Under the type statute existing in Missouri, there is hopeless conflict as to the last moment at which a nonsuit may be voluntarily taken. 18 C. J. 1156; note (1932) 79 A. L. R. 688. As the principal case states it can certainly be taken at any time before a demurrer to the evidence or a motion for a directed verdict has been filed. Equally clearly, it cannot be taken after the jury has retired to consider its verdict. *Suess v. Motz* (1926) 220 Mo. App. 32, 285 S. W. 775; *De Phillips v. Neslin* (1930) 155 Wash. 147; 283 Pac. 691. In Ohio it has been ruled to be too late after a motion for a directed verdict has been made, even though the judge has not yet even considered the motion. *Jacob Lamb Baking Co. v. Middleton* (1928) 118 Ohio St. 106, 160 N. E. 629. Kansas agrees with Oklahoma in holding that the question depends whether the judge has intimated how he will rule on the motion. *Cott v. Baker* (1922) 112 Kan. 115, 210 Pac. 651. However, the weight of authority is that a motion to dismiss may be made even after the judge has ruled on the motion for a directed verdict or the demurrer to the evidence. *Segall v. Garlichs* (1926) 313 Mo. 406, 281 S. W. 693; *Pitt v. Abrams* (Fla. 1931) 139 So. 152; *Daube v. Kuppenheimer* (1916) 272 Ill. 350, 112 N. E. 61; *Darby v. Pidgeon Thomas Iron Co.* (Tenn. 1921) 232 S. W. 75; *Fentress & Co. v. Young* (C. C. A. 8, 1931) 55 F. (2d) 53 (applying a Wisconsin statute).

If a trial judge should grant a motion to dismiss which was made too late, there is no effective remedy available to the defendant in a jury case unless the jury has already brought in a verdict for the defendant. The jury will have disbanded and cannot be reconvened. *Suess v. Motz, supra.* Obviously when a verdict has once been rendered, the trial judge cannot grant a motion for a new trial merely to allow the plaintiff to file a motion for a nonsuit. *Lawyers' Cooperative Publishing Co. v. Gordon* (1903) 173 Mo. 139, 73 S. W. 155.

It would seem that the ruling in the present case unduly restricted the right to take a nonsuit. The arguments on a motion for a directed verdict or a demurrer to the evidence may show the plaintiff's counsel how to remedy the fatal weakness in his case by securing additional evidence. Yet, the lawyer may easily not discover this until the judge has intimated how he will rule on the motion for a directed verdict or the demurrer to the evidence. The moral of this case is that if the plaintiff must have a stupid lawyer, he might just as well have a stubborn one, for the lawyer will not be allowed to correct his mistakes after they have been pointed out to him. It would also seem very difficult in practice, particularly on appeal, to determine whether or not the trial judge had given some intimation of how he was going to rule on the motion for a directed verdict or the demurrer to the evidence.

G. W. S., '33.

NEGLIGENCE—HUMANITARIAN RULE—DUTY OF WATCHFULNESS—The plaintiff, a member of the St. Louis Police force, was run over by a steam roller. It was admitted that he was contributarily negligent in standing in the area being rolled while directing traffic so as to keep it off of the part of the street being repaved. The driver of the roller did not see the plaintiff. An in-

struction in the usual form under the Missouri humanitarian doctrine was given allowing recovery if the driver of the roller "should have seen" the plaintiff in time to prevent the injury. The plaintiff recovered judgment. On appeal the judgment was reversed because no instruction was given to the jury to determine the question "whether under the facts and circumstances existing at the time . . . the operator . . . could reasonably have assumed that the street where he was operating the roller would at all times be clear of persons and vehicles, or was he bound to anticipate that they might come, or be, upon the street in such proximity to his movements as to be endangered thereby". *Haines v. Bridges Asphalt Paving Co.* (Mo. 1932) not yet reported.

Much confusion in the application of the humanitarian rule is caused by a failure to realize that the various states do not agree upon the types of fact situations to which this doctrine may be applied. In some jurisdictions it is necessary that the operator of the vehicle have time after he acquires actual knowledge of the fact that the plaintiff is in a position of peril to avoid injuring the plaintiff. *St. Louis Southwestern Railroad Co. v. Cochran* (1906) 77 Ark. 398, 91 S. W. 747; *Graves v. Chicago, Rock Island & Pacific Railway Co.* (1928) 207 Iowa 30, 222 N. W. 344; *Woloszynowski v. New York Central Railroad Co.* (1930) 254 N. Y. 206, 173 N. E. 471. In other jurisdictions it is enough if there was time after the peril could have been discovered in the exercise of reasonable care. *Halzle v. Hargreaves* (1925) 233 Mich. 234, 206 N. W. 356; *Pennsylvania Railroad Co. v. Simmons* (Md. 1930) 150 Atl. 263. Missouri is firmly committed to still a third view. Under this view, where the operator does not actually see the plaintiff in a position of peril while there is still time to avoid injury, there must have been a duty to be watching for persons in such a position or no instruction can be given as to ability to avoid injury after the time the driver should have seen the plaintiff if the driver had been exercising reasonable care. *Matz v. Missouri Pacific Railway Co.* (1908) 217 Mo. 275, 117 S. W. 584.

The present case may be welcomed because of its clear and simple statement of the conditions under which such a duty exists. Other language of the opinion, however, is most unfortunate in seeming to decide that the existence of this duty is a jury question. The Court cites no authority for this rule. An examination of all prior Missouri appellate cases in which the question of the existence of the duty of watchfulness has been involved shows that in every case the courts have decided the problem as though it were an issue of law. *Trigg v. Water, Light & Transit Co.* (1908) 215 Mo. 521, 114 S. W. 972; *Logan v. Chicago, Burlington & Quincy Railroad Co.* (1923) 300 Mo. 611, 254 S. W. 705; *Phillips v. Henson* (1930) 326 Mo. 282, 30 S. W. (2d) 1065; *Grubbs v. Kansas City Public Service Co.* (Mo. 1931) 45 S. W. (2d) 71. In all the other states which agree with Missouri in requiring that there be a duty of watchfulness, the courts decide as a matter of law whether this duty exists under the particular fact situation. *Dyer v. Cumberland County Power & Light Co.* (1921) 120 Me. 411, 115 Atl. 194; *Richards v. Palace Laundry Co.* (1919) 55 Utah 409, 186 Pac. 439; *Dent v. Bellows Falls Street Railway Co.* (1922) 95 Vt. 523, 116 Atl. 83. The whole

situation has been well summarized by the Supreme Court of Kansas: "The doctrine is a rule of law, but the facts to which it applies must be found by the jury." *Tartar v. Missouri-Kansas-Texas Railroad Co.* (1925) 119 Kan. 365, 239 Pac. 754.

Under the peculiar situation existing in the instant case where there was conflicting testimony as to the existence of the facts necessary to impose the duty of watchfulness, it is proper to say that there must be a finding by the jury as to the facts which existed at the time. But this finding should not be obtained by submitting the bare question of the presence of the duty to the jury, but rather by instructing them that they must find certain specific facts to have existed before they can apply the instruction based upon the humanitarian doctrine. Any other ruling will result in the courts still further weakening their slight control over the actions of juries in personal injury cases. G. W. S., '33.

NEGLIGENCE—PROXIMATE CAUSE—SPREADING FIRES.—In line with its traditional practical viewpoint, the Court of Appeals of New York early adopted a strict attitude toward liability for the spread of fire negligently set, applying a closer test of proximate causation than any other jurisdiction. The case of *Ryan v. New York Central Railroad Co.* (1866) 35 N. Y. 210, is a forerunner of the ultimate New York position. In that case the defendant railroad company negligently set fire to one of its sheds, the flames spreading to and destroying the house of the plaintiff, situated upon adjoining land, 130 feet distant from the sheds. The court, in declaring that there was no cause of action, used language significant in understanding the present unique New York position upon the point: "Each man, in a commercial community, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution and to call upon his neighbor upon whose premises a fire originated to indemnify him instead, would be to award a punishment quite beyond the offense committed." The decision also pointed out that the principle of subrogation would entitle insurance companies to the benefit of all claims of insured property owners, a situation which, in an extensive fire, would produce claims beyond possibility of adequate payment, at least without the bankruptcy of the merely negligent offender.

The ultimate New York rule, however, is somewhat less stringent than the doctrine of the *Ryan* case. It was laid down definitely in *Hoffman v. King* (1899) 160 N. Y. 618, 55 N. E. 401. Under it the negligent fire is the proximate cause only of damage to property immediately adjoining the premises of the defendant, with no liability for the results of the fire's spreading across intervening lands to lands not adjoining. *Moore v. Van Beuran* (1925) 240 N. Y. 673, 148 N. E. 753; *Rose v. Pennsylvania Railroad Co.* (1923) 236 N. Y. 568, 142 N. E. 287; *Moch Co. v. Rensselaer Water Co.* (1928) 247 N. Y. 160, 59 N. E. 896; *Daugherty v. King* (1901) 165 N. Y. 657, 59 N. E. 1121.