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CASE NOTES

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AGENCY — Master-Servant — Exception to General Rule of Master's Non-Liability for Tortious Acts of Servant Done Outside Scope of Employment. — Plaintiff, a prior employee of defendant who permissibly remained on defendant's premises and used employee housing facilities after termination of employment, was robbed, assaulted, and severely injured by one Gomez, who had recently been employed by the defendant. The plaintiff alleged breach of duty of defendant to adequately police his property, so as to prevent injuries to persons thereon by any of its employees. Testimony and evidence failed to disclose any prior criminal record as to Gomez, any wrongdoing by Gomez while in defendant's employ prior to the assault, or that prior to assault there was any experience on defendant's farm of assaults or violence or thefts on the part of employees. The trial court denied the plaintiff's motion for a new trial and entered judgment for the defendant. Plaintiff appealed. HELD: Affirmed. The plaintiff failed to bring his case within the protection of Pennsylvania law, which subscribes to the view of Section 317, Restatement of Torts, which states that "[a] master is under a duty to exercise reasonable care so as to control his servant while acting outside the course of employment as to prevent the servant from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if . . . (b) the master . . . (ii) knows or should know of the necessity and opportunity for exercising such control." *Teals v. King Farms Co.*, 285 F. 2d 62 (3d Cir. 1960).

A universally recognized principle of law is that a master is civilly liable for injuries and damages to third persons occasioned by the conduct of his servant while acting within the scope of his employment. *Lipman v. Atlantic Coast Line R. R.*, 108 S. C. 151, 93 S. E. 714 (1917); *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. 32, 50 Atl. 286 (1917). This principle, known as the doctrine of respondeat superior, seems to have been founded on public policy, its purpose being to allocate to business the risks normally attendant thereto. 40 MARQ. L. REV. 337; MECHEM, OUTLINES OF THE LAW OF AGENCY 359 (4th ed. 1952). It is equally as well established that no recov-

ery will be allowed against the master where it is ascertained that the servant's conduct is, in the customary legal phraseology, without the scope or course of employment. *Ciarmataro v. Adams,* 275 Mass. 521, 176 N. E. 610 (1931); *Lamma v. Charles Stores Co.,* 201 N. C. 134, 159 S. E. 444 (1931). Indeed, it has been held that under such circumstances, the employee in committing a tortious act is deemed to be as much a stranger to the employer as any third person. *Nelson Business College Co. v. Lloyd,* 60 Ohio St. 448, 54 N. E. 471 (1899). It is acknowledged that this rule on non-liability may be altered by statute, *Davenport v. Charleston & W. C. Ry.,* 72 S. C. 205, 51 S. E. 677 (1905); *Ginter v. Pennsylvania R. R.* 262 Pa. 474, 105 Atl. 824 (1919), and also that the master may make himself liable by ratification of the servants' acts. *Cowles v. Johnson,* 225 N. Y. 39, 121 N. E. 487 (1918); *Southern Ry. v. Chambers,* 126 Ga. 404, 55 S. E. 37 (1906). The principle of non-liability is also predicated upon public policy, the presumption being that due to the nature or circumstances of the tortious act involved, the master has little of the element of control inherent in the master-servant relationship. *Wright v. Wilcox,* 19 Wend. (N. Y.) 343 (1838); *Gulf v. Reed,* 80 Tex. 362, 115 S. W. 1105 (1891). On the other hand, such an act may be so connected with employment in time and place as to give the master a special opportunity and a peculiar ability to control the servants' conduct, even beyond the ambit of activity commonly designated as the scope of employment. Harper and Kime, *The Duty to Control the Conduct of Another,* 43 YALE L. J. 896 (1934). Early cases in point applied such a theory in quashing the defense of the fellow servant rule, where it was shown that there was actual fault or misconduct attributable to the master, either in the act of injury or in the selection and employment of the agent in fault. *Rosenatiel v. Pittsburg Ry.,* 230 Pa. 273, 79 Atl. 556 (1911); *Frazier v. Pa. R. R.,* 38 Pa. 104 (1861). These cases conspicuously involved railways, as did the leading case of *Fletcher v. Baltimore & Potomac R. R.,* 168 U. S. 135, 42 L. Ed. 411 (1897), which is referred to as having formulated the doctrine applied in the principal case. The Court imposed liability on the master due to his acquiescence in previous similar tortious acts of his servant, although outside the scope of the servant's authority. However, this doctrine is not confined to railroad companies. *Ford v. Grand Union Co.,* 268 N. Y. 243, 197 N. E. 2d 419 (1947). In *Hogle v.*

H. H. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794, 32 L. R. A. (n. s.) 1038 (1910), the rule was applied to a manufacturer. Also relatively recent cases have imposed liability on municipalities where basic aspects of the rule were applicable. *McCrink v. City of New York*, 296 N. Y. 99, 71 N. E. 2d 419; *Stevens v. City of Pittsburg*, 129 Pa. Super 5, 194 Atl. 563 (1937). That the doctrine is not restricted to any particular type of defendant is evidenced by its formulation into the *Restatement of Torts*, § 317 (1934). This section has been applied by several courts in the past and covers directly the facts of the principal case. *Ford v. Grand Union Co.*, 268 N. Y. 243, 197 N. E. 266 (1935); *Dincher v. Great Atl. & Pac. Tea Co.*, 356 Pa. 151, 51 A. 2d 710 (1947).

It is submitted that the doctrine of respondeat superior is an anomaly in the law, and justifiable only on the premise that there is no other feasible way to equitably distribute the burden of loss from damages and injuries which are inherent in the master-servant relationship. However, recognition of the doctrine does not impose absolute liability on the master, for we have seen that the label "outside the scope of employment" normally relieves him altogether. That this, in general, should be true is understandable, for the mere fact of a master-servant relationship does not destroy the peculiar personal aspects of the servant's existence. Nevertheless, to dogmatically assert that an act done outside the scope of employment can never subject the master to liability is to add anomaly to the already anomalous. That a master who knows or should know of the necessity and who has the opportunity for exercising control over his servants (even though acting outside the scope of his employment) should be liable for the consequences of his dereliction, is a proposition of law which commends itself to the integrity of those most skilled in the principles of fair and substantial justice.

WILLIAM A. LITTLE.

CARRIERS — Shipping Act of 1916 — Who is a Common Carrier By Water? — Prior to 1934 petitioner had been engaged in carrying passengers and freight as a common carrier in the trade between Ecuador and ports on the Atlantic. In 1934 petitioner installed specially refrigerated compartments, called "reefers," provided special care, and began carrying

bananas for three shippers on a contract basis as a "private carrier." Between 1946 and 1957, petitioner refused to honor requests for banana space from other shippers in the trade because of limited space and prior contractual agreements reserving the space. In 1957 the other shippers petitioned the Federal Maritime Board to set aside the contracts under provisions of the Shipping Act [46 U.S.C.A. 812, 815 (1916)] forbidding unjust and unfair discrimination against a shipper by a common carrier by water. From an order directing petitioner to grant space to the other shippers, petitioner appealed, contending, contrary to the Board ruling, that it was not a "common carrier by water" within the meaning of the Act, 46 U.S.C.A. 801 (1916), ["The term 'common carrier by water' in foreign commerce . . . means a common carrier, except ferryboats . . . , engaged in the transportation by water of passengers or property. . . . *Provided,* that a cargo boat commonly called an ocean tramp shall not be deemed such a 'common carrier by water in foreign commerce,' "] because it had not held itself out as a common carrier by water of bananas. It further contended that because bananas are a commodity of a special nature requiring special care and handling, it might carry bananas on a contract basis as a private carrier. HELD: The Shipping Act is not confined to those goods as to which the carrier has held itself out as a common carrier, but it extends to other goods which such carriers have transported. *Grace Line v. Federal Maritime Bd.,* 280 F. 2d 790, (2d Cir. 1960); *cert. denied,* 364 U. S. 933, 5 L. Ed. 2d 365 (1961).

At common law a common carrier is one who holds himself out to the public as engaged in the business of transporting goods for compensation for those who may choose to employ him. 9 AM. JUR. *Carriers* § 4 (1937); *Citizen's Bank v. Nantuckett Steamship Co.,* 5 Fed. Cas. 719 (No. 2730) (D. Mass. 1811). The holding out need not be express but may be implied from conduct. *Fish v. Chapman,* 2 Ga. 349, 46 Am. Dec. 393 (1847). Whether one is a common carrier is determined by the business actually carried on, *United States v. California,* 297 U. S. 175, 80 L. Ed. 567 (1936); *Terminal Taxi v. Kutz,* 241 U. S. 252, 60 L. Ed. 984 (1916), or by the obligation assumed, *Smitherman v. Mansfield Hardwood Lumber Co.,* 6 F. 2d 29 (W. D. Ark. 1925). Thus, it is generally held that carriers of merchandise by water, seeking general employment, are to be regarded as common carriers. *The Lady Pike,* 88

U. S. (21 Wall) 1, 22 L. Ed. 499 (1874); *Propeller Niagara v. Cordes,* 62 U. S. (21 How.) 22, 16 L. Ed. 41 (1859). On the other hand, a private carrier is one, who, without making it a vocation or holding himself out to the public as willing to carry generally, undertakes by *special* agreement in a *particular* instance to transport property without being bound to serve every person who may apply. 9 AM. JUR. *Carriers* § 37 (1937); *Stones v. Underseth,* 85 Mont. 11, 277 Pac. 437 (1929). However, the same person may be engaged in one line of business as a common carrier and in another line as a private carrier. *Terminal Taxi v. Kutz, supra; Chenery v. Employees Liab. Assur. Corp.,* 4 F. 2d 826 (9th Cir. 1925). But the same facilities cannot be used at the same time in both common carrier and private carrier transportation. *The City of Dunkirk,* 10 F. 2d 609 (S. D. N. Y. 1925); *Hubert v. Public Serv. Comm.,* 118 Pa. Super. 128, 180 Atl. 23 (1935). Although at common law a common carrier may act by special contract as a private carrier, when acting outside the scope of its legal duties in carrying something that is not its business to carry because of special dangers or extreme values of the cargo, *Express Cases,* 117 U. S. 1, 29 L. Ed. 791 (1886); *United States v. Louisville & Nashville R. R.,* 221 F. 2d 698 (6th Cir. 1950), a person cannot by executing a contract change the character of his operation from that of common carrier to private carrier, *Denver & R. G. W. Ry. v. Linck,* 56 F. 2d 957 (10th Cir. 1932); *Memphis News Pub. Co. v. Southern R. R.,* 110 Tenn. 684, 75 S. W. 941 (1903), nor divest himself of his status by declaring in his bill of lading that he is not a common carrier. *Bank of Ky. v. Adams Express,* 93 U. S. 174, 23 L. Ed. 872 (1876). Accordingly, it is generally held that a carrier by water becomes a private carrier when the *entire* ship is chartered to a *special* person or for a *special* reason, the ship then being an ordinary bailee to transport for hire (so-called "tramp") or private contract carrier. *The Monarch of Nassau,* 155 F. 2d 48 (5th Cir. 1946); *Koppers Conn. Coke Co. v. James McWilliams Blue Line,* 89 F. 2d 865 (2d Cir. 1937), *cert. denied* 302 U. S. 706, 82 L. Ed. 545 (1937). If any part of the ship is available to the public, although the other portion is taken up by a cargo shipped under a special charter, the owner is still a common carrier. *Gage v. Tirell,* 91 Mass. (9 Allen) 299 (1864). Thus, in accord with the principle of the instant case in *City of Dunkirk, supra,* it was held that a general ship taking cargo at various points

could not evade its liability as a common carrier by carrying a cargo of coconut oil under special contract.

The case is correctly decided. The statute is concerned with the regulation of carriers, not of carriage. Therefore, it is not necessary to go any further than to determine whether petitioner falls within the regulated class of carriers. The statute recognizes only two classes of carriers by water, the common carrier and the bailee for hire or "tramp," the latter being specifically exempted from regulation. At common law it is clear that a ship carrying goods generally in the trade is a common carrier by water of all the goods it transports. If the ship carries the goods, no further holding out is necessary; the law will imply it. Moreover, at common law only a bailee for hire or "tramp" could become a private carrier with the privilege of contract carriage. To become such a carrier, it was necessary that the *entire* ship be chartered out; no part of the vessel could be retained for use by the public. By these tests petitioner clearly has the status of a common carrier by water and under the classification of the Act is, consequently, subject to regulation under the statute. The dissent, however, insists that the *Express Cases, supra,* uphold petitioners arguments. Upon examination it is evident that these cases should not control. First, they are concerned with the common law exceptions; this is, statutory material which takes precedence. Second, they are confined to railroads which have nothing comparable to the private carrier by water, the bailee for hire or "tramp." Again the carriers in specific instances were acting outside the scope of their normal duties in carrying cargo of extraordinary nature; no question was raised concerning discrimination against the shipping public. At no time do these cases suggest that a common carrier by water generally of all commodities in the trade may *regularly* transport on a contract basis a particular commodity which constitutes a material part of its business. The dissent continues with the argument that Congress did not intend to eliminate the privilege of contract carriage. This overlooks the fact that at common law only a bailee for hire or "tramp" had this privilege, a class of carrier which Congress specifically excepted from regulation under the statute. Certainly Congress in providing a comprehensive regulatory scheme for water commerce did not intend that a common carrier might exempt itself from regulation by its own *fiat,* merely by claiming that it had not expressly held itself out

as a common carrier of a particular commodity, especially when express holding out was not required at common law. Lastly, the dissent urges that the special handling problems of bananas should allow petitioner to carry on a contract basis. The statute is silent here, but it does provide that the Federal Maritime Board shall be empowered to make findings as to the unjust or unfair nature of the discrimination. As the majority points out, this provision should give petitioner sufficient protection on this question since the board has sufficiently broad power to determine whether petitioners' actions were justified under the circumstances.

EDWARD C. ROBERTS.

CONTRACTS — Statute of Frauds — Insufficiency of Written Agreement Authorizing Broker to Sell Real Estate Where No Statement of Commission to Be Paid is Included. — Plaintiffs, real estate brokers, obtained buyers for defendants' realty in accordance with the terms embodied in a binder signed by defendants. There was no statement in the binder of the commission to be paid (a blank space provided for this purpose was unfilled) but plaintiffs later inserted a notation therein at the time of the sale. Defendants refused to consummate the sale, and plaintiffs sued for the commission allegedly due. The trial court judge, sitting without a jury, rendered judgment for plaintiffs. On appeal, HELD: Reversed. A written agreement authorizing a broker to sell real estate for a commission which does not contain a statement as to the amount of commission to be paid is insufficient under N. M. STAT. ANN. tit. 70, § 1-43 (Comp. 1953), a general statute which requires brokers' employment contracts to be written. *Carney v. McGinnis,* 358 P. 2d 694 (N. M. 1961).

At common law, absent statutes to the contrary, a parol contract for the payment of a commission to a broker for the sale of realty is valid. *Henning v. Hill,* 80 Ind. App. 363, 141 N. E. 66 (1923); *Fisher v. Bell,* 91 Ind. 243 (1883). The general Statute of Frauds, requiring contracts for the sale of lands or interests in them to be in writing, is generally considered not to apply to employment contracts of brokers unless the compensation involves a conveyance of realty or interests therein. *Palmer v. Wadsworth,* 264 Mass. 18, 161 N. E. 621

(1928); *Hancock v. Dodge*, 85 Miss. 228, 37 So. 711 (1905). This is also the view in South Carolina. *Carter v. McCall*, 193 S. C. 456, 8 S. E. 2d 844 (1940); *Jumper v. Dorchester Lumber Co.*, 119 S. C. 171, 111 S. E. 881 (1922). However, in many jurisdictions, statutes upheld as a justifiable exercise of the state's police power and as an exemption and enlargement of the statute of frauds have been enacted requiring these contracts to be evidenced by a written instrument or memorandum. *Harris v. Dunn*, 55 N. M. 434, 234 P. 2d 821 (1951); *Hale v. Kriesel*, 194 Wis. 271, 215 N. W. 227 (1927). The sufficiency of the writing depends, to a great extent, upon the particular provisions of the various statutes, but most states agree that there must be some mention of the names of the parties, *Watson v. Brazelton*, 176 S. W. 2d 216 (Tex. Civ. App. 1943); a description of the property, *Lee v. Casselman*, 29 Wash. 2d 47, 185 P. 2d 107 (1947); the authority of the broker, *Herring v. Fisher*, 110 Cal. App. 2d 322, 242 P. 2d 963 (1952); a promise to pay commissions, *Garvey v. Wenzel*, 272 Wis. 606, 76 N. W. 2d 291 (1956); and the amount of compensation to be received by the broker. *VerMass v. Culbertson, Roe, & Bell, Inc.*, 154 Neb. 528, 48 N. W. 2d 674 (1951). There is a considerable divergence of opinion as to the sufficiency of the statement with respect to the compensation to be paid, but, generally, the writing is sufficient where the amount of compensation can be definitely ascertained from its terms without resort to parol evidence. *Hueth v. Stevenson*, 100 N. J. L. 1, 124 Atl. 773 (1924); *Buratti v. Tennant*, 147 Tex. 536, 218 S. W. 2d 842 (1949); where the writing refers to some extrinsic fact or another writing by means of which the compensation can be ascertained with sufficient certainty, *Jacobs v. Joseph E. Copp Co.*, 123 Ohio St. 146, 174 N. E. 353 (1930); *Graham v. Guetzkow*, 177 Wis. 259, 187 N. W. 982 (1922); where the writing provides the mode of ascertaining the compensation, or a basis on which the compensation can be definitely computed, *Mikkelson v. Faber*, 195 Wis. 64, 217 N. W. 702 (1928); *Gifford v. Straub*, 172 Wis. 396, 179 N. W. 600 (1920); where only a mathematical computation is necessary to determine the amount of compensation, *Fisk v. Henarie*, 13 Ore. 156, 9 Pac. 322 (1886); *Realty Mart Corp. v. Standring*, 165 Wash. 21, 4 P. 2d 1101 (1931); and where the writing imports a promise to pay compensation and provides a means for ascertaining the amount thereof without destroying its character as a written instru-

ment. *Stockberger v. Zane,* 73 Ind. App. 4, 125 N. E. 65 (1919); *Lawson v. Holloman,* 238 S. W. 2d 987 (Tex. Civ. App. 1951). In California, it is held that there need be no statement of the rate of commission payable as long as the fact of employment is expressed, and parol evidence is admissible to ascertain the compensation. *Caminetti v. National Guar. Life Co.,* 56 Cal. App. 2d 92, 132 P. 2d 318 (1942); *Toomy v. Dunphy,* 86 Cal. 639, 25 Pac. 130 (1890). However, the decided weight of authority is that there must be some statement of the amount of compensation to be paid or the writing is insufficient. *Stone v. Bradshaw,* 64 Idaho 152, 128 P. 2d 844 (1942); *Case v. Ralph,* 56 Utah 243, 188 Pac. 640 (1920). This is especially true where a blank space in the instrument for the amount or percentage of commission is not filled. *Vogel v. Ensor,* 76 Ind. App. 91, 131 N. E. 416 (1921); *Black v. Milliken,* 143 Wash. 204, 255 Pac. 101 (1927).

While it is true that the passage of the New Mexico statute was a valid exercise of the state's police power, it does not necessarily follow that the court's construction is truly representative of the legislature's intent at the time of the passage of the act. The most frequent reason given for such legislation is that the sale of realty by brokers for a commission is a "prolific source of litigation founded upon fraud and perjury." The statute was, accordingly, designed to prevent brokers from claiming commissions on transactions they never had been authorized to make. Many of the states which require brokers employment contracts to be written also expressly provide that a statement of the commission to be paid must be included in the writing or memorandum. This is not the case here, for the statute is quite general in its terms. If the New Mexico legislature had intended that the compensation be set out in the writing, it is probable that they would also have enacted such a provision as other jurisdictions have. This decision is an example of judicial legislation in the face of a pre-existing, adequate legal remedy. As long as the authority to sell is in writing, there is no possibility for the mischief the legislation was designed to remedy, and the only question would be the value of the broker's services. It is well settled that where work is done under an express contract which contains no statement of compensation, the law implies a promise to pay what the service is reasonably worth, and the court will so construe the instrument. It

would seem that the New Mexico court has interpreted the statute too broadly — it is in derogation of the common law and should be construed strictly — and has rendered it unnecessarily restrictive. The California opinion appears to be the better view when there has been an oral agreement for compensation. Otherwise, the courts should resort to the common law rule of settling a reasonable compensation.

DONALD O. CLARK.

CRIMINAL LAW — Disorderly Persons — Persons Required by Statute to Relinquish Telephone Line in an Emergency. — The defendant was convicted in municipal court of being a disorderly person in that she failed to relinquish a telephone party line to a doctor in an alleged emergency, such action being in violation of New Jersey Statutes, § 2A:170-25.5 (Supp. 1959), which provides: "Any person who fails to relinquish a telephone party line . . . after he has been requested so to do to permit another to place a call, in an emergency in which property or human life are in jeopardy and the prompt summoning of aid is essential, to a fire or police department or for medical aid or ambulance service . . . shall be a disorderly person; provided such party line at the time of the request is not being used for any other such emergency call." The defendant appealed on the ground that the state failed to establish the emergency as required by the statute. HELD: Affirmed. The doctor's testimony and the steps taken by the hospital upon the patient's arrival were consistent with the finding that an emergency existed. *State v. Zelinski,* 166 A. 2d 383 (N. J. 1960).

To fully understand the law applicable to telephones one must consider the law applicable to telegraph companies as well, since for purposes of the law the two instruments may be considered of the same class or type. *Northwestern Tel. Exch. Co. v. Chicago, Minn. & St. P. Ry.,* 76 Minn. 334, 79 N. W. 315 (1899); *Attorney General v. The Edison Tel. Co.,* L. R. 6 Q. B. 244 (1880). Generally telegraph and telephone companies are considered common carriers, *Western Union Tel. Co. v. Eubanks,* 100 Ky. 591, 38 S. W. 1068 (1897); *Reaves v. Western Union Tel. Co.,* 110 S. C. 233, 96 S. E. 295 (1918), and are required to serve the general public without discrimination. *Western Union Tel. Co. v. Hill,* 163 Ala. 18,

50 So. 248 (1909); *Clemens v. Western Union Tel. Co.*, 42 Del. 138, 28 A. 2d 889 (1942). However, it was recognized in England at an early date that certain types of messages, particularly those having to do with matters of state, were to have priority over routine messages. The Telegraph Act, 1863, 26 & 27 Vict. c. 112, § 48. This doctrine was adopted by the United States, 25 Stat. 385 (1888), 47 U. S. C., § 15 (1952), *Western Union Tel. Co. v. Pennsylvania R. R.*, 195 U. S. 540, 49 L. Ed. 312 (1904), and later by numerous states, many of whom applied this doctrine to messages of an emergency nature. CAL. CIVIL CODE § 2207; OKLA. REV. STAT. § 9317 (1931). Twenty-nine states have recently adopted statutes providing that persons failing to relinquish a telephone party line in a declared emergency shall either be disorderly persons, N. J. REV. STAT. 2a:170-25.5 (Supp. 1959), or shall be guilty of a misdemeanor. N. Y. CONSOL. LAWS § 1424-A (McKinney Supp. 1960); VA. CODE § 18.1-368 (1950). Regarding the duty owed by a telephone company to its subscribers, a telephone company has been held liable for a failure of its service in an emergency due to negligence of intentional misconduct where the telephone company was aware that an emergency existed, and where the resultant damages might reasonably have been expected to follow as the natural and probable consequences of the act. *Southwestern Tel. & Tel. Co. v. Allen*, 146 S. W. 1066 (Tex. Civ. App. 1912); *Vinson v. Southern Bell Tel. & Tel. Co.*, 188 Ala. 292, 66 So. 100 (1914). In a majority of cases recovery has been denied where the telephone company had no notice that an injury would result from a negligent or intentional failure of its service. *Southern Tel. Co. v. King*, 103 Ark. 160, 146 S. W. 489 (1912); *McFarlin v. Gulf States Tel. Co.*, 257 S. W. 298 (Tex. Civ. App. 1923). Likewise, recovery from a telephone company for the loss of property by fire due to a failure of the company's service has been consistently denied. Such action having been held not to have proximately caused the damage. *Volquardsen v. Iowa Tel. Co.*, 148 Iowa 77, 126 N. W. 928 (1910); *Forgey v. Macon Tel. Co.*, 291 Mo. 539, 237 S. W. 792 (1922). In the latter part of the nineteenth century, many states passed statutes making it a criminal offense to cut or tamper with the wires or poles of any telegraph or telephone company. CODE OF LAWS OF SOUTH CAROLINA § 58-316 (1952); N. C. Gen. Stat. § 14-154 (1951). Under this statute, a railroad company that wilfully cut certain telephone lines, thus preventing the

plaintiff from securing the services of a physician to attend his wife in childbirth, was held liable for her death in an action in tort. *Hodges v. Virginia-Carolina R. R.*, 179 N. C. 560, 103 S. E. 145 (1920). While violation of a statute is negligence per se, many courts have required that there be a causal connection between the unlawful act and the injury before recovery will be allowed. *Harris v. Hughes*, 266 S. W. 2d 763 (Mo. Ct. App. 1954); *Aldridge v. Hasty*, 240 N. C. 353, 82 S. E. 2d 331 (1954).

In examining the sufficiency of the State's evidence in the present case, which is one of first impression in the United States, the Court indicated that it would be liberal in determining the existence of an emergency where the person attempting to summon aid believed that an emergency existed. The Court stated that "the purpose of the statute is to save human lives not to gamble with them." This indication of liberality may be construed as judicial approval of the legislative act. Although the statute is penal in nature, it gives rise to the interesting question of what will be the effect of such a statute in a civil action for injuries resulting from a failure to relinquish the line in an emergency. There being no litigation in this area, we might examine the analogous cases where the action was brought against the telephone companies for a failure of service. Here the existence of a duty was established by reason of the high degree of care a common carrier owes to its subscribers. In an action against a third party in a jurisdiction without such a statute the plaintiff, in addition to proving proximate cause, would have the burden of establishing a duty owed the plaintiff by the third party. Further, it can be seen from the cases against the telephone company that the tendency has been to deny recovery on the ground that the resulting injuries were too remote. By violating the statute, however, one becomes a wrongdoer and may be civilly liable for any consequences that proximately result from his unlawful act, whether or not he could anticipate or foresee the result. The statute also imposes a duty on the defendant to act and establishes a standard of care to which he may be held in an action in tort. A civil action brought under the statute would be similar to the case of *Hodges v. Virginia-Carolina R. R., supra,* and presumably the same result would be reached. It must be kept in mind, however, that recovery in a civil action may be denied for a mere violation of a penal statute, unless there is a casual re-

lation between the violation and the injury. Regardless of the result of any civil action that might arise, legislation of this type is a praiseworthy example of the legislature's attempt to safeguard life and property through affirmative action. It is urged that states not having a statute of this type adopt such legislation.

COLDEN R. BATTEY, JR.

EVIDENCE—Hearsay—Newspaper Article Admissible. — The clock tower on plaintiff's courthouse collapsed and telescoped into the courtroom. No one was injured, but the damage exceeded $100,000. Because of charred timber found in the debris and testimony of several residents that they had seen a bolt of lightning strike the courthouse five days earlier, plaintiff's investigator concluded that lightning struck the tower causing it to collapse. Plaintiff carried fire and lightning insurance with defendant. Defendant's investigators and engineers found that the tower collapsed of its own weight, that lightning could not have caused the collapse, and that the charred timbers were the result of a fire in the tower which occurred many years before the date lightning supposedly struck. The trial court allowed defendant to introduce into evidence an article in a fifty-eight year old newspaper to the effect that a fire had occurred in the tower of the courthouse in 1901, while it was still under construction. Judgment in the lower court was for defendant. On appeal, HELD: Affirmed. The newspaper article is admissible because it is necessary and trustworthy, relevant and material, and its admission is within the discretion of the trial judge. *Dallas County v. Commercial Union Assur. Co.*, 286 F. 2d 388 (5th Cir. 1961).

Hearsay evidence is testimony or written evidence in court of a statement made out of court resting upon the credibility of the out-of-court asserter for its value. MCCORMICK, EVIDENCE § 225 (1954). The broad rationalization is that it is a rule rejecting assertations which cannot be subjected to cross-examination. 5 WIGMORE, EVIDENCE § 1362 (3d ed. 1940). The hearsay rule clearly applies to both oral and written evidence. *Baltimore Am. Ins. Co. v. Pecos Co.*, 122 F. 2d 143 (10th Cir. 1941); *Thornton v. City of Birmingham*, 250 Ala. 651, 35 So. 2d 545, 7 A. L. R. 2d 773 (1948). Therefore,

it follows that the rule as it pertains to written evidence also embraces the exceptions. 31 C. J. S. *Evidence* § 194 (1942). Over the years, many exceptions have developed, but all are based upon two principles — necessity and trustworthiness. 5 WIGMORE, EVIDENCE §§ 1420-1422 (3d ed. 1940). For hearsay evidence to be "necessary," there should be no better evidence available; *Montana Power Co. v. Federal Power Comm'n*, 185 F. 2d (D. C. Cir. 1950); *United States v. Aluminum Co. of America*, 35 F. Supp. 820 (D. C. 1940), although the Model Code of Evidence would permit any oral or written statement based on personal knowledge, provided the declarant is unavailable. MODEL CODE OF EVIDENCE rules 501(3) & 503, compare UNIFORM RULES OF EVIDENCE 63(4). See, McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 219 (1956). Hearsay is "trustworthy" where the circumstances are such that an accurate statement would probably be uttered, *Olender v. United States*, 210 F. 2d 795 (9th Cir. 1954); thus giving it the "guaranty of the occasion." *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 207 Fed. 515 (2d Cir. 1913). The United States Supreme Court has characterized newspaper reports of stock market prices as "trustworthy" and held them to be admissible. *Virginia v. West Virginia*, 238 U. S. 202, 59 L. Ed. 1272 (1915). The federal courts have become more liberal in allowing evidence to be admitted, and have allowed evidence where "relevant and material." 5 MOORE, FEDERAL PRACTICE § 43.02(3) (2d ed. 1951). Rule forty-three has been interpreted as allowing evidence to be admitted, rather than excluded, whenever there is doubt as to its competency. *Pfotzer v. Aqua Syss.*, 162 F. 2d 779, (2d Cir. 1947). Hearsay statements in newspaper articles and clippings have been declared inadmissible in many state courts, *Lindahl v. Supreme Ct. I. O. F.*, 100 Minn. 87, 110 N. W. 358 (1907); *Green v. Ashland Water Co.*, 101 Wis. 258, 77 N. W. 722 (1898), even though at the time they were attempting to prove such believable reports as a person's death. *Bebbington v. California W. Ins. Co.*, 30 Cal. 2d 157, 180 P. 2d 673 (1947); *State v. Adanks*, 256 S. W. 768 (Mo. 1923). South Carolina has had no case involving the admissibility of a hearsay statement in a newspaper, but statements from books have been declared to be incompetent and inadmissible. *Edwards v. Union Mills*, 162 S. C. 17, 159 S. E. 818 (1931). Although the United States Supreme Court admitted newspaper reports of stock market prices as being "trust-

worthy," *Virginia v. West Virginia, supra,* in most jurisdictions it is necessary for such evidence to fit into one of the specific exceptions to the hearsay rule, *Camps v. New York Transit Authority,* 261 F. 2d 320 (2d Cir. 1958); such as where an eighty year old newspaper was admitted as an "ancient document." *Trustees v. Farmers Sav. Bank,* 66 Ohio L. Abs. 332, 113 N. E. 2d 409 (Ohio C. P. 1953), *aff'd,* 115 N. E. 2d 690 (Ohio Ct. App. 1953). One state court even upheld the admission of a newspaper where it was objected to as hearsay, but the truthfulness of what it purported to prove was not denied. *Pilkington v. Pilkington,* 230 Mo. App. 569, 93 S. W. 2d 1068 (1936).

The United States Supreme Court having declared stock market price lists from a newspaper as admissible evidence of the price at that time, *Virginia v. West Virginia, supra,* how can it be denied that a newspaper report of a fire is admissible as evidence that a fire occurred? In a published price list the chances of error are enormous, while the chance of reporting a fire which did not occur is most unlikely. This decision's only fault is its tardiness. The courts have heretofore barred a source of reliable information. We recognize that newspapers often make glaring errors, but these are obvious to the most casual reader. The trial judge can easily ascertain the reliability of the newspaper account by the type of facts attempted to be proven. Certainly, all of our judges know that Dewey was never President (Chicago Tribune, Nov. 3, 1948). The newspaper in this case could have been admissible under several specific exceptions to the hearsay rule. It could possibly have been admitted as a "business record"; for what is the business of a newspaper but to record and report such events. *But see Johnston v. Lutz,* 253 N. Y. 124, 170 N. E. 517 (1930). It was fifty-eight years old and could have qualified as an "ancient document." See *Trustees v. Farmers Sav. Bank, supra.* It was, indeed, a record of a "personal observation." While hearsay evidence has usually been excluded unless it would fit into one of these specific exceptions, the court here has taken all of these exceptions and put them under the heading of "necessary and trustworthy, relevant and material." The already recognized exceptions fit easily into this general classification, and it furnishes a practical yardstick by which to measure evidence in future cases. It should not be necessary to squeeze evidence into one of the hearsay exceptions when it meets the

general requirements prescribed by this decision. The position taken by this court was advocated by Wigmore, and the trail was blazed by Judge Learned Hand in *G. & C. Merriam Co. v Syndicate Pub. Co., supra,* where he could not find a specific exception to allow the hearsay evidence offered, he declared it admissible under the "principle" of the hearsay rule. Often an old newspaper report of an event may be the only recordation of its happening, as in this case, and to deny this evidence to the court is to deprive it of evidence available to the public at large. With little effort the court could have molded the newspaper article to fit into one of the exceptions, instead they have sought a general rule leaving much to the discretion of the trial judge. This is proper, since the trial judge is in the best position to decide the fate of the evidence offered. Certainly a major step has been made in the development of the law of evidence. In allowing the newspaper article a new exception to the hearsay rule has not been established, but the principle of all the established exceptions has now become law.

C. JOE ROOF.

TRADE REGULATION — Fair Trade Act — Constitutionality of Permissive Contract Provision. — The plaintiff, retailer, brought proceedings against the defendant, manufacturer, for declaratory judgment that the Fair Trade Act, VA. CODE ANN. §§ 59-8.1 to -8.9 (Supp. 1960), is unconstitutional and invalid. Prior to reselling flashbulbs at a price less than the specified minimum resale price, the plaintiff was notified by letter of the minimum resale prices. After receiving an adverse judgment in the lower court the retailer brought error to the state supreme court. Held: Affirmed. Acceptance of the commodities for resale with notice attached stating the minimum resale prices is actual notice, and acceptance with actual notice is deemed assent to the terms and a contract is created. *Standard Drug Co. v. General Elec. Co.,* 202 Va. 367, 117 S. E. 2d 289 (1960). Petition for cert. filed, 29 U. S. L. Week 3375 (U. S. June 1, 1961) (No. 1013).

The fair trade laws are in effect a general statement of policy sanctioning vertical price fixing of commodities bearing the mark of the producer, although such policy runs directly counter to the policy of the anti-trust laws and the

common law. *General Elec. Co. v. R. H. Macy & Co.*, 103 N. Y. S. 2d 440, 199 Misc. 87 (1951). The avowed purpose of such legislation is the protection of the producer against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguishing trademark, brand or tradename, and such objective is to be effectuated by preventing price cutting. *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 9 So. 2d 303 (1942); *General Elec. Co. v. R. H. Macy & Co., supra.* The backbone of every fair trade law is the "non-signer" clause, by which an individual not a party to a price-fixing contract may be bound by its terms. *Tichenor Antiseptic Co. v. Schwegmann,* 231 La. 51, 90 So. 2d 343 (1956); *Rogers-Kent, Inc. v. General Elec. Co.*, 231 S. C. 636, 99 S. E. 2d 665 (1957). The U. S. Supreme Court in 1911 ruled that all resale price maintenance agreements in interstate commerce were violative of the Sherman Anti-Trust Act, such a contract amounting to an unlawful restraint of trade. *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U. S. 373, 55 L. Ed. 502 (1911). In 1936, the same Court upheld an Illinois statute authorizing resale price maintenance agreements as an appropriate means for protecting the good will attached to producers' trademarks. In holding that the "non-signer" clause did not violate the due process clause of the U. S. Constitution, the Court reasoned that the retailers had not been unlawfully deprived of the right to dispose of their property at their own price since, "under an implied consent theory they were said to have acquired the product impressed with a restriction running with it." *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 229 U. S. 183, 81 L. Ed. 109 (1939). The Miller-Tydings Act exempted fair trade legislation from the previous prohibitions of the Sherman Act. 50 Stat. 693 (1937), 15 U. S. C. § 1 (1958). In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 95 L. Ed. 1035 (1951), it was held that the Miller-Tydings Act applied only to cases where the parties had entered into contracts made under state fair trade laws, and in so holding the court exposed the controversial "non-signer" clause to the statutory prohibitions on restraint of trade. In an effort to obliviate the effect of the ruling in *Schwegmann Bros. v. Calvert Distillers Corp., supra,* the McGuire Act was passed. This act legalizes state "non-signer" provisions in interstate commerce where such provisions are valid components of the state fair trade law. 66 Stat. 631 (1952), 15 U. S. C. § 45 (1958). The

McGuire Act was held constitutional in 1953, and the court said that until the U. S. Supreme Court ruled otherwise its ruling in *Old Dearborn* would prevail. *Eli Lilly & Co. v. Schwegmann Bros. Giant Super Mkts.*, 205 F. 2d 788 (5th Cir. 1953). With Fair Trade Acts presently secure at the federal level, the opponents of fair trade have had their greatest success in attacking the legislation in the state courts on state constitutional grounds. Nearly all of the states have Fair Trade Acts, and the majority of those tested and sustained have been upheld on virtually the same ground as presented in *Old Dearborn*. *Max Factor v. Kunsman*, 5 Cal. 2d 466, 55 P. 2d 177 (1936); *Bourgois Sale Co. v. Dorfman*, 273 N. Y. 167, 7 N. E. 2d 30 (1937); 34 ORE. L. REV. 128 (1955). The rest of the state supreme courts, in what has been regarded as a trend, have struck down the statutes as violative of the respective state constitutions and, in doing so, have rejected the arguments and reasoning of the *Old Dearborn* decision. The specific grounds for declaring the provisions unconstitutional have varied, but the theories most often adopted are: 1) Violation of due process of law. *Cox v. General Elec. Co.*, 211 Ga. 286, 85 S. E. 2d 514 (1955); *Rogers-Kent, Inc. v. General Elec. Co., supra.* 2) Denial of equal protection of the laws. *McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 195 Neb. 703, 68 N. W. 2d 608 (1955); and 3) Unlawful delegation of legislative power. *Olin Mathieson Chem. Corp v. Francis*, 134 Colo. 160, 301 P. 2d 139 (1956); *Quality Oil Co. v. E. I. duPont de Nemours & Co.*, 182 Kan. 488, 322 P. 2d 731 (1958). In 1956, Virginia ruled that its Fair Trade Act, VA. CODE ANN. §§ 59-1 to -8 (Supp. 1960), was in conflict with subsequently amended sections of the Anti-Monopoly Act, VA. CODE ANN. §§ 59-20 to -40 (Supp. 1960), and had been repealed by implication, and thus did not determine the constitutionality of the "non-signer" provision. *Benrus Watch Co. v. Kuisch*, 198 Va. 94, 92 S. E. 2d 384 (1956). The General Assembly of Virginia re-enacted the Fair Trade Act in 1958, substituting for the "non-signer" clause a permissive contractual provision that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer. VA. CODE ANN. §§ 59-8.1 to -8.9 (Supp. 1960).

By elimination of the controversial "non-signer" clause and substituting for it a permissive contract provision, Virginia has removed the chief ground and reason relied upon by

courts that have held Fair Trade Acts to be unconstitutional. The agreement between the manufacturer or distributor and retailer restricting the sale of trademarked goods at less than a specified minimum price is limited to voluntary agreements. As stated by the court in *Schwegmann Bros. v. Calvert Distillers Corp., supra,* "[c]ontracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing." Questions may arise as to whether the agreement actually constitutes a "contract" or is merely a stipulation by the seller made a "contract" by legislative fiat regardless of assent by the buyer. Under the act acceptance of the commodities for resale with notice attached stating the minimum resale prices is actual notice, and acceptance with actual notice is deemed assent to the terms and a contract is formed. An analogous situation is found in the resale of patented goods. The decisions of the U. S. Supreme Court have firmly established that a patentee cannot, by virtue of his statutory monopoly, impose, by notice accompanying the goods, a restriction as to the resale price which would accompany them into the hands of subsequent purchasers. *United States v. General Elec. Co.*, 272 U. S. 476, 71 L. Ed. 362 (1926); *Ethyl Gasoline Corp. v. United States,* 309 U. S. 436, 84 L. Ed. 852 (1940).

Although the present Virginia act eliminates the "non-signer" clause, this factor alone is not sufficient to uphold the constitutionality of the Fair Trade Act, especially where the courts do not recognize a need for them. The courts will still have to accept and rely to a large extent upon the reasoning of *Old Dearborn,* as Virginia did in this case. The present trend is to regard Fair Trade Acts as price fixing statutes, whereas in *Old Dearborn* the court said that the primary aim is to protect the property, namely, the goodwill, of the producer and that the price restrictions were adopted as an appropriate means to that legitimate end, not as an end in itself. In *Rogers-Kent v. General Elec. Co., supra,* the South Carolina Supreme Court held its Fair Trade Act unconstitutional as it applied to "non-signers." In its decision the Court said that the Fair Trade Act can be justified only upon the theory that it is a proper exercise of the police power of the state which can only be exercised where it is reasonably necessary in the interest of the public safety, health, and general welfare, and that it was difficult to find justification for this legislation

upon these considerations since the act applies to trade marked products on which no distinction is made between commodities affected with a public interest and those that are not. Therefore, even though the act eliminates the controversial "non-signer" clause, the constitutionality of Fair Trade Acts patterned after the present Virginia act will seemingly depend to some extent upon acceptance or rejection of the reasoning in *Old Dearborn*, and the courts' views as to the need for such statutes.

DALTON FLOYD, JR.

TRESPASS — Infants — Can A Nine-Year-Old Child Form The Necessary Intent in an Action of Trespass? — Plaintiff brought an action of trespass against a nine-year-old defendant who admittedly swam to the bottom of plaintiff's public swimming pool, raised a metal cover over a drain opening, inserted a tennis ball into the pipe, and replaced the cover. The ball was sucked into a critical part of the pipe and caused substantial damage. The lower court judge in his instructions to the jury stated that in determining whether or not the defendant was a trespasser the jury should consider whether the nature of the act is such that children of like age would realize its injurious consequences. On appeal, HELD: Reversed. The child's act was clearly intentional and this issue should not have been submitted to the jury at all. *Cleveland v. Perry,* 165 A. 2d 485 (D. C. Mun. App. 1960).

The broad common law principle regarding an action ex delicto is absolute liability regardless of the age of the infant. *Sikes v. Johnson,* 16 Mass. 389 (1820), 27 AM. JUR. *Infants* §§ 90, 91 (1940). However, the age of an infant in an action of negligence does play a substantial part in determining his liability, since a child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult; but his conduct is to be judged by the standard to be expected from a child of like age, intelligence, and experience under similar circumstances. *Charbonneau v. MacRury,* 84 N. H. 501, 153 Atl. 457 (1931). Another exception seems to be where the infant is incapable of forming the necessary mental attitudes which are required elements of the tort in question. For example, the necessary ingredients

of libel and slander are malice and evil intent, therefore a child of such immature and tender years that he cannot form malice or entertain conscious evil intention cannot be guilty of either libel or slander. *Munden v. Harris,* 153 Mo. App. 652, 134 S. W. 1076 (1911). As to intentional torts, the courts appear to be in agreement that in so far as a young child can form the intention to do the physical act releasing the harmful force, he can be held liable. *Ellis v. D'Angelo,* 116 Cal. App. 2d 310, 253 P. 2d 675 (1953). An action of trespass is regarded as an intentional tort; therefore, it is not essential that the defendant act designedly if the injury is the immediate result of the force applied by him and the plaintiff is damaged by this force. *Newson v. Anderson,* 24 N. C. 42, 37 Am. Dec. 406 (1941). A lunatic is held accountable in a civil action for any tort he may commit, on the development of the principle that in trespass the intent is not conclusive. *McIntyre v. Shorlty,* 121 Ill. 660, 13 N. E. 239 (1887). In an intentional tort the defendant may be liable although he has meant nothing more than a good-natured practical joke. *Reynold v. Pierson,* 29 Ind. App. 273, 64 N. E. 484 (1902). Even where he is seeking the plaintiff's own good, liability may result. *Johnson v. McCommel,* 15 Hun 293 (N. Y. 1878). In a personal injuries action the intent to harm need not be established, and the absence of it does not absolve a six-year-old defendant so long as the act was done with intent to inflict an offensive bodily contact. *Baldenger v. Banks,* 201 N. Y. S. 2d 629 (App. Div. 2d (1960). The intent of a five-year-old child to cause harm is immaterial in determining his liability under a trespass action. *Seaburg v. Williams,* 16 Ill. App. 2d 295, 148 N. E. 2d 49 (1958).

The instant case is certainly no variation of the general rule which has stood the test of time and seems deeply embedded in the common law. It is contended by those who appear to be in a minority that the mentality required of an infant in a wilful tort of the trespass type should conform to that required in negligent torts. A distinction is evident. A child of tender age may be without sufficient mentality to foresee that his careless conduct might result in injury to others, but it can certainly be expected that a nine-year-old child is capable of intending to do his positive acts, which is the only intent necessary in an action of trespass. Therefore, it seems consistent to hold that the child who is incapable of negligence is at the same time capable of intending to commit a positive

act which is wrongful in itself. It cannot be correctly stated that the courts in allowing recovery have completely eliminated the age factor. It is still conclusive if there is proof that the infant is incapable of intending to do his positive acts; going further would be recognizing the ancient theories of liability without fault. The results of such decisions, as rendered by this court, should have the effect of parents maintaining a closer watch over their children thereby reducing the risk of such injuries occurring.

WILLIAM HAGOOD.