Missouri Law Review

Volume 1
Issue 2 *April 1936*

Article 6

1936

Recent Cases

Recent Cases

BILLS AND NOTES—FICTITIOUS PAYEE.

First National Bank v. Produce Exchange Bank[1]

Ben T. Wilson handled the banking transactions for several interrelated Kansas City construction companies. He filled out a check on one of the companies for $1,000 payable to plaintiff bank and had C. J. Brown, the secretary and treasurer of the company, sign it. Wilson took this check to plaintiff bank and by his direction, plaintiff's exchange teller prepared a cashier's check for $1,000 payable to James Edgar, an existing person intended by Wilson to have no interest in the check.[2] Upon completion of the instrument Wilson indorsed the name of James Edgar on it, signed his own name as an indorser and deposited it to his credit in defendant bank. Defendant sent the check through the clearing house to plaintiff who paid it. In like manner two other checks for $1,000 each were drawn and honored by plaintiff. Defendant, as a member of the clearing house association, had agreed with the association to take up on demand any item bearing a forged indorsement which was cleared for the defendant. Plaintiff, claiming the indorsement by Wilson was a forgery, brought this action to recover the amount paid to defendant in honoring the checks.

By statute an instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable.[3] The trial court held that Wilson was the person making the instrument payable to a fictitious payee and thus that his indorsement was not a forgery since the check in that case would be payable to bearer. The Court of Appeals sustained the trial court's holding. The same conclusion was reached in the first hearing before the Supreme Court. At this hearing a distinction was drawn between this case and *American Sash and Door Co. v. Commerce Trust Co.*[4] In that case a pay roll clerk made up the pay roll, and from it a bookkeeper wrote out checks which were signed by the treasurer. The pay roll clerk padded the pay roll with fictitious names, and when the checks to the fictitious persons were made and signed he indorsed and cashed them. There it was held the treasurer's knowledge controlled in determining whether the instrument was payable to bearer. Upon rehearing of the principal case, the Supreme Court held that it was analogous to the *American Sash and Door Co.* case. Thus it found that plaintiff's teller was the person making the instrument "so payable". By this holding Wilson's indorsement would be a forgery since the teller did not know the payee was fictitious. Therefore the court held for plaintiff.

The court's apparent difficulty in deciding this case can be explained, for while decisions in other jurisdictions are in accord,[5] there is considerable plausibility in the opposite view. In the *American Sash and Door Co.* case the treasurer had no intention of drawing the checks according to the will of the pay roll clerk. Instead, he intended to make the checks

1. 89 S. W. (2d) 33 (Mo. 1935).

2. The law is well established that the payee named in an instrument will be deemed fictitious though designating an existing person, if there was no intent that he should have a beneficial interest in the paper. Snyder v. Corn Exchange National Bank, 221 Pa. 559, 70 Atl. 876 (1908); Norton v. City Bank & Trust Co., 294 Fed. 839 (C. C. A. 4th, 1923); United States Storage Co. v. Central Mfg. Dist. Bank, 343 Ill. 503, 175 N. E. 825 (1931); American Sash & Door Co. v. Commerce Trust Co., 332 Mo. 98, 56 S. W. (2d) 1034 (1932); Goodyear Tire & Rubber Co. of Cal. v. Wells Fargo Bank & Union Trust Co., 1 Cal. App. (2d) 694, 37 P. (2d) 483 (1934).

3. MO. REV. STAT. (1929) § 2638.

4. 332 Mo. 98, 56 S. W. (2d) 1034 (1932).

5. Seaboard Nat. Bank v. Bank of America, 193 N. Y. 26, 85 N. E. 829 (1908); Robertson Banking Co. v. Brasfield, 202 Ala. 167, 79 So. 651 (1918); American Express Co. v. People's Savings Bank, 192 Iowa 366, 181 N. W. 701 (1921); City of St. Paul v. Merchants' Nat. Bank, 151 Minn. 485, 187 N. W. 516 (1922); City Nat. Bank of Mexia v. First Nat. Bank of Wortham, 20 S. W. (2d) 212 (Tex. 1929).

payable only to men who had actually worked for the company. In the present case the intention of the teller was to make the check payable according to the will or caprice of Wilson. If Wilson had directed the check to be made payable to bearer it would have been so made. His will was the sole controlling factor in determining to whom the check should be drawn. It is to be noted that while the statute says only the *knowledge* and not the *intention* of the person making the instrument "so payable" can be looked to in determining whether the instrument is payable to bearer, the intentions of the parties can certainly be considered here since the purpose for such consideration is only to determine who is the person making the instrument "so payable". It seems, then, that some basis does exist upon which these cases can be distinguished, and that it would not be entirely inconsistent with the *American Sash and Door Co.* case to hold that Wilson was the one who made the check payable to the fictitious payee.

The principal case is quite similar to the situation where the drawer leaves the name of the payee blank and a fictitious name is filled in by some one else. There, courts hold the one filling in the name is the person making the instrument "so payable".[6] While in the present case Wilson did not perform the physical act of writing the fictitious name, still he had as free a hand in choosing the payee as did the person who filled in the blank. In view of these facts it does not seem unreasonable to say that Wilson was the person who made the instrument payable to the fictitious payee and that there was no forgery here.

The drawer-drawee bank, in this case, is secured by payment from the purchaser of the cashier's check. If that payment were made by check and the check be worthless the bank would ordinarily have an action only against the purchaser. But if the purchaser had the cashier's check made payable to a fictitious person without the knowledge of the bank, then under the court's holding, the bank would have an action against a bona fide purchaser for value and without notice, to whom the bank, as drawee, had paid the check.[7] Since the drawer-drawee bank was instrumental in creating the cashier's check and had adequate opportunity to secure itself, it would not seem unfair to let it stand the loss as against a bona fide purchaser. Thus, while the present opinion can be substantiated by the holdings in other jurisdictions, the opposite view certainly has some merit.

JOHN H. FOARD

CONSTITUTIONAL LAW—TAXATION—PRIVILEGES AND IMMUNITIES OF A CITIZEN OF THE UNITED STATES.

Colgate v. Harvey[1]

An income and franchise tax statute of the state of Vermont contained a provision imposing a tax on net income received from securities, but exempting from taxation net income received from loans made within the state at an interest rate not exceeding 5 per cent.[2] The statute was attacked on the ground that it violated the equal protection and the privileges and immunities clauses of the Fourteenth Amendment. In a 6 to 3 decision, the Supreme Court of the United States sustained that contention as to the section containing the exemption provision. After recognizing the principle that the equal protection clause does not forbid a reasonable classification in matters of taxation,[3] Justice Sutherland, writing the

6. Tri-Bullion Smelting & Development Co. v. Curtis, 174 N. Y. Supp. 830 (1919); Rancho San Carlos Inc. v. Bank of Italy, 123 Cal. App. 291, 11 P. (2d) 424 (1932).

7. Lieber v. Fourth Nat. Bank, 137 Mo. App. 158, 117 S. W. 672 (1909); Miners & Merchants' Bank v. St. Louis Smelting & Refining Co., 178 S. W. 211 (Mo. 1915); State v. Broadway Nat. Bank, 153 Tenn. 113, 282 S. W. 194 (1926); Home Ins. Co. v. Mercantile Trust Co., 219 Mo. App. 645, 284 S. W. 834 (1926); Endilich v. Bank of Battle Creek, 200 Wis. 175, 227 N. W. 866 (1929).

1. 56 S. Ct. 252 (1935).

2. Vt. Laws 1931, No. 17, § 3.

3. American Sugar Refining Co. v. Louisiana, 179 U. S. 89 (1900); Clement National Bank v. Vermont, 231 U. S. 120 (1913); Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U. S. 132 (1918); Maxwell v. Bugbee, 250 U. S. 525 (1919); Heisler v. Thomas Colliery Co., 260 U. S. 245 (1922); Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413 (1923); Lacoste v. Department of Conservation of State of Louisiana, 263 U. S. 545 (1924); Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50 (1926); Alward v. Johnson, 282 U. S. 509 (1931);

majority opinion, indicated that the inequality here was not proper. He stated that the classification had no fair relation to the object of the act, which was only to collect revenue, no other public purpose being named. He went on to say that assuming some other public purpose might be served, the provision was invalid by reason of the privileges and immunities clause of the Fourteenth Amendment. That conclusion was denounced in a dissenting opinion written by Justice Stone, and concurred in by Justices Brandeis and Cardozo. Following a denial that this particular discrimination contravened the equal protection clause, he attacked that part of the majority opinion which relied on the privileges and immunities clause.[4] He stated that the clause has never been held to afford protection to any form of interstate transaction, but has been limited to the protection of interests "growing out of the relationship between the citizen and the national government, created by the Constitution and federal laws."

It has repeatedly been declared that the privileges and immunities clause of the Fourteenth Amendment extends only to rights arising from the Constitution and laws of the United States.[5] Yet the decision in the principal case declares that the investment of money outside the state is included in this category. This conclusion was reached by drawing an analogy to the right to pass freely from state to state, which right is protected by the clause in question.[6] It is difficult to see the similarity in the two situations, for the court expressly holds that it is a privilege of a citizen of the United States to loan money outside the state "whether in so doing he remains in Vermont or not." The finding is especially interesting in view of the fact that this seems to be the first case which has held a state statute invalid under the privileges and immunities clause of the Fourteenth Amentment.[7] From the language of the case it is difficult to determine exactly how far the court intended to go. It is not altogether clear whether the court meant that it is beyond the power of a state to enact any tax on income received from loans outside the state, or that the tax here was unconstitutional because discriminatory, or that it was invalid because the basis of the classification was unreasonable. As indicating the first view, the court said the power to tax this income is the power absolutely to preclude loans outside the state, and a state is forbidden by the Fourteenth Amendment from prohibiting a lawful loan of money in another state. If the court intended to go that far in its decision, it limits the taxing power of the states in a situation which even the commerce clause has never been held to cover. That clause does not invalidate a tax solely because it is levied on net income derived from interstate transactions.[8] It is more probable that this tax was held invalid because it discriminated against loans not made within the state, since the court said "the discriminatory tax here imposed abridges the privileges of a citizen of the United States." As Justice Stone points out, neither the equal protection nor due process clauses require exact equality of taxation. If the ma-

State Board of Tax Commissioners of Indiana v. Jackson, 282 U. S. 527 (1931); Lawrence v. State Tax Commissioners of Mississippi, 286 U. S. 276 (1932); Union Bank & Trust Co. v. Phelps, 288 U. S. 181 (1933).

4. Justice Stone said, "Feeble indeed is an attack on a statute as denying equal protection which can gain any support from the almost forgotten privileges and immunities clause of the Fourteenth Amendment."

5. Slaughter-House Cases, 83 U. S. 36 (1872); In re Kemmler, 136 U. S. 436 (1890); McPherson v. Blacker, 146 U. S. 1 (1892); Giozza v. Tiernan, 148 U. S. 657 (1893); Duncan v. Missouri, 152 U. S. 377 (1894); Twining v. New Jersey, 211 U. S. 78 (1908); Maxwell v. Bugbee, 250 U. S. 525 (1919); Ownbey v. Morgan, 256 U. S. 94 (1921); Prudential Ins. Co. of America v. Cheek, 259 U. S. 530 (1922); Hamilton v. Regents of University of California, 293 U. S. 245 (1934).

6. Crandall v. Nevada, 73 U. S. 35 (1867) (though decided before the adoption of the Fourteenth Amendment, the case held this a right of national citizenship); see Williams v. Fears, 179 U. S. 270, 274 (1900).

7. Justice Stone said, "Since the adoption of the Fourteenth Amendment, at least 44 cases have been brought to this Court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until today, none has held that state legislation infringed that clause."

8. United States Glue Co. v. Town of Oak Creek, 247 U. S. 321 (1918); Shaffer v. Carter, 252 U. S. 37 (1920); Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 (1920); Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413 (1923).

jority's real objection to the tax is its *discriminatory* feature, he predicts that the privileges and immunities clause will become "an inexhaustible source of immunities, incalculable in their benefit to taxpayers and in their harm to local government, by imposing on the states the heavy burden of an exact equality of taxation wherever transactions across state lines may be involved." The only other possibility is that the tax was held unconstitutional because the classification it adopted was unreasonably discriminatory. However, that situation is adequately covered by the equal protection clause, which forbids a classification in matters of taxation if such classification does not have a reasonable relation to the objects of the legislation.[9] The majority of the court said that clause was contravened in this case. It indicated that a different decision might have been reached had the exemption applied only to income received from money invested in Vermont property. The court reasoned that in that situation a public purpose would be served through a resulting increase of wealth within the state. Would not a similar line of reasoning uphold the provision in question? The exemption would tend to encourage loans within the state, and, as the dissent argued, it is not for the court to say that the presence of such funds would not benefit local industry through a lowering of interest rates.

Because of the new life it infuses into the privileges and immunities clause of the Fourteenth Amendment, and because of the additional limitation it imposes on state power, at least in the field of taxation, this case may well have far-reaching effects.

W. L. NELSON, JR.

CONTRACTS—CLAUSES IN RESTRAINT OF MARRIAGE IN TEACHERS' CONTRACTS.

Taggart v. School District No. 52, Carroll County[1]

Plaintiff was suing to recover wages allegedly due her under a teaching contract. The contract contained the following clause: "Be it further agreed that the party of the First Part, declares that she is not married, and that if she should become married at any time during the school term of 1933-34, she shall immediately resign her position as teacher and this contract shall become null and void." Plaintiff was married at the time when she signed this contract, but the Kansas City Court of Appeals permitted her to recover, saying that the courts of the state had long held such clauses "arbitrary, unreasonable, and void." Supporting its decision with no discussion as to why the clause was void, the court cited only the earlier Missouri case of *Byington v. School District of Joplin*.[2] However, the decision in this latter case did not rest upon the question of whether the board of education had the power to make and enforce a rule in regard to marriage, or if it did have such power, whether the rule was a reasonable or valid one. The court specifically said that the appellant took no exceptions to the finding of the court below on that question and that the question "is settled as far as this case is concerned." The case was decided in the appellate court solely on the question of abandonment of the contract on the part of the plaintiff. Thus the *Byington* case does not seem to be authority for the decision in the *Taggart* case.

The decision respecting the marriage clause in the *Taggart* case appears directly to conflict with the holding of the Springfield Court of Appeals in the case of *Blodgett v. Consolidated School Dist. No. 35 of Scott County*.[3] In this latter case, the court permitted the "marriage clause" to stand, and Plaintiff was not permitted to recover because of her breach of the clause.

Inasmuch as the court in *Taggart v. School District* gives no reason for holding the marriage clause to be "arbitrary, unreasonable, and void", it is difficult to discuss the

---

9. Royster Guano Co. v. Virginia, 253 U. S. 412 (1920); Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71 (1924); Schlesinger v. Wisconsin, 270 U. S. 230 (1926); Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32 (1928); Liggett Co. v. Lee, 288 U. S. 517 (1933).

1. 88 S. W. (2d) 447 (Mo. App. 1935).
2. 224 Mo. App. 541, 30 S. W. (2d) 621 (1930).
3. 86 S. W. (2d) 374 (Mo. App. 1935).

merits of the decision. The probable basis for the holding is the often stated doctrine that contracts and conditions in restraint of marriage are void.[4] Professor Williston says, "As the sanctity of the marriage relation is at the foundation of the welfare of the State, the law has looked with jealous regard at contracts concerning the relation."[5] This "jealous regard" seemingly began during the reign of Augustus after the passage of the *Lex Iulia* and the *Lex Pappia Poppaea*.[6] The two laws were passed to encourage marriage, and the natural result was that agreements in restraint of marriage were invalid. Lord Chancellor Loughborough in the case of *Pearce v. Loman*[7] says, "In the civil law, all conditions upon marriage, without reasoning upon the effect or nature of them, were contrary to a positive law made in encouragement of marriage, upon the peculiar circumstances of the Roman World at that time, antecedent to the two laws. . . ." Later writers disagree with Loughborough as to the exact reason for the rule in the Roman law,[8] but in any event it did exist, and was followed by the Ecclesiastical courts.[9] From the Ecclesiastical courts, the rule came into the common law. In *Harvey v. Aston*,[10] the court says, "The true reason [for holding such a condition void] . . . seems to be . . . to keep an uniformity between this court and the Ecclesiastical Court; for since pecuniary legacies may be sued for in the Ecclesiastical Court where such a condition [in restraint of marriage] would be holden void, it would be strange that the legatee suing in the Ecclesiastical Court should recover his legacy, but suing here should be barred."

Since the doctrine has come into the common law, it has been modified to some extent, so that the rule now generally followed is that such contracts and conditions are not void if the restraint upon marriage is a reasonable one.[11] The elements which go to make up this reasonableness are not very clearly defined by the courts. Some say that if the restraint is not the chief purpose of the contract, it is reasonable.[12] Others hold that if marriage is inimical to the employment contracted for, the restraint of marriage is not unreasonable.[13]

Viewing all of the circumstances of the teacher's contract, the doctrine of the *Taggart* case appears to be an unsound one. The restraint in that case was not the chief purpose of the contract, but rather was only incidental to the contract of employment. The fact that marriage brings with it the duty of caring for the home and the possibility of pregnancy argues that marriage is inimical to the profession of teaching.[14] The restraint was only for one year, and it is difficult to conceive why it should be considered unreasonable.

The opinion of the Springfield Court of Appeals in the *Blodgett* case appears to be a more liberal and sounder view. A strict adherence to the old doctrine is not an absolute necessity; and the clause in question in the *Taggart* case does not seem to be unreasonable in the light of the circumstances of the case. If it is still felt that such clauses are not socially desirable, the better way to eliminate them would be by means of a statute rather than by an unreasonable interpretation of the "public policy" which such clauses are supposed to affect.

Another point to be observed is that made by the lower court in the *Byington* case. That court held that § 11137 of the 1919 Revised Statutes of Missouri limited the power of the school board in respect to what might be included in the teacher's contract; and that the school board could not, by its contract with the teacher, enlarge its authority or power to make rules and regulations. Thus, the court holds, that under that statute the school board was not empowered to put the marriage clause in the contract. The statute does state what elements must be included in the contract, but does not expressly limit the provisions of the contract to those elements. A more liberal interpretation of that statute would be that the school board could add any reasonable provisions in the teacher's contract which it felt were necessary. Such an interpretation would permit the inclusion of the marriage

4. 3 WILLISTON, CONTRACTS (1920) § 1741.
5. *Ibid.*
6. MOMMSEN, RÖMISCHES STAATSRECHT 376ff; BUCKLAND, A TEXT-BOOK OF ROMAN LAW 10, 291.
7. 3 Ves. 138 (1796).
8. (1914) 49 L. R. A. (N. S.) 606.
9. 3 Ves. 138 (1796).
10. 2 Comyns 726 (1740).
11. WILLISTON, *op. cit. supra* note 4; (1914) 49 L. R. A. (N. S.) 633.
12. Fletcher v. Osborn, 282 Ill. 143, 118 N. E. 446 (1918).
13. Williston, *op. cit. supra* note 4.
14. Backie v. Cromwell Consolidated School District, 186 Minn. 38, 242 N. W. 389 (1932).

clause, if, of course, we regard the marriage clause as a reasonable one. The *Taggart* case has been certified to the Supreme Court, and it is possible that the decision of that body will rest upon the judicial interpretation of the above mentioned statute

KIRK JEFFREY

EVIDENCE—IMPEACHMENT OF FORMER TESTIMONY.

State v. Pierson[1]

At the second trial of the case of *State v. Pierson*, the plaintiff read in evidence the testimony of a witness given at a former trial, the witness then being incompetent to testify by reason of insanity. The Supreme Court of Missouri held that it was error to exclude evidence offered by the defendant for the purpose of impeaching the credibility and weight of the former testimony, such evidence being designed to show that, unknown to the defendant, such witness had been suffering from the same disease, *dementia praecox*, at the time of the first trial.

By this decision the court seems to be logically extending the general rule stated by Wigmore,[2] namely, that "the existence of a derangement of the sort termed insanity is admissible to discredit, provided that it affected the witness . . . while on the stand"; but no decision has been found in which former testimony was thus sought to be impeached.

In *Blanchard v. People*,[3] the Colorado Supreme Court held that a witness who was absent and whose testimony on a former trial was read to the jury could not be impeached by proof that he was of a low order of intelligence, where it was not claimed that he was insane. This evidence was not excluded on the ground that former testimony cannot be impeached by showing that the witness was mentally incompetent to testify at the time of the former trial. The court merely applied the general rule that no witness can be impeached by showing that he is not possessed of ordinary powers of mind.[4] The court said: "It should be borne in mind that no question of insanity, or of a mind diseased or weakened by liquor or drugs, is here presented or decided".

As to impeachment of former testimony in other ways, a good many cases are to be found where it was sought to impeach such testimony by evidence of statements contradicting those made at the earlier trial. The majority rule seems to be that such impeaching evidence cannot properly be introduced, regardless of whether the contradictory statements were made prior or subsequently to the testimony at the earlier trial, unless the proper foundation has been laid by a warning question.[5] That is, the witness must be asked while on the stand, whether he made such contradictory statements in order that he may deny so doing, or explain the statements if he admits having made them; his attention must be called to the time, manner and place of making the statements. In the case of former testimony the warning question cannot be asked because at the time of the second or later trial the witness is not on the stand, and most courts refuse to dispense with this requirement. No Missouri case has been found in which former testimony was thus sought to be impeached. However, in an analogous situation, where under Mo. Rev. Stat. (1899) § 678,[6] an affidavit for continuance embodying the particular facts expressed to be proven by a witness, may under certain circumstances be introduced as the testimony of such witness on account of his absence, the statute providing further that the opposite party may prove any contradictory statements made by the witness in relation to the matter in issue, the Missouri courts have held that such contradictory statements are admissible though no foundation for the impeachment of the absent witness can be laid by asking a warning question.[7] It has also been

1. 85 S. W. (2d) 48 (Mo. 1935).
2. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 932.
3. 70 Colo. 555, 203 Pac. 662 (1922).
4. 2 WIGMORE, EVIDENCE (2d ed. 1923) § 935; Bell v. Rinner, 16 Oh. St. 46 (1864), a leading case on this point.
5. Mattox v. United States, 156 U. S. 237 (1895); Hubbard v. Briggs, 31 N. Y. 536 (1865); Omaha St. R. Co. v. Boesen, 75 Neb. 767, 105 N. W. 303 (1905). *Contra:* Mitchell v. State, 87 Tex. Crim. Rep. 530, 222 S. W. 983 (1920).
6. Mo. Rev. Stat. (1929) § 940.
7. Ely-Walker Dry Goods Co. v. Mansur, 87 Mo. App. 105 (1901); Nagel v. Transit Co., 104 Mo. App. 438, 79 S. W. 502 (1904).

held that a party opposing the probate of a will may impeach "constructive testimony" of an absent attesting witness by showing the witness' contradictory statements.[8]

On the other hand, it has been held that a party cannot impeach testimony in the deposition of a witness by proving contradictory statements, without first having called the witness' attention to such statements by a warning question.[9]

Investigation of Missouri cases fails to show any case where a party attempted to impeach the testimony of a witness in a deposition by showing that the witness was in a defective mental condition at the time the deposition was taken. The Texas courts have held that such evidence is admissible, the witness' mental capacity being material to enable the jury properly to weigh his testimony.[10]

HELEN HUNKER

EXECUTORS AND ADMINISTRATORS—JURISDICTION TO GRANT LETTERS—CONFLICTING ADJUDICATION OF DOMICILE.

In re Grenning's Estate[1]

Section 4 of the Missouri Revised Statutes (1929) provides that "letters testamentary or of administration shall be granted in the county in which the mansion house or place of abode of the deceased is situated." Testator died on December 17, 1932, having executed his will several years before in the state of Oklahoma. Later in December this will was filed in the probate court of Ralls County, and on the same day, a commission was ordered to issue for the taking of the testimony of the attesting witnesses to the will in Oklahoma. On January 23, 1933, defendant, not knowing of the will, or of the proceedings commenced in Ralls County, applied for appointment as administratrix of testator's estate at the probate court of Monroe County, alleging that the testator was a resident of Monroe County. On the same day the court appointed defendant administratrix as prayed. On February 11, 1933, the probate court of Ralls County found that the testator was a resident of Ralls County and ordered that the will be admitted to probate, and on March 6, 1933, appointed plaintiff executor. Several days later plaintiff filed this motion in the probate court of Monroe County praying that this court revoke and set aside all proceedings theretofore had by it concerning the administration of the estate and the appointment of the defendant as administratrix. From an order revoking her letters of administration, defendant appealed to the circuit court, and from its judgment sustaining plaintiff's motion, defendant again appeals. Affirmed.

In holding that the finding of a probate court as to the existence of a fact upon which its jurisdiction over a particular matter depends is not subject to collateral attack, this case is in accord with the previous Missouri cases involving this question,[2] and with the weight of authority.[3] Missouri seemingly extends this principle to apply as between states as well as between counties,[4] though the prevailing view on the latter point is to the contrary.[5]

---

8. German Evangelical Bethel Church of Concordia v. Reith, 327 Mo. 1098, 39 S. W. (2d) 1057 (1931).

9. Able v. Shields, 7 Mo. 123 (1841); Gregory v. Cheatham, 36 Mo. 161 (1865); Ebert v. Metropolitan St. Ry. Co., 174 Mo. App. 45, 160 S. W. 34 (1913).

10. Kellner v. Randle, 165 S. W. 509 (Tex. Civ. App. 1914); McClure v. Fall, 43 S. W. (2d) 821 (Tex. Civ. App. 1931).

1. 89 S. W. (2d) 123 (Mo. App. 1936).

2. In re Duly's Estate, 27 Mo. 43 (1858); Johnson v. Beazley, 65 Mo. 250 (1887); In re Estate of Davison, 100 Mo. App. 263, 73 S. W. 373 (1902); Linder v. Burns, 243 S. W. 361 (Mo. 1922); Wyatt, Adm'r v. Wilhite, 192 Mo. App. 551, 183 S. W. 1101 (1916).

3. In re Kladivo's Estate, 188 Iowa 471, 176 N. W. 262 (1920); Bremer v. Lake Erie & W. R. Co., 318 Ill. 11, 148 N. E. 862 (1925); Bolton v. Schriever, 135 N. Y. 65, 31 N. E. 1001 (1892); Holmes v. Warton, 194 N. C. 470, 140 S. E. 93 (1927); Sewell v. Christison, County Judge, 114 Okla. 177, 245 Pac. 632 (1926).

4. Citizen's Bank & Trust Co. v. Moore, 215 Mo. App. 21, 263 S. W. 530 (1924).

5. Baker v. Baker, Eccles & Co. 242 U. S. 394 (1917); Colvin v. Jones, 194 Mich. 670, 161 N. W. 847 (1917).

The courts of a few states, including Kansas, hold that the finding of a probate court that the testator was a resident of its county may be collaterally attacked, even in courts of concurrent jurisdiction.[6] It seems obvious that the consequences of such a rule are chaotic. If this position is taken each probate court in the state could appoint a personal representative by finding that the testator was a resident of its county, and there would be nothing to prevent every representative appointed from recovering for the same debt from a debtor of the testator, as a judgment for one would not be a bar to a recovery by another.

When holding that a decision of a probate court respecting the residence of a testator is not open to collateral attack, it is generally not difficult to decide which of the courts purporting to decide this question may retain its jurisdiction to the exclusion of all others, because in the ordinary case the court in which proceedings are first commenced becomes the first to decide the question of residence. When, however, as in the principal case, the court in which proceedings were first started is not the first to decide this question, the necessity of determining which court shall prevail then becomes a serious problem. It is provided by statute[7] in this state that "if, after letters of administration are granted, a will of the deceased be found, and probate thereof be granted, the letters shall be revoked, and letters testamentary or of administration with will annexed shall be granted." It is apparent that such revocation does not deprive the court of any jurisdiction it may have acquired. Furthermore, it is proper for a probate court to revoke letters granted by it when it is made to appear that jurisdiction belongs to a court in another county.[8] The question as to which court has jurisdiction still remains. This case holds, apparently without precedent, that when the court in which proceedings were first commenced makes an order appointing an administrator or executor, such order relates back to the inception of the proceedings begun in that court, and thus it may retain its jurisdiction to the exclusion of all other tribunals. Some cases reach the same result, but base it upon the theory that the court in which the first petition was filed acquires exclusive jurisdiction upon such filing and that this jurisdiction is never relinquished.[9] The better view would seem to be that no exclusive jurisdiction is acquired until the court decides that the facts necessary for the proper assumption of jurisdiction exist and thereupon gives its order of appointment.[10]

It has been held in actions in personam, where either of two or more courts may have jurisdiction, and in those actions in rem where it is assumed or unquestioned that the facts necessary for the acquisition of jurisdiction exist, that jurisdiction may be deemed to have attached when the petition was filed or process served.[11] Consequently in these cases the court thus acquiring jurisdiction is entitled to retain it,[12] and prohibition will be granted to prevent other courts from interfering with this jurisdiction.[13] But even in these cases, when a judicial order or judgment is given, it becomes binding and conclusive on all other courts, regardless of which action was first commenced.[14] In any event such cases should have no

6. Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369 (1902); Dresser v. Fourth Nat. Bank, 101 Kan. 401, 168 Pac. 672 (1917).

7. Mo. Rev. Stat. (1929) § 40.

8. Power v. Green, 139 Ga. 64, 76 S. E. 567 (1912); 23 C. J. 1101.

9. Stewart v. Poinbeouf, 111 Tex. 299, 233 S. W. 1095 (1921); Hanson v. Nygard, 105 Minn. 30, 117 N. W. 235 (1908). The case of State *ex rel.* Mitchell v. Gideon, 215 Mo. App. 46, 137 S. W. 220 (1928), appears to support this view, though it is distinguishable in the respect that it contains a strong suggestion of fraud in the procuring of the will from the first court in which it was filed in order to probate it in the other court.

10. Tilton v. O'Conner, 68 N. H. 215, 44 Atl. 303 (1895); see also Phoenix Bridge Co. v. Castleberry, 131 F. 175 (C. C. A. 4th, 1904); Long v. Burnett, 13 Iowa 28 (1862); Jackson v. Handy, 166 Okla. 13, 25 Pac. (2d) 771 (1933).

11. State *ex rel.* Tauban v. Davis, 190 S. W. 964 (Mo. App. 1916); Julian v. Commercial Assur. Co., 220 Mo. App. 115, 279 S. W. 740 (1926); In re Couch Cotton Mills Co., 275 Fed. 496 (N. D. Ga. 1921); Graig v. Hoge, 95 Va. 275, 28 S. E. 317 (1897).

12. Julian v. Commercial Assur. Co., 220 Mo. App. 115, 279 S. W. 740 (1926); Cromwell v. Hamilton, 87 Okla. 66, 209 Pac. 395 (1922); 15 C. J. 1134.

13. State *ex rel.* Tauban v. Davis, 190 S. W. 964 (Mo. App. 1916); State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 107 S. W. 487 (1907); Lee v. Superior Court of California, 191 Cal. 46, 214 Pac. 972 (1923); State v. District Court of Tulson County, 82 Okla. 54, 198 Pac. 480 (1921).

application to the type of case under discussion, since here a jurisdictional fact must be found to exist before it can be determined which court is the proper one to assume jurisdiction, and since, it being a proceeding in rem, only one court can truly be said to have jurisdiction. The unsoundness of the theory that jurisdiction attaches upon the filing of the petition is apparent if the court in which the first petition is filed subsequently decides that it has no jurisdiction. Moreover, as a legal fiction should only be used to prevent injustice,[15] it is difficult to see how the application of the fiction of relation back here can be said to be justified. On the other hand, the desirability of the actual administration of the estate being commenced at the earliest possible date would ordinarily be reached by allowing the first court to grant letters to prevail.

SESCO V. TIPTON

INCORPORATED SOCIETY—NATURE OF MEMBERSHIP IN.

State ex rel Baumhoff v. Taxpayer's League of St. Louis[1]

This was a petition for a writ of mandamus for the reinstatement of relator into membership in the Taxpayer's League from which he had been excluded without a hearing. The facts of the case may be briefly stated. The relator was a member of the Taxpayer's League since its incorporation in 1925, and in 1931 he wished to examine the books of the corporation in order to prepare a defense to a slander suit that had been brought against him by the secretary-treasurer of the League. To prevent the relator from exercising his corporate right of examination, a resolution was passed, excluding him from the League and thereby depriving him of this right. The court observed that "obviously, the purpose and effect of the resolution . . . was to exclude from membership all persons not on the list of members approved by the meeting as constituting the list of members in good standing . . . ."[2] The possibility of resignation of the relator is unimportant to the discussion of the case.[3] The Taxpayer's League of St. Louis County was organized under Art. 10, c. 32 of Rev. Stat. of Missouri (1929), providing for the incorporation of benevolent, religious, scientific, fraternal-beneficial and educational associations not organized for profit. Its purpose was to promulgate better government for St. Louis County. The writ was denied by the St. Louis Court of Appeals on the theory that it had no jurisdiction, because relator had no proprietary or pecuniary interest to be protected.

The problems of protecting rights when no such interest appears is presented to courts of law when extraordinary legal remedies are sought and to courts of equity when injunctive relief is sought. It is acknowledged in the principal case that the relator seeks to protect an intangible interest that is neither proprietary nor pecuniary in nature. A close analogy to the situation is found in the protection of so-called rights of personality. In these cases the courts were at first inclined to refuse relief because no property interest was presented for their protection. The writer concedes that the relator had no tangible property interest to be protected in the case under discussion, but it is submitted that he had a right of some sort

---

14. Nave v. Adams, 107 Mo. 414, 17 S. W. 958 (1891); Drake v. Kansas City Public Service Co., 226 Mo. App. 365, 41 S. W. (2d) 1066, *rehearing denied*, 54 S. W. (2d) 427; United States v. Dewey, Fed. Cas. No. 14,956 (1876); Boatman's Bank of St. Louis v. Fritzlen, 135 F. 650 (C. C. A. 8th, 1905); Sims v. Miller, 151 Ark. 377, 236 S. W. 828 (1921); Paskewie v. East St. Louis & S. Ry. Co., 197 Ill. App. 1 (1915); 2 FREEMAN, JUDGMENTS, (5th ed. 1925) § 719; 34 C. J., 758 (1924).

15. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 1895 (1905); Stearns *Fiction* (1932) 81 U. OF PA. L. REV. 1, 7.

1. 87 S. W. (2d) 207 (Mo. App. 1935).

2. *Id.* at 208.

3. *Ibid.* "Relator, on motion for rehearing, presents a number of excerpts from the testimony going to show that he never resigned as a member of the Taxpayer's League. The opinion concedes that on that issue the evidence was conflicting. This case, however, does not rule on that issue, but on the resolution adopted at the meeting of September 26th, which unquestionably excluded the relator from membership. Cases cited by relator, wherein were involved direct or severable pecuniary or proprietary rights or interests in point."

that ought to have been protected, whether it is to be called an interest of substance or what not. The court held, however, that since there was no property right to be protected in relator's petition for reinstatement into membership for the purpose stated, it had no jurisdiction to hear the case.[4]

Equitable and legal jurisdiction has been extended beyond the protection of tangible property rights in a great many cases. The extension of jurisdiction for the protection of human dignity and peace of mind has been made much easier through the ever-widening meaning attached to the conception of property. The gulf between an acre of land and the right of privacy may have been too broad for equity to cover both, but its jurisdiction over "property," as the courts choose to define it, has allowed the protection of rights that are certainly not "severable proprietary or pecuniary interests."[5] Although the courts have extended the concept of "property" to include a great many interests and privileges, yet the court refused in the principal case even to consider the value of the intangible right of participation in the association by the relator. If the court had wished to follow the fiction of requiring a prerequisite of a "property interest" before it would entertain the case, it could have easily called this privilege of participation "property" and then gone into the question of whether it was of enough value to protect. The writer readily concedes that all rights of members of every sort of organization should not necessarily be protected. However, there might well be an injury in some of the cases involving membership in clubs, associations, or leagues, that is akin to a violation of privacy, and which, therefore, might be a grave injury without involving any interest of "property" at all. The fear that Sir George Jessel expresses[6] that equity would undertake an impossible task if it sought to protect against such injuries will be dealt with a little later.

Turning now to the three cases cited by the court to sustain its decision we find little authority for its broad proposition of denial of jurisdiction. In *State ex rel Hyde v. Jackson*

---

4. *Ibid.* The complete holding of the court was—"Whether or not the action of the League in this excluding from membership, without a hearing, was wrongful or unauthorized is a matter not within purview of judicial concern, since no direct or severable pecuniary or proprietary right or interest is involved."

5. Pound, *Equitable Relief against Defamation and Injuries to Personalty* (1915) 29 HARV. L. REV. 640, 668-877; Chaffee, *Equitable Relief Against Torts* (1920) 34 HARV. L. REV. 388, 389; note (1936) 36 COL. L. REV. 502; note (1936) 34 MICH. L. REV. 588. Public nuisances are remotely connected with property rights and equity takes jurisdiction. Equity has long protected state-recognized "mental property" such as patent, copyrights, and trademarks. Trade secrets, unpublished poems, and private letters are even protected. Gee v. Pritchard, 2 Swan. 402 (1818). Drake v. Drake, 177 N. W. 624 (Minn. 1920) (wife enjoined from nagging her husband); Stock v. Hamilton, 149 Ga. 227, 99 S. E. 861 (1919) (father enjoined from associating and communicating with his daughter); Ex Parte Warefield, 40 Tex. Crim. Rep. 413, 50 S. W. 933 (1899) (defendant enjoined from associating with wife who alienated the wife's affection). The case of Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911), recognized the right of privacy as a property interest when it allowed action for damages because of the unauthorized publication of the picture of five-year old son of plaintiff.

6. Rigby v. Connol, 14 Ch. D. 482 (1880). "There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's courts to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together without any property in common at all. A dozen people may agree to meet and play bridge at each other's house for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any court of justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each other's houses, or at any place there is a possibility of their meeting each other; but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any court of justice would interfere with such an association if some of the members declined to associate with some of the others." Note however, that England has modified the effect of this decision. See Osborne v. Amalgamated Society of Railroad Servants, 104 L. T. 2728 (1911) 1 Ch. 562, where the decision was expressly qualified as going too far. See, also D'Arcy v. Adamson, 57 S. J. 391; 29 T. L. R. 367.

County Medical Society,[7] the court refused to reinstate a doctor who had been excluded from a medical society because he had written an obscene letter to one of the members of the Library Club of the society after his application for membership in this club had been refused. The court laid down the rule that before mandamus would be issued, a property, or pecuniary right would have to be infringed. In *State v. Landwehr*,[8] the point of jurisdiction was not directly involved. The members of a lodge attempted to enjoin an order of the Grand Chancellor that suspended plaintiff from membership. There was no contention on the part of the plaintiffs that the Grand Chancellor had not acted within the scope of his authority. The court simply declined to interfere with internal affairs of the corporation. In *Hall v. Morrin*,[9] again the problem of jurisdiction was not involved. The court declined only to interfere with internal affairs of the organization after it had decided that the trial for suspension of the member was in accord with the constitutional provisions of the articles of associations.[10] It is difficult to see how the case can be cited as authority for the proposition that it is not in the judicial purview of the court to inquire into the question of expulsion without a hearing except when there is a property right involved.

It is submitted that the court was wrong in its decision in the principal case, and that other decisions of that same court support the writer's view. In the case of *Albers v. Merchants' Exchange of St. Louis*,[11] this court approved the theory that equity's jurisdiction depended upon inadequacy of legal remedy rather than the existence of any severable proprietary interest. In this case, the plaintiff sought reinstatement in the Merchants' Exchange by applying for an injunction prohibiting the directors from suspending him because of nonpayment of a fine imposed upon him for smoking in the building. This is the first Missouri case to pass directly on the point of law involved in the instant case. The court said: " 'The remedy by writ of injunction or prohibition shall exist in all cases where an injury to real or personal property is threatened, *and to prevent the doing of any legal wrong whatever*, whenever, in the opinion of the court, *an adequate remedy cannot be afforded by an action for damages*, R. S. 1899, Sec. 2722 . . . .' It is shown by the testimony of the plaintiff that he is a commission merchant, doing business in volume varying from ten to twenty millions a year, and the privilege of meeting other merchants on the floor of the exchange to trade with them *is a very valuable privilege*. It is obvious, upon slightest reflection, that the rules of the law in regard to the measure of damages afford no standard by which the loss which might flow from even a temporary deprivation of this right could be estimated."[12] It is to be noted that courts of another jurisdiction have held that equity has no jurisdiction on the same facts found in the *Albers* case.[13]

The writer does not urge the proposition that the court of equity should listen to all disputes of all organizations at any time and the Missouri courts have seen fit to lay down certain prerequisites that an excluded member must comply with before he is entitled to a judicial review. The relator must exhaust all remedies within the corporation or the unincorporated society before he may be able to ask the court's aid.[14] The writer does not suggest

7. 295 Mo. 144, 243 S. W. 341 (1922).
8. 261 S. W. 241 (Mo. App. 1924).
9. 293 S. W. 435 (Mo. App. 1927).
10. The court said: "There are many instances that occur to us in which the members of the tribunal, before which the hearing is had, are either directly or indirectly affected by the offenses alleged to have been committed. Courts cite and try persons for contempt. Directors of boards of trade and stock exchanges try members for offenses which have injured the very directors sitting in judgment, and similar practice is to be found in the cases of police boards, medical societies, bar associations, clubs and other social organizations. We conclude therefore that, inasmuch as the manner of plaintiff's trial was governed by the contract existing between him and the International Association, and inasmuch as the hearing appears to have been conducted in substantial conformity with the laws and rules of practice provided in the constitution by which he agreed to be bound, his objection to the validity of his trial and conviction are not well taken."
11. 39 Mo. App. 583 (1890).
12. *Id.* at 589 (Italics the writer's).
13. Fisher v. Board of Trade, 80 Ill. 85 (1875).
14. Mulroy v. Knights of Honor, 28 Mo. App. 463 (1888). See also Dawkins v. Antrobus, 17 Ch. 615, 630 (1881); Labouchere v. Earl of Wharncliffe, 13 Ch. D. 346, 353 (1879); Fisher v. Keane, 11 Ch. D. 353 (1878); Sperry's Appeal, 116 Pa. St. 391 (1887).

that cases involving membership in the Wednesday Club or the Saturday Night Bridge Club should not be heard by the courts unless very special circumstances are found, but such cases should not be dismissed with a statement of a supposed rule of law that excludes from the court's jurisdiction all associations that do not happen to have some "severable pecuniary or proprietary interests."

Again in 1901, this court, in the case of *Brandenburger v. Jefferson Club Association*,[15] expressed the view here urged. This case seems to have escaped the notice of the court entirely. A club was organized and incorporated for the purpose of preserving, defending, and advancing the essential principle of pure government as formulated by Thomas Jefferson and embodied in the history of the Democratic Party. Quoting from the opinion, "There are *rights and privileges incident to membership in an organization like the respondent club, independent of any property interest* which, if not valuable, are prized as desirable, and the esteem in which they are held is likely to wax instead of wane, because the trend of society bids fair to continue toward association habits and efforts. . . . The law has not lingered; along with the phase of contemporary life has gone a development of rules needed to appropriately regulate these corporations, which have characteristics of their own and call for an application of legal principles *unlike that made to companies created for gainful purposes.*" The court goes on to say: "It may be said, generally, that the disciplinary power of a corporation of the class to which the Jefferson Club belongs, over its members, and its rights to try, suspend and expel them for alleged delinquencies, is not interfered with by the courts except when abused. *If a fair mode of trial is provided, with due notice to the accused, an opportunity to defend himself and a decision rendered in good faith, not from caprice or ill will, the civil courts will not supercede it.*"[16]

It is to be noted that the interest protected in the *Albers* case was valuable. It was not tangible property in any sense of the word. The *Brandenburger* case could possibly be distinguished on the ground that relief was denied the relator but it is to be noted that the court first inquired into whether the relator had been excluded according to the laws of the club and deciding that he had been then refused to go further. The narrow holding does not decide that the relator's "privilege" would have been of sufficient value to be protected but their dictum points clearly to the existence of some interest within the cognizance of legal protection.

The *Albers* and the *Brandenburger* cases, thus, do not require a proprietary interest. True, the right of the relator in the principal case was intangible, but the courts have protected intangible rights.[17] If the definition of property must be extended until the courts clearly recognize that a legal fiction is being employed to protect rights other than proprietary interests the writer feels that the extension should have been made in the principal case. The better view would be clearly to recognize the factual situation and acknowledge that there is a right, a privilege of membership in a voluntary association, wholly disconnected from any proprietary interest and then inquire into the justification of legally protecting such an interest, requiring always the compliance with the rule of exhaustion of remedies within the corporation before the court entertains the plea that the corporation has wrongfully excluded him.

In the principal case the court refused even to go into the question of the hearing the relator received, in fact held the fact to be immaterial. The relator is left then without any remedy at all to protect his rights and privileges that are incident to membership in the League. The *Brandenburger* case seems to be the best decision rendered by the St. Louis Courts of Appeals on the same factual circumstances.

JOHN W. OLIVER

---

15. 88 Mo. App. 148 (1901).
16. *Id.* at 158. (Italics the writer's). The statute this quotation refers to is the statute that permits the pro forma decree corporations to adopt by-laws for expulsion of members. The same provision is found today in MO. REV. STAT. (1929) § 5005.
17. *Supra*, note 5.

INSURANCE—LIABILITY OF INSURER TO INSURED FOR REFUSAL TO SETTLE.
McCombs v. Fidelity and Casualty Co. of New York[1]

The action was for damages arising out of a liability insurance policy issued by defendant, Fidelity and Casualty Company of New York, to plaintiff, R. M. McCombs. By this policy the defendant company agreed to insure the plaintiff in the sum of $5000 against liability for damages imposed by law arising from bodily injury or death suffered by any person or persons as a result of the operation of a certain automobile. By the terms of this policy the insurer reserved the right to settle any claim or suit brought against the insured and to conduct the defense to any such action, in the event the insured was sued. The insured was not to interfere in any negotiation or legal proceeding conducted by the insurer on account of any claim arising out of his operation of the automobile specified.

While this policy was in force, the insured, by reason of his negligence in the operation of his automobile, seriously injured George McClard. Prior to the trial of the McClard case, the attorney for the insurance company in charge of the insured's defense, received a bona fide offer of settlement of that action for $5000. This offer was rejected by the insurance company. The attorney for the insurance company and for the insured knew beyond a reasonable doubt that McClard under the facts of the case would recover a judgment far in excess of $5000 against the insured. He regarded the case as a hopeless one for the defense and accordingly advised the insurance company to settle the case for the limit of the liability policy. This the company refused to do on the ground that it was not its policy to settle for the maximum liability as there was an element of chance that McClard would not recover. McClard recovered a judgment for $10,000 against the insured, who brings this action to recover damages from the insurance company for its failure to settle for $5000 as offered by McClard. The St. Louis Court of Appeals found that the evidence of bad faith in refusing to settle was ample and affirmed the judgment for the plaintiff below.

This case presents a question of first impression in Missouri, but has been frequently decided in other jurisdictions where similar policy provisions were involved. By the terms of the policy the privilege of the insured to settle the claim was taken away,[2] and such agreement is not void as a champertous contract;[3] but there is a duty on the insurer to act in good faith and to act diligently in settling a claim or in defending any such action.[4] The interests of the insurer and insured in defending the action are not opposed, but in deciding whether or not to accept an offer of settlement their interests may be different. The liability of the insured is unlimited, and a settlement for any amount not exceeding the sum named in the policy is acceptable to him. The insurer, on the other hand, has a limited liability. It may be to his advantage to refuse an offer of settlement if the amount asked closely approaches the maximum liability under the policy. He may feel that there is a chance that the verdict will not equal the maximum of his liability.

The courts agree that if failure to settle is in bad faith, the insurer is liable.[5] Many courts hold, furthermore, that negligence in not settling the claim is a basis for relief against the insurer.[6] Some jurisdictions, although holding that bad faith makes the insurer liable, refuse

1. 89 S. W. (2d) 114 (Mo. App. 1935).

2. In General Accident Assur. Corp. v. Louisville Telephone Co., 175 Ky. 96, 193 S. W. 1031 (1917), it was held that a provision prohibiting the insured from settling any claim involving accident covered by the policy would not prevent insured from settling the amount in excess of that for which the insured was liable.

3. *Ibid.*

4. Brassie v. Maryland Casualty Co., 210 N. Y. 235, 104 N. E. 622 (1914); Cleveland Wire Spring Co. v. General Accident Assur. Corp., 6 Ohio App. 344 (1917); New York Cons. R. Co. v. Mass. Bonding and Ins. Co., 193 App. Div. 438, 184 N. Y. Supp. 243 (1920).

5. Wisconsin Zinc Co. v. Fidelity and Deposit Co., 162 Wis. 39, 155 N. W. 1081 (1916); Best Building Co. v. Employers Liability Assur. Corp., 247 N. Y. 451, 160 N. E. 911 (1928); Tiger River Pine Co. v. Maryland Casualty Co., 163 S. C. 229, 161 S. E. 491 (1931).

6. Attleboro Mfg. Co. v. Frankfort Marine Ins. Co., 240 Fed. 573 (C. C. A. 1st, 1917); Douglas v. United States Fidelity and Guaranty Co., 81 N. H. 371, 127 Atl. 708 (1924) (insurer held liable for negligent failure to settle claim within the limits of the policy); Slowers Furniture Co. v American Indemnity Co., 15 S. W. (2d) 544 (Com. App. Tex. 1929) (insurer defending suit against the insured must exercise ordinary care in considering offer of settlement).

to extend the liability beyond the maximum named in the policy where the insurer is only negligent.[7] Will the courts of Missouri extend this liability further and hold the insurer liable for a negligent failure to settle? Many courts have accepted this view, but their reasoning is quite varied. Some say that the insurer is an agent of the insured; others say that he is an independent contractor. Both of these views are subject to criticism. It must be admitted after an analysis of the arguments employed to found a duty, that they are not in the light of logic and precedent sufficient. Yet the courts have the power and the duty to make new precedents, in order that present day needs may be satisfied. As said by Mr. Justice Cardozo, "You may call this process legislation if you will. In any event no system of *jus scriptum* has been able to escape the need of it."[8] It seems that the source of this liability is the great desire for the courts to recognize "the position of guardianship occupied by the insurer in society and to endow the insurer with a responsibility for efficient action greater than is required by the corner grocer."[9]

In the case of an insurance company's tort liability arising from an unreasonable delay in acting on an application for insurance, some courts recognize the liability of the insurer, but do not agree in their reasoning to support such liability.[10] Because of an insurance company's position in society there is some basis, perhaps, for this doctrine of tort liability in these cases. Certainly if an insurance company is liable in damages for its unreasonable delay in acting on an application for insurance, likewise, it should be liable for failure to settle a claim under an indemnity policy, whether the insurance company acted in bad faith, or was negligent.

SAM P. KIMBRELL

NUISANCE—SPLITTING OF CAUSES AND SUMMARY OF MISSOURI LAW AS TO CONTINUING NUISANCE.

Kelly v. The City of Cape Girardeau[1]

Plaintiff's land was flooded by heavy rains because of street grades established by the City of Cape Girardeau and because of an inadequate storm sewer. Plaintiff maintained several actions at law for damages against the city and the condition was adjudicated a continuing or temporary nuisance.

In 1931 plaintiff recovered, in one action, for damages resulting from several floods. In 1932 plaintiff brought the present action to recover for damages caused by other floods which occurred prior to the floods which were the basis of the 1931 action.[2] The Springfield Court of Appeals held that the judgment in the 1931 action was not a bar to the present action because each flood was a separate and distinct cause of action. However, the Court of Appeals certified its decision to the Supreme Court because the judges considered the decision to be in conflict with certain prior decisions.

The decision of the Court of Appeals was vigorously criticised in a note in the University of Missouri Law Series[3] along the lines now adopted by the Supreme Court in reversing that decision and holding that the judgment in the 1931 action was a bar to the present action because of the policy against permitting a plaintiff to split a cause of action. It is submitted that this result is highly desirable as protecting the courts as well as the defendant from the burden of unnecessary litigation. It is in accord with several previous decisions in this state

7. Mendota Electric Co. v. New York Indemnity Co., 175 Minn. 181, 221 N. W. 61 (1928); Best Building Co. v. Employers Liability Assur. Corp., 247 N. Y. 451, 160 N. E. 911 (1928) (insurer held not liable for more than amount of policy on ground of negligence in failing to settle for less).

8. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1922) 15.

9. Comment (1930) 40 YALE L. J. 121; Comment (1933) 13 B. U. L. REV. 734.

10. Boyer v. State Farmers' Mutual Hail Ins. Co., 86 Kan. 443, 121 Pac. 329 (1912); Duffe v. Bankers Life Ass'n., 160 Iowa 19, 139 N. W. 1087 (1913). *Contra:* National Union Fire Ins. Co. v. School District, 122 Ark. 179, 182 S. W. 547 (1916); American Life Ins. Co., v. Nabors, 124 Tex. 221, 76 S. W. (2d) 497 (1934); Lipscomb, *Court-Made Torts* (1933) 3 IDAHO L. J. 12.

1. 89 S. W. (2d) 41 (Mo. 1935).

2. 228 Mo. App. 865, 72 S. W. (2d) 880 (1934).

3. 49 U. OF MO. BULL. L. SER. 62 (1935).

in which the same considerations were involved,[4] and also in accord with the leading cases from other jurisdictions.[5]

The present decision has settled the Missouri law as to this point. Since the Court, *obiter*, approved certain Missouri decisions involving other problems in connection with continuing or temporary nuisances, it is worth while to summarize the Missouri law in connection with such decisions:

I Definition:

"A temporary nuisance, as distinguished from a permanent one, may be said to be one which may be abated."

"Where . . . the structure or character of the business, when properly conducted and operated, does not constitute a nuisance, but only becomes such through negligence, then the nuisance or injury is only temporary or abateable."[6]

II Relief may be obtained by:

A—Suit in equity for an injunction.[7]

B—Action at law for damages.[8]

III Considerations arising in actions at law:

A—Measure of damages:

1. Recovery may be had only for such damages as have accrued. Probable future injuries may not be shown.[9]

B—Pleading:

1. If the injuries are of an intermittent type each separate occurrence must be declared on in a separate count.[10]
2. If the injury is of such nature as to be constantly operating, one count is apparently sufficient.[11]

C—Limitations:

1. The statute runs independently on each injury or item of damage.[12]

D—Splitting of causes:

1. All damages which have accrued prior to the filing of the petition must be sued for, otherwise they are barred and cannot be the basis of a subsequent action.[13]

Cape Girardeau, Mo. S. Russell Vandivort, LL. B., '35

---

4. Steiglider v. The Missouri Pacific Railway Co., 38 Mo. App. 511 (1889); Kelly v. The City of Cape Girardeau, 227 Mo. App. 730, 60 S. W. (2d) 84 (1933); Viviano v. Ferguson, 39 S. W. (2d) 568 (Mo. App. 1931).

5. Indiana Pipe Line Co. v. Christensen, 195 Ind. 106, 143 N. E. 596 (1924); Beckwith v. Griswold, 29 Barb. 291 (N. Y. 1859).

6. Shelly v. Ozark Pipe Line Corp., 327 Mo. 238, 37 S. W. (2d) 518 (1931).

7. Sherlock v. Kansas City Belt Railway Co., 142 Mo. 172, 43 S. W. 629 (1897). Harrelson v. Kansas City and Atlantic Railroad Co., 151 Mo. 482, 52 S. W. 368 (1899).

8. Kelly v. The City of Cape Girardeau, 228 Mo. App. 865, 72 S. W. (2d) 880 (1933).

9. This result is desirable because the probable damages are difficult to estimate and because the nuisance might be abated. See Van Hoosier v. Hannibal and St. Joseph Railroad Co., 70 Mo. 145 (1879); Shelly v. Ozark Pipe Line Corp., 327 Mo. 238, 37 S. W. (2d) 518 (1931).

10. Offield v. Wabash, St. Louis and Pacific Railway Co., 22 Mo. App. 607(1886); Bunten v. Chicago, Rock Island and Pacific Railway Co., 50 Mo. App. 414 (1892).

11. Shelly v. Ozark Pipe Line Corp., 327 Mo. 238, 37 S. W. (2d) 518 (1931).

12. Kelly v. The City of Cape Girardeau, 89 S. W. (2d) 41 (Mo. 1935).

13. Kelly v. The City of Cape Girardeau, 89 S. W. (2d)41 (Mo. 1935); Steiglider v. The Missouri Pacific Railway Co., 38 Mo. App. 511 (1889); Kelly v. The City of Cape Girardeau, 227 Mo. App. 730, 60 S. W. (2d) 84 (1933); Viviano v. Ferguson, 39 S. W. (2d) 568 (Mo. App. 1931).

PLEADING—COUNTERCLAIM—MUTUAL LIBELS AS ARISING OUT OF THE SAME TRANSACTION.

Skluzacsk v. Wilby[1]

To plaintiff's cause of action for libel contained in defendant's letter of July 19, 1934, defendant filed a counterclaim based on an alleged libel published by the plaintiff in a phamplet in June, 1934. Apparently there was a connection between the two publications in that they were made with reference to a common controversy that had arisen between the parties. Held that the counterclaim did not arise out of the same transaction as plaintiff's cause of action and, therefore, could not avail the defendant in this action.

The statute defines and limits a counterclaim as "a cause of action arising out of the contract or transaction of plaintiff's claim, or connected with the subject of the action."[2] A counterclaim has been allowed for mutual slanders when they occured at the same time,[3] but most courts hold to the contrary.[4] When the defendant counterclaims for assault in an action for slander, both occuring at the same time, the majority of the courts refuse to allow the counterclaim, though here there is a greater tendency to do so.[5] In case of collisions it is generally recognized that the defendant may counterclaim for the negligence of the plaintiff.[6] Also, the courts do not have any difficulty in allowing the defendant's counterclaim in case of mutual assaults,[7] for it is generally held that the word "transaction" is broad enough to include the entire physical encounter.[8] There is, perhaps, better reason to allow a counterclaim in the last two situations, because the court generally determines which party has a cause of action.

Despite the efforts at generalization, the statutes have remained a matter for the specific application to the facts of each particular case. The courts have, however, attempted to base the limits of the transaction on a narrow interpretation of the wording of the statute, and have disregarded its purpose, namely to promote trial convenience in the case of controversies between the same parties where there are common questions of law and fact. Clark says the only test which can be consonant with the function of the counterclaim is whether or not the particular claim, in the court's discretion, may be expediently tried with the plaintiff's cause.[9] The word "transaction" should not be restricted to contractual relations,[10] and should be flexible enough to include all facts that a layman would naturally associate with, or consider as being a part of, the course of dealings between the parties.[11]

In a suit for conversion of sacks, the Missouri Supreme Court allowed a counterclaim for a defect in quality of the goods which were shipped in the sacks.[12] The court said that the word "transaction" included all the facts and circumstances out of which the injury arose. In an action for the value of the professional services of a physician, the defendant based his counterclaim on a contract to "heal and cure," but it was found that no such agreement existed and the counterclaim was disallowed.[13] The court implied by way of dictum that if the defendant has based his claim on the transaction clause of the statute, it would have been allowed. In *Becke v. Forsee*,[14] where the plaintiff sued for malicious prosecution for causing his arrest on the charge of assault with intent to kill, and the defendant counterclaimed for injuries resulting from the assault, the court refused to allow the counterclaim

1. 263 N. W. 95 (Minn. 1935).
2. Mason's MINN. STAT. (1927) § 9254. The corresponding statute for Missouri will be found in Mo. REV. STAT. (1929) § 777.
3. Powell v. Powell, 160 Wis. 504, 152 N. W. 168 (1915).
4. Wrege v. Jones, 13 N. D. 267, 100 N. W. 705 (1904); Sheehan v. Pierce, 23 N. Y. Supp. 1119 (1893).
5. MacDougall v. Maguire, 35 Cal. 274 (1868). *Contra:* Mogle v. Black, 5 Ohio C. C. R. 51 (1890).
6. Heigel v. Willis, 3 N. Y. Supp. 497 (1889). *Contra:* Simpkins v. Columbia & G. R. Co., 20 S. C. 258 (1882).
7. Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081 (1902); Pelton v. Powell, 96 Wis. 473, 71 N. W. 887 (1897); Deagan v. Weeks, 73 N. Y. Supp. 641 (1901). *Contra:* Prosser v. Carroll, 68 N. Y. Supp. 542 (1900).
8. Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081 (1902).
9. CLARK, CODE PLEADING (1928) 455.
10. Ritchie v. Hayward, 71 Mo. 560 (1880).
11. CLARK, *op. cit. supra* note 9, at 452.
12. Ritchie v. Hayward, 71 Mo. 560 (1880).
13. Ruth v. McPherson, 150 Mo. App. 694, 131 S. W. 474 (1910).
14. 199 S. W. 734 (Mo. App. 1917).

upon the ground that the matter which defendant injected into the cause did not arise out of the acts connected with the malicious prosecution.

In view of the holding in the *Becke* case, the Missouri courts would probably agree with the decision in the principal case. What the courts would do in the case of mutual slanders occuring on the same occasion is more doubtful. It may be suggested that both cases present common questions of law and fact which may be said to arise out of the same transaction without doing violence to the ordinary concept of the expression.

ALDEN A. STOCKARD

STATUTE OF FRAUDS—PART PERFORMANCE—RENDITION OF PERSONAL SERVICES CUT SHORT BY PROMISOR'S EARLY DEATH.

Selle v. Selle[1]

Pursuant to an oral promise by his uncle that the plaintiff would get certain realty upon the death of the uncle, in consideration of the plaintiff's caring for him during his life, the plaintiff took his uncle into his home and there nursed and cared for him for a period of two weeks, at which time the uncle died, not having conveyed or devised the land to the plaintiff. Plaintiff brought a suit for specific performance against the heirs of the uncle and obtained a decree in his favor in the lower court. Upon appeal the Supreme Court reversed the decree and remanded the case, with directions to ascertain the value of the plaintiff's services and to make the amount a lien upon the land. The court said that "our rule is that although the contract is oral, if the contract has been fully performed by the party agreeing to render the services so that a denial of specific performance would work a fraud on the party who has fully performed, then the statute of frauds cannot be successfully invoked as a bar to recovery. But, in ruling on such contracts, even though performed on one side, the subject of specific performance is always within the sound discretion of the chancellor, and such relief will be granted or denied according to the facts." The court then points out three facts in this case which defeat the plaintiff's action: (1) The services rendered by the plaintiff can be easily compensated in money; (2) the services rendered were of such a short duration; (3) the services were not, in their nature, disagreable nor arduous. The implication of the opinion is that the fact that the services were rendered over only a short period of time makes their value easily computable in money.

Although there is a conflict of authority, the majority of American jurisdictions follow the view that the rendition of personal services is a sufficient part performance to take an oral contract out of the operation of the Statute of Frauds and to render it enforceable in equity.[2] Missouri, apparently, is with this majority.[3] This equitable relief against the estate of the deceased person is many times spoken of as specific performance of the contract to make a will. Obviously a contract to make a will or to devise certain property is not one which lends itself to a specific enforcement, in as much as if the will were made, it could later be revoked during the testator's life. The most that the courts can do, after the death of the promisor, is to require the heir or devisee of the land to convey the property in accordance with the decedent's promise—it is an action in the nature of specific performance of the ancestor's obligation to devise, which is enforced against his heirs, who are not purchasers of the property for value and without notice.

---

1. 88 S. W. (2d) 877 (Mo. 1935).

2. Speck v. Dodson, 178 Ark. 249, 11 S. W. (2d) 456 (1928); Gordon v. Spellman, 145 Ga. 682, 89 S. E. 749 (1916); Flannery v. Woolerton, 329 Ill. 424, 160 N. E. 762 (1893); Bryson v. McShane, 48 W. Va. 126, 35 S. E. 848 (1900); Brinton v. Van Cott, 8 Utah 480, 33 Pac. 218 (1893); Denevan v. Belter, 232 Mich. 664, 206 N. W. 500 (1925); Howe v. Watson, 179 Mass. 30, 60 N. E. 415 (1901); 36 CYC. 673; 58 C. J. 1017; 25 R. C. L. 588; 15 L. R. A. (N. S.) 466; 38 L. R. A. (N. S.) 752; 69 A. L. R. 14.

3. Gupton v. Gupton, 47 Mo. 37 (1870); Sutton v. Hayden, 62 Mo. 101 (1876); Hiatt v. Williams, 72 Mo. 214 (1880); Carney v. Carney, 8 S. W. 462 (Mo. 1888); Hall v. Harris, 145 Mo. 636, 47 S. W. 506 (1898); also see, Ver Standig v. St. Louis Union Trust Co., 62 S. W. (2d) 1095 (Mo. App. 1933); Jones v. Jones, 63 S. W. (2d) 146 (Mo. 1933).

Other courts, although recognizing the doctrine of part performance if possession is taken, will not deny the operation of the Statute of Frauds where the acts relied upon to constitute part performance are wholly acts of personal service.[4] A few courts refuse to recognize the doctrine in its entirety, holding that only a strict compliance with the letter of the statute will move the court to enforce the contract.[5]

Conceding, as does the principal case, that the Missouri court would in certain situations enforce an oral contract to devise land where the performance, either partial or full, is the rendition of personal services, it appears, that if the services are cut unduly short by the death of the promisor, then the promisee cannot enforce the contract. There are two views, it seems, as to the effect of the brevity of services occasioned by the early death of the promisor where the obligation is to care for the promisor until his death.

Some courts look to the extent of the undertaking by the promisee, rather than to the actual duration of the services, to determine whether the promisee has made out a case which entitles him to enforce the contract.[6] The contract is viewed as of the time of its inception, and, if at that time, it was fair and equal on its face, and further, if the promisee has actually entered upon the performance of the services, then the mere fact that the promisee stands to gain due to the early death of the promisor does not render the contract unenforceable. In *Berg v. Moreau*,[7] the promisee and her husband lived with and cared for the deceased for about eighteen months and the Missouri Supreme Court granted specific performance, holding that the nature of the plaintiff's services were such that their value could not be estimated in money, noting that "the jingle of the guineas of a mere dry money recompense cannot cure the hurts of a broken contract relating to services such as performed in this case". The court in that case also said that if the deceased had lived out his life expectancy of four years the compensation agreed upon would have been only fair and that if he had lived over his expectancy, the compensation would have been inadequate. In an Idaho case,[8] the services were performed over a period of only one month and relief was granted, the court saying that subsequent events such as the early death of the promisor could not enter into the fairness of the contract nor the adequacy of consideration in this class of contracts, as there is present an element of uncertainty, so that the fairness of the contract and the adequacy of consideration must be determined as of the time when the contract is made. In a Massachusetts case,[9] the promisee lived with and cared for the deceased over a period of only thirty-eight hours. The court held that there was such part performance as to entitle the promisee to enforce the contract, because at the time the contract was made, it could not be foreseen which party would profit the most and that each assumed the loss or gain by contingencies and each was willing to do so. In an Oregon case,[10] the promisee and his wife orally contracted with the decedent that in consideration of them living with and caring for decedent for the remainder of his life, he would devise to them certain property. The promisor met with an accidental death some four months later, and the Oregon court granted specific performance of the contract against the devisees under the decedent's will, declaring that "the uncertainty of the time during which the plaintiffs would continue performance of the contract was naturally within the contemplation of the parties and they must be presumed to have contracted with reference thereto". The courts following this view, in order to determine the fairness of the contract and the adequacy of consideration, take notice of mortality tables and the physical condition of the promisor.[11]

4. Grant v. Grant, 63 Conn. 530, 29 Atl. 15 (1893); Rodman v. Rodman, 112 Wis. 378, 88 N. W. 218 (1901); Dexter v. Winslow, 254 Mass. 407, 150 N. E. 158 (1926); Burns v. McCormick, 233 N. Y. 230, 135 N. E. 773 (1922); RESTATEMENT, CONTRACTS (1932) § 197; 1 WILLISTON, CONTRACTS (1920) § 494.

5. Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767 (1906); Coffey v. Humble, 154 Ky. 708, 159 S. W. 554 (1913).

6. Lathrop v. Marble, 12 S. D. 511, 81 N. W. 885 (1900); Bless v. Blizzard, 86 Kan. 230, 120 Pac. 351 (1912); Howe v. Watson; Brinton v. Van Cott; Bryson v. McShane, all *supra* note 2. But see Hazelton v. Reed, 46 Kan. 73, 26 Pac. 450 (1891).

7. 199 Mo. 416, 97 S. W. 901 (1906).

8. Dingler v. Ritzius, 42 Idaho 614, 247 Pac. 10 (1926).

9. Howe v. Watson, 179 Mass. 30, 60 N. E. 415 (1901).

10. Woods v. Dunn, 81 Ore. 457, 159 Pac. 1158 (1916).

11. *Ibid.* and Berg v. Moreau, 199 Mo. 416, 97 S. W. 901 (1906).

Another view is that the short duration of the promisee's services makes the value of those services capable of accurate estimation in a suit at law in quasi-contract, and thus the promisee is not entitled to relief in equity.[12] This view is expressed in a Virginia case where the promisee and his wife boarded and nursed the deceased, who was an invalid for a period of three months. The court said that the services were rendered over such a comparatively short time that they were compensable in money damages.[13] The Missouri case of *Ackerton v. Fly*[14] is said to support this view, but that case may be distinguished on the ground that the promisee had not rendered services of a personal nature, but services of such a nature that their value could be accurately estimated and compensated for in money damages even though they had extended over a period of years rather than, as was the fact, over a period of several days. The principal case, it appears, follows this latter view, holding that "more is required to justify specific performance in cases like the one here than life expectancy and that the contract was fair when made", and that that "something more" is that the services must not be "capable of an approximately accurate estimate, and their value liquidated in money, so that the promisee may be made substantially whole". The court then holds that the short duration of the services and the fact that the services were neither arduous nor disagreeable are additional factors to be considered, apparently on the basis that they make the value of the services more easily and accurately estimable in money.

Accepting the view, as the Missouri court does, that the rendition of personal services takes an oral contract to convey or devise land out of the operation of the Statute of Frauds, and disregarding the historical, theoretical, and practical unsoundness,[15] perhaps, of that view, it is submitted that it is inconsistent to hold that the brevity of the personal services due to the early death of the promisor affects the enforceability of the contract in equity, by making the value of those services capable of accurate monetary estimate. What would the court have held in the principal case if the promisor had lived for a period of, say, ten years, and during all that time the promisee had cared for and nursed the promisor? The court says that the services were neither disagreeable nor arduous. If we disregard the fact that disagreeableness is probably not required, and hold that the services need only be of a personal nature, there is little doubt that in the case supposed the court would have held that the services were disagreeable, arduous, and not estimable in money damages. Such a case was *Sutton v. Hayden*,[16] where the promisee lived with and nursed the deceased, an invalid, for fifteen years, and the Missouri court granted specific performance of the promise to devise, because "the services are such that money cannot buy, a thousand nameless and delicate services and attentions, incapable of being the subject of an explicit contract, which money with all its peculiar potency, is powerless to purchase". Again in *Gupton v. Gupton*,[17] this court held that the value of such services could not be accurately estimated at law, for who "can say how much it is worth to meet and manfully bear the caprices of unreasoning and fretful old age", and granted relief although the services extended over only a four year period.

In the instant case the promisor was both aged and an invalid, and the fact is not disputed that he did not want to go to the hospital but desired to go to the plaintiff's home. At least, the deceased himself thought that he would receive the sort of service, care and attention from the plaintiff, his nephew, that could not be obtained elsewhere. The language of either the *Hayden* or *Gupton* cases could apply equally well to the case supposed above. Should the fact, then, that in the instant case the services were rendered for only two weeks affect the result? If the value of the services cannot be accurately estimated over a period of years, then the value of those same services cannot be accurately estimated if rendered for only two weeks, and thus specific performance should be granted. Or conversely, if the

12. Newbold v. Michael, 110 Ohio St. 588, 144 N. E. 715 (1924); Semmes v. Worthington, 38 Md. 298 (1873); Yager v. Lyon, 337 Ill. 271, 169 N. E. 222 (1929); Frizzell v. Frizzell, 149 Va. 815, 141 S. E. 868 (1928); Hazelton v. Reed, 46 Kan. 73, 26 Pac. 450 (1891).

13. Frizzell v. Frizzell, 149 Va. 815, 141 S. E. 868 (1928).

14. 99 Mo. App. 116, 72 S.W. 706 (1903).

15. Burns v. McCormick, 233 N. Y. 230, 135 N. E. 773 (1922); 33 HARV. L. REV. 931.

16. 62 Mo. 101 (1876).

17. 47 Mo. 37 (1870).

value of the services can be accurately estimated if rendered for only two weeks, then, just as easily, by simple multiplication, it can be accurately estimated if performed for ten years, and specific performance should be denied in both cases.

It is submitted that the court in the principal case, adopting as it did the finding of the lower court that a contract in fact existed,[18] should have looked only to the nature of the services and upon discovering them to be of a personal nature, and finding the contract was fair when entered into and had been fully performed by the promisee, should have upheld the decree of the lower court granting specific performance. Perhaps, the result of this case may be satisfactorily explained, when the true basis upon which the Missouri court takes an oral contract to convey or devise land out of the operation of the Statute of Frauds and enforces it in equity, is examined. The principal case states the rule to be, that an oral contract is taken out of the operation of the statute when to deny specific performance would work a "fraud" on the party performing the services. Numerous Missouri cases have so stated the rule, some calling it "equitable fraud".[19] It is obvious, however, that in this type of case there is no fraud, but the court is allowing relief in equity because of hardship on the promisee if relief is denied. The promisee must show that in performing the services he has placed himself in such a position that if the Statute of Frauds is not disregarded it will amount to a great hardship on him. So the court in the principal case is perhaps holding that where the services have been rendered over such a short period of time, the plaintiff has not made out a case of such hardship as will warrant the Statute of Frauds to be disregarded and the contract enforced. No doubt such is the basis, for in *Campbell v. McLaughlin*[20] the Missouri court had no hesitancy in granting specific performance of a *written* contract to devise land in consideration of services to be rendered during the promisor's life, even though the actual duration of the services was only seventeen days. Considering then what appears to be the true, even if unmentioned, basis upon which the Missouri court takes an oral contract from without the operation of the Statute of Frauds where the acts of performance relied upon are personal services, the court probably reached a result in harmony with the other Missouri cases involving the rendition of personal services in cases of this type.

A. D. SAPPINGTON

TAXATION—ARBITRARY AND GROSSLY EXCESSIVE VALUATION OF PROPERTY—DUE PROCESS

Great No. Ry. v. Weeks[1]

Plaintiff, an interstate railroad company, brought suit in the Federal District Court of North Dakota to enjoin the collection of taxes levied for 1933 upon its railroad properties in North Dakota. The State Board of Equalization in assessing plaintiff's property had apportioned the system value to the State upon the basis of the average of the five following factors: (1) miles of track, (2) physical property, (3) car and locomotive miles, (4) ton and passenger miles, and (5) gross earnings. The system value for such apportionment was determined by averaging the average market price of the stocks and bonds of plaintiff company over a five year period and the average net income over a five year period, capitalized at 6%. For the 1933 assessment, the Board took the assessment determined as outlined above for 1932, minus the value of a short stretch of track removed since 1932. Plaintiff brought this suit, contending that the apportionment of system value to the State operated to assess property outside North Dakota, and that even if the method of apportionment could not be condemned, the assessment was nevertheless arbitrary and excessive and

18. The court is not necessarily bound by the finding of the lower court, and it appears that the evidence of the existence of the contract must be very strong. Russell v. Sharp, 192 Mo. 270, 91 S. W. 134 (1905); Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 200 (1905); Walker v. Bohannon, 243 Mo. 119, 147 S. W. 1024 (1912).

19. Farrar v. Patton, 20 Mo. 81 (1854); Dickerson v. Chrisman, 28 Mo. 134 (1859); Fuchs v. Fuchs, 48 Mo. App. 18 (1892); Buxton v. Huff, 254 S. W. 79 (Mo. 1923); cases cited *supra* note 3.

20. 205 S. W. 18 (Mo. 1918).

1. —U. S.—, 56 S. Ct. 426 (1936).

in violation of the due process clause of the Fourteenth Amendment. The bill was dismissed in the trial court and that judgment was affirmed in the Circuit Court of Appeals.[2] The case went to the United States Supreme Court on certiorari, and the judgment was there reversed by a court divided 6-3.[3] This court took the view that while the method of apportionment must be upheld, the valuation of the whole system was arbitrary and grossly excessive. It held that the Board arbitrarily adopted the 1932 valuation based on stock and bond values and net income, thereby disregarding the decline in value of all properties from 1932 to 1933 and producing a grossly excessive assessment in violation of due process. Over-valuation alone is not enough to warrant an injunction, nor is mere error of judgment enough, it noted. "There must be something that in legal effect is the equivalent of intention or fraudulent purpose to overvalue the property and so set at naught fundamental principles that safeguard the taxpayer's rights. . . ."[4] The validity of the assessment must be tested upon consideration of facts established by the evidence and those of which judicial notice will be taken. The evidence shows that if the valuation for 1933 had been determined by the same method as the valuation for 1932, it would have been $15,000,000 less than the 1932 valuation. The Court takes judicial notice of "the depression" beginning in 1929 and becoming by 1933 more than a temporary condition. The Board's failure to take into consideration this enormous diminution in value from 1932 to 1933 is in the opinion of the Court the equivalent in law of intention to make a grossly excessive assessment for 1933 in violation of due process. The Court observed that it need not consider whether the assessment was repugnant to the equal protection clause or the commerce clause of the Constitution.

In a strong dissent, Justice Stone pointed out that the decision of the majority of the court rests on the single ground that the valuation of plaintiff's property is excessive, without any showing or contention that there was any discrimination in the valuation of plaintiff's property as compared with that of other property in the State or that plaintiff was in any way bearing an undue share of the tax burden imposed on all property owners in the State. The doctrine seemingly announced by this decision is a novel one and a departure from principles long considered fundamental and so firmly established in the field of taxation as to be beyond question at this date.[5]

"It has long been recognized that discrimination between taxpayers, if intentional or so persistent as to be systematic, is a denial of equal protection . . . ."[6] But the majority opinion goes beyond this familiar principle and bottoms its decision not on the equal protection clause but on the due process clause. It reasons, in effect: "The State law requires that all property . . . be assessed at its true and full value in money. . . . The true and full value of the property is the amount the owner would be entitled to receive as just compensation upon a taking of that property by the State or the United States in the exercise of the power of eminent domain. . . . The principles governing the ascertainment of value for purposes of taxation are the same as those that control in condemnation cases, confiscation cases and generally in controversies involving the ascertainment of just compensation."[7] Therefore, to tax property at a valuation other than its true and full value for condemnation purposes is to take property without making just compensation, and this violates the due process clause of the Fourteenth Amendment.

To take the last step in this chain of reasoning, the majority opinion disregards the essence of the doctrine long established that over-valuation alone is not enough to justify setting aside a tax but that intentional discrimination must be shown.[8] It does lip service to that doctrine, after a fashion, in these words: "Over-valuation is not of itself sufficient to warrant an injunction against any part of the taxes based on the challenged assessment; mere error of judgment is not enough; there must be something that in legal effect is the

2. 77 F. (2d) 405 (C. C. A. 8th, 1935).
3. Justices Stone, Cardozo and Brandeis dissenting; majority opinion by Mr. Justice Butler.
4. 56 S. Ct. at 429.
5. 4 COOLEY, TAXATION (4th ed., 1924) § 1612.
6. 56 S. Ct. at 436.
7. 56 S. Ct. at 428.
8. Sioux City Bridge v. Dakota County, 260 U. S. 441 (1922); Iowa-Des Moines Bank v. Bennette, 284 U. S. 239 (1931); Cumberland Coal Co. v. Board, 284 U. S. 23 (1931); Chicago & Northwestern Ry. v. Kendall, 266 U. S. 94 (1924); Raymond v. Chicago Traction Co., 207 U.S. 20 (1907).

equivalent of intention or fraudulent purpose to *overvalue* the property and so to set at naught fundamental principles that safeguard the taxpayer's rights and property", citing *Rowley v. Chicago and Northwestern Ry.*[9] In the case referred to, the question of discrimination was directly involved and had been alleged in the petition. In his opinion there, Justice Butler said: "Over-valuation resulting from error of judgment will not support a claim of discrimination. There must be something amounting to an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of *uniformity*. There was no discrimination against respondent by the undervaluation of the property of others." This is very different from the statement in the principal case. It says nothing about an intention merely to overvalue. It goes further and says not only that discrimination must be shown but that such discrimination must be intentional. In the principal case, discrimination is not even alleged.

The majority opinion makes another assumption that seems unfounded. It assumes that valuation of property for purposes of taxation involves the same considerations as valuation for purposes of the exercise of the power of eminent domain, and its decision is grounded upon considerations of just compensation in terms of due process. The distinction between the power of taxation and the power of eminent domain, and between the purposes for which they are exercised, are matters not considered by this opinion. Yet the distinction is clear, and the nature of these different powers should be the guide in determining the application of the Constitution to these powers.

"The power of taxation is the power of the sovereign state to require from individuals a contribution of money or other property, as and for their respective shares of contribution to any public burden. Private property taken for public use by eminent domain is taken, not as the owner's share of contribution to the public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates on the community or a class of persons in the community, and by some rule of apportionment, while the exercise of the right of eminent domain operates on the individual, and without reference to the amount or value exacted from any other individual or class of individuals.... Property may be taken under the taxing power without making any direct compensation whatever, the foundation for this power being in an absolute political necessity, compensation to the taxpayer being merely theoretical and incidental. Hence, the constitutional provisions prohibiting a taking of private property for public use without making just compensation do not apply to taxation."[10] Taxes must be paid to meet governmental expenses, however great, and a taxpayer cannot complain simply because taxes are heavy. Justice Stone in his dissent says: "The activities and expenses of government over which the State has plenary control do not cease during a depression. They may increase. The State may meet these expenses by raising the valuation of taxable property, or by raising tax rates, or both, without infringing any constitutional immunity.... The Constitution guarantees no immunity from taxation, even though the tax, because of its amount, may be burdensome."[11] Thus it is apparent that the Constitution makes only one guarantee with respect to taxation, namely, that the burden will be imposed uniformly and so distributed among those who must bear it that none will bear an undue share of the burden. This guarantee is to be found in the equal protection clause. As to the amount of the tax that may be imposed, the Constitution is silent.

There is language in some of the cases that might suggest that a tax will be set aside if arbitrary and excessive, even though no discrimination is shown. It is sometimes said that equity will set aside a tax that is "arbitrary or discriminatory." But an examination of the

9. 293 U. S. 102 (1934).

10. 10 R. C. L. 8; Gilman v. Sheboygan, 67 U. S. 788 (1863); Chicago B. & Q. Ry. v. Otoe County, 83 U. S. 667 (1873); Mobile County v. Kimball, 102 U. S. 691 (1881); Henderson Bridge Co. v. Henderson, 173 U. S. 592 (1899); *cf.* Nichols v. Coolidge, 274 U. S. 531 (1927); Blodgett v. Holden, 275 U. S. 142 (1928); Untermeyer v. Anderson, 276 U. S. 440 (1928).

11. 56 S. Ct. at 436, 437.

cases will disclose that only where a so-called "arbitrary and excessive" tax has worked out so as to discriminate against a particular taxpayer has the tax been set aside.[12]

The cases cited by Justice Butler in the majority opinion as definitive of the "principles that govern property valuation" do not support the decision. *Fargo v. Hart*[13] and *Rowley v. Chicago & Northwestern Ry.*[14] involved excessive allocation of system value to the taxing State, a question expressly decided in favor of the Board in the principal case. *Monongahela Navigation Co. v. U. S.*[15] set aside an improper valuation for condemnation purposes. It has been pointed out that the due process clause providing just compensation for property so taken does not apply to taxation. *Southwestern Tel. Co. v. Public Service Comm.*[16], *Bluefield Co. v. Public Service Comm.*[17], and *McCardle v. Indianapolis Co.*[18] set aside improper valuations for purposes of determining whether public utility rates were confiscatory. Confiscation, through rate regulation denying a reasonable return (like too low a valuation in condemnation cases), is exactly the sort of a taking of property which is prohibited by the due process clause. Plaintiff in the principal case complains simply that the Board took the 1932 valuation of its property as a basis for 1933 taxes, without any showing that the Board did not use the 1932 valuation as a basis for the taxation of other property in the State. It shows no inequality in the distribution of the tax burden, and it is only this inequality against which the Constitution guarantees any immunity. Justice Stone said: "Recently we held that a claim that rate of a non-discriminatory tax is excessive presents no constitutional question. *Magnano Co. v. Hamilton*, 292 U. S. 40, 44. No reason has been advanced at the bar, or given in the opinion of the court, why a tax valuation, excessive when compared with condemnation or market value, should have any different legal consequences. In neither case is inequality of the tax burden established. It is for that reason that this court has held, without exception, that valuation of property for tax purposes, however excessive, not shown to be discriminatory, infringes no constitutional immunity",[19] citing *Rowley v. Chicago & Northwestern Ry.*[20], *Southern Ry. v. Watts*,[21] *Cumberland Coal Co. v. Board*,[22] and *Sunday Lake Shore Co. v. Wakefield.*[23]

If, as the principal case seems to decide, a taxpayer may come into equity and have a tax set aside on the single showing that his own individual assessment is in excess of the value of his property for condemnation purposes, it would seem not only that a new protection is construed into the Constitution, but that the Federal Courts are opened to a flood of litigation. The only constitutional guarantee hitherto recognized with respect to taxation is that the burden will be equally distributed. The doctrine of the principal case seems to be that the Federal Courts will review any assessment of a State Board on the single allegation that it is excessive. This, it is submitted, is both contrary to established principles and productive of a definitely undesirable result. It is difficult to see how even a grossly excessive valuation of property for taxing purposes, as measured by its condemnation or market value, is a taking of property without due process unless other taxable property is assessed on a different basis so that non-uniformity in the imposition of the burden results. It is only this discrimination against which the Constitution makes any guarantee.

ROBERT A. WINGER

TRIAL PRACTICE-INSTRUCTIONS-FAILURE TO REQUEST.

Arnold v. May Department Stores Co.[1]
Brown v. Terminal R. R. Ass'n. of St. Louis[2]

These two cases hold in substance that allowing a personal injury suit to go to the jury over the defendant's objection and exception, in that regard, on a single instruction of the plaintiff respecting the measure of damages was not reversible when defendant's own general

12. L. R. A. 1916A, 972.
13. 193 U. S. 490 (1904).
14. 293 U. S. 102 (1934).
15. 148 U. S. 312 (1893).
16. 262 U. S. 276 (1923).
17. 262 U. S. 679 (1923).
18. 272 U. S. 400 (1926).
19. 56 S. Ct. at 436.
20. 293 U. S. 102 (1934).
21. 260 U. S. 519 (1923).
22. 284 U. S. 23 (1931).
23. 247 U. S. 350 (1918).

1. 85 S. W. (2d) 748 (Mo. 1935).
2. 85 S. W. (2d) 226 (Mo. App. 1935).

instructions sufficiently covered the case. Thus, again is presented the much controverted question, whether it is reversible error for the trial court to permit a civil case to go to the jury over the objection of the defendant after plaintiff has failed to submit any instructions other than a measure of damage instruction.

In a very early case, the Supreme Court of Missouri said: "It is, certainly, the duty of the Circuit Courts, to instruct the jury on all principles of law which may be applicable to the facts in evidence before them, and to refuse to do so is error; but the refusal must appear in the record by bill of exceptions, to enable this court to correct it."[3] This language is not entirely clear, but it seems to mean that although a duty rested upon the court to instruct, it was only error to fail to instruct when a proper instruction had been requested. In any event, a few years later the rule that mere non-direction is not error was definitely established when the court refused to set aside a verdict where a case was submitted to the jury without instructions since none were asked which could throw any light upon any legal question raised by the evidence.[4] That is, the failure to instruct is not error unless appropriate instructions were requested and refused.[5] This rule was long followed in Missouri,[6] and is clearly the rule of practice in the majority of jurisdictions in this country today.[7]

The Missouri Supreme Court long recognized the defects of this rule. In one case it said, "The idea possessed by some lawyers that an instruction on the measure of damages in a personal injury case is all that they should attempt to write for fear of getting error in the record is an idea which, when put into practice, should be promptly condemned. There should in all cases be at least one principal instruction outlining to the jury the theory under the petition upon which recovery is sought. The jury should not be left to gather the theory of recovery from the petition aided solely by a formal instruction upon the measure of damages. Nor should the counsel cast the burden on a trial judge to draw such an instruction."[8] This warning was repeated often in later cases and paved the way for the change which was soon to come.[9]

In 1934, *Dorman v. East St. Louis Railway Co.*[10] was decided. There the trial judge, over the objection and exception of the defendant, allowed a case for personal injuries to go to the jury on a single instruction of the plaintiff as to the measure of damages together with general instructions requested by the defendant. In regard to the instructions requested by the defendant and given by the trial court the Supreme Court said: "These instructions very clearly and definitely stated facts, which if found by the jury, would entitle defendant to a verdict. They also very clearly and definitely set forth what purported to be plaintiff's allegations of negligence, and advised the jury that 'before plaintiff can recover under said allegations she must prove the same to the reasonable satisfaction of the jury by a prepond-

3. McKnight & Brady v. Wells, 1 Mo. 14 (1821). See also Coleman v. Roberts, 1 Mo. 97 (1821); Nicholas v. The State, 6 Mo. 6 (1839).

4. Drury v. White, 10 Mo. 354 (1847).

5. (1916) 14 R. C. L. 795.

6. Penn v. Lewis, 12 Mo. 161 (1848); Tetherow v. The St. Joseph & Des Moines Railroad Co., 98 Mo. 74, 11 S. W. 310 (1888); Coleman v. Drane, 116 Mo. 387, 22 S. W. 801 (1893); Feary v. O'Neill, 149 Mo. 467, 50 S. W. 918 (1899); Brown v. Globe Printing Co., 213 Mo. 611, 112 S. W. 462 (1908); Erickson v. Lundgren, 37 S. W. (2d) 629 (Mo. 1931); Luikart v. Miller, 48 S. W. (2d) 867 (Mo. 1932); Cahill v. Liggett and Meyers, 14 Mo. App. 596 (1884); Kinsolving v. Kinsolving, 194 S. W. 530 (Mo. App. 1917); Biskup v. Hoffman, 220 Mo. App. 542, 287 S. W. 865 (1926); Sneed v. St. Louis, Public Service Co., 53 S. W. (2d) 1062 (Mo. App. 1932).

7. 2 THOMPSON ON TRIALS (2d ed. by Early 1912) § 2341. See cases collected in (1916) 14 R. C. L. 795 n. 16.

8. Eversole v. Wabash Railroad Co., 249 Mo. 523, 155 S. W. 419 (1913).

9. Sutter v. Metropolitan St. Ry. Co., 188 S. W. 65 (Mo. 1916); Denkman v. Prudential Fixture Co., 289 S. W. 591 (Mo. 1926); Shumate v. Wells, 320 Mo. 536, 9 S. W. (2d) 632 (1928); Barr v. Nafziger Baking Co., 328 Mo. 423, 41 S. W. (2d) 559 (1931); Bello v. Stuever, 44 S. W. (2d) 619 (Mo. 1931); Luikart v. Miller, 48 S. W. (2d) 867 (Mo. 1932); Young v. Wheelock, 333 Mo. 992, 64 S. W. (2d) 950 (1933); Iman v. Walter Freund Bread Co., 332 Mo. 461, 58 S. W. (2d) 477 (1933); Freeman v. Berberich, 332 Mo. 831, 60 S. W. (2d) 393 (1933); Buchanan v. Rechner, 333 Mo. 634, 62 S. W. (2d) 1071 (1933).

10. 335 Mo. 1052, 75 S. W. (2d) 854 (1934).

erance or greater weight of the evidence'."[11] The court held that in view of these instructions it was clear that the jury in this case was sufficiently instructed on the whole case, and since as a result the defendant was not prejudiced by plaintiff's failure to submit an instruction setting forth her theory of liability, the action of the court in submitting the case to the jury was not prejudicial error. If prejudice had resulted to the losing party, by reason of failure to state to the jury the law of the case, and the point had been properly saved, it seems that the judgment would have been reversed and the cause remanded for retrial. In the course of the opinion the Supreme Court said that it is the duty of the trial judge to see that the jury is instructed as to the issues and the law, and that the trial judge should refuse to submit the case until this is done; that the plaintiff can rightfully be required to formulate and request the court to give an instruction informing the jury of the theory upon which he seeks recovery, for this burden should not devolve upon the trial judge. A failure in this respect constitutes at least prima facia error. The court expressly disapproved the earlier decisions holding that mere non-direction is not error, adding, "Our previous rulings inconsistent with the views herein expressed are disapproved and should no longer be followed."[12]

Two more recent cases involve the application of the rule laid down in the *Dorman* case In *Arnold v. May Department Stores Co.*[13], the Supreme Court held that it was not reversible error to permit a personal injury case to go to the jury after the plaintiff had failed to submit instructions other than a measure of damages instruction, when the trial court gave an instruction at defendant's request which clearly and concisely told the jury that no greater burden rested upon defendant than to exercise ordinary care. It was said that defendant's instruction was sufficient on the whole case, and that defendant was not prejudiced by the failure of plaintiff to submit an instruction predicating the facts relied upon for recovery. But the Supreme Court approved the doctrine laid down in the *Dorman* case, namely, that the plaintiff is not entitled to go to the jury unless he submits an instruction hypothesizing his theory of recovery, and that to allow him to do so over objection is at least prima facia error.

In *Brown v. Terminal Ry. Ass'n. of St. Louis*,[14] an action involving personal injuries, the plaintiff failed to submit an instruction hypothesizing his theory of recovery. The trial court allowed the case to go to the jury over defendant's objection and exception in that regard, on a single instruction of the plaintiff respecting the measure of damages, together with certain instructions offered by the defendant. Defendant appealed, assigning as error the failure to give an instruction setting forth plaintiff's theory of recovery. It was held that, although no instruction was given stating the specific negligent act or acts of defendant that would have to to proved to entitle plaintiff to a verdict, reversible error was not committed for the defendant was not prejudiced by the omission of such an instruction.

All these cases involved actions for personal injuries, but as pointed out by a recent writer,[15] there is no reason to believe that the application of the rule laid down in these cases will be restricted to actions for personal injuries.

A few jurisdictions meet the problem presented by the *Dorman* case by placing the burden of instructing the jury upon the trial judge. In these jurisdictions, even though the parties do not submit instructions, it is the duty of the judge to instruct the jury.[16] These jurisdictions forsee the injustice which would likely result from submitting the case to a jury composed of inexperienced laymen, with nothing more than their conscience as a guide and their sense of justice as law, and allowing them to render a verdict.

Although the courts held in the Missouri cases discussed above that the trial courts did not commit reversible error in submitting the case to the jury, it would seem that these

11. *Id.* 75 S. W. (2d) at 860.
12. Id. 75 S. W. (2d) at 859.
13. 85 S. W. (2d) 748 (Mo. 1935).
14. 85 S. W. (2d) 226 (Mo. App. 1935).
15. Note (1935) 20 ST. LOUIS L. REV.
16. Rowell v. Town of Vershire, 62 Vt. 405, 19 Atl. 990 (1890); Teasley v. Bradley, 110 Ga. 497, 35 S. E. 782 (1900); Hillton, etc., Lumber Co. v. Ingram, 119 Ga. 652, 46 S. E. 895 (1904); Wise v. Oultrim, 139 Iowa 192, 117 N. W. 264 (1908); Schwaninger v. McNeeley and Co., 44 Wash. 447, 87 Pac. 514 (1906); Mahoney v. Gooch, 264 Mass. 467, 141 N. E. 605 (1923); Blue Valley Bank v. Melburn, 120 Neb. 421, 232 N. W. 777 (1930); Milyak v. Philadelphia Rural Transit Co., 300 Pa. 457, 150 Atl. 622 (1930).

cases stand for the following propositions: It is reversible error for a trial court to permit a case to go to the jury, over defendant's objection, on a single instruction respecting the measure of damages. On the other hand, it is not reversible error for the trial court to permit a case to go to the jury after the plaintiff has failed to submit instructions other than a measure of damage instruction, if instructions given, even though general, sufficiently cover the rules of law applicable to the evidence and the issues in the case. Therefore, the safe thing for a plaintiff to do, is to submit an instruction hypothesizing his theory of recovery. But if plaintiff fails to submit such an instruction, the defendant should object to the case going to the jury and refuse to offer any instructions whatever, for if the case is submitted to jury over defendant's objection but on instructions given at the request of defendant, it may be held that defendant was not prejudiced by plaintiff's failure to offer an instruction hypothesizing his theory of recovery.

LAWRENCE ROBERT BROWN