

RES IPSA LOQUITUR—EFFECT ON BURDEN OF PROOF.—The plaintiff, a minor, brought an action for personal injuries sustained when a detached radiator in the defendant's theater fell, breaking the plaintiff's leg. The trial court decided that the doctrine of *res ipsa loquitur* would apply to these circumstances and instructed the jury that if the plaintiff proved these facts this placed upon the defendant the burden of proof to rebut the presumption of negligence and show by a preponderance of the evidence that neither he nor his servants had been guilty of any negligence. The Supreme Court of Missouri, sitting in banc, reversed a judgment for the plaintiff on the ground that giving such an instruction was prejudicial error. *McCloskey v. Kopljar* (Mo. 1932) 46 S. W. (2d) 557.

To understand the significance of this case it is necessary to analyse carefully the language of certain earlier Missouri decisions. Two fairly early Missouri cases give considerable support to the doctrine of the instant case. In *Furnish v. Missouri Pacific Ry. Co.* (1890) 102 Mo. 438, 13 S. W. 1044, it was held that such an instruction was erroneous, but not sufficiently prejudicial to justify a reversal. The court thought that it would have been better to instruct that the proving of such facts merely made out a prima facie case which, if unexplained, would justify recovery, but that this was a mere technical nicety. This was shortly followed by a decision ruling that it was not error to refuse to give such an instruction. *Schaeffer v. St. Louis & Suburban Ry. Co.* (1895) 128 Mo. 64, 30 S. W. 331. However, all this was upset by the celebrated case of *Price v. Metropolitan Street Ry. Co.* (1909) 220 Mo. 435, 119 S. W. 932. The Supreme Court in banc upheld as correct an instruction which placed upon the defendant the burden of proof to "rebut this presumption of negligence and establish the fact that there was no negligence on its part and that the injury, if any, was caused by inevitable accident or by some cause which such highest degree of care could not have avoided." The defendant had offered an instruction which stated that the burden of proof always remained on the plaintiff to show that the defendant's servants were guilty of negligence as alleged and specified in these instructions. Judge Graves speaking for the Court, said that such an instruction had no place where the doctrine of *res ipsa loquitur* applied and would completely destroy the whole doctrine of presumptive negligence. This doctrine was followed in many cases, but there were signs which indicated the dissatisfaction which certain judges felt with a view which was contrary to the legal theory that the burden of proof is always on the plaintiff unless the defendant is relying on an affirmative defense. Indeed Judge Graves (then Chief Justice) said in a dissenting opinion in a later case that the point as to shifting the burden of proof had not been adequately presented to the Court in the *Price* case and that the reason why he so emphatically rejected the defendant's proposed instruction was not because it misplaced the burden of proof, but rather because it required the proof of specific rather than general negligence. *Simpson v. Chicago, R. I. & P. Ry. Co.* (Mo. 1917) 192 S. W. 737 (the judgment after an instruction

similar to that in the *Price* case was affirmed, but the judges could not agree as to the reasons for the affirmance and two dissented). In *Bond v. St. Louis, San Francisco Ry. Co.* (1926) 315 Mo. 987, 288 S. W. 777, the Court followed the *Price* case but called it illogical as a rule of evidence. Judge Gantt said that such a doctrine "must be regarded as one of substantive law, adopted for the protection of passengers. It has been followed so long that its enforcement must now be considered part of the public policy of the state." In the *McCloskey* case Judge Ellison criticises the earlier cases as not making a clear enough distinction between the burden of proof (i. e. bearing the risk of non-persuasion of the jury) and the burden of evidence (i. e. bearing the duty of producing enough evidence to satisfy the judge and allow him to send the case to the jury). The *res ipsa loquitur* doctrine only satisfies the burden of evidence, it does not change in any way the burden of proof. Judge Ragland and Judge Henwood concurred in a separate opinion in which they said they agreed with everything said in the majority opinion, but wished to express more strongly their view that the *res ipsa loquitur* doctrine raised only a permissible inference of fact which the jury might draw, but which it was not compelled to draw even if there was no further evidence. Judge Gantt dissented on the ground that as a matter of judicial administration it was better to place the true burden of proof on the defendant once the facts on which the *res ipsa loquitur* doctrine is based had been shown.

The result of the *McCloskey* case is to bring Missouri once more into line with the orthodox position as to the effect of the *res ipsa loquitur* doctrine. It is true that in many states the issue is still confused by the use of loose language as to "inferences," "presumptions," "burden of proof," and other like phrases without being careful to use these terms in their accepted technical sense. As the Supreme Court of the United States has well said the circumstances to which the doctrine is applicable are such that they permit "an inference of negligence, not that they compel such an inference . . . it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it." *Sweeney v. Erving* (1913) 228 U. S. 233; *Kleinon v. Banner Laundry Co.* (1921) 150 Minn. 515, 186 N. W. 123; *Humphrey v. Twin State Gas & Electric Co.* (1927) 100 Vt. 414, 139, Atl. 440.

It is disquieting that the principal case does not expressly overrule the *Price* case, since some future court, desirous of making it more difficult for a carrier to escape liability, might use the factual difference between the two cases to retain the doctrine of the *Price* case when a carrier-passenger relationship was involved. It is reassuring to note that in a still later case, the Missouri Supreme Court speaks of the *McCloskey* case as expressly overruling the *Price* case. *Sanders v. City of Carthage* (Mo. 1932) 51 S. W. (2d) 529. If courts desire to extend the field of quasi-absolute liability, they should do so by a clear statement that this is their purpose rather than by distorting a rule of evidence.

N. P., '34.