to the breakdown of a questionable distinction between subsequent purchasers and mortgagees.

It is noteworthy that the facts of the principal case arose before the Certificate of Title Act became effective.[14] This act would preclude the problem of the principal case by providing title registration and a recordation of encumbrances on the certificate of title, thus facilitating actual notice.[15] But the act is narrow in its scope, referring only to motor vehicles, leaving the problem discussed above still alive with respect to other chattels.

J. P. M.

TORTS

NEGLIGENCE — DUTY OF PLAINTIFF — PROXIMATE CAUSE

Plaintiff brought an action against the Board of County Commissioners for the destruction of her home by fire. Liability was predicated upon a statute which made the commissioners liable in their official capacity for damages, caused by their negligence, in not keeping roads or bridges in repair.[1] The commissioners had allowed a ditch to remain open across a county road, making it impossible for the apparatus of the fire department to reach the scene of the fire, and prevent the subsequent damage. On these facts, the Court of Appeals for Hamilton County held that the defendants were not liable, because the plaintiff was not included within the class of persons protected by statute, and because the blockade of the road was not the proximate cause of the loss.[2]

It is often said in negligence actions, that to enable the plaintiff to maintain an action, he must show that the defendant owed him a duty of reasonable care, and that such a duty is owing to the plaintiff, if and only if, the defendant should anticipate that some one in the position of the plaintiff might be hurt, if the defendant did not use reasonable care.

A leading case announcing this doctrine is *Palsgraff* v. *Long Island Railroad Co.*[3] In that case the plaintiff was denied recovery for being injured by a set of scales, falling from overhead as a result of an explosion of a package of fire crackers some distance away, which were knocked

[14] OHIO G.C. *sec.* 6290-1 to -20, Effective Jan. 1, 1938. This act is not retroactive; see OHIO G.C. sec. 6290-9.

[15] OHIO G.C. sec. 6290-4 and -9. By provision in OHIO G.C. sec. 6290-9 the *Chattel Mortgage Recording Act,* cited note 13 *supra,* shall never apply to motor vehicles.

[1] OHIO G.C. sec. 2408. The board (of county commissioners) shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such road or bridge (public, state or county) in proper repair.

[2] Sheley v. Swing, 65 Ohio App. 109, 29 N.E. (2d) 364 (1939).

[3] 248 N.Y. 339, 162 N.E. 99 (1928).

from the hands of a man boarding the train by an employee of the defendant. The court held that to recover, plaintiff must be in the apparent zone of danger of defendant's negligent act. This view has been adopted by the Restatement of the Law of Torts.[4]

However, as the following cases indicate, many courts have held defendant liable if they found that he was negligent, and that this negligence was the proximate cause of plaintiff's injury, without discussing the subject of duty owed the plaintiff.

Occasionally the doctrine is rejected. One court allowed a plaintiff to recover for injuries received when defendant's train struck a cow and hurled it against plaintiff who was not on the railroad track. The court said: "On the undisputed facts defendant was not guilty of want of care or negligence in respect to any duty which defendant owed plaintiff individually." The fact that the defendant was negligent, and that this negligence was the proximate cause of the accident, was sufficient in the opinion of the court to make the defendant liable.[5]

So in the well known motor lorry case,[6] the plaintiff was allowed to recover for the death of his wife, who was apparently not within the zone of danger of the runaway lorry; but who died as the result of fear for the safety of her children.

Eckert v. *Long Island Railway*[7] is an example of the rescue cases, which the Restatement of Torts regards as an exception to the rule requiring plaintiff to be in the zone of danger.[8] In this case the plaintiff, who attempted to rescue one endangered by the defendant's negligence, was allowed to recover. Usually courts state in such cases that attempted rescue is a foreseeable result of the defendant's negligence. But to say that moral force, which acts upon the rescuer and causes him to endanger himself, thus widens the zone of danger so that he is included, is to beg the question, by looking back at defendant's negligence in the light of its ultimate results.

But where, as in the principal case, the statute prescribes the standard of conduct to be followed, the courts much more consistently require that the plaintiff establish himself as one of the class of people for whose benefit the statute was enacted. The cases of *Marsh* v. *Koons*,[9] and *Lake Shore & Michigan Southern Railway Co.* v. *Lüdtke*[10] indicate that the Ohio view is in accord with this statement. The former case

[4] AMERICAN LAW INSTITUTE RESTATEMENT OF THE LAW OF TORTS, section 281.
[5] Alabama G.S. R.R. v. Chapman, 80 Ala. 615, 2 So. 738 (1887).
[6] Hambrook v. Stokes Bros. (1925) 1 K.B. 141.
[7] 43 N.Y. 502, 3 Am. Rep. 721 (1871).
[8] AMERICAN LAW INSTITUTE RESTATEMENT OF LAW OF TORTS, section 472.
[9] 78 Ohio St. 68, 84 N.E. 599 (1908).
[10] 60 Ohio St. 384, 69 N.E. 53 (1904).

involved a statute[11] which required that cattle be fenced. A cow strayed onto the highway, and frightened plaintiff's horse, which resulted in injury to the plaintiff. Declaring that the object of the statute was the prevention of trespasses, and not the safety of travelers, the court denied plaintiff recovery. The statute[12] in the latter case required the railroad company to build a fence which it failed to do. A six-year-old boy who wandered onto the tracks was injured by a train. Denying recovery, the court said that the fence required by statute was one sufficient to turn stock, and not one that would keep persons from going onto the tracks.

In the principal case, the court held that plaintiff could not recover because she was not a member of the class which the statute was designed to benefit, *viz.*, travelers upon the road. But conceivably, it could be argued that the fire engine was traveling on the road for the intended benefit of the plaintiff, and, due to the negligence of the county, was unable to travel beyond a certain point, resulting in the destruction of plaintiff's house.

Of course, the services of the fire department are governmental functions, and, as such, in the absence of statute, no liability could be imposed on the political subdivision, under which it operates, even if it were negligent.[13] But, there is increasing authority holding one liable for negligence in preventing a third person from rendering aid to plaintiff, even though the third party was under no legal duty to do so.[14]

Thus a railroad has been held liable for obstructing a fire engine in going to a fire by blocking the street.[15] But in most of the cases holding defendant liable, for preventing the rendering of aid to third persons, the negligence of defendant took place after the need for aid had arisen, where, as here, there was nothing that defendant could do at the time of the fire. An analogous situation is presented in *Concordia Fire Insurance Co.* v. *Simmons*,[16] where a defendant's negligence consisted of puncturing water lines, a week before the fire broke out. Allowing plaintiff to recover, the court said: "So long as the householder or inhabitant of the city is in a position to receive and the municipality is ready

[11] Revised Statutes, Sections 4202 and 4206.

[12] Revised Statutes, Section 3324.

[13] Aldrich v. Youngstown, 106 Ohio St. 342, 27 A.L.R. 1497 (1922). See OHIO G.C. section 3714-1.

[14] Kiernan v. Metro. Construction Co., 170 Mass. 378, 49 N.E. 648 (1898); Little Rock Traction and Electric Co. v. McCaskill, 75 Ark. 133, 70 L.R.A. 680 (1905); Cleveland C.C. and St. L. Ry. Co. v. Tauer, 176 Ind. 621, 96 N.E. 758 (1911); Metallic C.C. Co. v. Fitchburg R. Co., 109 Mass. 277, 12 Am. Rep. 689 (1872); Clark v. G.T.W.R. Co., 149 Mich. 400, 142 N.W. 112 (1907).

[15] Houren v. Chicago Milwaukee & St. Paul Ry. Co., 236 Ill. 620, 86 N.E. 611 (1908).

[16] 167 Wis. 541, 168 N.W. 199 (1918).

and willing to continue such services, the person who interferes with such relationship between municipality and its inhabitant and thereby causes injury to such householder or inhabitant must respond for such damages as may be directly traceable to his interference as a proximate cause."

The cases last discussed were against private defendants. Here, the action is against the county commissioners. And at common law, both the maintenance of roads and fire fighting apparatus were governmental functions, so that there could be no action against county commissioners for so negligently maintaining highways that fire engines could not travel on them.[17] But since a statute now imposes a duty on public authorities to keep streets in repair, the defendant would be liable for injuries proximately caused by its negligence. A search has revealed only two cases in which the plaintiff suffered damage because of the negligence of a political subdivision in failing to keep roads in proper repair so that fire fighting apparatus could reach the fire. Both of these were in Kentucky. The reasoning involved in the first of these, *Hazel* v. *Owensboro*,[18] was relied on in the instant case. The court there held that the disrepair of the street was not the proximate cause of the accident, although it conceded that the city would be liable for injury to travelers resulting from defects in the highway. The court insisted that any loss was "altogether problematical," and that "the connection between the condition of the street and the fire is too remote, in fact there is none."

In the second, a later case, *Small* v. *Frankfort*,[19] the court sustained a demurrer to plaintiff's petition, in which plaintiff had made all the necessary allegations as to negligence, duty and proximate cause, saying: "The demurrer admitted all the facts sufficiently pleaded. Notwithstanding this no cause of action is stated, for the city is not liable because in the exercise of governmental functions, its agents neglected to perform duties incumbent upon them, thus allowing the street to become defective, . . . and failed to provide the fire department with a reasonably sufficient amount of hose . . ." The court apparently sees no insuperable difficulty in a causation argument, and had the Kentucky defendant been under a statutory duty to keep the road in repair, the result might have been different.

The causation argument does not seem particularly persuasive. One might as readily say: "What kind of damage can be more a proximate

[17] 3 OHIO DIGEST—COUNTIES: Section 111, p. 230. "A board of county commissioners is not liable in its official capacity for damages for negligent discharge of its official duties except in so far as liability is created by statute."

[18] 30 Ky. L. Rep. 627, 99 S.W. 315 (1907).

[19] 203 Ky. 188, 33 A.L.R. 692 (1924).

consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved? It is the immediate consequence of the proximate cause."[20]

Upon its zone of duty argument, the court seems to be on stronger grounds. While plausible arguments might be made either way on this point, it is believed that most courts would support the view taken by the court, that the plaintiff was not within the class protected by the statute. S.L.

TORTS — NEGLIGENCE — RES IPSA LOQUITUR

The plaintiffs drove to the defendant's gasoline station to have their car lubricated. The defendant was then engaged in blending gasoline of different grades of volatility. The vapors arising from the gasoline exploded and caused injury to the plaintiffs. In action of negligence it was held that the doctrine of *res ipsa loquitor* was applicable.[1]

The phrase literally translated means, "the thing speaks for itself." The classic legal definition was given by Erle J. in *Scott* v. *London Docks Co.* as follows: "When the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."[2]

The doctrine has probably been most frequently invoked in carrier cases. It has been applied where the plaintiff was injured as a result of a collision of two trains of the defendant,[3] and also where plaintiff's injury was due to the collision of defendant's train with that of another carrier.[4] Derailment cases have been a frequent subject for its application.[5] Likewise the plaintiff was permitted to rely upon it in the upsetting of a stagecoach.[6] The court applied it to the case in which the plaintiff, while waiting on the defendant's car, was struck on the head by the falling of the trolley pole from the top of the electric car.[7]

[20] Atkinson v. Newcastle & Gateshead Waterworks Co., Law Rep. 6 Exch. 404 (1871).

[1] Hiell v. The Golco Oil Co., 137 Ohio St. 180, 28 N.E. (2d) 561, 17 Ohio Op. 544, 31 Ohio L. Abs. 429 (1940).

[2] 3 H. & C. 596, Exchequer court (1865).

[3] The Iron Railroad Co. v. John Mowery, 36 Ohio St. 418, 38 Am. Rep. 597 (1881).

[4] Toledo Consolidated Street Railway Co. v. Fuller et al., 17 Ohio C. C. 562, 9 Ohio C. D. 123 (1894).

[5] Lake Shore Electric Railway Co. v. Hobart, 32 Ohio C. C. 154, 13 Ohio C. C. N. S. 592 (1909).

[6] McKinney v. Neil, 1 Ohio Fed. Dec. 703, 1 McLean 540 (1839).

[7] Cincinnati Traction Co. v. Holzenkamp, 74 Ohio St. 379, 78 N.E. 529, 112 Am. St. Rep. 980 (1906).