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Recent Cases

W. L. S.

affecting his equitable remedies, and that the right, therefore, of a mortgagee to a receiver for the preservation of his security, upon proper cause shown, is in no manner impaired by such statute.

5. That if the mortgagor in possession or those deriving title through him subsequent to the mortgage are permitting or committing waste of a character to impair the security, and the security is inadequate and those personally liable for the debt are insolvent, a proper case has been made out for the appointment of a receiver to take charge of the property and to apply the rents and profits, or so much thereof as may be necessary for that purpose, in protecting it from preventable waste, this being, in effect, a probable exception to Rem. C. S. 804 (P C. 7530)

6. That even though for proper cause shown, a receiver may be appointed, the matter is entirely discretionary with the Court, and that even though the mortgage stipulates otherwise, in no case is a mortgagee entitled, as a matter of right, to the appointment.

In conclusion, it may be said that approval should be given to that enlightened public policy which protects the home owner in the possession of his home, but that there is little reason or justice in extending that public policy for the purpose of enabling the insolvent owner of an apartment house or other business property, who has specifically pledged the rents and income as security for his debt, to avoid his just obligation and pocket such rents and income during the pendency of the foreclosure action.

J. C. PEARL.

RECENT CASES

INSURANCE—CONTEST BETWEEN FIRST AND SECOND MORTAGEES. A owned a tract of land with a dwelling on it, mortgaged to B for $950.00; dwelling insured for $800.00 and mortgage clause in favor of B was attached to the policy· A, desiring to construct a store building on the land, negotiated a $1600.00 loan from C, B releasing his mortgage and taking a 2nd mortgage; C's mortgage provided A should keep the buildings on the property insured for not less than $1600.00 for the benefit of C; C held a $2000.00 policy on the store building; it was agreed between A and C that the insurance on the dwelling should also be changed to make same payable to C, but this was not done, and the dwelling burned. In a contest between B and C: *Held*, that B was entitled to the entire $800.00. *Fireman's Fund Insurance Company v. Edward R. Smith, A. D. Devonshire and Capital Savings & Loan Assn.*, 70 Wash. Dec. 201, 16 Pac. 2d 202 (1932).

An insurance policy is a personal contract between insurer and insured and does not pass with the property insured, *Newark Fire Insurance Co. v. Turk*, 6 Fed. 2d 533, 43 A. L. R. 496 (CCA Penn. 1925) *Fogg v. London & Provincial Marine & General Ins. Co.*, 237 Ky. 636, 36 S. W 2d 44 (1931) *New York Underwriters v. Denson*, 100 Okla. 89, 227 Pac. 124 (1924) *Mercer v. Germania Fire Ins. Co.*, 88 Or. 410, 171 Pac. 412 (1918). However, a contract between mortgagor (insured) and mortgagee whereby the former agrees to insure for the benefit of the latter creates an equitable lien in favor of the mortgagee in the proceeds of insurance on the property at the time of the contract or thereafter procured by the mortgagor, enabling the mortgagee to collect the proceeds even in absence of any mortgage clause on the policy *In re Zitron*, 203 Fed. 79 (D. C. Wisc. 1913) *Stebbins v. Westchester Fire Ins. Co.*, 115 Wash. 623, 197 Pac. 913 (1921) *1st National Bank v. Commercial Union Assurance Co.*, 40 Idaho 236, 232 Pac. 899 (1925)

Northwestern Fire & Marine Ins. Co. v. New York Life Ins. Co., 238 Ky. 229, 37 SW 2d 67 (1931) see *Planters Bank v. Glove & Rutgers Fire Ins. Co.*, 156 S. C. 453, 153 S. E. 385, 386 (1930). Accordingly, save as B's interest as evidenced by his mortgage clause intervenes here, C could no doubt recover the insurance proceeds.

The attachment of the so-called "standard" form of mortgage clause, providing that as to the mortgagee the insurance shall not be invalidated by acts of the mortgagor, creates a new contract between insurer and mortgagee. *Newark Fire Ins. Co. v. Turk*, 6 Fed. 2d 533, 43 A. L. R. 496 (CCA Penn. 1925) *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508 (1897) *Oregon Mortgage Co. v. Hartford Fire Ins. Co.*, 122 Wash. 183, 210 Pac. 385 (1922) *Kimberley & Carpenter v. National Liberty Ins. Co.*, 157 Atl. 730 (Dela. 1931). The affect, however, of a simple loss payable clause, is to make the mortgagee an appointee to receive payment and not a party to the contract of insurance, mortgagee, in case of loss, taking only such interest as the insured has, *Inland Finance Co. v. Home Ins. Co.*, 134 Wash. 485, 236 Pac. 73, 48 A. L. R. 121 (1925) *Wyley v. Federal Ins. Co.*, 136 Wash. 686, 241 Pac. 292 (1925) *Hill v. International Indemnity Co.*, 116 Kan. 109, 225 Pac. 1056 (1924) *Hartford Fire Ins. Co. v. Bryan*, 50 S. W 2d 74 (Ky. 1932). Under the standard clause, violation of conditions of the policy by the insured mortgagor which would vitiate the policy as to him do not defeat recovery by the mortgagee. It would seem clear that no agreement between the mortgagor and a third party could operate the cut off the mortgagee's rights under the contract between him and the insurer under the mortgage clause.

"Insurable interest" as defined by the courts is such pecuniary interest as will mean loss through destruction of the property and there may be such interest even without a property right or lien in the subject matter, *Farmers & Merchants Bank v. Hartford Fire Insurance Co.*, 43 Idaho 222, 253 Pac. 379 (1927) *Tischendorf v. Lynn Mutual Fire Insurance Co.*, 190 Wisc. 33, 208 N. W 917, 45 A. L. R. 856 (1926) Wash. Rem. Comp. Stat. Ann. (1922) Sec. 7033 defines insurable interest as "Every interest in property or any relation thereto or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured." Under this statute the Washington court has held contingent interests to be insurable interests, *O'Neil v. Pacific States Fire Ins. Co.*, 128 Wash. 133, 222 Pac. 215 (1924) (purchaser under contract of sale) *Hassett v. Pennsylvania Fire Ins. Co.*, 150 Wash. 502, 273 Pac. 745 (1929), (assignor of car contract who guaranteed same). In fact, it is not questioned in the cases that the holder of a second mortgage has an insurable interest in the encumbered property.

The mortgage to whom payment is to be made "as his interest may appear" under a mortgage clause, need only to show existance of an interest at the time of the loss, *Fenton v. Cascade Mutual Fire Assn. of Wash.*, 60 Wash. 389, 111 Pac. 343 (1910) *Kimberley & Carpenter v. National Liberty Ins. Co.*, 157 Atl. 730 (Dela. 1931) *Walz v. Penninsular Fire Ins. Co.*, 223 Mich. 399, 194 N. W 125 (1923). It would accordingly appear immaterial that in the instant case B released his first mortgage subsequent to attaching of the mortgage clause, and then took a second mortgage. It has been held that the mortgagee whose interest is indicated on an attached mortgage clause can collect to the exclusion of a prior mortgagee who interest is not so shown, where there were several mortgagees, *Jeffreys v. Boston Ins. Co.*, 202 N. C. 368, 162 S. E. 761 (1932). The Louisiana court in *Hartford Fire Ins. Co. v. Landreneau*, 19 La. App. 280, 140 So. 52 (1932) also held for the 2d mortgagee under facts making out a stronger case for the 1st mortgagee than existed in the Wash. case. (Policy issued after execution of the 2d mortgage, court said that 1st mortgagee's equitable claim would not offset the rights of the 2d mortgagee under his mortgage clause). The Washington decision is in accord with well settled principles of insurance law.

W L. S.

WARRANTS—PAYMENT OF SAME ISSUED IN EXCESS OF STATUTORY POWER. Plaintiff, treasurer of Spokane County, brought this action to restrain

the county commissioners from issuing and selling bonds to pay the warrant indebtedness created for emergency indigent relief. Plaintiff contends that there was no authority to borrow the money by the issuance of the bonds because of non-compliance with Rem. Comp. Stat., section 4086, since the warrants were issued for amounts greater than five hundred dollars. Plaintiff maintains that there is no need for issuing the bonds to fund these warrants when the warrants are not valid obligations. The court failed to pass on the validity of the warrants but held that when the county received the money and applied it beneficially to an authorized purpose, an action would lie to recover the money even though the commissioners had not fully complied with statutory provisions in obtaining the same. Inasmuch as the court holds that an action to recover the money, it concludes that it would necessarily follow that the bond issue for the purpose of taking care of the indebtedness would not be defective or invalid, *Paul J Kruesel v. Alvin H. Collin et al.*, 70 Wash. Dec. 223, 16 Pac. (2) 442 (1932).

Where the public corporation has received the money for invalid securities and has appropriated the same to some legitimate corporate purpose, an action for money had and received, or for benefits received, is the proper procedure for the recovery of the amount. *Gilman v. Fern ald*, 141 Fed. 941, 72 C. C. A. 675, (C. C. A. 8th, Iowa, 1905) *Thomson v. Elton*, 109 *Wis.* 589, 85 N. W 425 (1901). A number of the holdings emphasize the necessity that the corporation shall not only receive the money, but shall actually appropriate it to some purpose for which it had power to contract an indebtedness. *Chelsea Sav. Bank v. Ironwood*, 130 Fed. 410, 66 C. C. A. 230, (C. C. A. 6th Mich. 1904) *Ironwood v. Wickes*, 93 App. Div.. 164, 87 N. Y. Supp. 554 (1904) *New Haven v. Weston*, 87 Vt. 7, 86 At. 996, 49 L. R. A. (N. S.) 921 (1913).

Generally public corporations are restricted by statute or constitution in their power to contract indebtedness. These restrictions, which are set up for the protection of taxpayers from the unlawful acts of public officers, which are not to be evaded directly or indirectly by enforcing an implied obligation against the corporation. Where the invalidity of the instrument is due to an essential lack of power to issue it, no implied promise will be raised against corporations. It is in these cases where the enforcing of the implied liability would operate to defeat the protective purpose of statutes prescribing a definite procedure to follow to contract valid indebtedness. In instances such as this the prohibition should be as effectual against the implied as the express promise if it is worth anything at all. *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132, 4 Sup. Ct. Rep. 820 (1885) *McCurdy v. Shiawassee County*, 154 Mich. 550, 118 N. W 625 (1908) *Eaton v. Shiawassee County*, 218 Fed. 588 (C. C. A. 6th 1914) certiorari denied in 239 U. S. 647.

In a case somewhat analogous to the one at hand it was held that the holder of warrants which were void because of failure to comply with statutory requirements could still maintain action to recover the reasonable value of the equipment for which the warrants were given in payment, the invalidity of the obligation not being a defense to the implied contract. *Austin Bros. v. Montague County et al.*, — Tex. — 10 S. W (2) 718 (1928). Even where county commissioners consented to entry of judgment in favor of a holder of defective warrants, such entry of judgment was not held fraudulent, the court recognizing that the invalidity of the warrants would be no defense to an action for money had and received, as the validity of the underlying debt is the basis for determining whether the action should lie or not. *Sweet et al. v. Denver & R. G. R. Co.*, 59 Colo. 131, 147 Pac. 669 (1915).

To allow recovery in every instance where the statute is not complied with in the issuance of instruments of indebtedness would be to indirectly fritter away the safeguard step up by statute or constitution. However, to admit liability on these warrants in the instant case in an action for money had and received, even though the warrants in themselves might not be enforceable, seems to be the only proper result where the money was applied beneficially for a legitimate corporate purpose. Even though it might appear on first glance that there should be no liability here be-

cause of non-compliance with the statute, yet the object of the statute is still being carried out in that the public is not being forced to pay an indebtedness which was unjustly created. The result seems much more desirable than to insist on a strict construction of the statute which might bar any action to recover the money. P. M. G.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PERSONAL INJURIES. The plaintiff recovered $40,000 for injuries which would evidently be permanent. After this was affirmed in the Supreme Court, the defendant petitioned the Supreme Court for permission to move for a new trial in the lower court. This was supported by affidavits which showed that the plaintiff had recovered from his injuries to a great extent. The plaintiff presented counter-affidavits. There was no suggestion that any fraud had been practiced on the court, but the petition was granted on the ground that this was newly discovered evidence which the trial court should consider. Whether or not the new trial should be granted was left to the discretion of the trial court, with the provision that its inquiry should be limited to the question of damages. *Haaga v. Saginaw Logging Company*, 70 Wash. Dec. 99, 15 Pac. (2d) 655 (1932).

The rule is well settled that a new trial will be granted if a plaintiff recovers from his injuries so soon after trial that it is obvious that he obtained a judgment by fraud. *Wells, Fargo & Co. v. Gunn*, 33 Colo. 217, 79 Pac. 1029 (1905). If the plaintiff's condition improves because of facts in existence at the time of the trial, which were not discovered by the medical experts, a new trial will be granted, *Anshultz v. Louisville Ry. Co.*, 152 Ky. 741, 154 S. W 13, 45 L. R. A. N. S. 87 (1913) However, the instant case does not fit into either of these classifications. Haaga's recovery was due entirely to the healing processes of nature, and the new facts were not in existence at the time of the trial.

There is some doubt whether the fact that an injury has healed is newly discovered evidence at all. In a similar situation it has been held that after developments, refuting an opinion as to fuutre probable results, cannot be classified as newly discovered evidence. *Foge v. Interborough Rapid Transit Co.*, 53 Misc. 32, 130 N. Y. S. 977 (1907).

When there was no showing that a recovery from the injuries could have been predicted if all the facts had been known at the time of the trial, the courts have uniformly held that such recovery is not grounds for a new trial. *Gilson v. Washington Water Power Co.*, 93 Wash. 480, 161 Pac. 352 (1916) (evidence of recovery not conclusive) *Seaboard Air Line Ry. v. Reid*, 6 Ga. App. 18, 63 S. E. 1130 (1909) *National Concrete Construction Co. v. Duvall*, 153 Ky. 394, 155 S. W 757 (1913) *Cole v. Fall Brook Coal Co.*, 57 Hun 585, 10 N. Y. S. 417 (1890) *Brooks v. Rochester Ry. Co.*, 10 Misc. 88, 31 N. Y. S. 179 (1894).

The granting of a new trial is discretionary with the trial court, and all these cases which have denied it are merely affirming the decisions of the trial courts. Nevertheless, they announce the policy that the verdict of a jury should not be disturbed unless it has been obtained by fraud. The possibility of a recovery from the injuries is litigated at the trial, and the jury's speculation as to the future should settle the matter for all time. It is better that injustice should be done in the individual case than that litigation should be prolonged indefinitely. In view of these considerations of policy, and the lack of authority to support its position, the Washington court, although not granting a new trial in the instant case, would seem to have taken an untenable view in allowing the trial court to consider this motion for a new trial.

G. V P

BANKS AND BANKING—TAKING OTHER THAN MONEY IN PAYMENT. The State Treasurer issued a check, drawn on the Olympia National Bank and payable to the First National Bank of Portland in payment of two state warrants issued by the State Auditor to the plaintiff, who had authorized their collection by the Portland Bank. The draft drawn on the First National Bank of Seattle by the Olympia National Bank in payment of the Treasurer's check was dishonored when presented for payment due to lack of funds in the Seattle Bank to the credit of the Olympia National Bank, which for the purposes of this decision was considered insolvent

when the draft was drawn. The check being collected was returned through the various collecting agencies to the Treasurer after the Olympia National Bank failed. In this action the plaintiff was granted a writ of mandate requiring the Treasurer to pay money out of the Treasury in satisfaction of the original warrants on the theory that the Treasurer was not released from liability on the original indebtedness in view of Section 11 (1) of the Bank Collection Code, Chapter 203, Session Laws of 1929, p. 518. The Supreme Court refused to recognize the Treasurer's contention that Sec. 7 of the same act should defeat recovery *State of Washington ex. rel. Kern and Kibble v. Hinton as State Treasurer* 68 Wash. Dec. 156, 10 Pac. (2d) 1115 (1932).

In rendering this decision, which is the first in which the Bank Collection Code is cited, the Supreme Court faced the problem of interpreting two sections of the Bank Collection Code and applying this interpretation. The sections considered by the court provide:

> Sec. 7. "Where the item is received by a solvent drawee or payor bank, it shall be deemed paid when the amount is finally charged to the account of the maker or drawer."
>
> Sec. 11 and subsec. 1. "When an item is duly presented by mail to the drawee or payor, whether or not the same has been charged to the account of the maker or drawer thereof or returned to such maker or drawer, the agent collecting bank so presenting may at its election, exercised with reasonable diligence, treat such item as dishonored by nonpayment and recourse may be had upon prior parties thereto in any of following cases:
>
> (1) Where the check or draft of the drawee or payor bank upon another bank received in payment therefor shall not be paid in due course;"

Section 11 (1) is designed to protect the payee and the collecting bank when the check or draft accepted in payment of the item being collected is not paid. In view of Sec. 7, which releases the the drawer even though payment is not in cash, provided the drawee remits while solvent, it is evident that Sec. 11 (1) binds the drawer, as a prior party, only when the drawee bank remits by check or draft while insolvent .Sec. 7 properly limits the drawer's release from liability on an instrument as a prior party when a draft is remitted in payment, to those cases in which the drawee is solvent, since the drawer can not insist on payment and release by an insolvent drawee. Since the drawee bank in this case was insolvent when the remittance by draft was made, Sec. 11 (1) attaches liability on the Treasurer, as a prior party without the qualification contained in Sec. 7. The same result as that reached in this decision is suggested as the proper remedy in 43 Harv. L. Rev. 307 (1929) and 7 N. C. L. Rev. 188 (1929)

Prior to the enactment of this legislation, it is questionable whether our court would have reached the same result. In *First Nat. Bank v. Commercial Nat. Bank and T Co.*, 137 Wash. 335, 242 Pac. 356 (1926), the generally accepted doctrine was recognized that if the payee of a check or his agent, accepts from the drawee bank something else in place of cash, as a draft on another bank or a deposit slip or credit, when the drawee holds funds of the drawer sufficient to pay the check, and would pay it in cash if demand were made, the transaction will be regarded as a payment of the check and the drawer discharged. *People ex. rel. Port Chester Sav. Bank v. Cromwell*, 102 N. Y. 477, 7 N. E. 413 (1886) *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 31 A. L. R. 1261 (1924) 4 Wash. Law Review 40 (1929) *Texas Electric Service Co., v. Clark*, 47 S. W (2d) 483 (Texas, 1932). *Contra, Thomas v. Westchester County*, 115 N. Y. 470, 21 N. E. 674, 4 L. R. A. 477 (1889) and *Cleve v. Craven Chemical Co.*, 18 F (2d) 711 (N. C., 1929) (result reached under statute allowing remittance by draft). Cases collected in 52 A. L. R. 994.

Although the drawer of the item being collected was generally discharged even though payment was made by draft the position of the collecting agent was less secure. In *First Nat. Bank v. Commercial Nat. Bank*

and T. Co., supra, the collecting agent was held liable for failure to collect in cash, while in *Spokane Valley State Bank v. Lutes*, 133 Wash. 66, 233 Pac. 308 (1925) the collecting agent was released from liability for failure to collect in cash on the theory that a general custom to collect other than in cash is impliedly included in the authority conferred on the collecting bank acting as agent for the payee. See 61 A. L. R. 739.

It is evident that more confusion and uncertainty existed in the cases dealing with the liability of the collecting agent than in the cases in which the question of the drawer's discharge was involved. The Bank Collection Code, sponsored by the American Bankers' Association seems to be an attempt to resolve, in favor of the collecting agent, the uncertainty as to the collecting agent's liability. Its effect on the liability of the drawer seems to be incidental to the main purpose of the act.

H. H.

MALICIOUS PROSECUTION—WANT OF PROBABLE CAUSE. The defendants in this case, a sheriff and his deputies, were informed by plaintiff's neighbors, and by Federal prohibition agents that plaintiff's premises were being used for the manufacture and sale of intoxicating liquor. Defendants, without making an investigation, secured a search warrant from a justice of the peace and raided the premises. A thorough and disturbing search failed to reveal any evidenc of liquor law violations. Plaintiff brought suit for malicious prosecution and recovered in the lower court. The judgment was affirmed on appeal, the Supreme Court defining probable cause as evidence competent in a trial before a jury. *Ladd v. Miles et al.*, 70 Wash. Dec. 655 (1932).

The definition of probable cause in the present case of malicious prosecution is much more strict than that used by the great majority of jurisdictions. Although there is some variation in the use of terms, the usual requirement is a reasonable grounds of suspicion, supported by circumstances strong enough in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which h is charged. *Moore v. Durrer*, (Cal) 16 Pac. (2d) 676 (1932) *Schwartz v. Schwartz*, (Wis.) 240 N. W 177 (1932). Prior to the present case this state was in accord. *Waring v. Hudspeth*, 75 Wash. 534, 135 Pac. 222 (1913), *Borg, et al. v. Binghurst*, 105 Wash. 521, 178 Pac. 450 (1919).

The test of probable cause now adopted by this state was first announced in *Giles v. United States*, 284 Fed. 208 (C. C. A. 1st 1922). The case was one of first instance involving probable cause for search and seizure under the National Prohibition Act to arise in that jurisdiction. The court based its definition on the requirements for search warrants under the Espionage Act, tit. 11 sec. 5, the National Prohibition Act, secs. 25 and 33, and on the Fourth Amendment. The definition was subsequently used by the Federal Courts in *Wagner v. United States*, 8 Fed. (2d) 581 (C. C. A. 8th 1925) *Proulx v. United States*, 32 Fed (2d) 760 (C. C. A. 1st 1929) and recently by the United States Supreme Court in *Grau v. United Sates*, 53 Sup. Ct. 38 (1932).

It is interesting to note that the Federal cases cited above involved illegal search of defendant's premises by prohibition agents, and further, that the test of probable cause was used in connection with motions to suppress evidence or quash indictments. Apparently the Federal Courts have never applied the rule in any other type of case. Some state courts hav gone nearly as far in liquor cases involving the same questions. *Wallace v. State*, (Ind.) 157 N. E. 657 (1927) *People v. Soretsky*, 343 Ill. 583, 175 N. E. 844 (1931).

Although the present public stand on prohibition may now be some justification for the use of this test by the Federal Courts, its adoption by this court, especially in view of the prior repeal of the state dry law, seems a little late and difficult to justify. The court by applying this definition of probable cause to the field of malicious prosecution, without limiting it in any way, is undoubtedly taking a dangerous step. For example, the query at once arises as to how this test would work in larceny cases, or in others which usually require immediate action. It is needless to say that its unrestricted application there would soon discourage most criminal prosecutions and lead to a further breakdown of law enforcement.

P. L.

PLEADING—RES IPSA LOQUITUR. In an action for personal injuries, the plaintiff alleged specific acts of negligence and yet relied on the doctrine of *res ipsa loquitur* *Held*: that such an allegation of specific acts of negligence does not deprive the plaintiff of the presumption of the doctrine of *res ipsa loquitur* *Highland v. Wilsonian Investment Co.*, 70 Wash. Dec. 647 (1932).

There are cases which hold that the plaintiff by merely alleging specific acts of negligence precludes any right to rely upon the doctrine. *Orr v. Des Moines El. Light C.*, 222 N. W 560 (Iowa 1928) *Federal Electric Co. v. Taylor* 19 Fed. (2d) 122 (C. C. A. 8th 1927) *Carpenter v. Burmeister* 273 S. W 418 (Mo. 1925).

These courts take the view that the sole reason for the rule of *res ipsa loquitur* is that in view of all the particular circumstances, the plaintiff cannot be expected to know the particular negligent act causing the injury, and therefore is permitted to reply upon the presumption established by the doctrine of *res ipsa loquitur* Therefore, when the plaintiff alleges specific acts of negligence, he thereby admits that he does know the particular acts causing the injury, and is thereby precluded from relying on the presumption established by the doctrine. There are many cases that adopt the more liberal rule that allegations of specific negligence in no way deprive the plaintiff of his right to reply upon the doctrine of *res ipsa loquitur* if the case is otherwise a proper one for its application. *Humphrey v. Twin State Gas Co.*, 139 Atl. 440 (Vt. 1927) *Kleinman v. Banner Laundry Co.*, 186 N. W 123 (Minn. 1921).

(For a discussion of both rules and citation of cases see "Pleading Res Ipsa Loqutur," 7 N. Y. U. L. Q. Rev. 415-433.)

The Supreme Court of Washington has disapproved the strict rule and has adopted the more liberal rule of pleading *res ipsa loquitur* In *Walters v. Seattle R. & S. R. Co.*, 48 Wash. 238, 93 Pac. 420 (1908) it was held that a passenger injured in collision of street cars who alleged in his complaint the particular cause of the accident was not deprived of the use of the doctrine of *res ipsa loquitur* The *Walters* case was approved in *Lobb v. Seattle R. & S. R. Co.*, 48 Wash. 238, 93 Pac. 420 (1908) This view was reaffirmed in *Kluska v. Yeomans*, 54 Wash. 465, 103 Pac. 819 (1909) the court holding that a plaintiff does not lose the benefit of the presumption of the doctrine of *res ipsa loquitur* because he has alleged what he considered to be the specific cause of the accident. In *Osborne v. Charbneau*, 148 Wash. 359, 268 Pac. 884 (1928), it might seem that a contra result was reached, the court holding that the plaintiff by introducing evidence as to the specific cause of the accident thereby deprived herself of the right to rely upon the presumption of the doctrine. However, it is questionable whether the *Osborne* case was a proper one for the application of the doctrine of *res ipsa loquitur*

The instant case reaffirms the view taken in the *Kluska* case. namely, that a plaintiff by alleging specific acts of negligence does not thereby deprive himself of the right to rely on the presumption arising from the doctrine of *res ipsa loquitur* Logically and consistently it would seem that the liberal rule is incorrect, for it destroys the very principle upon which the doctrine of *res ipsa loquitur* rests. The doctrine is founded upon the theory that the plaintiff has knowledge of what caused his injury, and therefore is permitted to rely on the presumption that the defendant was negligent. The plaintiff by alleging specific acts of negligence immediately negatives any such proposition and should thereby be automatically precluded from relying on the presumption.

L. A. C.