The instant case illustrates the difficulty encountered in the attempt to abide by the strict letter of the statute[17] on the one hand and at the same time to construe the term "payment" so as to reduce the number of collusive suits against insurance companies,[18] by extending the class of persons carried as guests.

A. E. H.

TORTS—RES IPSA LOQUITUR—RIGHT OF CONTROL WITHOUT EXCLUSIVE CONTROL—[Missouri].—Plaintiff customer was injured when a bolt of awning material displayed for sale fell upon her from an open counter in the defendant's store. Plaintiff relied upon the doctrine of *res ipsa loquitur*. *Held*, though defendant had sufficient right of control as required by the doctrine, plaintiff failed to exclude the probability that the accident was caused by the negligence of a third person, and therefore could not recover on the theory of *res ipsa loquitur*.[1]

The doctrine of *res ipsa loquitur* has been held applicable to cases where a customer is injured by falling merchandise.[2] In these cases the falling merchandise was not subject to inspection by the customers. In the instant case, however, the merchandise was open for inspection and handling by many customers. The storekeeper, therefore, did not have exclusive control, although he had the right of control.[3] Most jurisdictions require that the defendant have exclusive control over the article[4] and deny recovery where

17. See dissent in Voelkl v. Latin (Ohio App. 1938) 16 N. E. (2d) 519.

18. Note (1936) 10 U. of Cin. L. Rev. 289; Note (1937) 12 Wash. L. Rev. 138.

1. Hart v. Emery, Bird, Thayer Dry Goods Co. (Mo. App. 1938) 118 S. W. (2d) 509.

2. Garfinkel v. B. Nugent & Bros. Dry Goods Co. (Mo. App. 1930) 25 S. W. (2d) 122; Perry v. Stein (Mo. App. 1933) 63 S. W. (2d) 296; Crawford et al. v. American Stores Co. (1927) 5 N. J. Misc. 413, 136 Atl. 715; Higgins v. Ruppert (1908) 7 App. Div. 530, 108 N. Y. S. 919; Higgins v. Goerke-Krich Co. (1918) 91 N. J. L. 464, 103 Atl. 37, aff'd in 92 N. J. L. 424, 106 Atl. 394. However, in the case of Martin v. Brown (1936) 56 Idaho 379, 54 P. (2d) 1157, the court refused to apply the doctrine of *res ipsa loquitur* to the case of a falling timber in a lumber yard on the ground that the accident was not so obviously destructive as to require that the doctrine be used. This reasoning could very well be used in all cases of falling merchandise in a store.

3. Hart v. Emery, Bird, Thayer Dry Goods Co. (Mo. App. 1938) 118 S. W. (2d) 509; Guttman v. F. W. Woolworth Co. (1936) 159 Misc. 821, 288 N. Y. S. 819.

4. Harper, *Torts* (1933) 183, sec. 77; The President Wilson (D. C. N. D. Cal. 1933) 5 F. Supp. 684; Blade v. Site of Fort Dearborn Bldg. Corp. (1927) 245 Ill. App. 484; Black Mountain Corporation v. Partin's Adm'r (1932) 243 Ky. 784, 49 S. W. (2d) 1015; Goldman v. City of Boston (1931) 274 Mass. 329, 174 N. E. 686; Murray v. Great Atlantic & Pacific Tea Co. (1932) 236 App. Div. 477, 260 N. Y. S. 132; Carter Oil Co. v. Independent Torpedo Co. (1924) 107 Okla. 209, 232 Pac. 419; Dittert v. Fischer (1934) 148 Ore. 366, 36 P. (2d) 592; U. S. Torpedo v. Liner (Tex. App. 1927) 300 S. W. 641.

he has the mere right of control.[5] In a few states, however, all that is required is that the defendant have the right of control.[6]

Where the defendant does not have exclusive control but has the right of control, it may well be that the article has been handled by a third person. In such case it would seem proper to require the plaintiff to exclude the probability that the injury might have been due to the negligence of a third person and if he fails to do so to deny recovery.[7] Practically, however, the exclusion of this probability is very difficult to establish, since absence of exclusive control would seem to allow the inference that the injury might have been due to the negligence of a third person. In Missouri, therefore, where right of control only is required, the plaintiff may frequently be unable to establish his case where the defendant does not have exclusive control. The result of the cases in Missouri then may often be the same as in those jurisdictions requiring the defendant to have exclusive control.

E. M. S.

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5. Bonner v. Texas (C. C. A. 5, 1937) 89 F. (2d) 291; The Mercier (D. C. D. Ore. 1933) 5 F. Supp. 511; Olson v. Witthorne & Swan (1928) 203 Cal. 206, 263 Pac. 518; Klenzendorf v. Shasta Union High School Dist. (1935) 4 Cal. App. (2d) 164, 40 P. (2d) 878; Guttman v. F. W. Woolworth Co. (1936) 159 Misc. 821, 288 N. Y. S. 819; Sherlock v. Strouss-Hirshberg (1936) 132 Ohio St. 35, 4 N. E. (2d) 912; Kilgore v. Shepard Co. (1932) 52 R. I. 151, 158 Atl. 720.

6. Van Horn v. Pacific Refining & Roofing Co. (1915) 27 Cal. App. 105, 148 Pac. 951; McCloskey v. Koplar (1932) 329 Mo. 527, 46 S. W. (2d) 557, 92 A. L. R. 641; Pandjiris v. Oliver Cadillac Co. (1936) 339 Mo. 711, 98 S. W. (2d) 969.

7. The President Wilson (D. C. N. D. Cal. 1933) 5 F. Supp. 684; Olson v. Witthorne & Swan (1928) 203 Cal. 206, 263 Pac. 518; Goldman v. City of Boston (1931) 274 Mass. 329, 174 N. E. 686; Grindstaff v. J. Goldberg & Sons (1931) 328 Mo. 72, 40 S. W. (2d) 702.