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Notes on Recent Missouri Cases

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"My keenest interest is excited, not by what are called great questions and great cases but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore some profound interstitial change in the very tissue of the law".—Mr. Justice Holmes, Collected Legal Essays, p. 269.

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NOTES ON RECENT MISSOURI CASES

WILLS—BEQUEST TO EMPLOYEE ON CONDITION HE IS IN THE EMPLOY AT DEATH OF THE TESTATOR. *Hovey v. Grier.*[1]

The case, *Hovey v. Grier*, decided recently by the Kansas City Court of Appeals, presents an interesting problem in regard to a conditional bequest in a will. The will included a provision that certain named beneficiaries, including E. W. Engle, should receive certain bequests of stock, but provided that, "If either (naming the beneficiaries including E. W. Engle) shall not be in my employ at the time of my decease or shall cease to work under the direction of my trustee George S. Hovey, that portion of stock which would otherwise have gone to him shall be issued and delivered to Celia Poinsett." E. W. Engle had been in the employ of the company but in 1918, with consent of testator, he had entered the army where he remained until September 5, 1919, the testator having died some two months before in July 1919. Engle following his discharge from the army had returned to actual service for the company.

1. Hovey v. Grier, 23 S. W. (2d) 1058 (1929).

The court held that under the circumstances Engle was at the time of the death of the testator in his employ, that the parties had not intended to and had not treated the employee-employer relationship as ended; that therefore the relationship had not been terminated and Engle was entitled to the bequest.

Obviously the question involved is whether Engle was an employee of the company at the time of the testator's death. The particular reason for his absence, namely, that he was serving in the army, does not seem to be of importance and was not emphasized by the court. The important thing, as stressed by the court, was that he was absent under such circumstances that the relationship had not been severed. Does the court apply strictly the rules as to master and servant or does the court apply the rules less harshly in order to effect the apparent intention of the testator? In other words are the courts more inclined to be liberal in finding an employee-employer relationship in cases of bequests to employees?

The employee-employer relationship is of course a relationship arising out of a contract.[2] As such it may include such provisions and make such qualifications in respect to emergencies as the parties may desire. It is quite often said that in order for the relationship to exist the servant must be under the control of the master, that the employer must be able to direct the servant and exercise supervision over him.[3] While this is generally true it is not an essential element in that it must be always present. The relationship may still exist although the control and direction is temporarily dispensed with and the employee is not rendering actual service or being paid.[4] An employee is still an employee while he is on leave of absence or temporarily ill. In an early English case[5] the employee was absent from employment for some time, permission having been given him. For this time he was not paid. The question was whether he was in the service of the employer within the meaning of a certain legislative act. The court ruled that the master had dispensed with his services during this period, but that he was still in his service. In *People v. Lynch*[6] a civil service employee was given an indefinite leave of absence on account of illness. The question was whether she had been separated from the service within the meaning of the act which prohibited rehiring persons who had been so separated for more than a year. It was held that the employee had been merely on leave of absence. The court said, "If the relator had a right to return to the service at any minute she was no more separated from it than an employee on an ordinary, two weeks vacation."[7] An employee remains an employee although he may be temporarily not at work; for instance if the employment is such that it cannot be continued during severe rains.[8]

A contract of employment is generally terminated by continuing sickness or permanent disability of the employee.[9] However, the parties may contract to the contrary.[10] In an Indiana case[11] the employee became ill and was able to work only

2. Harrell v. Atlas Portland Cement Co., 250 Fed. 83, 162 C. C. A. 255 (1918); Rogers v. Rogers, 70 Ind. App. 659, 122 N. E. 778 (1919); New v. McMillan, 79 Okla. 70, 191 Pac. 160 (1920).

3. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440 (1889); Mound City Paint, etc., Co. v. Conlon, 92 Mo. 221, 4 SW 922 (1887); Spelman v. Delano, 177 Mo. App. 28, 163 SW 300 (1914); Kiser v. Suppe, 133 Mo. App. 19, 112 SW 1005 (1908); Alabama Fuel Co. v. Smith, 203 Ala. 70, 82 S 30 (1919); Employer's Indemnity Co. v. Kelly Coal Co., 149 Ky. 712, 149 SW 992 (1912); McNamara v. Leipzig, 227 NY 291, 125 NE 244 (1919).

4. Industrial Trust Co. v. Alves et al., 46 R.I. 16, 124 Atl. 260 (1924).

5. King v. Parish of Islipp, 1 Stra. 423, 11 Mod. Rep. 341, 92 E. R. 863 (1796).

6. People v. Lynch, 149 NYS 895, 164 App. Div. 517 (1914).

7. People v. Lynch, supra note 6.

8. In re Cowell's Estate, 170 Cal. 364, 149 Pac, 809 (1915).

9. Williams v. Butler, 58 Ind. App. 47, 105 NE 387 (1914); O'Connor v. Briggs, 182 Mass. 387, 65 NE 836 (1903); Macauley v. Press Pub. Co., 170 App. Div. 640, 155 N. Y. S. 1044 (1915).

10. Egan v. Winnipeg Baseball Club, 96 Minn. 345, 104 NW 947 (1905).

11. Red Cross Mfg. Co. v. Stroop, 79 Ind. App. 532, 135 NE 351 (1922).

four days between February 11th and April 14th. The parties had agreed that there should be no deductions for time lost. The court held that although generally the inability of an employee by reason of sickness to perform his part absolves both parties and terminates the relationship, yet the parties can contract differently.

Thus the relationship is one subject to such conditions as the parties may see fit to impose. Absent a provision providing for such an event, and, absent an agreement or understanding by the parties to the opposite effect, an abandonment by the employee will terminate the employment.[12] This is true even though the employee is not to blame for his absence.[13] So in the principal case if Engle had merely abandoned work to join the army the relationship would have been ended. This is the exact situation in *Marshall v. Granville*.[14] However, the parties can contract so as to continue the relationship as has been seen. This is sometimes quite difficult to determine for the contract may be one to resume services after the period of absence and not one of continuing employment.[15]

We may now consider the principal case and other cases as to bequests to employees, in order to determine whether these cases can be explained in the light of the above considerations or whether they depend upon a separate and distinct rule applicable to wills, by which rule, the employee-employer relationship is more easily found. It is believed that the majority of the cases can be explained on the basis that the relationship actually exists, although it will be seen that some cases seem to show a liberal tendency in finding such a relationship.

In the principal case much evidence was introduced to show the attitude of the testator towards Engle, that he was considered as absent but that he would return to resume his duties, etc. One witness testified that the testator considered his men in the service just the same as when in his employ. Though the evidence is contradictory as to this, the following statement shows quite well the position of the Court of Appeals. "It seems clear that the court (lower court) proceeded upon the theory that no leave of absence could be granted the employee which would retain him in the relation or status mentioned in the will, or, on the theory that taking all of the testimony for the appellant (Engle) as true it did not show the granting of a leave of absence. The pleadings were sufficient to present the issue, and in our view the evidence warranted the verdict."[16] The jury had found the issues in favor of Engle; that the employment had not been terminated.

The court relies on the English case, In re Cole.[17] That case is similar in facts to the principal case; the question being whether the legatee remained in the employ of the company within the terms of the bequest. The court said, "The question whether he is in the employment of the company is not the same thing as the question whether he is in fact rendering actual service to the company."[18] Evidence was introduced to show that neither the legatee or the officers of the company intended or desired to terminate the relationship. The position of the court is best shown by this statement, "The intention here is that the employment should continue but that there should be a temporary dispensation of obligation to render services." This court rests its decision upon an earlier English case.[19] In that case the legacy was left to A, if in the testator's service at the time of his decease. It appeared that

12. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 NE 801 (1917); Nash v. H. R. Gladding Co. 118 Mich. 529, 77 NW 7 (1898); New York Life Ins. Co. v. Thomas, 47 Tex. Civ. App. 150, 103 SW 423 (1907).

13. Leopold et al v. Salkey, 89 Ill. 412 (1878).

14. Marshall v. Granville, 2 K. B. 87, 86 L. J. K. B. 767 (1917).

15. In re Drake, 2 Ch. 99 (1920).

16. Hovey v. Grier, supra note 1 at 1066.

17. In re Cole, 1 Ch. 218 (1919).

18. In re Cole, supra note 17 at 223.

19. Herbert v. Reid, 16 Ves. 481 (1810).

other members of the household had sent the servant, A, away so that he was not actually rendering services at the time of the testator's death. The court stated, "There was evidence from the testator himself, that notwithstanding appearances the plaintiff was still in his service."[20] The employment was held not to be ended. A later English case is that of In re Drake.[21] There the bequest was of certain sums in proportion to periods of employment; for ten years a certain amount; for five years a certain amount, etc. The question was whether certain periods spent by some of the employees in the army could be included. The court held that this could not be done, saying that the facts of In re Cole were altogether different, for in this case there was no evidence that the parties intended the employment to continue but that rather they entered merely into a contract to re-hire the parties upon their return. The case recognizes the soundness of In re Cole's Estate, but under its different facts seems quite right.

There are but few American cases involving similar facts. The court in the principal case discusses two such cases. In the case entitled In re Thompson's Estate[22], the testatrix gave to each person not named in her will, who had been in her employment ten years or more immediately preceding her decease, ten thousand dollars, and to each person so employed for five years or more five thousand dollars. Thomas Chappel, a chauffeur, had entered the army after his employment had begun. The question was whether this period should be included. The matter is very briefly dealt with and few facts are given which are helpful. The court in disposing of this bequest states that Mrs. Thompson gave Chappel a "leave of absence" for services in the World War and that he must be deemed to have been five years in her service and entitled to the legacy. Another employee had been employed for ten years but two months before the death of the testatrix, had become paralyzed and was removed to a hospital. Pursuant to the directions of Mrs. Thompson he was placed upon half pay. The court after stating that the employee had not been discharged, held that he was entitled to the bequest. This later position may seem rather extreme, for probably no formal discharge was needed to terminate the employment.[23] It seems that the former bequest was correctly allowed if the chauffeur was granted a leave of absence as stated by the court.

The second case considered by the Court of Appeals is In re Mitchell's Estate.[24] The bequest was of five hundred dollars to each of the testator's servants in his employ at the time of his death, who had been so employed for not less than one year preceding his death. Mary Broderick had been employed for some fourteen months but during the period had been obliged to go to a hospital for four months. The court ruled that she was entitled to the bequest. The court said that although her salary was not paid during the four months the testator had paid her hospital expenses, which were in excess of her wages, had not discharged her and that she was excusably absent. While this may be enough to show that the employment was not ended the court also made the following statement, "It is neither in harmony with the spirit of his will, nor his generous treatment of her that she should be deprived of this small legacy." This seems to indicate that the court would be willing to "stretch a point" in order to find the employee-employer relationship, so as to uphold the bequest.

A similar attitude is shown in a Rhode Island Case.[25] The bequest was to Ada Rice if she should be in the employ of Mrs. Lewis at the termination of a trust.

20. Herbert v. Reid, supra note 19 at 485.
21. In re Drake, 2 Ch. 99 (1920).
22. In re Thompson's Estate, 213 N. Y. S. 426, 126 Misc. Rep. 91 (1925).
23. Supra Note 9.
24. In re Mitchell's Estate, 186 N. Y. S. 666, 114 Misc. Rep. 370.
25. Abbott v. Lewis et al., 77 N. H. 94, 88 Atl. 98 (1913).

Because of illness she was forced to discontinue further service and she later returned to her home in Nova Scotia. Mrs. Lewis frequently had expressed a desire that she return. It was held that she had not been discharged and that the evidence tended to prove merely a temporary absence on account of illness. The court then said, "The relation of confidence and friendship which would be implied from continued employment still existed, and as it was not understood that the employment was definitely terminated,upon the facts stated the maid is entitled to the legacy."[26]

One other case has been found, that of *Industrial Trust Co. v. Alves et al.*[27] The testator gave one thousand dollars to each servant in his employment at the time of his decease, who had been so employed for at least six months. One, Sotel, at the time of the death of the testator and for three months before, was working at the greenhouse. During the three months directly preceding that he had not worked full time, though it seemed he had worked at certain times. The court held that although he had not been engaged in actual work for a good portion of the time that he did not thereby lose his status as an employee, as he was at all times, "subject to the call of the testator." He was held to be entitled to the bequest. It seems that under the facts the employee-employer relationship existed.

While some of the cases seem to show a liberal tendency by which the courts are more likely to find the fact of employment, yet it seems that the cases on the whole may be supported on the grounds that the relationship actually exists. This seems to be true as to the principal case. Engle claimed that it was agreed that his going into the army would not terminate his contract of employment and evidence was introduced to show this. The jury found the issues in his favor and it seems the Court of Appeals was entirely right in holding that the lower court was wrong in rendering judgment against Engle and in favor of Celia Poinsett.

W. WIMMELL*

*LL.B., 1930.

CHATTEL MORTGAGES—SUFFICIENCY OF DESCRIPTION OF AUTOMOBILE IN RECORDED MORTGAGE TO GIVE CONSTRUCTIVE NOTICE TO THIRD PERSONS. *First Nat. Bank of Brookfield v. Gardner et al.*[1]

A dealer in automobiles executed two mortgages on a car. Both mortgages correctly described the body, style and number of cylinders, but the prior recorded mortgage recited the wrong motor and factory numbers, and it was held not to be entitled to priority over the subsequently recorded mortgage which was correct in every respect except that it described the model as "K" when it was in fact "R". The prior recorded instrument recited the motor and factory numbers respectively as 14L39208 and 19835, the correct numbers being 14L39206 and L19835.

For a chattel mortgage to be valid as between the parties thereto it must contain such an identification of the property that the mortgagee may say with a reasonable degree of certainty what it is that is the subject of his lien.[2] A more stringent test

26. Abbott v. Lewis et al., supra note 25 at 98, 88 Atl. 100.

27. Industrial Trust Co. v. Alves et al., 46 R. I. 16, 124 Atl. 260 (1924).

1. 5 S. W. (2d) 1115 (Mo. App. 1928).

2. Security Nat. Bank v. White Co., 50 S. D. 598, 211 N. W. 452 (1926) (description insufficient to give the mortgage validity as between the parties). In the following cases the descriptions of cars were held sufficient to give validity to the mortgages as between the parties: Humphreys Sav. Bank v. Carpenter et al., 213 Mo. App. 390, 250 S. W. 618 (1923); Clark v. Ford et al., 179 Ky. 797, 201 S. W. 344 (1918); Owen v. George Cole Motor Co., 292 S. W. 1 (Tenn 1927); Smith v. Farmers' State Bank, 262 S. W. 835 (Tex. Civ. App. 1924); Harding et al. v. Jesse Dennett Inc. et al., 17 S. W. (2d) 862 (Tex. Civ. App. 1929); Alder v. Godfrey, 153 Wisc. 186, 140 N. W. 1115 (1913); see Walker v. Fitzgerald et al., 157 Minn. 319, 324, 196 N. W. 269 (1923), reargument 197 N. W. 259 (1924).

however is applied where the validity of the mortgage is questioned by third persons not parties to it. It is unanimously held that a description in a recorded chattel mortgage is sufficient to give constructive notice to subsequent parties if it invites and suggests inquiries which will enable third persons to identify the property.[3]

The court in the Principal case pointed out the difference between a misdescription or false description and an incomplete description accurate so far as it goes. While a meager description suggests inquiry, a false description just in so far as it is complete, will be taken as accurate and will suggest that there is no need for further inquiry. In the case under discussion there was a false description which on its face appeared to be complete, and this, coupled with the fact that mortgagor was a dealer in cars, is a sound basis for the decision. In two other cases in which the facts were substantially the same as in the principal case, a like result was reached.[4]

In the instant case the court said, in pointing out the significance of the fact that mortgagor was a dealer, "There may be a distinction between the case at bar, a dealer giving a mortgage upon an automobile, and an individual, especially if the individual owns but one car of that make. In the case at bar it must be remembered that there are many cars of that make dealt in by the dealer. Many cars owned and sold by the dealer have the same outward aspects, and the only means of identification would be the numbers. There were doubtless cars made and sold that had the very numbers contained in the false description. We think that for the protection of third persons the description in chattel mortgages as to factory or motor number must be accurate." From the court's concluding sentence, however, it appears the same result would probably have been reached if mortgagor had been an individual owning but one car, but query. It might be argued in that event, and not without some little force, that a reasonably diligent third person would surely make inquiries.

In *First Mortgage Loan Co. v. Durfee et al.*[5] the description in the mortgage was, "One Ford automobile, model T, 1918. Type of body, sedan. Number 3558516,

3. First Nat. Bank of Brookfield v. Gardner et al., 5 S. W. (2d) 1115 (Mo. App. 1928); Iowa Automobile Supply Co., v. Tapley, 186 Iowa 1341, 171 N. W. 710 (1919); Iowa Sav. Bank v. Graham et al., 192 Iowa 96, 181 N. W. 771 (1921); Stiles et al. v. City State Bank, 56 Okla. 572, 156 Pac. 622 (1916); Nelson v. Robinson et al., 48 S. D. 436, 205 N. W. 40 (1925); Wright v. Lindsay, 92 Vt. 335, 104 Atl. 148 (1918); Sargent, Osgood and Roundy Co. v. Kelly et al., 99 Vt. 350, 132 Atl. 135 (1926); Mack International Motor Truck Corp. v. Jones and Combs et al., 149 SE544 (Va. App. 1929); Jones, Chattel Mortgages (2d ed. 1883) sec. 54.

4. Wise v. Kennedy, 248 Mass. 83, 142 N. E. 755 (1924) (Mortgagor was a dealer and the description in the mortgage stated the serial number of the car to be 6552 when it was 6557); McQueen et al. v. Tenison 177 S. W. 1053 (Tex. 1915) (In addition to reciting the wrong factory number, 32466, the correct number being 2466, the description stated that the car was a 4-passenger Maxwell when it was in fact a 5-passenger. The mortgagor was the Dallas Automobile Clearing House Ass'n, which no doubt puts it in a class with dealers, but the court reached its decision without mentioning this point.)

In Exchange Nat. Bank v. Palace Car Co., 1 La. App. 307 (1926), and in Alberts v. Alberts et al., 221 N. W. 80 (S. D. 1928) the description in the mortgages contained the wrong motor numbers, and it was held that the recorded instruments did not give constructive notice to third persons.

The description in Wright v. Lindsay, 92 Vt. 335, 104 Atl. 148 (1918) was "One Ford touring auto, model T, serial number 621120, --------, now in the possession of said Baldwin in Newport, Vt., and being the only property of this kind now owned by said Baldwin." The court held this was a sufficient record to give constructive notice to subsequent parties, although there were at least five different serial numbers of principal parts of the car, and a plate on the dash on which were the words, "Manufacturer's number of this car is 593350." The serial No. in the mortgage was the No. on the engine.

In the following cases the description contained among other things the correct engine number, and it was held sufficient: Sowards et al. v. Jones, 75 Colo. 25, 223 Pac. 747 (1924); Iowa Sav. Bank v. Graham et al., 192 Iowa 96, 181 N. W. 771 (1921). But of course, the number alone is not sufficient. In Valley Securities Co. v. Stafford, 8 La. App. 607 (1928) it was held that the description, "One roadster number 14525832" was not sufficient as affecting third persons to mortgage a Ford roadster of the same motor number.

5. 193 Iowa 1142, 188 N. W. 777 (1922).

serial number..... Number of cylinders, 4." The court held this record did not put the subsequent purchaser of a car number 2558516 on inquiry into the possibility whether by some mistake the two numbers were intended to identify the same car, for to hold that it did would destroy the protection which the statute affords to subsequent purchasers. This decision has been criticized for requiring perhaps undue exactness of the description.[6] It was suggested that the startling similarity of the numbers and the size and evenness of the error should be sufficient to put a third person on inquiry, especially in view of the fact that not many individuals would have several cars of like description, and not even dealers would be in the least likely to have two cars whose factory numbers were an even million apart. Perhaps there is some merit to this criticism, but where is the line to be drawn between correct numbers and incorrect numbers?

It is believed that once a court rules that an incorrect number will be an adequate description to give constructive notice, that such a holding will be bound to lead to confusion and difficulty. For example, let it be supposed that an automobile's motor number is 425, and that the automobile is correctly described in every respect except that its motor number is recited to be 525. Possibly in that particular case a careful searcher of the records might suspect that there was a mere typographical error, and might be put on inquiry. But suppose the number had been stated to be 452 or 542. Would the searcher again be put on inquiry? A court would be treading on dangerous ground should it attempt to hold that some misstatements of numbers would put a party on inquiry while others would not. As a matter of fact no court has gone so far as to say that a description which recites the wrong motor number will give constructive notice to third persons.[7]

It has sometimes been held that a false recital in description of the mortgaged property can be rejected, and the rest of the description, if sufficient, will give constructive notice to third persons. Perhaps this is a corollary to the rule that the whole description must be considered together.[8] In *Wise v. Kennedy*[9] the question was raised whether a false recital of the number of the mortgaged car could not thus be treated as surplusage, and the remainder of the description held adequate. In that case the description of the mortgaged property was, "One new Jordan touring car No. 6552." The court said that if the number were rejected the description would then be insufficient to give constructive notice, for it would not satisfy the requirement that the description must distinguish the subject-matter of the mortgage from other property of the same class.[10]

While the motor or factory number is undoubtedly one of the most important elements in the description of a car, and if misstated will in the vast majority of

6. (1923) 8 Iowa L. Bull. 268.

7. In Alberts v. Alberts et al., 221 N. W. 80 (S. D. 1928) the property covered by the mortgage was described as "One Ford coupe, engine number 1149529" The correct number was 11495528. The court held that the mortgage was ineffectual as against parties taking a subsequent mortgage, and said, quoting from Security Nat. Bank v. White Co., 50 S. D. 598, 211 N. W. 452 (1926), "In the matter of chattel mortgages on stock and other property not susceptible of such description as would absolutely distinguish the property mortgaged from other property of the same class, this court has been less strict than some other courts in its requirements for the creation of a valid lien. But such decisions have no application to cases involving an absolute misdescription of property susceptible of accurate description." The court uses language so strong as to indicate that it probably would hold invalid as to third persons any description which recited the wrong motor or engine number.

8. First Nat. Bank of Brookfield v. Gardner et al. 5 S. W. (2d) 1115 (Mo. App. 1928); Wright v. Lindsay, 92 Vt. 335, 104 Atl. 148 (1918); Sargent, Osgood and Roundy Co. v. Kelly et al., 99 Vt. 350, 132 Atl. 135 (1926).

9. 248 Mass. 83, 142 N. E. 755. (1924).

10. Commercial Sav. Bank v. Brooklyn Lumber and Grain Co. et al., 178 Iowa 1206, 160 N. W. 817 (1917); Iowa Auto Supply Co. v. Tapley, 186 Iowa 1341, 171 N. W. 710 (1919); Hauseman Motor Co. et al. v. Napierella, 223 Ky. 433, 3 S. W. (2d) 1084 (1928).

cases if not in all of them prevent the record from giving constructive notice, it is not indispensable to the validity of the mortgage as against third persons. Other elements may lend adequate particularity to the description. If the mortgage states that the car is the only one mortgagor has answering the description, this is enough to distinguish the car from other cars of the same class.[11] Also a statement of the location of the car seems to be sufficient for that purpose.[12] Where both these elements appear in the description it is adequate without a doubt.[13] Where the description contains neither of these elements nor the motor or factory or serial number it is probably insufficient.[14]

Suppose the description in the mortgage recites the wrong motor number, but in addition thereto gives the location of the car and states that it is the only one of its kind mortgagor owns. Would the rule suggested and discussed above, namely, that of treating the number as surplusage, apply? It is believed that a court might hold either way, depending on the particular circumstances of the case. No case dealing with this state of facts has been found.

In the case of *Nelson v. Robinson et al.*[15] the mortgage stated that the car was the property of the mortgagor and in his possession, and gave the make and type of the car. It was held that this description was constructive notice to a subsequent purchaser. The court stated that, "If a person of ordinary prudence, acting in good faith, and making the inquiries suggested by the mortgage, would have been enabled to identify the mortgaged property, the description is sufficient." In pointing out the objectionableness of being too exacting of descriptions the court said, ". . . . this court will bear in mind that the requirement of accuracy in description is not to enable those who are not actually misled to deal in mortgaged property relying on technical defects to defeat the claims of the mortgagee." The soundness of this suggestion is, of course, unquestionable, but its practical force is doubtful. Furthermore, lax requirements invite the so-called technical defects.

A few courts seem to recognize and attach some significance to the fact that an automobile is a chattel which can be minutely described. In *Iowa Automobile Supply Co. v. Tapley*.[16] the bill of sale described the car as a seven passenger Colby automobile then in the possession of W. A. Walford in the county of Polk and state of Iowa. The court, holding this description insufficient to give constructive notice,

11. Hicks v. Walker Brothers Co., 31 Ga. App. 395, 120 S. E. 694 (1923) ("One 1½-ton Kissel truck" plus an inference from the evidence that mortgagor had but one such truck); see Commercial Sav. Bank v. Brooklyn Lumber and Grain Co. et al., 178 Iowa 1206, 160 N. W. 817 (1917) Court said that if it had been asserted in the description that the vehicle was the only one or one of several owned by or in the possession of mortgagor in the place named, this would have distinguished the vehicle from its class).

12. Stiles et al v. City State Bank, 56 Okla. 572, 156 Pac. 622 (1916) (The only thing which resembled a statement of location was a provision in the mortgage that the property should not be removed from Oklahoma County. All of the description added to this was "Three new Michigan Automobiles, forty horse power, No.-------" The decision goes far). Nelson v. Robinson et al., 48 S. D. 436, 205 N. W. 40 (1925) (parallels the above case); Mack International Motor Truck Corp. v. Jones and Combs et al., 149 S. E. 544 (Va. App. 1929) (county of location stated). *Contra:* Iowa Automobile Supply Co. v. Tapley, 186 Iowa 1341, 171 N. W. 710 (1919) (Statement of county of location held not to narrow down the location sufficiently to differentiate the car from its class.;) see Commercial Sav. Bank v. Brooklyn Lumber and Grain Co. et al., 178 Iowa 1206, 160 N. W. 817 (1917) (Said by way of dictum that if the statement of location had been correct, it might have saved the instrument otherwise invalid as to third persons.).

13. Sargent, Osgood and Roundy Co. v. Kelly et al., 99 Vt. 350, 132 Atl. 135 (1926).

14. Walker v. Fitzgerald et al., 157 Minn. 319, 196 N. W. 269 (1923), reargument 157 Minn. 323, 197 N. W. 259 (1924).

15. 48 S. D. 436, 205 N. W. 40 (1925). The name of the car appearing in the mortgage was "Norwark." The real name was "Norwalk." The court, holding the description would put any prudent man on inquiry, said, "No reasonable man would place any reliance in the variation of a single letter, without appreciable effect on the sound being produced by the variation."

16. 186 Iowa 1341, 171 N. W. 710 (1919).

employed the following language: "As a matter of common knowledge auto cars generally bear registry numbers and factory numbers, and have the marks of individual identification by which they may be designated with reasonable particularity, and he who takes and records a lien on one of them without noting something by which it may be differentiated from others in its class has only himself to blame if he thereby permits a subsequent purchaser to obtain precedence over him." Another court in asserting that the best description of a motor vehicle is the name of manufacturer, the model and the factory or motor number, said, "It is a matter of common knowledge that automobiles are thus described when sold, mortgaged or insured. It is the only description which furnishes reasonable means of identification. It is easy to give, is definite and certain, and has generally been adopted by the public."[17]

In support of its decision holding a false recital of the serial number fatal to the description of the car the court in *Wise v. Kennedy*[18] said, "It is common knowledge, ... that automobiles of various mechanical designs, made by numerous manufacturers under multiform trade-names, are constantly in the market for purchase and sale, and that cars of any one of the makers can be distinguished with reasonable certainty from other automobiles of the same class only by the numbers by which each car is designated." While none of these excerpts go so far as to say that motor or factory numbers are indispensable to a valid description as against third persons, they at least indicate that some courts are wont to recognize the fact that an automobile is susceptible of a complete differentiation from its class, and to require accordingly a more detailed description of automobiles than of other chattels.

Query if courts should not go the full length, requiring the mortgage description of a car to be complete in itself. It is easier for mortgagees to be accurate and thorough in their descriptions than it is for third persons to run down every clue which an incomplete or inaccurate description appears to suggest. Furthermore, the general rule that a description is sufficient to give constructive notice if it suggests inquiries which will enable third persons to identify the property, had its inception at a date prior to the age of automobiles. The basis or justification for the rule lay in the fact that generally if not always it was impossible for the description in the mortgage to be complete and adequate in itself. This is clearly not true when the subject matter of the mortgage is an automobile. So it appears mortgages on automobiles should be taken out of the general rule, the reason therefor not obtaining.

G. C.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF STATUTES MAKING TESTIMONY CONCLUSIVE, *O'Donnell v. Wells*.[1]

In the recently decided case of *O'Donnell v. Wells*, the Supreme Court of Missouri held that since a legislative assembly is without power to prescribe what shall constitute proof of a fact, a city law-making body cannot prescribe what shall be conclusive evidence of negligence in an action for wrongful death. It is proposed here to examine those statutes by means of which various legislatures have attempted to influence fact determination in the courts, and to determine the constitution-

17. Walker v. Fitzgerald et al., 157 Minn. 319, 196 N. W. 269 (1923), reargument 157 Minn. 323, 197 N. W. 259 (1924).

18. 248 Mass. 83, 142 N. W. 755 (1924).

1. 21 SW (2d) 762 (1929)

ality thereof. As we are concerned primarily with the power of the legislature, it will be necessary for our purposes to understand exactly the effect of a particular statute before we can determine whether the legislature has encroached upon the functions of the judiciary.

Such statutes can be classified into these categories:[2] (1) those which provide that where fact A is shown to exist, fact B is conclusively presumed to exist, which, in effect, change the substantive law: (2) those that declare that proof of fact A shall be conclusive evidence of fact B, the substantive law remaining unchanged; (3) those which provide that certain evidence shall be sufficient to take a case to the jury for their determination; (4) and finally those which make fact A presumptive evidence of fact B, such presumption being rebuttable. Each type of statute will be separately considered.

As to those statutes which provide that where fact A is shown to exist, fact B is conclusively presumed, it should be noted that such statutes can usually be construed as amounting to a change in the substantive law. The legislature has not provided that fact A shall be considered proof of fact B. It has made the existence of fact B immaterial, and has established a rule of substantive law. To take a concrete case: were the legislature to pass a statute providing that where breaking is shown, entering is conclusively presumed, thus making the fact of entering irrebutable, the legislature would have, in effect, enacted that the crime of burglarly shall henceforth consist of breaking only.[3] The right and power of the legislature to change the substantive law being supreme, subject only to constitutional restraints, it follows that it is within the power of the legislature to change the substantive law by means of a "conclusive presumption."

A leading case[4] which clearly establishes the power of the legislature to formulate a conclusive presumption involves a statute the provision of which is "that the surviving wife shall be conclusively presumed to be wholly dependent upon her husband" in actions under the Workmen's Compensation Act. The court, in this case, used this language: "The legislature in declaring that a particular fact shall be conclusively presumed does not establish a presumption in the ordinary sense of the term, but rather a rule of law to the effect that in the case specified, the non-existence of the fact presumed is immaterial. The legislature can make a presumption conclusive unless such presumption would cut off or impair some right given and protected by the constitution.[5]

Distinguishable from those cases in which we find a change in the substantive law are those where the legislature has attempted to prescribe what shall constitute conclusive evidence of a given fact. In other words, we deal now, not with a statute which provides that fact B shall be "conclusively presumed" from evidence of fact A, but with those statutes and ordinances which purport to instruct the court as to

2. Another type of statute may be mentioned in this connection; i. e., those statutes which make the findings of particular administrative bodies final as to questions of fact and not subject to judicial review. But the problem of administrative finality involves complications beyond the scope of the present discussion. In this connection, see: Findley-Kehl Inv. Co. v. O'Connor, 256 SW 798 (1923); State ex rel v. Atkinson, 271 Mo. 28, 195 SW 741 (1917); Dickinson, Administrative Justice and the Supremacy of Law.

3. See State v. LaPointe, 81 NH 227, 234, 123 Atl. 692, 31 ALR 1212 (1924).

4. State ex rel v. District Court, 139 Minn. 409, 166 NW 772 (1918). Accord: Daggs v. Ins. Co., 136 Mo. 382, 28 SW 85 (1896); St. Louis & S. F. R. Co. v. Mathews, 165 US 1, 17 Supt. Ct. 243, 41 L. Ed. 611 (1896); Feagain v. Dark, Assn, 202 Ky 801, 261 SW 607 (1924). Contra: Little Rock & S. F. R. Co. v. Payne, 33 Ark. 816 (1878).

5. For example, the state would have no power to enact that election to office shall be conclusively presumed from a certificate of election. The constitution provides that the number of votes shall determine the election. Attorney-General v. Barstow, 4 Wisc. 567, 792 (1855), 2 Wigmore on Evidence (2d), section 1351, 1353.

what shall be considered proof. Where there is no constitutional restraint on the power of the legislature, and where the legislature has not clearly indicated its intention otherwise, such statutes can usually be construed as effecting a change in the substantive law, and, therefore, valid. But where the legislature has clearly indicated that the substantive law is to remain unchanged, then the question as to the power of such an assembly to determine what shall be considered proof of a fact arises. In the principal case of *O'Donnell v. Wells*,[6] the ordinance provided, in part, that "evidence that a person has driven a motor vehicle for a distance of one city block at a speed of twenty-five miles per hour shall be considered proof of careless and negligent driving." The court construed the ordinance to mean that proof of fact A shall be conclusive evidence of fact B, and that the ordinance did not involve, therefore, a change in the substantive law. In such a case the legislative body has not changed the substantive law; it has not modified the common law of torts. On the contrary it clearly indicates that carelessness or negligence shall remain the basis of liability, and then proceeds to prescribe what shall constitute proof of negligence.[6a] Though the difference between this type of statute and the ones providing for a "conclusive presumption" may seem to be one merely of form, it is believed, and the authorities generally sustain such belief, that there is a vital and fundamental distinction. In the one case, the legislative body effects a change in the substantive law, the right to do which is naturally not controverted. In the other case, the legislature retains and adopts the common law basis of liability, and then encroaches on the province of the judiciary by prescribing what shall constitute proof.

There is no confusion in the cases upon this matter. When such statutes cannot be construed as amounting to a change in the substantive law, the courts universlly hold them to be unconstitutional.[7] As Professor Wigmore says: "The judicial function under the constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigations is to forbid the exercise of an indestructible judicial function. To make a rule of conclusive evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province.[8]"

That the legislature has the power to change the substantive law is clear. That the legislature does not have the power to determine what shall constitute "conclusive evidence," or proof, is equally clear. There are two other types of

6. Supra note 1. In this case there was a municipal ordinance involved, and not a statute. For the purpose of this discussion, the distinction between a statute and a municipal ordinance is not material, for if the state legislature has not the power to prescribe what shall constitute proof, a city law-making body has no such power.

6a. It should be noted that the ordinance in the case of O'Donnell v. Wells was penal in character. Violation of such ordinance was punishable by fine. It would seem that a violation of this ordinance would constitute negligence per se, according to the rules of tort law. Propulonris v. Goebel Const. Co., 279 Mo. 258, 213 SW 792 (1919); Burt v. Nicholas, 264 Mo. 1, 15, 173 SW 681 (1914); Butz v. Cananaugh, 137 Mo. 503, 38 SW 1104, 59 Am. St. Rep. 504 (1897); Brannock v. Elmose, 114 Mo. 55, 21 SW 451 (1892); Dickson v. Mo. Pac. Ry. Co., 104 Mo. 491, 16 SW 381 (1891); Ashby v. Gravel Road Co., 99 Mo. App. 178, 185, 73 SW 229 (1903). In such cases the courts adopt, as a basis of civil liability, that standard of care required by the statute or ordinance. In the principal case, however, the ordinance was not dealt with upon this basis; it was considered as a mandatory rule of evidence. Though the language of the specific provision in question might seem to justify such construction, yet the ordinance remains penal in character, a violation of which is usually considered negligence per se.

7. Findley-Kehl Inv. Co. v. O'Connor, supra note 2; State ex rel v. Davis, 302 Mo. 307, 315, 259 SW 80 (1923); State ex rel v. Atkinson, supra note 2; Roth v. Gabbert, 123 Mo. 21, 27 SW 528 (1894); Abbot v. Lindenbower, 42 Mo. 162 (1868); People v. Love, 310 Ill. 558, 142 NW 204 (1924); State v. Sixon, 77 W. Va. 243, 87 SW 267 (1915). See: Sellers v. State, 11 Okla. Crim. Rep. 588, 149 Pac. 1071 (1915); State v. Barrett, 138 N. C. 630, 50 SE 506, 1 L. R. A. (NS) 626 (1915).

8. 2 Wigmore on Evidence (2 ed), sec. 1353.

statutes, however, that have caused a great amount of uncertainty and confusion in the cases of various jurisdictions. These statutes provide, in effect: (1) that evidence of fact A shall be prima facie evidence of fact B, and (2) that evidence of fact A shall be presumptive evidence of fact B.

It is to be noted that the courts are by no means consistent in their definitions of these terms. Some courts seem to consider them to be synonymous. In general, however, it is considered that "prima facie" evidence is such evidence that would justify reasonable men in finding to be true the fact which such evidence was offered to prove; it is sufficient evidence to take a case to the jury, which might, then, reasonably find the fact to be true or not true.[9] "Presumptive" evidence, however, is evidence of such weight that the jury must find, in the absence of proof to the contrary, that the proposition for which such evidence was offered to prove, is true. Where fact A is shown, fact B is true, unless there is proof to the contrary: that is a presumption. The distinction between prima facie evidence and presumptive evidence is vital, and must be kept clearly in mind in determining the validity of the statutes to be considered here. The problem here is to determine the constitutionality of each type of statute.

May the legislature, by statutory enactment, determine what shall constitute prima facie evidence? It is generally said that the legislature has such authority under its broad powers of regulating court procedure and the rules of evidence. How far does this regulatory power extend? It has been held that a statute which provided that in every case, whatever be the nature and sufficiency of the evidence, the jury shall determine and decide the issue, was unconstitutional because it attempted to deprive the courts of their exclusive power to pass upon the sufficiency of the evidence.[10] However, statutes which provide that proof of one fact shall be prima facie evidence of another have been generally upheld.

One can find any number of cases sustaining the power of the legislature to provide that proof of one fact shall be prima facie evidence of another.[11] Frequently one will find a statute which provides that "illegal possession" of intoxicating liquors is an offence, followed by a provision that proof of possession shall be prima facie evidence of illegality. Now if such statute be interpreted to mean that, upon a showing of the fact of possession, the jury shall be permitted to consider the illegality thereof, it amounts to nothing more than a regulation of procedure, to which there is no objection. And several jurisdictions consider this to be the proper application of such statutes.[12]

The Supreme Court of North Carolina has declared: "The power of the legislature to pass a statute making the possession of a certain amount of intoxicating liquor prima facie evidence of an intent to violate the law against illegal sales is supported by the authorities and text-book writers, and is based upon the right of the legislature to change the rules of evidence, and upon the doctrine that an accused person has no vested right in any presumption or rule of evidence which the

9. Due to the fact that the term "prima facie" is used in varying meanings by the courts, it is necessary, in order to understand the position of a particular court, to ascertain what is understood by that court to be the definition of the term. A great many courts say that the legislature can make fact A prima facie evidence of fact B, and then proceed to say that the jury must find fact B, in the absence of proof to the contrary—a true presumption.

10. Thoe v. Chicago, M. & St. P. Ry. Co., 181 Wisc. 456, 195 NW 407, 29 A. L. R. 1280 (1923).

11. State v. Cunningham, 25 Conn. 195; State v. O'Connell, 82 Me. 30, 19 Atl. 86 (1889); State v. Intoxicating Liquors, 80 Me. 57, 12 Atl. 794 (1888); State v. Barrett, supra note 7; State v. Stromberg, 14 N. D. 291, 103 NW 566 (1905); State v. LaPointe, supra note 3; People v. Cannay, 139 N. Y. 32, 34 NE 759, 36 Am. St. Rep. 668 (1893); Board of Excise v. Merchant, 103 N. Y. 143, 87 NE 484, 57 Am. Rep. 705 (1886); Sellers v. State, supra note 7.

12. State v. Cunningham, supra note 11; State v Barrett, supra note 7; State v. LaPointe, supra note 3

law-making power can not alter, within certain limits. When possession is shown, then the legal presumption of guilt arises, and it devolves upon the accused to give a satisfactory explanation. Such a statute does not make it obligatory upon the jury to convict after presentation of such proof, but shifts upon the accused the duty to explain. * * * *. When proof of a certain fact is made prima facie evidence of the main fact to be established, the law does not mean that there is any presumption of guilt thereby created, but that there is sufficient evidence to go to the jury, and upon which they may convict, if there is no countervailing testimony.[13]" This court, then, upholds the statute on the ground that the legislature has the right to change and to regulate court procedure.

Now while the courts agree upon this general proposition that it is within the power of the legislature to change the rules of evidence and of procedure, their interpretation of the scope of such power has, by no means, been uniform. Many courts hold that the legislature, under this authority, has the power not only to determine what shall constitute prima facie evidence, but also has the right to determine what shall be presumptive evidence. These courts either give sanction to an express presumption, or they interpret "prima facie" to mean "true, unless rebutted" —which amounts to the same thing.

It must be admitted that, by the great weight of authority, the decisions favor such a view. The Supreme Court of the United States has held that such statutes do not violate the "due process" clause of the constitution.[14] Many state authorities are in accord with the position of the Supreme Court.[15]

The Supreme Court of Georgia recently used this language: "It is within the power of the legislature to formulate rules of evidence, and, therefore, within the legislative power not only to legalize as evidence a presumption that the insolvency of a bank was caused by fraudulent acts of the officer directly charged with its affairs, but also to place upon such officers the burden of rebutting this presumption.[16]" Generally speaking, the courts sustain such statutory presumptions by holding that it is within the power of the legislature to regulate court procedure, that the only effect of such statute is to "give a sort of artificial force" to the evidence, that the person against whom the evidence is offered still has the right of having the facts determined by a court, and that he is not deprived of his right to give evidence before a jury. These courts sustain statutes which provide that evidence of possession of intoxicating liquor shall be presumptive evidence that such possession was illegal; they thus shift to the defendant the burden of producing evidence to show that the possession was lawful.

It may be proper to inquire whether, conceding that the legislatures have the power to establish both prima facie rules and also statutory presumptions, such rules must be reasonable. Is it necessary that fact A be of such a nature as might reasonably create an inference of fact B? For example, could the legislature provide that proof that a defendant was wearing a hat at the time of the injury shall be prima

13. State v. Barrett, supra note 7.

14. Yee Hem v. U. S. 268 U. S. 178, 45 Sup. Ct. 470, 69 L. Ed. 904 (1924); Hawes v. Georgia, 258 U. S. 1, 32 Sup. Ct. 204, 66 L. Ed. 431 (1922).

15. Youmans v. State, 7 Ga. App. 101 (1909); People v. Love, supra note 7; State v. Intoxicating Liquors, 109 Iowa 145, 80 NW 230 (1899); Shanlian v. Equitable Co., 226 Mass. 67, 115 NE 46 (1917); Gillespie v. State, 96 Miss. 856, 513 So. 811, 926 (1910); Rosenfeld v. Jayways, 67 Mont. 558, 216 P 766 (1923); Durfee v. State, 53 Nebr. 214, 73 NW 676 (1897); Katz v. Eldredge, 96 N. J. Law 382, 118 Atl. 242 (1921); People v. Molland, 222 N. Y. 456, 119 NE 102, 4 A. L. R. 463 (1918); State v. Humphrey, 42SD512, 176 NW 39 (1920); Scott v. Commonwealth, 121 Va. 812 (1917). It is difficult to ascertain the Missouri view on this question. While the phrase "prima facie" is frequently used, it remains undefined. The implication of the case of O'Donnell v. Wells, supra note 1, is that the courts of Missouri would give effect to a statutory presumption.

16. Youmans v. State, supra note 15.

facie evidence that such defendant was guilty of negligence? The authorities quite generally hold that such rules of procedure and of evidence must be subjected to the test of rationality.[17] In fact, the Supreme Court of the United States has recently held that an arbitrary presumption violates the "due process" clause of the constitution.[18] One eminent text-writer contends that the reasonableness of such rules should not be subject to judicial review, that it is a matter exclusively for the legislature to determine.[19] It is to be noted, however, that the only authorities cited are contra to his position.

To return to the question whether the legislature has, or should have, the power to establish a true presumption, it is to be noticed that the effect of such presumptions is to require the defendant to come forward with evidence in rebuttal of the fact presumed, or else have the fact found against him. The question then arises: does the constitution guarantee only that a person shall have a right to give evidence before a jury, and that he shall have the right to a determination of the facts by such jury? It would seem that the constitutional guarantees extend farther. One has the additional right not to give any evidence. In criminal cases, the accused has the undoubted right to refuse absolutely to utter a word in his behalf, or to give any other evidence at the trial; he has the right to require the state to prove every element of the crime with which he is charged. And as it is beyond the power of the state directly to require a defendant to give evidence in his behalf, it would seem that it would necessarily follow that the state could not accomplish the same result by the indirect procedure of establishing a presumption against such defendant. And in civil cases, it is suggested that it is not the function of the legislature to determine the sufficiency of evidence. That would seem to be the exclusive function of the court.

Mr. Justice Peaslee, in *State v. LaPointe*,[20] attacks the power of the legislature to establish presumptions in the following language: "The broader interpretation of such statutes impairs the defendant's undoubted right to insist that he can not be convicted except upon evidence produced against him. If it were to be called a rule of evidence, it would be invalid because it would undertake to invade the judicial sphere, by prescribing the weight to certain evidence. Treated as a rule of procedure, it undertakes to compel the defendant to produce evidence, or else have a question of fact decided against him, as though it were one of law. To stress this so-called privilege of the defendant to produce evidence, as so many courts have stressed it, is an entire perversion of the protection guaranteed to him. It is true it is his right to produce evidence, but it is equally true that he cannot be compelled to do so, whether directly or indirectly.* * * It is his constitutional right not to produce evidence. Were it not for the array of cases denying the substance of this privilege, it would seem incredible that anyone could suppose that it could be invaded by any legislation based upon a power to penalize the exercise of a right. Giving to him the right to produce evidence, or not, is no substitute for his right not to produce it. . . ." Certainly this argument is sound. But the courts have quite generally sustained the power of the legislatures to establish such presumptions, both in civil and in criminal cases.

J. A. L.

17. State v. Gremmett, 33 Ida. 203, 193 Pac. 380 (1920); State v. Beach, 147 Ind. 74, 44 NE 949 (1896); People v. Cannon, 139 N. Y. 32, 34 NE 759 (1893); State v. Price, 175 N. C. 804, 95 SE 478 (1928).

18. Manley v. State, 279 U. S. 1, 49 Sup. Ct. 215, 73 L. Ed. 575 (1928).

19. 2 Wigmore on Evidence (2 ed), sec. 1356.

20. Supra note 3.

CONTRIBUTORY NEGLIGENCE OF ONE SPOUSE AS AFFECTING A JOINT ACTION BY BOTH OR AN ACTION BY THE SURVIVING SPOUSE FOR THE DEATH OF THEIR INFANT CHILD UNDER SECTION 4217 OF MISSOURI REVISED STATUTES (1919). *Carney v. Chicago R. I. & P. Ry. Co.*[1] and *Herrell v. St. Louis-San Francisco Ry. Co.*[2]

These cases involve a discussion of the doctrine of imputed negligence. In *Carney v. Ry.*, the Supreme Court of Missouri held that the negligence of the wife in going on the track in front of a fast approaching train would not bar the husband's action for the death of his infant child which the wife was carrying. Section 4217 of the Revised Statutes of 1919 expressly states that the mother and father have a joint action for the death of their unmarried minor children; or if either parent be dead, then the survivor may bring the action. As the mother and child were killed, the husband alone had an action for the death of his infant child in this case. In *Herrell v. Ry.*, the Supreme Court held that a plea of contributory negligence of the father alone was not a defense to a joint action by the father and mother for the wrongful death of their unmarried minor son under section 4217. In this case the defendant urged that the failure of the father to look and warn his son of the approaching train while the son was driving his father's car was a defense to the joint action or at least to the father's share of the judgment.

By prior Missouri cases it has been held that a plea of contributory negligence to this action for the statutory penalty is a defense unless the humanitarian doctrine has been pleaded. Contributory negligence of both parents is a defense.[3] Contributory negligence of the deceased is a defense.[4] Contributory negligence of the surviving parent is a defense.[5]

The cases under discussion seem to go a little further, especially the *Herrell* case which permits a recovery although one of the plaintiffs was contributorily negligent. The grounds for this decision are as follows: (1) That the cause of action accruing to the father and mother is joint and indivisible; (2) that the negligent father has no separate interest in the cause of action, and therefore the father and mother jointly are the plaintiff, and a defense good as against one is not a defense to all or any part of this joint cause of action; (3) that the defense of contributory negligence is a rule of convenience and does not go to the heart of the action; and (4) that the negligence of the husband is not imputed to the wife merely because of the marital relationship, and there must be an agency or joint enterprise relationship in order for the negligence of any person to be a bar to another's cause of action.

An analysis of the above points raises a number of interesting questions. By the express terms of section 4217, the father and mother, if both are living, have a joint action for the death of their unmarried minor child, and each has an equal interest in the judgment. On the basis of this part of section 4217, the Supreme Court ruled that the penalty could not be apportioned between the negligent and non-negligent parents; thus they allow the guilty beneficiary as well as the innocent beneficiary to recover his or her share of the penalty. On principle it is clear that a

1. 23 S. W. (2d) 993 (decided July 30, 1929).
2. 23 S. W. (2d) 102 (decided Nov. 15, 1929).
3. Weise v. Remme, 140 Mo. 289, 41 S. W. 797 (1897).
4. Holwerson v. St. Louis & Suburban Ry. Co., 157 Mo. 216, 57 S. W. 770 (1900); Huckshold v. Ry. Co., 90 Mo. 548, 2 S. W. 796 (1886).
5. Chawkley v. Wabash Ry. Co., 317 Mo. 782, 297 S. W. 20 (1927). The court said that a negligent mother was not in a position to claim a penalty for a catastrophe to which her own act contributed.

beneficiary should not profit from his wrongful act. The reasons advanced by our court for not following that general rule are as follows: (1) That the father has no separate interest in the cause of action; and (2) that prior to judgment, he has no separable interest in the penalty. Therefore, if his contributory negligence is a defense at all it must go to the entire cause of action or to none of it. The first reason advanced is sound enough; but the second reason seems to fall when examined in the light of the decision of the Colorado Supreme Court in the case of *Phillips v. Denver City Tramways Co.*[6] In comparing the Colorado statute with the Missouri statute it is seen: First, that it differs from our statute in that the mother is not a necessary party plaintiff if the father is living, but if she is living, the father, in any event, will hold one half the judgment in trust for her; second, it is like the Missouri statute in that if both the father and mother are living, each has an equal interest in the judgment, and thus as far as the difficulty of apportioning the damages is concerned, the problem is the same. The Supreme Court of Colorado said: "Each of the parties here have a half interest, and it would be an easy matter for the jury, under the proper instructions and interrogatories, in case they find the father guilty of contributory negligence as would defeat his recovery, to ascertain the amount that should be given the mother whose rights are not precluded." In Missouri it would seem to be even easier to apportion the judgment, for it is rendered on the basis of being a penalty and not on the basis of being the amount of damages that the various plaintiffs have sustained. In the *Herrell* case, it would seem that the jury could have been instructed to first assess the penalty, and second to ascertain whether or not the father was contributorily negligent. If the father was held contributorily negligent, and if both the father and mother were living, the court could give judgment only to the mother for one half of the penalty assessed; or, if it happened that the mother died before judgment was rendered, then the court could refuse to give judgment at all; or, if it happened that the father died before judgment was rendered, then judgment for the full amount of the penalty could be rendered in favor of the mother by the provision in the statutes relative to survivorship. Thus the possibility of the death of either joint plaintiff would seem to be no reason for refusing to bar a negligent father from his share of the penalty, when this unjust result could be avoided by a few special instructions.

Another line of cases[7] refuses to allow either the guilty or the innocent beneficiary to recover in cases similar to the *Herrelt* case. This rule is clearly unjust for it would seem to be better to allow both the guilty and innocent beneficaries to recover than to bar both, for surely the innocent beneficiary should not suffer because of the other's wrongful act. In some states[8] it is impossible to let one parent recover, without the other sharing in the judgment, because of the community property laws; and therefore the most just result is to let both recover. But the cases in most of the community property states, where this point has been decided, refuse to allow a recovery by either. In other states,[9] where the administrator sues for the beneficiaries, some bar all beneficiaries if any of the principal beneficiaries are negligent. As most of these decisions were in states that have no laws of community property, and married women hold their property to their own separate use, this result seems unjust,

6. 53 Colo. 458, 128 Pac. 460 (1912).

7 and 8. Creveili v. Ry. Co., 98 Wash. 42, 167 Pac. 66 (1917), 23 A. L. R. 696 (1923); Vinnette v. Northern Pac. Ry. Co., 47 Wash. 320, 91 Pac. 975, 18 L. R. A. N. S. 328 (1907); Kenna v. Ry. Co., 57 Cal. App. 124, 207 Pac. 35 (1922).

9. Hazel v. Bus. Co., 310 Ill. 38, 141 N. E. 392 (1923); (1924) 22 Mich. L. Rev. 489; (1924) 72 Penn. L. Rev. 333; (1924) 30 A. L. R. 491; (1924) 18 Ill. L. Rev. 564; (1923) 23 A. L. R. 696; Novitsky v. Knickerbocker Ice Co., 276 Ill. 102, 114 N. E. 545 (1916); Edwards v. Negley, 193 Ill. App. 426 (1914); Tooner's Administrators v. Ry. Co., 109 Ky. 41, 58 S. W. 439 (1900).

for it would have been possible to let the innocent beneficiaries recover and bar the negligent beneficiaries on the basis that one cannot profit from his wrongful act.

Another reason for the holding of the court in the *Herrell* case is that the defense of contributory negligence is merely a rule of convenience and that it does not go to the heart of the action. Even if the above proposition be admitted, it would seem that the maxim that "one shall not profit from his wrongful acts" should prevail to bar the negligent father from recovering his share of the statutory penalty; for as shown above there are really no practical difficulties in the way in apportioning the penalty.[10]

An important question[11] raised in both the *Herrell* and *Carney* cases is that the contributory negligence of the husband should not be imputed to the wife merely

10. The court as an additional reason for its conclusion says that the defenses to the statutory penalty named therein indicate that the law-makers intended them to be preclusive; and, as the defense of contributory negligence was not included in the named defenses, they will not extend this defense to cover cases not decided by precedent. It seems that the legislature could be said to have intended merely to make clear the usual defenses applied without any intention of making such defenses preclusive.

11. An outline of cases, a part of which is suggested by Professor Wigmore, *Contributory Negligence of the Beneficiary as a Bar to the Administrator's Action for Death* (1908) 2 Ill. L. Rev. 487, showing the relation of the cases under discussion to similar actions for the death or injury of a child where the negligence of someone might be set up in bar:

Case A.	Plea	Recovery
Child surviving:	1. Child's negligence	1. No. Hight v. Bakery Co. 168 Mo. App. 433, 151 S. W. 776 (1912)
Child's own action for corporeal injury.		Henry v. Ry. Co., 141 Mo. App. 351, 125 S. W. 794 (1910); Green v. Ry. Co., 173 Mo. App. 276, 158 S. W. 740 (1913) (unless too young to be guilty of contributory negligence).
	2. Parent's negligence	2. (a.) Yes, Missouri and majority of decisions. Berry v. Ry. Co., 214 Mo. 593, 114 S. W. 27 (1908); Neff v. Cameron, 213 Mo. 350, 111 S. W. 1139 (1908); Note (1921) 15 A. L. R. 414; Gilmore, *Imputed Negligence* (1921) 1 Wis. L. Rev. 193.
		(b.) No, minority. Negligence of the parent or custodian is imputed to the child where the child is incapable of exercising the ordinary care of an adult. Hartfield v. Roper, 21 Wend. (N Y.) 615 (1839); Pastore v. Livingston, 131 N. Y. Supp. 971 (1911); Morgan v. Ry. Co., 115 Me. 171, 98 Atl. 628 (1916); Note (1921) 15 A. L. R. 423; (1920) 19 Mich. L. Rev. 108.
Case B.		
Child surviving:	3. Child's negligence	3. No. Note (1926) 42 A. L. R. 717; Gilmore, *op. cit. supra*; (1926) 24 Mich. L. Rev. 592 (criticizing the existing law).
Parent's action for loss of services.		
	4. Parent's negligence	4. No. Frick v. Ry. Co., 75 Mo. 542, 545 (1882).
Case C.	5. Child's	5. No. Huckshold v.
Child deceased:	negligence	Ry. Co., *supra* note 4.
Administrator's action for wrongful death.	6. Beneficiary's negligence	6. (a.) Bars negligent beneficiaries only. Cleveland, C. C. & St. L. Ry. Co. v. Grambo, 103 Ohio St. 471, 134 N. E. 648 (1921); Wolf v. Ry. Co., 55 Ohio St. 530, 43 N. E. 708 (1896); Potts v. Union Traction Co., 75 W. Va. 212. 83 S. E. 918 (1914); Anderson v. Ry. Co., 143 Tenn. 216, 227, S. W. 39 (1921); Note (1923) 23 A. L. R. 674 and 691 The theory is that the administrator brings the action for the benefit of the distributees and not for the estate, and the court will not allow one

because of the marital relationship, and that an agency or joint enterprise relationship must be proved in this situation as in any other in order for the negligence of one to bar another's cause of action. In the *Herrell* case the court gave the following reasons: (1) That the husband and wife are no longer a unit motivated by the husband since the enactment of the Married Women's Property Acts; (2) that the husband is not liable for his wife's torts because of the marital relationship under a recent statutory enactment;[12] and (3) that the husband and wife have equal powers over the control and custody of their children by statute.[13] On the basis of the above reasons a long list of Missouri cases[14] were expressly overruled in which it was assumed without discussion that the negligence of one parent in failing to safeguard the children would be imputed to the other parent. This places Missouri in line with the majority view, and it is clearly more in accord with our present day concept of the marital relationship.

The minority view[15] rests on the basis that each parent impliedly authorizes the other to act for the other in the common care and custody of their children; thus on the basis of the marital relationship, they raise this implied warranty of authority to constitute each parent the agent of the other in the care of their children. This view raises a fiction as bad as the old fiction of the unity of husband and wife, for husbands or wives have no thought of acting as agents for the other in the care of their children, but each acts for the best interests of the child.

		to profit from his wrongful act. (b.) All beneficiaries recover. Wymore v. Mahaska Co., 78 Iowa 396, 43 N. W. 264 (1889); Warren v. Manchester St. Ry. Co., 70 N. H. 352, 47 Atl. 735 (1900); Southern Ry. Co. v. Shipp, 169 Ala. 327, 53 So. 150 (1910); (1923) 2 Ore. L. Rev. 128; (1925) 11 Va. L. Rev. 311; Note (1923) 23 A. L. R. 655, 682. The theory is that the action belongs to the deceased's estate and not to the beneficiaries. (c.) Bars all beneficiaries. See note 9, *supra* for authorities.
Case D. Child deceased: Parent's action for wrongful death of child under section 4217 of the Revised Statutes of Missouri 1919, or similar statutes.	Plea	Recovery	
	7. Negligence of sole plaintiff.	7. No. Chawkley v. Wabash Ry. Co., *supra* note 5.	
	8. Negligence of both Plaintiffs.	8. No. Weise v. Remme, *supra* note 3.	
	9. Negligence of only one parent in a joint action by both parents.	9. (a.) Negligent and non-negligent plaintiffs recover. Herrell v. St. Louis-San Francisco Ry. Co., *supra* note 2.	
		(b.) Only non-negligent beneficiaries recover. Phillips v. Denver City Tramways Co., *supra* note 6.	
Situation under discussion.		(c.) Neither of the beneficiaries recover. See *supra* note 7 for authorities.	
	10. Negligence of deceased parent in an action by surviving parent.	10. (a.) No. Darbrinsky v. Pennsylvania Co., 248 Pa. 503 94 Atl. 269 (1915).	
		(b.) Yes, Carney v. Chicago R. I. & P. Ry. Co., *supra* note 1.	

12. Mo. Rev. Stat. (1919) sec. 4241, enacted in 1915.

13. Mo. Rev. Stat. (1919) sec. 371, enacted in 1913.

14. Frick v. Ry. Co., 75 Mo. 542 (1882) (instructions approved that the negligence of the plaintiff or his wife would bar the plaintiff's action); Nagel v. Ry. Co., 75 Mo. 653 (1882) (in an action by both parents for the wrongful death of their child, it was assumed that the negligence of the mother would bar a recovery); Weise v. Remme, *supra* note 3; Levin v. Ry. Co., 140 Mo. 624, 41 S. W. 968 (1897); Mary Albert v. Ry. Co., 192 Mo. App. 665, 179 S. W. 955 (1915); Jensen v. Kansas City, 181 Mo. App. 359, 168 S. W. 827 (1914); Howard v. Scarritt Estate Co., 161 Mo. App. 552, 144 S. W. 185 (1912).

15. Darbrinsky v. Pennsylvania Co., *supra* note 11; Tooner's Administrators v. Ry. Co., *supra* note 9.

It is interesting to note that in expressly overruling earlier Missouri cases on the question the court in the *Herrell* case seemed to overlook the fact that the earlier *Carney* case had already decided this same question, but without any discussion of the previous authorities in this state, although the two opinions cite the same authorities in other jurisdictions.

P. G. O.

DEFENSE OF VOLUNTARY ASSUMPTION OF RISK DEPENDENT UPON A CONTRACTUAL RELATIONSHIP. *Thompson v. City of Lamar.*[1]

Plaintiff brought this action to recover damages for personal injuries received while engaged in repairing the roof of a building, in the city of Lamar, by coming into contact with the uninsulated wires of an electric lighting and power line owned and operated by the defendant municipality. The plaintiff alleged that due to the leaning condition of the poles to which the wires were attached the wires passed over and above the corner of the building, on which the plaintiff was working, about eighteen inches or two feet above the roof thereof; that said wires were loose and sagging, and had no insulation of any kind upon them to protect workmen on the roof of said building who might come in contact with them; and that such conditions had existed for such a length of time that the defendant city knew or could have known of such conditions in time to have remedied the same. The plaintiff further alleged that he saw the wires of defendant's said electric line, but he did not know whether they carried a current of electricity or not; that he was constantly careful not to come in contact with them; that, as he finished working on said roof near the corner over which the wires passed, he stood up and started to turn around and continue his work of repairing said roof, when a sudden gust of wind whipped said wires against plaintiff's body and limbs, and as a result thereof he was rendered unconscious and fell from the roof to the ground. The defendant pleaded contributory negligence and assumption of risk. The trial court refused the defendant's instruction which sought to submit the issue of plaintiff's assumption of risk. On appeal the supreme court said: "As we have heretofore said, the issue of assumption of risk is ordinarily and peculiarly referable to the relation of master and servant, and is based on contract, express or implied. We deem such issue inapplicable to the present case, for no relation of master and servant, or other contractual relation, existed between plaintiff and defendant city. The instructions given on behalf of both plaintiff and defendant fairly and fully submitted the issue of plaintiff's contributory negligence, and no harm or error was committed by the trial court in refusing defendant's instruction on the issue of assumed risk."

The purpose of this comment is to point out the fundamental difference between the doctrine of voluntary assumption of risk and that of contributory negligence, and to show that this distinction has not always been observed, with the effect that no little confusion has resulted from the failure of the courts in this respect. In order to lay any basis for a discussion of assumption of risk, it is necessary to have an understanding of the differences between assumption of risk and contribu-

1. 17 S. W. (2d) 960 (1929). This discussion is confined to the theoretical distinctions between assumption of risk and contributory negligence, and any questions of master-servant falling under the Employers' Liability Acts or the Safety Device Acts have been purposely avoided.

tory negligence. The cases are either so silent or hopelessly confused as to be of little value. Professor Bohlen points out the following fundamental differences:[2]

1. Voluntary assumption of risk negatives the idea of even prima facie liability. This is based upon a lack of a breach of any duty owed by the defendant to the plaintiff. If the plaintiff voluntarily enters into association with the defendant, if fully aware of the dangers, and assumes the risk of injury from such dangers, then clearly the defendant has breached no duty for he owed none. Since the defendant owed no duty to the plaintiff there was never any liability.

2. The assumption of the risk must be voluntary, and must be made where the plaintiff has knowledge of the danger. It is not enough that the plaintiff have knowledge of the danger and encounters it; but it must also appear that the encountering of the danger was voluntary, and that no coercive force was applied or exerted. If, after the plaintiff has entered into the association with defendant, some new danger is discovered, plaintiff must have had an opportunity to have discontinued such association and refuse, before he can be said to have voluntarily assumed the risk.

3. Where the plaintiff has voluntarily assumed the risk, recovery is not refused on the ground that the plaintiff has acted improperly or has fallen below the standard of the normal man. Plaintiff may have exercised reasonable care. In fact he may have had more than due regard for the danger and exercised extraordinary care. The plaintiff may have had good reason for encountering such a danger. His action may have been commendable. But whether prudent or reckless, the defendant owes him no duty and there can be no recovery. The plaintiff was free to take or leave such association. With full knowledge of the dangers he elected to take it, and defendant, having consented to plaintiff's entering the association, owes him no duty beyond a true disclosure of what the relationship is to be.

Continuing, Professor Bohlen makes the following observations on contributory negligence:

1. Contributory negligence, though not universally, is generally an affirmative defense. It displaces a prima facie liability established. Here there has been a breach of a duty owed by the defendant so that prima facie there is liability. Yet even though it be found that the plaintiff did not voluntarily assume the risk, this does not negative the existence of contributory negligence nor prevent the defendant from setting it up as a defense.

2. Contributory negligence excludes the idea of any deliberation; the plaintiff has acted without due regard to the duty of self protection that he owes to himself.

3. The very essence of contributory negligence is that the plaintiff had misconducted himself. He has done or failed to do that which under the circumstances a reasonably prudent man would not have done or failed to do.

If the defendant's act is unlawful but not negligent, it would seem that the defense of contributory negligence was not available. Contributory negligence means that the negligence of the plaintiff and of the defendant have contributed to the injury. It is the plaintiff's negligence acting in concert with the antecedent negligence of the defendant which makes it contributory. If the defendant has not been negligent, then the plaintiff's negligence cannot in any way contribute to the defendant's unlawful act in producing the injury. Yet assumption of risk would be a defense if the plaintiff voluntarily and with knowledge encountered the danger.

If the defendant's act is negligent, then either contributory negligence or as-

2. *Studies in the Law of Torts* (1926) 500; *Contributory Negligence* (1908) 21 *Harvard Law Review* 245.

sumption of risk would be available as a defense, depending on the circumstances, and the fact that one could not be proved would not negative the existence of the other, but it would seem that there can never be a case in which both defenses could be proved to exist on the same set of facts.[3] If the plaintiff has voluntarily assumed the risk, then there is no breach of a duty by the defendant for there is no duty. The two defenses are opposed to each other, in that contributory negligence is based on a breach of a duty by the defendant as well as a breach of a duty by the plaintiff, while assumption of risk negatives the existence of any duty owed by the defendant.

There is a class of cases in which the plaintiff may assume the risk and not be precluded from recovery, as where he must either assume a certain known risk or fail to fulfill a legal or moral duty, for the defendant is coerced into doing so by circumstances created by the defendant's fault.[4] Then assumption of risk cannot be a defense and only in case the plaintiff has not exercised due care in conducting himself with reference to the known danger should recovery be denied.

The doctrine of assumption of risk first received prominent announcement in the "spring gun" case,[5] but there was no effort made to draw any distinction between contributory negligence and assumption of risk until later. Then came the opinion of Shaw, J., in *Farwell v. B. & W. R. R.*,[6] in which he said that the servant assumed the ordinary risk of his employment. This decision was reached by making assumption of risk an implied condition in the contract of employment. A majority of the courts, apparently in a haze, and groping for some distinction, seized on Shaw's pronouncement and proceeded to lay great stress on the existence of a contract between plaintiff and defendant.[7]

There are three theories as to the basis of this doctrine. A vast majority of the courts hold that voluntary assumption of risk is based on a contract either express or implied. This is the position taken in the instant case.

3. But see Strother v. Milling Co., 261 Mo., 1 169 S. W. 43 (1914); Nodland v. Kreutzer & Wasem, 184 Ia. 476, 168 N. W. 889 (1918); Wescott v. Chicago Great Western R. Co., 157 Minn. 325, 196 N. W. 272 (1923).

4. See Bohlen, *Voluntary Assumption of Risk* (1906) 20 *Harvard Law Review* 14. at 18 in which the writer points out these eight situations;

a. In case of a market or a fair held on the premises.
b. Where a traveler uses a highway known to be dangerous, but where there is no other safer convenient way.
c. Where a tenant of offices or a flat, the approaches, stairs, halls etc., of which remain under the care of the landlord, together with the safe maintenance, knowing that this duty has not been performed and that the approaches have been allowed to become unsafe, remains in possession and does not immediately throw up his lease.
d. Where a shipper of goods or an intending passenger to whom the carrier is bound to furnish carriage and access to and egress from the premises for the purpose, knowing of some slight imperfection in the appliances of carriages or in the approaches to the station, persists in having his goods carried or who uses such defective means of access or egress.
e. Where a landowner's access or his premises having been impeded or rendered dangerous by the defendant's wrongful act, he braves the danger to raise the siege.
f. Where by the defendant's wrongful misconduct the plaintiff is in danger in the performance of work not upon the defendants premises and at a point where the plaintiff has a right to be irrespective of the defendant's consent.
g. Where one moves to a nuisance, or knowing of a wrongful act by an adjacent owner continues to use the land for the purposes for which it is naturally adapted, but which through the defendant's misconduct involves a risk of injury to his person or property.
h. Where plaintiff under an exigency caused by the defendant's wrongful misconduct, acts consciously and voluntarily in a way which subjects him to a known danger, but where he has so acted in the protection of some legal right or in the performance of some legal or social duty.

5. Ilott v. Wilkes, 3 B. & Ald. (1820).

6. 4 Met. 49 (1842).

7. St. Louis Cordage Co. v. Miller, 126 Fed. 495 (C. C. A. 8th, 1903), Shelby Iron Co. et al v. Cole, 208 Ala. 657, 95 So. 47 (1922); St. Louis, I. M. & S. Ry. Co. v. Brogan, 105 Ark. 533, 151 S. W. 699 (1912); Houston's Admn'x v. Seaboard A. L. Ry., 123 Va. 290, 96 S. E. 270 (1918).

In Oregon[8] estoppel has been given as the basis of the doctrine but that idea has received no support.

The third and soundest basis is that assumption of risk rests on the maxim *"volenti non fit injuria"* which is borrowed from the civil law.[9] The denial of a recovery in a case where a plaintiff has voluntarily assumed the risk is an outgrowth of individualism. Each person should be responsible for taking care of himself, and if he voluntarily assumes a known risk he alone is responsible for any injury therefrom.

If the contractual relationship is the basis of the doctrine then we have a clear distinction between assumption of risk and contributory negligence. But the distinction is unsound and the best answer to this is found in the opinion of Jaggard, J., in *Rase v. Minneapolis, St. Paul & S. S. M. Ry. Co.*,[10] in which he says, "the exact nature of the distinction however, is not generally agreed upon. It is often said that assumption of risk is a matter of contract; contributory negligence of tort or of conduct. This is fallacious. Both defenses are equally peculiar to the law of tort..... the former (assumption of risk) is mere passive subjection by the servant to the risk of injury inherent in known defective conditions. The latter (contributory negligence) is an act of omission on complainant's own part tending to add new danger to his situation not necessarily incident to conditions, and bringing upon himself a harm caused not solely by them, but created in part at least by his own misconduct. Contributory negligence is a breach of a legal duty to take due care. Assumption of risk is not a duty but is purely voluntary on the part of the servant. The doctrine of assumption of risk rests on intelligent acquiesence with knowledge of the danger and appreciation of the risk." While the term 'servant' is used, the same opinion goes on and expressly says that assumption of risk is not limited to the cases where a contractual relationship existed between the defendant and the plaintiff. There is no good reason given for limiting the doctrine to cases of contractual relationship. The only true question in such a case is whether the defendant owed the plaintiff a duty. The non-existence of a duty owed to the plaintiff is as evident in a case where the plaintiff and defendant have entered into no contractual relationship as where they have. Voluntary assumption of risk is implied in the contracts of employment between master and servant. But such implication is not based on the contract itself, but arises from the conduct of the plaintiff.

The idea of estoppel hardly deserves mention. It would involve the plaintiff being estopped to assert that the defendant was negligent. If the defendant owed the plaintiff no duty there could be no estoppel because the defendant was never negligent.

The soundest basis of the doctrine is the civil maxim *"volenti non fit injuria"*. This recognizes that it is the plaintiff's own conduct which precludes his recovery and also shows that there was never any liability on the defendant's part. The gist of the doctrine is that the plaintiff, exercising his free volition has elected to encounter a known danger, and since he is the caretaker of his own fate, and chooses to take a hazardous course rather than one free from danger, the defendant owes no duty to the plaintiff.

Some courts hold that assumption of risk has a dual aspect.[11] In its technical

8. Busch v. Robinson, 46 Ore. 539, 81 Pac. 237 (1905).

9. Obermeyer v. Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673 (1906); Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460 (1905); Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314 (1903). See the excellent discussion of this subject in 3 *Labatt's Master and Servant* (2d ed., 1913) secs. 1163-1204.

10. 107 Minn. 260, 120 N. W. 360 (1909).

11. Indiana Natural Gas & Oil Co., v. O'Brien, 160 Ind. 266, 65 N. E. 918 (1903). See also Filling-

meaning it is confined to those cases where there is a contractual relationship between the plaintiff and the defendant. On the other hand they speak of "incurred risk" or "running the risk" or "the risk or hazard" as being the equivalent of the maxim *"volenti non fit injuria."* Incurred risk or running the risk is held to be of universal application and is not confined alone to cases where the relation of the parties is of a contractual nature. This distinction is wholly unnecessary. The same result could be reached without the distinction and all confusion thereby avoided. Furthermore, there are some difficulties attending such a distinction. In its technical sense assumption of risk would seem to rest entirely upon the contract either express or implied. Yet they hold that an infant assumes the risk which one of that age should be aware of, and an infant's contract is voidable and may be disaffirmed when the infant reaches his majority. How then could he be held to have assumed any risk if he disaffirmed the contract when he became of age? This seems to show that the real basis of assumption of risk is conduct and not contract.

The Missouri courts have not only restricted assumption of risks to cases where the relation of the parties is of a contractual nature,[12] but they hold that the servant does not even assume the risk of the master's negligence;[13] and if the servant continues in the service of the master with actual or constructive knowledge and without a promise of a remedy, it then becomes a question of contributory negligence. In *Pitaman v. St. Louis & San Francisco Ry. Co.*,[14] the court says, "under the doctrine found in Missouri dealing with so called assumption of risk, the employee does not assume the negligence of the master or that of a vice principal. The moment negligence comes in at the door it may well be said that assumption of risk goes out at the window. We have here in Missouri come to use the term "assumption of risk" to express the mere hazards that appertain to a dangerous avocation when unaffected by the negligence of the master. When, however, the servant enters into or remains in the service of the master with actual or constructive knowledge of the master's negligence and without a promise of a remedy, we speak of this in our Missouri courts as contributory negligence. Other courts for the most part call it true assumption of risk."

This modification of an already limited doctrine, when carefully analyzed, amounts to a holding that there is no such thing as assumption of risk.[15] They hold that assumption of risk is not an issue where the master has been negligent. That limits assumption of risk to cases where there is a contractual relation between the parties and only there when the master has not been negligent. But in such cases there is not any liability if the master has not been negligent because there is no basis for any liability. If the defendant is negligent so as to have a basis for a liability on the defendants part, assumption of risk is no defense because it does not apply to cases where the master has been negligent. If there is negligence on the defendants part, but no contractual relation between the parties, assumption of risk

ham v. St. Louis Transit Co., *supra* note 9, in which the Missouri court says, "assumption of risk is never available unless based upon contract or if not exclusively on contract, then on an act done so spontaneously by the party against whom the defense was invoked, that he was a volunteer and any bad result of the act must be attributed to an exercise of his free volition instead of to the conduct of his adversary. The word assumption imports a contract or some kindred act of an unconstrained will." Quoted with approval in Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445, 110 S. W. 1086 (1908).

12. Goetz v. Hydraulic Press Brick Co., 320 Mo. 586, 9 S. W. (2d) 606 (1928). On motion for rehearing the court expressly says that the case was not ruled upon any question of contributory negligence or assumption of risk.

13. See Stother v. Milling Co., *supra* note 3, the Missouri cases are collected in (1910) 28 L. R. A. (N. S.) 1217.

14. 259 Mo. 109, 168 S. W. 622 (1914).

15. (1910) 28 L. R. A. (N. S.)1217. (Collection of Missouri cases).

is no defense because of the lack of contractual relationship. Then clearly there is no situation in Missouri where assumption of risk can be a defense. The effect of such holdings has been to abolish assumption of risk entirely and to substitute contributory negligence in its place. The injustice of that is clear. The plaintiff may assume a risk and still not be negligent.

A. E.

BILLS AND NOTES—TRANSFER WITHOUT INDORSEMENT—RIGHT OF HOLDER FOR VALUE TO INDORSEMENT. *Ginter v. Commerce Trust Co.*[1]

In an action upon a promissory note the Commerce Trust Company was sued as an unqualified indorser. The note in question was either purchased from the trust company without an indorsement or taken up to prevent a foreclosure. It was later sold to the plaintiff. At the close of the evidence, the trial court instructed the jury to return a verdict in favor of the trust company. After judgment on the verdict Ginter appealed. The Kansas City Court of Appeals held that there was no error committed in directing a verdict in favor of the Commerce Trust Company. Although only incidentally involved in the adjudication of the principal case, the court ruled that "no presumption arises from the sale of a note that the seller intended to guarantee its payment by indorsing it in blank."

One fundamental requirement of securing the free and easy transfer of negotiable instruments is that the rights of the transferee of an unindorsed negotiable instrument payable to the order of the transferor be definitely determined. When an instrument payable to order is transferred by delivery, without indorsement, the transferee acquires only such rights as would pass to the assignee of a paper not negotiable,[2] and he takes subject to all defenses and equities to which it was subject in the hands of the assignor.[3] To preserve the negotiability of bills and notes, statutory provisions give the transferee the right to demand written evidence of the transfer in the form of the transferor's indorsement. As to the nature of the indorsement, the Negotiable Instruments Law[4] and the Missouri Code[5] are silent. The situation where the parties intended an assignment governed by rules of ordi-

1. 14 S. W. (2nd) 41 (Mo. App. 1929).

2. Patterson v. Cave, 61 Mo. 439 (1875); Gookin v. Richardson, 11 Ala. 889 (1847); Simpson v. Hall, 47 Conn. 417 (1879); Hashell v. Mitchell, 53 Me. 468 (1866); Minor v. Bewick,, 55 Mich. 491 (1885); White v. Phelps, 14 Minn. 21 (1868); Berstein v. Fuerth, 132 Misc. 343, 229 N. Y. S. 791 (1930); Tom-Pah-Pe v. Roddy, 130 Okla. 54, 265 P. 128 (1928); Klein v. Lancaster Trust Co., 290 Pa. 280, 138 A. 768 (1927); Puget Sound State Bank v. Washington Paving Co., 94 Wash. 505, 162 P. 870 (1917).

3. Metropolitan Discount Co. v. Lyman, 194 Mo. App. 384, 266 S. W. 489 (1924); Townsend v. Alewel, 202 S. W. 447 (Mo. App. 1918); Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080 (1900); Weber v. Orten, 91 Mo. 677, 4 S. W. 271 (1887); Patterson v. Cave, *supra*, note 3.

4. Negotiable Instruments Law, section 49. "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

5. Mo. Rev. Stat. (1919), Section 835. "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to enforce the instrument against one who signed for the accommodation of his transferor, and the right to the indorsement of the transferor if omitted by accident or mistake. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement was made."

nary contracts is not treated in this note.[6] The precise issue demanding solution here is one concerning the rights of one who has given value[7] for a paper upon which the transferor's indorsement was inadvertently omitted. That he takes the legal title, as well as the equitable does not here concern us.

Section 44 of the Negotiable Instruments Law makes it possible for one who has an obligation to indorse to limit personal liability.[8] This form of indorsement does not impair negotiability in any way. We are concerned, in this note, with whether a holder of an order instrument accidentally unindorsed must be content with a qualified indorsement or, in the absence of any expressed or implied agreement to the contrary, whether he may expect an indorsement without qualifications which is the one most commonly used and expected in ordinary commercial transactions.

In an Indiana case decided before the adoption of the Uniform Negotiable Instruments Act, it was alleged that a contract was entered into by which the defendant, for sufficient consideration, was to indorse certain notes for the plaintiff. The Court instructed the jury that "where the agreement for the transfer is shown, and a valuable consideration therefor, the party claiming that the transfer was to be by delivery, or by indorsement 'without recourse', or otherwise than by simple indorsement, has on him the burden of so proving." This instruction was held by the Indiana Supreme Court to be a proper one.[9]

Perhaps the leading case on the point at issue in the United States is the Oregon case of *Simpson v. First National Bank of Rosebud.*[10] It interprets the Oregon Statute Section 5882, L. O. L. which, like most states' statutes, including Missouri's, is patterned after, and corresponds with, the forty-ninth section of the Negotiable Instruments Law.[11] Here was an action against the bank to recover a balance on a bankrupt's note, which note, prior to the maker's bankruptcy, had been delivered by the bank to the plaintiff for value and without an indorsement. The court ruled that the above statute gives to the transferee the right to an unqualified indorsement unless the parties agreed that the indorsement should be qualified.[12] It should be noted in passing that this rule is not the same as that laid down in the principal case. The Oregon Court, instead of refusing the presumption as did the principal case, presumed an agreement to indorse generally in the absence of an agreement to the contrary.

6. It is sufficient to say that to compel such a transferor to indorse the instrument in any manner would be manifestly contrary to justice and right. The Missouri Code provides for this circumstance by adding the words "if omitted by accident or mistake" to what is practically the provisions of section 49 of the Negotiable Instruments law, which places no express restriction upon the holder's right to the transferor's indorsement. It seems evident that such is the meaning of the statute without such express limitation. Brewster, one of the leading authorities on negotiability, believed that this section entitled the transferee to an indorsement even where the omission was intentional. He believed that in such case the transferor could indorse "without recourse." McKeehan, *The Negotiable Instruments Law*, found in The Negotiable Instruments Law, Brannon, 3rd Edition, p. 511.

7. Negotiable Instruments Law, section 49 has no pplication save when actual value is paid. Bond v. Maxwell, 40 Ga. App. 680, 150 S. E. 861 (1930).

8. "Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability." There is no similar provision in section 49. James Barr Ames says, "Such a provision should be added to this section." Ames, *Comments and Criticisms Upon the Negotiable Instruments Law*, 14 Har. L. Rev. 241.

9. Wade v. Guppinger et al, 60 Ind. 376 (1878).

10. 94 Or. 147, 185 P. 913 (1919).

11. *Supra*, note 7.

12. In Oregon the distinction between suits in equity and actions at law is preserved. The Oregon Supreme Court affirmed the action of the lower court in sustaining the demurrer to the complaint but remanded the cause with permission to the plaintiff to amend the complaint so as to entitle her to relief in equity.

In a Kansas case,[13] one Lawrence, prior to the insolvency of the Citizens' State Bank, had paid value for certain demand notes which the bank set aside from its assets for him. The receiver refused to indorse them with any indorsement but a limited one. Under an act[14] similar to the Missouri Act,[15] the Kansas Court held that the holder would be entitled to an indorsement without any qualifications unless a qualified indorsement was agreed to by the parties to the transaction or an agreement to make a qualified indorsement was fairly to be presumed from the accompanying circumstances.

The ruling of the principal case indicates that the transferee of an unindorsed negotiable instrument must prove an agreement to indorse generally; and in the absence of such proof, he must be content with a qualified indorsement. It did not appear in the case that either of the parties had contracted for a general indorsement. It is not contended that the transferee should be entitled to an unqualified indorsement when it appears that the intention of the parties was otherwise. It is contended that the rule is in error in placing the burden of proving an agreement to indorse without any qualifications upon the transferee.

Although there is little law upon this question, the rule in the Kansas case,[16] along with that of the leading case,[17] seems to be a proper one. It announces a sound interpretation of the statute and a logical determination of such a holder's rights. If the parties had contemplated that a qualified indorsement was to be all that was owing to him, since a general indorsement is commonly expected, there was necessarily an expressed or implied understanding. Instead of placing the burden of proving the absence of such an agreement upon the transferee, as does the principal case, it should rest upon the transferor to show the presence of such an agreement or facts from which its presence may fairly be implied. If the transferor's proof of such understanding is wanting, the transferee should be entitled to an unqualified indorsement. Such a rule would seem to give to the transferee no more than than to which he is equitably entitled and appears to be a reasonable interpretation of Section 835 of the Missouri Statutes.

B. H.

13. Lawrence v. Citizens' State Bank, 113 Kans. 724, 216 P. 262 (1923).
14. Kans. Gen. Stat. 1915, Section 6576.
15. *Supra* note 8.
16. *Supra*, note 13.
17. *Supra*, note 10.