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Notes on Recent Cases

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NOTES ON RECENT CASES

CONSTITUTIONAL LAW—Due process—Provision for service on state officer—Necessity of notice to defendant. This case involves the validity under the 14th Amendment of a statute of New Jersey providing for service of process on non-resident of the state in suits for injury by the negligent operation of automobiles on its highways. (7 U. S. Sup. Court 313) *Wuchter v. Pizzutti.* Pizzutti was driving a team of horses attached to a wagon on the public highways of New Jersey. Wuchter was a resident of Pennsylvania and was following the wagon with his automobile. Wuchter drove his car so as to crash into the rear of the wagon damaging it and injuring Pizzutti and his horses. He instituted a suit against Wuchter in the Supreme Court of New Jersey. The defendant was served with process under the provisions of the statute, by leaving process with the Secretary of State. A judgment interlocutory was taken against him and a writ of inquiry of damages was issued. Although the statute did not require it, notice of its proposed execution was actually served personally on Wuchter in Pennsylvania. Wuchter did not appear and a final judgment was entered. Wuchter then appealed to the Supreme court contending that the act under which process was served was unconstitutional, because it deprived him of property without due process of law, in contravention of the Fourteenth Amendment to the Federal Constitution. The statute in question made no provision for actual notice being communicated to the non-resident defendant.

Chief Justice Taft, in delivering the opinion of the court, gives to us a very instructive conception of proper service under the due process clause of the Fourteenth Amendment. The question made in the present case is whether a statute making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably certain that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued. We think that a law with the effect of this one should make a reasonable provision for such probable communication. We quite agree, and, indeed, have so held in the Pawloski Case (274 U. S. 160, 61 L. ed. 222), that the act of a non-resident in using the highways of

another state may be properly declared to be an agreement to accept service of summons in a suit growing out of the use of the highway by the owner of the automobile, but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service of the Secretary of State or some officer of the State, without more, it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for fraud (*Heineman v. Pier*, 110 Wis. 185, 85 N. W. 646), or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law.

In determining the reasonableness of provision for service we should consider the situation of both parties. The person injured must find out to whom the offending automobile belongs. This may be a difficult task but should not be so difficult when the operator is within the state. In finding out who it was, and whether the person is of such financial responsibility as to warrant a suit, he almost necessarily will secure knowledge of his post office address or his place of residence, and thereby be enabled to point out how notice may be communicated to him. With this information at hand the state may properly authorize service to be made on one of its officials, if it also requires that notice of that service shall be communicated to the person sued. Every service of this kind therefore should require the plaintiff bringing the suit to show in the summons to be served the post office address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communicating by mail or otherwise with the defendant.

An attempt was made by the counsel for the plaintiff in argument to justify such service upon a non-resident motorist

by comparing the present statute with statutes which have been upheld providing that non-resident corporations may properly be served by leaving a summons with a state official, where the corporation has not indicated a resident agent to be served, (*Pennsylvania Fire Ins. Co.v. Gold Issue Min. & Mull. Co.* 234 U. S. 93, and *Simon v. Southern R. Co.* 236 U. S. 115). Such corporations may be properly required to accept service through a public officer as a condition of their doing business in the state. Their knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a non-resident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the Secretary of State to learn whether he has been sued. It has been held that even in cases of non-resident corporations, that a statute directing service upon them by leaving process with the state official is void if it contains no provision requiring the official to give the foreign corporations notice that suit has been brought and citation served. (184 Fed. 959, 961 and in *Gouner v. Missouri Valley Bridge Co.* 49 So. 657). In the latter case the Louisiana court said in respect to such a law;—"This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile. When a petition can not legally be served on a defendant, the court can exercise no jurisdiction over him. The service defines the court's jurisdiction." A number of State authorities are cited in the opinion none of which have gone so far as to render valid a statute which does not make communication of actual notice to the defendant an essential element. (*Nelson v. Chicago, B. & Q. R. Co.* 225 Ill. 197, 8 L. R. A. (N. S.) 1186, *Pinney v. Providence Loan Co.* 80 Am. St. Rep. 41, 50 L. R. A. 577, and *Hinke v. Kettle River Co.* 72 N. W. 835). The case of *McDonald v. Mabee* 243 U. S. 90, 61 L. ed. 608, 609, is also cited. In that case a person domiciled in Texas left the state to make his home in another state. An action for money was begun by publication

in a newspaper after his departure, and a judgment recovered and sustained by the state supreme court and later held to be void by this court. In that case the supreme court pointed out that the foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. . . . And in states bound together by a constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact. See *Roler v. Holly,* 176 U. S. 398, 44 L. Ed. 520, 20 Sup. Ct. Rep. 410.

These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are compiled with the defendant will receive actual notice, and that is the principle which should apply.

It is urged in the present case that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it cannot therefore supply constitutional validity to the statute or to service under it. (*Coe v. Armour Fertilizer Works,* 237 U. S. 413, 59 L. ed. 1027 & fol., *Louisville & N. R. Co. v. Central Stock Yards Co.* 212 U. S. 132, 144, 53 L. ed. 441, 446; *Stuart v. Palmer* 74 N. Y. 183, 188, 30 Am. Rep. 289; *Berryhill v. Sepp* 106 Minn. 458, 21 L. R. A. (N. S.) 344.

It may be well to note that Justice Brandeis and Holmes dissented from the main opinion delivered by the court upon the ground that counsel for the defendant failed to raise the objection that such service was invalid in the lower court, and hence it could not now be reviewed here. They did however object to the jurisdiction of the court below and it seems reasonable that their basis for such objection was that valid process had not been

served. Such a technical objection should not be allowed to stand in the path of justice in determining whether or not a person had been properly served.

—*Edward P. McGuire.*

CITIZENS—Child born of Chinese parents on American vessel on high seas—Aliens. All sections of the country agree that there is one great national problem which should concern us more than all others, but as to what that great problem is, each section will have a different answer. The middle west unanimously points to the farm situation as the thing most in need of attention, while down in Dixie the everpresent and most important item of concern is the negro question. The western coast, however, has its peculiar problem in dealing with immigration from China, as is amply evidenced by the large number of decisions of the federal courts involving questions of citizenship and immigration in that circuit. One of the latest of these is the case of *Lam Mow v. Nagle, Commissioner of Immigration, 24 Fed. (2d) 316.* In that case, Lam Mow, alias Lam Korea, petitioned for a writ of habeas corpus directed to John D. Nagle, as commissioner of immigration for the port of San Francisco. His petition was dismissed by the federal district court and he appealed.

Lam Mow was born of Chinese parents aboard an American merchant vessel on the high seas. His parents at that time were subjects of China but were domiciled in the United States and were returning to this country from China. Petitioner maintained that such conditions of birth made him a citizen of the United States under Article 14, Section 1, of the federal constitution. That section in part provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Petitioner based his contention upon the assumption that a merchant ship is to be considered a part of the territory of the country in which she is registered and under whose flag she sails. Color and human interest is added to this contention by the plea that any other decision would have the effect of making him virtually a man without a country, and therefore without political status. The court, however, pointed out that the parents of petitioner at the time of his birth were subjects of China and under the jurisdic-

tion of the Chinese government, a jurisdiction qualified only temporarily to such extent as is recognized by the law of nations while a subject of one country is being transported on the high seas aboard a vessel of another sovereign. Petitioner, therefore, did not owe allegiance to the United State merely because he was born upon a ship sailing under the Stars and Stripes. In the language of the court, "The general statement, or its equivalent, that a vessel upon the high seas is deemed to be a part of the territory of the nation whose flag she flies, must be understood as having a qualified or figurative meaning." Lam Mow, therefore, was not born "in the United States" within the meaning of Article 14, Section 1, of the federal constitution, and the Circuit Court of Appeals, Ninth Circuit, affirmed the decision of the district court.

—*Henry Hasley.*

CRIMINAL LAW—Homicide—Respondeat Superior. The defendant was travelling in an automobile over a public highway in Georgia. The car was driven by the defendant's chauffeur at a rate of fifty miles an hour and as the car approached a curve it collided with another car, being driven in the opposite direction and the collision caused the death of an occupant in the latter car.—The chauffeur stated after the accident that while in the act of wiping the windshield he lost control of the car. The chauffeur and the defendant were indicted for murder and the former absconded and has not been apprehended. From the evidence it did not appear that the defendant was at any time driving the car, nor did he give the chauffeur any directions as to the manner of operating the same. The jury found the defendant guilty of involuntary manslaughter and the question was certified as to the validity of the verdict as a matter of law by the Supreme Court of Georgia in *Moreland v. State,* (139 S. E. 77).

It is generally recognized that the doctrine of respondeat superior pertains only to civil cases and the application of the doctrine now being inaugurated in criminal law is apparently a deviation from recognized principles. Imputing the undirected criminal acts of an agent to his principal in the prosecution of such a serious felony as homicide is a dangerous departure unless substantiated by competent authority. The court cites only

one case (*Commonwealth v. Sherman,* 191 Mass. 349) which it considers the exact question to have been decided. In the Massachussetts case the defendant's chauffeur exceed the speed limit of twelve miles an hour and the court found the defendant guilty of speeding although he was not operating the automobile. It seems almost absurd that any court of last resort should innovate a precedent of such auspicious gravity as finding a man guilty of homicide based on the reasoning of a court which passed on such an insignificant misdemeanor as "exceeding the speed limits of twelve miles an hour".

There are cases holding corporations guilty of crimes on the theory that a corporation commits the crime itself when its negligent agents act intra vires. This rule has been enunciated in the Federal Courts (159 Federal 582).

In the instant case granting that the theory advanced is correct as a matter of law that the defendant is held liable for homicide on the theory of respondeat superior and that the negligence of the agent was imputed to him either by a failure to restrain the agent from speeding or by impliedly ratifying the act, where will the Supreme Court of Georgia terminate the application of the rule? Will all the acts of chauffeurs while the owner is in the car be imputed to him by the application of respondeat superior? If the doctrine is applied in criminal cases, it is not preposterous to foresee fathers convicted for murder in many states which hold the latter responsible for the torts of the children arising from the use of the family car, although the father would be far distant from the scene of the accident. However it must be remembered that in many of the states chauffeurs are more common than in Georgia and they will appreciate the fact that they have propensities, unenslaved and individualistic. Also that chauffeurs consider their occupation a matter of driving, and not a matter to be driven.

—*Thomas V. Happer.*

BALIMENTS—Gratutitous Bailee—Conversion. This is the case of a gratutious bailee delivering certain goods in good faith and with due care to a man whom he believed to be an express agent. However, the supposed agent of the American Express Company was later found to be an imposter. He converted the goods in question. The bailor sued the bailee for the

value of the goods. It was held that in spite of the fact that the defendant was a gratutious bailee, he was, nevertheless, responsible for the loss of the merchandise. *Baer v. Slater,* 158 N. E. 328, Mass. 1927.

It is the first duty of the bailee to take reasonable care of the bailed chatell. As he receives no benefit, the general rule is that he is resposible only for gross negligence. What is reasonable care will depend upon the nature and value of the bailed chatell, the circumstances of the undertaking and the contract of the parties. (*Coggs v. Bernard,* 2 Ld. Ray. 909; *Foster v. Essex Bank* 17 Mass. 479.) It has often been suggested that if the bailee takes the same care of the bailed goods as of his own he is free from liability. But one may take risks with his own that he has no right to take with the property of another. Taking such care of the bailed goods as of one's own repels a presumption of gross negligence, but this may be overcome and liabiilty fastened upon the bailee by showing want of slight negligence. (*First National Bank v. Graham,* 79 Pa. St. 106). It seems apparent that the bailor would not authorize the delivery of the goods to a defrauder and consequently the act of the bailee was a conversion. (*Hall v. Boston and Worchester R. Co.* 14 Akken 439, 433, Mas. 1867.) It is said, however that if the loss results from conditions equally within the knowledge of the bailor and bailee then the former cannot maintain an action against the latter. Thus, if the place where the goods are to be deposited are known to the bailor, he is estopped from setting up any loss therefrom. It appears that the results of the present case are desirable in so far that it takes no exception to the general rule that regardless of the character of the bailment, a delivery to an unauthorized third party constitutes negligence and a conversion. It is easy to see that the imposing of strict rules of conversion will undoubtly insure greater safety and protection of the property bailed.

—*W. F. Craig.*

DECLARATORY JUDGMENTS—Extra Territorial Effect. The doctrine of declaratory judgments is a recent innovation in this country and may increase or decrease in favor in proportion to the ability of the courts to apply it with satisfactory results. It has been long established in England, and Scotland preceded England in its use by several centuries. The Uniform

Declaratory Judgments Act was approved in the year of 1922 and the state of Indiana adopted it five years later. The scope of the act is to afford relief and security with the respect to rights and status and to have these rights judicially determined.

The foremost objections to the doctrine of declaratory judgments that it is a delegation of non-judicial duties and impairs the right of due process of law by taking away the right to a trial by jury. In the case of *McCrory Stores Corporation v. Braunstein* (134 Atl. 752) the court held that the act did not violate the provisions in the constitution, that only judicial powers shall be vested in the courts; but nevertheless the decisions have the effect and the force of judgments.

The question in the instant case to be reviewed is whether a court of equity by means of a declaratory judgment, may exercise jurisdiction over real property out of the state *Westchester Mortgage Co. v. Grand Rapids & I. R. Co.*, 246 N. Y. 194, 158 N. E. 71.) The facts indicate that a note had been executed and delivered in the state of Rhode Island payable in one year after date, in the city of Newport. The security for the said note was the assignment of an interest in a trust fund. The trust consisted of certain real property situated in the state of Rhode Island. At a time subsequent to this transaction, other assignments of this interest veer made to secure further indebtedness. The note and the interest were never paid and the plaintiff sought a declaratory judgment in the state of New York, on the theory that he had a lien paramount to all others on the property of the trust to the amount of the note and the interest. The plaintiff was unsuccesful in the prosecution of his action for the reason that the court of New York claimed that it had no jurisdiction to declare what rights the plaintiff possessed concerning property in the state of Rhode Island.

The court of New York correctly adjudicated this case because it is a well settled rule of law that needs no citation that a court of equity has no power to pass upon the status of property out of its jurisdiction. A bill of specific performance could not be maintained in the state of New York to pass title to land in the state of Rhode Island so why allow the plaintiff to accomplish something indirectly under the guise of declaratory judgment that he could not have accomplished directly under regular equity procedure.

To permit a court of equity to assume extra territorial effect over real property would lead to inconceivable abuses and conflicts. The uniform act itself recognizes the distinct jurisdiction of courts of equity and law. In a recent New Jersey Case (133 Atl. 387) a bill for declaratory relief alleging facts which brought it within the jurisdiction of the law courts was dismissed because of lack of equity jurisdicton. The Declaratory Judgments Act does not legalize extra-territorial jurisdiction of the courts, for it has been long recognized that the rights in property are rights *in rem* and the status of them is determined by the state in which the property is situated. Any other doctrine would be a gross and reprehensible usurpation. The court of New York established a correct precedent in the Westchester case that will be in all probability followed in other jurisdictions who have adopted declaratory judgments.

—*Thomas V. Happer.*

EXECUTORS AND ADMINISTRATORS—Rights of Creditors—Chattel Mortgages—Effect of Failure to Record. The Supreme Court of Iowa in the case of *Raybourn, et al., v. Creger, et al.,* 216 N. W. 272, was concerned with determining the rights of creditors of a deceased mortgagor where the chattel mortgage was not filed until after the death of the mortgagor. The effect of the decision of the court is to nullify the efforts of the decedent to secure a debt due to the children of his deceased sister for money borrowed from their mother during her lifetime. The mortgagor employed an attorney to draw up a chattel mortgage on eighty-five head of hogs which were being cared for by a hired man on mortgagor's farm. After executing the mortgage, he delivered it to the attorney with instructions to file it for record. He then left the office of the attorney and committed suicide, dying early the next morning. On that same day, but after the death of the mortgagor, the attorney filed the mortgage in accordance with the previous instructions. The decedent's estate was insolvent and the administrator sold the hogs described in the mortgage and applied the money to the payment of general creditors of the estate whose claims had been filed and proved against the administrator. Plaintiff then commenced this action in equity to establish the lien of his chattel mortgage on the proceeds of such sale in the hands of

the administrator. The court held that the equities of the parties are to be determined as of the time of the death of the deceased mortgagor, and that, since at that time there was no notice of record of the chattel mortgage given by decedent, the right of the creditors to the proceeds of the sale was superior to any right acquired under such mortgage.

In quoting from *Blackman v. Baxter, Reed & Co.*, 125 Iowa 118, 100 N. W. 75, 70 L. R. A. 250, 2 Ann. Cas. 707, the court said: "There can be no race between creditors for the assets of a dead man. After his demise neither the recording of an incumbrance nor the taking of possession can confer a preference. All rights are of necessity to be adjudicated as of the date of decedent's death, and, as in an insolvent estate the adminstrator takes the property for the benefit of the creditors, their interest in the assets relates back with his title and right of possession." In quoting further from the same case, the court declared that "the administrator has taken title and possession, and, regardless of the date of appointment, that title and possession, according to the common law, . . . relate back to the time of dissolution. In an insolvent estate that title and possession is in the trustee for the benefit of creditors. Their interest in the property attaches the instant of the decedent's death, and, as representing them, the administrator may insist upon the invalidity of the unrecorded mortgage. The result is equitable, for it avoids clandestine preferences, and distributes the assets of the insolvent estate among all creditors alike."

The appellant further contended that under the statute there was no necessity for filing the mortgage for record. The Iowa statute provides for such filing whenever the mortgaged property remains in the actual possession of the mortgagor, and appellant maintained that, since the property was in the possession of the hired man on a farm on which the mortgagor did not reside, the recording statute did not apply. This contention, was overruled by the court on the ground that the person having possession of the hogs was the mere servant of the mortgagor and his possession was the possession of his master.

Wasted effort is frequently one of the incidents of haste. Had the decedent been a trifle less hasty in staging his exit from the manacles of this world, his attorney at least might have had time to file the chattel mortgage before his untimely death. Then

the relatives which he thus sought to save from loss, granting the validity of the mortgage, might have received the benefit of the preference which the giving of the mortgage indicates he wanted them to enjoy.

—*Henry Hasley.*

GAMING—Measure of wife's recovery for husbands losses at gambling. This is the case of *Worland et al. v. McGill,* Court of appeals of Ohio. (160 N. E. 478.) Lulu E. McGill, plaintiff brought an action against Thomas C. Worland, Walter Belpash and the C. E. S. Realty Company as defendants to recover money she claimed her husband expended at gambling. The lower court sustained a demurrer to the petition on the grounds that it did not state a cause of action. Brought to this court on error. The appeal court was under the opinion that the plaintiff had a cause of action under Sec. 5767, General Code and reversed the judgment and remanded the cause for further hearing. After remanding the cause to the court below the action was tried again and the defendants Worland and Belpash appealed, alleging error.

The court below admitted as evidence of the fact that the plaintiff's husband had gambled at the defendants gambling house, an account book in which George H. McGill had kept a record of his winnings and losses. This book was inadmissible as the entries were not made contemporaneously or substantially contemporaneously with the transactions. The plaintiff admitted that she had seen her husband make the entries after he returned home from the gambling house. The account was not one kept in due course of business.

A verdict was given for the plaintiff in the court below in the sum of $3,500 against all of the defendants. This was assigned as error. The verdict would have been good against McGill and Belpash, but not against the C. E. S. Realty Company which owned the premises in which the gambling resort was kept There could be no money judgment against the realty company The court had only power to adjudge the amount of damages, to be a lien on the premises.

The amount recoverable by the plaintiff in this action would be the amount expended by plaintiff's husband in gambling and received by the person or persons conducting the gambling

scheme, together with exemplary damages as provided by the code. For reason of the above mentioned errors the judgment is reversed and the cause remanded for a new trial.

—*John P. Berscheid.*

HUSBAND AND WIFE—Action of tort under Statute enabling married women to sue. The plaintiff was injured through the negligent driving by her husband of an automobile, the property of the defendant Company being operated in the conduct of its business by the husband as an agent and employee of the defendant. The question is whether an employer is liable to the wife, where the negligence of the husband and employee was the cause of her injuries.

The question is a new one in this state but has been presented on many occasions in other jurisdictions. While it is purely a question of local law, the statutes in most of the states are similar in character and have a common object in the removal of the disabilities of married women and the placing of the sexes with equality respecting their rights and manner of enforcing them. The particular statute in question allowed married women to sue and be sued in the same manner as if she were unmarried and also allowed the wife who was sued jointly with her husband to separately defend the action. These statutes in other states have been interpreted by courts in the following jurisdictions: *Aultman, Taylor & Co. v. Obermeyer* 6 Neb. 210, *Strom v. Strom* 98 Minn. 427, 107 N. W. 1047, *Peters v. Peters* 42 Iowa 182, *Proser v. Proser* 102 S. E. 787, *Johnson v. Johnson* 77 So. 335. An examination of these authorities disclosed a great weight of opinion opposed to opening a field of litigation between spouses in tort actions by means of judicial interpretation and without unmistakable legislative action. The procedural difficulties, the dangers of disrupting the secrecy and serenity of marital relations, the avenue for fraud, the startling innovation in permitting such controversies, and the lack of clear legislative indorsement have all been assigned as ample reasons for the refusal of the courts to sanction, by supplying statutory interpretation, a new form of litigation manifestly requiring unequivocal legislation for its existence. An illustration of this reluctance is found in *Thompson v. Thompson,* 218 U. S. 111, 21 Ann. Cas. 921, where the statutes under consideration come close to an author-

ization. The legislation in most of the states apparently designed to remove disabilities from married women, so as to place the sexes in an equal position before the law. This was fully attained. The husband may not sue the wife for tort. Both spouses have the same disability The equality is complete. The court points out that if the situation is to be changed, it should come through legislation.

Although the statutes authorizes suits by a wife against third persons, the question arises whether they may be maintained in cases where they are grounded upon the negligence of the husband when employed by third persons and the employee is liable to the employer for his negligence. In the case of *Doremus v. Root,* 13 Pac. 572, the court points out that if recovery may be had by the wife against the employer, and he in turn may recover from the husband (employee), then the family wealth remains the same save as diminished by the expenses on the litigation. It would seem that to permit a recovery against the employer results simply in countenancing an encircling movement where a frontal attack upon the husband is inhibited. (*Maine v. James Maine & Sons Co.,* 201 N. W. (Iowa).

Suits between spouses shold be confined as heretofore to those having contractual elements or where there is direct statutory authorization, and suits by a spouse against third persons grounded upon the tort of the other spouse, and without contractual elements, fall in the same category.

In another recent case *Smalley v. Simkins,* 215 N. W. (Wis.), a somewhat analogous situation arose. Mr. and Mrs. Smalley and Mr. Simkins decided to take a trip to Chicago in Simkins' car and the men agreed that each should drive half the way. While Smalley was driving the car came in contact with a telegraph pole and Mrs. Smalley was injured. She brought an action her husband and Simkins. She recovered a judgment in the lower court and on an appeal by Simkins the Supreme court of Wisconsin said, "The two Smalleys and Simkins were taking the trip for separate and distinct purposes of their own. While driving, Frank Smalley was as much the agent of the plaintiff as he was that of Simkins. The plaintiff ought not therefore to be permitted to assert an alleged agency of her husband, the driver, for the owner of the car, and ignore an exactly similar relationship existing at the same time between her husband and

herself. In substance, Simkins was loaning the use of his car to the Smalleys, and the two supplied their own driver at that portion of the journey. While this decision is based upon a somewhat different grounds than those cited heretofore it nevertheless shows the reluctance of courts to offer aid to a wife in a tort action. These cases represent the apparent weight of authority in the United States. If a wife is to be permitted to her husband in a tort action, and I see no immediate need for such relief under ordinary circumstances, her relief must come about through positive legislation and not judicial interpretation.

—*Edward P. McGuire.*

INTOXICATING LIQUORS—Injunction for Nuisance—Mulct Tax. In *State ex rel Seeburger Co. Atty. v. De Leon et al* the court granted an injunction against the property of all the defendants and assessed a mulct tax of $600 against all the defendants and the property for the maintainence of a liquor nuisance. The defendant De Leon was the lessee of the property and it was owned by Tolchinsky and Friedman. These two defendants appealed from the injunction and the mulct tax on the grounds that they did not know, and had no reason to believe, that their tenant was maintaining a liquor nuisance.

The court here held that when a decree of injunction is granted against the tenant an injunction shall be granted as against the property, regardless of whether or not the owner had knowledge of the nuisance. *State, ex rel Seeburger v. Pickett,* 202 Iowa 1321, 210 N. W. 782. As the state did not conclusively show that appellants had knowledge of the nuisance it was improper to assess the mulct tax against them. *Seeburger v. Pickett supra, Drake v. Kingsbaker,* 72 Iowa 441, 34 N. W. 199. Reversed as to mulct tax.

—*Marc Wonderlin.*

MASTER AND SERVANT—Workmen's Compensation Act—Injury by Nail Thrown by Fellow Servant in Play Before Beginning Work. Workmen's Compensation Acts during recent years have found a place on the statute books of a great many of our states. Their uniform aim is to provide relief for the workman injured in the course of his employment and to make the business in which he is engaged carry the burden of

the casualties and injuries caused by it. The extent to which such acts have been invoked in the fulfillment of their humane mission is well illustrated by the case of *Badger Furniture Co. et al. v. Champeau, et al., 217 N. W. 734 (1928)*, decided by the Supreme Court of Wisconsin.

The original action in the District Court was brought to review an award of the Industrial Commission in favor of Champeau under the Wisconsin Workmen's Compensation Act. Champeau was an employee of the furniture company and was hired to run a spinning machine. The basis of his claim for compensation was an inquiry to his eye caused by a nail which was playfully thrown by a fellow employee. The injury occured about seven minutes before time to begin work, while Champeau was sitting on a window sill five feet from his machine, awaiting the signal to start the machine. His fellow employee was seated on another window sill a short distance away when he negligently threw the nail in play, striking claimant in the eye. Under this set of facts, the District Court set aside the award of the Industrial Commission. Claimant appealed to the Supreme Court of the state.

The Wisconsin act, among other things, contained this provision for liability: "Where at the time of the accident, the employee is performing service growing out of and incidental to his employment. Every employee going to and from his employment in the ordinary and usual way, while on the premises of his employer, shall be deemed to be performing service growing out of and incidental to his employment." The statute, therefore, is very broad in its provision as to what constitutes "service growing out of an incidental to his employment". And since negligence of the fellow servant is no defense, the injury to Champeau clearly grew out of his employment, within the meaning of the act. The fact that the nail was thrown in play can make no difference, since the injured employee was not engaged in play at the time of the injury.

But that is not all. The court even goes so far as to overrule the former decision of the same tribunal in the case of *Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D, 968,* in which compensation was denied. The court said: "In that case the injured workman had ceased work at night, and, before leaving the premises, was dusting his

clothes with a compressed air hose. A fellow employee voluntarily undertook to clean the dust from the injured workman's back with the hose, and in using the hose to play a practical joke he unintentionally injured the workman. . . . When the Havolic Case was decided, the court had not had many cases under the Compensation Act before it, and there were but few decisions under Compensation Acts in other jurisdictions. Since then the law of workmen's compensation has been more fully developed, and there has been a general trend of liberality in interpreting the act in this court to carry out the legislative purpose. . . . We are satisfied that this court was in error in its decision in the Havolic Case. That case, therefore, must be, and it is, overruled."

In the instant case, the decision of the District Court was reversed and the award of the Industrial Commission sustained.

—*Henry Hasley.*

MUNICIPAL CORPORATIONS—Building Permit Not A Contract—Right to Revoke. In a suit for damages (*Rehmann et al v .City of Des Moines* 215 N. W. 957,) sustained by the plaintiff when he failed to perform a contract for the sale of a building, such failure being caused by the city's wrongful revocation of his building permit. The plaintiff contended that the officers of the city wrongfully revoked the permit, that the defendant city is liable for the ratification of the wrongful revocation and that the defendant city breached its contract and is liable thereon.

A public officer in the exercise of his judicial or quasi judicial duties is not liable in damages for the honest exercise of his judgment within his jurisdiction according to *Roerig v. Houghton* 144 Minnesota 231, 175 N. W. 542. The revocation of a building permit is the exercise of the police power and the city is not liable in damages to the owner. *Stevens v. City of Muskegon* 111 Michigan 72, 69 N. W. 227. A permit is the privlege to do what would otherwise be unlawful and is not a contract. Therefore the city cannot be held for the breach of contract. 37 C. J. 168; *Lerch v. City of Duluth,* 88 Minnesota 295, 92, N. W. 1116.

—*Marc Wonderlin.*

MUNICIPAL CORPORATIONS—City Not Liable for Damages Arising Out of Revocation of Building Permit. The original action was brought in the court of common pleas to re-

cover damages against the city of Toledo for revoking a building permit in contemplation of the construction of a street after the plaintiff had expended large sums of money for excavation, drainage and other work looking towards the construction of the dwelling house authorized by the permit. The court sustained a general demurrer to the petition and, as the plaintiff did not desire to plead further, her petition was dismissed. *James v. City of Toledo,* 157 N. E. 309 (Ohio).

The petition stated that the plaintiff was the owner of lot number 56 in Lewis Heights in the City of Toledo and had entered into a written contract with one Ruch for the construction of a house on said lot, and for this purpose secured from the defendant, through its commissioner, a permit authorizing the construction of said house. After the plaintiff had purchased material and started the construction work, the city council passed a resolution appropriating certain property, including the plaintiff's lot, for the purpose of constructing a street. The commissioner then withdrew the building permit and ordered all construction work to be stopped. The plaintiff alleges that she requested the defendant to either buy or appropriate her property or reissue her permit but said requests were refused and subsequently another resolution was passed by the city council which nullified the previous resolution whereby her property had been appropriated. That she has suffered great damages by having the permit revoked and by the failure on the part of the defendant to appropriate her lot.

Citing the case of *Clinard v. City of Winston-Salem* 91 S. E. 1039, the court held that the matter of issuing and revoking of building permits was clearly a case of a municipality acting in a governmental capacity and for which the city cannot be held for damages. In thus acting the city was a representative of the state and non-liability could arise for such acts. The court added, however, that notwithstanding the non-liability of the city for damages, an action of mandamus to compel the issuing of a building permit would lie in a proper case.

—*Herbert J. Nester.*

NEGLIGENCE—Plaintiff required to show dangerous nature of dye which caused injury. Pauline Karr was plaintiff in the case of *Karr v. Inecto Inc.* Court of Appeals of New York. 160 N.E.398. The defendant was a manufacturer of hair dye.

The plaintiff conducted a "beauty parlor", and was requested by a patron to apply the dye manufactured by the defendant to the hair of the patron. This was done and during the operation the plaintiff claims some of the liquid came in contact with her finger and as a result the finger began to swell. An infection set in, which necessitated several operations on plaintiff's finger. The plaintiff claims that she had never before applied the dye, herself, but it had been used by some of her employees. She also claims she used care so as not to come in contact with the dye. It is alleged that the dye is of an inherently dangerous nature and poisonous to the skin.

To recover damages the plaintiff must show that the dye was the cause of her injury; that the dye or chemical was inherently dangerous or poisonous and that the defendant was negligent in putting a dangerous and harmful product on the market. The appellate division reversed a decision dismissing the action, holding that the evidence did not make out a *prima facie* case.

This court is of the opinion that the action should be dismissed for the reason stated above. The plaintiff has failed to show that the dye was inherently dangerous or that the injury was the result of coming in contact with the dye. It was not shown that the dye had injured the person to whom the dye had been applied as a means of coloring the hair. The dye was in that case applied to the scalp and some of it trickeled down the customers forehead. It seems then that the plaintiff's injury was probably due not to the harmful effect alleged to the dye, but to some other infection. The plaintiff's contention is too conjectural to merit any consideration. The evidence does not support the claim. Judgment of the trial court affirmed.

—*John P. Berscheid.*

AN ANNOUNCEMENT

The faculty of the College of Law has recently announced its appointment of Thomas V. Happer of Dayton, Ohio as editor-in-chief of the "Notre Dame Lawyer" to succeed Joseph P. McNamara, the retiring editor. Mr. Happer has been prominent on the staff of the review this year. Russell C. Kuehl of South Bend, present assistant business manager, has been appointed to succeed Robert J. Mohlmann as business manager. Mr. Kuehl has been on the business staff for two years.