

of a illegal transaction or intrusted it to the agent for an illegal purpose. *Nave v. Wilson*, 12 Ind. A. 38, 38 N. E. 876; *Clarke, Harrison & Co. v. Brown*, 77 Ga. 606; *Munns v. Donovan Comm. Co.*, 117 Ia. 516, 91 N. W. 789; *Morgan v. Groff*, 4 Barb. (N. Y.) 524. No question of par delictum could possibly enter into the principal case to defeat the plaintiff's action, as in *Garland v. Isbell*, 139 Ga. 64, 76 S. E. 591, which was a suit to determine which of the parties was the rightful winner of a lottery prize. A comparison between that case and *Martin v. Hodge, supra*, brings out well the distinction between a suit in which plaintiff relies upon the lottery to make out his case and an action in which he makes out cause of action without reference to the lottery. R. L. A. '29.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENTAL INJURY SUFFERED IN THE COURSE OF EMPLOYMENT.—The Workmen's Compensation Act of Illinois provides compensation for "accidental injuries or death suffered in the course of employment." A young girl, employed in a factory in the city of Westville, Illinois, contracted typhoid fever, and died as a result of the illness. From fifteen to thirty girls employed in the same factory were treated at the time for typhoid fever and the weight of evidence established that the deceased had contracted the disease through the medium of drinking water furnished in the factory. The parents of the girl were awarded compensation for her death by an arbitrator, the award was affirmed by the Industrial Commission. *Held*, the ruling of the commission was correct, and the death resulted from "an accidental injury suffered in the course of employment." *Rissman & Son v. Ind. Commission*, 323 Ill. 459, 154 N. E. 203.

Both English and American decisions recognize the fact that there are certain acts necessary to the life, comfort, and convenience of the servant while at work, which, though strictly personal to himself, are incidental to the service, and an injury sustained in the performance of such an act is deemed to have arisen "in the course of employment." Hence, injuries occasioned while the employee was preparing to eat lunch have been compensated. *Clem v. Chalmers Motor Co.*, 178 Mich. 340; *Blouss v. Delaware, L. & W. Ry. Co.*, 73 Pa. Super. Ct. 95; *Haller v. City of Lansing*, 195 Mich. 753. Also injuries incurred while the servant attempted to care for his own comfort are suffered in the course of employment. *Benson v. Bush*, 104 Kan. 198; *Evans v. The Peterson*, 28 Times L. R. 18. An indulgence in tobacco, satisfying a natural want, should be necessarily contemplated by the employer, and an injury incidental to such an act occurs in the course of employment. *Whiting-Mead Commercial Co. v. Industrial Accident Commission*, 178 Cal. 505; *Dzikowska v. Superior Steel Co.*, 259 Pa. 578; *Springer v. North*, 200 N. Y. S. 248; *Kaetha v. Hall Mercantile Co.*, 157 Minn. 290. A workman injured while washing in preparation to go home after his day of work can recover compensation. *Hollenbach Co. v. Hollenbach*, 181 Ky. 262. Stopping work to take a drink of water is incidental to the employment. *In re Osterbrink*, 229 Mass. 407; *Gililand v. Edgar Zinc Co.*, 112 Kan. 39; *Widdell Co. v. Industrial Commission of Wisconsin*, 180 Wis. 179; *Archibald v. Ott*, 77 W. Va. 448. Other cases involving personal incidental services to the same effect are *Zabriskia v. Erie Ry. Co.*, 85 N. J. L. 157; *Weldon v. Skinner & Eddy Corp.*, 103 Wash. 243; *Morris v. Lambeth*, 22 Times L. R. 22, and *Leach v. Oakley Co.* (1911), 1 K. B. 523. In the light of such decisions, many of which were decided under identical statutes, the Illinois Court was certainly justified in holding that the injury to the deceased occurred "in the course of employment."

The troublesome question concerning the case under discussion is whether the contraction of typhoid germs through drinking water is an "accidental injury" under the Act. A prior Illinois decision, *Christ v. Pacific Mutual Life*

Ins. Co., 312 Ill. 525, held that the contraction of typhoid fever may be regarded as accidental if the disease is contracted by accidental means. In *Frankamp v. Fordney Hotel*, 222 Mich. 525, an accident is defined to mean an unforeseen event occurring without the will or design of the person whose mere act causes it. That case specifically held that the contraction of typhoid fever from drinking water was an accidental injury. Other cases in accord are *Ames v. Lake Independence Lumber Co.*, 226 Mich. 83; *Wiltfong v. Lake Independent Lumber Co.*, 226 Mich. 91; *Brodin's Case*, 124 Me. 162; *Vennen v. New Dells Co.*, 161 Wis. 370; *Wasmuth-Endicott v. Karst*, 77 Ind. App. 279. Two cases, *contra*, *State ex rel Fairbault Woolen Mills et al. v. District Court of Rice County*, 138 Minn. 210, and *Industrial Commission v. Cross*, 104 Ohio St. 561, can be distinguished because of differences in the Workmen's Compensation Acts under which they were decided. It would seem to follow that the case of *John Rissman & Son v. Industrial Commission*, the instant case, is decided on well established principles and is in accord with modern decisions. F. A. E. '28.

MUNICIPAL CORPORATIONS—LIABILITY FOR TORTS—PROXIMATE CAUSE.—Plaintiff was riding a bicycle. The wheel of a passing truck dropped into a hole in the cartway causing mud to splash in the plaintiff's eyes. Small stones in the mud penetrated the plaintiff's eye and caused loss of sight of the eye. Held, in an action against the city, that the defect in the street caused the passing vehicle to splash the mud in the plaintiff's eye, that such defect was the proximate cause of the injury, and that the city was liable. *Stemmler v. City of Pittsburgh*, (1926) 287 Pa. 365, 135 Atl. 100.

This case is interesting because of the indirect nature of city's liability. Municipal corporations are bound to keep streets in reasonably safe condition. Failing to do so makes them liable for all injuries due to such negligence. *Bassett v. St. Joseph*, 53 Mo. 290. In *Twist v. City of Rochester*, 55 N. Y. S. 850, the court held that a city must use reasonable care in keeping its streets safe for public use, and if any injury results to a traveller it cannot claim exemption from liability because its streets are public. Authorities are practically uniform in holding a city liable for injuries resulting from its negligence in failing to keep streets in repair even though the defective street was not the sole cause of the injury. *Belleville v. Hoffman*, 74 Ill. App. 503. Thus a city was liable where the injury was produced as a result partly of a defect in the street, and partly of nature of the accident. *Lacon v. Page*, 48 Ill. 499; *Vogel v. City of West Plains*, 73 Mo. App. 588; *Barrett v. Savannah*, 9 Ga. App. 642, 72 S. E. 49; *Vogelsan v. City of St. Louis*, 139 Mo. 127, 40 S. W. 653. In *Joliet v. Shufelt*, 144 Ill. 403, 32 N. E. 969, the city was held liable where a street was negligently constructed and plaintiff was thrown from his buggy and injured even though the accident would not have occurred if the horses's harness had not broken. If, however, the injuries are a result of a collision with a fire-truck the city is not liable although a defect in the street contributed to the collision. *City of Louisville v. Bridwell*, 150 Ky. 589, 150 S. W. 672; Or if the plaintiff's negligence was the proximate cause of the injury there can be no recovery against the city even though the street was defective. *De Camp v. Sioux City*, 74 Ia. 392, 37 N. W. 971. E. C. F. '27.

NEGLIGENCE—MOTOR VEHICLES—DUTY OWED BY DRIVER TO SELF-INVITED GUEST.—The plaintiff in this case was a widow who was employed in Pine Bluff. The defendant was going to Little Rock by automobile and the plaintiff, who was anxious to see her children living there, obtained the defendant's permission to accompany him. The testimony introduced by the plaintiff tended to

show that the automobile in which they made the trip was turned over on account of fast driving by the defendant, which resulted in injury to the plaintiff. The trial court instructed a verdict for the defendant on the theory that the only duty he owed the plaintiff while riding in his automobile as a self-invited guest was to refrain from injuring her willfully or wantonly. The testimony failed to reveal any evidence of a willful or wanton attempt on the part of the defendant to injure the plaintiff. *Held*, error to instruct a verdict on this theory. Justice Humphreys was of the opinion that the driver of an automobile was required to exercise ordinary care in the operation thereof, to transport his passengers safely, whether guests by sufferance, self-invited guests, or invited guests. Two of the other Justices thought that in a gratuitous carriage for the sole benefit of the guest only slight diligence is required of the driver, and he becomes liable only for gross neglect. *Black v. Goldweber*, 291 S. W. (Ark.) 76.

The case is peculiar in that it presents the three theories of the liability of an automobile driver for injuries sustained by a guest in the course of the ride. The theory of the trial court is followed in only two or three jurisdictions. These decisions preserve the distinction between invitee and bare licensee and they apply the general rule of duty to bare licensees to owners and drivers of automobiles and other vehicles. The injured party having solicited the ride, the act of the driver in acceding to the request possessed none of the elements of a contract and the driver is liable only if the injury to the self-invited guest is inflicted willfully or wantonly. See *Lutvin v. Dopkus*, 94 N. J. L. 64; *Crider v. Yolande Coal & Coke Co.*, 206 Ala. 71 89 So. 285; *Reed v. Rideout's Ambulance*, 212 Ala. 428.

Another respectable minority of courts, clinging to the distinction between the degrees of care, hold that a gratuitous carrier owes only slight diligence to an invitee, and the driver of an automobile therefore is not liable for the injury of a guest unless such injury is the result of gross negligence on the part of the driver. See *Marcinowski v. Sanders*, (Mass.) 147 N. E. 275; *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N. E. 168; *Epps v. Parish*, 26 Ga. App. 399, 106, S. E. 297.

By far the majority of the courts follow the rule as cited by Justice Humphreys, that the driver of an automobile is required to exercise ordinary or reasonable care in the operation thereof, to transport his passengers safely, whether guests by sufferance, self-invited guests, or invited guests. These decisions abolish the distinction between bare licensee and invitee and apply the rule to guests at sufferance as well as to guests by invitation. The driver, having accepted the passenger, owes him the duty of exercising reasonable care, and not unreasonably to expose him to danger and injury by increasing the hazard of travel. Recent decisions in the various states recognizing this rule are *Sheehan v. Foster*, 251 Pac. (Cal.) 235; *Dickerson v. Connecticut Co.*, 98 Conn. 87; *Munson v. Rupker*, 148 N. E. (Ind. App.) 169; *Mayberry v. Sivey*, 18 Kan. 291; *Beard v. Klusmeier*, 158 Ky. 153; *Jacobs v. Jacobs*, 141 La. 272; *Fitzjarrell v. Boyd*, 123 Md. 497; *Hemington v. Hemington*, 221 Mich. 206, 190 N. W. 683; *Rappaport v. Stockdale*, 160 Minn. 78, 199 N. W. 513; *Great Southern Lumber Co. v. Hamilton*, 137 Miss. 55, 101 So. 787; *Alley v. Wall*, 272 S. W. (Mo. App.) 999; *Liston v. Reynolds*, 69 Mont. 480, 223 Pac. 507; *Bauer v. Griess*, 105 Neb. 381, 181 N. W. 156; *Clark v. Traver*, 200 N. Y. S. 52; *Mitchell v. Southern Ry.*, 176 N. C. 645, 97, S. E. 628; *Grabau v. Pudwill*, 45 N. D. 423, 178 N. W. 124; *Farrell v. Soliski*, 123 At. (Pa.) 423; *Leonard v. Bartle*, 135 At. (R. I.) 853; *Tennessee Central Ry. Co. v. Vanhoy*, 143 Tenn. 312, 226 S. W. 225; *Moorcfield v. Lewis*, 96 W. Va. 112, 123 S. E. 564; *Glick v. Baer*, 86 Wis. 263, 201 N. W. 752; *Ryan v. Snyder*, 29 Wyo. 196, 211 Pac. 482. F. A. E. '28.

RAPE—RESISTANCE OF FEMALE—CHARGE RELATING TO OUTCRY.—The defendant was charged with common law rape. He admitted the act of sexual intercourse with the prosecutrix but denied that it was without her consent. The evidence clearly established that the prosecutrix had received a serious injury from some source; her jaw was fractured and she was semiconscious for many hours. The alleged offense occurred a distance of from 350 to 500 feet from the defendant's car. Another young couple of the party had remained in the car and testified that they heard no outcry from the prosecutrix. The testimony of the defendant and the prosecutrix on this point was in conflict. The defendant requested the following instruction: "If the jury believed from the evidence that, at the time the offense is alleged to have been committed, the prosecuting witness made no outcry, and was in a position to have made an outcry, or could have made others hear who were in close proximity, then you should take this into consideration with all the other evidence in determining the guilt or innocence of the respondent, and whether a rape was in fact committed or not." This instruction was refused, but the court did charge as follows: "In determining her power to resist you must take into consideration all the facts connected with the time and place at which the act of intercourse took place, her physical powers at that time, the resistance she was able to make, her ability to summon help, in any way in her power, by screaming or otherwise. You are to consider all these things from the evidence that has been brought before you." The defendant was convicted and on appeal the court was divided four to four. Conviction affirmed. *People v. Rich*, (Mich. 1927) 212 N. W. 105.

The general rule is that in a prosecution for common law rape proof of the failure of the female to make an outcry, where the transaction occurred in a place not so remote from human help that the outcry would be unavailing, is for the consideration of the jury in determining the question of consent or non-consent. *State v. Cross*, 12 Ia. 66, 79 Am. Dec. 519; *Oleson v. State*, 11 Neb. 276, 9 N. W. 38. It is reversible error to refuse to instruct the jury that if the prosecutrix made no outcry it raised a strong presumption that no rape had been committed. *Barney v. People*, 22 Ill. 160. The Missouri doctrine is that where the act is committed within probable hearing of other persons a failure to make an outcry is a circumstance which would justify a strong, but not conclusive, inference that the act was with the consent of the prosecutrix and not by force, and that a refusal to charge that it was for the consideration of the jury to determine whether, in fact, rape had been committed, constituted reversible error. *State v. Witten*, 100 Mo. 525, 13 S. W. 871. Where the prosecutrix testified she believed she was too remote from human habitation and the accused testified that the intercourse was voluntary, the court on proper request must charge that the failure to make an outcry might be considered in connection with the other facts as showing want of resistance. *Jackson v. State*, 92 Ark. 71, 122 S. W. 101. It is not reversible error to refuse to charge that an outcry was necessary for conviction where the prosecutrix was an epileptic just above the age of consent, *Eberhart v. State*, 134 Ind. 651, 34 N. E. 637; or under the statutory age of consent, *Moore v. State*, 90 Tex. Cr. 604, 236 S. W. 477; or in "a mental stupor from alcoholic drink, which made her insensible and incapable of consenting," *Quinn v. State*, 153 Wis. 573, 142 N. W. 510. In the instant case the four judges for reversal of the conviction placed their judgment on the ground that the charge given was too general and that the defendant was entitled to a specific charge, hypothetically stated, of his theory upon this branch of the case which was supported by evidence. On the other hand, the four judges for affirmance of the conviction believed that the substance of the instruction requested was embodied in the charge given; that the charge given did not mislead the jury and did not prejudice the defendant. The latter position finds support in the case of *State v. Ingraham*, 118 Minn. 13, 136 N. W. 258, in which it was held that

a refusal to charge that the prosecutrix must use her "voice by calling for aid or giving an alarm" did not constitute error where the court did instruct that she must resist "to the utmost extent of her ability." T. S. '27.

SALE OF REGISTERED AUTOMOBILE WITHOUT ASSIGNMENT OF CERTIFICATE OF TITLE IS VOID UNDER MISSOURI STATUTE.—Defendant bought an automobile from a company into whose hands plaintiff had delivered it for sale. Plaintiff had made no assignment of the certificate of title as required by the Motor Vehicle Act of 1921, Special Session, page 88, section 18, which requires an assignment, and provides that failure to comply with the statute renders the transaction fraudulent and void. He sued in replevin for the recovery of the automobile. The trial court directed a verdict for the plaintiff and was sustained by the St. Louis Court of Appeals. *Held*, that the provision of the statute was mandatory and all sales without compliance therewith were fraudulent and void. *Quinn v. Gehlert* (Mo. 1927) 291 S. W. 138.

The decision of the court is based on the earlier decision of the Supreme Court of Missouri which first construed the statute and held the same to be mandatory. *Connecticut Fire Ins. Co. v. Cox*, 306 Mo. 537, 268 S. W. 87, 37 A. L. R. 1456. In this case the purchaser of an automobile had not had the certificate of title assigned to him but had taken out insurance on the vehicle. A loss occurred and he sued for the insurance. It was held that the sale was void and the plaintiff had no insurable interest in the automobile and hence could not recover. The statute is held to be mandatory the court, quoting with approval the statement of counsel, said: "The law as settled in Missouri seems to be that a disregard or a violation of positive law cannot be a consideration for a valid contract and that such contracts will not be enforced in our courts and this whether the act which is forbidden either at common law or by statutory law is *malum in se* or merely *malum prohibitum*."

The court then cites numerous cases in which similar statutes were held mandatory and contracts in violation of the statute held void and unenforceable. Failure to comply with positive statute prohibiting possession of certain game during certain seasons of the year in that the contract sued on involved the possession of the game within the prohibited season was held void. *Haggerty v. St. Louis Ice Mfg. & Storage Co.*, 143 Mo. 238. Sale of a lot made without compliance with statute requiring plat of town to be made out, acknowledged, and recorded before sale, held void. *Downing v. Ringer*, 7 Mo. 585. Contracts made by foreign corporations which have not complied with the statute and secured a license to do business in the state, held void and unenforceable. *Tri-State Amusement Co. v. Forest Park Highland Amusement Co.*, 192 Mo. 404. There are few cases in other jurisdictions on this precise point and most of them are collected in the note, following the *Connecticut Fire Insurance Case* in 37 A. L. R. 1465. Most of the cases follow the rule laid down by the Missouri court and declare the transaction void when the statute had not been complied with. A vendor is not allowed to recover the purchase price from the vendee if the title has not been transferred in the manner required by the statute. *Arotzky v. Kropintzky*, (1923) 98 N. J. L. 344. And this is true even though notes have been given by the purchaser. *Swank v. Moisan*, 85 Ore. 662. Kansas courts seem to follow this general rule. *Hammond Motor Co. v. Warren*, 213 P. 810. In this case a mortgagee was allowed to replevin the automobile which had been sold by the mortgagor without making the assignment of the title required. On almost the same facts as the instant case a Texas court in *Ferris v. Langston*, 253 S. W. 309, held the same as the Missouri court, and for some time this was the doctrine of the Texas courts. Recent decisions have effected a complete reversal, however, and it is now held in that state that failure to comply with the statute will not void the transaction which is otherwise valid.