Bridge & Transit Co., *supra* note 15.

17. Eppstein v. Missouri Pac. Ry., 197 Mo. 720, 94 S.W. 967 (1906); Beck v. Chicago R.I. & P. Ry., 327 Mo. 658, 37 S.W. 2d 917 (1931); Whiteaker v. Missouri Pac. R.R., 28 S.W. 2d 680 (Mo. App. 1930); Nicholson v. St. Louis & S.F. Ry., 51 S.W. 2d 217 (Mo. App. 1932).

18. In Missouri this duty owed to known trespassers and tolerated intruders or "bare" licensees is closely linked up with the humanitarian doctrine. However, under the facts of this case there was no basis for the application of that doctrine here. See McCleary, *The Bases of the Humanitarian Doctrine Reexamined,* 5 Mo. L. REV. 56 (1940); see Woodson, J. dissenting in Murphy v. Wabash R.R., 228 Mo. 56, 128 S.W. 481 (1910), in which he presents some startling statistics showing the appalling number of trespassers killed or injured every year upon railroad property and especially the great frequency of such casualties in Missouri which he suggests is due to what he regards as the undue consideration which Missouri courts require railroads to show to such trespassers and to the humanitarian doctrine. "This rule is of recent origin and is a judge made law, pure and simple, and, like most of them, results in more evil than good. For every meritorious case compensated for by it 50 others are induced thereby to go into places of danger, and are injured as a result thereof."; or see Bohlen, *The Duty of A Landowner Toward Those Entering His Premises of Their Own Right,* 69 U. OF PA. L. REV. 237 at p. 252 (1921).

NEGLIGENCE—SOLE CAUSE AS A DEFENSE

Beahan v. St. Louis Public Service Co.[1]

The driver for the defendant company, a common carrier, stopped the bus at a space reserved for such stops. The plaintiff, a passenger, in alighting from the bus stepped into a broken spot in the sidewalk variously estimated to be from an inch to two and one-half inches deep at its deepest point. She fell and sustained the injuries for which she brought this action. The evidence showed that the plaintiff had never previously alighted at this particular stop and that she did not actually see the broken area until after the fall. It was also shown that the driver had no knowledge of the defective walk until the time of injury, and the jury at the trial made no finding that he should be held to have such knowledge. The plaintiff relied upon the act of the driver in stopping the bus so as to deposit passengers at the uneven spot in the sidewalk and upon his failure to warn her of that condition as being such negligence as would permit recovery. Aside from an admission of the degree of care required of it as a common carrier, the defendant company entered a general denial and raised no issue as to contributory negligence by the plaintiff. The jury returned a verdict in favor of the defendant. On appeal to the St. Louis Court of Appeals, the plaintiff contended that the trial court erred in allowing the defendant to submit what is commonly referred to as a "sole cause" instruction in which it asked that the jury might find the negligence of the plaintiff to be the sole cause of the fall.[2]

BENNICK, C., writing the majority opinion for the St. Louis Court of Appeals held that it was impossible for the plaintiff to be negligent in stepping from the bus, as the defendant company contended, unless the defendant company was also negligent. "In other words, the evidence could not consistently support a finding that plaintiff was guilty of negligence without at the same time requiring a finding that the driver had been guilty of concurring negligence. This for the

1. 213 S.W. 2d 253 (Mo. App. 1948).

2. The instruction submitted by the defendant and complained of by the plaintiff is as follows: "The Court instructs the jury that if you find and believe from the evidence that plaintiff alighted from the motorbus of the defendant at the time and place mentioned in the evidence and that she stepped into a hole or crack or uneven place in the sidewalk, if you so find, and if you find and believe from the evidence that plaintiff saw or, by the exercise of ordinary care, could have seen said hole or crack or uneven place in said sidewalk, if you so find, in time to have avoided stepping thereon, if you so find, and if you further find and believe from the evidence that the act of plaintiff in so doing was negligence on her part, if you so find, and if you further find and believe from the evidence that her negligence, if you find that she was negligent, was the sole cause of her fall and whatever injuries, if any, plaintiff sustained on the occasion in question, and that such injuries, if any, were not due to any negligence on the part of the operator of the motorbus in any of the particulars set out in other instructions herein, then, in that event, plaintiff is not entitled to recover and your verdict must be in favor of the defendant." That this instruction is in proper form, Johnson v. Dawidoff, 352 Mo. 343, 177 S.W. 2d 467 (1944); Kimbrough v. Chervitz, 353 Mo. 1154, 186 S.W. 2d 461 (1945); Steffen v. Ritter, 214 S.W. 2d 28 (Mo. 1948).

reason that if plaintiff was to be held guilty of negligence, it was only so because the driver's negligence had created the dangerous situation with which she was confronted. It follows, therefore, that the negligence on the plaintiff's part, as submitted in the instruction, could at most have amounted to no more than contributory negligence, which defendant had failed to plead as a defense."[3] ANDERSON, J., in the dissent recognizes that the situation of the parties was different, and different inferences could be drawn with respect to the negligence or lack of negligence of either in failing to discover the alleged defect. He held a jury might well find under the facts in evidence that the operator of the bus had a right to assume that a person stepping from the bus to the sidewalk at this place would, in the exercise of ordinary care, observe the defect and avoid it, and this would call for a finding that defendant was not negligent.[4]

The slightest discussion of "sole cause" or a comprehensive understanding of it in the cases necessitates a clear conception of the distinction between negligence and causation as used in tort cases. Elementary though it may be, this distinction has not always been adequately presented in the opinions and has been the source of no small amount of confusion.[5]

Negligence may be said to exist if there is a duty, *i.e.*, whether one could reasonably anticipate or foresee as of the time of the act some risk of injury to a particular person or one in that class, and a breach of that duty in that the person charged failed to act as a reasonable man would have acted under the circumstances.[6] Legal or proximate causation, on the other hand, presents a narrower concept. The outlook there applied is as of a time not only after the alleged cause but also following the event. Legal cause may be said to be present when it is possible to view the sequence of events in retrospect and find that this particular injury may not be considered too unusual or extraordinary as a consequence of the defendant's negligent conduct so as to be considered unreasonable in making the defendant compensate the plaintiff for the harm.[7]

It is a basic concept in determining tort liability that an injured person should not be in a position to require another to pay for his injuries where these were the consequences entirely of his own act or acts. It is this fundamental concept on which the defense of "sole cause" is justifiable. Contrary to the firm establishment of the concept, however, the defense of "sole cause" is relatively new. The first Missouri case to recognize a "sole cause" instruction based on the defendant's

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3. 213 S.W. 2d 253, 257 (Mo. App. 1948).
4. *Id.* at 258.
5. Green, *The Negligence Issue*, 37 YALE L. J. 1029 (1928).
6. This is the view of Mr. Justice Cardozo in the leading case of Palsgraf v. Long Island R.R. 248 N.Y. 339, 162 N.E. 99 (1928), 59 A.L.R. 1253 (1929), and a view which is most recently affirmed in Panke v. Shannon, 212 S.W. 2d 792 (Mo. 1948).
7. RESTATEMENT, TORTS §§ 440-453 (1934); the leading case applying the "forseeability test" to determine causation is Milwaukee & St. P. Ry. v. Kellogg, 94 U.S. 469 (1876); cases are collected in note 155 A.L.R. 157 (1945).

evidence was *Borgstede v. Walbauer* decided in 1935.[8] From this case originated the later affirmed requirement that a defendant must present his "sole cause" instruction on a hypothesized state of facts as supported by his evidence.[9] This requirement persists even though a "sole cause" defense may be raised under a general denial and, as to pleading at least, is not an affirmative defense. The reasoning in support of hypothesization of facts is that a jury will not be as likely to find what is in fact merely contributory negligence on the part of the plaintiff to be his sole negligence, or, without proper reason, impute the negligence of a third party to the plaintiff as it would be if the instruction were "the mere statement of an abstract legal proposition." This result occurred because of the recognition of the availability of sole cause as a defense to the humanitarian doctrine where contributory negligence must be a foreign issue. The use of the "sole cause" instruction overcomes some of the advantages granted the plaintiff under the humanitarian rule by broadening the defendant's defense and not limiting him to a converse humanitarian instruction.[10] The requirement of demanding a complete hypothesization of the facts as supported by the evidence in the "sole cause" instruction may well be criticized as being without reason and going beyond the purpose which justifies any hypothesization.[11]

The *Borgstede* case presented a set of facts where the acts of the plaintiff made it impossible for the defendant by the exercise of the highest degree of care to avoid injuring the plaintiff, who in turn relied on the humanitarian doctrine.[12]

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8. 337 Mo. 1205, 88 S.W. 2d 373 (1935).

9. McGrath v. Meyers, 341 Mo. 412, 107 S.W. 2d 792 (1937); Reiling v. Russell, 345 Mo. 517, 134 S.W. 2d 33 (1939); Long v. Mild, 347 Mo. 1002, 149 S.W. 2d 853 (1941); Hopkins v. Highland Dairy Farms Co., 348 Mo. 1158, 159 S.W. 2d 254 (1941); Shields v. Keller, 348 Mo. 326, 153 S.W. 2d 60 (1941); Stanich v. Western Union Tel. Co., 348 Mo. 188, 153 S.W. 2d 54 (1941); Semar v. Kelly, 352 Mo. 157, 176 S.W. 2d 289 (1943); Kimbrough v. Chervitz, 353 Mo. 1154, 186 S.W. 2d 461 (1945).

10. Doherty v. St. Louis Butter Co., 339 Mo. 996, 98 S.W. 2d 742 (1936).

11. Hyde, C, (now Judge) in writing the opinion in Long v. Mild, 347 Mo. 1002, 1014, 149 S.W. 2d 853, 860 (1941) said, "Of course as an abstract legal proposition, it is correct to say that a plaintiff cannot recover from the defendant if his injuries resulted from his own sole negligence or the sole negligence of a third party . . . However, the mere statement of such an abstract legal proposition does not make a proper jury instruction. As this court said of such an instruction, 'the cryptic way in which this information was conveyed to the jury was calculated, not to enlighten, but to confuse.' Roland v. St. L.-S. F. R. Co., Mo. Sup., 284 S.W. 141, 145." With this compare Dean McCleary's statement appearing in *Sole Cause in Negligence Cases,* 10 Mo. L. REV. 1, 27 (1945) that "In an effort to lay down requirements in complicated situations to prevent the jury from being 'mystified,' it seems that now both the jury and lawyers are 'mystified,' leaving the appellate court alone in possession of the secret." In Long v. Mild, *supra,* it is suggested that the defendant could have submitted a better hypothesization had he stated that his truck was *"completely* off the highway" rather than "the truck was off the highway." (italics added).

12. The plaintiff was crossing a street and according to the defendant's evidence and hypothesized facts submitted in his "sole cause" instruction the plaintiff walked into the side of his movng automobile. The plaintiff brought

The suggestion has been made that the instruction submitted there by the defendant was subject to two constructions. First, the injury would have occurred regardless of the presence or absence of the defendant's negligence and for this reason the real issue was one of *causation* by the plaintiff. Second, since the defendant had no chance to avoid the injury, a jury could not possibly find him negligent and therefore the injury necessarily was the result of the plaintiff's own *negligence.*[13] Subsequent opinions allowing "sole cause" to be pleaded as an effective defense did not accept one or the other of the views, either of which would have relieved the defendant of liability, but instead demanded that the instructions be phrased in the conjunctive so that in order to frame a valid "sole cause" instruction the defense lawyer now finds it necessary to show not only that the defendant did not contribute to the cause of the injury, but also that he was in no way negligent and that the sole negligence was that of the plaintiff or a third person.[14]

The indiscriminate use of "sole cause" to include not only a defense based on causation but also a defense based on negligence, and the requirement of hypothesization of the instruction are the two major causes of reversals in the appellate courts in cases where the opinion turns on the propriety of the instruction submitted by the defense. The result has been a demanding technicality in drafting the "sole cause" instruction where there is apparently no need for greater technicality than is required in other instructions embodying a defense based on the concept that the plaintiff should not recover from another for injury resulting from his own act or the acts of a third person.[15]

Assuming the issue to be one of negligence on the part of the defendant company in the instant case it appears that the majority opinion requires more than a carrier's duty to use the highest degree of care, which like ordinary negligence must have some limitation based on a reasonable man standard, and instead makes the defendant bus company virtually an insurer of its passengers. The dissenting opinion it would seem has a firmer foundation in the recognition that the presence or absence of negligence must depend primarily on the position or

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the action based on the humanitarian doctrine, but by the defendant's evidence there was no way the defendant could have avoided the accident even had he seen or had he been held to have seen the plaintiff without endangering the lives of others.

13. Ball, *The Vanished Sole Cause Instruction,* 13 Mo. B.J. 50 (1942).

14. See the instruction in the instant case, *supra* note 2; Fenton v. Hart, 73 S.W. 2d 1034 (Mo. App. 1934); Long v. Mild, 347 Mo. 1002, 149 S.W. 2d 853 (1941); Hopkins v. Highland Dairy Farms Co., 348 Mo. 1158, 159 S.W. 2d 254 (1941); Semar v. Kelly, 352 Mo. 157, 176 S.W. 2d 289 (1943); Steffen v. Ritter, 214 S.W. 2d 28 (Mo. 1948).

15. For suggested solutions to the existing situation see Dean McCleary, *Sole Cause in Negligence Cases,* 10 Mo. L. REV. 1, 27 (1945) *et seq.;* Farley, *Instructions to Juries—Their Role in the Judicial Process,* 42 YALE L. J. 194 (1932) suggests that the purpose of an instruction is not so much to guide the jurors in the law as it is to vest control of the case in the appellate court.

situation of the party charged, and this is true regardless of the degree of care imposed by law.

To the writer the real issue in the principal case is the question of whether on the facts the negligence of the plaintiff in not looking at the sidewalk when she stepped from the bus may be an intervening or what is truly a sole cause of the injury. This could not be considered contributory negligence and an instruction on contributory negligence given since the defendant did not plead that affirmative defense. As a matter of substantive tort law, assuming defendant to be negligent, the chain of causation between the defendant's negligence and the plaintiff's injury is broken when an independent act of the plaintiff, not within the reasonable contemplation of the defendant and not the result of the stimulus of the situation created by the defendant's conduct, intervenes to bring about the injury.[16] Under such a state of facts the negligence of the defendant becomes the remote cause and ceases to be the proximate or legal cause of the injury. The decision could not rest on this simple declaration of law because under the existing Missouri requirement it is impossible for the defense attorney to draft an instruction acceptable to the supreme court setting forth an intervening or sole cause resulting from an act by the plaintiff unless he also include the broader and more difficultly proven absence of negligence by the defendant and presence of "sole negligence" by the plaintiff. Obviously it is the latter question of the defendant's negligence alone which determines the validity or invalidity of the alleged sole cause defense in the Missouri cases.

JOE BEAVERS

TORTS—LIABILITY OF INDIVIDUAL FOR ARREST MADE BY POLICE

Snider v. Wimberly[1]

When defendant stopped at his electrical service and supply company in Kansas City, Missouri, at about 11:30 p.m. January 23, 1945, he discovered a man in his office. The intruder rushed at him, struck him, and escaped by going down on an elevator and out a basement window. The defendant called the police and a business associate. The only light in the building at the time of the break-in was from external sources (street light and a near-by neon sign). The defendant stated he could not identify the intruder. A Kansas City police sergeant and an officer of the burglary bureau took charge of the investigation. From the method of escape, it was deduced that the prowler was familiar with the premises. The

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16. AM. JUR., *Negligence*, § 76 (1941); Beal, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 651 (1920), clearly presents the rule for intervening cause thus; ". . . where the defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer, if some new force later combines with this condition to create harm, the result is remote from defendant's act."

1. 209 S.W. 2d 239 (Mo. 1948).

defendant imparted to the police the names of several former employees whom he thought to be of approximately the same height, size and appearance as the prowler. Plaintiff, a former employee, was among those mentioned. At the request of the police the highway patrol went to plaintiff's apartment in Excelsior Springs, Missouri at about 3:00 a.m. on January 24th. There, they questioned the plaintiff, examined his hands and his automobile and then checked with a friend with whom plaintiff claimed to have been visiting the night of the 23rd. At 9:30 p.m. the same day, plaintiff was arrested, put through the police "line-up" and kept in jail about twenty-four hours. Before his release, the plaintiff gave information to the police which led to the arrest and conviction of another former employee of the defendant. A typewritten police report which was submitted as evidence over the objection of the defendant, contained a statement made by the defendant that he thought the prowler was an ex-employee by the name of the plaintiff who lived in Excelsior Springs, Missouri. In an action for false imprisonment, judgment was awarded for $10,000 ($5,000 actual and $5,000 punitive). On appeal to the supreme court this judgment was reversed.

Counsel for the plaintiff seem to have based their cause of action on the actual jailing of the plaintiff, rather than the arrest, since the action was one in tort for false imprisonment and not for the tort of false arrest. The distinction between these two torts is rather a shadowy one, and the text writers and judges have frequently used the term interchangeably.[2] In this decision, however, the court consistently used the term "false arrest," stressing the manifestations of the defendant leading up to the arrest. Throughout the opinion the court treated the cause of action as one for false or illegal arrest. There would appear to be a valid basis for distinguishing these causes of action, on the authority of Missouri cases holding that in an action for "false imprisonment" there must be a "direct restraint" of the plaintiff's liberty by the defendant's action,[3] while the test announced as giving rise to a cause of action for false arrest where the arrest is not made by the defendant or in his presence is whether he ". . . directed, advised, countenanced, encouraged or instigated it."[4] The facts in the principal case were tested by this criteria. Thus it appears that where a person is taken into custody unlawfully due to action of the defendant, the tort is one of "false arrest," but where the defendant directly takes part in the incarceration the cause of action should be brought for "false imprisonment."

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2. Gariety v. Fleming, 121 Kan. 42, 245 Pac. 1054 (1926); Coffman v. Shell Petroleum Corp., 228 Mo. App. 727, 71 S.W. 2d 97 (1934); Richardson v. Empire Trust Co., 230 Mo. App. 580, 94 S.W. 2d 966 (1936); S. H. Kress & Co. v. Bradshaw, 186 Okla. 588, 99 P. 2d 508 (1940); Hepworth v. Covey Bros. Amusement Co., 97 Utah 205, 91 P. 2d 507 (1939); PROSSER, TORTS § 12 (1941).

3. Burton v. Drennan, 332 Mo. 512, 58 S.W. 2d 740 (1933); Hurst v. Montgomery Ward & Co., 107 S.W. 2d 183, 186 (Mo. App. 1937); *accord,* W.T. Grant Co. v. Owens, 149 Va. 906, 141 S.E. 860 (1928).

4. Snider v. Wimberly, *supra* n. 1; *accord,* Vimont v. S. S. Kresge Co., 291 S.W. 159 (Mo. App. 1927).

Without passing on its admissability the court considered the police report as the strongest evidence against the defendant but found it insufficient at law to maintain the action of false arrest. Something more than the giving of mere information is required. The defendant must go beyond such point and instigate the arrest.[5] However, words alone may be sufficient to show that the defendant caused or instigated the arrest of the plaintiff,[6] and in at least one Missouri case,[7] where a ring had disappeared and a servant girl was suspected, the elements for false arrest were inferred from the circumstances when the defendant threatened the girl, called the police, but no evidence was offered that the defendant actually requested an arrest. In the principal case, the court stressed the fact that the highway patrol went to plaintiff's apartment and made an investigation before the arrest was made.

The court in the instant case in drawing a distinction between the torts of false arrest and false imprisonment, holds that while words alone are sufficient to amount to "direction, countenance, encouragement or instigation," a bare statement by the defendant that he "thought" the plaintiff to be the guilty party is insufficient; or if such a statement is sufficient, then the defendant's liability was terminated by a showing that the arresting authorities did not rely on the statement of the defendant, but acted only after a subsequent investigation.[8]

RICHARD G. POLAND

TORTS—LIABILITY OF LESSOR AND LESSEE TO WINDOW WASHER

Roach v. Herz-Oakes Candy Co.[1]

This was an action for $10,000 damages for the wrongful death of plaintiff's former husband, a window washer, who was killed as a result of a fall from the fourth-story window of a building belonging to defendant trust company. The defendant candy company was joined as a party defendant on the theory such defendant was in occupancy and control of the building as the lessee of defendant trust company. Evidence indicated the agreement of the lease was not signed by defendant candy company until some time in May, 1942, and the candy company

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5. Vimont v. S. S. Kresge Co., *supra;* Lark v. Bande, 4 Mo. App. 186 (1877).

6. Pandjiris v. Hartman, 196 Mo. 539, 94 S.W. 270 (1906) (ordered officer to, "Do your duty.") Harris v. Terminal R. R. Ass'n. of St. Louis, 203 Mo. App. 324, 218 S.W. 686 (1920) (defendant's agent shouted to officer, "Stop that woman!"); Oliver v. Kessler, 95 S.W. 2d 1226 (Mo. App. 1936) ("take him on officer, take him on."); McGill v. Walnut Realty Co., 235 Mo. App. 874, 148 S.W. 2d 131 (1941) (whispered to policeman, "take charge of him."). No distinction between false arrest and false imprisonment was made in any of the Missouri Appeals cases cited above.

7. Wright v. Hoover, 211 Mo. App. 185, 241 S.W. 89 (1922) (action for false arrest and false imprisonment).

8. *Cf.* Richardson v. Empire Trust Co., *supra,* (action brought for false arrest and imprisonment, libel, fraud and slander but recovery denied.).

1. 212 S.W. 2d 758 (Mo. 1948).

commenced paying the rent January 1, 1942, but nevertheless it may be reasonably inferred that defendant candy company had prior to November 8, 1941, (date of deceased's death) entered upon the premises and had arranged with employer of deceased to wash the windows. The deceased had been engaged in the occupation of window cleaning for twenty years. He was an employee of a company which specialized in window washing. The cleaning company was to receive $15.00 for cleaning the windows of the building in question, to supply its own cleaning materials and its own tools and to wash the windows according to its own methods. Prior to the deceased's death on November 7, 1941, defendant trust company engaged a contractor to remodel and improve the building on a "cost plus" basis. This work was in progress on the date of the accident. The court affirmed the judgment for a directed verdict for both defendants.

First to be considered is the responsibility of the lessor under these circumstances. When land is leased to a tenant the law of property regards the lease as equivalent to a sale of the premises for the term. Hence, in absence of agreement, the lessor surrenders possession and control, retaining only a reversionary interest,[2] and it is generally recognized that the rule of caveat emptor[3] is relevant which, in application, indicates that the lessor of premises is not liable for dangerous conditions or activities of the lessee on such leased premises to either the tenant or a person on the premises in right of the tenant.[4] In general, the rights of the invitee[5] of the possessor of the premises are co-extensive with those of the tenant as against the landlord.[6]

There are exceptional situations in which the lessor's liability continues. The first such exception is where the lessor conceals or fails to disclose to his lessee any natural or artificial condition involving unreasonable risk of bodily harm to a person on the land as a tenant or to those persons in right of the tenant, and the lessee or such other person does not know of the dangerous con-

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2. PROSSER, TORTS p. 649 (1941).

3. In Shaw v. Butterworth, 327 Mo. 622, 38 S.W. 2d 57 (1931), the court held that in absence of a covenant or promise, the tenant must take the premises in the condition in which he finds them, for to a mere contract of letting the rule of caveat emptor is relevant.

4. Lasky v. Rudman, 337 Mo. 555, 85 S.W. 2d 501 (1935); Pinnell v. Woods, 275 Ky. 290, 121 S.W. 2d 679 (1938) (holding that the lessor is not generally liable for activities of lessee even where create nuisance); see HARPER, TORTS, pp. 234, 235 (2d ed. 1937).

5. Feldewerth v. Great Eastern Oil Co., 149 S.W. 2d 410 (Mo. App. 1941) (independent contractor is an invitee). In Connole v. Floyd Plant Food Co., 96 S.W. 2d 655 (Mo. App. 1936), the court held that an invitee to a place of business is one who goes there either at the express or implied invitation of the owner or occupant on business of mutual benefit to both. See, McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land,* 1 Mo. LAW REV. 58 (1936), where the classification problem is noted.

6. In Darlington v. Railway Exchange Bldg., 353 Mo. 569, 183 S.W. 2d 101 (1944), it was stated that if such duty was owing to the tenant it was also owing to the invitee. See Tomlinson v. Marshall, 208 Mo. App. 381, 236 S.W. 680 (1922); Bender v. Weber, 250 Mo. 551, 157 S.W. 570 (1913).

dition or the risk involved and the lessor knows or has adequate reason to suspect[7] such condition and risk involved and has reason to believe that the lessee or such other person by reasonable inspection will not discover the condition or realize the risk.[8] The rule in Missouri is that the landlord will not be liable for concealed defects or dangerous conditions existing at the time of the demise, unless he knew of the defects or had knowledge of facts from which he ought to have known or will be presumed to have known of them.[9] For conditions arising after the lease, the lessor has no duty to inspect and is not an insurer of the premises,[10] and is not liable for said conditions unless one of the other exceptions can be applied.

An exception invoked in numerous cases is where lessor retains control of parts of the premises such as approaches, halls, stairs, elevators,[11] roofs,[12] central heating and lighting.[13] The liability arises out of an implied duty to use reasonable care to keep said premises in a reasonably safe condition and for breach of this duty the lessor is liable under the normal negligence analysis.[14] Under these circumstances the lessor has an affirmative obligation. Where several tenants occupy the premises then the landlord retains control of certain parts of the premises, but if the premises are occupied by only one tenant or under conditions such that one tenant is in exclusive possession the landlord does not retain control and is not liable.[15]

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7. Meade v. Montrose, 173 Mo. App. 722, 160 S.W. 11 (1913) (". . .does not mean that if the landlord has no reason to suspect concealed defects or dangers, neverthless he must make an examination in an effort to discover them. . . It only means that if he had reason to suspect their existence, and did not exercise reasonable diligence to satisfy himself of their nonexistence before leasing, without mentioning the matter to his tenant, he will be liable.")

8. Bartlett v. Taylor, 351 Mo. 1060, 174 S.W. 2d 844 (1943); Burton v. Rothschild, 351 Mo. 562, 173 S.W. 2d 681 (1943); 1 TIFFANY, LANDLORD AND TENANT § 86 (d) (1910).

9. Whiteley v. McLaughlin, 183 Mo. 160, 81 S.W. 1094 (1904); Logsdon v. Central Development Ass'n, 233 Mo. App. 499, 123 S.W. 2d 631 (1938); Clark v. Chase Hotel Co., 230 Mo. App. 739, 74 S.W. 2d 498 (1934); Meade v. Montrose, 173 Mo. App. 722, 160 S.W. 11 (1913) (knowledge of facts from which he ought to have known or will be presumed to have known of them); 36 C.J. p. 220, 221 (1924); RESTATEMENT OF LAW OF TORTS § 358 (1934).

10. Home Owners' Loan Corp. v. Huffman, 124 F. 2d 684 (C.C.A. 8th 1942), *affirmed* 150 F. 2d 162 (C.C.A. 8th 1945).

11. 25 A.L.R. 1273 (1923) (approaches, halls, stairs, elevators).

12. 43 A.L.R. 1273 (1926) (roofs).

13. Reinagel v. Walnuts Residence Co., 194 S.W. 2d 229 (Mo. 1946) (where inherently dangerous, landlord required to furnish lights); Darlington v. Railway Exchange Bldg., 353 Mo. 569, 183 S.W. 2d 101 (1944); 13 A.L.R. 837 (1921) (heating and lighting).

14. Schneider v. Dubinsky Realty Co., 344 Mo. 654, 127 S.W. 2d 691 (1939); Gray v. Pearline, 328 Mo. 1192, 43 S.W. 2d 807 (1931); Morelock v. De Graw, 234 Mo. App. 303, 112 S.W. 2d 126 (1937); Buchanan v. Wolff, 105 S.W. 2d 26 (Mo. App. 1937), court held that there is an implied duty of exercising care to keep them in reasonably safe condition for all persons rightfully using them.

15. Lambert v. Jones, 339 Mo. 677, 98 S.W. 2d 752 (1936); Turner v. Ragan, 229 S.W. 809 (Mo. 1921) (one who rented both apartments in a two-apartment

A third exception arises where there is a contract to repair and the landlord does not repair or attempt to repair. In most jurisdictions, including Missouri, a lessor cannot be held liable in tort for personal injuries received by a tenant or one rightfully on leased premises as a result of such breach; his liability is limited to the contract.[16] This is to be distinguished from a member of the public who is injured off the premises while using the street. Here the courts seem to be in accord that the landlord is liable for tort on the theory of reserved control.[17]

A fourth exception arises where the landlord undertakes to make repairs. He is required to exercise ordinary care in making such repairs and is liable for injuries sustained by reason of his negligence or unskillfulness in making them.[18]

Liability is also imposed upon the lessor who leases for the purpose of the admission of the public.[19] This exception applies to dangerous conditions that the landlord knows about or should know about at the time of the lease and where he has reasons to believe that the lessee will not make the condition safe before admitting the public as patrons. This is for the protection of the public and not the tenant,[20] and only applies to those parts thrown open to the public.[21]

The sixth and last general exception is that of the duty owing by the lessor to those off (outside) the premises. The lessor's responsibility to adjoining landowners and to the public is such that he is not permitted to shift it to another.[22]

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building and sublet portions of an upstairs apartment held in actual possession and control of halls and stairways so that owner was not liable for injuries occasioned by lack of repair of stairway); Bender v. Weber, 250 Mo. 551, 157 S.W. 570 (1931) (if not under landlord's control, then not liable).

16. In Kohnle v. Paxton, 268 Mo. 463, 188 S.W. 155 (1916), it was held that landlord cannot be held in tort for personal injuries received by tenant as result of a defect arising solely from a breach of covenant to repair the leased premises, and not from active negligence independent of the contract. Logsdon v. Central Development Ass'n, 233 Mo. App. 499, 123 S.W. 2d 631 (1938); Davis v. Cities Service Oil Co., 131 S.W. 2d 865 (Mo. App. 1939); Norris v. Walker, 232 Mo. App. 645, 110 S.W. 2d 404 (1937); McCleary, *The Restatement of the Law of Torts and the Missouri Annotations,* 2 Mo. LAW REV. 28 (1937); the authorities generally are collected in 8 A.L.R. 765 (1920); 68 A.L.R. 1194 (1930); 163 A.L.R. 329 (1946).

17. RESTATEMENT OF LAW OF TORTS §§ 357, 358 (1934); the cases are collected in 89 A.L.R. 480 (1934).

18. Lasky v. Rudman, 337 Mo. 555, 85 S.W. 2d 501 (1935) (assuming to repair and doing so negligently, landlord is liable for all injuries resulting from such negligence). See Shaw v. Butterworth, 327 Mo. 622, 38 S..W. 2d 57 (1931) (stating that landlord repairing or restoring condition of building would be liable, if negligent, notwithstanding lack of actual knowledge of defect); Vollrath v. Stevens, 199 Mo. App. 5, 202 S.W. 283 (1918).

19. Brown v. Reorganization Inv. Co., 350 Mo 407, 166 S.W. 2d 476 (1942); HARPER, TORTS p. 235 (1937); RESTATEMENT OF LAW OF TORTS § 359 (1934).

20. 123 A.L.R. 870 (1939) (landlords liability to those entering as a business patron upon leased premises); 22 A.L.R. 610 (1923) (amusement-injury to patrons).

21. BOHLEN, STUDIES IN THE LAW OF TORTS pp. 70, 71, 72 (1926); PROSSER, TORTS § 81 (1941).

22. Mitchell's Adm'r v. Brady, 124 Ky. 411, 99 S.W. 266 (1907).

Most of the cases arising under this exception are in connection with private nuisances[23] or dangers to the highway, such as parts of the building likely to fall into the street[24] or where holes exist in the sidewalk.[25]

It was held in the principal case that there was no evidence tending to show that the lessor through the contractor had negligently repaired the windows, nor was there evidence showing a defect, but assuming there was such hidden defect there was no evidence introduced that the lessor had notice or knowledge, actual or constructive, of the defect. Therefore, the court sustained a directed verdict by the trial court for defendant lessor.

The duty imposed upon the lessee (occupier) of the premises to an invitee is greater than that owing to a licensee or trespasser.[26] It may well be stated that the occupier's liability to an invitee is that to a licensee plus additional protection. The occupier is required, in the alternative, either to warn of dangerous conditions and activities, or make the premises safe for the invitee as to those conditions and activities which the occupier knows about or should know if reasonable vigilance had been exercised.[27] If the invitee knew about the dangers or they were such that he could reasonably be expected to know then the occupier is not liable.[28] Since his presence is for the benefit of the possessor the invitee may assume that the premises are in reasonable safe condition and he is not required to be on the alert for possible dangers as the licensee.[29] But the occupier is not an insurer of the safety of the invitee and his duty is only one of reasonable care.[30] Where the in-

23. Mylander v. Beimschla, 102 Md. 689, 62 Atl. 1038 (1906) (downspout).
24. Foley v. Everett, 142 Ill. App. 250 (1908) (shutter).
25. In Kelly v. Laclede Real Estate and Investment Co., 348 Mo. 407, 155 S.W. 2d 90 (1941), the court held that the tenant as well as the landlord is liable for any injury which may be caused thereby to a person lawfully in the highway. See Cool v. Rohrbach, 21 S.W. 2d 919 (Mo. App. 1929); Rose v. Gunn Fruit Co., 201 Mo. App. 262, 211 S.W. 85 (1919) (potentially dangerous hole in sidewalk); 138 A.L.R. 1065 (1942).
26. Porchey v. Kelling, 353 Mo. 1034, 185 S.W. 2d 820 (1945); Stevenson v. Kansas City Southern Ry., 348 Mo. 1216, 159. S.W. 2d 260 (1941) (holding that the owner or occupier of realty has no duty to protect those who go on realty as volunteers, or with his express or tacit permission, or from motives of curiosity or private convenience, and a bare licensee, barring wantonness, intentional wrong or active negligence by owner or occupier takes the premises as he finds them, but for an invitee the owner or occupier has a duty to take ordinary care to prevent injury.
27. Blackwell v. J. J. Newberry Co., 156 S.W. 2d 14 (Mo. App. 1941); Smith v. Sears, Roebuck and Co., 117 S.W. 2d 658 (Mo. App. 1938); Hubenschmidt v. S. S. Kresge Co., 115 S.W. 2d 211 (Mo. App. 1938) (knew or in exercise of ordinary care could have known).
28. Perringer v. Lynn Food Co., 148 S.W. 2d 601 (Mo. App. 1941); Horvath v. Chestnut Street Realty Co., 144 S.W. 2d 165 (Mo. App. 1940); Vairo v. Vairo, 99 S.W. 2d 113 (Mo. App. 1936).
29. Holmes v. Ginter Restaurant Co., 54 F. 2d 876 (C.C.A. 1st 1932); Kroger Grocery and Baking Co. v. Monroe, 237 Ky. 60, 34 S.W. 2d 929 (1931).
30. Giles v. Moundridge Milling Co., 351 Mo. 568, 173 S.W. 2d 745 (1943) (an owner is not an insurer of his business invitee's safety); Casciaro v. Great Atlantic and Pacific Tea Co., 238 Mo. App. 361, 183 S.W. 2d 833 (1944); Kellogg v. H. D. Lee Mercantile Co., 236 Mo. App. 699, 160 S.W. 2d 838 (1942).

vitee goes beyond the area of the business invitation the occupier is only liable for the new relation as created.[31]

In certain cases the duty to warn is not sufficient and the occupier must do more in the way of safeguarding. These cases generally involve situations in which the invitee is subjected to unnecessary pitfalls where warning may not be understood or the invitee may not be in a position to protect himself.[32] Likewise, for common carriers and other public utilities where a person otherwise would have to forego a privilege to travel or some other corresponding privilege.[33] This protection includes acts of third person on the premises causing injury to patrons where the risk could reasonably be forseen. This theory appears to be based upon the occupier's control and power of expulsion over the premises.[34]

In the principal case it was held that there was no evidence tending to show a latent defect, or obvious defect, of which the lessee had knowledge, either actual or constructive, but if it was an obvious defect the plaintiff's decedent must have seen it and assumed the risk. The directed verdict for defendant lessee was sustained.

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31. Murphy v. Fred Wolferman, Inc., 347 Mo. 634, 148 S.W. 2d 481 (1941); Philibert v. Benjamin Ansehl Co., 342 Mo. 1239, 119 S.W. 2d 797 (1938); Watson v. St. Joseph Coal Mining Co., 331 Mo. 475, 53 S.W. 2d 895 (1932); 33 A.L.R. 181 (1924); 20 A.L.R. 1147 (1922).

32. McCready v. Southern Pac. Co., 26 F. 2d 569 (C.C.A. 9th 1928); Fleischmann Malting Co. v. Mrkacek, 14 F. 2d 602 (C.C.A. 7th 1926).

33. RESTATEMENT OF LAW OF TORTS § 347 (1934).

34. In Smith v. Terminal R. R. Ass'n of St. Louis, 160 S.W. 2d 476 (Mo. App. 1942), the court held that the occupant of premises on which another is injured by third person who does not stand in such relation to owner or occupant as to render respondeat superior doctrine applicable, is not liable to injured person unless liability can be predicated on theory of public nuisance or dangerous condition known to owner or occupant, who failed to take reasonable precautions to alleviate it. See 106 A.L.R. 1003 (1937).