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Recent Cases

CONSTITUTIONAL LAW—INTERSTATE COMMERCE

*Santa Cruz Fruit Packing Co. v. National Labor Relations Board*¹

The petitioner was engaged at its Oakland plant in canning, packing, and shipping fruit and vegetables, the bulk of which was grown in the state, and all but thirty-five percent of which was sold within the state after being canned and packed. The National Labor Relations Board found that the company, in violation of the National Labor Relations Act,² had dismissed certain warehousemen who undertook to join a labor union.³ The cease and desist order of the Board was upheld by the Circuit Court of Appeals for the Ninth Circuit and, on certiorari, by the United States Supreme Court. The petitioner urged that the warehousemen were engaged in intrastate commerce and were, therefore, not subject to federal regulation. The court decided that, although when viewed separately the warehousemen were engaged in intrastate business, the close and intimate effect on interstate commerce of the labor strife in the plant brought the subject matter within the authority of the commerce clause. This effect was traced to the thirty-five percent of the finished products which was sold and shipped in interstate commerce.

This difficult and increasingly important question is presented by the case—when does local activity affect interstate commerce substantially enough to bring the commerce power of the federal government into play? Since the broad general principles expounded by Chief Justice Marshall,⁴ various attempts have been made to formulate rules by which to answer the question. It has been said that the commerce power may be exercised when the “direct object” of the local acts is to burden commerce.⁵ It has also been said that there must be

1. 58 Sup. Ct. 656 (1938).

2. 49 STAT. 450 (1935), 29 U. S. C. § 152 (Supp. 1938); 49 STAT. 452 (1935), 29 U. S. C. § 158 (Supp. 1938).

3. *Ibid.* § 152, subd. 7, provides that “the term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.” § 158, subd. 1, provides that it shall be an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights” of self-organization. Subd. 3 adds, or “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”

4. *Gibbons v. Ogden*, 9 Wheat. 1, 8 (U. S. 1824) (Marshall said the commerce power applied to “those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States. . . .”) (Italics the author’s).

5. *Swift & Co. v. United States*, 196 U. S. 375, 397 (1905) (Mr. Justice Holmes said the effect on interstate commerce “is a direct object; it is that for the sake of which the several specific acts and courses of conduct are done

an "intent" to burden commerce.⁶ A more recent standard offered was the "direct-indirect" test championed so vigorously by the majority opinions in *Schechter Poultry Corp. v. United States*⁷ and in *Carter v. Carter Coal Co.*⁸ Seizing upon the adjective "direct," which is of rather a vague and indefinite connotation at best, the court sought to endow it with a specific meaning and thereby enclose this phase of the commerce power within bounds of slide-rule precision. However, in 1937, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,⁹ the court carefully avoided treating the problem as one to be solved by the application of rigid formulas. The principal case affirms the holding of the *Jones & Laughlin* case, saying ". . . the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution. . . ." This represents the present approach to the question, and it is obvious this approach is of little practical assistance in determining when the effect of local activity on interstate commerce is so substantial that the federal government may act.

The question is now admittedly one of degree, and that degree can be ascertained only by the gradual process of exclusion and inclusion as different factual situations arise and are adjudicated. The principal case is significant in that it fixes a new outpost in liberal application of the commerce power in regard to intrastate business, as is shown by a comparison of the facts with those of the *Jones & Laughlin* case. In the latter case the company involved was a huge steel concern of national proportions, the great bulk of whose business was in interstate commerce, while here only thirty-five percent of the locally produced goods ever reached interstate commerce. Furthermore, in the former case not only was the steel, produced in the plant where the labor differences

and adopted."); *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895), where there was a monopoly of manufacture within the State, was distinguished on the ground that the effect on interstate commerce was "not a necessary consequence nor a primary end".

6. *Anderson v. United States*, 171 U. S. 604, 618 (1898) (the court said it was not the intent to burden interstate commerce); *Montague & Co. v. Lowry*, 193 U. S. 38, 46 (1904) (in holding intrastate contracts to control the sales of tile to burden interstate commerce the court said the scheme "ceases to be a mere transaction in the State of California, and becomes part of a purpose which, . . . amounts to . . . a contract . . . in restraint of interstate trade or commerce."); *Swift & Co. v. United States*, 196 U. S. 375, 398 (1905) ("The intent of the combination is not merely to restrict competition among the parties, but, . . . to monopolize commerce among the States."); *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922) (the court said coal mining was not interstate commerce, but restraint of it may be a burden on interstate commerce if the relationship is close, direct, and substantial, and the intent to restrain interstate commerce can reasonably be inferred); *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295 (1925); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America*, 274 U. S. 37, 54 (1927).

7. 295 U. S. 495, 544 (1935).

8. 298 U. S. 238, 307 (1936).

9. 301 U. S. 1 (1937).

occurred, intended presently for shipment in interstate commerce, but also most of the raw materials that went into the production of the steel had barely ended their interstate journey. Thus the production was but a brief interlude between two vast movements in interstate commerce. In the instant case, however, the fruit was, for the most part, locally grown, and all the operations of the company up to and including the functions of the warehousemen were only local in character. The effect of strife among the warehousemen upon commerce had to be traced to the comparatively small percent that later found its way into commerce. In the *Jones & Laughlin* case the court relied heavily upon the magnitude of the interstate operations involved. Also, the court was probably influenced by the striking similarity of facts to those in *Stafford v. Wallace*,¹⁰ where the close relation which the local acts of commission men in stockyards bore to the previous and subsequent interstate movement of stock led the court to invoke the "throat of commerce" doctrine. However, in the *Fruit Co.* case the facts do not permit any conceivable reliance upon this doctrine, nor do they present a huge corporation whose operations are chiefly interstate. In these respects this case represents a materially broader exercise of the commerce power than does any previous case.

Since the question is one of degree, and the line of demarcation between local activity affecting interstate commerce and mere local activity can be drawn only after varied situations have been decided upon, this holding is a significant step toward a state of predictability of the law regarding this phase of the commerce power.

JESSE D. JAMES

CRIMINAL LAW—ASSAULT WITH INTENT TO MAIM—INTENT REQUIRED

*State v. Martin*¹

The state's evidence showed that at night, the defendant threw an electric light bulb filled with acid against the left front door of a cab owned by the T. Cab Company, as the two cars passed going in opposite directions at a moderate rate of speed. The windows of the cab were open. The prosecuting witness was riding on the right side and a woman on the left side of the back seat, and the driver on the left side of the front seat. The acid splattered over the taxicab, but none of the occupants was burned. There had been recent labor organization trouble and defendant, being the agent of a labor union, had shortly before attempted to organize the employees of the T. Cab Company, without success. There was nothing in the evidence to show that defendant knew the prosecuting witness was in the cab. Defendant was convicted in the trial court of the statutory crime of assault with intent to maim, but the judg-

10. 258 U. S. 495, 516 (1922).

1. 119 S. W. (2d) 298 (Mo. 1938).

ment was reversed by the supreme court because the evidence did not justify submitting the case to the jury.

This case presents the question of specific intent required in the statutory crime of assault with intent to maim.² The specific intent necessarily depends on the wording of the statute,³ and the purpose for which the statute was passed.⁴

In cases involving statutes which are of the wording and purpose of the Missouri statute, where the victim of the assault is thought to be another, the very person assaulted is the person intended to be maimed, and the mistake as to identity is immaterial.⁵ Where the case involves an accidental blow from mistake in aim, the majority of courts hold a conviction can not be sustained.⁶ The early Missouri cases sustained convictions where it appeared that the assailant's blow was in fact intended for another,⁷ but later cases indicate this state is now in line with the majority of jurisdictions.⁸

Specific intent cannot be presumed, but must be proved by the state as one of the necessary facts of the case, though the defendant's acts may be shown as evidence from which the jury can find the existence of the intent charged,⁹ and malice generally or a general criminal intent will not be sufficient.¹⁰

2. Mo. REV. STAT. (1929) § 4014, making it a felony for any person to shoot at or stab another or "assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person. . . ."

3. A charge of assault with intent to kill, where the actual intent was directed against another, was not sustained in the case of *Callahan v. State*, 21 Ohio St. 306 (1871), under the Ohio statute which reads, "if any person shall maliciously shoot . . . any other person with intent to kill or maim such person, every person so offending shall be guilty of a misdemeanor." Under similar facts a charge of assault to do great bodily harm was sustained in *People v. Keefer*, 18 Cal. 636 (1861), under a statute which reads, "if anyone commits an assault with a deadly weapon with intent to do injury upon a person, shall be punished. . . ."

4. *Rex v. Williams*, 1 Leach 529 (K. B. 1790). There the defendant was indicted under a statute prohibiting the cutting and defacing of wearing apparel. The evidence showed that defendant had intended primarily to wound the person of the wearer, although he must have known that in so doing he would cut the clothing of the person. The court held, in view of the particular circumstances under which the statute was passed, that a primary intent to deface clothing was required, and dismissed the indictment. Somewhat analogous also are *People v. Cotteral*, 18 Johns 115 (N. Y. 1820), and *Delany v. State*, 41 Tex. 601 (1874). See Note (1920) 18 MICH. L. REV. 237.

5. *McGehee v. State*, 62 Miss. 772 (1885); *State v. Wansong*, 271 Mo. 50, 195 S. W. 999 (1917); *State v. Layton*, 332 Mo. 216, 58 S. W. (2d) 454 (1933); *State v. West*, 152 N. C. 832, 68 S. E. 14 (1910); *Olds v. State*, 54 Tex. Crim. Rep. 411, 113 S. W. 272 (1908); Note (1912) 37 L. R. A. (N. S.) 172.

6. *Lacefield v. State*, 34 Ark. 275 (1879); *Commonwealth v. Morgan*, 74 Ky. 601 (1876); *Morgan v. State*, 21 Miss. 242 (1849); *People v. Robinson*, 6 Utah 101, 21 Pac. 403 (1889).

7. *State v. Jump*, 90 Mo. 171, 2 S. W. 279 (1886); *State v. Montgomery*, 91 Mo. 52, 3 S. W. 379 (1886).

8. *State v. Mulhall*, 199 Mo. 202, 97 S. W. 583 (1906); *State v. Williamson*, 203 Mo. 591, 102 S. W. 519 (1907).

9. *Simpson v. State*, 81 Fla. 292, 87 So. 920 (1921); *State v. Worthen*, 111 Iowa 267, 82 N. W. 910 (1900); *Moseley v. State*, 92 Miss. 250, 45 So. 833 (1908).

10. *Andrews v. State*, 37 Ga. App. 95, 138 S. E. 923 (1927); *State v.*

The court in the principal case indicates that the evidence would have sustained a conviction if the defendant had been charged with assault with intent to maim the driver, because the driver was either seen by the assailant or it was known that some one must necessarily have been operating the cab. If the assailant had intended to maim the driver, that intent could not be transferred to any of the other occupants of the cab,¹¹ as it could have been if the charge had been murder, manslaughter,¹² or common assault.¹³ Nor could the assailant have been convicted of assault with intent to maim an occupant of the cab if his intent had been to injure the cab only.¹⁴

Since intent cannot be transferred in the crime of assault with intent to maim, and since there was no evidence to show that defendant knew or had reason to believe the prosecuting witness or any third party was in the cab, the specific intent necessary for the crime is entirely lacking.

HARRY H. BOCK

EQUITY—NON-PROFIT CORPORATION—INJUNCTION AGAINST UNFAIR USE OF
CORPORATE NAME

*Pacific Movement of the Eastern World v. Wright.*¹

Plaintiff, seeking an injunction, alleged that defendants, who were suspended members of the plaintiff benevolent corporation, were arrogating to themselves the rights and privileges of the corporation by calling meetings and raising money and acting as officials of plaintiff corporation, thus damaging it and thwarting the accomplishment of its benevolent purposes. Defendants contended that equity had no jurisdiction since no money or property interests were involved. *Held*, an adequate remedy against defendants for damages

Johnson, 318 Mo. 596, 300 S. W. 702 (1927). In most jurisdictions it is held that if at the time of the commission of the offense the accused was intoxicated so that he did not have the mental capacity to entertain the specific intent, which is required to constitute the crime, he must necessarily be acquitted. See annotations in (1897) 36 L. R. A. 465; (1921) 12 A. L. R. 861; Note (1920) 34 HARV. L. REV. 78; (1897) 11 HARV. L. REV. 341. Missouri has seemingly adopted the rule that drunkenness cannot be interposed as a defense to an offense committed as the immediate result of such drunkenness, and although there may be no specific intent, the law will apply the intent necessary. *State v. Bobbst*, 269 Mo. 214, 190 S. W. 257 (1916); *State v. Jordan*, 285 Mo. 62, 225 S. W. 905 (1920), assault with intent to kill, a crime requiring a specific intent. See comment (1925) 32 U. OF MO. BULL. L. SER. 59.

11. *State v. Mulhall*, 199 Mo. 202, 97 S. W. 583 (1906); *State v. Williamson*, 203 Mo. 591, 102 S. W. 519 (1907). See Cook, *Act, Intention, and Motive in the Criminal Law* (1917) 26 YALE L. J. 645.

12. *State v. Payton*, 90 Mo. 220, 2 S. W. 394 (1886); *State v. Gilmore*, 95 Mo. 554, 8 S. W. 359 (1888); *State v. Pollard*, 139 Mo. 220, 40 S. W. 949 (1897); *State v. Clark*, 147 Mo. 20, 47 S. W. 886 (1898); Note (1904) 63 L. R. A. 660.

13. *Powell v. State*, 32 Tex. Crim. Rep. 230, 22 S. W. 677 (1893); *State v. Meadows*, 18 W. Va. 658 (1881).

14. *People v. Keefer*, 18 Cal. 636 (1861).

1. 117 S. W. (2d) 647 (Mo. App. 1938).

cannot be afforded here, and by statute² an injunction will issue in such a case to prevent the doing of a legal wrong. "The name of a corporation . . . is a necessary element of its existence, and the right to its exclusive use will be protected upon the same principle that persons are protected in the use of trade-marks."³

The right to be protected in the exclusive use of a name is a common law right,⁴ and as to corporations⁵ has been protected by statute,⁶ the courts since an early date having said that a corporation's right to its name is a necessary element of its existence.⁷ Having a right to such use, will equity enjoin a violation of that right? This question raises two problems: First, the one defendant stressed, viz., assuming that the right to exclusive use of a name is not a property right, without it, then, does equity have jurisdiction to issue an injunction? Second, is the right to exclusive use of a name a property right in itself?⁸ If it is, of course, no problem is involved. Basically, the two questions must be considered together, since cases and writers, in dealing with the problem, combine the two, in effect saying that although a property right is necessary, and an injunction should be refused where it does not exist, a recognized personal right will, nevertheless, be protected, a property right being found somehow and somewhere, either in the personal right itself or in a so-called right of substance. This has been said in many different ways.⁹ The ultimate result reached, however, is by way of protecting the interest, whether

2. MO. REV. STAT. (1929) § 1519.

3. Court quoting from *State ex rel. Great American Home Savings Institution v. Lee*, 288 Mo. 679, 233 S. W. 20, 28 (1921).

4. *State ex rel. Hutchinson v. McGrath*, 92 Mo. 355, 5 S. W. 29 (1887); *Loyal Order of Moose v. Paramount Progressive Order of Moose*, 224 Mo. App. 276, 26 S. W. (2d) 826 (1930). But see *Baumann v. Baumann*, 250 N. Y. 382, 165 N. E. 819 (1929), where defendants were husband and the woman he married after an illegal divorce from plaintiff. Plaintiff sought to enjoin D from taking the husband's name contending that only P, as husband's wife, was entitled to it. The injunction was denied. This case was subjected to wide criticism and seems to be against the weight of authority. Notes (1929) 4 Sr. JOHN'S L. REV. 100; (1929) 14 MINN. L. REV. 96; (1929) 14 CORN. L. Q. 501; (1930) 28 MICH. L. REV. 342.

5. As pointed out by the court in the principal case, the United States Supreme Court has repeatedly held a corporation to be a person within the Fourteenth Amendment.

6. MO. REV. STAT. (1929) § 14338, providing that no person, society, association, or corporation shall assume a name which is the same as or a colorable imitation of the name of another and calculated to deceive. Where two claim the same name, the first organized and using the name is entitled to exclusive use. MO. REV. STAT. (1929) § 4541 (certificate of incorporation will not be issued in the name of or similar to an existing corporation). Note L. R. A. 1915B 1074.

7. *State ex rel. Hutchinson v. McGrath*, 92 Mo. 355, 5 S. W. 29 (1887) (cited in the *Lee* case, *supra* note 3, which was in turn cited in the principal case).

8. To this effect, see *Iowa Auto Market v. Auto Market and Exch.*, 197 Iowa 420, 197 N. W. 321 (1924); *Middleton v. Mut. Benevolent Soc.*, 159 Ga. 536, 126 S. E. 786 (1925); (1926); 2 CAMB. L. J. 396; Note L. R. A. 1915B 1074.

9. *Ex parte Badger*, 286 Mo. 139, 226 S. W. 936 (1920); *Baumann v. Baumann*, 250 N. Y. 382, 165 N. E. 819 (1929) (dissenting opinion); (1925) 9 MINN. L. REV. 283; Note (1897) 37 L. R. A. 783.

it be property as such or merely an interest of so-called personality according to the varying feelings of the courts as to the justice of the causes presented for consideration.

It will be noted that here the invasion of plaintiff's right or interest is in the use of plaintiff's corporate name by way of getting money and calling meetings by the apparently unorganized defendants. No great difference can be seen, however, between this and the situation presented by many cases where plaintiff's name, ritual, and insignia were used by an organized group acting in competition with the plaintiff.¹⁰ Of similarity, also, are cases where plaintiff and defendant are profit seeking competitors,¹¹ in which plaintiff's prior¹² use of its name is protected if defendant's use is so similar that it will be likely to mislead the public.¹³ The reason for granting injunctive relief in this latter type of case has been said to be found in the desire to protect the originator of good will and to prevent the subsequent user from capitalizing on the benefits to be derived from the use of the name alone, apart from the caliber of the thing sold, be it goods or services.¹⁴ As has been figuratively said, ". . . the commercial body is full of parasites who thrive by feeding on the commercial tissue which other men's labor and skill have built up. . . ." ¹⁵ Would not the same reasoning seem to apply in the case of a non-profit enterprise, the thing "sold" being, in such an instance, membership rather than goods or services? No sound distinction can be seen between the two groups. The confusion arising from the similarity in names will in both cases result in reducing the plaintiff's followers, actual or prospective, either by satisfying them in the use of defendant's high quality offering, by making them dissatisfied with plaintiff's offering through use of defendant's inferior one, or by diverting them from the plaintiff.^{15a} Nor would fraud or fraudulent intent in defendant's use of the name seem to be a requirement in this con-

10. Note L. R. A. 1915B 1074.

11. Note (1930) 66 A. L. R. 948 (cases collected in an exhaustive annotation).

12. The use by plaintiff must be prior to that of defendant. Defendant cannot by subsequently incorporating or registering the name filch plaintiff's name, even though plaintiff was unincorporated: *Graves v. District Grand Lodge No. 18, 155 Ga. 147, 116 S. E. 613 (1923)*; *Middleton v. Mut. Benevolent Soc., 159 Ga. 536, 126 S. E. 786 (1925)*; *Filley v. Fassett, 44 Mo. 168 (1869)*; 5 C. J. 1343; Note L. R. A. 1915B 1074.

13. *Faisan v. Adair, 144 Ga. 797, 87 S. E. 1080 (1915), aff'd, 148 Ga. 403, 96 S. E. 871 (1918)*; *Grand Orient Lodge of La. v. Jackson, 12 La. App. 555, 125 So. 306 (1929)*; *Loyal Order of Moose v. Paramount Progressive Order of Moose, 224 Mo. App. 276, 26 S. W. (2d) 826 (1930)*; (1926) 35 YALE L. J. 752. Laches as barring plaintiff's relief: *Gaines & Co. v. Whyte Grocery, Fruit & Wine Co., 107 Mo. App. 507, 81 S. W. 648 (1904)*; *Burrell v. Michaux, 286 S. W. 176 (Tex. Com. App. 1926)*, noted in (1926) 75 U. OF PA. L. REV. 184; Note L. R. A. 1915B 1047.

14. McCollom, *Protection by Equity of Corporate Names Against Unfair Competition* (1906) 6 COL. L. REV. 245.

15. Note (1911) 5 ILL. L. REV. 499.

15a. (1930) 3 So. CALIF. L. REV. 439; (1937) 25 KY. L. J. 280.

nection, for ". . . where confusion will result and the 'business' be affected, there is authority, and with reason it would seem, for maintaining that a fraudulent intent is unnecessary . . . and the reason for distinguishing between commercial and non-commercial corporations disappears."¹⁶ Moreover, the situation presented in the principal case is a stronger one than that found in the commercial cases, since here plaintiff itself was the object of defendant's evil intent, no competing organization being involved. Nor is there a substantial difference where plaintiff is an unincorporated voluntary association.¹⁷

Much of the difficulty arising from the necessity of the property right would be avoided if equity had statutory authority to grant injunctions where the court thinks it just or convenient,¹⁸ rather than to limit the authority, even in the court's discretion, to cases where a legal wrong exists.¹⁹ This added requirement serves only to necessitate an inquiry as to what is a legal wrong. Without it, the injunctive power would, as a practical matter, be subjected to no more abuse than it is at present, and confusion in the cases would be substantially reduced.

CHARLES M. WALKER

FRAUDULENT CONVEYANCES—CONDITIONS PRECEDENT TO SETTING ASIDE

*Haynes v. Tyler*¹

Action to set aside a fraudulent conveyance. In May, 1934, Dunstan obtained a judgment against Haynes. On May 6, 1937, Haynes instituted an action against Dunstan on a promissory note. On May 18, 1937, Dunstan assigned his judgment to McDow, who knew of the action pending against Dunstan. On June 7, 1937, execution was issued on the assigned judgment. On the same day Haynes brought the present action to set aside the assignment claiming that it was a conveyance in fraud of creditors and alleging that Dunstan was insolvent and bankrupt. On September 13, 1937, judgment was rendered against Dunstan on the note. On November 9, 1937, the present suit came to trial and the petition was dismissed. On appeal it was held that the rights of the parties must be determined as of the time of the filing of the suit, and since Haynes was not a judgment creditor at that time the suit must fail. The allegation of bankruptcy was of no consequence since the proceedings took place under the unconstitutional Frazier-Lemke Act. No point was made by the court of Dunstan's uncontroverted insolvency.

The subject of the present suit is of a peculiar nature. The property alleged

16. (1909) 9 COL. L. REV. 634.

17. *State ex rel. Great American Home Savings Institution v. Lee*, 288 Mo. 679, 233 S. W. 20 (1921); *Faisan v. Adair*, 144 Ga. 797, 87 S. E. 1080 (1915), *aff'd*, 148 Ga. 403, 96 S. E. 871 (1918) *semble*.

18. Note (1897) 37 L. R. A. 783.

19. Mo. REV. STAT. (1929) § 1519.

1. 123 S. W. (2d) 609 (Mo. App. 1939).

to have been fraudulently conveyed is a chose in action against the plaintiff-creditor himself. The bill is founded on the proposition that the statutory right of set-off of judgment executions is such a property interest that an assignment for the purpose of preventing the potential set-off is within the rule against fraudulent conveyances.² This principle was recognized in *Ford v. Stevens Motor Car Co.*³ where an equitable right of set-off was enforced against the fraudulent assignee who took with notice of a pending action by the judgment debtor against the assignor. That case determines that the conveyance can be attacked. The instant case presents the further problem of the conditions under which the attack may be brought.

It is well settled that as a general rule a creditor's bill to set aside a fraudulent conveyance must be based on a judgment at law obtained before the equitable bill is filed.⁴ One can say with confidence that the rule finds justification in the supplementary character of equitable jurisdiction,⁵ but the application of and exceptions to the rule confuse any more precise statement of its foundation.

It is sometimes said that the creditor may not tie up the property unless he has a claim against the debtor which he may satisfy from the debtor's goods, and the latter is entitled to have that claim proved before a jury.⁶ As will be seen, however, the right to a jury trial does not avail the debtor in all situations; notably, situations containing elements suggestive in themselves of independent equitable jurisdiction such as a trust,⁷ or other equitable interest.⁸ But the fraud, on which the right to set the conveyance aside is predicated, is not sufficient grounds for equitable interference alone.⁹

It is sometimes said that the general ground for equitable jurisdiction is

2. Mo. REV. STAT. (1929) § 846. The statute applies to assignees. *Bauer v. Counts*, 197 Mo. App. 233, 193 S. W. 874 (1917).

3. 209 Mo. App. 144, 232 S. W. 222 (1921); *State ex rel. Stevens Motor Car Co. v. Allen*, 292 Mo. 360, 239 S. W. 105 (1922).

4. *Thias v. Siener*, 103 Mo. 314, 15 S. W. 772 (1890); *Davidson v. Dockery*, 179 Mo. 687, 78 S. W. 624 (1904); *Daggs v. McDermott*, 327 Mo. 73, 34 S. W. (2d) 46 (1931); *Dodd, Brown & Co. v. Levy*, 10 Mo. App. 121 (1881); *Commercial State Bank v. Ankrum*, 191 Mo. App. 251, 177 S. W. 778 (1915); *Gilson v. Carroll*, 231 Mo. App. 395, 97 S. W. (2d) 146 (1936). A foreign judgment will not suffice. *Crim v. Walker*, 79 Mo. 335 (1883).

5. WAITE, *FRAUDULENT CONVEYANCES* (3d ed. 1897) 6, 7.

6. See *Bewes, Inc. v. Buster*, 108 S. W. (2d) 66, 69, 70 (Mo. 1937), wherein the cases are collected; *Buckley v. Maupin*, 125 S. W. (2d) 820, 824 (Mo. 1939).

7. *Kankakee Woolen Mill Co. v. Kampe*, 38 Mo. App. 229, 238 (1889); *Cape County Savings Bank v. Wilson*, 225 Mo. App. 14, 34 S. W. (2d) 981 (1931).

8. *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592 (1891); *Heaton v. Dickson*, 153 Mo. App. 312, 133 S. W. 159 (1910). The theory is that once equity has taken jurisdiction it will do complete justice between the parties. *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592 (1891); *Lackland v. Smith*, 5 Mo. App. 153, 172 (1878).

9. *Gilson v. Carroll*, 231 Mo. App. 395, 97 S. W. (2d) 146 (1936); *Buckley v. Maupin*, 125 S. W. (2d) 820 (Mo. 1939). Nor will a plea of circuitry of action move the court. *Dodd, Brown & Co. v. Levy*, 10 Mo. App. 121, 124 (1881).

the inadequacy of the legal remedy, and that as a rule of thumb the inadequacy can only be shown by judgment obtained and execution returned *nulla bona*.¹⁰ It should be observed that this imposes an additional requirement beyond proof before a jury. The rule of thumb is not infrequently dispensed with.¹¹

A combination of the preceding theories, based on the proposition that the creditor's right to the property is of legal origin, that he must proceed at law so far as to establish such a right and no more, and though equitable assistance still rests upon the doctrine of the inadequacy of the legal remedy, the very nature of a fraudulent conveyance, by clouding the debtor's title and lessening the marketability of the asset, renders all legal remedies imperfect.¹² This theory being the broadest and most indefinite is most easily reconciled with the cases. It accounts for the decisions allowing a creditor's bill whenever the creditor has proceeded so far as, by the law of the jurisdiction, will give him a line on the property as may be the case by attachment,¹³ or mere rendition of judgment,¹⁴ for the existence of a lien coincides with a legal right to subject the property to the claim. It avoids the inconsistency of a requirement that the writ of execution be returned *nulla bona*, for neither the debtor nor his fraudulent assignee has a right to specify which property shall be taken, and the creditor should not be required to prove there was no other property available so long as the law recognizes his right to levy on this property if he chooses.¹⁵

It should be observed that none of these theories reconcile the exception which permits a general creditor to bring a creditor's bill against his insolvent debtor.¹⁶ There is no difficulty when the debtor is bankrupt because under the

10. *Merry v. Fremon*, 44 Mo. 518, 521 (1869); *Humphreys v. Atl. Milling Co.*, 98 Mo. 542, 10 S. W. 140 (1889). Execution may be dispensed with when the debtor is insolvent. *Turner v. Adams*, 46 Mo. 95, 99 (1870); *Steele v. Reid*, 284 Mo. 269, 223 S. W. 881 (1920); *Iron Co. v. McDonald*, 61 Mo. App. 559, 569 (1895).

11. See note 16, *infra*.

12. *Central National Bank v. Doran*, 109 Mo. 40, 18 S. W. 836 (1891); *Castorina v. Herrmann*, 340 Mo. 1026, 104 S. W. (2d) 297 (1937), wherein the cases are collected.

13. *Bainbridge v. Allen*, 70 N. J. Eq. 355, 61 Atl. 706 (1905). Mo. REV. STAT. (1929) § 1324 provides that an attaching creditor may maintain suit to set aside a fraudulent conveyance in equity. The rule in Missouri prior to the statute was contrary. *Martin v. Michael*, 23 Mo. 50 (1856).

14. Mo. REV. STAT. (1929) § 1104 provides that a judgment operates as a lien on real property in the county where issued. This applies to property that has been fraudulently conveyed. *Slattery v. Jones*, 96 Mo. 216, 8 S. W. 554 (1888). The property may be sold directly or the incumbrance may be removed in equity. *Knoop v. Kelsey*, 102 Mo. 291, 14 S. W. 110 (1890). If the judgment has become dormant then the suit cannot be maintained. *Mullen v. Hewitt*, 103 Mo. 639, 15 S. W. 924 (1890). But see *Merry v. Fremon*, 44 Mo. 518 (1869).

15. *Patton v. Bragg*, 113 Mo. 595, 20 S. W. 1059 (1893); *Dalton v. Barron*, 293 Mo. 36, 239 S. W. 97 (1922). There is much authority to the contrary. See 27 C. J. 725.

16. See *Pendleton v. Perkins*, 49 Mo. 565 (1872); *Lyons v. Murray*, 95 Mo. 23, 8 S. W. 170 (1888); *Gill v. Newhouse*, 178 S. W. 495 (Mo. 1915); *Hume v. Wright*, 274 S. W. 741, 744, 745 (Mo. 1925); *Lomax and Stanley Bank v. Peacher*, 30 S. W. (2d) 44 (Mo. 1930); *Farmers and Traders Bank v. Kendrick*,

Bankruptcy Act the trustee is accommodated to the position of a judgment creditor.¹⁷ But where the insolvency has not progressed to bankruptcy it is not clear why the fact of insolvency, which carries a fair inference of the ineffectiveness of the legal remedy when judgment is obtained, dispenses with the proof of legal right to assets. The Missouri Supreme Court, in its most recent utterance on the matter, has declined to recognize such an exception.¹⁸ It distinguished earlier authority on the ground that the trial at law was not only *futile* but *impossible* as well.¹⁹ But when the claim has been admitted,²⁰ or allowed by a probate court,²¹ or assignee for the benefit of creditors,²² the objection of uncertainty is overcome and equity will hear the case. These decisions may be indicative of a trend represented by the Uniform Fraudulent Conveyance Act,²³ independent statutes,²⁴ and even judicial construction²⁵ towards expediting the enforcement of claims against an (*a priori*) fraudulent and dilatory debtor.²⁶

The court in the present case chose to ascertain the rights of the parties as of the time of the filing of the bill. While the merit of this position might be questioned inasmuch as plaintiff Haynes was a judgment creditor at the time the present case went to trial,²⁷ there is perhaps a more serious objection. The

108 S. W. (2d) 62 (Mo. 1937); *Bewes, Inc. v. Buster*, 108 S. W. (2d) 66 (Mo. 1937); *Luthy v. Woods*, 1 Mo. App. 167 (1876) (but see same case in 6 Mo. App. 67 (1878)); *Beal v. McVicker*, 3 Mo. App. 592 (1876); *Nieters v. Brockman*, 11 Mo. App. 600 (1881); *Kankakee Woolen Mill Co. v. Kampe*, 38 Mo. App. 229 (1889); *White v. University Land Co.*, 49 Mo. App. 450 (1892); *Webb & Co. v. Midway Lumber Co.*, 69 Mo. App. 546, 554 (1896). *Cf. Mullen v. Hewitt*, 103 Mo. 639, 15 S. W. 924 (1890); *Mellier v. Bartlett*, 106 Mo. 381, 17 S. W. 295 (1891); *Atlas National Bank v. Moran Packing Co.*, 138 Mo. 59, 39 S. W. 71 (1897); *Ready v. Smith*, 170 Mo. 163, 70 S. W. 484 (1902); *Kent v. Curtis*, 4 Mo. App. 121 (1877); *Gabbert v. Union Gas Co.*, 140 Mo. App. 6, 123 S. W. 1024 (1909).

17. BANKRUPTCY ACT OF 1898, § 70c, as amended.

18. *Buckley v. Maupin*, 125 S. W. (2d) 820 (Mo. 1939).

19. *Id.* at 825.

20. *Farmers and Traders Bank v. Kendrick*, 108 S. W. (2d) 62 (Mo. 1937); *Bewes, Inc. v. Buster*, 108 S. W. (2d) 66 (Mo. 1937); *Nieters v. Brockman*, 11 Mo. App. 600 (1881).

21. *Lyons v. Murray*, 95 Mo. 23, 8 S. W. 170 (1888). *Cf. Alnutt v. Leper*, 48 Mo. 319 (1871).

22. *Roan v. Winn*, 93 Mo. 503, 4 S. W. 736 (1887). Affirmative acknowledgment of the claim must in Missouri be distinguished from negative failure to deny it.

23. 9 U. L. A. 179. The act does not expressly give a general creditor the right to set aside the conveyance in equity but has been so interpreted. See *McLaughlin, Application of the Uniform Fraudulent Conveyance Act* (1933) 46 HARV. L. REV. 404, 438-445, wherein the cases are collected.

24. See 27 C. J. 735.

25. *First Nat. Bank v. McDonough*, 19 Ariz. 223, 168 Pac. 635 (1917); *Dawson Bank v. Harris*, 84 N. C. 206 (1881).

26. *Glenn, The Uniform Fraudulent Conveyance Act; Rights of Creditor Without Judgment* (1930) 30 COL. L. REV. 202.

27. *Cf. Levitsky v. Wirzes*, 109 N. J. Eq. 25, 156 Atl. 272 (1931); *People ex rel. Cauffman v. Van Buren*, 136 N. Y. 252, 32 N. E. 775 (1892); *Oliphant v. Moore*, 155 Tenn. 359, 293 S. W. 541 (1927); *Holladay v. Hodge*, 84 S. C. 109, 65 S. E. 1019 (1909). In these cases equitable relief was granted while the

court nowhere dealt with the fact of Dunstan's uncontroverted insolvency. It held the case to be governed by the general rule as laid down in *Gilson v. Carroll*²⁸ and *Daggs v. McDermott*,²⁹ yet it is to be noted that in each of those cases there was no showing of insolvency or lack of other property, the court in the *Gilson* case stressing the fact.³⁰ Although the debatable question of whether insolvency alone gives the court power to exercise equitable jurisdiction has been answered in the negative since the decision in the principal case,³¹ *quaere*, whether there was not also here the possibility of plaintiff's irreparable injury by suffering a levy that would not otherwise occur if the court entertained jurisdiction at this time? Since it was held that the present suit was brought prematurely, presumably defendant Tyler, the sheriff, was free under the rule of this case to make the levy and the plaintiff could do nothing until he had received his uncollectible judgment.

GIDEON H. SCHILLER

SALES—IMPLIED WARRANTY—PRIVITY—DONEE CONSUMER

*Conner v. Great Atlantic & Pacific Tea Co.*¹

Action, based on an implied warranty of fitness of food, against a retail grocer. Plaintiff's husband purchased some fresh meat from the defendant. The plaintiff prepared and ate the meat, which proved to be injurious. Judgment was given for the defendant, the court saying that privity of contract is essential to the existence of an implied warranty, and that the implied warranty arising from the contract of sale and purchase did not extend to third parties such as the wife of the purchaser in this case.

The plaintiff here was the donee of a vendee, and there was lack of privity between her and the vendor-defendant. It would seem that there would be a similar lack of privity had the plaintiff been a subvendee instead of a donee of the vendee, but in *Madouros v. Kansas City Coca-Cola Bottling Co.*² the subvendee of bottled goods was allowed to recover from the manufacturer, the court saying that if privity was required then there was privity.³ Emphasis was there put on the fact that the goods were put up in a sealed package to

action at law was still pending. The decree was made contingent on the outcome of the legal action. *Contra*: *Post v. Roach & Co.*, 26 Fla. 442, 7 So. 854 (1890). In *Ford v. Stevens Motor Car Co.*, 209 Mo. App. 144, 232 S. W. 222 (1921), the suit was brought by the judgment creditor pending appeal from the judgment by the debtor.

28. 231 Mo. App. 395, 97 S. W. (2d) 146 (1936).

29. 327 Mo. 73, 34 S. W. (2d) 46 (1931).

30. *Gilson v. Carroll*, 231 Mo. App. 395, 97 S. W. (2d) 146 (1936).

31. *Buckley v. Maupin*, 125 S. W. (2d) 820 (Mo. 1939).

1. 25 F. Supp. 855 (W. D. Mo. 1939).

2. 230 Mo. App. 275, 90 S. W. (2d) 445 (1936). For a discussion of this case and of the field as a whole, see (1937) 2 Mo. L. REV. 73.

3. *Madouros v. K. C. Coca-Cola Bottling Co.*, 230 Mo. App. 275, 283, 90 S. W. (2d) 445, 450 (1936).

reach the ultimate consumer. The language used was the result of the court's attempt to evade the requirement of privity and fix liability on the bottler-manufacturer, which it did. Recovery has been denied against a jobber or wholesaler of canned goods who was not the canner or manufacturer,⁴ in this state, the reason being suggested that the wholesaler had no opportunity to inspect as had the canner. On this basis, the cases which allow recovery against the canner and not against the wholesaler can be reconciled.⁵

In *Nemela v. Coca-Cola Bottling Co. of St. Louis*⁶ the court recognized the doctrine of the *Madouros* case that there is privity between the sub-vendee and the canner, although as a matter of fact the point was not directly in issue in that case, the plaintiff being a direct purchaser from the manufacturer.

The same formula for avoiding the old requirement of privity was followed in *McNicholas v. Continental Baking Co.*⁷ The sub-vendee of food in a sealed package was there allowed to recover against the manufacturer, the court saying that the implied warranty of fitness ran to the ultimate consumer where, as in that case, the goods were put up in a sealed package, to reach the consumer in that form.

The court in the principal case cites the *McNicholas* and *Nemela* cases as upholding the proposition that privity of contract is necessary to uphold a suit for breach of implied warranty. On the basis of the language used in the cases that is correct, but from the standpoint of actual privity, as it is usually regarded, it is incorrect. Regardless of the language used, the result of these Missouri cases is to dispense with the requirement of privity where a sub-vendee is suing the manufacturer of food put up in such a way as to reach the ultimate consumer in the original package or can. It would seem that the same result should be reached in these cases if a donee of the vendee rather than a sub-vendee sues. However, that situation has not been decided in Missouri. In another jurisdiction it has been decided that the donee of the vendee may recover.⁸

On the facts, the principal case is distinguishable from other Missouri cases cited in that it involves the donee of a vendee, and also involves food which was not packaged or canned. The food sold here was fresh meat, and was, of course, subject to inspection by the retailer who sold it. Under the circumstances, the vendee, the husband of the plaintiff, could have recovered on

4. *De Gouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S. W. (2d) 336 (1936).

5. Note (1937) 2 Mo. L. REV. 235. This note considers the *De Gouveia* and *Madouros* cases irreconcilable on the point of privity. See also (1937) 2 Mo. L. REV. 370 for a discussion of that portion of the case which allowed recovery against the retailer.

6. 104 S. W. (2d) 773 (Mo. App. 1937). For a discussion of that case, see (1937) 2 Mo. L. REV. 528.

7. 112 S. W. (2d) 849 (Mo. App. 1938).

8. *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927). There is, however, a split of authority on this point. See (1937) 2 Mo. L. REV. 528.

the basis of implied warranty.⁹ It is difficult to understand why the plaintiff should not also be allowed to recover. The only bar to plaintiff's recovery is lack of privity, and where, as here, this requirement serves only to stand in the way of justice it should be done away with. The *McNicholas* and *Madouros* cases stand as precedents for breaking away from the strict requirement of privity where it is considered desirable. And while those cases involve recovery against a manufacturer, they might still have been used as precedents for avoiding the requirement of privity, although in the instant case recovery was sought to be had against a retailer.

JOHN P. HAMSHAW

TORTS—UNEMANCIPATED MINOR SUING ANOTHER UNEMANCIPATED MINOR OF
THE SAME FAMILY

*Rozell v. Rozell*¹

Plaintiff and defendant are brother and sister, respectively, the former twelve years of age at the time of the accident and the latter sixteen. Both infants are unemancipated, unmarried, have no separate estates, and, when plaintiff sustained his injuries, both were living with their parents and were being supported by them. Plaintiff was injured while a passenger in an automobile operated by defendant. Defendant appeals from a judgment of a New York Supreme Court allowing plaintiff \$5000.00 damages plus costs. On appeal defendant did not challenge the finding of the jury that the accident was due to her sole negligence; she contends that public policy prohibits the maintenance of the action on the theory that it is destructive of the family unit, and also that such an action is an invitation to fraud when the owner of the car involved is protected by insurance against liability for personal injuries. The proof does not show who was the owner of the car in which plaintiff and defendant were riding. On argument counsel for defendant stated that the owner of the car was protected by liability insurance and asserted that otherwise the action would never have been started. The appellate division affirmed the judgment for the plaintiff, pointing out that infants and persons of unsound mind are liable for their tortious negligence, and that liability in a civil action is imposed not as a mode of punishment but as a mode of compensation. The court knew of no rule of social policy in the state which prohibited the maintenance of the action under review, pointing out that where the owner carried insurance the domestic peace and tranquillity are not threatened by the action.

At common law personal injury suits were prohibited between members of

9. *Great Atlantic & Pacific Tea Co. v. Eiseman*, 259 Ky. 103, 81 S. W. (2d) 900 (1935). This case was decided on the basis of statute, but the court says that the result would have been the same even before the enactment of the statute.

1. 8 N. Y. Supp. (2d) 901 (3rd Dep't 1939).

the family. In primitive times the family was looked upon as a unit of government.² Suits within the family were thought to breed discord and disturb the domestic tranquillity of the home. If there has been conduct on which a suit may be based, it would seem the domestic tranquillity has already been disrupted. However, there is a tendency to break away from the strict common law rule. The courts seem more willing to break away where the husband and wife are the parties than in the parent and minor child situation.³ At common law husband and wife were regarded as one person and therefore they could not contract with or sue one another. Married women's acts in various states abolishing this common law unity of husband and wife to a great extent have been largely responsible for this development.⁴

In most cases it has been held that a child may not sue its parent in tort.⁵ The lack of cases in the English reports indicates there were no suits by minors against their parents at early common law; however, it has been asserted that there was no rule preventing such actions.⁶ In recent years there has been noted a slight relaxation in suits by unemancipated minors where insurance is involved.⁷ The Canadian courts seem to have been more progressive in granting relief to infants in such cases.⁸

*Munsert v. Farmers Mutual Automobile Ins. Co.*⁹ appears to be the first case to hold that an unemancipated minor brother can sue his unemancipated minor brother, who lives in the same home, for a tort.¹⁰ Previously the Wisconsin court had held that a minor might sue his brother who was slightly over the age of twenty-one, but still living with the family.¹¹ In the principal case the New York court takes a stride forward following the *Munsert* case. The court feels that if suits between spouses are allowed by statute,¹² which the legislature evidently felt would sow no "seeds of discontent and discord in the

2. McCurdy, *Torts Between Persons in Domestic Relation* (1930) 43 HARV. L. REV. 1030.

3. *Schubert v. Schubert Wagon Co.*, 249 N. Y. 253, 164 N. E. 42 (1928); *Poulin v. Graham*, 102 Vt. 307, 147 Atl. 698 (1929); see (1930) 28 MICH. L. REV. 774; McCurdy, *loc. cit. supra*, note 2.

4. *Brown v. Brown*, 88 Conn. 42, 89 Atl. 889 (1914).

5. *Sorrentino v. Sorrentino*, 248 N. Y. 626, 162 N. E. 551 (1928); *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1927), 52 A. L. R. 1113 (1928); *Wells v. Wells*, 48 S. W. (2d) 109 (Mo. App. 1932), holding that a mother might sue her minor child in tort. See note on this case in (1935) 48 U. OF MO. BULL. L. SER. 42.

6. See Note (1937) 26 GEO. L. J. 139.

7. *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930); *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932).

8. *Fidelity and Casualty Co. v. Marchand*, 4 D. L. R. 157 (1924); Note (1937) 26 GEO. L. J. 139.

9. 281 N. W. 671 (Wis. 1938).

10. See (1939) 37 MICH. L. REV. 658; (1939) 6 CHI. L. REV. 308.

11. No authority can be found that one brother cannot sue another brother even though they reside in the same home. *Bielke v. Knaack*, 207 Wis. 490, 242 N. W. 176 (1932).

12. C. 669 of the Laws of 1937, amended § 57 of the Domestic Relations Law.

home," that a suit between a brother and sister for a tort would not disturb the domestic peace and tranquillity, especially where insurance is involved.

Thus, there seems to be a slow modification of the common law rule. An infant suing for property rights, which was allowed at common law, is just as apt to disrupt the family life as suing for personal injuries.¹³ Where insurance is involved the domestic tranquillity of the home, one of the chief reasons for the rule, is not disturbed—quite the contrary. Whether an action is allowed should depend upon the facts in each case: if a member of the family would have to pay, the action perhaps should be denied; but if insurance is involved the action should be allowed.¹⁴ While true there is danger of collusion and fraud, and precautions will be necessary to protect the insurer, yet this should not prevent an injured infant from maintaining his action. The change of times and the growth of the habit of protection through insurance would seem to warrant some alteration of the common law rule.¹⁵

J. BAIRD REYNOLDS

TRUSTS—BANKS AND BANKING—DEPOSIT OF TRUST FUNDS BY TRUSTEE

*Buder v. Holt*¹

Plaintiff and one Franz were co-trustees of an estate, and as such, placed trust funds on time deposit in the Scruggs, Vandervoort & Barney Bank. They received a time certificate of deposit for said sum, issued to them as trustees. Later the bank failed, and plaintiff in this suit is seeking to set off the deposit against a note due the bank on which he was personally liable. The court said that the set off could not be permitted unless the trustee was personally liable to the cestui que trust for so depositing the trust funds, and refused to allow it. This suggests the question of the liability of a trustee for failure to earmark trust funds when depositing them in a bank.

It is well settled, as a general rule, that a trustee who deposits trust funds in a bank, without clearly disclosing the fiduciary character of the funds, is personally liable to the cestui que trust, in the event of the failure of the bank.²

13. *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1927). See dissent at 263.

14. *McCurdy, Torts Between Persons in Domestic Relation* (1930) 43 HARV. L. REV. 1030; see Note (1937) 26 GEO. L. J. 139.

15. See Note (1937) 26 GEO. L. J. 139; *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1927) (see dissenting opinion).

1. 117 S. W. (2d) 235 (Mo. 1938).

2. *Coleman v. Lipscomb*, 18 Mo. App. 443 (1885) (agent); *In re Estate of Horner*, 66 Mo. App. 531 (1896) (executor); see *Mayer v. Citizens Bank of Sturgeon*, 86 Mo. App. 422, 428 (1900) (curator). Cases in other jurisdictions are: *In re Curtis' Estate*, 162 Mich. 47, 127 N. W. 36 (1910) (administration); *Otto v. Van Riper*, 31 App. Div. 278, 52 N. Y. Supp. 773 (1st Dep't 1898), *aff'd*, 164 N. Y. 536, 58 N. E. 643 (1900) (guardian); *Mulholland's Estate*, 175 Pa. 411, 34 Atl. 735 (1896) (guardian); *O'Connor v. Decker*, 95 Wis. 202, 70 N. W. 286 (1897). See 3 BOCERT, TRUSTS AND TRUSTEES (1935) 596; Note (1937) 36 MICH. L. REV. 343. But *cf.* *Sagone v. Mackey*, 225 N. Y. 594, 112 N. E. 621 (1919)

The mere fact that he may have told the cashier or other employee of the bank, who received the funds, that they were part of an estate of which he was trustee, will not serve to alter this liability.³ Neither will the good faith of the trustee, nor his ignorance, serve to excuse him from such liability.⁴ However, the Missouri Supreme Court, in *Cornet v. Cornet*,⁵ where the trustee was a member of a firm and deposited trust funds to the firm's account, while recognizing the general rule, refused to hold the trustee guilty of conversion, and charge him interest on the fund, saying that the balance was always in excess of the trust funds, and that the trustee was ignorant that such a rule existed. In that case, though, it is to be noted that there was no loss to the trust estate through failure of the bank, and the only purpose of holding the trustee to be liable would have been to impose a penalty, which the court felt was unjustified.

The reasons for the rule are several. One was suggested at an early date by the Supreme Court of Pennsylvania, in the case of *Commonwealth v. McAlister*,⁶ where it was recognized that the trustee might simultaneously deposit money of his own in another bank, and in the event of the loss of such money, there would be nothing to prevent his saying that the money lost was the trust fund. Additional reasons which have been put forth, are that such deposits make it more difficult for the cestui to trace the property;⁷ that the trustee could more easily transfer the assets to a bona fide purchaser, thus cutting off the cestui;⁸ that creditors of the trustee might attach the trust assets in efforts to satisfy the private debts of the trustee, and even though unsuccessful, cause the cestui trouble and expense.⁹ The same reasoning applies to investments of trust funds by the trustee in his own name,¹⁰ although the present tendency in some of the investment cases is to relax the rule where losses to the trust funds have occurred as a result of general business conditions, rather than the failure to earmark the funds.¹¹

The next inquiry, then, is as to the extent that the funds must be ear-

(agent). For a more exhaustive citation of authorities, see the annotation in (1926) 43 A. L. R. 600.

3. *In re Estate of Horner*, 66 Mo. App. 531 (1896).

4. *Henderson v. Henderson*, 58 Ala. 582 (1877); *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289 (1886); *Commonwealth v. McAlister*, 28 Pa. 480 (1857), *aff'd*, 30 Pa. 536 (1858); *Booth v. Wilkinson*, 78 Wis. 652, 47 N. W. 1128 (1891).

5. 269 Mo. 298, 190 S. W. 333 (1916).

6. 28 Pa. 480, 484 (1857). The court said: "Suppose Mr. McAlister (the administrator) had simultaneously deposited a like sum of his own in another bank, and that other, instead of the Savings Institution, had failed. It would at least have been in his power to say it was the trust fund that was lost." This case was later affirmed in 30 Pa. 536 (1858).

7. 3 BOGERT, *loc. cit.* *supra* note 2.

8. *Ibid.*

9. *Ibid.*

10. *Commonwealth v. McAlister*, 28 Pa. 480 (1857), *aff'd*, 30 Pa. 536 (1858).

11. Scott, *Fifty Years of Trusts* (1936) 50 HARV. L. REV. 60, 67; Comment (1937) 21 MINN. L. REV. 469; Comment (1938) 86 U. OF PA. L. REV. 910 (discussing *Restatement, Trusts* (1935) § 179, comment d.).

marked, in order to protect the trustee from liability. The Missouri decisions on this question are somewhat in conflict. In *Eyerman v. Second Nat. Bank*,¹² the court held that a deposit by "Herman Rechtein, county treasurer," made the bank his individual debtor, and that the words "county treasurer," were merely *descriptio personae*.¹³ Later, in *Lindsay v. Cont. Nat. Bank*,¹⁴ a deposit by "Tudor F. Brooks, agent" was held to give notice to the bank that the deposit was for someone else, two judges distinguishing the *Eyerman* case on the ground that this was a garnishment proceeding, while the third judge thought that the *Eyerman* case controlled. In a more recent case, where the deposit was by "M. H. Forrester, Circuit Clerk," the words "circuit clerk," were held to be merely *descriptio personae*,¹⁵ while in another case where a time certificate of deposit was to "Robert C. Taul, trustee" the court held that the deposit was not wrongful per se.¹⁶ In view of these decisions, it is difficult to say what the Missouri view is, but it appears safe to assume that a trustee, to protect himself in depositing or investing trust funds, should place them in his name as trustee for a named beneficiary, or of a named estate, as the case may be.

A related group of cases, which, however, do not bear directly on this question, and should not be confused with it, are those where there has been a deposit of public funds in a bank, by a public official as such. Upon the failure of the bank, the official may be held liable for the loss, regardless of earmarking, but on grounds other than those set forth in this discussion.¹⁷

In conclusion, it is submitted that the better view would require the trustee to definitely earmark the fund as that of the particular estate. The result would certainly tend to prevent the "juggling" around of trust funds by trustees, either with their own money or that of two or more estates, and the simplification and increased efficiency of tracing the funds.

OZBERT W. WATKINS, JR.

12. 13 Mo. App. 289 (1883), *aff'd*, 84 Mo. 403 (1884).

13. *Cf.* *Powell v. Morrison*, 35 Mo. 244 (1864); *Fletcher v. Schaumburg*, 41 Mo. 501 (1867); *Webster v. Switzer*, 15 Mo. App. 346 (1884). But *cf.* *Gregg v. Farmers & Merchants' Bank*, 80 Mo. 251 (1883).

14. 82 Mo. App. 301 (1900).

15. *Forrester v. Cantley*, 227 Mo. App. 325, 51 S. W. (2d) 550 (1932).

16. *State ex rel. Swan v. Taul*, 223 Mo. App. 204, 65 S. W. (2d) 1049 (1933).

17. See for examples of such cases, *State ex rel. The Township v. Powell*, 67 Mo. 395 (1878); *State ex rel. Mississippi County v. Moore*, 74 Mo. 413 (1881).