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Notes

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the law building does not make the law school. The Dean appeals to the Notre Dame lawyers in these words:

"Law is a progressive rather than an exact science. The study of law is not limited to the learning of fixed rules. The purpose of a law school is to train the mind to comprehend the development of the principles of law and to apply them to contemporary conduct. The practice of law is not a business for profit, nor an occupation to exact fees from society for clever advice. It is a profession with responsibilities to the public. It is a public trust and the lawyer is a public servant. As a law-maker, the lawyer's duty is to make the laws just. As a judge and advocate, his duty is to see that the law is properly administered.

Now, you Notre Dame lawyers! The $400,000 law building does not make the law school. The builders will have built in vain unless within its walls the 150 young men learn to appreciate the duties and responsibilities of a lawyer. Unless the Notre Dame Law School sends forth legal thinkers, honest legal advisers, true law-makers, and efficient law-administrators, it will have failed to fulfill its mission. I plead! Go forth as a Notre Dame man imbued with the Notre Dame spirit; carry to the ranks of the profession Her teachings and Her ideals; and thus reflect credit upon your Alma Mater as well as yourself."

NOTES

AUTOMOBILES—DUTY OF DRIVER TO GUEST—GUEST STATUTES.*—In *Higgins v. Mason*[1] "the plaintiff, Josephine B. Higgins, her husband, Robert Higgins, and the defendant's wife, Grace Mason, were the guests of the defendant, George Mason, Jr., on an automobile trip from Corinth, N. Y., to Gravesville, a village near Utica, N. Y., and return, and rode with the defendant in an automobile owned and furnished by him. On the return journey, when about twenty miles from Corinth, the car, then driven by the plaintiff, Josephine B. Higgins, suddenly turned to the left, crossed the road on a sharp angle, entered the left-hand ditch, and overturned. The occurrence caused the death

*See McCabe, *The Duty of an Automobile Driver to a Gratuitous Guest*, 6 NOTRE DAME L. (1931) 300. And see Note, 74 U. OF PENN. L. REV. (1925) 86; and notes in 20 A. L. R. 1014, 26 A. L. R. 1425, 40 A. L. R. 1338, 47 A. L. R. 327, 51 A. L. R. 581, 61 A. L. R. 1252.

1 174 N. E. 77 (N. Y. 1930).

of Robert Higgins. The plaintiff brings this action, as his administratrix, to recover damages for the death, charging that it was caused by the defendant's negligence." It appeared that "on the return journey, near Utica, seventy miles before its arrival at the place of the accident, the automobile, driven by the defendant Mason, had taken a 'swerve' or 'slew' from the right side to the left edge of the macadam highway." All conceded that "it had been raining and the road was wet." The defendant Mason said that "the car slewed because he applied the brakes to the car while on a slippery road." There was testimony "to the effect that Mason, several days after the accident, said in reference to the swerve that 'he knew there was something wrong with the car but he did not know what'; that he 'thought there was something wrong,' but that he thought 'they would be able to get home'; that Grace Mason, his wife, while driving after the swerve, called out to him, 'Papa, there is something wrong with the car.' " It was held that the defendant was not liable for the death of his guest because of a mechanical defect in the car, although the defendant, by inspection, might have discovered the fault, since the guest, in accepting the invitation to ride, must have taken the car as he found it, and no duty of inspection rested upon the defendant. The court said:

"Mason would be liable only if he knew of the dangerous condition; realized that it involved an unreasonable risk; believed that the guests would not discover the condition or realize the risk; and failed to warn them of the condition and the risk involved. . . . Even if Mason knew that something was wrong with the car, that it was 'logy' on hills, that it did not steer well, this was far from being realization of the fact that a serious mechanical defect, making further travel dangerous, was involved. Mason's own conduct in exposing his wife and himself to the peril of traveling farther in the car indicates that he was not conscious of the peril. If Mason thought the car safe for himself, he could not have realized that it was unsafe for his guests. Then, also, if Mason's failure to realize that the 'something' which was wrong with the automobile constituted a dangerous condition was due to his lack of mechanical knowledge, that was a risk assumed by the guests when they accepted his invitation to take the trip."

The rationale of this decision is apparent from the foregoing reasoning. The relationship that exists between an automobile owner and a gratuitous passenger is said to be analagous to that existing between a landowner and his guest. The court cites the Restatement of the Law of Torts as setting forth the proper rules which govern the case. Kellog, J., who delivered the opinion of the court, said:

"The duty of an owner of premises to a gratuitous licensee has been clearly stated in the Restatement of the Law of Torts, Tentative Draft No. 4, American Law Institute. The owner is liable for injuries caused by a defective condition of the premises only if he 'knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk' and fails to use reasonable care to make the premises safe or 'to warn them of the condition and the risk involved therein.' Section 212. If a host invites a guest to dine with him at his country place, and the road to his house has become dangerously undermined, the host is not liable to his guest for an injury caused by a collapse of the road, if he did not have actual knowledge that the road was undermined, although he 'could have discovered it had he paid attention to the condition of his road.' Id. Illustrations, p. 165."

Probably the first decision in New York, and one of the first decisions in this country, defining the obligation of one who invites another to ride in his private vehicle, toward the passenger so invited, is that of *Patnode v. Foote*.[2] In this case the plaintiff had been subpoenaed by the defendant as a witness in an action to which he was a party, and there was evidence to warrant the jury in finding that the defendant had *invited* the plaintiff to ride with him to the place of trial, in "an open buggy drawn by one horse driven by himself." The defendant drove at a "reckless rate of speed, against the plaintiff's protest." The defendant contended that since the plaintiff was his gratuitous passenger he owed no duty of care to the plaintiff. Houghton, J., in delivering the opinion of the court, said:

"A person thus invited to ride stands in the same situation as a bare licensee who enters upon real property which the licensor is under no obligation to make safe or keep so but who is liable only for active negligence. . . . The obligation of one who invites another to ride is not as great as that of the owner of real property who invites another thereon, especially for the purposes of trade or commerce, because, under such circumstances, the one who gives such invitation is bound to exercise ordinary care to keep such property reasonably safe. . . . one who invites another to ride is not bound to furnish a sound vehicle or a safe horse. If he should have knowledge that the vehicle was unfit for the transportation or the horse unsafe to drive, another element would arise, and he might be liable for recklessly inducing another to enter upon danger. These latter elements, however, are not involved in the present action, and the duty of the defendant toward the plaintiff only was to use ordinary care not to increase the danger of her riding with him or to create any new danger."

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2 153 App. Div. 494 (1912).

These cases represent one view as to the liability of an automobile driver for injuries to a passenger in his private car. This view, briefly stated, is that the situation gives rise to the relation of licensor and licensee; the owner is not bound to furnish a "sound vehicle," but if he knows that the car is unsafe and that it involves an unreasonable risk to the passenger and has reason to believe that the latter will not discover the condition or realize the risk and fails to use reasonable care to make the car safe or to warn the passenger of the condition and the risk involved therein the owner is liable to the passenger for the resulting injury; it is the duty of the owner not to increase the danger which the guest assumes upon entering the car manned by the owner or to create any new danger, such as by fast and reckless driving.

In the *Higgins* case the rules of liability existing between licensor and licensee were applied as far as the "condition" of the automobile was concerned. In the *Patnode* case the same rules of liability were held to be applicable in the matter of the "management" of the automobile. In the former case it would seem that the rules of liability obtaining between licensor and licensee would establish the proper measure of liability. There is not any fundamental difference between an invitation extended by a person to dine with him and an invitation to ride with him. In the one instance the guest is said to accept the premises of his host as he finds them, in so far as the *condition* of the premises is concerned. If the owner knows of a defective condition which involves an unreasonable risk of danger to his guest and has reason to believe that the guest will not discover the condition or realize the risk, he owes a duty to the guest to make the premises safe or to warn the guest of the condition and the risk involved therein. The guest should have no right to a greater security than that enjoyed by the host or other members of the family. Likewise, when the owner of an automobile invites another person to take a pleasure drive the guest should take the car as he finds it, and the owner would not be liable to the guest for an injury due to a defective condition of the car unless he had reason to believe that the car was unsafe to make the trip. In such a case liability would be based upon the defective condition of the car and not upon negligent operation thereof.

Where liability is based upon *negligent operation of the car* the question of whether the rules of liability obtaining between licensor and licensee should apply gives rise to some difficulty. Those rules of liability were intended to apply principally with reference to the condition of premises. May they be extended so as to apply with reference to liability based upon negligent management of an automobile? Such is a part of the problem involved in this Note. The larger problem is to determine the basis and scope of the common

law duty that the driver or owner of an automobile owes to his guest in so far as the law of negligence is concerned; and to indicate the statutory trend. The *Patnode* case gave an affirmative answer. In *Clark v. Traver* [3] the plaintiff, while riding as a guest in the defendant's automobile, received injuries through an accident arising, as alleged, from the automobile being driven at an excessive speed. The defense was contributory negligence. The court said:

"It is well established that the duty which the defendant owed to the plaintiff as a licensee was to exercise ordinary and reasonable care, not to increase the danger of the plaintiff while thus in defendant's car or to create any new danger. (Patnode v. Foote. . . .)"

The Court of Appeals of New York does not appear to have decided this question. There is a *dictum* in *Rolfe v. Hewitt* [4] indicating an affirmative answer. In that case the plaintiff's intestate was killed by the overturning of an automobile in which he was riding. The car was owned by the defendant, and at the time of the accident was being driven by his chauffeur. Apparently the chauffeur lost control of the car, thus causing the overturning. The court said:

"If he (the intestate) were in the car with the consent of the chauffeur then as to him he was a licensee, but not as to the defendant."

Both the English Courts and the Appellate Division of the Supreme Court of New York have held that a licensee (one permitted to use the premises of another for one's own purposes) does not take the risk of dangers superadded by the active misconduct of the host.[5] The host must take into account the probable presence of the licensee upon those parts of the premises to which the permission applies; and he is under a duty not to do any act which if he "stopped to think" would imperil the safety of the licensee if he avails himself of the permission granted him.[6] That is to say, the landlord is liable to the licensee for injuries due to the failure of the landlord to conduct his activities upon the premises with reasonable care. The analogy would seem to be well drawn. But Collins, M. R., in *Harris v. Perry & Co.*,[7] takes a different attitude:

"At all events, I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. The principle in all cases of this class is that the care exercised must

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3 205 App. Div. 206 (1923). Aff'd 143 N. E. 736.

4 125 N. E. 804 (N. Y. 1920.)

5 Gallagher v. Humphrey, 6 L. T. (N. S.) 684 (Q. B. 1862); DeBoer v. Brooklyn Wharf Co., 51 App. Div. 289 (1900). See as to liability of a railway to a person, gratuitously but expressly invited to ride in its engine, for injuries caused by its negligent operation, Harris v. Perry, L. R. [1903] 2 K. B. 219.

6 BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 171, 172.

7 L. R. [1903] 2 K. B. 226.

be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation. . . ."

In the one case it is a question of the obligation assumed by one inviting another to come upon his land. While the extent of the obligation assumed by inviting one to ride gratis in his carriage is a question of the liability of one who enters upon a gratuitous undertaking to carry.

Perhaps a better analogy would be the rule set forth in the Restatement of the Law of Torts [8] and supported by the cases listed in the Explanatory Notes [9] thereto:

"If the actor takes charge of another whom the actor's non-tortious conduct has rendered helpless, the actor is under a duty to exercise reasonable care to give the other aid or protection."

But it is said in the *Comment* that

". . . the actor is not required to conform to a high standard of diligence and competence, to possess any special bill (skill)? or to subordinate his own interests to those of the other, to the same extent as would be necessary if the services were obligatory or for compensation. . . . Indeed, there is a strong analogy between the lack of that reasonable care which is necessary to make the actor liable in such case and that recklessness which makes an act something more than negligence though less than intentional injury." [10]

In a jurisdiction which purports to recognize only one degree of negligence, this rule and the comment thereto would seem to be applicable by way of analogy to the question of liability of the automobile driver to his guest. The Court of Appeals of New York, however, is definitely committed to a recognition of gross negligence in so far as it means a failure to exercise slight diligence.[11] In the *Patnode* case the Appellate Division of the New York Supreme Court committed itself to the view that the driver of vehicle owes to the invited guest the duty to use ordinary care "not to increase the danger" to the guest "or to create a new danger," in the *operation* of the vehicle. But in that case there was evidence to warrant the jury in finding that the defendant drove at a *reckless* speed. So the case is really

8 TENTATIVE DRAFT No. 4, § 197.
9 EXPLANATORY NOTES ON TORTS, TENTATIVE DRAFT No. 4, p. 16.
10 *Supra* note 8 at 123.
11 See Weld v. Postal Telegraph Cable Co., 103 N. E. 957 (N. Y. 1913).

not authority for what is said to be the general rule, *viz.*, that an owner or driver of an automobile owes the duty to an invited guest to exercise reasonable care in its operation, and not unreasonably to expose him to danger and injury by increasing the hazard of travel.[12]

The decisions in the Supreme Court of Alabama[13] support the view that the owner and driver of an automobile owes to an *invitee* (express or implied) the duty to exercise reasonable care in the operation of the car "not to unreasonably expose to danger and injury the occupant by increasing the hazard of that method of travel. He must exercise the care and diligence which a man of reasonable diligence, engaged in like business, would exercise for his own protection and the protection of his family and property—a care which must be reasonably commensurate with the nature and hazards attending this particular mode of travel." A distinction is made between the duty owed to an *invitee* (whether express or implied) and the duty owed to a mere *licensee* in this connection, the latter being defined as one whose presence in the car is merely tolerated by the driver. It is said that the *licensee* assumes "all the risks of carriage except such as might result from wanton or intentional wrong or a failure to exercise due care to avert injury after his danger became apparent."[14] It is difficult to accept this distinction which seems, from the language of the Supreme Court of Alabama, to turn on the fact that the licensee is in the car for his own benefit or pleasure, the owner having no interest or advantage in his presence.[15] The important thing in either instance, whether the guest be expressly invited or his presence be merely tolerated, would seem to be that the owner has given his consent to the presence of the guest in the car and must take that into account in the matter of the *operation* of the car.[16] The Supreme Court of Alabama does not, as a general rule, recognize but one degree of negligence.[17]

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12 See Note, 47 A. L. R. 327.

13 Perkins v. Galloway, 69 So. 875 (Ala. 1915); Garner v. Baker, 108 So. 38 (Ala. 1926); Thomas v. Carter, 117 So. 634 (Ala. 1928). See, also, Hall v. Slaton, 144 S. E. 827 (Ga. App. 1928), applying the Alabama rule as to an injury that occurred in Alabama. The action was brought against the driver to recover damages for the death of a person who was riding in the automobile at the time of the accident. Evidence that the car was being driven at a speed of 50 or 60 miles an hour when it ran through the timbers of a bridge was held to be erroneously rejected as it would have authorized the inference that the driver was not using ordinary care under the rule applicable in Alabama.

14 Crider v. Yolande Coal & Coke Co., 89 So. 285, 286 (Ala. 1921).

15 See Crider v. Yolande Coal & Coke Co., *op. cit. supra* note 14, at 287.

16 Compare Bohlen, *op. cit. supra* note 6, at 171, 172.

17 See Stringer v. Alabama Midland R. Co., 13 So. 75 (Ala. 1893); Alabama G. S. R. Co. v. Hall, 17 So. 176 (Ala. 1895).

In *Central Copper Co. v. Klefisch* [18] the plaintiff was a member of an "auto party," the driver of the car being "furnished by" the defendant. It appears that the defendant furnished this means of recreation to its employees, one of whom was the plaintiff, and that the car was being used for this purpose at the time of the plaintiff's injury. The Supreme Court of Arizona said:

"It is the law that the owner of a motor vehicle, who invites a guest to ride with him, is bound to use reasonable and ordinary care for the safety of the guest. . . . Nor is it necessary for liability that the conduct of the operator should be willful or wanton, or have amounted to gross negligence. . . . If this be the law, much more is it so when the invitation was extended, not as ordinary courtesy to a guest, but for the purpose of keeping defendant's employees better satisfied with the conditions of their employment . . . it (the defendant) was under the duty of seeing that their safety was cared for in a reasonable manner, just as if it (this means of transportation) had been furnished as a matter of contract."

Not only does the court adopt the three degrees of negligence but it seems, in adopting the general rule, to base the duty upon the fact that the driver has taken the plaintiff into his custody. The purpose of the ride is immaterial. The important thing is that the plaintiff is in the car with the owner's permission, and the latter owes a duty to the plaintiff not to do an act which will imperil the safety of the plaintiff.

In *Black v. Goldweber* [19] the plaintiff was a "self-invited" guest in the defendant's automobile. The testimony tended to show that the car, in which they were driving, turned over on account of fast driving by the defendant, which resulted in the injury that the plaintiff complained of. The only question presented for the Supreme Court of Arkansas to decide was whether the trial court was in error in instructing a verdict for the defendant upon the theory that the only duty he owed to the plaintiff as a self-invited guest was to refrain from injuring her willfully or wantonly. In giving an affirmative answer, Humphreys, J., in speaking for the court, said:

"The trend of modern authority is to disregard this distinction (between the duty owing to an invitee and that owing to a bare licensee) and apply the rule of duty imposed on owners and drivers of vehicles to invitees, to self-invitees, or licensees also. The prevailing rule . . . requires drivers of automobiles to exercise ordinary care in the operation thereof to transport their passengers safely, whether guests by sufferance, self-invited guests, or invited guests. . . . 'He who enters an automobile to take a ride with the owner also takes the automobile

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18 270 Pac. 629 (Ariz. 1928).
19 291 S. W. 76 (Ark. 1927).

and the driver as he finds them. But, when the owner of the automobile starts it in motion, he, as it were, takes the life of his guest into his keeping, and in the operation of such car he must use reasonable care not to injure any one riding therein with his knowledge and consent. . . .' " Hart and Kirby, JJ., concurred in this opinion. Yet, in a special concurring opinion, in which Kirby, J., concurred, Hart, J., said:

". . . I hold to the view that, in a gratuitous carriage for the sole benefit of the guest, the law requires only slight diligence, and makes the owner of the automobile liable only for gross neglect."

Notwithstanding this special concurring opinion, the next year, in the case of *Bennett v. Bell*,[20] Kirby, J., who delivered the opinion of the court, purported to adopt the views set forth by Humphreys, J., in the case of *Black v. Goldweber*. He made no reference to his former opinion. But the facts in the *Bennett* case give rise to the inference that there was a failure to use "slight diligence." The plaintiff was riding in the defendant's automobile at his invitation. While driving at a speed which the plantiff testified was 65 miles an hour, the defendant ran into some loose gravel on a sharp curve and the car turned over injuring the plaintiff. The latter had protested against the speed of the car. In *Gurdin v. Fisher* [21] it was alleged by Mrs. Millie Gurdin, one of the plaintiffs, that she was an invited guest in an automobile owned by one of the defendants and driven by the other defendant as agent of the owner; and that the driver negligently permitted the car to leave a pavement on the trip, and without stopping the car or slowing its speed, he negligently turned the car in such a manner as to cause it "to wreck and turn over" thereby injuring her. She testified that she "imagined he was driving too fast," and that he "was going between 45 and 50 miles an hour; could not tell exactly because she was in the back seat." Another occupant in the car testified that the driver "was making the curves a little fast and that he cautioned him once or twice"; and that when the car left the pavement it hit a rut, and, "instead of using ordinary prudence in driving through that rut, he jerked his wheel around, he jerked it all the way over and caused the car to run completely from the right side of the road around on the left and turned over." The court instructed the jury that if the driver was *negligent*, whereby any of the passengers were injured, he was liable, and it would make no difference whether it was a "joint enterprise," or whether the passengers were guests by sufferance, or whether they were invited by the driver or some one else, or self-invited. The Supreme Court of Arkansas held that it was not error to so instruct the jury. In view of the fact that Hart and

20 3 S. W. (2d) 996 (Ark. 1928).
21 18 S. W. (2d) 345 (Ark. 1929).

Kirby, JJ., gave the majority opinion in the case of *Black v. Goldweber* and in view of the facts in the *Bennett and Gurdin* cases the state of the law in Arkansas is in doubt. It is not clear as to whether the scope of the duty depends upon the question of whether the owner of the car derives a benefit from the presence of the passenger in the car or whether it depends upon the fact that the passenger is in the car with the consent of the owner.

An earlier statute [22] in California permitted the guest in a vehicle to recover for personal injuries caused by the ordinary negligence of the driver in the operation of the vehicle. This statute was construed in *Sheean v. Foster*,[23] a case wherein the facts seemed to establish that the plaintiff was a self-invited guest in the defendant's automobile. This was not apparently regarded as a material factor in the decision. The negligence that was held to constitute a violation of the statute consisted in running into a tree while the defendant (the driver) was looking for the switch key. This statute was said to recognize the general common law rule.[24] But by a statute enacted by the California Legislature in 1929 the right of a guest to recover for personal injuries caused by the operation of the automobile in which he is riding is made dependent upon "proof of gross negligence, willful misconduct, or intoxication of the driver." [25] No factual situations have been discussed in connection with the application of the statute. According to the phraseology of the statute, gross negligence would seem to mean a failure to use slight care—a definition that has been recognized in this jurisdiction. It might be added that a guest is defined by the statute "as being a person who accepts a ride in any vehicle without giving a compensation therefor." [26] Probably this will be construed so as to include the self-invited guest; at least, it should be so interpreted on principle. The three degrees of negligence seem to be recognized in this jurisdiction.[27]

The decisions in Connecticut prior to the enactment of the so-called "guest statute" in 1927 adopted the general rule prevailing at common law in respect to an injury to the guest due to the operation of the automobile. Wheeler, C. J., in *Dickerson v. Connecticut Co.*,[28] discusses the doctrine thus:

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22 The statute provided that a carrier of persons without reward must use ordinary care and diligence for their safe carriage. See Sheean v. Foster, 251 Pac. 235 (Cal. 1926).

23 *Op. cit. supra* note 22.

24 See Callett v. Alioto, 290 Pac. 438 (Cal. 1930).

25 Callett v. Alioto, *op. cit. supra* note 24.

26 DEERING'S GEN. LAWS, SUPP. 1929, Act 5128, § 141¾.

27 See discussion in Walter v. Southern Pac. Co., 116 Pac. 51 (Cal. 1911).

28 118 Atl. 518 (Conn. 1922).

"The guest on entering the automobile takes it and the driver as they then are, and accepts the dangers incident to that mode of conveyance If the driver be intoxicated, or the automobile be defective, and the owner does not then know this, and injury result to the guest in consequence, the owner of the automobile is not liable to him. If the driver becomes intoxicated after the gratuitous transportation has begun, or the defect in the automobile was one which the owner knew about and failed to inform the guest, he exposed the guest to a new danger in the first instance, and in the second he was injured in consequence of the failure of the owner to exercise toward him ordinary care to inform him as to the defect. . . . When the journey has begun, the owner's duty is to so operate the car that no new danger to the guest is created, and no increase is in the danger from this mode of transportation is incurred by him. If the owner increases the danger, or creates a new danger by the manner in which he operates the automobile, he has not exercised toward his guest reasonable care. This would follow if he operated the car at an unreasonable speed, or in violation of some law or municipal ordinance or regulation, or without having the car under reasonable control, or without keeping a proper lookout, and in consequence of his conduct an accident resulted in which the guest was injured."

This case involved the question of liability due to negligent operation of the car. If the injury had been due to a defective condition of the automobile, the *dictum* indicates that a result similar to the decision in the *Higgins* case would have followed. The decisions in this jurisdiction purport to reject the classification of negligence made by Lord Holt in *Coggs v. Bernard* [29] and to recognize but one degree on negligence. There is but one standard of care, so Wheeler, C. J., says in the *Dickerson* case; and the jury simply

". . . inquire whether the owner has exercised due care in the circumstances presented to him, and they determine this by asking what the reasonably prudent person would have done similarly circumstanced, and if the owner's conduct has not measured up to this standard he has not exercised due or ordinary care. That standard is simple and unvarying. As the danger increases, the care must increase, for the reasonably prudent man would so act in a similar situation." [30]

As to whether this is a better practical view than that adopting the three degrees of negligence is an inquiry beyond the scope of this Note. It seems fairly obvious that it would be if the jury received no more than a dogmatic statement that the owner of the car was only liable to the guest for gross negligence without an explanation as to why that should be the law. A "dogmatic statement as to what

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[29] 2 Ld. Raym. 909 (1703).

[30] *Op. cit. supra* note 28 at 519.

the law is, without stating the reason why it is so, receives but little heed from one who does not understand why he should not as a man, and not as a juryman, give effect to his natural sympathy for those in distress." [31] Probably a particular description of the duty of the owner of the car, in terms of the facts of the case, to the guest, without stress upon words, would be a more desirable practice. It may be doubted as to whether the "unvariable" standard of the Connecticut court would be a better solution of the difficulty.

Under section 1, c 308, of the Public Acts of 1927, the Connecticut Legislature limited the liability of the owner or operator of a motor vehicle to one who was riding in it as his guest to "two classes of cases: First, when the accident was caused by intentional misconduct; and, second, when it was caused by heedless or reckless disregard of the rights of others, meaning thereby something more than the mere failure to exercise the care of a reasonably prudent man. . . ." [32] In construing this statute, Wheeler, C. J., in *Bordonaro v. Senk* [33] says: "The framers of the statute undoubtedly used the noun 'heedlessness' in place of the adjective 'heedless' and the word 'or' for 'and.' The phrase 'or caused by his heedlessness or his reckless disregard of the rights of others' meets the legislative intention when it is construed to read, 'or caused by his heedless and his reckless disregard of the rights of others.' . . . Act or conduct in reckless disregard of the rights of others is improper or wrongful conduct and constitutes wanton misconduct, evincing a reckless indifference to consequences to the life, or limb, or health, or reputation or property rights of another." Therefore, no cause of action for negligence is included in the provisions of this statute. In *Ascher v. H. E. Friedman, Inc.*,[34] the plaintiff was a guest in a car driven by her sister; they were hastening to arrive home before a threatened thunderstorm broke. They approached the house at a rate of speed of 25 to 30 miles an hour, and the driver turned from the street into the driveway without slackening her speed, in her haste to get home, with the result that the car mounted the curb and crashed into the house, injuring the plaintiff. It was held that the driver was not guilty of operating the car with *reckless disregard* of the guest's rights. Banks, J., in delivering the opinion of the court, said:

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31 Remarks of Simpson, J., in Cody v. Venzie, 107 Atl. 383, 385 (Pa. 1919).

32 Silver v. Silver, 143 Atl. 240, 242 (Conn. 1928).

33 147 Atl. 136, 137 (Conn. 1929). *Accord*: Grant v. MacLelland, 147 Atl. 138 (Conn. 1929). Section 1 of the Connecticut statute provides: "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others."

34 147 Atl. 263 (Conn. 1929).

"Conduct arising from momentary thoughtlessness, inadvertence, or from an error of judgment, does not indicate a reckless disregard of the rights of others. . . . The accident was the result of a momentary bit of careless driving, a failure to use due care." [35]

In *Meyer v. Hart* [36] the plaintiff was a guest in an automobile belonging to the defendant and being driven by him down a "steep hill over a road, where traffic was apt to be heavy," on a wet and slippery asphalt pavement at speed of 35 miles an hour. At the foot of the hill was an intersecting street. The defendant disregarded the guest's caution to drive slower. It was held that the operation of the automobile at the time of the accident was a *heedless and reckless disregard* of the rights of the plaintiff. In *Maher v. Fahy* [37] the plaintiff's decedent was riding as a guest of the defendant Fahy when a collision occurred with the car driven by the defendant Verwholt. At the time of the collision the Fahy car was occupying 2½ feet of the left side of the street 35 feet wide, leaving nearly three times the width of the Verwholt car for it to pass. The street in front of the Fahy car was clear of vehicles; and Fahy was not racing with the Verwholt car. This was held not to be *heedless and reckless disregard* of the rights of the guest.

In *Boyle v. Dolan* [38] the declaration alleged "that the defendant invited the plaintiff to drive with him in his automobile; that plantiff accepted the invitation; that defendant driving said automobile at a reckless and careless and dangerous rate of speed, over plaintiff's repeated objections and request to drive at a careful and prudent rate of speed, negligently and carelessly lost control of said automobile, and negligently and carelessly collided with another automobile. . . ." The Supreme Court of Florida, in a *per curiam* decision, held that the declaration did "not wholly fail to state a cause of action," and that a demurrer thereto had been improperly sustained. There was no discussion of the principles of liability. The result indicates that in this jurisdiction the driver owes a duty to the guest of using ordinary care in the operation of the car. The three degrees of negligence seem to be recognized by the Supreme Court of Florida.[39]

The Appellate Courts of Illinois adopt the rule, in regard to the liability of an owner or operator of an automobile to an invited guest, that the operator or owner is bound to exercise reasonable care for the safety of his invited guest and that whether the invitation is express

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35 At page 264.
36 147 Atl. 678 (Conn. 1929).
37 151 Atl. 318 (Conn. 1930).
38 120 So. 334 (Fla. 1929).
39 See Florida Southern Ry. Co. v. Hirst, 11 So. 506 (Fla. 1892).

or implied.[40] The duty is based upon the fact that the guest "is in a sense in the custody of" the owner of the car.[41]

In *Munson v. Rupker*[42] the complaint alleged that the plaintiff had been invited by the defendant to become his guest on an automobile trip; and that while the defendant negligently drove the automobile at a speed of 40 miles an hour he attempted to make a turn but failed to do so and negligently drove the car into a ravine, causing it to turn over and injure the plaintiff. The lower court instructed the jury that if it found from the evidence that the plaintiff was present in the car at his own solicitation, and not as an invited guest, the defendant would owe no duty to him except not to injure him intentionally or willfully. In holding that this instruction constituted error, the court said:

"It seems to us that the only sensible and humane rule is that an owner and driver of an automobile owes a guest as sufferance the duty of using reasonable care so as not to injure him. The rule as to trespassers and licensees upon real estate, with all its niceties and distinctions, is not to be applied to one riding in an automobile at the invitation of, or with the knowledge and tacit consent of, the owner and operator of the automobile. A trespasser and licensee going upon a tract of land—an inert, immovable body—takes it as he finds it, with knowledge that the owner cannot and will not by any act of his start it in motion and hurl it through space in a manner that may mean death to him who enters thereon. He who enters an automobile to take a ride with the owner also takes the automobile and the driver as he finds them. But, when the owner of the automobile starts it in motion, he, as it were, takes the life of his guest into his keeping, and in the operation of such car he must use reasonable care not to injure any one riding therein with his knowledge and consent. It will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or as a self-invited guest, than a gratuitous bailee owes to a block of wood. *The law exacts of one who puts a force in motion that he shall control it with skill and care in proportion to the danger created.* This rule applies to a guest at sufferance as well as to a guest by invitation." (Italics supplied.)

In its reference to the rule applicable to licensees upon real estate, the court seems to overlook the principle that the possessor owes a duty to the licensee, who has availed himself of the permission, to use reasonable care in conducting his activities on the premises

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40 Lasley v. Crawford, 228 Ill. App. 590 (1923) (Implied invitation). See Barnett v. Levy, 213 Ill. App. 129 (1919).

41 See Barnett v. Levy, *op. cit. supra* note 40.

42 148 N. E. 169 (Ind. App. 1925).

so as not to imperil the safety of the licensee. At least the court did not go far enough in discussing the duty of the possessor of premises to a licensee thereon. The basis for the rule adopted is obvious from the court's reasoning. The duty is owed to the guest as a human being whose person is in the custody of the driver of the automobile—a person who has availed himself of the permission to be in the car to the knowledge of the driver. On petition for rehearing, which petition was denied,[43] the court expressly repudiated the view that either the analogy of the real property cases or gratuitous bailment of personal property cases applied to the situation. However, in 1929 the Legislature of Indiana passed a statute [44] which limited the liability of the owner or operator of a motor vehicle to one who is riding in it as his guest to two classes of cases: First, when the accident is caused by intentional misconduct; and, second, when it is caused by reckless disregard of the rights of others. This excludes any liability for failure to use ordinary care. In the *Munson* case it was said that there are no degrees of negligence in Indiana. In *Vandalia R. Co. v. Clem* [45] the Indiana Appellate Court said:

"To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a *reckless disregard for the safety of others,* and a willingness to inflict the injury complained of. It involves conduct which is *quasi* criminal." (Italics supplied.)

While this is a definition of willful misconduct, it is a definition in terms of a *reckless disregard for the safety of others.* So it seems that any liability under the statute must be based on conduct that is *quasi* criminal.

In Kentucky, a jurisdiction which recognizes *two degrees* of negligence (slight and gross, the latter being defined as a failure to use slight care),[46] the owner of an automobile owes to an invited guest the duty to use "ordinary care to avert and not to create or increase danger." The leading case in this state and a case that is frequently cited in other jurisdictions is *Beard v. Klusmeier.*[47] In this case the plaintiff, who was an invited guest in the defendant's automobile, testified that the defendant was racing with another car that had attempted to pass and that she had protested and asked to be allowed to get out but the defendant had refused to heed her request; that the defendant's car collided with a pile of brick, sand, and other building material, which had been stacked in the street, injuring her.

43 151 N. E. 101 (Ind. App. 1926).

44 4 BURNS ANN. IND. STATUTES (WATSON'S REV.) SUPP., 1929, § 10142.1.

45 96 N. E. 789, 791 (Ind. App. 1911).

46 Chesapeake & O. Ry. Co. v. Dodge, 66 S. W. 606 (Ky. App. 1902); Louisville & N. Ry. Co. v. Brown, 217 S. W. 686 (Ky. App. 1919).

47 164 S. W. 319 (Ky. App. 1914).

The case was decided primarily on the authority of Connecticut decision in *Pigeon v. Lane.*[48] In discussing this case, the court said: "In that case the person invited to ride in the private vehicle of another is declared to be a licensee, and the duty of the person giving such invitation is stated to be the refraining from doing any 'negligent acts by which the danger of riding upon the conveyance was increased or a new danger created.' . . . A person thus invited to ride stands in the same situation as a bare licensee who enters upon real property which the licensor is under no obligation to make safe or keep so, but who is liable only for active negligence . . . We think the rule there stated is the correct rule, and that appellant's duty to appellee was to use ordinary care not to increase the danger of her riding with him, or to create any new danger . . . if the driver fails to use ordinary care in driving the automobile, he thereby creates a new danger for which he is liable."

The court also cited *Mayberry v. Sivey,*[49] a case wherein the Kansas court said:

". . . the law requires from all persons, including those who render gratuitous services, reasonable care for the safety of life and person."

So the Kentucky court has thrown but very little light upon the basis for the rule prevailing in that jurisdiction. It seems as if the court intends to adopt the analogy of the real property cases. In *R. B. Tyler Co. v. Kirby's Adm'r.*[50] the court said that the *Beard* case "held that a *social* guest in an automobile is a licensee," and made the distinction between licensees and invitees depend on the purpose of the visit, whether for the sole benefit of the passenger or partly at least for the benefit of the owner of the car. The distinction seems to be immaterial, however, in so far as the scope of the duty is concerned."

In *Fitzjarrel v. Boyd*[51] the plaintiff, while riding as an invited guest, was injured because of the alleged negligence in the operation of the automobile. It was alleged that the driver of the car was negligent "in attempting to pass another vehicle upon the road on which they were traveling at a high rate of speed and against the protest of" the plaintiff. The Court of Appeals of Maryland held that it was the duty of the defendant to use ordinary care not to increase the danger of the riding with him or to create any new danger, such as by fast and reckless driving. There was no discussion of the basis for this rule. The court relied mainly upon the authority of *Patnode v. Foote* and *Beard v. Klusmeier.* This jurisdiction does not seem to recognize any degrees of negligence.[52]

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48 67 Atl. 886, 11 Ann. Cas. 371 (Conn. 1907).

49 18 Kan. 291 (1877).

50 293 S. W. 155 (Ky. App. 1927).

51 91 Atl. 547 (Md. App. 1914).

52 See Schermer v. Neurath, 54 Md. 491, 39 Am. Rep. 397 (1880).

In *Hemington v. Hemington* [53] the plaintiff was riding as a guest of her daughter at the time of the accident. "It appears that the daughter drove at an unlawful and reckless rate of speed, against the repeated remonstrances of her mother, and the immediate occasion of the accident was putting on the brakes, under a speed of 45 miles per hour, to avoid a horse and buggy crossing the road at an intersecting highway." The Supreme Court of Michigan said that case came within the rule relative to driver and guest, and that the driver of an automobile is under the obligation of exercising reasonable care for the safe transportation of his guests and not to unreasonably expose the guest to danger by increasing the hazard of this method of travel. As authority for this the court relied on Huddy on Automobiles (5th ed.) § 678. There was no discussion of the rule.[54] The Supreme Court of Michigan purports to recognize only what it labels "ordinary negligence" and "subsequent negligence." [55] The latter has been frequently called "gross negligence," and defined as "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." [56] The later cases point out that this is a misuse of the expression "gross negligence" and that such misconduct is not negligence at all.[57]

In Missouri it is said that "it is the duty of an automobile owner and driver to use reasonable care in its operation, and not to unreasonably expose a guest to injury." As authority for this the St. Louis Court of Appeals, in *Alley v. Wall*,[58] cited Berry on Automobiles (2d ed.) and Huddy's Law of Automobiles (2d ed.) but there was no discussion of the principle involved. In the *Alley* case the plaintiff was an invited guest of the defendant (the driver). The alleged negligence consisted in permitting the car to run off the highway, into a ditch, while the defendant was attempting to pass a truck. The court held that there was no error in refusing to give the defendant's instruction in the nature of a demurrer to the evidence. In the ordinary action based on negligence, the Supreme Court of Missouri does not recognize the three degrees of negligence.[59]

In *Hornbeck v. Richards* [60] the Supreme Court of Montana said: "We are of the opinion that the express or implied duty of the driver of an automobile to one who rides with him as an invited guest is to

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53 190 N. W. 683 (Mich. 1922).

54 *Cf.* Emery v. Ford, 207 N. W. 856 (Mich. 1926).

55 Union Trust Co. v. Detroit, G. H. & M. Ry., 214 N. W. 166 (Mich. 1927).

56 Denman v. Johnston, 48 N. W. 565, 567 (Mich. 1891); Wexel v. Grand Rapids & I. Ry. Co., 157 N. W. 15, 17 (Mich. 1916).

57 Gibbard v. Cursan, 196 N. W. 398 (Mich. 1923).

58 272 S. W. 999 [St. Louis Ct. of App. (Mo.) 1925].

59 See Young v. St. Louis, I. M. & S. Ry. Co., 127 S. W. 19 (Mo. 1910).

60 257 Pac. 1025 (Mont. 1927).

exercise reasonable and ordinary care in its operation so as not unreasonably to expose such guest to danger by increasing the hazard incident to that method of travel . . . 'The care must be proportionate to the danger.'"

In this case the plaintiff's intestate was riding as an invited guest of the defendant's intestate in the latter's automobile. The car "was being driven at a rate of speed approximating 40 miles per hour" at the time of the accident, but no objection was made by any one in the car as to the speed or the manner of driving until the instant of the accident. It does not appear that this court has decided the question as to whether there are three degrees of negligence recognized in this jurisdiction in the ordinary action for negligence.[61]

It is said that "the most remarkable and striking view on the subject is the one adopted by the Supreme Court of New Jersey" in the cases of *Lutvin v. Dopkus* [62] and *Rose v. Squires* [63] "where the court relied upon an analogy to earlier property cases, holding that a licensee can recover only for injuries sustained by reason of the willful acts of the landowner, and where the court based the distinction between a licensee and an invitee, not on the ground of the purpose of the injured person's presence in the automobile, but on the question as to whether such person was invited to ride or was merely permitted to do so." [64] In the former of these two cases the plaintiffs had asked the defendant to drive them to a picnic, given by a social organization of which the parties to the controversy were members. The plaintiffs alleged that on the return trip the car was driven at a high rate of speed by the defendant and while so driven it overturned, injuring the plaintiffs. It was held that the legal status of the plaintiffs was that of licensees "to whom the only legal obligation imposed is that of refraining from the perpetration of acts wantonly or willfully injurious." In the latter case Lena Rose, the plaintiff's intestate in one of the cases involved, and Anna Rose, the plaintiff in the other, were passengers in an automobile driven by the defendant Campbell "when it came into collision with another automobile driven by the other defendant Squires, which came out of a side street. As a result of the collision, Campbell's automobile ran into a tree, Anna Rose was severely, and Lena Rose fatally injured." It was a disputed question of fact as to whether the "two Rose women were in Campbell's car by his invitation, or at their own solicitation." The court said:

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61 See Neary v. N. P. Ry. Co., 110 Pac. 226, 231 (Mont. 1910), and cases cited therein.

62 108 Atl. 862 (N. J. Sup. Ct. 1920).

63 128 Atl. 880 (N. J. Sup. Ct. 1925).

64 See remarks of the court in Munson v. Rupker, *op. cit. supra* note 43, at 102.

"In the former alternative, he would of course owe them a duty of reasonable care; in the latter, he owed them no duty except to abstain from acts wilfully injurious . . . there is a substantial distinction between mere negligence, albeit gross, and willful injury. It was never suggested in the case that Campbell desired or attempted to hurt his passengers . . . Willful negligence is common enough; it is often called 'taking a chance.' But unless there be positive intent to do injury to a licensee or trespasser no legal duty is violated."

If we accept the language used in the quotation from the *Rose* case at its face value it appears that the Supreme Court of New Jersey does not recognize the three degrees of negligence in the ordinary action based upon negligence.

In *Bauer v. Griess* [65] the Supreme Court of Nebraska held that the driver of an automobile who invites another to ride with him as his guest is bound "to use ordinary care not to increase" the danger to the guest or "to create any new danger, such as by fast and reckless driving." The court relied upon the Kentucky decision of *Beard v. Klusmeier;* and there was no discussion of the principle. It appeared, from the facts, that the plaintiff was invited by the defendant to go pleasure driving, and that the plaintiff was injured when the defendant "drove his car too far to the left side of the beaten tread of the road, thereby striking a small ditch" while he was racing with the driver of another car that had passed them. The evidence was conflicting as to whether the plaintiff had urged that the speed of the defendant's car be increased. It is said that there are no degrees of negligence in this jurisdiction.[66]

In *Stewart v. Houk* [67] the Supreme Court of Oregon held that the Oregon "guest" statute, which deprived the guest of the right of recovery against the owner or driver of the automobile for an injury negligently inflicted upon him by his host if he was being transported without charge, unconstitutional since it deprived the guest of his common-law remedy for negligence without providing some other efficient remedy in its place; also, because the statute supplied an implied stipulation for nonliability of the host for negligence regardless of the incapacity of the guest to contract and regardless of the culpability of the host. The court said that the host owes a duty to the guest to exercise due care for his guest's safety. In *Cederson v. Oregon R. & Nav. Co.*[68] the court said:

"There are degrees of negligence, such as slight and gross . . . In some instances greater care and vigilance is exacted than in others."

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[65] 181 N. W. 156 (Neb. 1920).

[66] See remarks of Ragan, C., in Village of Culbertson v. Holliday, 69 N. W. 853 (Neb. 1897).

[67] 271 Pac. 998 (Or. 1928).

[68] 62 Pac. 637 (Or. 1900).

So this jurisdiction seems to recognize degrees of negligence in the ordinary action based on negligence.

The rule in Pennsylvania seems to be that the host owes to the guest the duty to use ordinary care in the operation of the automobile.[69] It is not clear as to whether the rule is based on the analogy of the gratuitous bailment cases or upon the fact that the host has given his consent to the presence of the guest in the car and must take this into account in the operation of the car. The court does say that "whether there are three or more or less kinds or degrees of negligence, however, and whether there is a distinction between 'kinds' and 'degrees' is beside the question." [70]

The attitude of the Rhode Island Supreme Court in reference to the doctrine is set forth in *Leonard v. Bartle*.[71] In this case the plaintiff charged the defendant "with recklessly operating and driving his automobile on a public highway at an excessive and improper speed, thereby causing personal injury to the plaintiff, a guest and free passenger in defendant's car." It appeared that the plaintiff was a member of a party of five persons who were returning home in the defendant's automobile (a coupe) from a dance. The plaintiff became a passenger in the car at the suggestion of one of the defendant's friends and passengers. There was evidence showing that the defendant drove at a speed of 40 miles an hour over a road that was unlighted and rough from lack of repair, and that he had increased the speed of the car over the protests of the plaintiff and another one of the passengers. The defendant lost control of the car, which left the highway and ran against a tree. The only question was whether the trial court erred in refusing to charge, in accordance with the request of the defendant, that if the jury found that the plaintiff was a guest of the defendant and not a passenger for hire, she could recover damages only if the jury found that the defendant was guilty of gross negligence in the operation of his car. In overruling the defendant's exception, and holding that the request to so charge was properly denied, Stearns, J., said:

"In this state the doctrine of degrees of negligence has never been adopted. In the case of bailment of goods, the amount of care required in different kinds of bailment in some jurisdictions is made the basis for the establishment of degrees of negligence generally. But in this state the obligation of the bailee has been considered with reference to the duty rather than to the characterization of the breach of the

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[69] See Cody v. Venzie, *op. cit. supra* note 31; Simpson v. Jones, 131 Atl. 541 (Pa. 1925); Conroy v. Commercial Casualty Ins. Co., 140 Atl. 905 (Pa. 1928); Ferrell v. Solski, 123 Atl. 493 (Pa. 1924).

[70] Remarks of Simpson, J., in Cody v. Venzie, *op. cit. supra* note 31, at 384.

[71] 135 Atl. 853 (R. I. 1927).

duty as slight, ordinary, or gross negligence . . . 'Ordinary care is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended. The greater the danger the higher the degree of care required to constitute ordinary care, the absence of which is negligence. It is a question of degree only. The kind of care is precisely the same.' . . . The duty of the driver in the operation of an automobile in this state is regulated by statute (which provides a maximum rate of speed, and a penalty for violation). . . . The prohibition of reckless driving is to prevent injury to 'any person.' The statute requires the same duty of care of a guest or passenger in the operation of the car and the rate of speed as of a person outside the automobile; the fact that the conveyance, as in this case, was free, does not lessen the duty of the exercise of ordinary care by the operator. . . . if the rate of speed is in excess of the maximum statutory limit, such fast driving is evidence of negligence."

Of course it is much easier to reach a solution of the problem as to the scope of the duty and the basis for it in jurisdictions which do not recognize the three degrees of negligence. The Rhode Island court reached its conclusion, in part at least, by a process of elimination. If the liability is based on the statute, the decision would not provide a general rule applicable to all situations.

In *Robinson v. Leonard*[72] the plaintiff was a self-invited guest in the defendant's automobile. "The negligence charged in the declaration is traveling at a high rate of speed and swerving out of the road, by reason of which the defendant lost control of the car." The trial court permitted the plaintiff to testify, over an objection that the evidence was incompetent, irrevelant, and immaterial, to a conversation with the defendant, that took place soon after the accident, in which the defendant said that he lost control of the car because he was going too fast. The Supreme Court of Vermont held that there was no error in receiving the evidence over this objection. The defendant moved for a directed verdict, at the close of the evidence, on four grounds, one of which was that if the plaintiff was a self-invited guest there could be no recovery without showing a willful or wanton injury. The defendant contended that if the plaintiff was a self-invited guest his status was that of a licensee. It was held that such was not the rule in Vermont; and that the same obligation, *i. e.*, to use ordinary care in the operation of the car, is imposed upon the driver in the case of a self-invited guest as in case of one expressly invited by the driver. The decision seems to have been based upon the fact that the plaintiff had availed himself of the defendant's permission to be in the car. In *McAndrews v. Leonard*,[73] another case growing out of the

[72] 134 Atl. 706 (Vt. 1926).
[73] 134 Atl. 710 (Vt. 1926).

same accident as that involved in the *Robinson* case, the court said: ". . . the term 'gross negligence' forms no separate division of negligence under our law, outside of bailments, as to which we say nothing. See Briggs v. Taylor, 28 Vt. 180."

In *Moorefield v. Lewis* [74] the plaintiff's decedent was a guest of the defendant on a pleasure drive in the latter's automobile. The road terminated abruptly at a river bank; a proposed bridge, "to carry the road across the river at this point, had not been constructed." No barriers or signs stood to warn travelers on the way. The situation of danger could have been observed by those using the highway for a distance of 250 or 300 feet. The defendant admitted that he "was traveling 20 miles an hour towards the end of a 'blind' road, leading up a mountain gorge, with numerous curves and steep embankments. Some of the evidence shows the speed to have been 30 miles an hour." The defendant was unable to stop his car in time to avoid being precipitated into the river. The plaintiff recovered a judgment, to which the defendant prosecuted a writ of error assigning as one ground that counsel for the plaintiff, in the course of an opening statement to the jury, had said that the defendant had indemnity insurance. The Supreme Court of Appeals of West Virginia said:

". . . we would be inclined to reverse the case on this ground (*viz.*, that this statement was highly prejudicial to the defendant, and his motion to discharge the jury on this ground should have been sustained) but for the fact that, in our opinion, a plain case for recovery has been established . . . . 'The express or implied duty of the owner and driver to the occupant of the car is to exercise reasonable care in its operation, and not to unreasonably expose him to danger by increasing the hazard of that method of travel.' [75] . . . The defendant, no doubt absorbed in the pleasure of the occasion, was without conscious sense of the danger. This, however, does not relieve him of legal negligence. A person in charge of an instrumentality as productive of injury as an automobile in motion should direct his attention to its proper and careful operation."

In *Marple v. Haddad* [76] the plaintiff's decedent was riding with the defendant as a self-invited guest on the latter's truck when the truck suddenly left the road and ran down an embankment and injuring the plaintiff's decedent so that he died as a result. There were two theories as to what caused the accident. The plaintiff contended that the defendant lost control of the truck, while rounding a curve, because he was driving at a reckless rate of speed. The defendant contended that the accident resulted from a defect in the steering apparatus of

74 123 S. E. 564 (W. Va. 1924).
75 Citing HUDDY ON AUTOMOBILES (6th ed.) 880.
76 138 S. E. 113 (W. Va. 1927).

the truck. Two mechanics examined the truck after the accident and found that the steering apparatus was defective. On the other hand, five eyewitnesses fixed the speed of the truck at the time of the accident as from 22 to 40 miles an hour. In the second instruction to the jury the trial court said that it was the duty of the defendant to use ordinary care in the operation of the truck. The defendant contended that this instruction was erroneous because the only duty of the defendant was to refrain from wantonly or willfully injuring the deceased. The Supreme Court of Appeals of West Virginia referred to its former decision in the *Moorefield* case as committing it "to the doctrine of ordinary or reasonable care," and that this is the rule whether the passenger is a self-invited guest or one expressly invited by the owner of the car. The court admitted that the rule seems to be "'incongruous with the innate and natural spirit of gratitude with which such hospitality should be met';" but it said that "'one who takes another into one of these high-powered swiftly moving machines knows disaster may follow, unless he operates it with the required degree of care. *He must know and realize that he has voluntarily taken the life and safety of a human being into his care.*'" (Italics supplied.) In *Poling v. Ohio River R. Co.*[77] it was said that the terms "slightest negligence" and "gross negligence" were applicable in this jurisdiction, especially in two classes of cases; "The former, to common carriers of passengers . . . The latter, to voluntary licensees and trespassers." But this jurisdiction has not applied the analogy of the real property cases to the driver and guest cases; so the three degrees of negligence seem to be of no importance in connection with the question under discussion, especially in view of the decision in the *Marple* case.

In *Mitchell v. Raymond*[78] the Supreme Court of Wisconsin held that the driver of an automobile owes to his invited guest the duty of using ordinary care in the operation and management of the car to prevent injury to the guest. The court reasoned as follows:
"We therefore now hold, in accord with what seems the great weight of authority and as a choice among many rules, each of which bristles with difficulties, that, as to the gratuitous guest in a vehicle on a public highway, the owner or driver of such vehicle owes to such guest the duty of exercising ordinary care to avoid personal injury to him . . . Under this rule as now determined the host who assumes to pilot his vehicle upon the public highways, subject as all such vehicles are to the rules and regulations governing traffic on crowded present day thoroughfares becomes chargeable, in such operation and management of his vehicle, with the duty of exercising ordinary care to avoid in-

[77] 18 S. E. 782 (W. Va. 1893).
[78] 195 N. W. 855 (Wis. 1923).

jury to his occupant. This conclusion we are forced to reach, even though the rule as thus declared may seem incongruous with the innate and natural spirit of gratitude with which such hospitality should be met."

The court went on to say:

"We must also decline to recognize any such possible distinction as is spoken of in several decisions between the guest who asks for the favor and the guest who is first invited by the host."

In referring to the Connecticut decision of *Deckerson v. Conn. Co.*[79] the court said:

"Though the Connecticut court declines to recognize the distinction so firmly established in this jurisdiction between the three degrees of negligence—slight, ordinary, and gross—yet such different view on that particular question does not affect the question here, as the expressions used in that case as to ordinary care coincides with our definition of the same term when used in this jurisdiction."

In the *Mitchell* case the plaintiff Jane M. Mitchell in an automobile, driven by the defendant Morey, was riding "southwesterly on county highway A." This highway joins with, but does not cross, state trunk highway 63. The defendant Raymond was driving his automobile north on highway 63. "A collision occurred on highway 63 and about opposite the end of county highway A, and as a result Mrs. Mitchell was injured." According to the evidence of the defendant Raymond, a high embankment shut off the view from either highway of approaching vehicles from the other until they were within a very short distance apart. The speed of either car does not appear from the reported facts, but the court said that the facts warranted the conclusions reached by the jury and trial court that the driver of each automobile was driving at an excessive and unreasonable rate of speed. As to whether there was gross negligence on the part of defendant Morey is another matter. According to the law of Wisconsin the defendant Morey had the "right of way" over defendant Raymond, who was approaching from the left.[80] Notwithstanding the statutory provisions, does not the public interest demand that the operator of a vehicle on one of the main arteries of traffic have the right of way, especially under the circumstances existing in the principle case? Do not traffic conditions today demand high speed on the main state highways? Some state legislatures have already repealed statutes that limited the speed of motor vehicles on state highways to a certain number of miles an hour. It does not appear in the principal case as to whether either defendant violated a "stop" or a "slow" notice. It would probably be desirable today to require operators of vehicles

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79 118 Atl. 518 (Conn. 1922).

80 See Bertschy v. Seng, 195 N. W. 854 (Wis. 1923).

about to enter the main arteries of traffic to stop, look, and listen. The collision took place in August, *i. e.*, during the heavy traffic season. Of course, according to this decision, it is not necessary to determine whether, as a matter of fact, the defendant Morey was guilty of gross negligence. But this jurisdiction purports to recognize the three degrees of negligence. Yet this decision states that the definition of ordinary care in Wisconsin coincides with that accepted by the Connecticut court—a jurisdiction that purports to apply but one degree of negligence.

In *Vogel v. Otto*,[81] a decision of the same date as that in the *Mitchell* case, the Wisconsin court applied the same doctrine. In this case the plaintiff was a "gratuitous guest" of the defendant Otto, the owner and driver of the car. She was injured by reason of the "bumping of the machine" over the rails at a railroad crossing. In endeavoring to cross the railroad at an angle the right wheels of the car failed to reach the planking that was provided and this caused the bumping of the car with such violence as to injure the plaintiff. The lights of the car were "shed in a direction so as not to disclose the exposed rails;" and the defendant did not decrease the speed of his automobile when he crossed the rails. The court held that "in view of the rule of ordinary care now adopted by this court, that the question of the defendant Otto's negligence raised a proper question for the jury," and that the lower court erred in granting a nonsuit as to him. The situation seems to be regarded in the same manner as that of driving at an excessive and unreasonable speed. In the *Mitchell* case the Wisconsin court specifically stated that they did not intend to "limit or withdraw" anything that had previously been said as to liability for an injury due to the defective "condition" of the automobile. In *O'Shea v. Lavoy*,[82] a case that was decided two years before the *Mitchell* and *Vogel* cases, it was held that the owner of an automobile is not liable to an invited guest riding therein for injuries sustained by the latter, due to the turning over of the car because of the defective *condition* of the car. The theory of the decision was that the rules of liability that apply to a licensee going upon the premises of the licensor apply with reference to the condition of the automobile. Beginning in 1926 we have what has been called "a series of recessions from *Mitchell v. Raymond*," [83] starting with *Cleary v. Eckart*.[84] In that case it was held that the invited guest accepts such skill as may be possessed by the driver in the operation of the car. The court said:

". . . plaintiff accepted such hospitality as the host had to offer, and

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81 195 N. W. 859 (Wis. 1923).
82 185 N. W. 525, 20 A. L. R. 1008 (Wis. 1921).
83 See Note 28 MICH. L. REV. (1929) 57, 59.
84 210 N. W. 267, 51 A. L. R. 576 (Wis. 1926).

that consisted of the car in the condition in which it was, and the driver, with such limited skill as she had been able to acquire in driving a car but 1,200 miles, of which the plaintiff had knowledge."

In expanding this doctrine to what was conceived to be its logical limits, the Wisconsin court, in *Olson v. Hermansen,*[85] said that it included whatever risks attached to the driver's customary habits of driving. The invited guest also assumes the risk incident to the driver's known lack of sleep.[86] Also, the risks incident to the peculiar nature of the trip, such as driving to a fire, are said to be assumed by the guest.[87]

Failure to establish a breach of duty to use ordinary care is one thing. It is quite another to show assumption of risk or contributory negligence as a bar to recovery when once a breach of duty to use ordinary care is established. In the *Krueger* case, however, the court held, as a matter of law, that there was a "failure to show any actionable negligence by defendant." So it seems that in the latter class of cases, involving assumption of risk, recovery must be based upon gross negligence or willful wrongdoing. Suppose a case should arise wherein the guest was not familiar with the driver or his habits of driving. Would the rule announced in the *Mitchell* and *Vogel* cases apply? It is difficult to predict what attitude the Wisconsin court would take. It has adopted a most flexible definition of ordinary care:

"Ordinary care is a relative term, it depends in no small degree upon the given situation. Where the danger resulting from inadvertence is great, the care known as ordinary care calls for a greater degree of care than where the danger resulting from inadvertence is slight." [88]

Gross negligence is defined as an act "which is intentional or done under such circumstances as to make the willful, wanton disregard of the rights of others equivalent to an intent." [89]

Gross negligence as thus defined is different in *kind* from gross negligence which is a failure to use slight care. Yet, in the *Mitchell* case, the Wisconsin court says that the distinction between the three *degrees* of negligence is "firmly established in this jurisdiction." So the term "gross negligence" is used to signify two different things. In the one sense ordinary and gross negligence differ in degree of inattention, while in the other sense gross negligence differs in kind from ordinary negligence. Probably the court will abandon the use of this term in the former sense.[90]

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85 220 N. W. 203, 61 A. L. R. 1243 (Wis. 1928).

86 Krueger v. Krueger, 222 N. W. 784 (Wis. 1929).

87 Sommerfield v. Flury, 223 N. W. 408 (Wis. 1929).

88 Per Owen, J., in Sommerfield v. Flury, *op. cit. supra* note 87, at 411.

89 Per Rosenbury, J., in Theby v. Wis. Power & Light Co., 222 N. W. 826, 831 (Wis. 1929).

90 See Theby v. Wis. Power & Light Co., *op. cit. supra* note 89.

The Supreme Court of Wyoming adopts the rule that the owner or operator of an automobile is under a duty to his invited guest to use ordinary care in the operation of the car,[91] relying on the Alabama decision of *Perkins v. Galloway*.[92] It does not appear from the decisions in this jurisdiction as to whether the three degrees of negligence are recognized.

In some states the host is liable to the guest only where gross negligence is found. The Court of Appeals of Georgia adopts this so-called minority rule. In *Epps v. Parrish*[93] it was alleged that the plaintiff was riding as a guest in an automobile owned and driven by the defendant, and that the latter "carelessly and negligently, and because of inexperience and lack of skill in the handling of an automobile, lost control of the automobile and drove it, head on, into a tree," by reason of which the plaintiff was injured. It was held that no cause of action was set forth, as it was not alleged that the defendant was guilty of gross negligence. This appears to be the first decision on the question of the nature of the liability in this class of cases in Georgia. The court, in discussing the question of liability, said:
"See, in this connection, the reasoning set out in Selo v. Dunn & Brown, 42 Ga. 528, 5 Am. Rep. 544. . ."
In the *Selo* case it was held that one who keeps a ferry for one's own use and for the convenience of the customers at one's mill, but who does not charge ferriage, is not a common carrier, and is only liable for gross negligence. The court reasoned that the ferryman was a *mandatory,* a bailee not for hire, and so was only liable for gross negligence.

In *Harris v. Reed*[94] the plaintiff sued for damages alleged to have been sustained while she was riding in an automobile as "a gratuitous invited guest of the defendant." "The petition charges that the defendant, while driving her automobile upon the public highway at a rate of speed of 'about 35 miles an hour,' overtook and passed another automobile on the right-hand side, and in doing so scraped the fenders of the other car and that 'just after' this, and while driving at the rate of approximately 40 miles an hour, defendant turned her head to look back, and caused her automobile to run off an embankment, thereby inflicting described injuries upon the plaintiff . . . " The plaintiff was the only witness at the trial. It appeared that after the striking of the other car the plaintiff admonished the defendant to "look out;" and that immediately thereafter the defendant had glanced

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91 Ryan v. Snyder, 211 Pac. 482 (Wyo. 1923); Collins v. Anderson, 260 Pac. 1089 (Wyo. 1927).

92 *Op. cit. supra* note 13.

93 106 S. E. 297 (Ga. App. 1921).

94 117 S. E. 526 (Ga. App. 1923).

backwards. But it did not appear as to whether the defendant had looked back because of the striking of the other car or because of the plaintiff's admonition. The Court of Appeals of Georgia held that the defendant was not guilty of gross negligence, saying:
"The speed at which she (the defendant) was driving, and the fact that in some wholly unexplained manner she scraped the fender of the other car, could not possibly be held to prove that the defendant was operating the car without the existence of even a 'slight' degree of care. Nor can it be said that the fact that the defendant, in the emergency and under the sudden excitement attendant upon scraping the other car, and the admonition which was then uttered by the plaintiff, obeyed the promptings of a natural and humane instinct by momentarily glancing back at the other car and its occupants, evidences an entire lack of even slight prudence such as would constitute gross negligence."

Peavey v. Peavey [95] raises a very interesting question in this connection. The plaintiff was injured in a collision between two automobiles at the intersection of two avenues in the city of Atlanta, while riding as a guest in one of the cars. The gross negligence charged was violation of the state statute prohibiting the driving of automobiles at a greater rate of speed than 10 miles an hour while approaching and traversing intersections of public highways. The Court of Appeals of Georgia said that conceding that this statute applies to intersections of streets in a city, the violation of this law would not constitute gross negligence. But suppose the collision had taken place at a time when or place where traffic was heavy. Or suppose the car, in which the plaintiff was riding, was being driven at a speed of 30 or 40 miles an hour. Certainly, merely driving faster than 10 miles an hour is not necessarily gross negligence at common law.

Massachusetts has adopted the rule that the measure of liability of the automobile driver or owner who undertakes to carry gratis is the same as that of one who undertakes to keep personal property gratis. The leading case on this theory of liability is *Massaletti v. Fitzroy.*[96] The plaintiff was injured while riding with the defendant in the latter's automobile and at the defendant's invitation. The car was driven by the defendant's servant who was furnished by the owner of the garage where the car was kept. Through the negligence of the servant the car was overturned and it fell upon the plaintiff causing the injuries complained of. It was held that the plaintiff could not recover since gross negligence was not established. The court discusses at considerable length the matter of degrees of negligence and holds that there is a practical distinction between gross negligence and

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[95] 136 S. E. 96 (Ga. App. 1926).
[96] 118 N. E. 186, L. R. A. 1918 C, 264, Ann. Cas. 1918 B, 1088 (Mass. 1917).

the want of ordinary care. While the court reaches this conclusion, it recognizes that there is "inherent difficulty" in stating the difference between these two degrees of negligence. Be that as it may, this court has rigidly adhered to the distinction between these two degrees by exercising a close supervision over the verdicts of juries in this class of cases. In so far as it has had the opportunity to do so—that is, from the factual standpoint—this court has held in approximately 88% of the cases that have come before it that the evidence would or did not support a finding of gross negligence.

Let us notice the factual situations that have been presented to the Supreme Judicial Court of Massachusetts. In the first place, gross negligence was defined by Chief Justice Rugg in *Altman v. Aronson*,[97] to be the "heedless and palpable violation of a legal duty respecting the rights of others." In applying this definition, it was held in *Burke v. Cook*[98] that a speed of 35 miles an hour upon a roadway substantially free from traffic, without intersecting streets and without obstruction of vision, the passing of another vehicle, the act of turning the wheel quickly to the left since the car seemed to be steering to the right, and the turning over of the car, whether considered separately or in conjunction, do not tend to prove gross negligence. The plaintiff was a guest in the car which was owned and operated by the defendant; and there was a verdict for the plaintiff. The court remarked that if the action could be maintained by making out a case of ordinary negligence, there was a jury issue. The decision in this case was said to govern in *Shrier v. Feigelson*[99] where it was held that a speed of between 15 and 20 miles an hour on a pavement 21 feet wide, when no other vehicles were in sight, and the headlights were "casting a good light before them," a sudden call of warning by the defendant (the car was owned by the defendant and another, who were partners in a certain business) to the driver, the turning of the car to the right and the crashing into a telephone pole, did not constitute gross negligence. The plaintiff was a guest in the car, which was operated by a Mr. Germain, another member of the party. There was a verdict for the plaintiff.

The decision in the *Burke* case was said to govern in *Marcinowski v. Sanders*[100] where it was held that a speed of between 35 and 40 miles an hour on an incline in a country town, while the parties were traveling towards a fire and there was no other traffic on the highway, the swaying of the car to the left, and the striking of a telephone pole, did not constitute gross negligence. The plaintiff was an invited guest

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97 121 N. E. 505, 506 (Mass. 1919).
98 141 N. E. 585 (Mass. 1923).
99 153 N. E. 307 (Mass. 307).
100 147 N. E. 275 (Mass. 1925).

of one Richard Hibbard, who was driving at the time of the injury to the plaintiff; Hibbard died after suit was brought against him and the action was continued against his administratrix. There was a verdict for the plaintiff.

In *Bertelli v. Tronconi*[101] the plaintiff was injured in a collision between the defendant's automobile and a truck, while she was riding as a guest of the defendant. The plaintiff's testimony described the speed of the car as "very fast"; and she also testified that it was dark and raining hard at the time of the accident and that the windshield was not equipped with a cleaner. A verdict was directed in favor of the defendant at the trial. It was held that the evidence would not warrant a finding of gross negligence.

In *Forman v. Prevoir*[102] the plaintiff, while boarding a motor truck as a self-invited guest, standing with one foot on the truck and about to grab hold of a rod that held the curtain, was thrown to the ground and injured when the defendant driver, without ascertaining whether the plaintiff was in a position of comparative safety, suddenly started the truck. The trial court directed a verdict for the defendant. It was held that the facts did not constitute gross negligence; but the court said that they might have justified a finding of lack of ordinary care.

In *Bank v. Satran*[103] the plaintiff was a guest in the car of the defendant, and was injured in a collision between the defendant's vehicle and a motor bus, while the defendant was rounding a curve at a speed of 20 miles an hour, on a highway covered with snow. The defendant's automobile skidded into the motor bus. The plaintiff and another passenger had previously warned the defendant to drive slower. He had thereupon driven slower for a time and then increased the speed. There was a verdict for the defendant at the trial. It was held that the evidence would not support a finding of gross negligence; but the court observed that it was "abundant to justify a finding that the defendant drove carelessly."

In *Mason v. Thomas*[104] the plaintiff was the defendant's guest in her automobile, and the two rode on the rear seat of the car. The plaintiff was injured when the car overturned while being driven by an unlicensed operator. The evidence indicated that the driver, because of want of experience, became confused and excited when a "car came from behind at a very rapid rate" of speed, and while seeking to put on the brakes, in his confusion, stepped on the accelerator, and, before the licensed operator beside him could render

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101 162 N. E. 307 (Mass. 1928).
102 164 N. E. 818 (Mass. 1929).
103 165 N. E. 117 (Mass. 1929).
104 174 N. E. 217 (Mass. 1931).

assistance, the car went to the right and turned over. There was a verdict for the plaintiff at the trial. It was held that there was no gross negligence.

In one case, *viz., Manning v. Simpson,*[105] the verdict for the plaintiff was allowed to stand. The defendant, in meeting an oncoming car at a curve on a slippery road and, fearing a collision, put on additional speed and drove to the left across the path of the approaching car, in a futile effort to get into a driveway. The court said that "there was evidence from which the jury could have found that the accident would have been avoided had he stopped when an ordinary prudent man would have appreciated danger, or had he turned to his right and kept on across a graveled border and upon some car tracks which, though uninviting, were less dangerous than the road in front of the other vehicle. . . . The evidence does not require a finding that the defendant's action was simply unwise conduct of one who, in an emergency, does what occurs to him on the spur of the moment." It was held that "the jury were warranted in finding" that the defendant was guilty of conduct amounting to gross negligence.

In six of these Massachusetts decisions, where the jury had an opportunity to decide that the conduct of the host amounted to gross negligence, a verdict for the plaintiff was the result. In two of these eight cases there was a directed verdict. This certainly shows the truth of the proposition that a mere statement as to what the law is receives but little heed from one who does not understand why he should not give effect to his natural sympathy for those in distress. On the other hand, these decisions show that the Massachusetts court is making a determined effort to enforce the rule of liability in that jurisdiction. Probably the only generalization that we can make from these decisions is that the host's conduct must be such as to show a striking disregard of the danger of probable injury to his guest in order to be considered guilty of gross negligence. The nearest that we can come to predictability of liability based on negligence is that the host's conduct must strike one at first blush as constituting a palpable disregard of the risk of harm to the guest.

Apparently the first decision on the question under consideration in Washington is *Heiman v. Kloizner.*[106] The plaintiff was injured in a collision betweeen the automobile in which she was riding as an invited guest of the defendant and another automobile. The collision took place at an intersection of two streets in the city of Seattle. The testimony offered by the plaintiff was not very positive as to the speed at which the defendant's car was being driven at the time of

105 159 N. E. 440 (Mass. 1928).
106 247 Pac. 1034 (Wash. 1926).

the accident, and the court said that it did not show excessive speed. Also, the court said that other evidence suggested negligence on the part of the driver of the other car. The court held that the evidence did not show that the defendant was negligent in that degree necessary "to render him liable in damages to the plaintiff, in view of her being in his automobile as his invited guest." The opinion "does not definitely fix the degree of lack of care which must be shown by an invited guest before liability will result. It holds that degree is somewhere between that required where the carriage is one for hire and that necessary to be exercised with reference to the safety of a mere trespasser." [107] Reasoning from this, the court in *Saxe v. Terry* [108] said that "it must follow that before an invited guest can recover, a showing of gross negligence is necessary." The reason for the rule in this jurisdiction seems to be in the analogy of the gratuitous bailee cases. The important thing is not that the host has given his consent to the presence of the guest and must take this into account in the operation of the car. The scope of the duty depends on the material benefit that the host derives. In the *Saxe* case the host's automobile failed to make a turn because of gravel on the pavement. There was no evidence of excessive speed. The road was wet but not "skiddy," the accident happened a short time before daylight. The court held that there was no evidence of gross negligence. There was a verdict in favor of the plaintiff in the lower court. In the *Heiman* case the trial court sitting without a jury gave judgment for the plaintiff. In a concurring opinion Bridges, J., made the following remarks:

". . . it does not seem to me either necessary or desirable to inject into the law an additional degree of care or negligence. Up to the present, in all personal injury cases other than where common carriers are involved, I believe the rule of this court has been the doctrine of ordinary care, or such care as a reasonably prudent person would exercise . . . Slight care might be ordinary care . . . The degree of care should remain the same, but the amount of care required to make up that degree is different under different circumstances."

Fullerton, J., in a dissenting opinion, said:

"In my opinion the degree of negligence . . . was a question of fact for the jury and not a question of law for the court."

In *Blood v. Austin* [109] an action was brought against the driver of an automobile for causing the death of an invited guest. While being driven at a speed of from 30 to 40 miles an hour, on a highway that was "frozen and covered with loose, round gravel or rocks," the car left the road and ran against a railing on the left which gave way,

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107 Remarks of Main, J., in Saxe v. Terry, 250 Pac. 27, 28 (Wash. 1926).
108 *Op. cit. supra* note 107.
109 270 Pac. 103 (Wash. 1928).

causing the car to "topple down an embankment," resulting in the death of the invited guest. The driver had been warned to slow down but did not do so in time to round the curve in safety. Also, the driver started to speed up "about 100 to 200" feet from a caution sign "Curve 250 feet." At the trial a verdict was directed for the defendant. The Supreme Court of Washington said that

". . . it cannot be held that the injury was wanton, or the result of gross negligence on the part of the respondent."

This review of the leading cases in the various jurisdictions in this country which have passed upon the question of the scope of liability, of the owner or driver of an automobile to his guest, for an injury due to the negligent operation of the car or for an injury due to the defective condition of the car while the guest is receiving his gratuitous transportation exhibits the increasing importance of this problem. Most of the cases have involved the question of liability due to the negligent operation of the car. The attempt to solve the problem by reasoning from the analogies of the landlord and licensee cases or the gratuitous bailment of personal property cases seems to be undesirable. The duty, it is submitted, should be owing to the guest as a person who is present in the car with the consent of the owner or driver, whether as a self-invited guest or as an invited guest, and whose presence should be taken into account in the matter of the operation of the automobile. The standard of conduct, whether the particular jurisdiction recognizes three degrees of negligence, should be that of a reasonable man. If this rule seems to be *incongruous with the innate and natural spirit of gratitude with which such hospitality should be met,* the answer is that the driver *has voluntarily taken the life and safety of a human being into his care* and that an automobile becomes a dangerous instrumentality in the hands of one who operates it in a manner contrary to that standard of conduct to which a reasonable man would conform. If this rule operates to the unfair advantage of the insurance (liability) companies, the remedy lies with them in the absence of state control over rates.

W. D. Rollison,
assisted by
E. L. Hessmer.

VALIDITY OF LIMITATION OF LIABILITY FOR UNREPEATED OR UNINSURED MESSAGES.—Salesman X goes to a telegraph office in the city of X for the purpose of sending a telegram to his broker in the city of Y. He casually turns the blank and reads the following:

"To guard against mistakes or delays the sender of the message should write it legibly and order it repeated, that is, telegraph back

to the sending station for comparison for such repeating an additional charge of one-quarter the regular rate will be made. It is agreed between the sender of the message hereof and this company that said company shall not be liable for mistakes or delays in the transmission or for non-delivery or misdelivery or any unrepeated message beyond that amount of charge which may or shall accrue to this company, out of the amount received from the sender for this and the other companies by whose lines such message may pass to reach its destination. That this company shall not be liable for mistakes in the transmission or delivery or non-delivery or misdelivery of any repeated message beyond fifty times the extra sum received by this company by the sender for repeating such message over its own lines."

Two questions arise, first, are those stipulations valid and binding upon salesman X? Second, are those stipulations binding on him if he fails to read them? The majority view would answer both questions in the negative. The minority view would answer both questions in the affirmative.

The authorities are in conflict as to the validity of this stipulation, some holding that it is reasonable, and that when assented to by the sender, it relieves the company from liability beyond the amount stipulated; [1] while others, and an undoubted numerical majority, are to the effect that as applied to a case in which the telegraph company through its servants has been guilty of even ordinary negligence the stipulation is contrary to public policy and void.[2]

All the authorities are in accord that stipulations limiting their liabilities in case of wilful misconduct or gross negligence are void.[3]

Some of the states that hold limitation of liability by contract for unrepeated message is valid are: California, Massachusetts, Michigan,

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1 TELEGRAPH AND TELEPHONES, 26 R. C. L., p. 570.

2 TELEGRAPH AND TELEPHONES, 37 Cyc, p. 1684; 11 L. R. A. (N. S.), p. 560, 35 A. L. R. 338, 1907.

3 Dixon v. Western Union Telegraph Co., 3 App. Div. 60, 38 N. Y. Supp. 1056 (1896), where through gross negligence of the defendant's servants, the word "fifty" was omitted. Held: A stipulation as to unrepeated message was no defense.

The same rule was applied in: Mowry v. Western Union Telegraph Co., 51 Hun. 62, 126 N. Y. Supp. 666 (1900) (retaining the message for seven days); Redington v. Pacific Postal Tel. Cable Co., 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432 (1895) (nineteen transmitted as nine).

See: Western U. Tel. Co. v. Piper, Tex. Civ. App. 191 S. W. 817 (1916); Klotz v. W. U. Tel. Co., 187 Ia. 1355 (1920).

Under an act of Congress, June 18, 1910, U. S. COMP. ST. 8563, the sender of the telegram is bound by the conditions and limitations in the telegram as to the amount of liability in case of failure to exercise reasonable care in delivery of telegram. U. S. Tel. Co. v. Gildersleve, 175 N. W. 825 (1920); Western U. Tel. Co. v. Crall, 38 Kan. 679 (1888).

New York, Pennsylvania, United States Federal Courts, Texas, and Iowa.[4] England and Canada have the same rule.

Some of the states which hold that limitation of liability by contract for negligence of a telegraph company is invalid are: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Tennessee, Utah, Vermont, and Wisconsin.[5]

The purpose of this note is to urge the soundness and reasonableness of the minority view.

One of the main theories on which the majority view is based is that telegraph companies are quasi-public. They receive from the public valuable franchises. They owe the public the duty of exercising care and diligence. Their business intimately concerns the public. Many interests are practically dependent upon it. Their negligence in the transmission of a message may often work irreparable mischief to individuals and communities. It is essential for the public good that

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[4] Coit v. Western U. Tel. Co., 130 Cal. 657, 53 L. R. A. 678, 80 Am. St. Rep. 153 (1900). (On account of atmospheric disturbances $35 changed to $27); Grennell v. Western U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485 (1873) (Omission of the word answer); Western U. Tel. Co. v. Carew, 15 Mich. 525 (1867) (Where message on reaching its destination read four cases instead of forty). Bennett v. Western U. Tel. Co., 18 N. Y. Sup. 772 (1892) (Adding the letter "s" to "horse"); Passmore v. Western Union Tel. Co., 78 Pa. 238 (1875) (Where the word "sold" was substituted for "hold"); Primrose v. Western U. Tel. Co., 154 U. S. 1, 1893; 38 Law. Ed. 883 (1893) (Only mistake of consequence was the change of the word "bay" to "buy").

[5] American Union Tel. Co. v. Daughtery, 81 Ala. 191, 7 So. 660 (1890); Stiles v. Western Union Tel. Co., 2 Ariz. 308, 15 Pac. 712 (1887); Western Union v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744 (1890); Western Union Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136 (1864); Western Union Tel. Co. v. Milton, 53 Fla. 484, 43 So. 495, 125 Am. St. Rep. 1077, 11 L. R. A. (N. S.) 560 (1907); Western Union Tel. Co. v. Blanciard, 68 Ga. 299, 45 Am. Rep. 480 (1882); Western Union Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279 (1874); Western Union Tel. Co. v. Meredith, 95 Ind. 93 (1883); Western Union Tel. Co. v. Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795 (1888); Western Union Tel. Co. v. Eubanko, 100 Ky. 591, 3 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711 (1897); Western Union Tel. Co. v. Goodbar, 82 Miss. 733, 35 So. 190 (1903); Reed v. Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492 (1896); Kemp v. Western Union Tel. Co., 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363 (1890); Western Union Tel. Co. v. Longwell, 5 N. Mex. 308, 21 Pac. 339 (1889); Williamson et. al. v. Postal Telegraph Co., 151 N. C. 223, 65 S. E. 974 (1909); Western Union Tel. Co. v. Driswold, 39 Ohio 301, 41 Am. Rep. 500 (1881); Blackwell Milling v. Western Union Tel. Co., 19 Okla. 376, 89 Pac. 235 (1906); Pepper et al. v. Western Union Tel. Co., 87 Tenn. 554 (1889); Wertz v. Western Union Tel. Co., 7 Utah 446 (1891); Gillis v. Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736 (1889); Fox v. Postal Telegraph Cable Co., 138 Wis. 648, 120 N. W. 399 (1909).

their duty of using care and diligence be rigidly enforced.[6] They should no more be allowed to effectually stipulate for exemption from this duty than should a common carrier of passengers or any other party engaged in a public business.

The majority view insists that this rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of their plain duty. It is no hardship upon them. They engage into business voluntarily. They have the entire control of their servants and instruments. They invite the public to entrust messages to them for transmission.[7] Why then should they refuse to perform the common duty of care?

A common carrier is not allowed to protect himself by contract without consideration from liability for result of his own negligence.[8] There seems to be no good reason why the same rule should not apply to a telegraph company.

The minority rule answers the above argument by saying that the liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried with peculiar opportunities for embezzlement or collusion with thieves. The identity of the goods received with those delivered cannot be mistaken. Their value is capable of easy estimation

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6 Western Union Tel. Co. v. Short, 53 Ark. 434, 9 L. R. A. 744, 14 S. W. 694 (1890) (Change of August 17 to August 7); Western Union Tel. Co. v. Crawford, 110 Ala. 460, 20 So. 111 (1896) (Change of word eighth to eighty); Walker v. Western Union Tel. Co., 75 S. C. 512, 56 S. E. 38 (1906) (Message was "Toots desperately ill; convulsions. Better come" was finally delivered as "Toots desperately; all convulsions better now"); Wertz v. Western Union Tel. Co., 7 Utah 446, 13 L. R. A. 510, 27 Pac. 172 (1891) (I will give you one thousand cash ball, six month; Answer. was delivered as reading "I will give one hundred cases balc, 6 months, Answer").

7 Whereby a constitutional or statutory provision, a telegraph company is made or treated as a common carrier, a stipulation as to unrepeated message is against public policy and void. Postal Tel. Cable Co. v. Wells, 82 Miss. 733, 35 So. 190 (1903) (change in cipher message of "alike" into "alive"); Western Union Tel. Co. v. Eubanks, 100 Ky. 591, 36 L. R. A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068 (1897) (Message received as sent to "J. A. Russell," instead of "J. W. Russell," as directed and thus delayed in delivery); Postal Tel. Cable Co. v. Schaefer, 110 Ky. 709, 62 S. W. 1119 (1901) (Message offering potatoes at $1.70 per barrel was delivered as offering them at $1.07 per barrel); Western Union Tel. Co. v. Beal, 56 Neb. 415, 71 Am. St. Rep. 682, 76 N. W. 903 (1899) (Seven hundred and ninety dollars changed into "even hundred ninety dollars"); Western Union Tel. Co. v. Meek, 49 Ind. 53 (1874) (Terms of a proposition seriously changed and name of sender entirely disfigured).

8 Bank of Ky. v. Adams Express, 93 U. S. 115 (1876); Hart v. Penna. R. R., 112 U. S. 338 (1884); N. J. Steam Navigation Co. v. Merchant Bank, 6 How. 344 (1848); Southern Express Co. v. Caldwell, 21 Wall 246 (1874); Railroad Co. v. Pratt, 22 Wall 123 (1874).

and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damage is measured by the value of the goods. A telegraph company is intrusted with nothing but an order or a message which is to be transmitted or repeated by electricity.

Rules and regulations stipulating against mistakes and delays in transmission are valid in view of the uncertainties attendant on the delivery of messages by means of electricity, and the difficulties in the way of guarding against errors and delays in the performance of such a service.[9] It is just and reasonable that the conductor of a telegraph should require that additional precautions should be taken to ascertain the accuracy of the messages as received, at the request and expense of the parties interested if they intend to hold him responsible in damages for any mistakes.[10] There is nothing in the regulation which tends to embarass or hinder the free use of the telegraph or to impose on those having occasion to transmit or receive messages any onerous or impracticable duty. A mistake in its transmission might occasion no serious damage to the parties interested. Whether it would do so or not would be within the knowledge of the sender or receiver, rather than within that of the operator who transmits it. The latter could rarely be expected to know what would be the consequences of an error in its transmission. The sender knows the occasion and the subject of the message. He can best judge the consequences attendant upon any mistake in sending it, to determine whether it is of a nature to render a repetition necessary to ascertain its accuracy instead of throwing this burden on the owner or conductor of the telegraph, who cannot be supposed to know the effect of a mistake or the consequences in damages of a failure to transmit it correctly.[11]

Some of the courts which are in accord with the majority rule say there is no valid contract between the telegraph company and the sender relative to liability for negligence in the transmission of a message by the company. They assert, where is the consideration for the contract? It does not move from the company. On the contrary, the company demands from the sender of the message fifty per cent in addition to the usual price for sending it for repeating. A contract by the company limiting its liability for negligence, mistake, or delay is not a contract of any legal effect. A common carrier receives a

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9 Grinnell v. Western Union Tel. Co., 113 Mass. 299 (1873); Clement v. Western Union Tel. Co., 137 Mass. 463 (1884); Primrose v. Western Tel. Co., 154 U. S. 1 (1893); M'Andrew v. The Electric Co., 33 Eng. Law & Eq. R. 180 (1900).

10 Western Union Tel. Co. v. Carew, 15 Mich. 525 (1867).

11 Ellis v. American Tel. Co., 13 Allen 226 (1886).

valuable consideration for such a contract by reduction in freight charges. A telegraph company does not receive a valuable consideration for a contract of this character.[12]

If there is such a contract limiting liability of the company the sender has entered into it under a species of moral duress. His necessities compelled him to resort to the telegram, and he was compelled to submit to such conditions. It was so argued by the Illinois court.[13]

The sender of a message gets sufficient notice of the conditions and stipulations on the back of the telegram. There is usually printed at the foot of the message blanks *Read the notice and agreement on the back.*[14]

It is argued that the sender often never reads the printed "conditions and agreement" thus subscribed. But it does not follow from this that they are not bound by the conditions. It was negligence not to read them before signing and delivery of the message. The sender should not be permitted to shut his eyes, and refuse to see what was so plainly before him. To allow this would operate as a fraud upon the telegraph company. It would enable one party through his negligence to create a liability against another in his favor when none was bargained for.

A shipper is bound by the terms and conditions in a bill of lading whether he reads it or not.[15] He cannot avoid its effect by showing that he executed it hurriedly or without due care or that he was ignorant of its contents.[16] Why not apply the same rule to the sender of a telegram?

The advertised time table of a railroad has been held part of a general offer. It becomes binding when accepted by a purchaser whether he reads it or not. The law requires him to inquire and exercise diligence.[17] Why not require the sender of a message to use

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12 Tyler v. Western Union Tel. Co., 60 Ill. 421 (1871).

13 Tyler v. Western Union Tel. Co., *op. cit., supra* note 12. *Contra*: Primrose v. Western Union Tel. Co., *op. cit., supra* note 4.

14 Breese v. U. S. Tel. Co., 45 Barbour 274, 48 N. Y. 141 (1871); Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078 (1894).

15 Jolnstine v. Richmond R. Co., 39 S. C. 55, 17 S. E. 512 (1893); Inman v. Seaboard Aire R. Co., 159 Fed. 960 (1908); Herring v. Atlantic Coast Line, 160 N. C. 252, 76 S. E. 527 (1912).

16 St. Louis R. R. Co. v. Ladd, 33 Okl. 160, 124 Pac. 461 (1912); Nashville R. Co. v. Stone, 112 Tenn. 348, 79 N. W. 1031 (1899); Bethea v. Northeastern R. Co., 26 S. C. 91, 1 S. E. 372 (1887); Caw v. Texas Pac. R. R. Co., 194 U. S. 427, 24 Sup. Ct. R. 663, 48 Law Ed. 1053 (1903); Adams Express Co. v Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647 (1902); Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. R. 131, (1886).

17 Denton v. Great North. R. R., 5 E. & B. 860 (1867); Shears v. Eastern R. R. Co., 14 Allen 433, 92 Am. Dec. 280, (1867); Coleman v. Railroad Co., 138 N. C. 351, 50 S. E. 690 (1905).

the same care? When a person receives sufficient notice of the conditions and stipulations on the back of a telegram and sends it without objection, it is reasonable for the operator to assume that the sender assented to such an agreement. An acceptance to a contract can be made by acts as well as words.[18]

Professor Williston says that "One who writes a telegraphic message on a blank, offered by the company which contains printed terms and conditions is bound by them in so far as they are not violations of public policy." [19]

The public are notified of the terms of the telegram. Without this precaution of repeating messages, mistakes by telegraph companies are unavoidable. There is no principle of public policy which does or should permit a telegraph company from being prudent enough to protect themselves from ruin, by requiring such a condition in the transmission of messages.

The minority rule is in accordance with the main principles of damages. This rule is emphasized in the case of *Hadley v. Baxendale,*[20] ever since considered a leading case on both sides of the Atlantic, and approved and followed by *Primrose v. Western Union Telegraph Company,*[21] and *Howard v. Stillwell.*[22] Lord Baron Alderson laid down as the principles by which the jury ought to be guided in estimating the damages arising out of any breach of contract, the following: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.,* according to the usual course of things from such a breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach." The same rule of damages has been applied, upon failure of a telegraph company to transmit or deliver a cipher message in many instances.[23]

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18 WILLISTON ON CONTRACTS, vol. 1, pp. 27, 46.

19 WILLISTON ON CONTRACTS, vol. 1, p. 159.

20 9 Exch. 354 (1854).

21 *Op. cit., supra* note 3.

22 139 U. S. 199 (1890).

23 Candee v. Western Union Tel. Co., 34 Wis. 471, 479-481 (1874); Beaupre v. Pac. & Atl. Tel. Co., 21 Minn. 155 (1874); Mackay v. Western Union Tel. Co., 16 Nevada 222 (1889); Daniel v. Western Union Tel. Co., 61 Texas 452 (1884); Cannon v. Western Union Tel. Co., 100 N. C. 300, 6 S. E. 731 (1888); Western Union Tel. Co. v. Wilson, 32 Fla. 527 (1885); Abeles v. Western Union Tel. Co., 37 Mo. App. 554 (1889).

CONCLUSION: The minority rule should be urged and extended because:

a. Liability of a telegraph company is unlike that of a common carrier.
b. A telegraph company has no control over electrical apparatus and atmospheric conditions.
c. It makes the sender of a message vigilant and careful about entering into a contract.
d. It is in accord with the main rules of damages.

John M. Ruberto.

CRIMINAL PROCEDURE—THE ABOLITION OF NONSENSE IN CRIMINAL PLEADING.—The large number of convictions for murder which have been reversed by appellate courts for defects in the indictment or information have brought unfavorable comment upon the courts. Everyone at all familiar with criminal procedure has noticed the cumbrous and complicated forms of indictment and information intended to charge the crime of murder in the first degree. It is interesting to note that in *Nichols v. State*,[1] the Supreme Court of Nebraska approved a form suggested by Judge Rose of that court, which was as follows:

> " 'In the District Court for Cheyenne County, Nebraska.
>
> " 'The State of Nebraska, Plaintiff, v. Charles Nichols, Defendant.
>
> " 'Allen E. Warren, the duly elected, qualified and acting county attorney of Cheyenne county, Nebraska, prosecuting pursuant to law in the name of and for the state of Nebraska, plaintiff, makes information to the district court for Cheyenne county in session October 17, 1921, at the regular October term of that year, as follows:
>
> " 'In Cheyenne county, Nebraska, June 17, 1921, Charles Nichols, defendant, feloniously, purposely and of his deliberate and premeditated malice, shot Emma Carow with a revolver, and as a result thereof she died June 17, 1921. Defendant thus committed murder in the first degree.
>
> Allen E. Warren,
> County Attorney of Cheyenne
> County, Nebraska.

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1 109 Neb. 335, 191 N. W. 333 (1922).

" 'The State of Nebraska, County of Cheyenne—ss.:

" 'Allen E. Warren, being duly sworn according to law, says the facts stated in the foregoing information are true as he verily believes.

Allen E. Warren,
County Attorney of Cheyenne
County, Nebraska.

" 'Subscribed in my presence and sworn to before me October 17, 1921.

" '[SEAL] Isola B. Wasson,
Clerk of the District Court of
Cheyenne County, Neb.' "

The above form of information for first degree murder was approved again by the Nebraska Supreme Court in *Phegley v. State*.[2]

William M. Cain.

University of Notre Dame, College of Law.

SURETYSHIP—STATUTE OF FRAUDS—"MAIN PURPOSE" RULE.—In the case of *Witschard v. A. Brody and Sons, Inc.*,[1] the defendant Buckley contracted with defendant Brody and Sons, Inc., to perform certain work on the premises of the latter, in making excavations, building walls and laying concrete floorings. For necessary lumber supplied to the job the defendant became indebted to the plaintiff, Westbury Company, and plaintiff refused to supply more lumber until he was paid. A member of the firm of Brody and Sons orally told the plaintiff that if they "continued to deliver the balance of materials needed on that job he would guarantee payment of what had already been delivered and what was to be delivered in the future." The Westbury Company thereupon resumed deliveries to Buckley, and the bill remaining unpaid the plaintiff seeks in this action to recover the amount of the bill from the Brody Company upon their oral promise. The New York Court of Appeals considered this oral promise as one to answer for the debt, default or miscarriage of another and unenforceable under the statute of frauds.[2]

This court apparently does not adhere to the "Main Purpose Doctrine," which is, briefly, that where the main purpose of the promisor in making an oral promise of guarantee is to secure some pecuniary benefit to himself the promise is not struck by the statute of frauds. The New York Court says: "The fact that the Westbury Company,

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2 113 Neb. 138, 202 N. W. 419 (1925).

1 177 N. E. 385 (N. Y., 1931).

2 PERSONAL PROPERTY LAW CONSOL. LAWS, c. 41, PAR. 31, SUBD. 2.

in continuing its deliveries to Buckley, at the request of the Brody Company supplied a consideration for the latter's promise is not sufficient to make the statute inoperative. To say that the payment of a consideration removes an oral contract of guarantee from the application of the statute is to say that the statute can never operate, for there is no such thing as a contract without consideration."

Discussing the "Main Purpose" Rule, Arant on Suretyship says: "Where the owner of land contracts with P to improve it in some way and P contracts with C . . . to furnish him materials to be used in the performance of the contract with the owner, frequently P is unable to make payments as promised and C threatens to . . . furnish no more materials . . . S, the owner then orally promises C that he will see that he is paid if he will . . . furnish P with additional materials . . . . The promise of S, under such circumstances, is held by most courts to be without the statute. . . . But, where the purpose of S is emphasized in determining whether his promise is within the statute or not, the statute is frequently held to be inapplicable as to labor or supplies furnished after the promise, but otherwise as to that which was previously furnished." [3]

Courts which follow the "Main Purpose" Rule, however, draw a fine line of distinction between mere advantage to the promisor and actual benefit. For example, the case of *Richardson Press v. Albright* [4] held that if a promise by a stockholder in a corporation is merely to answer for its debt, it is unenforceable under the statute if no sufficient note or memorandum in writing is made. In this case the defendant was a large stockholder in a publishing company and orally promised to see plaintiff paid on the corporation's account. But the plaintiff, creditor, continued to regard the corporation as the principal debtor and attempted to collect bills from it and in plaintiff's action against the stockholder the court held his promise struck by the statute, saying the personal pecuniary gain to the promisor was insufficient to constitute consideration that would make him an original promisor. This question, however, is subject to a division of judicial opinion and there are many cases holding the other way, especially as to work performed or materials furnished subsequent to the oral promise. Generally the benefit to the stockholder is said to be too indirect to support his oral promise.

In the case of *Taylor v. Lee* [5] the defendant was a landlord and, making arrangements with plaintiff, whereby plaintiff was to supply the tenant with materials, the defendant said the tenant would be on

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[3] ARANT ON SURETYSHIP (HORNBOOK SERIES), p. 123.
[4] 121 N. E. 362, 8 A. L. R. 1195 (N. Y., 1918).
[5] 121 S. E. 659 (N. C., 1924).