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Recent Cases

AGENCY—AGENT ACTING WITHOUT AUTHORITY—IMPLIED WARRANTY

Robinson v. Pattee

In the principal case, Walter J. Pattee and his wife owned certain land as tenants by the entirety. The defendant wife signed for herself and her husband a contract to sell the property to the plaintiff. The defendant told the plaintiff that she had her husband's power of attorney. This power of attorney was insufficient in that it did not authorize the defendant to enter into a contract for the sale of land. The plaintiff tendered performance of his obligation, but the defendant, upon learning that the power of attorney was insufficient, declined to perform.

The court held that the wife was not liable for damages for breach of her promise to convey her interest. As the property was held by the entirety no conveyance of it could be made unless both the husband and wife joined. The vendee, therefore, did not intend to enter into a contract with the wife alone but intended to contract with both husband and wife, and unless he secured enforceable promises from both husband and wife, there was no meeting of the minds and hence no contract binding the wife. The court held, however, that the wife was liable on a theory of breach of implied warranty of authority to bind her husband.

The early cases in Missouri seemed to follow the rule that the agent who purports to act for a principal, but in truth has no authority to act, is liable on the contract. These decisions held the agent liable as a party to the contract on the theory that someone was intended to be bound, and as the agent could not bind his principal, then he himself was liable. There are still a few jurisdictions in this country which follow this rule. Apparently the courts which have continued to

1. 22 S.W. 2d 786 (Mo. 1949).
2. Gibson v. Zimmerman, 12 Mo. 385 (1849); Otto F. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1917); Mahen v. Ruhr, 293 Mo. 500, 240 S.W. 164 (1921).
5. Byars v. Doores, 20 Mo. 284 (1855), “But if an agent, acting without authority in attempting to bind another, although his name appears as agent for the principal, yet, if he does not employ language which will exclusively bind the principal, or if, rejecting the words which he had no authority to use, enough will remain to create a promise on his part, he will be personally liable on the contract.”; Coffman v. Harrison, 24 Mo. 524 (1857); Myers Tailoring Co. v. Keeley, 58 Mo. App. 491 (1894), “If he purported to act on behalf of Griffin, and in so doing exceeded his authority, he became individually liable; for it is well settled that an agent, who fails to bind his principal, binds himself.”; Duffy v. Mallinkrodt, 81 Mo. App. 449 (1899); Gestring v. Fisher, 46 Mo. App. 603 (1891).
hold the agent liable on the contract have neglected to examine the theory of the agent's liability. Where parties enter into a contract it is true that each intends that the other party shall be obligated to perform as he has promised. But when a contracting party enters into a contract with an agent, he does not intend to contract with the agent but intends only to exchange promises with the principal through the agent. No contract between the third party and the agent being intended, it would seem to be incorrect for the court to create such a contract in order to make the agent respond to the third party in damages.\(^7\)

That the agent should be liable in some action is the only equitable result and is based on a strong public policy against such conduct by the agent.\(^8\) However, this policy may be furthered without tearing asunder the basic doctrines of the law of contracts. The rule followed in a majority of American jurisdictions and the rule which seems to prevail in Missouri today is that the agent, although not a party to the contract, is liable for breach of an implied warranty.\(^9\) When the agent represents to the other contracting party that he acts for a principal, he, by implication, warrants his authority to act, and the other party by entering into the contract changes his position in reliance on this implied warranty and, thus, may bring an action for breach of the implied warranty if the agent does not have authority.\(^10\)

A Missouri court\(^11\) set forth the three situations in which an agent is liable: 1) where the agent makes a fraudulent representation of his authority with intent to deceive; 2) where he has no authority and knows it, but nevertheless makes the contract as if he had authority; 3) where not having, in fact, authority to make this contract as agent, he yet does so under the bona fide belief that such authority is vested in him. In the first two situations the agent may subject himself to liability in deceit. In the last the sole possible theory of liability is that of breach of implied warranty of authority.\(^12\)

Unless otherwise agreed, a person purporting to make a contract with another for a partially disclosed or undisclosed principal is a party to the contract.\(^13\) This

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7. 1 STORY, AGENCY 317 (9th ed. 1882).
8. 1 MECHEM, AGENCY 1001 (2d ed. 1914).
9. Griswold v. Haas, 277 Mo. 255, 210 S.W. 356 (1919). "... if one represents himself as the agent of a disclosed principal and attempts to contract in the name of such principal without authority or in excess of his authority, he becomes liable to the third party; not on the contract unless it contains apt words to bind him, but for breach of the express or implied covenant of authority, or, in a proper case, in an action of fraud and deceit." Lingenfelder v. Leschen, 134 Mo. 55, 34 S.W. 1089 (1896). See Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135, 138 (1898); Chamberlain v. Spalding, 237 Mo. App. 1040, 1050, 170 S.W. 2d 434, 458 (1945).
12. Chieppo v. Chieppo, 88 Conn. 233, 90 Atl. 940 (1914); Lingenfelder v. Leschen, 134 Mo. 55, 34 S.W. 1089 (1896).
rule prevails because the person with whom the agent contracts relies upon the credit and honesty of the agent. An agent who signs a sealed instrument or a negotiable instrument will be liable on the instrument if it does not appear on the instrument that the person signing did so as the agent for another. In the case of a negotiable instrument the name of the principal must appear on the face of the instrument.

The Missouri courts recognize two exceptions to the doctrine that the agent who acts without authority is liable in deceit or for breach of implied warranty of authority. When the agent purports to act for a principal who does not exist, the courts hold that the agent is a party to the contract and, therefore, can be held in an action for breach of contract. The other exception is applied when the agent’s authority is a pure question of law and the relevant facts are known to the other party. The Missouri courts also follow the universal rule that the agent does not warrant that his principal has capacity to enter into the contract.

In Missouri when the agent is held liable on the contract, the courts have allowed not only the usual loss of bargain damages but also have allowed the injured party to recover any expenses he may have incurred in bringing an action against the agent’s purported principal. If the action is brought on a deceit theory then the liability of the agent will be for all the damages incurred by the party with whom he contracts. When the action is brought on a breach of warranty theory the measure of damages seems to be the same as when the action is upon the contract plus any expenses incurred by the plaintiff because of the agent’s misrepresentation.

If someone must suffer from a transaction of this type, justice appears to be best served by holding the agent responsible to any injured party. Therefore, the Missouri Supreme Court seems to have reached a fair and logical decision in holding the wife liable on a breach of implied warranty theory.

Edmund M. Brown

14. Restatement, Agency § 324 (1933) (negotiable instruments); Restatement, Agency § 325 (1933) (sealed instruments).
17. Western Cement Co. v. Jones, 8 Mo. App. 373, 379 (1880), “where all the facts are known to both parties and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability.”; Michael v. Jones, 84 Mo. 578 (1884); Humphrey v. Jones, 71 Mo. 62 (1879); International Store Co. v. Barnes, 3 S.W. 2d 1039 (Mo. 1928).
18. Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135 (1898); Restatement, Agency § 332 (1933).
20. 53 Harvard L. Rev. 1042 (1940) (points out recovery will be approximately the same as if the agent was held to be a party to the contract.); 35 Yale L. J. 625 (1926); See note 34 L. R. A. (N. S.) 518 (1911).
MISSOURI LAW REVIEW

PERSONAL PROPERTY—DEPOSIT OF GRAIN IN ELEVATOR

AS BAILMENT OR SALE

Latta v. Transit Grain Co.2

The plaintiff deposited wheat in B’s elevator with knowledge of a custom which gave the warehouseman an option either to return a like quantity of wheat or to pay the market price of the wheat at the time of demand. B sold the wheat to the defendant who bought it in good faith thinking B was the owner. Held, that the deposit constituted a sale and therefore the defendant was not liable for conversion.

This case seems to support the prevailing view in the United States, that when there is a delivery of grain to an elevator under a contract which gives the warehouseman an option upon the demand of the depositor either to redeliver a like quantity of grain or to pay the market price, the transaction is a sale.2 Another view is that when the warehouseman has this option title does not pass until the time the warehouseman exercises his option to buy the grain and until that time the transaction is a bailment.3 The latter would seem to be the better view, for should the warehouseman return like grain, the parties would not consider that there had been a sale to the warehouseman; furthermore, in most cases it is provided that the price to be paid by the warehouseman is the market price at the time the warehouseman exercises his option and not the market price at the time the grain is placed in the elevator.

If, on the other hand, the depositor of the grain is given the option of demanding grain of like quantity and grade4 or the market value of such grain at the time of demand, most courts in the United States hold that the transaction is a bailment, even though it is contemplated that the grain deposited will be mixed with like grain deposited by others or by the elevator operator himself.5 This represents an exception to the common law rule that there cannot be a bailment unless the return of the specific goods bailed is contemplated.

Every state in the United States has adopted the Uniform Warehouse Receipts Act which provides that fungible goods may be stored in a common depository

1. 222 S.W. 2d 467 (Tex. 1949).
2. Barnes Bros. v. McCrea & Co., 75 Iowa 267 (1888); Bonnett v. Shipping Ass’n, 105 Kan. 121, 181 Pac. 634 (1919); Savage v. Salem Mills Co., 48 Ore. 1, 85 Pac. 69 (1906); Stricklin v. Rice, 141 S.W. 2d 748 (Tex. 1940), noted in 19 Tex. L. Rev. 351 (1941).
3. State v. Rieger, 59 Minn. 151, 60 N.W. 1087 (1894), 8 Harv. L. Rev. 432 (1895); Brown, Personal Property § 78 (1st ed. 1936).
under a contract of bailment.\footnote{6} Goods which have been held to be fungible are chickens,\footnote{7} canned salmon,\footnote{8} coal,\footnote{9} kafir corn,\footnote{10} flax,\footnote{11} cotton seed\footnote{12} and petroleum,\footnote{13} while lumber,\footnote{14} and bales of cotton\footnote{15} have been held to be nonfungible.

The dicta of the English and British Dominion courts seem to indicate that unless the contract provides for the return of the very goods stored, the transaction is a sale and the warehouseman may pay for the goods either in money or like goods depending upon the provisions of the contract of storage.\footnote{16} Prior to the enactment of the Uniform Warehouse Receipts Act some United States jurisdictions took the English view,\footnote{17} refusing to apply a special rule to fungible goods and applying to them a normal common law rule that a bailment involves the return of the specific goods bailed.

The principal case seems to support the view that when the terms of the contract are not made definite by the warehouse receipt, evidence of the custom of the community may be admitted to help determine what the real intent of the parties was.\footnote{18} If the terms of the warehouse receipt are clear, evidence of the custom of the community will not be admitted.\footnote{19} Contract provisions which tend to indicate that the parties intended a bailment are the risk of loss being placed on the depositor,\footnote{20} the market price being paid as of the time the option to sell is exercised,\footnote{21} the storage rate being high enough to pay for the actual expense of storage, and in all cases the elevator operator is required to keep enough grain


11. State v. Cowdery, 79 Minn. 94, 81 N.W. 750 (1900).


17. E.g., Chase v. Washburn, 1 Ohio St. 244 (1853); 6 Am. L. Rev. 450 (1872).


21. State v. Edwards, 345 Mo. 929, 137 S.W. 2d 447 (1940); Summers v. Peoples Elevator Co., 136 S.W. 2d 81 (Mo. 1939).}
on hand to equal the amount of grain deposited.22 The true test of whether there is a sale or a bailment is whether the warehouseman is allowed to use the grain as he wishes or whether he must use it as directed by the depositor.

Farmers who deposit grain in an elevator under a contract of bailment become tenants in common as to all grain deposited in the elevator.23 If at any time the amount of grain which the elevator contains becomes less than the amount of grain necessary to redeem the outstanding warehouse receipts there is a conversion by the warehouseman and the purchaser of the grain,24 but it has been held that a demand must be made before there is a conversion and if sufficient grain is added before that demand is made the conversion is healed.25 This decision would seem to be based on the preference theory rather than on the property theory, for the elevator might be emptied and enough new grain to equal the outstanding receipts put in. If the elevator is filled with new grain belonging either to the warehouseman or another depositor and then the amount of grain becomes less than the amount necessary to redeem the outstanding warehouse receipts, there is a conversion just as though no new grain had been added and the amount of grain in the elevator had become less than the amount necessary to redeem the outstanding receipts.26

If the parties do not contract otherwise and the transaction is held to be a bailment, the depositor has the risk of loss by shrinkage, fire or other casualty,27 the right to take a pro rata share of the grain in the elevator should the elevator operator become bankrupt,28 and the right to sue a bona fide purchaser who buys grain from the warehouseman for conversion, if the warehouseman fails to keep enough grain on hand to meet the outstanding receipts.29

WILLIAM D. LAY

23. Ramsey v. Rondenberg, 72 Colo. 567, 212 Pac. 820 (1923); Sexton & Abbott v. Graham, 53 Iowa 181, 4 N.W. 1090 (1880); Hall v. Pillsbury, 43 Minn. 33, 44 N.W. 673 (1890).
On V-J day George Parker, his brother and his minor son, Billie, drove to a neighboring tavern. After the tavern keeper refused to sell them beer because of their highly intoxicated condition the men decided to drive to another town. As the drive necessitated going over treacherous mountain roads Billie, who had not been drinking, asked that he be permitted to stay at the tavern. The father, however, ordered him to get into the car. Billie then requested that he be permitted to drive, but the father refused and drove the car himself. The car was later discovered in a ravine with all the occupants killed. The administrator of Billie's estate brought action under the wrongful death statute against the administrator of the father's estate charging that Billie's death was caused by the gross negligence of the father. The Supreme Court of Oregon held that the father had been guilty of willful misconduct, and that the general rule of nonliability should be modified to allow an unemancipated minor child to maintain an action for damages against his parent for a willful or malicious personal tort.

Since the case of Heselott v. George decided in 1891, American courts have generally denied recovery in tort actions between unemancipated minor children and their parents. In that case a mother wrongfully and maliciously caused her minor child to be confined in a hospital for the insane. In denying the action brought by the daughter the court said: "The peace of society and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent."

This concept of social policy is the basis usually advanced for disallowing the suit. Other reasons advanced are danger of fraud, depletion of family funds, and the possibility that the parent or child would fall heir to the same money

1. 218 P. 2d 445 (Ore. 1950).
2. 68 Miss, 703, 9 So. 885 (1891).
3. Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Small v. Morrison, 185 N. C. 577, 118 S.E. 12, 31 A.L.R. 1135 (1923); Cannon v. Cannon, 287 N. Y. 425, 40 N.E. 2d 236 (1942); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 192 Wis. 260, 212 N.W. 787, 52 A.L.R. 113 (1927). Although there have been no reported English cases most of the English authorities have assumed the suit would be allowed. 2 Addison, Torts Page 727 (4th ed. 1876); Eversley, Domestic Relations Page 571 (4th ed. 1926); Pollock, Torts, Page 128 (12th ed. 1923).
taken from them in the suit. Courts following this rule have made no distinction between intentional and unintentional torts. As stated in Roller v. Roller, the same principle which would allow the action in the case of a heinous crime would permit an action to be brought for any other tort. It is to be noted, however, that this rule has not been extended to other family relationships even where they live together in the same house; nor does it apply to actions based on contract or property rights. The prevailing law prefers to correct or punish the parents misconduct by taking the child from his custody or by criminal action.

The principal case is representative of a view taken by a very small number of courts which has permitted the action to be brought. The first case allowing the action was Dunlap v. Dunlap decided in 1930 where the minor son was injured while in the employ of the father. The father carried liability insurance, and it was thought that these factors destroyed the reasons for disallowing the suit, inasmuch as there was no danger of depleting the family funds or of disturbing the harmony of the family. Two other courts have followed this decision and permitted the action when the parent was protected by insurance in his vocational capacity, but the decided weight of authority is to the effect that insurance should not create liability where none exists. Other courts have allowed the suit in cases of wilful misconduct or have interpreted the wrongful death statute as displacing any social policy to the contrary. The minority courts, in opposition to the general rule, declare that tort actions will not impair parental control or family harmony any more than contract actions, and that in many cases the tort itself has destroyed any peaceful relationship which might have existed. Most of these courts have, nevertheless, based their decision upon some factor taking it outside the ordinary negligence case.

8. The most extreme case is that of Roller v. Roller, supra, where the minor daughter was raped by the father. The courts more readily deny the actions based on negligence. Cannon v. Cannon, 237 N. Y. 425, 40 N.E. 2d 236 (1942).
9. 37 Wash. 242, 79 Pac. 783 (1905).
11. Miller v. Miller, 148 Mo. 113, 49 S.W. 852 (1899); Bobb v. Bobb, 89 Mo. 411, 4 S.W. 511 (1887).
17. Illustrative of this view is the statement by the Kansas City Court of
The question is still open in Missouri as the supreme court has not ruled upon the issue,\textsuperscript{19} and the decisions of the courts of appeal have been in conflict. In \textit{Dix v. Martin},\textsuperscript{20} decided by the Kansas City Court of Appeals, there was dictum to the effect that in a case of excessive punishment a tort action should be permitted between parents and unemancipated minor children. The same court in 1932 held that a mother could bring an action against her minor son for negligently causing her to be injured in an automobile accident.\textsuperscript{21} The Springfield Court of Appeals, however, refused to follow the lead of the Kansas City Court of Appeals and held in \textit{Cook v. Cook}\textsuperscript{22} that social policy forbids the bringing of a tort action by an adopted son against his parent. Thus the same dispute prevails in Missouri as in the rest of the nation.

Most of the courts recognize that harmonious relations should be encouraged in the family and that the permitting of tort actions in general between the parent and the child would tend to disturb that relationship. The only point of controversy seems to be whether the wide-spread protection afforded by liability insurance has displaced that policy in situations of the instant case. Protection to the family contributes to the security of the family unit, and any fear that protection afforded by insurance will promote recklessness runs counter to basic family instincts and interests. As most injuries to persons in automobile accidents are suffered by members of the driver's family, insurance rates may have to be adjusted if liability is extended to the family; but that is no reason for the law remaining as it is in this type of case. However, the prevailing authority holds that if the prevalence of and need for liability insurance for the protection of the family calls for any change in the common law rule, it is a matter for the legislature rather than the judiciary.\textsuperscript{23}

\textbf{Royal M. Miller}

Appeals in Wells v. Wells, 48 S.W. 2d 109 (Mo. App. 1932) on page 111:

"It may be that an action in tort by a parent against his minor child would introduce discord and contention into the home, but it is equally true that an action involving right in property, strictly speaking brought by parent against his minor child, would introduce discord and contention into the home and tend to disrupt the family relation, but it will not be claimed that the law forbids such action." See also Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905, 71 A.L.R. 1055 (1930), and \textsc{Prosser on Torts} § 99 p. 905 (1941).

18. Indicative of this is the action of the Oregon Court in the principal case. For here the court inferred from the evidence that the father had been guilty of willful misconduct when there was no showing that the plaintiff alleged anything more than gross negligence on the fathers part.

19. The recent case of Taylor v. Taylor, 232 S.W. 2d 382 (Mo. 1950) dealt with a negligence action brought by a mother against her son of legal age, and thus, is not in point. Although Wells v. Wells, 48 S.W. 2d 109 (Mo. App. 1932) and the principal cases were cited in the opinion, the court carefully confined its decision to the facts.

20. 171 Mo. App. 266, 157 S.W. 133 (1913).
22. 124 S.W. 2d 675 (Mo. App. 1939).
Torts—Duty of Employer to Rescuer of Negligent Servant
Who Also is the Imperiled Person

Dodson v. Maddox

Defendants' loaded gasoline transport, consisting of tractor and trailer, left the traveled portion of the highway and collided into an embankment. After the plaintiff had turned off the highway of his home, about a quarter of a mile in front of the transport, he heard the screeching of tires and saw the lights of the transport leave the highway and go out. Plaintiff then heard cries for help and hurried to the scene where he found the transport jack-knifed and headed into an embankment. The trailer was on its side with gasoline spilling over the highway and under the tractor, and the driver was pinned in the cab. While the plaintiff was attempting to rescue the driver from the cab, the gasoline caught fire, burning the driver and the transport and causing serious injuries to the plaintiff. Plaintiff sued the employers of the driver. The res ipse loquitur doctrine was allowed to show negligence on the part of the driver. It was admitted by the defendants that the conduct of the driver was exercised within the scope of his employment. Judgment in the lower court for the plaintiff was affirmed by the supreme court.

As far as can be determined, this is the first rescue case to come before the Missouri courts in which the person attempted to be rescued was also the negligent party creating the situation of peril. There are many decisions upholding the rule that a rescuer may recover if he shows that the person attempted to be rescued was placed in a situation of peril by the negligence of the defendant. This has been called the "rescue doctrine."

The court in the principal case held that the "rescue doctrine" did not apply to this case on the ground that the defendant employers were not shown to be negligent in placing the person attempted to be rescued in a situation of peril. The court purports to find a duty owing to the plaintiff on the theory that failure to use due care in the operation of the gasoline transport by the defendant's servant (driver) would create a foreseeable risk to the personal safety of users of the highway in the area of the risk, as a direct and immediate result of a collision. The court's theory seems to by-pass the fact that the plaintiff was not injured as a direct and immediate result of a collision, nor as a user of the highway. Plaintiff was injured while attempting a rescue after the collision had occurred. The cases cited by the court (none is a rescue case) to support its theory of

1. 359 Mo. 742, 223 S.W. 2d 434 (1949).
duty, predicated on the direct and immediate result of a collision, are not at all similar on the facts to the instant case. 4

The question now raised is whether the court properly refused to apply the rescue doctrine. In declaring the rescue doctrine inapplicable, the court seems to have overlooked the fact that the rescuer's cause of action is based on the defendant's negligence in creating a situation of peril and not upon the defendant's negligent conduct imperiling the life of a third person.

In Carney v. Buyea, 5 a New York case, the defendant parked her automobile on an incline, and when she later stepped in front of it and it began to roll forward the plaintiff yelled, "Look out," and pushed her out of the path of danger, but before he could extricate himself he was struck by the moving car and suffered personal injuries. The court overruled the defendant's contention that plaintiff could not recover because the defendant owed no duty to herself, and held that the plaintiff's right of action is not based on the defendant's wrongful conduct "in its tendency to imperil the person whose rescue is attempted, but upon its tendency to cause the rescuer to take the risk involved in the attempted rescue." 6 The recent Texas case of Longacre v. Reddick 7 applied the rescue doctrine to a situation nearly identical to that in Dodson v. Maddox. The court in granting recovery to the plaintiff, who had been injured in an explosion while rescuing the defendant's operator of a butane gas truck, held that the underlying basis of the rescue doctrine is that the defendant created a situation which provoked the rescue effort. The court said further that liability is not imposed on the employer because of negligence on his part, but because of his relation of master to the servant driver who, in the scope of his employment, negligently created the situation of peril which invited the rescuer to expose himself to an undue risk. Again, in the Michigan case of Brugh v. Bigelow, 8 it was held that in a rescue case it is immaterial that the person attempted to be rescued and the tort-feasor are one and the same person, due to the fact that it is the "occasioning of the cause for rescue" that renders the

4. Jerobek v. Safeway Cab, Transfer & Storage Co., 146 Kan. 859, 73 P. 2d 1097 (1937); Leinbach v. Pickwick Greyhound Lines, 135 Kan. 40, 10 P. 2d 33 (1932); Hall Motor Freight v. Montgomery, 357 Mo. 1188, 212 S.W. 2d 748 (1948). Plaintiffs in these cases were either passengers or drivers of automobiles involved in a collision. These cases establish a duty to persons in the immediate vicinity at the time of the collision. In the principal case, plaintiff was not in the area of the risk at the time of the collision, but was in his own driveway a quarter of a mile away, off the highway.

It is well to note here that the duty theory set forth by the court submits the plaintiff to denial of recovery on the ground of contributory negligence, as is even inferred in Leinbach v. Pickwick Greyhound Lines, supra. See, e.g., 38 Am. Jur., Negligence, § 182; RESTATEMENT, TORTS §§ 466, 467 (1934). See Note 13, infra, for application of contributory negligence to "rescue" cases.


tort-feasor liable. The Michigan, New York, and Texas courts seem to have no trouble in applying the rescue doctrine in this type of case.

It would seem that the duty to the plaintiff in the instant case is not to be based on the theory that the defendant owed a duty of care in the operation of its gasoline transport so as not to injure users of the highway in the area of the risk, but a duty to use care so as not to place a person in a situation of peril occasioning a rescuer to expose himself to an undue risk of injury. Applying the analysis for duty, could a reasonable man foresee a rescuer exposed to a risk of personal injuries in attempting to save life if the gasoline transport were not driven with due care? That the tort-feasor is held to “foresee” the rescue attempt has long been recognized. As Justice Cardozo said in the Wagner case, “Danger invites rescue. . . The risk of rescue if only it be not wanton, is born of the occasion. The emergency begets the man.”

The decisions indicate that courts are quite liberal in allowing recovery to a rescuer who has forsaken his own personal safety in order to aid another in peril. A rescuer, under the rescue doctrine, is not held to be contributorily negligent unless the attempt to rescue was recklessly or rashly made. Since the rescuer’s right of action is based on the wrongful act of creating a situation of peril, there seems to be no logical reason for not applying the rescue doctrine to cases in which the person rescued also happens to be the tort-feasor. And since an employer, under the respondeat superior doctrine, is liable for the torts of his servant acting within the scope of his employment, liability would also extend to the employer. That the defendant employers in the case in question were not proven to be negligent in placing their driver in a position of peril would, therefore, appear to be an invalid argument in declaring the rescue doctrine inapplicable.

Leonard A. O’Neal


10. It is submitted by Professor Bohlen that contributory negligence on the part of a third person imperiled would bar recovery to him, but not as to his rescuer, and, therefore, that the rescuer’s right of action is a distinct and separate one from that of a third person imperiled by defendant’s negligence. Bohlen, supra note 6, at 569. Accord, Hatch v. Globe Laundry Co., 132 Me. 379, 171 Atl. 387, 392 (1934); Restatement, Torts, § 472, comment a, p. 1242 (1934); Note, 5 A.L.R. 206 (1920).

11. See, e.g., Brugh v. Bigelow, 310 Mich. 74, 16 N.W. 2d 668, 671 (1944); Prossor, Torts, § 49, p. 361 (1941).


TORTS—LESSOR’S LIABILITY FOR INJURIES TO TENANT’S INVITEES ON PREMISES LET FOR PUBLIC PURPOSES

Warner v. Fry

A tavern patron sustained injuries as a result of plaster falling on him from the tavern ceiling and sought to recover damages against the building owner. The patron relied on the “public use” rule that a lessor is liable for injuries to the invitee of the tenant because of defects in premises leased for purposes involving public use thereof. The court held the rule inapplicable to premises leased for an ordinary commercial purpose such as a tavern.

The court was asked to apply the so-called “public use” exception to the general rule that the lessor of land is not liable to invitees of the tenant for injuries caused by defective conditions in the premises. The exception applies to premises let for public purposes though the scope of use included has not been generally determined. There are, however, certain limitations which are usually, if not universally, applied. The defect or dangerous condition must be one which existed at the time of the lease. The injured person must have been on the part of the premises leased for the particular use, and must have been there for purposes of that use.

The first cases involved leases of piers and wharves. Subsequent decisions in various jurisdictions have extended the rule quite generally to places of public amusement, frequently to hotels, and in some instances to such ordinary commercial establishments as beauty parlors, and grocery stores.

The basis of the landlord’s liability is said to be that he has impliedly in-

1. 228 S.W. 2d 729 (Mo. 1950).
2. For a general discussion of the landlord’s liability, see Harkrider, Tort Liability of a Landlord, 26 Mich. L. Rev. 260, 383, 531 (1927).
4. See Notes, 123 A. L. R. 870 (1939); 130 A. L. R. 1275 (1941).
5. 52 C. J. S. § 422 b (2) p. 77.
11. Webel v. Yale University, 125 Conn. 515, 7 A. 2d 215 (1939); Wood v. Prudential Investment Co., 212 Minn. 551, 4 N.W. 2d 617 (1942).
vited the public on the premises for whatever use they are intended, and so is under a duty to use reasonable care for the safety of those who respond.\textsuperscript{13} But see the opinion of Judge Cardozo in \textit{Junkerman v. Tilyou Realty Co.},\textsuperscript{14} where he says that perhaps it would be more wise to reject the fiction of invocation and say that "the nature of the use itself creates the duty, and that an owner is just as much bound to repair a structure that endangers travelers on a walk in an amusement park as he is to repair a structure that endangers travelers on a highway."

Where the lease is of extremely short duration,\textsuperscript{15} it has been suggested that the transaction could actually be described as merely a license, and not as a lease so that the lessor retains full possession and control of the premises.\textsuperscript{16}

The early cases involving wharves or piers based their conclusion on the grounds that the dangerous condition was a nuisance,\textsuperscript{17} not too unsound a theory considering the nature of such premises. But the use of the term nuisance has been carried through the cases to where it is applied to situations in which it is entirely inapplicable.\textsuperscript{18} The invitee of a tenant does not come upon the premises in the exercise of a public right, but in the right of the tenant.\textsuperscript{19} He cannot base his action on the theory of public nuisance. Nor do the fact situations of the cases bring them within the ambit of private nuisance.

In the principle case, the court considers a tavern an ordinary commercial establishment and not within the rule. It is held that the leases which come under the "public use" rule are those made for a purpose which contemplates "the assembly of a large number of persons at the same time on the premises, either upon one or several occasions, or continuously throughout the period of the lease.\textsuperscript{20} Other jurisdictions have similarly restricted the application of the rule.\textsuperscript{21}

\begin{enumerate}
\item LaFreda v. Woodward, 125 N. J. L. 489, 15 A. 2d 798 (1949), noted in 89 U. of Pa. L. Rev. 1104 (1944); Tulsa Entertainment Co. v. Greenless, 85 Okla. 113, 205 Pac. 179 (1922); 52 C. J. S. § 422b (2) p. 78.
\item 213 N. Y. 404, 108 N.E. 190 (1915).
\item Oxford v. Leathe, 165 Mass. 254, 43 N.E. 92 (1896) (hall for four nights); Brown v. Reorganization Investment Co., 350 Mo. 407, 166 S.W. 2d 476 (1942) (auditorium for one night); Tulsa Entertainment Co. v. Greenlees, supra, n. 13 (ball park for one day).
\item Oxford v. Leathe, supra, n. 15; 1 Tiffay, Landlord and Tenant § 106 (1910).
\item See note 8, supra.
\item Turner v. Kent, 134 Kan. 574, 7 P. 2d 513 (1932); Senner v. Danewolf, supra; Kane v. Lour, 52 Pa. Super. 467 (1913); Larson v. Calders Park Co., 54 Utah 325, 180 Pac. 599 (1919); 52 Am. Jur. § 667, p. 533; See Note, 130 A. L. R. 1275.
\item Webel v. Yale University, supra.
\item The court cites Brown v. Reorganization Investment Co., supra, noted in 9 Mo. L. Rev. 110 (1944), in which the rule of the restatement rule was applied. The case involved the letting of an auditorium for a wrestling exhibition.
\item Restatement, Torts § 359 (1934), when land leased for purposes involving admission of numerous persons:
\begin{quote}
A lessor who leases land for a purpose which involves the admission of a large number of persons as patrons of his lessee, is subject to liability for bodily harm caused to them by an artificial condition existing when the lessee took pos-
\end{quote}
\end{enumerate}
It has been said that to warrant the denomination of "public" or "semi-public" a use must contemplate the admission of a large number of persons, "in the sense of great as opposed to small." The reason given by the Missouri court is that persons assembled in large groups have little opportunity to discover and avoid dangerous conditions and are less likely to be warned of them or be on the alert to avoid them.

However, in Webeb v. Yale University, the court claims that no distinction should be made depending merely upon the number of persons who enter upon the premises. Further that the true basis of liability is that the landowner leases premises on which he knows or should know there are conditions existing that the tenant is not likely to correct, and dangerous to those who he is aware will be on the land as the tenant's invitees. Courts in a number of jurisdictions apparently go along with this reasoning and have extended liability quite far. A Nebraska case held a tavern, not unlike the one in the principle case, within the rule.

Such extension has been criticized as leaving little of the general rule which relieves landlords from liability save the lease of a private dwelling. On the other hand, the question has been asked as to whether the general rule may not be out of line with present day conditions so that the "public use" exception should be extended until the lesser is held accountable for injuries caused by any defective or dangerous condition existing at the time of the lease, from which an unreasonable risk of harm can be foreseen to anyone coming on the premises as

session, if the lessor (a) knew or should have known of the condition and realized or should have realized the unreasonable risk to them involved therein, and (b) had reason to expect that the lessee would admit his patrons before the land was put in reasonable condition for their reception."


23. Also see 1 TIFFANY, LANDLORD AND TENANT § 106 (1910).
invitees of the tenant. If this be the trend of the cases, Warner v. Fry stands as an effective block to such development in Missouri.

WILLIAM B. ANDERSON

TORTS—RAILROAD'S LIABILITY FOR DELAYING FIRE TRUCKS

Cottonwood Fibre Co. v. Thompson

This action by plaintiffs was to recover damages sustained in a fire allegedly aggravated by a train blocking a crossing and delaying the arrival of the fire department. The facts were in dispute, but basically the situation was as follows: plaintiffs' factory was located about 300 feet west of the Mississippi River, in St. Louis, abutted on the north side of Fillmore Street, an east-west street, and immediately east of defendant's north-south tracks. There was no north-south street between plaintiffs' factory and the river, the nearest north-south street was Broadway which was west of defendant's tracks. In order to get from Broadway to plaintiffs' factory, it was necessary for the fire truck to cross defendant's tracks on Fillmore Street. At the time the fire broke out in plaintiffs' factory, an eighty car train of defendant railroad was approaching the Fillmore Street crossing. By the time the fire truck reached the same crossing, some 25% of the train was past Fillmore Street. The train continued moving until it had cleared the crossing and consequently the fire truck was delayed some two to five minutes. Plaintiffs alleged that defendant's employees negligently operated the train at the Fillmore crossing thereby preventing the city fire apparatus from expeditiously and promptly reaching plaintiffs' factory (then afire), and, because of such delay, the building and contents were greatly damaged.

The interference by a railroad with the effects of firemen while fighting fires usually arises in various ways; by obstructing a crossing thereby delaying a fire truck; as in the instant case; by running over and severing a fire hose laid across the track; or by interfering in other ways with the effort to extinguish or prevent the spread of fire.


1. 359 Mo. 1062, 225 S.W. 2d 702 (1949).
   Houren v. Chicago, M. & St. P. Ry., 236 Ill. 620, 86 N.E. 611 (1908); Cleveland,
   C.C. & St. L. Ry., 176 Ind. 621, 96 N.E. 758 (1911); Globe Mall. Iron & Sheet Co.
   257 Pa. 192, 101 Atl. 338 (1917).
   3. Metallic Comp. Casting Co. v. Fitchburg Ry., 109 Mass. 277 (1872);
   Erickson v. Great Northern Ry., 117 Minn. 348, 135 N.W. 1129 (1912); Hurley v.
   Mo., K. & T. Ry., 170 Mo. App. 235, 156 S.W. 57 (1913); Phenix Ins. Co. v. New

   N.W. 970 (1908) (pulling a burning railroad car along the side of plaintiffs burning
   building thereby hindering firemen); White v. Colorado Cent. Ry., 29 Fed. Cases
   1004, No. 17543 (C.C.D. Colo. 1879) (storing plaintiff's goods in a warehouse with
   275, 68 Pac. 670 (1902) (putting a car of gunpowder near plaintiff's fire).
The basis for liability is common-law negligence on the part of the railroad which results in a loss to the plaintiff because of the spread of the existing fire. If the obstruction of the crossing is in violation of a statute prohibiting the obstruction for a definite period of time, negligence may be presumed from such violation. Most jurisdictions having cases on the subject require, in addition to the obstruction, that the employees in charge of the train have actual knowledge of the fire and knowledge of the fact that, by running the train past the crossing or by stopping the train on the crossing, the work of extinguishing the fire would be hampered, or from the surrounding circumstances the employees should have had knowledge from the exercise of due care. However there is no duty on the part of the railroad’s employees to keep a lookout for fires and possible interferences with fire departments.

If the railroad’s employees had knowledge of the interference or from the surrounding circumstances should have had knowledge, then the employees are under a duty to use care to mitigate the interference. Unless, of course, the train is able to stop before reaching a crossing, there will be some delay, but the railroad will be responsible for the delay in excess of the time that is reasonably required to remove the obstruction. It has been held, however, that where the train was taking on water and where the train was stopped because of brake trouble the railroad is not liable.

Probably a more difficult problem in these cases, assuming that the employees

5. Felter v. Delaware & H. R. Corp., supra, note 2; Metallic Comp. Casting Co. v. Fitchburg Ry., supra note 3; Globe Malleable Iron & Sheet Co. v. N. Y. Cent. Ry., supra note 2; 5 A.L.R. 1651 (1920). The basis for liability for such interference is expressed in American Sheet & Iron Co. v. Pittsburgh & L. E. Ry., 143 Fed. 789 (3rd. cir. 1906) where it is said: “It is not denied that a natural person, or a corporation, by its corporate agencies may so interfere with the rights of another, growing out of the emergency of a fire or conflagration, of or on such person's property or premises, as to make him or it liable for injury and damage directly resulting from such interference. Actionable interference of this kind is the violation of a fundamental social duty, and it is within the definition of a common-law tort.” But see Louisville & N. Ry. v. Scruggs, 161 Ala. 97, 49, So. 399 (1909). A distinction may be made, between active and passive use of one's property. A railroad may be liable for negligence in making an active use of its property, i.e., running over a fire hose, but not in making a passive use of its property, i.e., interfering with the firemen in placing a fire hose across the railroad track. See McClelland, J. (dissenting opinion) in Louisville & N. Ry. v. Scruggs, supra.

6. Houren v. Chicago, M. & St. P. Ry., supra note 2; Cleveland, C. C. & St. L. Ry., supra note 2. Accord, Hyde v. Gay, 120 Mass. 589 (1876), where running a train on Sunday in violation of a statute prohibiting such was declared negligence per se. Compare Hartford Ins. Co. v. Mellon, 206 Iowa 182, 220 N.W. 331 (1928), where it was held that a violation or an ordinance prohibiting the interference of firemen required knowledge of interference and violation was not negligence per se.


of the railroad were negligent in interfering with the efforts of firemen, is whether the negligence was the legal cause of an increase in loss.\textsuperscript{12} The question to be asked—could the fire have been extinguished or the damage from the fire limited if the fire truck had not been delayed? This is a question for the jury.\textsuperscript{13} The facts of the principle case show the difficulty in finding proximate causation. Plaintiffs’ factory was engaged in processing waste rope, jute and sisal, some of which was oil soaked and greasy and was highly inflammable. The building had wooden floors and roof. The court said: “Years of experience have demonstrated that fire fighting is speculative and uncertain as to results. No two fires are alike. Proximate causation is but mere speculation. This fire of this highly combustible material and wooden building was wholly beyond control in two minutes after discovery and the employees were forced to leave the building long before the fire department was within many blocks of the railroad crossing. Under the circumstances, the extent to which it may have spread before firemen could have started to fight it (assuming there had been no train) is purest conjecture. . .”.\textsuperscript{14}

This case is one of first impression in the Supreme Court of Missouri. However, in a similar case in a court of appeals, a railroad was held liable for interfering with the laying of a hose across the track.\textsuperscript{15} The decision is supported by other jurisdictions on similar facts.

Montgomery L. Wilson

TORTS—RES IPSA LOQUITUR—BOTTLED BEVERAGES

\textit{Maybach v. Falstaff Brewing Corporation}\textsuperscript{1}

In the instant case plaintiff was injured by the explosion of two bottles of Falstaff beer which she was removing from a shelf in a Kroger store. The bottles had been delivered by the defendant seven or eight days prior to the incident. Plaintiff submitted the case on res ipsa loquitur theory and offered evidence, which was excluded, that other bottles of beer from the same shipment had exploded. Defendant prevailed at the trial, but appealed when the trial court granted plaintiff a new trial on the ground of an erroneous instruction to the jury. The supreme court held that res ipsa loquitur was not applicable because defendant was not in control or had right of control of the instrumentality (the beer bottles) at the

\begin{enumerate}
\item \textsuperscript{12} Little Rock Traction Co. v. McCaskall, 75 Ark. 133, 86 S.W. 997 (1905); Metallic Comp. Casting Co. v. Fitchburg Ry., \textit{supra} note 3; Hurley v. Mo., K. & T. Ry., \textit{supra} note 3.
\item \textsuperscript{13} Eclipse Lbr. Co. v. Davis, 196 Iowa 1349, 195 N.W. 337 (1923).
\item \textsuperscript{14} Cottonwood Fibre Co. v. Thompson, \textit{supra} note 1. \textit{In accord}, Valentine v. Minneapolis Ry., \textit{supra} note 4, where it is said: “Even though plaintiff’s chance to save his timber, as alleged by defendant’s counsel, merely a ‘gambler’s chance,’ he has a right to take it, and defendant has no right to destroy such chance and render certain the destruction of his timber.”
\item \textsuperscript{15} Hurley v. Mo., K. & T. Ry., \textit{supra} note 3 (firemen had to disconnect a hose in order to permit a train to pass).
\end{enumerate}

1. 359 Mo. 446, 222 S.W. 2d 87 (1949).
time of the injury and remitted the case for retrial because of improper exclusion of evidence.

The present case belongs to the general classification of so-called "bottled beverage" cases in which plaintiff was injured by the explosion of either a carbonated or fermented beverage. From the earliest case involving the explosion of bottled beverages to the present, courts have been struggling with the question of satisfying the requirement of control of the instrumentality by the defendant to establish a res ipsa case. There are three views which prevail on this subject at present.

Until 1912, the bottled beverage cases rejected the application of res ipsa for the reason that the defendant was not in control of the bottle at the time of the explosion injuring the plaintiff. This view represents the minority view today.

The majority of the states today follow the view expressed in Payne v. Rome Coca-Cola Bottling Co., permitting the application of res ipsa to bottled beverage cases when the plaintiff negatives any possibility of intervening influences after the bottle has left defendant's possession. The requirement of the majority rule is that the plaintiff must show in addition to the fact that the defendant was in control of the bottled beverages at the time the negligent act was committed, that the bottles received ordinary care after leaving defendant's control and were not subjected to any unusual temperature or atmospheric changes.

The third view is known as the North Carolina rule; it requires that other

2. See note, 8 A.L.R. 500 (1919).
bottles must have exploded within a proximate time and space relationship of the bottle which injured the plaintiff before res ipsa is applicable.7

Prior to the decision in the instant case, Missouri had followed the majority view taken in Stolle v. Anheuser-Busch.8 There the plaintiff was injured while standing near a butcher counter by an exploding bottle of beer, which had been purchased in an adjoining store a few minutes earlier and placed on the counter by another person. The court stated that the plaintiff could rely upon res ipsa loquitur and that social policy required that the manufacturer assume the risks and hazards of an explosion incident to the reasonable and ordinarily careful transportation and handling of bottled beverages in the usual course of business; that otherwise the consumer was left practically without redress.

The decision in the instant case for the first time in Missouri expressly distinguishes between the defendant's control of the instrumentality at the time of the injury and at the time the negligent act is committed.9 Ordinarily the commission of the negligent act and its resulting injury accompany each other. However in cases involving the explosion of bottled beverages the negligent act—usually the failure properly to inspect the bottles on overcharging them with carbonic gas—may occur two or three weeks before an exploding bottle injures a consumer. Since all the facts and circumstances concerning the bottling and handling of the bottled beverages are peculiarly within the manufacturer's knowledge, it would be extremely difficult for an injured plaintiff to prove the manufacturer's specific acts of negligence even though the manufacturer was in fact negligent.

The reason given by the court for its present decision that res ipsa is not applicable is that proof of the occurrence and attendant circumstances, which point to negligence on the part of the defendant and is essential to res ipsa, cannot point to the negligence of a defendant who is out of control of the instrumentality at the time it causes the injury; therefore the defendant must be in control of the instrumentality at the time the injury for res ipsa to apply. This reasoning of the court seems to state that a defendant can not be the cause of an injury unless it is in fact in control of the instrumentality at the time an injury results from it. But one's control of the causative force of an injury may exist independently of another's exclusive possession and manual control of the offending thing at the time an accident occurs.10

The definition of res ipsa given in American Jurisprudence is apparently the view which influenced the decision of the present case. It is stated there that the function of res ipsa is to permit an inference of negligence as the responsible


8. 307 Mo. 520, 271 S.W. 497 (1925).

9. In McClosky v. Kaplar, 329 Mo. 527, 46 S.W. 2d 557 (1932), the court stated the defendant's control in a res ipsa case to be control at the time the negligent act was committed.

human cause of the accident from the accident itself in connection with its bare physical cause, including in the conception of physical cause, the defendant's control of the instrumentality or place connected with the accident without the aid of any evidence, direct or circumstantial extrinsic or intrinsic, indicating negligence.\textsuperscript{11} It is submitted that such a functional definition tends to reduce res ipsa to a rigid rule of law limiting its application to the "falling object" cases under which it originated during the 1860's. Such a restriction is not in harmony with the social philosophy of today with its aim of protecting as many individuals as possible.

The difficulty on the part of a plaintiff in proving a manufacturer's specific acts of negligence in a bottled beverage case apparently influenced the court's instructions on the handling of the case on retrial. These instructions seem to indicate what a plaintiff who has been injured by an exploding bottled beverage, must plead and prove to make a submissible case. The court stated that the plaintiff's petition alleged general negligence with as much particularity as could be expected. The petition stated that the bursting of the bottles would not have occurred if due care had been used by the defendant's in its manufacture, distribution and handling and "that all the facts and circumstances concerning the manufacture, bottling sealing and handling of said bottles are peculiarly within the knowledge of defendant." The court said if the plaintiff proved by circumstantial evidence that the explosion of the bottles was not due to negligent handling or exposure to undue temperature changes after the bottles left the possession and control of the manufacturer, that is, if it negatives the possibility that the injury may have been due to some cause intervening after the manufacturer had parted with control, it had made a submissible case. Query if this is not in effect the result reached with the application of res ipsa.

ROBERT P. KELLY

WILLS—EXECUTION—POSITION OF TESTATOR'S SIGNATURE

Potter v. Ritchardson and Reuther\textsuperscript{4}

In the principal case, the contested document was upon a form consisting of a single sheet with printed matter on both sides. On the front of the sheet was the language, "Last Will and Testament. Know All Men By These Present: That I, Ida A. Potter, of the County of Boone, State of Missouri . . . do make and publish this, my LAST WILL AND TESTAMENT, in manner and form following I will . . . " On the back of this sheet were the usual printed clauses, including the usual signature line. These were left blank. Then followed the attestation clause form, on the signature lines of which the two attesting witnesses had written their names and "Columbia, Mo." This writing on the back of the page read from left to right, i.e., horizontally, and downward from the top of the page. Now

\textsuperscript{11} 38 AM. Jur. § 297, p. 993.

\textsuperscript{1} 230 S.W. 2d 672 (Mo. 1950).
mentally picture the document turned side ways, so that one is reading vertically to the attestation clause above. In this position, on the lower part of this back page, was printed "Last Will and Testament of." On the next vertical line was written, "Ida A. Potter." The date, April 22, 1933 was also written following the signature. Now picture the document as originally held and read. Fold the document once from bottom to top and then repeat the folding. The only writing then visible would be that last mentioned, i.e., "Last Will and Testament of Ida A. Potter," and the date. The sole issue in the case was whether the instrument purporting to be the will of Ida A. Potter was signed under the provisions of the Missouri Statute\(^2\) relating to the execution of wills. It was held that it was so signed both by the Circuit Court of Boone County, and by the Supreme Court of Missouri.

The first Wills Act, 32 Hen. VIII, c.l., required only that wills be in writing, and it did not require that they be signed or that they be written in the hand of the testator. Abuses arising under this statute resulted in the passage of Section 5 of the Statute of Frauds.\(^3\) Both a writing and signing by the party devising, or by one acting by his express direction was required by this statute. Attestning and subscribing in the presence of the devisor by three or four credible witnesses was also necessary, or else the devise was utterly void.

It was under this statute that the leading English case of *Lemayne v. Stanley*\(^4\) was decided. The facts of the case were that the testator's will was written by him in his own hand, and began: "In the name of God, Amen, I John Stanley make this my last will and testament . . .," and the will was otherwise unsigned. The court of common pleas held the will duly signed, "for being written by himself, and his name in the will, it is a sufficient signing within the statute which does not appoint where the will shall be signed, in top, bottom or margin, and therefore a signing in any part is sufficient." The English Wills Act of 1837 changed the requirement by stating that the will "shall be signed at the foot or end thereof."\(^5\) This proved unsatisfactory and an amendatory act passed in 1852 declared that the testator's signature might be at or after, or following, or under or beside, or opposite to the end of the will, so long as it appears from the face of the will that the testator intended to give effect by his signature to the writing signed as his will.\(^6\)

The statutes in most states are like the Statute of Frauds, and the decisions follow the *Lemayne* case, in that they do not require that the will be signed in any particular place. But there remains the problem of intention. Was the

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   "Every will shall be in writing, signed by the testator or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

3. 29 *Car. II*, c. 3, § 5 (1677).
5. 7 *Wm. IV* and 1 *Vicr.*, c. 26, §§ 9 and 13 (1837).
6. 15 and 16 *Vicr.* c. 24.
writing of his name on the document by the testator intended by him as a signing of the will? "In some jurisdictions the courts insist that the intention should be gathered from the form of the instrument itself, but most permit evidence of the testator's declarations at the time for this purpose." The effect of requiring that the intention appear in the instrument is indirectly to require signing at the end in most cases.

Apparently the only prior Missouri case considering the problem in any detail is Catlett v. Catlett. This case is of little value, for the opinion, insofar as applicable to the problem involved in the principal case, was entirely dictum. The facts of the Catlett case were that Henry Catlett, the testator, was at his home and one Davis was visiting him. Catlett stated that he would like to make a will. Davis suggested that an attorney should draft the will. Catlett told Davis the necessary information, and Davis went into town and had an attorney draft the will. Davis brought the typed instrument back to Catlett, read it to him, and Catlett said it was just what he wanted and had Davis and one Yoho sign as witnesses in his and their presence. Catlett did not place or sign his name at any place on the instrument. Catlett's name appearing in the exordium clause was not sufficient to satisfy the statute, but the court then goes on to say, the proper construction of the statute means the instrument shall be subscribed as is done in the usual way of executing other instruments of writing. The case was disposed of by the fact there was no signature on the will.

The Missouri Supreme Court in the principal case points to evidence of Miss Potter's telling the two witnesses she was making her will, the writing of the will, the reading of it to the witnesses, and the request for them to witness and sign it. These facts created a reasonable inference that Miss Potter intended her signing to complete and authenticate the document as her testamentary act. The court clearly stated that the Catlett case insofar as it held otherwise was overruled.

If there was a question heretofore that subscribing was required by Section 520, and that one could not use extrinsic evidence to establish that the testator's name was written on the will with the intent that it be his signature, and that the Catlett case dictum was controlling in Missouri, the question is now settled. The problem to decide in Missouri is whether the testator's name was written with the intent to make the document effective as his will.

ROBERT L. RILEY

8. See Bamberger v. Barbour, 335 Ill. 458, 167 N.E. 122 (1929). The instrument was in the handwriting of the deceased, and his name appeared only in the exordium clause. In denying probate, the Supreme Court of Illinois discussed the Lemayne case, but declared that the cases not following the Lemayne case are more consonant with reason. The cases cited in support of the decision required intent be shown from the instrument, and denied probate when there was no signing at the end. The cases are collected in a note, 29 A.L.R. 891 (1924).
9. 55 Mo. 330 (1874).