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Recent Decisions

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of the testator be governed purely by psychogenic motives. The interval in *mania* is taken as a first indication of convalescence. The occurrence of the lucid period becomes more frequent as the patient improves. An indication of the testamentary capacity present during such interval may be had from Dr. Spitzka's description of the period. "The patient either admits that he has acted in an improper manner, apologizes for his misconduct, or more frequently becomes taciturn, and unwilling to make a humiliating confession." [15] Whether a person in this condition would have a disposing mind would undoubtly show some division among alienists. A para-lucid interval occurs in *Paretic Dementia.*[16] The delusions of grandeur present before the period of lucidity further detract from proper testamentary mental capacity because such delusions very frequently deal with possessions or property. Other diseases wherein the period can be found are periodical *mania* and periodical *melancholia.* In manic-depressive insanity the lucid interval is present and sometimes its length may be computed by the patient. This, however, is none too reliable because the intervals may vary in duration from several days to many years.[17] Such intervals are held in disfavor by one court [18] because it reasons that a testator who may compute the duration of lucid intervals is never fully restored to a state of disposing mental capacity.

A study of this problem indicates the progressive trend among courts to pass from the dark ages of psychiatry to a more modern humane treatment of mental defectives as regards their testamentary capacity. Today it is apparent that law and medicine must work together in keeping abreast of the rapidly developing science of psychiatry.

Charles G. Hasson.

RECENT DECISIONS

ADOPTION — RIGHT OF ADOPTED CHILD TO SUE ADOPTIVE PARENT IN TORT.— Bonner Kizer, an adopted child of 15 years, died as the result of strychnine poisoning. Evidence presented in the case showed that the poison had been administered by John R. Kizer, the adoptive father, on the pretext of treating said Bonner Kizer for malaria. Because the strychnine had been given over a period of time, the child's death was a slow one and accompanied by intense and excruciating pain which preceded death by several days and lasted until the demise. A suit for damages occasioned by the pain and suffering endured by the deceased was instituted by the administrator of his estate, A. J. Cole. And upon the suicide of John R. Kizer, the adoptive father, the proceedings were successfully continued against his

15 SPITZKA, MANUAL OF INSANITY, 1887, p. 139.

16 *Ibid.* p. 193.

17 DIEFENDORF, CLINICAL PSYCHIATRY, 1921, p. 413.

18 *In re* Martin's Will, 11 Mills 295, 144 N. Y. S. 174 (1913).

estate, in the name of Ben. A. Brown the administrator. *Brown v. Cole,* 198 Ark. 417, 129 S. W. 2d 245, 122 A. L. R. 1348 (1939).

Taken in conjunction with the common law rule that an unemancipated child cannot sue his parent for inflicted personal injuries, the conclusion of the instant case at first reading appears to be an outstanding exception and distinct paradox. Especially so when the grounds for this general holding are founded upon the maintenance of domestic tranquility as stated in *Matarese v. Matarese,* 47 R. I. 131, 133, 131 Atl. 198 (1925): "Any proceeding tending to bring discord into the family and disorganize its government, may well be regarded as contrary to the common law, and not to be sanctioned by the court." Substantially the same basis for the rule was also given in *Small v. Morrison,* 185 N. C. 577, 118 S. E. 12 (1923). In the leading case of *Hewlett v. George,* 68 Miss. 703, 9 So. 885 (1891) a concurrent basis for the ruling was enunciated when 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." Thus, at common law, the general ruling was founded on the desire to preserve parental control and insure domestic tranquility in conjunction with what was regarded as general public policy. Although there have been some statutory modifications, the common law is still recognized in many jurisdictions today. *McKelvey v. McKelvey,* 111 Tenn. 388, 77 S.W. 664, 64 L.R.A. 991, 102 Am. St. Rep. 787 (1903); *Ciani v. Ciani,* 127 Misc. 304, 215 N.Y.S. 767 (1926); *Rambo v. Rambo,* 195 Ark. 832, 114 S.W. 2d 468 (1938).

The general common law rule made no distinction between negligent personal injury and intentional or malicious personal injury. And this same tendency is evidenced in contemporaneous court decisions on this same problem. *Matarese v. Matarese, supra.* The theory being that recovery should be refused on the grounds of public policy, *Small v. Morrison, supra,* and because criminal action should constitute sufficient protection against malicious wrongs. *Roller v. Roller,* 37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893, 107 Am. St. Rep. 805 (1905). Torts, however committed, then, necessarily preclude the ability of an unemancipated child suing a parent for injuries inflicted thereby. The basis for this analogy was very well explained in the case of *Roller v. Roller, supra,* which laid down the doctrine that "Courts, in determining their jurisdiction or want of jurisdiction, rely upon certain uniform principles of law, and, if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarcation that can be drawn, for the same principle which would allow the action in the case of a heinous crime . . . would allow an action to be brought for any other tort. The principle permitting the action would be the same. The torts would be different only in degree." Accord: *Cook v. Cook,* 232 Mo. App. 994, 124 S. W. 2d 675 (1939); *Manion v. Manion,* 3 N. J. Misc. 68, 129 A. 432 (1925); *Lento v. Hajek,* 16 N. Y. S. 2d 776 (1940); *Luster v. Luster,* 299 Mass. 480, 13 N. E. 2d 438 (1938).

Although in the majority of cases, the courts have declined to make any distinction in the manner in which torts are committed and thereby modify the general rule barring recovery, there is a growing tendency to allow a civil suit for damages when an insurance company and not the parent is the true defendant. While only a few cases have gone along this line of reasoning, the conclusion as found in a note in 8 DUKE BAR ASS'N. J. 58 (1940) seems to be sound; namely, "That the family far from being disrupted will in fact be comforted by an intra-family suit at the expense of an insurance company does argue plausibly for the withdrawal of an immunity which protects family harmony." Thus in *Dunlap v. Dunlap,* 84 N. H. 352, 150 A. 905 (1930) the court said that the common law rule prohibiting suit should be recognized and applied with various limitations. So also in the case of *Worrell v. Worrell,* 174 Va. 11, 4 S. E. 2d 343 (1939), it

was decided that an unemancipated minor may sue the parent in his vocational capacity where the parent is protected by compulsory liability insurance. In a like case, *Lusk v. Lusk,* 113 W. Va. 17, 166 S. E. 538 (1932) the court said that family harmony would be assured rather than disrupted by allowing such a suit. And further, "A maxim of the common law is when the reason for a rule ceases, the rule itself ceases. . . . When no need exists for parental immunity the courts should not extend it as a mere gratuity." Everything considered, this seems to be good logic and the better rule, although constituting only the minority opinion.

In addition to grounding their argument on the basis of public policy and the maintenance of domestic tranquility the majority holdings argue that the ability to recover damages on these grounds is susceptible to fraud and because of the effect it would have on insurance rates. But it would seem that the courts would be put on their guard in cases involving close family relationships and so be more discriminating than usual. Then, too, insurance companies always investigate all cases thoroughly so as to prevent fraud, and this in itself should prove a sufficient safeguard.

It is uncontestable that insurance cannot create liability and this seems to be the focal point of the majority ruling. However, some states holding to the majority rule do so merely because the court considers it the duty of the legislature to modify the established rule, as in *Elias v. Collins* 237 Mich. 175, 211 N. W. 88, 89, 52 A. L. R. 1118, 1122 (1926). Or because according to statute no proceeding may be had against an insurance company until the right of action for personal injury is reduced to judgment. *Conely v. U. S. Fidelity & Guaranty Co.,* 98 Mont. 31, 37 Pac. 2d 565 (1934). Unless there is a more pronounced tendency towards the more equitable rule allowing recovery it seems only just that the various jurisdictions should enact statutes enabling minors to have such a right of action. But it is sufficient to note that there is an exception to the general rule prohibiting unemancipated children from suing their parents in tort in the jurisdictions where this ability to sue and recover in insurance cases exists. As to the ability of an adopted child to sue an adoptive father in tort as was held in the principal case, it would seem that this constitutes another exception to the general rule, should we accept the principal case as involving an acceptable principle of law.

Because adoption was a thing unknown to the common law, it is looked upon as the creature of statute. Vernier in his text AMERICAN FAMILY LAWS, § 254 (1936) commenting that today all jurisdictions possess such statutes states: "There is no sanction at common law, for the creation of the legal status of parent and child by adoption although statutes in this country have long permitted it." But it is to be commended as an advance of contemporary civilization that people should voluntarily take upon themselves the task of providing for less fortunate children by vesting them with a legal status through statute and thereby release the state of the duty of providing for them. Such a line of reasoning was adopted in an Illinois case wherein the court argued, "While the Adoption Act is in derogation of the common law insofar as judgments under it deprive parents of their natural rights to the custody of their children, it is, on the other hand, highly remedial and charitable in that it provides a method whereby children who would otherwise be the objects of public charity are suitably provided for by persons who assume a legal duty to do so." *People v. Wethel,* 202 Ill. App. 77 (1917). And in describing the rights of an adopted child, MADDEN, PERSONS AND DOMESTIC RELATIONS, 359 (1931) says, "Where the artificial relation of parent and child is created by adoption under the statutes, the relation will . . . give rise to substantially the same rights, duties, and liabilities as arise out of the natural relation."

Inasmuch as the general common law rule prohibits a child from suing his parent in tort it is apparent that the principal case made the distinction between natural and adopted children. It would be well then to inquire into the

status of the adopted child. While this will depend to a great extent upon the wording of the individual statutes there are some generalizations which can be made. "It may safely be said, as a general proposition, that an adoption effects a legal as well as a practical substitution of parents. Broad provisions to the effect that the child and adoptive parent sustain towards each other the legal relation of parent and child, and have all the rights and are subject to the duties of that relation; or that the child is to be considered 'to all legal intents and purposes' or 'in all respects' as the legitimate child of the person adopting, are found in forty jurisdictions." VERNIER, AMERICAN FAMILY LAWS, § 261 (1936). But as has been said, the wording of the specific statutes is to be considered in determining what is meant. Thus, in Arkansas, the jurisdiction of our principal case, it is the law that, "The court decrees that the child to all legal intents and purposes be the child of the petitioner; . . . upon the entry of the final decree of adoption the natural parents of the child, if living, shall be divested of all legal rights and obligations due from them to the child or from the child to them." ARKANSAS SESSION LAWS OF 1935 as amended by SESSION LAWS OF 1937, Act 328, p. 1241.

Thus, from a careful examination of the statute and the prevailing cases on the problem in this jurisdiction, *Rambo v. Rambo, supra,* wherein a minor child was denied the right to maintain an action for damages against a parent based upon an unintentional tort, it is true that the court "resorted to a tenuous distinction to depart from the rule of the common law," as was stated in a comment in 18 TEX. L. REV. 92 (1939). But was it a departure from the common law? Since adoption was a thing unknown at common law, the ability of an adopted child to sue an adoptive father in tort is a question stemming from the statutes giving such children a legal status and the rights and privileges of a natural child, As such, then, this case is not a departure from the common law because at common law this question would never have arisen since adoption and all the rights, privileges and disabilities arising thereunder were a nonentity. And this conclusion is borne out by the majority opinion of the instant case wherein the court said "It will be observed that in these statutes no attempt is made to invest either the child or adoptive parents with natural affection existing between blood relations, so the reason for the rule that prevents natural children from suing natural parents for voluntary torts committed upon them does not exist between adopted children and adoptive parents." The court considered that a bar still existed for a suit to be instituted by a natural child and therein showed strict adherence to the common law rule. Rather than make an exception as it had declined to do in *Rambo v. Rambo, supra,* the decision held that the differentiation between natural and adopted children lies in the natural bonds of affection and that inasmuch as the adopted child could not disrupt the parental authority nor throw into chaos the domestic tranquility of the home, his suit should be allowed. In light of the facts of the case, it is apparent that the court "leaned over backwards" to see that the common law rule was not broken. But why the distinction? If the adoption statutes of Arkansas gave to adopted children all the rights and privileges of natural children and made them subject to all the duties and liabilities of the natural child it is only reasonable to assume that the child by adoption should also be governed by the general common law rule preventing the suit of a parent in tort. The court in allowing recovery made the dubious distinction between natural and adopted children whereas in law none exists. Therefore, in the state of Arkansas a paradox exists as the result of the rule laid down in the instant case. An adopted child according to the interpretation of the Arkansas jurisdiction, is not a legally natural child although made one by operation of law — the statutes governing the court at the time this case was decided.

Robert E. Sullivan.

ADOPTION—RIGHT OF A READOPTED CHILD TO INHERIT FROM HIS FIRST ADOPTIVE PARENTS.—Petitioner James R. Burgess was adopted at the age of fourteen by Thomas F. and Cynthia Talley, with the consent of the child's living natural father, Walter A. Burgess. Five years later all parties concerned agreed that James should be returned to his natural father, who readopted him. It was ordered, adjudged and decreed that the relation of parent and child between the Talleys and James became null and void for all intent and purposes, as if the relationship had never been made. When the petitioner was over twenty-one years old, the Talleys executed a joint and mutual will bequeathing all property of either or both to the survivor, and not mentioning the petitioner. Cynthia died and by probate her property was decreed to her husband Thomas, who then executed another will, again not mentioning the petitioner, bequeathing his estate to certain nieces and nephews. Thomas died four months after executing this will. The petitioner then filed an application to vacate the final decree of distribution in Cynthia's estate and summons was served on Thomas' executor, E. M. Harris.

The district court held for the petitioner, saying that he was entitled to share in Cynthia's estate because of the rule that an adopted child unintentionally omitted from the will of his adoptive parent inherits by the law of intestacy as would a natural child. However, on appeal, the Supreme Court of Oklahoma reversed the district court and held for the executor. The court said that "one cannot occupy the status of an adopted child to two different sets of adoptive parents at the same time, while on the contrary he can be and is the adopted child of his adoptive parents and the natural child or 'issue' of his natural parents at the time. When he is adopted he is still the natural son of his natural parents nevertheless, even though his control is taken from them." In so ruling, the court admittedly sided with the decisions of the numerical minority. *In re Talley's Estate,* 109 Pac. 2d 495 (Okla., 1941).

The district court had based its decision upon *Alexander v. Samuels,* 177 Okla. 323, 58 Pac. 2d 878, 105 A. L. R. 1171 (1936). In that case a full-blooded Creek Indian named Nancy Alexander made a will which had been fully approved by the United States Commissioner bequeathing her entire estate to her husband, James Alexander. Nancy then legally adopted one Judy Alexander and soon thereafter died without making a new will to include Judy. Judy sought to recover from the defendant, who held through a *mesne* conveyance from the said James Alexander, as a pretermitted child of Nancy Alexander, under the Oklahoma statutes. The court held for the plaintiff child in accordance with the statutes: First, under Section 8954, C. O. S. 1921 (Section 1712, O. S. 1931) an adopted child is treated the same as a natural child for the purpose of inheritance. Second, under Section 11254, C. O. S. 1921 (Section 1569, O. S. 1931) a child born after the making of a will in the life time or after the death of the parent succeeds to the same portion as if the parent had died intestate. Third, under Section 11255, C. O. S. 1921 (Section 1570, O. S. 1931) the failure to name a child in a will must be intentional, otherwise the child will take by intestacy. Thus in the final analysis, the case merely decides that an adopted child inherits from his adoptive parents. Obviously this decision comes far from approaching the problem involved in the Talley case, although it is a fundamental starting point in a survey of the problem presented in that case.

The next step is to determine whether in the case of a second adoption after the death of the first adoptive parents the adopted child still inherits from his first adopters. In *Russell's Administrator v. Russell's Guardian,* 14 Ky. Law Rep. 236 (1898), the court held that the fact that an orphan's home subsequent to the death of the first person adopting the child, had cancelled the contract of adoption in consideration of another person adopting the child, did not deprive the child of its right of inheritance under the original article of adoption. And in the case of *Patterson v. Browning,* 146 Ind. 160, 44 N. E. 993 (1896), cited by the

counsel for the plaintiff in the principal case and in many other cases of importance to this question, the court said: "We see no reason why an adopted child may not inherit from its natural parents, and also from its adopted parents. And, if that is so, and we think it is, there is equally no reason why such adopted child might not inherit from both the first and second adopted parents. At all events, there is no reason why the second adoption should destroy the relation created by the first adoption, and the legal capacity to inherit thereby created."

In the parallel case of *In re Sutton's Estate,* 161 Minn. 426, 201 N. W. 925 (1925), a similar result was reached, after the *Patterson* case was cited. Here a widow, Martha P. Sutton, died intestate. Her only living child was the appellant. Her only other son had already died, but he had married and had adopted the respondent, Mary Elizabeth. Mary Elizabeth's adopted mother remarried Nicholas E. Kummer, and upon her death Kummer adopted Mary Elizabeth who by decree became his child and heir. It was held that the second adoption did not annul the status of the child as heir of her adoptive father.

But it is necessary to point out that in both the *Patterson* and the *Sutton* cases the first adoptive parent had died before the second adoption took place, and therefore the inherited property had already vested in the children before their second adoption took place. The last step we must take before squarely facing the Talley problem finds the courts still in almost universal accord. *Roberts v. Roberts,* 160 Minn. 140, 199 N. W. 581 (1924), agrees with what we have already seen in the decision of the principal case, that an adoption does not take away the right of a child to inherit from its natural parents. It is from this point on that we meet opposition as the question narrows down to the problem of whether a child who is readopted during the life of his first adoptive parents can inherit from them at their death. Here the cases divide their allegiance and we find both negative and affirmative answers.

The majority rule, with which the Oklahoma Supreme Court finds fault, is found in *Villier v. Watson,* 168 Ky. 631, 182 S. W. 869 (1916). Villier had adopted two children and had assumed parental control over them. Later all concerned agreed that the children's natural grandfather should adopt them and assume parental control. The court ruled that the children could inherit from their first adoptive parents. It based its opinion upon the fact that since the proceeding by the grandfather to adopt his natural grandchildren had not sought to annul the prior judgment of adoption by the first adoptive parents, that the former judgment was conclusive on such collateral attack, and thus the children were entitled to inherit from the Villiers, and especially since the second judgment did not declare the children to be capable of inheriting from the grandfather as though they were his children, but had merely said that they were to be his legal heirs, which as grandfather, they already were, and so no change was made in their status, with the exception of parental control.

In *Dreyer v. Schrick,* 105 Kan. 495, 185 Pac. 30 (1919), Gladys Schrick, the defendant, was adopted by the Beyers after Theresa Beyer had made her will. This would, as we have seen in *Alexander v. Samuels,* revoke the will as if a child had been born. While the Beyers still lived, Gladys was readopted by Charles and Mary Schrick, her present foster parents. Upon the death of the Beyers, the court held that Gladys could still inherit from them also, since there was no statute to prevent such dual inheritance. The court said that since the statute created the new relation, but did not cut it off, it would remain. Thus there must be another statute to keep the child from inheriting from both sets of adoptive parents. The court cited *In re Klapp's Estate,* 197 Mich. 615, 164 N. W. 381 (1917), and disagreed with its reasoning, saying that while a new domestic relation is created, it does not affect in any particular the first proceeding, which stands for all time, in all its integrity, attended by the same legal consequences as the birth of a

child to the adopting parents, unless formally annulled on sufficient grounds. The court added that it is the law, and not the birth or adoption, that creates the capacity to inherit, and thus since the statute creates the capacity and does not mention its destruction, another statute is needed to destroy it, and since there is no such destroying statute, the right still exists as before.

The third and final majority opinion to be mentioned in the *Talley* case is *Holmes v. Curl,* 189 Iowa 246, 178 N. W. 406 (1920). Here the plaintiff child was adopted by Martin L. and Abigal Curl in 1884, with the consent of her father, Nyran R. Pratt. In 1892 Pratt readopted the child. In 1911 Martin Curl died intestate. It was held that the plaintiff had not lost her right of inheritance by her readoption by her natural father before the death of her first adoptive parent. She was held merely to have acquired an additional right of inheritance. The court said that since the adoption of a child subsequent to the execution of a will has the same effect thereon as does the birth of a posthumous child for whom no provision is made, and since the plaintiff therefore had the same legal status as a natural child of the Curls, then it followed that her legal status in reference to the Curls was not changed by her readoption by her natural father, and thus her right of inheritance remained the same as if no second adoption had taken place.

But it was in the *Klapp* case that the Oklahoma Supreme Court found what it considered to be the sounder, though minority, view. As this case outweighed, in the Oklahoma court's opinion, the three cases that we have just discussed, it deserves particular attention in itself. Harlan Austin's parents had died when he was but three years old. He was adopted by Cyrus J. and Esther Klapp, with the consent of his natural grandparents. At the age of seven, his adoptive mother, Esther Klapp, died, and he was adopted by Albert E. and Eva E. Pulsipher, with the consent of Cyrus Klapp. In 1908 Cyrus married the defendant, and he died in 1915. His property was distributed one-third to the defendant and two-thirds to Harlan, the adopted child. The appellants from this decree of distribution include the defendant, Cyrus's father, his one brother, and four sisters. The court held for the appealing relatives and against the adopted child. The court was of the opinion that by the signing of the second valid adoption, and upon its approval by the court, it *ipso facto* had the effect of revoking or superseding the first adoption completely. Since the second adoption destroyed the first adoptive parent's right of custody and his right to the child's services, and since he was no longer obligated to care for, educate and support the child, why shouldn't the child's right of inheritance be destroyed in like manner, since that right was dependent for its existence upon the same assent, the same agreement, which created the other relationship? The next question follows naturally: How can the child be relieved of obligations to a natural parent and still retain its right to inherit?

The court answered these two questions together in its closing words: "But, it is argued, how can the child be relieved of its obligations to a natural parent and still retain its right to inherit? The reason therefor lies in the fact that at the moment of birth the child's status is fixed by law; at birth the child becomes the issue of the parent, and is included within the provisions of the statute which declares all issue shall inherit the property of their parents. In the case of the natural father, the question whether the child shall become his heir is not subject to his assent or contract, and therefore the child's right to inherit from him is not subject to his election. The law irrevocably fixes his status in that respect the moment he is born. In the one case, by no act of the parent, can he prevent the child becoming his heir. In the other case, the child cannot become his heir without his consent. One situation depends upon blood and birth; the other, upon consent and contract. If, as counsel for appellee insists, the doctrine of 'once in grace always in grace' controls, and 'once adopted always adopted' is to be the rule, I think we should hold that under the statute there can be no legal readoption

during the lives of the adoptive parents. This would be an unfortunate rule, and would doubtless work a hardship in many cases."

This minority view as adopted by the Oklahoma Supreme Court undoubtedly is the sounder solution of the problem when it is pointed out, as it was in *In re Klapp*, that there is a very definite distinction between the position of a natural parent and that of an adoptive parent in this respect, although at first peering into the problem and the involved statutes there seems to be no basis for any distinction. As future cases arise on this point it is quite probable they will agree with the Oklahoma Supreme Court, and soon this opinion will gain majority ranking and prestige.

James H. Graham, Jr.

COPYRIGHTS—EACH PUBLICATION AS A SEPARATE INFRINGEMENT.—Defendant was found guilty of an infringement of two copyrighted publications owned by plaintiff, i. e., "Morticians Prestige Builders." The infringing material was published by defendant in five advertisements of defendant's business as a funeral director in issues of the "Erie Dispatch-Herald," on five distinct days. The Federal District Court of the Western District of Pennsylvania held that the five publications constituted only one infringement within the purview of the minimum-damage clause of the copyright statute (17 U. S. C. A. § 25(b)). On reargument, the court reversed this decision, and, on the authority of *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499 (1919), decided that the publications amounted to five separate acts of infringement. *Zuckerman v. Dickson*, 35 F. Supp. 903 (1940).

The section of the Federal Copyright Law, relating to infringements (17 U. S. C. A. § 25), reads: "If any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable: (a) To an injunction restraining such infringement; (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph . . . , and in the case of the infringement of an undramatized or non-dramatic work by means of motion pictures, . . . and in the case of an infringement of a copyrighted dramatic or *dramatico*-musical work by a maker of motion pictures, . . . , and such damages shall in no other case exceed the sum of $5000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . ."

The *Westermann Co.* case presents both views of the problem, and provides arguments for both sides. Plaintiff designed and produced pictorial illustrations of styles in women's apparel, and supplied these to dealers in such apparel for use in advertising their goods. Exclusive licenses for use of these illustrations were granted, each license being restricted to a particular locality. A dealer in Columbus, Ohio, was given such an exclusive license, but defendant, publisher of a daily newspaper, without the consent of plaintiff or his licensee, reproduced and published six of plaintiff's copyrighted illustrations. Five were published once and the other one twice, the illustrations being used in each instance as part of an advertisement by some competitor in trade of plaintiff's licensee. The two advertisements having the same illustration were by different advertisers and were separated by an interval of twenty-six days.

The Circuit Court of Appeals for the Sixth Federal District held that the defendant's acts amounted to only one infringement of plaintiff's copyright. *Westermann Co. v. Dispatch Printing Co.*, 233 F. 609 (1916). It was argued that the various illustrations related to a single subject, and that plaintiff had tied them together by uniting the six cuts into his season's service. His right, so reasoned the court, "was the exclusive right to publish in Columbus this group of pictures for the season; and this was in substantial effect one right."

This case was appealed to the Supreme Court of the United States where it was determined that the defendant publishing company was guilty of seven distinct infringements. *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499 (1919). Mr. Justice Van Devanter, after quoting the minimum-damage clause of the copyright statute, wrote: "The statute says that the liability thus defined is imposed for infringing "the copyright in any" copyrighted "work." The words are in the singular, not the plural. Each copyright is treated as a distinct entity, and the infringment of it is a distinct wrong to be redressed through the enforcement of this liability. Infringement of several copyrights is not put on the same level with infringement of one. On the contrary, the plain import of the statute is that this liability attaches in respect of each copyright that is infringed. Here six were infringed, each covering a different illustration. Thus there were at least six cases of infringement in the sense of the statute."

In other words, the court found that there had been six cases of infringement because each of the six copyrighted pictures was printed once without the permission of the copyright owner or his licensee. That this is sound reasoning all will agree, but the decision, as thus far considered, should not govern the determination in the principal case, for in this latter, the same bit of copyrighted material was republished five times.

The learned Justice then went on to discuss the case of the copyrighted illustration which appeared on two occasions. Each time the illustration was used in a different advertisement, and was published at the instance of and for the benefit of a different advertiser. For this reason, the two publications were found to be distinct infringements.

Again the facts of the *Westermann Co.* case do not parallel those of the principal case, for in the latter, the copyrighted material was republished for the benefit of the same advertiser on all occasions in question. In fact, Justice Van Devanter concluded his discussion with "Whether it would be otherwise if that publication had been merely a continuation or repetition of the first, . . . are matters which we have no occasion to consider now. They are mentioned only to show that no ruling thereon is intended." In other words, the Supreme Court refused to express an opinion as to whether republication of the same copyrighted material amounted to separate infringements, but the District Court for the Western District of Pennsylvania, in deciding the principal case, saw fit to bind themselves by an opinion that was never rendered!

A survey of other cases strengthens the conclusion that the court was in error in the principal case. During the *interim* between the two decisions in the *Westermann Co.* case, the case of *Sauer v. Detroit Times Co.*, 247 F. 687 (1917), was decided. It was held that there had been one infringement under the minimum-damage provisions where a newspaper, without the permission or assent of the copyright owner, published a copyrighted map in its afternoon edition, and republished it in the noon edition of the following day. While this second edition was in some respects identical with that of the previous day, a considerably less number of copies were printed, material was rearranged in order to make room for new items, and a different class of subscribers was reached. However, since the same map was republished, there was held to be only one infringement.

Where a hotel owner used a copyrighted aerial photograph of his hotel, without the consent of the copyrighting photographer, in magazine advertisements, it was held that the insertions constituted separate infringements. *Cory v. Physical Culture Hotel, Inc.*, 14 F. Supp. 977 (1936); affirmed 88 F. 2d 411 (1937). The determining features here were that the series of advertisements could be discontinued at any time, the text of the advertisements varied, and a special key number was given to each publication of the advertisement to enable the defendant to identify the replies to the advertisements with each particular issue. Undoubtedly, the separate printings constituted as much separate infringements as if the copyrighted material had been used for the benefit of several advertisers.

The opinion in the *Westermann Co.* case was given much consideration in *Doll et al. v. Libin*, 17 F. Supp. 546 (1936). The Federal District Court in Montana recognized that the opinion in the *Westermann Co.* case never determined the status of repetitions of the same piece of copyrighted material; but, relying on the general principles set out in that opinion, decided that five publications of the same copyrighted material violated only one right and amounted to only one infringement.

These considerations lead to the conclusion that the answer to the problem of whether republications of the same piece of copyrighted material amount to one or several infringements of the copyright is that there is only one infringement where the republication is in substantially the same manner and for the same purpose; but if all the circumstances are changed, there are several infringements. In the latter case, the right itself is violated more than once, but in the former, as in the principal case, there is in effect only one infringement of one right. The court in *Zuckerman v. Dickson, supra,* should have retained its original decision, rather than allow itself to be confused by a decision which did not apply.

John E. Savord.

NEGLIGENCE—GOLF COURSE—LIABILITY FOR INJURY ON OR NEAR—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.—Plaintiffs, husband and wife, sued golf professional, the operators of the golf course and the insurer of the operator, for injuries to the wife received as the result of being struck by a golf ball driven from a nearby tee by another golfer. The plaintiff, wife, while receiving instructions from the professional, was standing in the direct line of flight of any ball properly driven from the tee to the green. The charge of negligence against the professional was that he was negligent in placing her in a dangerous position on the fairway of the golf course. Plaintiffs further charged defendant club as liable under the theory that the professional was "an agent servant and employee" and also because of alleged negligence in permitting golfers to play over the course while others were practicing thereon.

Held: the professional, by his initial negligence in placing the pupil a few yards directly in front of the tee was not the proximate cause of the accident, since the instructor could assume that another golfer would give a warning according to the universally recognized custom of the game, and the accident thus resulted from unexpected and unforeseen negligence of an intervening party. Judgment was rendered against the defendant professional by default. It was further held that the operator of the course was not liable on the ground of negligence in permitting golfers to play over the course while others were practicing thereon. There was no liability on the theory of master and servant for the reason that the lessons given by the professional were collected for and the fees therefor were retained by him personally. The question of the defendant insurer's liability was

excluded by the construction of its contract with defendant, operator of course. *Petrich v. New Orleans City Park Improvement Ass'n.*, 188 So. 199 (La., 1939).

The principal case is representative of what is apparently the general rule in the United States although there is good authority in support of the opposite view. According to the following cases it appears that among golf players it may be expected that no player would strike a ball from a nearby tee without first giving warning when it is apparent to the driver of the ball or should be foreseen by him that another player is in the direct path of his drive, without first giving a warning to such other player according to the universally recognized custom of the game. *Everett v. Goodwin,* 201 N. C. 734, 161 S. E. 316 (1931); *Alexander v. Wrenn* 158 Va. 486, 164 S. E. 715 (1932).

The cases relating to the failure to warn before shooting, where the presence of a person is in the probable line of fire seem to follow the "master and servant" theory as between the player and his caddie. Thus it was held that there existed the duty of ordinary care not to injure the caddie on the part of the player, but no duty existed to warn a caddie serving the player. *Stober v. Embry,* 47 S. W. 2d 921 (Ky., 1932). The liability of a player to the caddie of another is the same as his liability would be to any other player in case of injury through negligence on his part, the gist of the rule being that it is the duty of the player to warn persons in the general intended direction of his drive and the player's failure to warn such persons shows a lack of ordinary care. *Toohey v. Webster,* 117 Atl. 838, 23 A. L. R. 440, (N. J., 1922).

One of the general principles of law is laid down by Justice Case, in *Schlenger v. Weinberg,* 150 Atl. 434, 69 A. L. R. 738 (N. J., 1930), where a plaintiff was invited by the owner of a golf links to see the course. It was held that "a person who enters upon the links is necessarily subject to whatever danger that fact entails and that mere ownership of a golf course does not impute liability for an injury suffered by another from a golf ball driven by a player on the course." From this it would appear that a spectator on a golf course must be held to assume the risk of injury while walking onto the course.

As to the liability of a golf course management to a passerby, or to other persons rightfully on or near the premises although not taking part in the game either as player, spectator, or caddie, it has been held that defendants, player and management of the course were liable to passenger riding in automobile along highway adjoining the course where injury to plaintiff resulted from the hitting of the windshield by the out-of-bounds drive. The court said that the liability of the golf club may be predicated on either negligence or nuisance, where such dangerous condition of near highway course was known, or should have been known. The liability of the player was founded upon the principle that such act was a violation of the plaintiff's right to bodily security and that if it were evident to the defendant player, that there was a possibility of danger, and if the doing of a lawful act would naturally and probably result in harm, though unintended, in relation to the plaintiff, there was an actionable wrong. *Gleason v. Hillcrest Golf Course,* 148 Misc. 246, 265 N. Y. S. 886 (1933).

The liability of a golf course to a worker engaged in improvement of golf links was founded upon the negligence of the City Park Association in permitting golf to be played over the portion of the links where the plaintiff was working when reasonable prudence demanded that it should have foreseen that to allow use of the links, under the prevailing circumstances, would be unsafe as to workers *Brooks v. Bass,* 184 So. 222, (La., 1938).

Other cases in which golf clubs and associations have been held liable include: *Everett v. Goodwin, supra,* wherein a club was held liable for negligence in not using ordinary care in promulgating and enforcing reasonable rules. Rangers were employed by club for purpose of enforcing rules but none appeared in instant case.

The negligence of the starter hired by club for purpose of directing players when to tee off, was sufficient ground for holding defendant club liable as the proximate cause of the injury to plaintiff, golfer. *Stolnick v. Cooley,* 61 S. W. 2d 462, (Tenn., 1933).

Two actions by caddies under the Workmen's Compensation Acts of Wisconsin and California are in point to further illustrate the status of caddies in relation to the clubs at which they are serving golfers. In *Rice Lake Golf Club, Inc. v. Industrial Commission,* 254 N. W. 530, (Wis., 1934), a caddie was denied recovery for injury sustained while serving golfer at the club because no contractual relation between caddie and club existed so as to constitute plaintiff as an employee. In *Claremont Country Club v. Industrial Accident Commission,* 174 Cal. 395, 163 Pac. 209, L. R. A. 1918 F. 177 (1917), it was held that a golf club which, for the convenience of its members, provides caddies, who are hired and supervised by its own employees, is the employer of a caddie injured while in the performance of his duties.

An interesting point is brought out in *Campion v. Chicago Landscape Co.,* 295 Ill. App. 225, 14 N. E. 2d 879 (1938), in which the plaintiff was denied recovery for the alleged negligence of the defendant in the maintenance of its fairways and the alleged manner in which the course was laid out. Plaintiff was struck in the eye by a ball while playing golf on the Garfield course in Chicago, which at the time was under the operation of the defendant. In reversing the judgment of the Superior Court, the Appellate Court held that plaintiff failed to show that defendant was guilty of any negligence proximately causing injury to plaintiff and that it was rather the act of another player in driving the golf ball, and not the manner in which the course was laid out.

The doctrine of voluntary assumption of risk by the plaintiff by his own participation in the game of golf has been held to defeat recovery in a group of cases. In *Andrew v. Stevenson,* 31 SCOT. LAW REV. 194 (1906), cited in 23 A. L. R. annotation 447, the court denied recovery because of the doctrine of voluntary assumption of risk, holding the defendant not liable for hitting the plaintiff with a golf ball which he had sliced, the plaintiff not having been in the general direction of the drive. This same doctrine was held to deny plaintiff recovery in *Benjamin v. Nernberg,* 102 Pa. Sup. Ct. 471, 157 Atl. 10 (1931), where plaintiff was hit by ball driven by defendant while teeing off, the plaintiff being on the green.

Cases considering this problem of player versus player actually participating with the defendant or not, hold that it is the duty of the defendant to use ordinary care, and give sufficient warning when striking his ball in addition to following the prescribed and settled rules of the game. *Ratcliffe v. Whitehead,* 41 MAN. L. R. 590; 3 W. W. R. 447 (Manitoba, 1933); *Everett v. Goodwin, supra; Alexander v. Wrenn,* supra.

The same duty applies in a case where a ball directed by a player strikes a caddie not in his service. *Toohey v. Webster, supra; Simpson v. Fiero,* 237 App. Div. 62, 260 N. Y. S. 323 (1932); *Povanda v. Powers,* 152 Misc. 75, 272 N. Y. S. 619 (1934). It would, therefore, seem that there is no one general rule governing the liability of the player or the golf course in cases of injury to others. However, the rule that a player is not liable to his caddie for failing to give a warning seems to be quite general. In this situation we have seen that no duty is upon plaintiff to shout the customary "fore" as a warning; *Stober v. Embry, supra.* The duty imposed upon both a player, and a club, in relation to non-players who sustain injury may be predicated upon the negligence or the nuisance theory. The court allowed recovery against club and player and suggested that it could be based on either allegation: nuisance or negligence. *Gleason v. Hillcrest Golf Course, supra;* upon negligence, *Schlenger v. Weinberg, supra.* The principal case would seem to be in accord with the latter case. The defenses available in actions for

injury brought against club and player seem to be for the most part either assumption of risk, or contributory negligence. The defense of assumption of risk in actions against a club includes: *Schlenger v. Weinberg, supra;* and against a player, *Benjamin v. Case, supra.* Where one's own caddie is not exercising precaution when aware of potential danger, the defense of contributory negligence may prevail, *Stober v. Embry, supra.*

Edward A. Mahoney, Jr.

WORKMENS' COMPENSATION — DEATH AT THE HANDS OF AN INSANE THIRD PERSON.—John Ohlinger killed his wife, entered a taxicab and directed the driver to take him to the place of employment of the decedent, who he believed had sought to estrange his wife from him. The taxicab was stopped, as directed, at the filling station of the defendant company and Ohlinger asked the decedent to change a ten dollar bill for him. Ohlinger received the change, paid the cab-driver who then drove away in his cab. As the decedent was putting away the bill, Ohlinger shot and killed him. The court held that the decedent's death under the above circumstances was not compensable under the Workmens' Compensation Act. OHIO GEN. CODE, § 1465-37 *et seq. Shoemaker v. Standard Oil Company of Ohio,* 31 N. E. 2d 92 (1941).

If the assault on an employee is committed by another solely to gratify his personal ill will, anger or hatred, it is generally held that the injury does not arise out of the employment within the meaning of the Workmens' Compensation Acts. *Ex Parte Coleman,* 211 Ala. 248, 100 So. 114 (1924) — where a gasoline engine operator was killed by an assailant who assaulted him because of personal animosity; *Bryden v. Industrial Accident Commission,* 62 Cal. App. 215, 215 P. 1035 (1923) — where a petroleum company employee was shot and robbed of his own money, the thieves not being after anything but the contents of his pockets; *Talge Mahogany Co. v. Beard,* 90 Ind. App. 611, 169 N. E. 540 (1925) — where an employee and stockholder of a coal company was killed by another stockholder because of trouble which had arisen because of differences between stockholders as to the management of the company; *Scholtzhauer v. C. & L. Lunch Co.,* 233 N. Y. 12, 134 N. E. 701 (1922) — where a waitress was shot and killed by a co-employee because she refused an invitation to go out with him. Contra—*Verschleiser v. Joseph Stern & Son,* 229 N. Y. 192, 128 N. E. 126 (1920) — where one employed as a trucker in an abattoir had a piece of flesh thrown about his neck by a co-employee and was kicked and sustained an injury when he assaulted another employee who he supposed had thrown the piece of flesh; *Carbone v. Loft,* 219 N. Y. 579, 114 N. E. 1062 (1916) — where the claimant was injured in an assault made on him by another employee three quarters of an hour after an oral exchange of insulting language had taken place between them.

The decisions are in agreement that an injury by accident or assault in the course of employment caused by an act of a third person is compensable providing the injury is not a result of a personal intent to harm the employee as an individual but is directed against him as an employee or because of his employment. *Martin v. Chase,* 194 Iowa 407, 189 N. W. 958 (1922) — where an employee attending his duties as a clerk of a hotel was assaulted because the manner of his performance of those duties gave offense to an intoxicated man seeking to become a guest; *State v. District Court of Koochiching County,* 134 Minn. 16, 158 N. W. 713, L. R. A. 1916 F (1916) — where a bartender was struck in the eye by a drinking glass thrown by a drunken patron; *Dillon v. Dillman,* 133 Okla. 273, 272 Pac. 373 (1929) — where an employee was shot by a drunken man who wanted to borrow one of his employer's horses.