of different races, the constitution providing for equal privileges. But the overwhelming weight of authority is to the effect that a statute providing for separate schools for white and colored children is constitutional. A number of the cases so holding are collected and cited in the principal case. A more complete citation of authorities may be found in 13 Ann. Cas. 342 and Ann. Cas. 1916 C. 806. Nor is the validity of the act affected by the motives in its enactment. *Wong Kim v. Callahan,* 119 F. 381. The test of constitutionality is not whether the privileges of the races are identical, but whether equal educational opportunities are afforded. *Greenwood v. Rickman,* 145 Tenn. 361, 235 S. W. 425; *Daviess County Board of Education v. Johnson,* 179 Ky. 34, 200 S. W. 313. Hence, where separate schools are not maintained, colored children cannot be excluded from schools for white children. *State v. Duffy,* 7 Nev. 342, 8 Am. Rep. 713.

Statutes providing for taxes to be used exclusively for white schools are unconstitutional, because discriminatory. *Williams v. Bradford,* 158 N. C. 36, 73 S. E. 154. *McFarland v. Goins,* 96 Miss. 67, 50 So. 493. Void also, in general, are statutes which provide that the taxes raised from white persons be used for school for white children and the taxes from negroes for negro children. *Riggsbee v. Durham,* 94 N. C. 800 and other cases cited in note 13 Ann. Cas. 343.

Most of the decided cases involve the rights of negro children; the principal case holds that Mongolians, or for that matter, any other race except the Caucasian, may be excluded from white schools where there are equally good schools for "colored" children. In general, however, the word "colored" is limited to persons wholly or in part of negro blood. *Wall v. Oyster,* 36 App. Cas. (D. C.) 50, 32 L. R. A. (N. S.) 180, 38 Wash. L. Rep. 794. A number of cases to the same effect are listed in the note in Ann. Cas. 1912 D. 457. But in most of these cases the definition is dictum. On the other hand, the word "white," is usually held to mean person of the Caucasian race. *Ozawa v. United States,* 260 U. S. 178, 67 L. ed. 199, 43 Sup. Ct. 65. Other cases are cited in *Rice v. Ging Lum,* 139 Miss. 760, 104 So. 105, the principal case in the court below. Thus, the question in the principal case in the state court was one of construction rather than constitutionality. If "white" means Caucasian only, *ex necessitate,* "colored" must include all other races. This was the reasoning and conclusion of the Mississippi court in the principal case, and the Supreme Court held the statute as thus construed to be unconstitutional. J. N., '29.

NEGLIGENCE—RES IPSA LOQUITUR—BURDEN OF PROOF.—Plaintiff was injured when car driven by defendant on slippery pavement suddenly skidded on to the sidewalk, knocking plaintiff down. Negligence was pleaded generally, and the plaintiff relied upon the doctrine of *res ipsa loquitur.* Concerning the manner of the accident, the only testimony offered by the plaintiff was a telephone conversation between plaintiff's wife and defendant, in which the latter stated that she lost control of the car. The instructions when read together informed the jury that it might infer negligence by means of the *res ipsa loquitur* doctrine without knowing the specific act or omission which constituted the negligence, if it should find from the evidence that the defendant's auto ran upon the sidewalk and struck the plaintiff unawares from behind. *Smith v. Hollander,* 257 Pac. 577 (Cal. App., June, 1927).

On principle and authority, the holding seems unjustified. Courts have labored hard to keep to the maxim that negligence is never presumed. *Brown v. Light, Power & Ice Co.,* 137 Mo. App. 718, 109 S. W. 1032. As a general rule, it may be stated that negligence is a fact which must always be proved and will never be presumed. *Mentzer v. Armour,* 18 Fed. 373; *Pennsylvania Company v. Conlan,* 101, Ill. 93. The mere fact that an accident has happened

does not authorize the inference of negligence on defendant's part, although it may be taken into consideration with other facts and circumstances of the case. *Renders v. Grand Trunk Railway Co.,* 144 Mich. 387, 108 N. W. 368. A careful analysis of the better considered decisions shows that negligence will not be presumed from the mere fact of injury, when the fact is as consistent with a presumption that it was unavoidable as it is with negligence. Therefore, if it be left in doubt what the cause of the accident was, or if it may as well be attributable to the act of God, or unknown causes as to negligence, there is no presumption of negligence, and *res ipsa loquitur* will not apply. *Firebaugh v. Seattle Electric Co.,* 40 Wis. 658; *Patton v. Texas R. Co.,* 179 U. S. 658, 45. L. Ed. 361, 21 Sup. Ct. 275; *Le Barron v. East Boston Ferry Co.,* 11 Allen (Mass.) 312. When that doctrine does apply, it is almost universally conceded that it does not change the burden of proof as such. The burden of proving negligence is on the plaintiff, and it rests upon him throughout the trial. If he fails to sustain the burden, the case must go against him. *Brown v. Light, Power & Ice Co., supra.* Contrary results have been reached, however, but in those cases the courts confused the burden of proof with the burden of going forward with the evidence, as the court does in the principal case. *Southwestern Tel. & Tel. Co. v. Bruce,* 89 Ark. 581, 117 S. W. 564, L. R. A. 1916A. 930.

As a general proposition the doctrine of *res ipsa loquitur* may be said to apply when the thing which causes the accident is shown to be under the exclusive management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care. *Judson v. Giant Powder Co.,* 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, and cases there cited. Accordingly, to render the maxim applicable, the thing causing the injury must be shown to have been in the exclusive control of the defendant. *Raney v. Lachance,* 96 Mo. App. 479, 70 S. W. 376; *Boyd v. Portland Elec. Co.,* 41 Ore. 336, 68 Pac. 810; *Obertoni v. Boston, etc. R. R. Co.,* 186 Mass. 481, 71 N. E. 980. The maxim should not apply where the cause of the accident is known. *Parsens v. Hecla Iron Works,* 186 Mass. 221, 71 N. E. 572. And the rule does not apply where the injury was the result of two or more concurring causes. *McGrath v. St. Louis Transit Co.,* 197 Mo. 97, 94 S. W. 872.

In situations analagous to the principal case, where horses were the instrumentalities which caused the danger, results contrary to the one reached in the principal case obtained. The decisions were generally to the effect that where a horse ran away with his driver, there was nothing in that fact itself to show negligence on the part of the driver. *Rowe v. Such,* 134 Cal. 573, 66 Pac. 862. In that case the court conjectured that to sustain the doctrine of *res ipsa loquitur* would be to create a liability without fault. It must be borne in mind that regardless of the plaintiff's theory or mode of attack, he must prove a specific act or omission on the part of the defendant, for the driver of an auto is not an insurer against accidents arising from its operation. *Nager v. Reid,* 204 Mich. 313, 169 N. W. 828. For the attempts to declare an auto a dangerous instrumentality, and to put the owner in the position of an insurer have met with little favor in the courts. *Brinkman v. Zuckerman,* 192 Mich. 624, 159 N. W. 316. This stand is further exemplified specifically in *Philpot v. Fifth Ave. Coach Co.,* 142 App. Div. 811, 128 N. Y. S. 35. The basis of liability in a Pennsylvania case where the automobile skidded onto the sidewalk injuring the plaintiff was the high speed of the driver. *McGettigan v. Quaker City Auto Co.,* 48 Pa. Super. Ct. 602. Also, *Core v. Resha,* 140 Tenn. 408, 204 S. W. 1149. The plaintiff failed under similar circumstances in *Westlund v. Iverson,* 154 Minn. 52, 191 N. W. 253, in the absence of a showing of negligence. Hence,

in such cases, negligence is not a matter presumed by the court, but rather a question of fact *for the jury. Ivins v. Jacob,* 245 Fed. 892. This view is correct on principle, for mere skidding is not of itself evidence of negligence. Berry on Automobiles, 4th Ed., 231 and cases there cited. And in *Bloom v. Allen,* 61 Cal. App. 28, 214 Pac. 481, it was held that skidding may or may not be negligence, and, it is a question for the jury to decide.

All in all, no fault can be founded particularly with the mere consideration of the *res ipsa loquitur* maxim in a case of this sort, for it has been logically and rationally applied in many instances. See *Lazarowitz v. Levy,* 194 N. Y. App. Div. 400, 185 N. Y. S. 359, and *Green v. Baltuch,* 191 N. Y. S. 70. But it is submitted that there has been a misapplication of the doctrine here, insofar as the judge's instruction amounted to a peremptory instruction of negligence, if the jury merely found that the defendant did skid onto the sidewalk, regardless of the reason of the skidding. Such an instruction is not within the spread of *res ipsa loquitur.* A. E. M., '29.

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF SALE OF PATENT MEDICINE.—Defendant was indicted for wrongfully selling certain patent medicines, under a statute making it unlawful for any person other than a registered pharmacist to retail, compound, or dispense drugs, medicines, or poisons. Defendant claims that the statute was repugnant to the fourteenth amendment to the United States Consitution, and to Sec. 18, Art. 6 of the South Dakota constitution. *Held,* that the statute in quesion is unconstitutional, and defendant discharged. *State v. Wood,* 215 N. W. 487 (S. D., 1927).

Undoubtedly, the regulation and protection of the health of the public is a legitimate exercise of the police power of a state. But the courts have laid down the doctrine that the means employed must have a reasonable relation to the objects sought to be accomplished. *Lawton v. Steele,* 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. 499; *California Reduction Co. v. Sanitary Reduction Co.,* 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. 100. And that is the basis of the court's opinion in the principal case.

The court arrives at its conclusion by a process of reasoning that appears sound. There is, in South Dakota, no liability imposed upon registered pharmacists in selling patent medicines, there being no law compelling them to know the contents of the article. And at common law there being no liability for damages resulting from their sale. *West v. Emanuel,* 198 Pa. 180, 47 Atl. 965, 53 L. R. A. 329; *Wilson v. Faxon,* 138 App. Div. 359, 122 N. Y. S. 778. The main point in the court's reasoning, and the one upon which the decision really rests, is that the exclusion of all others but druggists from selling proprietary medicines, and then not regulating their sale by druggists, is a law giving to the druggists an exclusive privilege that will not produce the result that is the objective of the statute.

There are few cases to be found on this identical question, but one court has arrived at the opposite conclusion on the same line of reasoning. *State v. Wheelock,* 95 Iowa 577, 64 N. W. 620, 30 L. R. A. 429. In that case the court comes to the conclusion that the exclusion of sales by itinerant vendors, probably the strongest competitors of the pharmacies in the rural communities, would benefit the public health. It was held that the knowledge that the pharmacist would have of the contents of patent medicines, whether legally required or not, would have its effect as a benefit to the public.

The principal case is supported by a case quite similar in facts, and much the same reasoning is applied. *State v. Donaldson,* 41 Minn. 74, 42 N. W. 781. A brief filed by *amicus curiae* on behalf of the State Board of Pharmacy and