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## Recent Cases

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# Recent Cases

## AGENCY—APPARENT AUTHORITY OF AGENT OF UNDISCLOSED PRINCIPAL—RATIFICATION.

### *Herkert Meisel Trunk Co. v. Duncan*<sup>1</sup>

Under the terms of a conditional sale of the defendant's business, the purchasers, until the purchase price was paid, were to operate the business in their own names, but as the agents of the defendants, and were to buy all merchandise for cash. The agents bought goods from the plaintiffs *on credit*. The Plaintiffs now seek to recover the purchase price from the defendant. Held, defendant is liable: (1) as undisclosed principal initially bound by the act of the agent; (2) because he had ratified the acts of his agent, having accepted the benefits of the transaction.

A disclosed principal is bound by the contracts made by his agent with express,<sup>2</sup> implied,<sup>3</sup> or apparent authority.<sup>4</sup> It is well settled that an undisclosed principal is liable for the acts of his agent done within his express or implied authority.<sup>5</sup> Should such a principal be held liable for the acts of his agent done within the *apparent* scope of his authority? The basis of holding a disclosed principal, in the absence of express or implied authority, is his holding out to third parties that his agent has the authority to act in a certain capacity, whether we follow the objective theory of contracts and consider the holding out as a manifestation of consent or follow the subjective theory and consider the holding out as the basis of an estoppel.

Is there any such holding out by an undisclosed principal? It seems not, since the principal is not even known. But, in a situation like the instant case, does not the principal, nevertheless, hold out his agents as the *owners of the business*? How far should this representation extend the principal's liability? Since the plaintiffs dealt with the agents believing them to be the owners of the property in the business, it does not seem far fetched to subject this *property*, at least, to the claims of the plaintiffs.

To hold the principal *personally* liable may seem to go beyond what is necessary to hold him to his representation.<sup>6</sup> On the other hand, the principal's representation led the third party to believe that he was dealing with a business owner, a member of a more responsible class than the one to which an agent belongs. It seems proper, then, to impress liability upon the person who actually owns the business; otherwise, the third party would get less than he bargained for. In the *Restatement of Agency*, section 195, the rule is thus stated: "An undisclosed principal who entrusts an agent with the management of his business is subject to liability to third persons with whom the agent enters into transactions usual in such businesses and on the principal's account, although contrary to the directions of the principal." This rule is particularly equitable when, as in the principal case, the principal has received the benefits of the business. As Mitchell, J., said in *Hubbard v. Tenbrook*,<sup>7</sup> "To allow an undisclosed principal to absorb the profits, and then, when the pinch comes, to escape responsibility on the grounds of orders to his agent not to buy on credit, would be a plain fraud on the public."

1. 141 Kan. 564, 42 P. (2d) 587 (1935).

2. See 2 MECHEM, AGENCY (2d ed. 1914) § 1708.

3. See 1 MECHEM, AGENCY (2d ed. 1914) § 708.

4. See 1 MECHEM, AGENCY (2d ed. 1914) § 720; STORY, AGENCY (9th ed. 1873) § 443.

5. *Donner v. Whitecotton*, 201 Mo.

App. 443, 212 S. W. 378 (1919); see 2 MECHEM, AGENCY (2d ed. 1914) § 1731.

6. It also seems to give the third party a windfall, since when entering the contract he did not count on holding the principal responsible. But this is true whenever the third party is given a right against the undisclosed principal.

7. 124 Pa. St. 291, 16 Atl. 817 (1889).

It is doubtful, however, that the false appearance of financial responsibility which the undisclosed principal has given the agent can alone account for the former's liability on the latter's unauthorized contract. That giving false appearance of credit creates personal liability is a principle which possibly has not yet gained a foothold in our law. Thus, it has been held, in a situation much like the present one, that if the agent incurs an indebtedness on a matter unconnected with the undisclosed principal's business, the latter is not liable therefor.<sup>7a</sup> The real basis of liability in a situation like that in the instant case is probably the same one which underlies *respondere superior* in a vicarious liability for tort, *viz.*, that the act was done in furtherance of the business of the owner and within the general scope of the agent's employment; the principal is liable (subject to limitations on this liability where the agency is disclosed and the third person is put upon inquiry as to the extent of the agent's authority) simply because he owns and controls the business and the act was done in the course of and for the business.

Does the doctrine of ratification apply in this case? "Ratification may briefly be defined as the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to act as his agent."<sup>8</sup> From this definition it would appear that an undisclosed principal can not ratify the unauthorized acts of his agent, and the great majority of the courts in the United States and England so hold.<sup>9</sup> Granting that ratification is an anomalous doctrine,<sup>10</sup> it seems an arbitrary limitation upon the doctrine to preclude an *undisclosed* principal from ratifying, except for the consideration that the undisclosed principal doctrine is an anomaly itself. The same injustice occurs in both cases, if ratification is not permitted, namely, the principal would get the benefits of the agreement and refuse to accept the burdens. Nevertheless it is well settled that only a disclosed principal can ratify.<sup>11</sup> The principal case presents no reason for making an exception to the usual ratification rule. The Kansas Court has made an arbitrary exception to the established ratification doctrine, unless it is willing to follow the Massachusetts rule and permit ratification where the agent intended to act for the principal.<sup>12</sup>

C. D. TODD, JR.

#### ALIMONY—SUIT AFTER DIVORCE OBTAINED BY CONSTRUCTIVE SERVICE.

##### *Straub v. Straub*<sup>1</sup>

Previous to this action plaintiff had secured an absolute divorce in Arkansas where service by publication was had upon defendant.<sup>2</sup> The Arkansas decree was silent as to alimony, but had there been a provision for alimony, it would have been void due to lack of personal jurisdiction over defendant.<sup>3</sup> Plaintiff later sued for alimony in Maryland where defendant was personally served. Recovery

7a. *Yorkshire Banking Co. v. Batson*, L. R. 5 C. P. D. 109 (1880); *Kinahan v. Parry* [1911] 1 K. B. 459. *Cf.* *Gavin v. Walker*, 14 Lea (Tenn.) 643 (1885); *McCracken v. Hamburger*, 139 Pa. 326, 20 Atl. 1051 (1891). And see *Hubbard v. Tenbrook*, 124 Pa. 291, 296, 16 Atl. 817.

8. 1 MECHEM, AGENCY, (2d ed. 1914) § 347.

9. *Bank of Commerce v. Bernero*, 17 Mo. App. 313 (1885); 1 MECHEM, AGENCY (2d ed. 1914) § 377.

10. 1 MECHEM, AGENCY (2d ed. 1914) § 346. But see *Seavey, The Rationale of Agency* (1920) 29 YALE L. J. 859, 886 ff.

11. An occasional case has held that the receipt of the benefits by an undisclosed principal may be considered as a ratification. *Barnett Bros. v. Lynn*, 118 Wash. 315, 203 Pac. 389 (1922); *Comment* (1922) 22 *Col. L. R.* 465.

12. *Hayward v. Langmaid*, 181 Mass. 426, 63 N. E. 912 (1902).

1. 183 Atl. 605 (Md. 1936).

2. It is established that a divorce decree based on constructive service at the domicile is valid. *Hinkle v. Lovelace*, 204 Mo. 208, 102 S. W. 1015 (1907); *Roberts v. Fagan*, 86 Kan. 536, 92 Pac. 559 (1907); *Sudbury v. Sudbury*, 179 Iowa 1036, 162 N. W. 209 (1917).

3. *Hutton v. Dodge*, 58 Utah 228, 198 Pac. 165 (1921); *Bridges v. Bridges*, 46 R. I. 191, 125 Atl. 281 (1924); *Doeksen v. Doeksen*, 202 Iowa 489, 210 N. W. 545 (1926); *Wilson v. Smart*, 324 Ill. 276, 155 N. E. 288 (1927); *cf.* *Chapman v. Chapman*, 194 Mo. App. 483, 185 S. W. 221 (1916) (local land awarded); *Haddad v. Haddad*, 152 Okla. 280, 4 P. (2d) 110 (1931) (local land awarded).

was not allowed. It was held by the court that alimony was incidental to the marriage status. Thus after an absolute decree for divorce, alimony could not be obtained, for at that time there was no existing marriage status, it having been dissolved by the preceding divorce.

It is clear that where a statute expressly outlines when and under what circumstances alimony must be given, the statute controls.<sup>4</sup> But not all statutes specifically provide for every situation where alimony might be demanded. Thus in many states courts are left to determine, as a matter of policy, under what circumstances alimony should be given.<sup>5</sup>

There are several factors which might influence a court's decision in the situation presented by this case. The English rule of not allowing alimony except as incident to the marriage status has been influential in America in spite of the fact that the English situation is different from that in this country.<sup>6</sup> Many jurisdictions including Maryland (in the principal case) and Missouri,<sup>7</sup> have relied entirely upon this view in determining the award of alimony.<sup>8</sup> The fundamental theory of alimony is a factor that should not be overlooked. When granting alimony in connection with an ordinary divorce *a vinculo matrimonii* courts announce that the reason for allowing a wife recompense is based on a common law duty that her husband owes her.<sup>9</sup> Many cases definitely state that this duty exists after the marriage status is dissolved.<sup>10</sup> Courts bear this out each time they grant alimony after a permanent divorce decree. The holding is reasonable, for if this duty ever existed it should not be extinguishable by a divorce that might be brought about through the fault of the husband.

4. McIntire v. McIntire, 80 Mo. 470 (1883); Smith v. Smith, 88 N. J. Eq. 319, 102 Atl. 381 (1917).

5. Woods v. Waddle, 44 Ohio St. 449, 8 N. E. 297 (1886); Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017 (1894); Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977 (1910); Darnell v. Darnell, 212 Ill. App. 601 (1918); Searles v. Searles, 140 Minn. 385, 168 N. W. 133 (1918); Honaker v. Honaker, 218 Ky. 212, 291 S. W. 42 (1927).

6. Except in rare occasions only a divorce *a mensa et thoro* was granted in England. Such decree was a suspension from "bed and board" but left the marriage in full force. Alimony was allowed after the decree. In America, courts freely grant a divorce *a vinculo matrimonii* which puts an end to the marriage. In view of the English cases the general statement could be made that alimony is allowed only as incident to the divorce decree. From such generalization, the rule referred to developed. Spain v. Spain, 177 Iowa 249, 158 N. W. 529 (1916); BOUVIER'S LAW DICTIONARY (Baldwin's Student ed. 1934) 312.

7. Doyle v. Doyle, 26 Mo. 545 (1858); McIntire v. McIntire, 80 Mo. 470 (1883); Keena v. Keena, 10 S. W. (2d) 344 (Mo. 1928); Laweing v. Laweing, 21 S. W. (2d) 2 (Mo. App. 1929); Pfeiffer v. Pfeiffer, 33 S. W. (2d) 184 (Mo. App. 1930). Keena v. Keena, *supra*, involved a situation similar to the one presented by the principal case. The holding was in accord with this case.

8. Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340 (1901); Spain v. Spain, 177 Iowa

249, 158 N. W. 529 (1916); McCoy v. McCoy, 191 Iowa 973, 183 N. W. 377 (1921); Doekson v. Doekson, 202 Iowa 484, 210 N. W. 545 (1926); Franklin v. Bonner, 201 Iowa 516, 207 N. W. 778 (1926); Watson v. Watson, 168 Ga. 573, 148 S. E. 386 (1929); Long v. Long, 39 Ariz. 271, 5 P. (2d) 1047 (1931); Lyon v. Lyon, 243 Ky. 236, 47 S. W. (2d) 1072 (1932).

9. Anderson v. Norvell-Shapleigh Hardware Co., 134 Mo. App. 188, 113 S. W. 733 (1908); Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925); Duss v. Duss, 111 So. 382 (Fla. 1927); Brown v. Brown, 48 R. I. 420, 138 Atl. 179 (1927); Burdette v. Burdette, 153 S. E. 150 (W. Va. 1930); Metcalf v. Metcalf, 244 Ky. 536, 51 S. W. (2d) 675 (1932). Some cases base the duty on contract: Schooley v. Schooley, 184 Iowa 835, 169 N. W. 56 (1918); Nelson v. Nelson, 282 Mo. 412, 221 S. W. 1066 (1920); Heafey v. Heafey, 254 N. Y. Supp. 82, 142 Misc. Rep. 147 (1932).

10. Lape v. Lape, 99 Ohio St. 143, 124 N. E. 51 (1918); Salinko v. Salinko, 177 Wis. 475, 188 N. W. 606 (1922); Hambrecht v. Hambrecht, 128 Ore. 305, 274 Pac. 507 (1929); Cary v. Cary, 112 Conn. 256, 152 Atl. 302 (1930); Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771 (1932); Heard v. Heard, 116 Conn. 632, 166 Atl. 67 (1933). *Contra*: Downey v. Downey, 98 Ala. 373, 13 So. 412 (1893); Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340 (1901); Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182 (1908); Darby v. Darby, 152 Tenn. 287, 277 S. W. 894 (1926); Hughes v. Hughes, 211 Ky. 799, 278 S. W. 121 (1925).

A holding such as that in the principal case enables a husband easily to evade any legal enforcement of his obligations to his wife.<sup>11</sup> A similar evasion would also be made possible where a husband gets a divorce at his domicile on constructive service without the knowledge of the wife and interposes that divorce decree as a defense to a suit for divorce brought by the wife.<sup>12</sup> Thus courts which do not follow the rule that alimony must be incidental to the divorce decree, but grant recompense to the wife in these two situations,<sup>13</sup> seemingly reach a result that is both desirable and reasonable.

JOHN H. FOARD

ATTORNEY AND CLIENT—DISCIPLINE—ADVERTISING AND SOLICITATION.

*In re Tall*; *In re Gallant*<sup>12</sup>

In the *Tall* case the respondent attorney published and advertised for sale a booklet tending to encourage non-residents to come into Missouri for divorce by stating, among other things, that the state's peculiar law makes it almost impossible for nonresidents to discover the fact that suits for divorce had been filed. In response to requests for the book, he sent a form letter requesting a statement of marital troubles, a retainer fee, and enclosed a newspaper reprint extolling his virtues as a divorce lawyer and naming his town as a coming divorce mill with hopes of excelling Reno. As a result of these advertisements a number of out of state people secured divorces through respondent's effort as attorney. On action for disbarment, it was held that he was guilty of at least gross misconduct justifying six months' suspension. In the *Gallant* case a firm of two lawyers hired agents and runners to solicit claims. These agents and runners induced many persons to employ the law firm with respect to damage claims for alleged personal injuries. Contracts were entered into by the terms of which the respondent attorneys were to receive fifty percent of any amount collected upon the claims, and they further agreed to pay the expenses of physical examinations of the clients. Respondents made wholesale settlements of many such claims against a single company, and pro-rated the settlement money among the clients and kept fifty percent for themselves. Other individual claims were settled on the same percentage basis. On action for disbarment, both parties were suspended from practice for one year.

In any disbarment or suspension proceeding, the question arises as to where the court derives its jurisdiction. It is generally held that the right to practice before courts is not inherent in the individual, but is a privilege granted by law and subject to limitations and conditions necessary for the protection of the legal

11. The husband could absent himself from the state during divorce proceedings by the wife and thus prevent her recovery of any alimony. *Eldred v. Eldred*, 62 Neb. 613, 87 N. W. 340 (1901); *McCoy v. McCoy*, 191 Iowa 973, 183 N. W. 377 (1921); *Doeksen v. Doeksen*, 202 Iowa 484, 210 N. W. 545 (1926); *Darby v. Darby*, 152 Tenn. 287, 277 S. W. 894 (1926); *cf. Spain v. Spain*, 177 Iowa 249, 158 N. W. 529 (1916).

12. *Cook v. Cook*, 56 Wis. 195, 14 N. W. 33 (1882); *Downey v. Downey*, 98 Ala. 373, 13 So. 412 (1893); *Joyner v. Joyner*, 131 Ga. 217, 62 S. E. 182 (1908); *Hughes v. Hughes*, 211 Ky. 799, 278 S. W. 121 (1926).

13. Cases allowing alimony when divorce was previously secured by wife: *Woods v. Waddle*, 44 Ohio St. 449, 8 N. E. 297 (1886); *Weidman v. Weidman*, 48 N. E.

506 (Ohio 1897); *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931 (1899); *Darnell v. Darnell*, 212 Ill. App. 601 (1918); *Spradling v. Spradling*, 74 Okla. 276, 181 Pac. 148 (1919); *West v. West*, 114 Okla. 279, 246 Pac. 599 (1926). Cases allowing alimony when divorce was previously secured by husband: *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017 (1894); *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779 (1896); *Toncray v. Toncray*, 123 Tenn. 476, 131 S. W. 977 (1910); *Searles v. Searles*, 140 Minn. 385, 168 N. W. 133 (1918); *Davis v. Davis*, 70 Colo. 37, 197 Pac. 241 (1921); *Honaker v. Honaker*, 218 Ky. 212, 291 S. W. 42 (1927); *Keena v. Keena*, 10 S. W. (2d) 344 (Mo. 1928).

1. 93 S. W. (2d) 922 (Mo. 1936).  
2. 95 S. W. (2d) 1249 (Mo. 1936).

department of the government and of the public.<sup>3</sup> The courts have inherent power to determine what persons shall be admitted to the bar.<sup>4</sup> It follows that as a necessary and inherent incident of such power the courts also have the right to remove or to suspend attorneys for unworthy behavior, independent of any statutory enactment.<sup>5</sup> Such inherent jurisdiction residing in the court has been found even where a state constitution<sup>6</sup> specifically mentions certain cases wherein the court has jurisdiction and does not mention suspension or disbarment.<sup>7</sup> The action of disbarment is considered neither criminal nor civil, but is a proceeding *sui generis*, the object of which is not the punishment of the accused, but is the protection of the court and the public.<sup>8</sup> Although the accused has the right to a hearing with the opportunity to defend,<sup>9</sup> yet the procedure need not conform to the rules of criminal proceedings.<sup>10</sup> Provision is made by the Missouri Supreme Court for a bar committee to investigate and report on charges of unethical conduct of lawyers practicing before Missouri courts.<sup>11</sup> It appears that it was on the report of this bar committee that *In re Gallant* was instituted. The court adopted the procedure to be used in the face of a state statute dealing with disbarment,<sup>12</sup> the court courageously declaring that each department of the government has by its very nature the inherent power to accomplish objects naturally in the orbit of that department unless expressed otherwise in the constitution, and further, that the power to admit and to disbar and to establish the rules therefor belongs to the judicial branch.<sup>13</sup>

Although the power to disbar is held inherent in the courts, yet it is recognized that this power to disbar should be exercised with great caution.<sup>14</sup> The primary question for the court is the attorney's moral fitness for the practice of law.<sup>15</sup> In considering this the court can take into consideration the reputation of the attorney.<sup>16</sup> The court determines what acts constitute grounds for disbarment.<sup>17</sup> Courts differ as to the weight to be given to the codes of ethics adopted generally by the various state bar associations. One jurisdiction has adopted the state bar code of ethics by statute.<sup>18</sup> Some courts give it the effect of previous decisions holding the same way.<sup>19</sup> Other jurisdictions hold it as educational only and of no necessary effect.<sup>20</sup> The Missouri Supreme Court has by rule adopted the American Bar Association canons of ethics to be the measure of conduct and responsibility of the members of the bar practicing before the Missouri Supreme Court and of all courts over which it has superintending control.<sup>21</sup> The American Bar Association canons of ethics state in effect that solicitation of business and advertising for business where not warranted by personal relationship is unprofessional.<sup>22</sup>

3. *Goldsmith v. Board of Tax Appeals*, 4 F. (2d) 422 (App. D. C. 1927), *aff'd*, 297 U. S. 117 (1925).

4. *In re Chapelle*, 71 Cal. App. 129, 234 Pac. 906 (1925).

5. *State ex rel. Attorney General v. Harber*, 129 Mo. 271, 31 S. W. 889 (1895), on motion for reinstatement, 138 Mo. 196, 39 S. W. 773 (1897).

6. Mo. CONST. art. VI, §§ 2, 3.

7. *In re Sizer*, 300 Mo. 369, 254 S. W. 82 (1923).

8. *In re Davis*, 166 S. W. 341 (Mo. App. 1914).

9. *State ex rel. Shackelford v. McElhinney*, 241 Mo. 592, 145 S. W. 1139 (1912).

10. *In re Bowman*, an unreported decision by the Supreme Court of Missouri. The writer examined the original record of the case.

11. Supreme Court Rule 36.

12. Mo. REV. STAT. (1929) §§ 11107, 11715.

13. *In re Richards*, 333 Mo. 907, 63 S. W. (2d) 672 (1933); *Wheaton, Courts and the Rule-Making Powers* (1936) 1 Mo. L. Rev. 261; *Clark, Missouri's Accomplishments and Program for Eliminating the Unlawful Practice of Law* (1936) 22 A. B. A. J. 9.

14. *In re Sizer*, 306 Mo. 356, 267 S. W. 922 (1924).

15. *In re Hosford*, 62 S. D. 374, 252 N. W. 843 (1934).

16. *People v. Edelson*, 313 Ill. 601, 145 N. W. 246 (1924).

17. *In re Bowman*, an unreported decision by the Supreme Court of Missouri. The writer examined the original records.

18. Wash. Laws 1921, c. 126, § 15.

19. *In re Morris*, 43 S. D. 185, 178 N. W. 732 (1920).

20. *In re Clifton*, 33 Idaho 614, 196 Pac. 670 (1921).

21. Missouri Supreme Court Rule 36.

22. Canons of Ethics American Bar Assn., part II, §§ 27, 28.

The authorities are clear that encouragement by attorneys of divorce litigation by means of advertising or by circulars so worded as to induce divorce proceedings and the employment of themselves therein constitutes grounds for disbarment or suspension.<sup>23</sup> This uniformity of decision results from the prevalent policy that dissolution of marriages should not be encouraged.<sup>24</sup> In cases where divorce is not involved and where there is no fraud and the solicitation is not so crudely done as to lower the profession in the eyes of the layman, it has been held to be merely bad taste to be punished by public opinion.<sup>25</sup> But solicitation by paid touters is worse than solicitation by an attorney.<sup>26</sup> And when there is direct solicitation of business for gain or procurement through touters and runners resulting in the stirring up of litigation, it is considered such unprofessional conduct as is punishable by censure, suspension, or disbarment.<sup>27</sup> In the *Gallant* case the respondents clearly went beyond mere bad taste and engaged in unprofessional conduct deserving the discipline received.

ELMO HUNTER

#### CONFLICT OF LAWS—LOCAL PUBLIC POLICY.

##### *Mertz v. Mertz*<sup>1</sup>

Suit was brought in New York for personal injuries resulting from the negligent conduct of the defendant in Connecticut. The plaintiff was the wife of the defendant and by the Connecticut law could maintain a suit on this cause of action against her husband. The New York court held that since a wife could not by New York law sue her husband for personal injury,<sup>2</sup> the action was against the public policy of the state and should be dismissed.

The law of the place of the tort determines if the plaintiff has a cause of action,<sup>3</sup> though it may or may not be enforceable at the forum. The *Restatement* of conflict of laws states that, "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."<sup>4</sup> This applies only to causes of action so contrary to public policy that the forum will withhold the use of its courts altogether in enforcing them. In attempting to define public policy the New York court has said that it is "our own sense of justice and equity."<sup>5</sup> The court in the instant case states that New York has no public policy except what is to be found in its constitution and laws. At another time the court said that they "do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."<sup>6</sup> These general expressions do not meet the issue. Apparently no clearly defined concept of public policy is to be found in the cases.

23. Canons of Ethics American Bar Assn., part II, §§ 27, 28; *People ex rel. Moses v. Goodrich*, 79 Ill. 148 (1875); *In re Cohen*, 261 Mass. 484, 159 N. E. 495 (1928); *Reno Bar Assn. v. Scoular*, 34 Nev. 313, 123 Pac. 13 (1912).

24. *People v. MacCabe*, 18 Colo. 186, 32 Pac. 280 (1893); *in re Schnitzer*, 33 Nev. 581, 112 Pac. 848 (1911).

25. *Ibid.*

26. *Chreste v. Commonwealth*, 171 Ky. 77, 186 S. W. 919 (1916); (1935) 8 So. CALIF. L. REV. 239.

27. *In re Ades*, 6 F. Supp. 467 (D. C. Md. 1934).

1. 271 N. Y. 466, 3. N. E. (2d) 597 (1936).

2. *In Allen v. Allen*, 246 N. Y. 571, 159 N. E. 656 (1927), Pound, J., by dissenting opinion, attempts to show that this interpretation of the statute is ill-founded and the law of New York should not forbid a wife to sue her husband for personal injuries.

3. *Schaefer v. O. K. Tool Co.*, 110 Conn. 528, 148 Atl. 330 (1930); *Woodard v. Bush*, 282 Mo. 163, 220 S. W. 839 (1920); *Taylor v. Integrity Mutual Casualty Co.*, 216 Mo. App. 599, 265 S. W. 881 (1924).

4. RESTATEMENT, CONFLICT OF LAWS (1934) § 612; 2 BEALE, CONFLICT OF LAWS (1935) § 445.1.

5. *Vladikavkazsky Ry. v. N. Y. Trust Co.*, 263 N. Y. 369, 189 N. E. 456 (1934).

6. See *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 111, 120 N. E. 198, 202 (1918).

The theory of vested rights is followed in some states and has been recognized in New York.<sup>7</sup> By this theory the court of the forum recognizes that an obligation exists to give effect to rights which are created and have become vested under the law of another jurisdiction. Courts taking this view will be less inclined to refuse to adjudicate the issue than courts which regard the problem as one of expediency and so-called comity. The principal case does not mention the vested rights theory.

In the dissent to the present case, Couch, J., vigorously attacks the proposition that to allow this suit would be against the public policy of the state. "Conjugal peace would be as seriously jarred by an action for breach of contract, or on a promissory note, or for an injury to property, real or personal, all of which the law permits, as by one for personal injuries." The dissenting opinion in effect adopts the vested rights theory and adds a reservation by stating that "each State shall give effect to all valid causes of action created by the laws of another State except possibly in extreme cases." This seems to be the better view.

Missouri still applies the common law rule that an action by the wife against the husband for personal injuries cannot be maintained.<sup>8</sup> The question involved in the principal case has not been decided in Missouri. The Supreme Court has said by way of dictum, when considering if a wife could sue her husband for tort, that it was governed "by the rule that the extent of the right conferred must be determined by the law where the remedy is sought."<sup>9</sup> But there is a Missouri statute providing that whenever a cause of action has accrued under the laws of another state, action thereupon may be brought in the courts of Missouri if "such person or persons shall be authorized to bring such action by the laws of the state or territory where the cause of action accrued."<sup>10</sup> This statute has been construed broadly,<sup>11</sup> and if it is meant to cover the situation in the principal case, the suit would be allowed in Missouri, and the question of local public policy would not arise.

ALDEN A. STOCKARD

#### CONFLICT OF LAWS—WHAT CONSTITUTES "DOING BUSINESS."

##### *Union Mutual Life Co. of Iowa v. District Court of City and County of Denver*<sup>1</sup>

This case arises from an application for a writ of prohibition. Petitioner is a life insurance company incorporated in Iowa with its only place of business in Des Moines. It had a contract with a Colorado radio station whereby the radio company agreed to advertise petitioner's insurance policies over its station, and upon receiving any inquiries for insurance, to forward the same to petitioner in Des Moines. Through this means petitioner wrote many policies for Colorado residents. The policies were written in Iowa and mailed to the applicants in Colorado. One such policy was written on the life of Clara Bailey, with Charles Bailey named as beneficiary. The insured died, and Charles Bailey instituted a suit in Colorado on the policy. In this suit service was had on petitioner under a Colorado statute providing for personal service on a corporation "doing business" in Colorado by serving any agent of such corporation found in Colorado<sup>2</sup>. Petitioner's agent who was served in this suit was in Colorado to adjust Charles Bailey's claim. Petitioner, on the theory that it was not doing business in Colorado, moved to quash the services of summons, the denial of which motion is the basis of the appli-

7. *Id.* at 109, 120 N. E. at 201.

8. *Rogers v. Rogers*, 265 Mo. 200, 177 S. W. 382 (1915); *Butterfield v. Butterfield*, 195 Mo. App. 37, 187 S. W. 295 (1916); *Willott v. Willott*, 333 Mo. 896, 62 S. W. (2d) 1084 (1933).

9. *Rogers v. Rogers*, 265 Mo. 200, 177

S. W. 382 (1915).

10. Mo. REV. STAT. (1929) § 705.

11. *State ex rel. v. Guaranty Co.*, 322 Mo. 121, 14 S. W. (2d) 576 (1928).

1. 97 Colo. 108, 47 P. (2d) 401 (1935).

2. COLO. COMP. LAWS (1921) § 40(9).



cation for the writ of prohibition. The supreme court of Colorado denied the writ and held that the petitioner was doing business in Colorado and that, therefore, the statute was applicable and the service was good.

What constitutes doing business varies according to the purpose of the statute in question. A greater amount of local activity may be required for doing business under a penal or taxation statute than under such a statute as is found in the principal case merely subjecting the foreign corporation to service of process.<sup>3</sup> It is essential to the constitutional applicability of such statutes that the foreign corporation be doing business in the state,<sup>4</sup> and what acts of the corporation constitute "doing business" within the terms of the statute is a question of fact; but the theory is that the acts must be of such a nature that the corporation by virtue of doing them can be said to be present in the state.<sup>5</sup>

Some states, including Missouri, take the view that a corporation to satisfy this requirement must transact a substantial amount of its ordinary business in the state where service is sought.<sup>6</sup> The Missouri statute providing for personal service on a foreign corporation is substantially the same as that of Colorado,<sup>7</sup> but in contrast to the Colorado holding in the principal case, Missouri has held that a foreign corporation which sends an agent into Missouri to investigate a claim against the corporation is not doing business in Missouri,<sup>8</sup> and that a foreign corporation which regularly sends salesmen into Missouri to accept orders for goods on behalf of the corporation from Missouri retail storekeepers is not doing such business in Missouri as will permit service of process under the Missouri statute.<sup>9</sup> It is doubtful whether Missouri would hold that the facts in the Colorado case amounted to doing business, although Missouri has not decided the question in connection with radio advertising.

The interpretation given by the Missouri courts to the Missouri statute has been upheld in the Federal courts.<sup>10</sup> It is likely also that the United States Supreme Court would uphold the Colorado interpretation of its statute in the principal case if the facts showed acts done by the foreign corporation in excess of mere solicitation of business, as in the case of *International Harvester Co. v. Kentucky*, where it was found that the foreign corporation through its agents not only took orders for goods in Kentucky, but accepted checks, drafts and notes in payment therefor.<sup>11</sup>

The decision of the Colorado Supreme Court represents the extreme view as to what constitutes doing business. Most courts, including Missouri, probably would not accept such an interpretation, but since radio advertising over local radio stations has become a customary means of getting business, courts may in the future give greater significance to this fact in determining what is doing business.

S. PAUL KIMBRELL

#### CONTRACTS—MORAL CONSIDERATION.

##### *Webb v. McGowin*<sup>1</sup>

This was an action in assumpsit to recover installments alleged to be due on a contract. Plaintiff, an employee of a lumber company, was engaged in clearing

3. Isaacs, *An Analysis of Doing Business* (1925) 25 COL. L. REV. 1018.

4. *Riverside and Dan River Cotton Mills v. Menefee*, 237 U. S. 189 (1915).

5. Isaacs, *loc. cit. supra* note 3.

6. *Painter v. Colorado Springs & Cripple Creek Dist. Ry. Co.*, 127 Mo. App. 248, 104 S. W. 1139 (1907); *Nathan v. Planters Cotton Oil Co.*, 187 Mo. App. 560, 174 S. W. 126 (1915); *Bauch v. Weber Flour Mills Co.*, 210 Mo. App. 666, 238 S. W. 581 (1922).

7. MO. REV. STAT. (1929) § 728.

8. *Painter v. Colorado Springs & Cripple Creek Dist. Ry. Co.*, 127 Mo. App. 248, 104 S. W. 1139 (1907).

9. *Bauch v. Weber Flour Mills Co.*, 210 Mo. App. 666, 238 S. W. 581 (1922).

10. *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, 32 Fed. 802 (C. C. E. D. Mo. 1887).

11. *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914); *cf. Green v. Chicago, Burlington and Quincy Ry. Co.*, 205 U. S. 530 (1907).

1. 168 So. 196 (Ala. 1935).

the upper floor of a mill. In the course of his work it became necessary to drop a 75 pound block to the ground below. When plaintiff was in the act of dropping the block, he observed the defendant's testator directly below him, in such position that it was likely the falling block would strike the latter, and would inflict serious bodily harm and even death. In order to prevent the block from striking defendant's testator, plaintiff held to the block in the course of its fall, controlling its direction in such manner that defendant's testator was not injured. By holding to and falling with the block, plaintiff suffered serious injury, as a consequence of which he was rendered permanently crippled. Twenty-eight days later, in consideration of the plaintiff having prevented him from sustaining injury, the defendant's testator promised to pay to the plaintiff \$15.00 every two weeks for the remainder of the latter's life. These payments were continued for several years until the death of the testator in January, 1934, when they were discontinued. This action was commenced to recover the unpaid installments accruing up to the time of bringing the action. A demurrer to the complaint was sustained on the ground, *inter alia*, that the averments of the plaintiff's complaint showed that the agreement was without consideration. The court of appeals reversed the judgment and held that the plaintiff's act was a material benefit to the testator, imposing upon the latter a moral obligation to compensate the plaintiff, and that the testator's subsequent promise to pay was a "valid and enforceable contract." It was said that the defendant's testator's subsequent promise to pay was an affirmation or ratification of the services rendered, and that there was a presumption that a previous request for the services was made.

This case brings us face to face with the doctrine of moral consideration, a form of past consideration, whose foundations were laid in the middle of the eighteenth century by Lord Mansfield, whose influence spread rapidly in England until 1840. He applied the doctrine in several cases during his life and it appeared in numerous cases after his death. For example, it was held that a promise by overseers of the poor to pay for the expenses incurred in curing a pauper,<sup>2</sup> and a promise by a widow to indemnify one who had advanced money to another at her request during her coverture when she was incapable of contracting,<sup>3</sup> were enforceable. At the beginning of the nineteenth century, however, the doctrine was restricted, and the court of Queen's Bench announced as an accurate statement of the law that, "An express promise . . . can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision."<sup>4</sup> From an examination of the authorities there can be no doubt that the doctrine of moral consideration is wholly discredited in England.<sup>5</sup> The courts in most of the states in the United States, including the courts of Missouri, have rejected the doctrine, even though some exceptional cases of liability on promises made without present consideration, may still exist, as in the case of promises to pay debts barred by the statute of limitations, or by a discharge in bankruptcy.<sup>6</sup> The exceptions are no longer based upon the theory of moral consideration, but upon other grounds, and by the weight of authority moral consideration, as such, is held legally insufficient to support a promise.<sup>7</sup>

2. *Watson v. Turner*, Buller's N. P. 129 (1667).

3. *Lee v. Mugeridge*, 5 Taunt. 36 (1813).

4. *Wennall v. Adney*, 3 B. and P. 137, 140 (1802).

5. *Binnington v. Wallis*, 4 B. & Ald. 650 (1821); *Beaumont v. Reeve*, 8 Q. B. 483 (1846); *Eastwood v. Kenyon*, 11 A. & E. 438 (1849); Leake says: "It is obvious

that a promise moved by a sense of moral obligation only, is simply voluntary; and it is now settled [in England] in accordance with the general rule, that no valid contract arises from it." LEAKE, CONTRACTS (7th ed. 1921) 453.

6. 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 148.

7. *Farnham v. O'Brien*, 22 Me. 475 (1843); *Eakin v. Fenton*, 15 Ind. 59 (1860);

The principal case has gone a long way toward recognizing once more the validity of moral obligation as a basis for contract. The court's argument is, however, inherently weak. The case at bar is sought to be distinguished from "the class of cases where the consideration is a mere moral consideration or conscientious duty unconnected with receipt by promisor of benefits of a material or pecuniary nature." "Here the promisor," says the court, "received a material benefit consisting of defendant's testator having escaped injury."

But could the court say beyond a reasonable doubt, that had plaintiff failed to act, the testator would not have been injured? Here it would appear the court is speculating as to what might have been—certainly not a proper matter for the court's determination.

Apparently, the court recognizes the weakness of its argument thus far, and invokes a legal fiction to bolster its position, namely, that the testator's subsequent promise to pay is an affirmance or ratification of the services rendered, and that there was a presumption that a previous request for the services was made; that is, the court presumed that the testator, at some prior moment, requested plaintiff to jump from the mill and save the testator from injury. Such a presumption is contrary to fact and against the weight of modern authority, which finds such an implied request in cases where at the time of the services rendered the circumstances were such that the law would imply a promise to pay on the part of the one to whom such services were rendered.<sup>8</sup> There is no such implication in the principal case; the request for the services in this case, if such a request be implied, would more properly be interpreted as a request for a gratuitous service rather than a request for a service to be paid for. Likewise, the plaintiff would render such a service as a gratuity with no intention or expectation of reward; and when a gratuity is once bestowed, a later promise to pay for it is not enforceable.

In support of its position the court cites the case of *Kenan v. Holloway*.<sup>9</sup> An examination of this case, however, shows that it is not in point. In this case the plaintiff had voluntarily paid a judgment then in force against the defendant, concerning whose validity there was some doubt. Plaintiff had no intention of making a gift, but intended to collect the amount of the payment from the defendant. Defendant subsequently promised to reimburse plaintiff for the money expended. Assuming the judgment to be a valid judgment, then the defendant's subsequent promise to reimburse the plaintiff for his money in payment thereof, was a good and binding promise on the theory that where a benefit of pecuniary value is furnished with no intention to make a gift, though with no previous re-

Gwinn v. Simes, 61 Mo. 335 (1875); Hendricks v. Robinson, 56 Miss. 694 (1879); Kennerly v. Martin, 8 Mo. 698 (1884); Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837 (1887); Stockton Bros. v. Reed, 65 Mo. App. 605 (1896); Bragg v. Israel, 86 Mo. App. 338 (1900); Berryman v. Becker, 158 S. W. 899 (Mo. App. 1913); McGuire v. Hughes, 207 N. Y. 516 (1913); Nelson v. Diffenderfer, 178 Mo. App. 48, 163 S. W. 271 (1914); Rask v. Norman, 141 Minn. 198, 169 N. W. 704 (1918) (holding that it is well settled that contracts entered into or promises made on the basis of friendship and goodwill, unsupported by pecuniary or material benefit, create at most bare moral obligations, binding only on the conscience, a breach of which is not redressable in the courts.); Terry v. Terry, 217 S. W. 842 (Mo. App. 1919); Boone County Milling & Elevator Co. v. Lowery,

248 S. W. 623 (Mo. App. 1923); Heckman v. Van Graafeiland, 291 S. W. 190 (Mo. App. 1927).

8. Chamberlin v. Whitford, 102 Mass. 448 (1869); Moore v. Elmer, 180 Mass. 15, 61 N. E. 259 (1901); LANGDELL, CONTRACTS (1880) § 92.

9. 16 Ala. 53 (1894) (the court holding in effect, that a voluntary payment of money by one person for the use of another, without a previous request, will not support a subsequent promise to refund, unless the payment is beneficial to the promisor. Seemingly, here the court recognizes the general rule that moral obligation is not sufficient to support a subsequent promise to pay, but seeks to find some real and valuable consideration to which it can attach the subsequent promise to pay, by the theory of implied request).

quest, a subsequent promise by one who has received the benefit may be enforced,<sup>10</sup> whereas in the principal case, the benefit bestowed was intended originally as a gratuity.

The analogy of the court that had testator been accidentally poisoned, and a physician without his knowledge or consent treated him, thus saving his life, a subsequent promise to pay for such services would be valid, does not reach the case at bar, for in such a case the physician would be performing professional services under such circumstances that he would intend to charge and an implied promise to pay would be raised at the time the services were rendered. The element of gratuity just discussed would not enter into this situation.

We can well sympathize with the court in its desire to allow a recovery under the peculiar circumstances of this case. But however much we may wish to extend the number of promises of this nature that should be enforced, it is essential that such promises should be clearly defined. The test of moral consideration may vary with every individual. Should not this vague doctrine, difficult to apply, yield therefore, to certainty and definiteness in the law? Indeed, one judge who wrote a concurring opinion, expressed some doubt as to the correctness of the decision.<sup>11</sup>

WILLIAM W. VAN MATRE

CONTRACTS—ASSIGNMENT OF SALARY TO BE EARNED BY A PUBLIC SCHOOL TEACHER.

*Kimball v. Ledford*<sup>1</sup>

Ledford held an unsatisfied judgment against Miss Tharp, a teacher in the public schools of California. Shortly after this judgment was obtained, Miss Tharp executed an assignment of her salary earned and to be earned in the future to certain firms to whom she was indebted for the necessities of life. The California Civil Code, §955, provides: "No assignment of, or order for, wages or salary shall be valid unless at the time of the making thereof, such wages or salary have been earned, except for the necessities of life. . . ." Plaintiffs, school officials who pay Miss Tharp's salary, filed this bill of interpleader after claims had been made upon them for her salary by the judgment creditor and by the assignees. At common law a public official may not assign future earnings, and the court observes that the solution of the question here presented turns upon the determination of whether a teacher in the public school holds a public office. It was held that such a teacher does not hold a public office, but is only a contractual employee and that the assignment was valid.

At the old common law a claim for wages like any other chose in action was not assignable since the relation between the original debtor and creditor was regarded as a vital part of the obligation which could no more be changed than any other term of the obligation.<sup>1a</sup> Later, however, the assignment became enforceable in equity, and eventually it was enforced at law.<sup>2</sup> Today a valid assignment by an individual of future wages under an existing contract is allowed by the common law in some states and by statute in others.<sup>3</sup> It is important to

10. *Drake v. Bell*, 26 N. Y. Misc. 237, 55 N. Y. Supp. 945 (1899) (a promise to pay a mechanic for repairs made by mistake on defendant's house).

11. He said: "The questions involved in this case are not free from doubt and perhaps the strict letter of the rule, as stated by judges, though not always in accord, would bar a recovery by plaintiff."

1. 57 P. (2d) 163 (Cal. App. 1936).

1a. 2 WILLISTON, CONTRACTS (Rev. ed. 1936) § 405.

2. Holdworth, *History of the Treatment of Choses in Action by the Common Law* (1920) 33 HARV. L. REV. 997; Cook, *Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816.

3. *Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956 (1909); *Duluth, S. S. & A. R.R. v. Wilson*, 200 Mich. 313, 167 N. W. 55 (1918); *Rate v. Am. Smelting and Refining Co.*, 56 Mont. 277, 184 Pac. 478 (1919). It is not essential to the validity of an assignment of future wages that the contract of employment be definite as to

remember that the assignment of future earnings must in all events be made under an existing contract of employment, and not of earnings to arise from expected employment to be secured in the future. The assignment of the latter is invalid, since there is a mere possibility of future earnings, which the courts will not recognize.<sup>4</sup> However, in some jurisdictions while an assignment of wages under a contract not yet in existence conveys to the assignee no present right, either legal or equitable, yet it operates, when the employment has been secured and the wages have been earned, to give the assignee an equitable right to collect them from the employer.<sup>5</sup>

Statutes, however, frequently change or modify the common law governing assignments. The California Code is an example. A Missouri statute provides that "all assignments of wages, salaries and earnings, not earned at the time the assignment is made, shall be null and void."<sup>6</sup> This statute has been upheld as a valid exercise of police power,<sup>7</sup> and it has been held that wages are earned when services have been rendered by the employee over a stated unit of time at an agreed wage scale, whether the wages are payable or not;<sup>8</sup> so that if daily wages are to be paid at the end of each month and an assignment is made at the end of the first week of that week's wages, the assignment is valid. The California statute differs from the Missouri statute in that it allows the assignment of future earnings if they are for the necessities of life. Missouri does not allow any assignment of future wages whether for necessities of life or not. It is evident that the principal case would be decided differently in Missouri for this reason, and the case would not hinge, as it does, on the determination of whether a school teacher holds a public office.

Public officials at common law in England were not permitted to assign their future earnings on the ground that it was against public policy.<sup>9</sup> Most courts in this country have adopted that rule.<sup>10</sup> The reason for the rule is that the courts feel that the efficiency of the public service would be impaired by permitting public officers to assign their future earnings, since "one of the strongest incentives to industrial exertion—the expectation of pecuniary reward in the near future—would be gone."<sup>11</sup> A few courts in this country have allowed public officials to assign their future earnings, but in so doing they did not discuss the validity of such assignments on the ground of public policy.<sup>12</sup> An assignment by a public officer of wages already earned, however, is valid.<sup>13</sup> The efficiency of the public service is not affected in any manner, and, therefore, it is not against public policy.

the amount of compensation under it. *Wabash R.R. v. Smith*, 134 Ill. App. 574 (1907). Nor does the period of employment have to be definite. *Metcalf v. Kincaid*, 87 Iowa 443, 54 N. W. 867 (1893).

4. *Globe Indemnity Co. v. West Texas Lumber Co.*, 34 S. W. (2d) 896 (Tex. Civ. App. 1930); 2 WILLISTON, *op. cit. supra* Note 1a, § 413; RESTATEMENT, CONTRACTS (1932) §154.

5. *Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956 (1909); *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936 (1888); 2 WILLISTON, *op. cit. supra* note 1a, § 413.

6. MO. REV. STAT. (1929) § 2969.

7. *Heller v. Lutz*, 254 Mo. 704, 164 S. W. 123 (1914).

8. *Service Purchasing Co. v. Brennan*, 226 Mo. App. 110, 42 S. W. (2d) 39 (1931).

9. *Stone v. Lidderdale*, 2 Anstr. 533 (179-).

10. *Bang v. Dunn*, 4 Pac. 963 (Cal. 1884); *Bliss v. Lawrence*, 58 N. Y. 442 (1874); in re *Wilkes*, 8 Cal. App. 659, 97

Pac. 667 (1908); *Anderson v. Branstrom*, 173 Mich. 157, 139 N. W. 40 (1912); *Tribune Reporter Printing Co. v. Homer*, 51 Utah 153, 169 Pac. 170 (1917).

11. *Schloss v. Hewlett*, 81 Ala. 266, 1 So. 263 (1887).

12. *Brackett v. Blake*, 7 Met. 335 (Mass. 1844); *Macomber v. Doane*, 2 Allen 541 (Mass. 1861); *State v. Hastings*, 15 Wis. 75 (1862); see *Nat'l Bank v. Fink*, 68 Tex. 303, 304, 24 S. W. 256, 257 (1893); *Hooker v. McLennon*, 236 Mass. 117, 127 N. E. 626 (1920).

13. *Wood v. Brown County*, 125 Neb. 692, 251 N. W. 839 (1934); *Boster v. First Nat'l Bank*, 5 F. Supp. 15 (1934). If the assignee of a public officer's salary not yet earned has actually collected and reduced to possession the proceeds of the claim, he cannot be deprived of them. *Roesch v. W. B. Worthen Co.*, 95 Ark. 482, 130 S. W. 551 (1910); *Carnegie Trust Co. v. Battery Place Realty Co.*, 67 Misc. 452, 122 N. Y. Supp. 697 (1910).

The question in the principal case is, as the court points out, are teachers officials under the law that prohibits the assignment of future salaries by public officials? A public office has been defined as "the right, authority, and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public," and "the individual so invested is a public officer."<sup>14</sup> The teacher, although having an important public duty, exercises no sovereign power of either the legislative, executive, or judicial departments, and is, therefore, not within the definition. He is thus a contractual employee, and not a public officer.<sup>15</sup>

The principal case is sound both on authority and principle.

MILTON I. MOLDAFSKY

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CONTRACTS—FRAUD WITH RESPECT TO AN ILLEGAL CLAUSE IN THE CONTRACT.

*Taggart v. School District No. 52, Carroll County*<sup>1</sup>

Plaintiff, on May 1, 1933, entered into a contract with the board of directors of the defendant School District by the terms of which plaintiff was to teach for the school district for the year 1933-34. One of the clauses in this contract provided as follows: "Be it further agreed, that the party of the first part [plaintiff] declares 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." This clause was inserted in the contract pursuant to a rule of the board that married women would not be hired as teachers in the district. At the time this contract was executed, plaintiff was in fact married. The school board discovered this fact in July and twice thereafter notified plaintiff that the contract, because of the misrepresentation therein, had been declared null and void, and would not be recognized as binding. Plaintiff thereafter brought suit for breach of contract and obtained judgment in the circuit court. The theory of plaintiff's cause of action was that the board of directors had no legal right to adopt a rule prohibiting a teacher from marrying or the employment of married ladies as teachers, and that the marriage clause in the contract was illegal, null and void.

The Kansas City Court of Appeals affirmed the judgment,<sup>2</sup> holding that the clause in restraint of marriage was arbitrary, unreasonable, and void; and that since the clause was void, there could be no fraud in respect to such a clause; and, therefore, plaintiff should be permitted to recover on the contract. The decision by this Court with respect to the illegality of the clause in restraint of marriage was criticized by this writer in an earlier number of this Review.<sup>3</sup>

Meantime, the case has gone to the Supreme Court upon certification in this Court, the judgment of the trial court was reversed and the cause remanded with direction to enter judgment in favor of defendant. The decision of the Supreme Court was not, however, decided on the basis of whether a clause in restraint of marriage in a teacher's contract is void. The Court, finding it unnecessary to

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14. MECHEM, PUBLIC OFFICES AND OFFICERS (1890) § 1; see *Leymel v. Johnson*, 105 Cal. App. 694, 288 Pac. 858 (1930). Police officers, municipal firemen, prosecuting attorneys, and clerks are but a few of the many persons who have been held to be public officers. 2 WILLISTON, *op. cit. supra* note 1a, § 417.

15. *Mootz v. Belyea*, 60 N. D. 741, 236 N. W. 358 (1931); *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042 (1890); *Leymel v. Johnson*, 105 Cal. App. 694, 288 Pac. 858 (1930).

1. 96 S. W. (2d) 335 (Mo. 1936).  
2. 88 S. W. (2d) 447 (Mo. App. 1935).  
3. (1936) 1 Mo. L. Rev. 189.

discuss this question, held that since plaintiff was married at the time the contract was signed, her written contractual representation that she was not married was a fraud upon defendant, and of such a nature as to affect defendant's willingness to contract with plaintiff. The Court said that it would not aid a fraud-feasor by enforcing a contractual obligation procured by means of fraudulent representations.

This holding of the Supreme Court overrules some rather questionable language of the Kansas City Court of Appeals. Although it seems to be a feasible argument on the part of the Court of Appeals that there can be no fraud with respect to a clause that is illegal, the fallacy in its holding as applied to this case is that the court failed to take into consideration the fact that the school board was under no obligation to hire any teacher, and had it been known that plaintiff was married at the time that she signed the contract, she would not have been offered the position. If the court concedes, as the appellate court did, that the school board can refuse to hire a teacher for any reason whatsoever, then regardless of whether the clause in restraint of marriage was illegal, the fact remains that plaintiff's misrepresentation was of such a nature as to affect defendant's willingness to contract. Such a misrepresentation is a clear fraud upon defendant, and plaintiff was rightfully not permitted to recover.

Of course, if it should be held that a school board could not refuse to contract because of the fact that a teacher was married, then, perhaps, the view of the Kansas City Court of Appeals would be justified. However, the restraint of marriage doctrine has not been carried to such lengths, and, therefore, it appears that that Court was not warranted in its decision on this point.

KIRK JEFFREY

#### CRIMINAL LAW—TRANSFER OF INTENT—RETENTION OF DEFENSE.

##### *State v. Batson*<sup>1</sup>

The defendant was tried for the murder of Dr. Poole. The evidence was that he shot and killed a justice of the peace, and then in shooting at a constable killed the doctor. The lower court's instruction was to the effect that if the defendant did wilfully, deliberately, premeditatedly, and with malice aforethought, attempt to shoot and kill Justice Rabenau, and in so doing shot and killed Dr. Poole, then the intent which he had against Rabenau must be attributed to him in the killing of Dr. Poole. The defendant was convicted of first degree murder. Held, the judgment is reversed and the case remanded, because the evidence clearly shows the defendant was shooting at the constable when Poole was killed and that the justice had already been shot.

The doctrine of transfer of intent which the court applies in this case is an old one and clearly settled. Blackstone puts the rule in simple form when he says that, "if one shoots at A. and misses *him*, but kills B., this is murder, because of the previous felonious intent, which the law transfers from one to the other."<sup>2</sup> This is an almost universal rule and was applied in 1886 by the Supreme Court of Missouri,<sup>3</sup> and since that case was decided, it has been reiterated many times.<sup>4</sup>

The rule as to the retention of defenses which the defendant would have had against the intended victim is equally clear and almost as universally applied, but it does not arise as often and is not so well known as the theory of transferred intent. This rule is that the unintentional killing of a bystander by a shot fired in the exercise of the right of self-defense is excusable or justifiable if the killing of the party intended to be killed would have been excusable or justifiable.<sup>5</sup> This

1. 96 S. W. (2d) 384 (Mo. 1936).

2. 4 BL. COMM. \* 201.

3. *State v. Payton*, 90 Mo. 220, 2 S. W. 394 (1886).

4. *State v. Gilmore*, 95 Mo. 554, 8 S.

W. 359 (1888); *State v. Renfrow*, 111 Mo.

589, 20 S. W. 299 (1892); *State v. Clark*,

147 Mo. 20, 47 S. W. 886 (1898); *State v.*

*Cavin*, 199 Mo. 154, 97 S. W. 573 (1906).

5. 30 C. J. 88.

rule has been followed in nearly all jurisdictions where the problem has arisen. In a Texas case,<sup>6</sup> the court said that one who, shooting at another in self-defense, hits and kills a third party, will be guilty of no offense. A Missouri case,<sup>7</sup> decided in 1930, held the defendant was entitled to an instruction on self-defense and manslaughter. The court said that any defense which the defendant might have against the person shot at would be available against the person hit. In a later Missouri case,<sup>8</sup> the rule was again applied, the court holding that the defendant was entitled to an instruction that if he killed the deceased while lawfully defending himself from an attack by another person, he should be acquitted. These two cases seem to be the only ones in Missouri that have directly decided this point, but the rule has been upheld by *dicta* in all the cases in which it has been brought up.

DONALD H. CHISHOLM

DECEDENTS' ESTATES—ACTIONS AGAINST HEIRS—EXTRATERRITORIAL EFFECT OF NON-CLAIM STATUTE.

*Hagan v. Lantry*<sup>1</sup>

Testator was an obligor of a note, to be paid on demand after one year, which was executed in 1903 to the plaintiff as guardian for certain infants. He was a resident of Kansas, while the guardian and infants were residents of Oklahoma. A few months after the note was executed, testator died leaving his property by will to the defendants. The estate was duly administered in Kansas and the executrix discharged in 1905. The plaintiff, being in Oklahoma and having had no notice or knowledge of these events, did not file the note or make any claim against the estate. The defendants, having received testator's property, sold it. In 1914 this suit in equity was commenced by the guardian against the defendants in the county of their residence, Jackson County, Missouri, to establish and declare a trust in the proceeds of the assets in favor of the plaintiff. Thereafter the infants, having become of age, were substituted as plaintiffs. Judgment for the defendants was reversed.

When a claim against an estate is not barred by settlement of the estate and the applicable non-claim statute, the creditor may sue the heirs or distributees in equity after the estate has been administered.<sup>2</sup> A common example of this is in cases of claims which are contingent during the administration of the estate.<sup>3</sup> When a claim is barred by settlement of the estate and the applicable non-claim statute, no suit can be maintained against the heirs or distributees.<sup>4</sup> Likewise, when there has been no administration of the estate, the heirs or distributees cannot be sued directly.<sup>5</sup> In the principal case the claim was not contingent, but was merely unmaturing. Unmatured claims must ordinarily be presented or become barred.<sup>6</sup> So here there can be no justification for suit against the heirs unless, for some other reason, the Kansas proceedings and non-claim statute are not a bar to the plaintiff's right to sue the distributees in Missouri.

It is well settled that the fact that the creditor is a non-resident of the domiciliary state will not prevent him from becoming barred there.<sup>7</sup> Moreover, the

6. *Gaines v. State*, 67 Tex. Crim. Rep. 325, 148 S. W. 717 (1912).

7. *State v. Stallings*, 326 Mo. 1037, 33 S. W. (2d) 914 (1930).

8. *State v. Fielder*, 330 Mo. 747, 50 S. W. (2d) 1031 (1932).

1. 89 S. W. (2d) 522 (Mo. 1935).

2. *State ex rel. Brouse v. Burnes*, 129 Mo. App. 474, 107 S. W. 1094 (1908); 18 C. J. 953-957.

3. *Rankin v. City of Big Rapids*, 133 Fed. 670 (C. C. A. 6th, 1904); *Parks v.*

*Murphy*, 166 Ark. 564, 266 S. W. 673 (1924).

4. *Reveal v. Stell*, 56 Cal. App. 463, 205 Pac. 875 (1922); *Cincinnati R. & Ft. W. R. R. v. Heaston*, 43 Ind. 172 (1873).

5. *Craven v. State*, 50 Ind. App. 30, 97 N. E. 1021 (1912).

6. *Cincinnati R. & Ft. W. R. R. v. Heaston*, 43 Ind. 172 (1873).

7. *Hale v. Coffin*, 120 Fed. 470 (C. C. A. 1st, 1903); *Fields v. Mundy's Estate*, 106 Wis. 383, 82 N. W. 343 (1900).



plaintiff was not seeking, and could not have obtained ancillary administration in Missouri, because the decedent had no property in the state at the time of his death.<sup>8</sup> When ancillary administration may be obtained, the courts are divided as to whether the administration proceedings and non-claim statute of the state of the decedent's domicile is a bar in the ancillary state.<sup>9</sup> Here the plaintiff was simply suing to reach the proceeds of an estate which had already been administered in the domiciliary state. The court in the principal case says that the proceedings and non-claim statute of the domiciliary state cannot bar the plaintiff because such statutes "do not have extra-territorial effect."

It would seem that both reason and policy are opposed to the view taken by the court. An administration proceeding is an action *in rem*.<sup>10</sup> This is, undoubtedly, because statutes give probate courts general power to adjudicate all rights in the property administered. The non-claim statute is a necessary and essential part of the statutes giving this power, because without it the rights of non-claiming creditors could not be barred. The purpose of non-claim statutes is to make possible a speedy, effective, final and binding settlement of estates, and to cause the title of the distributees and their purchasers to be secure.<sup>11</sup> In the principal case, although the defendants were being sued in personam, the suit was for the wrongful withholding of the proceeds of a *res*, title to which had been adjudicated to be in the defendants by the Kansas probate proceedings. It appears, therefore, that the plaintiff should be barred by the Kansas adjudication *in rem*,<sup>12</sup> and that whether or not the Kansas non-claim statute is, in itself a bar, is irrelevant.

Even if the adjudication *in rem* does not bar the plaintiff's suit, it would seem that the running of the domiciliary non-claim statute should. A Missouri statute<sup>13</sup> requires courts of this state to give effect to the general statute of limitations of the place where the cause of action arose. It would seem that there should be an even stronger policy in favor of giving effect to applicable foreign non-claim statutes.<sup>14</sup> The purpose of these statutes has been mentioned. That this object will be defeated if non-claiming creditors are allowed to sue the heirs or distributees for assets received whenever they can find them in another state is obvious.

Although the Federal courts hold that whether a foreign non-claiming creditor can sue on his claim in a Federal court is governed by the law of the state of the domicile of the decedent,<sup>15</sup> what appears to be the only decision<sup>16</sup> of a state court involving the question under discussion supports the view of the court in the principal case. In that case the administrator of an estate in Missouri, where the decedent was domiciled, was allowed to be sued in Kansas by a creditor of the decedent after the Missouri non-claim statute had run. The case might have been distinguished from the principal case on the ground that in the principal case the estate had been administered and the administrator discharged, while in the Kansas case this was not true. In any event, because of the purpose and policy of non-claim statutes, it seems that the view opposite that taken by the court is the more desirable one.

It should be noted, however, that there are two separate grounds, not referred to by the court in its opinion, upon which the result reached in the principal case

8. Hill v. Barton, 194 Mo. App. 325, 188 S. W. 1105 (1916); 24 C. J. (1921).

9. Lipperd v. Lipperd, 181 Mo. App. 106, 163 S. W. 934 (1914) (holding the plaintiff not barred); Hunt v. Fay, 7 Vt. 170 (1835) (holding the plaintiff barred).

10. Baker v. Baker, Eccles & Co., 242 U. S. 394 (1917); Benoist v. Murrin, 48 Mo. 48 (1871).

11. Davis v. Shepard, 135 Wash. 124, 237 Pac. 21 (1925).

12. Rountree v. Montague, 30 Cal. App. 170, 157 Pac. 623 (1916).

13. Mo. REV. STAT. (1929) § 869.

14. Davis v. Shepard, 135 Wash. 124, 237 Pac. 21 (1925).

15. Security Trust Co. v. Black River National Bank, 187 U. S. 211 (1902); Goodno v. Hotchkiss, 237 Fed. 686 (D. Conn. 1916).

16. Toner v. Conqueror Trust Co., 131 Kan. 651, 293 Pac. 745 (1930).

may be justified. An exception to the Kansas non-claim statute<sup>17</sup> is that it shall not bar infants. The claim sued upon in the principal case was in favor of infants. Furthermore, the obligation was that of a partnership. Some courts hold that non-claim statutes do not apply to partnership obligations,<sup>18</sup> though the contrary view is also taken.<sup>19</sup> It appears, therefore, that the case reaches the proper result. It was, however, unnecessary as well as unfortunate, that the reasons given by the court for attaining this result were employed.

SESCO V. TIPTON

EVIDENCE—PRESUMPTIONS AS EVIDENCE.

*In re Pitcairn's Estate*<sup>1</sup>

The alleged will of Mary Pitcairn was contested on the ground that the instrument was not executed with the formalities required by statute. The testimony of the subscribing witnesses tended to prove that the statutory requirement that the testatrix sign in the presence of the witnesses and that the witnesses know they were attesting a will was not complied with. Held, the presumption of due execution, which arises from proof of the genuineness of the signatures, is independent evidence which may be weighed against positive testimony and is itself sufficient evidence to support a finding that the will was properly executed.

The holding of the California court giving probative weight to a legal presumption is adequately sustained by prior decisions in that state.<sup>2</sup> Without regard to whether it can be said that the California statutes specifically authorize such treatment, they do at least lend legislative sanction to the evidentiary effect given to presumptions by court decisions.<sup>3</sup> The same result, however, has been reached in a few states which have no relevant statutes.<sup>4</sup> The position of the California court is contrary to the rule in most states,<sup>5</sup> as well as that in the federal courts,<sup>6</sup> and is almost universally condemned by legal commentators.<sup>7</sup> The preferable rule is that when contradictory evidence is adduced the presumption as affirmative evidence fades out of existence, leaving the fact finder only the facts that gave rise to the presumption to weigh against the opposing evidence.<sup>8</sup>

17. KAN. REV. STAT. ANN. (1923) tit. 22, § 702.

18. *Pendleton v. Phelps*, 19 Fed. Cas. No. 10, 923 (C. C. Conn. 1810); *Carson v. Berson*, 86 Cal. 433, 25 Pac. 7 (1890).

19. *Fillyau v. Laverty*, 3 Fla. 72 (1850); *Nagle v. Ball*, 71 Miss. 330, 13 So. 929 (1893).

1. 59 P. (2d) 90 (Cal. 1936).

2. *People v. Milner*, 122 Cal. 171, 54 Pac. 833 (1898); *Hitchcock v. Rooney*, 171 Cal. 285, 152 Pac. 913 (1915); *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 Pac. 529 (1931). *Cf. In re Bryant's Estate*, 3 Cal. (2d) 58, 43 P. (2d) 529 (1935). See also (1930) 18 CALIF. L. REV. 418; (1932) 21 CALIF. L. REV. 65; (1933) So. CALIF. L. REV. 163.

3. See CAL. CODE OF CIV. PROC. (Deering, 1923) §§ 1957, 1963, 2061 (2).

4. *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285 (1898); *Clifford v. Taylor*, 204 Mass. 358, 90 N. E. 862 (1910); *re Cowdry*, 77 Vt. 359, 60 Atl. 141 (1905); 22 C. J. 82, § 25, n. 54.

5. *Watkins v. Prudential Ins. Co.*, 315

Pa. 497, 173 Atl. 644 (1934), 95 A. L. R. 878 (1935); 22 C. J. 124, § 61, n. 52.

6. *Lincoln v. French*, 105 U. S. 614 (1881); *Chambliss v. United States*, 218 Fed. 154 (C. C. A. 8th, 1914). *Contra: Coffin v. United States*, 156 U. S. 432 (1895).

7. 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2491; THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 314; 2 CHAMBERLAYNE, EVIDENCE (1911) §§ 1083, 1085; *Bohlen, Rebuttable Presumptions of Law* (1920) 68 U. OF PA. L. REV. 307. For median view see (1908) 8 COL. L. REV. 127.

8. “. . . the peculiar effect of a presumption ‘of law’ (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent *does* offer evidence to the contrary (sufficient to satisfy the judge’s requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury’s hands free from any rule.”

5 WIGMORE, EVIDENCE (2d ed. 1923) § 2491.

In general the Missouri courts seem to have taken the position that contradicted presumptions should not be given evidentiary weight,<sup>9</sup> but the language of some of the decisions seems to indicate that there has been some deviation.<sup>10</sup> In the case of *German Evangelical Bethel Church v. Reith*,<sup>11</sup> which involved facts somewhat similar to those of the principal case, the court said that proponents did not abandon the presumption of due execution even when contradictory testimony of the surviving witnesses was introduced in evidence. If this opinion is to be interpreted as giving probative weight to the presumption as such, it is then in accord with the holding in the principal case but in apparent conflict with the greater number of Missouri decisions on this point. It is submitted that the conclusion arrived at by the Missouri court was a result of facts peculiar to this case and that the decision should not be taken to stand for the general proposition that a legal presumption may be given evidentiary weight after it is contradicted by evidence. One possible distinction suggested within the opinion itself is that the contradictory testimony was adduced involuntarily on the part of proponents, since the law required them to call the surviving attesting witnesses. Another possible distinction is that the court really meant that the factual basis of the presumption was to be weighed as evidence for proponents rather than that the presumption as such should be given probative force. If the last suggested interpretation is correct, the opinion is then not open to the objection raised against the rule followed in California.

As Professor Chaffee has pointed out,<sup>12</sup> presumptions of law may be divided into two types: those based solely upon some public policy and those which have a "logical core." An example of the former is the presumption which arises when it is shown that goods were damaged in transit, that the last carrier was at fault. It is apparent that the probability is no greater that the last carrier caused the damage than the first, or any subsequent carrier, was at fault. Illustrative of the "logical core" type is the presumption that a letter properly addressed and mailed was received in course of post. Experience has demonstrated that there is only a very slight probability that a letter properly addressed and mailed will not be received in course of post.<sup>13</sup> In this situation the law, being cognizant of the fact that in the great majority of cases it would be futile to compel the sender to prove

9. *State ex rel. Detroit . . . Ins. Co. v. Ellison*, 268 Mo. 239, 187 S. W. 23 (1916); *Stack v. General Baking Co.*, 283 Mo. 396, 223 S. W. 89 (1920), noted in (1922) 23 U. Mo. BULL. L. SER. 39. In the latter case it is interesting to note the peculiar error that was made. Not only was the presumption excluded but also the fact that gave rise to the presumption. See also *Mockowik v. Kansas City, St. J. & C. B. R. R.*, 196 Mo. 550, 94 S. W. 256 (1906); dissenting opinion in *Reynolds v. Maryland Casualty Co.*, 274 Mo. 83, 105, 201 S. W. 1128, 1134 (1918).

10. ". . . to overcome the natural presumption against suicide there should be a great preponderance of evidence." *Almond v. Modern Woodmen of America*, 133 Mo. App. 382, 388, 113 S. W. 695, 697 (1908). ". . . it [presumption] can be considered in measuring the credibility or probative force of the evidence presented." *Guthrie v. Gillespie*, 319 Mo. 1137, 1146, 6 S. W. (2d) 886, 890 (1928). ". . . whether they [presumptions] have been overcome is for the jury." *Berry v. Adams*, 71 S. W. (2d) 126, 131, (Mo. App. 1934). See also *McCaskey Register Co. v.*

*Erffmeyer*, 46 S. W. (2d) 256 (Mo. App. 1932); *German Evangelical Bethel Church v. Reith*, 327 Mo. 1098, 39 S. W. (2d) 1057 (1931); (1922) 23 U. OF MO. BULL. L. SER. 39. When *res ipsa loquitur* is applicable the Missouri rule is that plaintiff's prima facie case does not disappear on the introduction of conflicting evidence but remains to be weighed by the jury against defendant's evidence. *Lober v. Kansas City*, 74 S. W. (2d) 815 (Mo. 1934).

11. 327 Mo. 1098, 39 S. W. (2d) 1057 (1931), 76 A. L. R. 617 (1932). It may be helpful to bear in mind the two following rules: The general rule is that the burden of proving due execution of a will is upon proponents. In *re Cullberg's Estate*, 169 Cal. 365, 146 Pac. 888 (1915); 68 C. J. 980 § 748, n. 35. A will may be proved in spite of the adverse testimony of all the attesting witnesses. *Re Christenson*, 128 Minn. 17, 150 N. W. 213 (1914).

12. Chaffee, *The Progress of the Law* (1921) 35 HARV. L. REV. 302.

13. Since the addressee has control of the evidence, this presumption has also a policy basis.

receipt of the letter, raises a presumption that the letter was received, thus lightening the burden of proof on the sender and saving the time of the court. If, however, contradictory evidence is introduced, it is then apparent that no longer can the assumption safely be made that it would be futile to go into the matter fully for the purpose of determining whether the letter actually was received.

The presumption in the principal case is of this second type, and the above reasoning is equally applicable. A presumption is merely a rule of law the significant effect of which is to cast on the party against whom it operates the burden of going forward with the evidence.<sup>14</sup> When no rebutting evidence is submitted the issue is decided according to the presumption not because the presumption is evidence, but rather because it is a rule of substantive law so directing. Whatever justification there may be for giving probative effect to a presumption based on some public policy, it is clear that there is no adequate reason for giving independent evidentiary weight to a presumption based solely upon usual fact. In any instance it seems objectionable to require the fact finder, particularly a jury, to weigh a rule of law against facts adduced in evidence. The presumption in the principal case is obviously one based not on policy but on usual fact only. Therefore, it seems enough that the fact finder should give weight to the facts in evidence.

WM. D. RUSSELL

#### EVIDENCE—UNCONTRADICTED EVIDENCE.

##### *Williams v. Excavating & Foundation Co.*<sup>1</sup>

Defendant's employee ran over and killed plaintiffs' son. Plaintiffs sued in a negligence action based upon the theory that the driver had violated an ordinance of the city of St. Louis requiring the operator of a slowmoving vehicle to drive it as close to the right hand side of the street as possible except when overtaking and passing another vehicle. After the accident the driver gave a written statement to the police, part of which set out that prior to the moment he saw the boy dart off the sidewalk and before he swerved in an attempt to avoid striking him, he had actually been operating his truck as near the curb as he could. This statement was introduced by plaintiffs. No evidence contradicted the driver's claim of having been close to the curb. The court instructed the jury, "To whatever extent it constituted the only evidence in the case upon a point in issue, it is to be taken as conclusive. . . ." The court then modified this statement somewhat by the words, "To whatever extent there were other facts and circumstances *in evidence* from which the jury could have drawn an inference contrary to the driver's version of the facts, then to that extent plaintiffs are not bound by the driver's statement. . . ." (Italics the writer's.) The appellate court upheld the instruction.

The question as to the weight to be placed upon uncontradicted evidence is one which has long been troublesome and which has been discussed since early times. Formerly the general conception was that if a man made any statement whatsoever under oath, he should be believed unless directly contradicted. The juries seem to have thought (as they very often still think) that direct unqualified testimony by an eye-witness or an ear-witness had to be believed unless it was distinctly contradicted.<sup>2</sup>

The modern tendency is expressed by Wigmore<sup>3</sup> who says, "*The mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner. . . .*" We must bear in mind that one of the functions of the

14. 5 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2490, 2491; 2 CHAMBERLAYNE, EVIDENCE (1911) § 1019; THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 314, 575, 576.

1. 93 S. W. (2d) 123 (Mo. App. 1936).  
2. 1 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 400.  
3. 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2034.

court is to direct a verdict when the evidence so preponderates upon one side of the question that there can be no reasonable doubt as to any question of fact. Is the mere fact that evidence is uncontradicted sufficient basis to justify the court in directing a verdict or, if the uncontradicted evidence is confined to one issue, in directing the jury that upon that particular issue they must find in accordance with the uncontradicted evidence? Most courts hold that one function of the jury is to pass upon the credibility of witnesses and, therefore, even though unimpeached, uncontradicted evidence must be passed upon by the jury.<sup>4</sup>

Missouri has probably gone farther in this direction than any jurisdiction with the possible exception of Pennsylvania whose stand upon the question is very similar to that of Missouri.<sup>5</sup> It has been decided by the Missouri Supreme Court that in no case whatsoever where oral testimony is given upon a question of fact can a verdict be ordered by mandatory instruction from the court; and that in all cases the jury have the absolute right to determine whether uncontradicted, unimpeached testimony convinces them. In the case of *Gannon v. Laclede Gaslight Co.*,<sup>6</sup> the court said, "When either party to a controversy submits testimony (other than written instruments that call for the court's construction of their meaning and import) to sustain his or her burden of proof, the other party though offering nothing to contradict it is entitled to have the jury pass upon the whole case, and to determine the credibility of the witnesses and the weight to be given to their testimony. . . ." The *Gannon* case has been accepted as law in Missouri.<sup>7</sup> The effect of this case has been virtually to prohibit the court from directing a verdict upon the basis of oral uncontradicted testimony.

Yet in the principal case we find the court apparently turning in the other direction. The effect of the words of the court is to take from the jury its right to weigh the credibility of the testimony of the uncontradicted witness. True enough, the court makes provision for the jury to consider other facts and circumstances *in evidence*, but in the absence of such circumstances having actually been introduced in evidence, the instruction compels the jury to accept the driver's uncontradicted testimony as true.<sup>8</sup> If the mere presentation of the evidence of a

4. *Hickman v. St. Louis Dairy Co.*, 90 S. W. (2d) 177 (Mo. App. 1936); *Lesser v. Wunder*, 9 Daly (N. Y.) 70 (1880); *Barker v. Lewis Pub. Co.*, 152 Mo. App. 706, 131 S. W. 924 (1910); *Talge Mahogany Co. v. Burrows*, 191 Ind. 167, 130 N. E. 865 (1921); *Markowitz v. N. Y. Rys.*, 176 N. Y. Supp. 778, 188 App. Div. 482 (1919); *United Traction Co. v. Monohan*, 190 N. Y. Supp. 425, 116 Misc. Rep. 609 (1921); *Lindenbaum v. N. Y., N. H., & Hartford R. R.*, 197 Mass. 314, 84 N. E. 129 (1908); *Nydes v. Royal Neighbors of America*, 256 Pa. 381, 100 Atl. 944 (1917). *Contra*: *Wells v. Lusk*, 188 Mo. App. 63, 173 S. W. 750 (1915); *Dunlap v. Smith*, 25 Ill. App. 288 (1888); *Larson v. Glos*, 235 Ill. 584, 85 N. E. 926 (1908); *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884 (1905); *Dolhonde v. Le-moine*, 32 La. Ann. 251 (1880).

5. *Dzsjuko v. Eureka-Maryland Assur. Corp.*, 109 Pa. Super. 9, 165 Atl. 518 (1933). In this case the court says that the rule in Pennsylvania that where evidence is oral only, the case is for the jury, no matter how clear, convincing, uncontradicted or one-sided the evidence may be. *Nanty-Glo Boro. v. American Surety Co.*, 309 Pa. 236, 163 Atl. 523 (1932); *McGlenn Distilling Co. v. Dervin*, 260 Pa. 414, 103 Atl. 872 (1918).

6. 145 Mo. 502, 46 S. W. 968 (1898).

7. In the case of *Hunter v. Wethington*, 205 Mo. 284, 103 S. W. 543 (1907), the court says that it does not follow that because two witnesses testified to the defendant's adverse possession for ten years, and their testimony was undisputed, that the court should have given judgment for the defendant. The credibility of their testimony was for the trier of the facts—the jury. *Adams v. Modern Woodmen of America*, 145 Mo. App. 207, 130 S. W. 113 (1910); *Dudley v. Wabash R. Co.*, 167 Mo. App. 647, 150 S. W. 737 (1912); *Wrightsmann v. Glidewell*, 210 Mo. App. 367, 239 S. W. 574 (1922).

8. The case of *Schwartz v. Germania Life Ins. Co.*, 21 Minn. 215 (1875), defines the function of the jury as followed by the weight of authority. It states in substance that the jury is not obliged to receive passively and follow blindly, testimony presented to it, though there is no contradictory evidence; but they are to examine and scrutinize the evidence carefully, and to follow it only so far as it seems reasonable and true. The case of *Barker v. Lewis Pub. Co.*, 152 Mo. App. 706, 131 S. W. 924 (1910), presents the usual Missouri attitude upon the question of the function of the jury. The court says: ". . . the matter

fact is to be called its proof, because undisputed by any other witness or witnesses, then the right of the jury to judge the weight of the evidence and the credibility of the witnesses in such cases means nothing.<sup>9</sup>

There must not only be the presentation of evidence of a fact by a witness or witnesses, but such evidence must have been accepted by the jury before proof can be said to have been made complete upon any given point. If what has been said fails to convince the jury, then no sufficient proof has been made, however positive or unqualified the utterance of witnesses. In many cases the testimony may *tend* to prove a given issue but still fall far short of convincing the jury.<sup>10</sup>

A possible distinction may be drawn between the principal case and most cases of uncontradicted evidence. In the principal case, the witness whose testimony was held to be conclusive against the plaintiffs was offered by the plaintiffs themselves, whereas in most cases of uncontradicted evidence the witness whose testimony is held to be conclusive is introduced by the party who benefits by the operation of the conclusive presumption. The court, however, makes no mention of this difference and treats the case just as though one of the defendant's witnesses (rather than one of the plaintiffs') had given the apparently damaging uncontradicted evidence.

In view of the numerous decisions by Missouri courts to the effect that no matter how convincing the testimony may be, the jury must pass upon its credibility,<sup>11</sup> it is difficult to see upon what basis the court sustained the instruction in the principal case.

MORTON M. LEIBOWITZ

TORTS—MISREPRESENTATION BY TURNING BACK SPEEDOMETER ON USED CAR AS CONSTITUTING FRAUD.

*Jones v. West Side Buick Co.*<sup>1</sup>

In 1930, S purchased a new 1931 Buick Sedan from D. He drove the car until August, 1933, when he traded it in as part of the purchase price of a new car. D took the old car which had been driven approximately 48,800 miles, as shown by the speedometer, and sent it to the repair shop. When the car was completely reconditioned, D caused the speedometer to be turned back from its true figure to make it read "22,400 odd miles." P purchased the car in August, 1933, paying D \$825.00 for it. He saw the car before he bought it, noted the speedometer reading and, according to the finding of the jury, relied on the reading. When he learned the true distance the car had been driven P sued D for \$500 actual and \$10,000 punitive damages. A verdict was returned in favor of P for \$150 actual damages and \$2,000 punitive damages. On appeal, the judgment was affirmed.

Speaking generally, fraud assumes so many hues and guises, and appears in such a variety of forms that courts have consistently refused to predefine just what conduct will amount to fraud.<sup>2</sup> It may be said, however, that the occur-

of the credibility of the witnesses and the weight and value of their testimony is one for the jury. The mere fact that no one contradicted Nelson's testimony does not relieve it from the operation of the rule authorizing the jury to give judgment on its weight and credibility. It is unnecessary to discuss the matter for the authorities are *directly in point and conclusive.*" [Italics the writer's.] Davidson v. St. Louis Transit Co., 211 Mo. 320, 109 S. W. 583 (1908).

9. Gannon v. Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968 (1898).

10. Bradley v. Becker, 296 Mo. 548, 246

S. W. 561 (1922); Mundy v. St. Louis-San Francisco Ry, 45 S. W. (2d) 941 (Mo. App. 1932); Kneuvén v. Berliner's Estate, 54 S. W. (2d) 494 (Mo. App. 1932); Hickman v. St. Louis Dairy Co., 90 S. W. (2d) 177 (Mo. App. 1936); Shaw v. Fulkerson, 96 S. W. (2d) 495 (Mo. 1936).

11. Gannon v. Laclede Gas Light Co., 145 Mo. 502, 46 S. W. 968 (1898); Whittington v. Westport Hotel Operating Co., 326 Mo. 1117, 33 S. W. (2d) 963 (1930).

1. 93 S. W. (2d) 1083 (Mo. App. 1936).  
 2. Clyce v. Anderson, 49 Mo. 37 (1871); Stonemets v. Head, 248 Mo. 243, 154 S. W. 108 (1913).

rence of certain elements in a transaction will entitle a party to base an action of fraud and deceit. It is usually said that there must be a misrepresentation of a material fact<sup>3</sup> upon which the party seeking relief may reasonably rely<sup>4</sup> and upon which he did rely<sup>5</sup> to his detriment.<sup>6</sup>

Representations as to value are generally not considered statements of fact.<sup>7</sup> But representations as to the conditions upon which value is based are representations of fact. A speedometer reading is an important consideration in determining the value of a used car.<sup>8</sup> All the other elements of fraud were clearly present.

D in the principal case attempted to justify his action on the existence of a custom or usage among dealers in second-hand automobiles to set back the speedometer of the vehicle they seek to sell to a mileage commensurate with the extent to which the car has been repaired by the dealer before being put upon the second-hand market. But the court refused to recognize the validity of a custom which is designed only to deceive and to allow the sellers of used cars to obtain an unfair and undue advantage over their customers.<sup>9</sup> However, it must be conceded that the custom that dealers do, as here alleged, set back speedometers has some basis in fact in the popular mind; yet seemingly only three cases have dealt with the question.<sup>10</sup> It is well recognized in the law that some leeway is allowed the vendor in actually misrepresenting the quality of his wares.<sup>11</sup> Puffer and exaggeration is expected from sellers and this is popularly regarded as a privilege to lie. Representations pertaining to the mileage of a car made in the negotiations leading up to the sale of second-hand cars have been treated by laymen in much the same fashion that courts have treated similar misrepresentations involved in the sale of chattels in which the principle of *caveat emptor* has governed.<sup>12</sup>

It is believed that the decision in the principal case has opened in Missouri a fertile field for litigation. What limitations will be put upon the case remain to be seen, though it is hard to conceive that punitive damages will be awarded so liberally another time. It might be suggested that the court reached a good result, both from the standpoint of legal principle and general commercial desirability, but the case raises an irritating conjecture as to the extent the Missouri court will go in indulging the gullibility of the purchaser. The question remains, may there be reasonable reliance in cases of this kind?

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3. Moore v. Cains, 116 Mass. 396 (1874); Bowman v. Branson, 111 Mo. 343, 19 S. W. 634 (1892).

4. 14 Cyc. 115.

5. Warren v. Ritchie, 128 Mo. 311, 30 S. W. 1023 (1895); Kirkendall v. Hartsock, 58 Mo. App. 234 (1894).

6. Jolliffe v. Collins, 21 Mo. 338 (1855); Peers v. Davis, Adm'r, 29 Mo. 184 (1859); Parker v. Marquis, 64 Mo. 38 (1876).

7. Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315 (1873); Homer v. Perkins, 124 Mass. 431, 26 Am. Rep. 677 (1878); Pigott v. Graham, 48 Wash. 348, 93 Pac. 435 (1908).

8. Fosburg v. Couture, 217 Pac. 1001 (Wash. 1923).

9. Sherrill-Russell Lbr. Co. v. Krug Lbr. Co., 216 Mo. App. 1, 267 S. W. 14 (1924).

10. Nash Co. v. Childress, 156 Miss.

157, 125 So. 708 (1930); Lizana v. Edwards Motor Sales Co., 163 Miss. 266, 141 So. 295 (1932); cf. Fosburg v. Couture, 217 Pac. 1001 (Wash. 1923) (in which the reading of the speedometer seems only to have been incidentally relied upon). The cases are distinguished in (1936) 21 St. Louis L. Rev. 341.

11. Dugan v. Cureton, 1 Ark. 31, 31 Am. Dec. 727 (1837); Endsley v. Johns, 120 Ill. 469, 12 N. E. 247 (1887); Westerman v. Corder, 86 Kan. 239, 119 Pac. 868 (1912).

12. Forrest v. Benson, 150 Ark. 89, 233 S. W. 916 (1921); Singer Sewing Mach. Co. v. Wardlaw, 29 Ga. App. 626, 116 S. E. 207 (1923); Harrison v. Broadway Motor Co., 128 Miss. 766, 91 So. 453 (1922); Fargo Gas & Coke Co. v. Fargo Gas & Elec. Co., 4 N. D. 219 (1895); and see 1 WILLISTON, SALES (2d ed. 1924) 336; Waite, *Caveat Emptor and the Judicial Process* (1925) 25 HARV. L. REV. 129.

## TRIAL—MISTRIAL FOR PREJUDICIAL EVIDENCE—NECESSITY OF MOTION TO STRIKE.

*State v. Beatty*<sup>1</sup>

Defendant, appellant here, was charged by information with disturbing the peace of one Everett English by swearing, threatening, and challenging to fight. Prosecuting witness, English, testified that Beatty drove up to him as he was working in his field, threatened to beat him up, and cursed him. English also testified, "I saw he was drunk." The statement as to defendant's drunkenness was objected to as a conclusion of the witness, as immaterial and irrelevant, not tending to prove or disprove any issue in the case, and as prejudicial to the rights of the defendant. Defendant's counsel moved that a mistrial be declared and the jury discharged. The court overruled the objection and the defendant excepted.

*Held:* That the statement as to defendant's drunkenness was a voluntary statement of the witness and not in response to the question asked. Under such circumstances, if the defendant wished to object to the answer and save his point as to the ruling thereon, it was his duty to move to strike the evidence and ask that it be disregarded. Since there was no motion to strike, even though the evidence was improper as a conclusion of the witness and irrelevant because of bringing into the case evidence of the commission of a crime of which defendant was not accused, that of driving a car while intoxicated, the point was not saved. The necessity for a discharge of the jury was largely within the discretion of the trial judge and the trial court did not abuse its discretion in that respect.

The rule that the proper remedy for an answer not responsive to the question asked, is to move to strike, is well settled in Missouri.<sup>2</sup> Equally well settled is the concept that whether or not such circumstances require a discharge of the jury before the trial is completed is largely within the discretion of the trial court.<sup>3</sup> The question suggested by the principal case is: What is the proper procedure to pursue in order to insist that evidence given voluntarily by a witness is prejudicial to the jury? The principal case would seem to answer that question inferentially. If the appellate court upholds the ruling of the trial court that the testimony of the witness does not present sufficient grounds upon which to declare a mistrial, there is nothing left for the appellate court to review because no other remedy has been requested. In view of the fact that appellate courts are always loth to disturb the trial court's ruling on the necessity of a mistrial, it appears advisable to request a discharge of the jury, and, upon receiving an adverse ruling, to save exception to that ruling, and then go further and move to strike out the improper evidence, and except to this ruling also if the motion is denied. If the latter motion is sustained, the moving party should make it clear to the court that he has not thereby acquiesced in the refusal of his motion to discharge the jury.<sup>4</sup> Thus, if both motions are denied in the trial court, the appellate court may review them both; or, if the motion to discharge the jury is overruled and

1. 94 S. W. (2d) 907 (Mo. App. 1936).

2. *State v. Eisenhour*, 132 Mo. 140, 33 S. W. 785 (1896); *Waddell v. Metropolitan Street Ry.*, 113 Mo. App. 680, 88 S. W. 765 (1905); *State v. Sykes*, 191 Mo. 62, 89 S. W. 851 (1905); *State v. Bateman*, 198 Mo. 212, 94 S. W. 843 (1906); *State v. Farrar*, 285 S. W. 1000 (Mo. 1926); *State v. Austin*, 29 S. W. (2d) 686 (Mo. 1930); *State v. Gould*, 329 Mo. 828, 46 S. W. (2d) 886 (1932); *State v. Raffie*, 60 S. W. (2d) 668 (Mo. App. 1933).

3. *Kennedy v. Holladay*, 105 Mo. 24, 16 S. W. 688 (1891); *Hamburger v. Rinkel*, 164 Mo. 398, 64 S. W. 104 (1901); *State v. Topalovacki*, 213 S. W. 104 (Mo. 1919);

*State v. Sinovich*, 329 Mo. 909, 46 S. W. (2d) 877 (1931).

4. There are no cases in Missouri on the question of the sustaining of the second motion amounting to a waiver of the first. However, in this state, where incompetent evidence is admitted over proper objection and exception, a party may offer instruction on the issue thus forced upon him without waiving the right to challenge the competency of the evidence. *Newman v. Standard Accident Ins. Co.*, 192 Mo. App. 159, 177 S. W. 803 (1915); *Caruthersville Lumber Co. v. Taylor*, 281 S. W. 97 (Mo. App. 1926). These cases are indicative that there should be no waiver in the above situation.



the motion to strike sustained, the objector has obtained the best possible remedy in the trial court, and at the same time has preserved for appellate review his contention that a mistrial should have been declared. This method will protect a party against prejudicial evidence going to the jury without, at least, an admonition from the court to disregard it.

O. S. BREWER

#### TORTS—LIABILITY OF ELECTRIC POWER COMPANIES TO INFANT TRESPASSERS.

##### *Blavatt v. Union Electric Light and Power Co.*<sup>1</sup>

The defendant power company erected and maintained a self-functioning substation. On the lot behind the substation there were transformers and high voltage electric wires. This lot was adjacent to one which had been used for some years previously and still was used as a playground by children. The transformers and high voltage wires were surrounded by a brick wall seven to ten feet high. The only entrance to the enclosure was by means of an iron gate supported by three hinges, which was kept locked. On this gate were warning signs. The plaintiff's son, an eighth grade student who could read, and other children were in the habit of using the brick walls of the enclosure as a backstop for handball games. To retrieve balls which went over the wall into the enclosure, one of the children would climb to the top of the wall by means of the protruding hinges on the gate. The plaintiff's son, while retrieving a ball from within the enclosure, was severely injured by coming in contact with a wire, and died soon after. There was no evidence that the defendant had actual knowledge of children using the structure. The plaintiff contends that, under the theory set forth in sections 205 and 209 of the *Tentative Draft of the Restatement of Torts*,<sup>2</sup> the defendant owed to the children the duty of keeping a watchman or of fencing the structure. The trial court rendered judgment for the defendant and the plaintiff appealed. This judgment was affirmed on appeal on the ground that there was no duty owed to trespassers except to refrain from wilful and wanton injuries to them. Also, the court apparently bases its opinion upon the fact that the building of the wall and the posting of the warning sign constituted sufficient care to discharge the duty to the children in the absence of proof of knowledge on the part of the defendant of the presence of the children.

While the denial of recovery upon the facts of this case does not appear to be particularly harsh or out of line with former decisions upon similar facts rendered by this court, yet it is difficult and interesting to attempt to determine whether the court based its decision upon the lack of a duty to the deceased or upon the lack of a breach of such duty if it existed.

The court sets out the general rule as to the non-liability of a possessor of land to trespassers except for wilful and wanton injuries.<sup>3</sup> It points out that the "attractive nuisance" doctrine will not be extended, in Missouri, beyond the "turntable cases."<sup>4</sup> Next, the court, in answer to the plaintiff's contentions of there being a duty to use reasonable care based upon sections 205 and 209 of the *Restatement*,<sup>5</sup> says: "We neither adopt nor reject, because unnecessary, the statement

1. 335 Mo. 151, 71 S. W. (2d) 736 (1934).

2. These sections became sections 335 and 339 of *RESTATEMENT, TORTS* (1934). The rule stated in section 335 relates to the conditions under which a possessor of land is subject to liability to constant trespassers upon a limited area thereof for harm caused to them by a highly dangerous condition created or maintained by him upon the land. Section 339 states the special duty owed by a possessor of land

as to artificial conditions highly dangerous to trespassing children.

3. *Berry v. St. Louis, M. and S. E. R. R.*, 214 Mo. 593, 114 S. W. 27 (1908); *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557 (1909).

4. *Howard v. St. Joseph Transmission Co.*, 316 Mo. 317, 289 S. W. 597 (1926); *Marcheck v. Klute*, 133 Mo. App. 280, 113 S. W. 654 (1908).

5. *RESTATEMENT, TORTS* (1934) §§ 335, 339.

of principles quoted from the tentative draft of the Restatement of the Law of Torts. It is enough to say that they do not make out a case of negligence upon the record before us." Later, in its opinion, the court states: "It is obvious that there are not here facts to invoke the principles of attractive nuisance cases." In the last paragraph of the opinion the court says: "In our opinion the high brick wall was a sufficient barrier against trespassers, if not to exclude them, at least to fulfill defendant's duty toward them."

If the court intended the preceding quotations merely as further justifications for the result reached in the case, then the decision is merely a reiteration of preceding Missouri decisions holding that no duty arises to an infant trespasser in a case of this nature.<sup>6</sup> However, if the court by the quoted statement meant to imply that there was a duty owed to the child to use reasonable care but that there had been no breach of this duty, then this case might easily serve as a turning point in cases of this kind.<sup>7</sup>

It would not be inconsistent with the standard of care in general imposed upon electric power companies in the maintenance of their equipment by the Missouri decisions, upon policy at least, to require a reasonable degree of care to protect infant trespassers in such a manner. The court has referred to the degree of care imposed upon power companies in the maintenance of their equipment in the following terms: "the highest degree of care"<sup>8</sup>; "care commensurate with the duty and obligation it has voluntarily assumed"<sup>9</sup>; "the utmost care."<sup>10</sup> These quotations show the courts as having high regard for the subtle and dangerous nature of electrical current. The reluctance of the court in allowing the defense of contributory negligence as a matter of law further demonstrates the recognition by the court of the hidden and not easily ascertained dangers of electrical energy. The fact that a plaintiff was a trespasser upon the property of a third party injured by negligently maintained electrical equipment is not available as a defense.<sup>11</sup> These decisions seem to indicate that the courts of Missouri recognize the dangerous propensities of electrical energy and show a high regard for human life.

Where the defendant power company was allowed to maintain uninsulated, high voltage wires upon a pole, equipped with steps easily within reach of a child, near a place frequented by youthful swimmers, the court merely stated that the "attractive nuisance" doctrine would not be extended past the "turntable cases" and thus imposed no duty on the power company to use reasonable care in protecting children who climbed the pole.<sup>12</sup> On social policy, this holding, where injuries result from negligently maintained wires, is difficult to reconcile with the cases where an infant trespasser climbing in the tree on the land of a third party comes in contact with uninsulated high voltage wires strung through the branches of the tree.<sup>13</sup> In these latter cases heavy damages have been allowed. Surely there is little difference as to the foreseeability of the risk of injury between

6. *Howard v. St. Joseph Transmission Co.*, 316 Mo. 317, 289 S. W. 597 (1926); *Kansas City Power and Light Co. v. Trimble*, 315 Mo. 32, 285 S. W. 455 (1926).

7. This change may be based upon the "implied invitation" theory of the "attractive nuisance" doctrine. *United Zinc and Chemical Co. v. Britt*, 258 U. S. 268 (1921). Or upon a duty to use care to prevent foreseeable injuries to infant trespassers as adopted by the RESTATEMENT, TORTS § 339. For further discussion see (1932) 27 ILL. L. REV. 459; (1923) 36 HARV. L. REV. 350.

8. *Foster v. K. C., C. C. and S. J. Ry.*, 325 Mo. 18, 26 S. W. (2d) 770 (1930); *Smith v. Southwest Mo. R. R.*, 333 Mo. 314, 62 S. W. (2d) 761 (1933).

9. *Kuhlman v. Water, Light, and Transit Co.*, 307 Mo. 607, 271 S. W. 788 (1925).

10. *Thornton v. Union Elec. Light and Power Co.*, 72 S. W. (2d) 161 (Mo. App. 1934).

11. *Hill v. Union Elec. Light and Power Co.*, 260 Mo. 43, 169 S. W. 345 (1914); *Geismann v. Missouri-Edison Elec. Co.*, 173 Mo. 654, 73 S. W. 654 (1903).

12. *Howard v. St. Joseph Transmission Co.*, 316 Mo. 317, 289 S. W. 597 (1926).

13. *Godfrey v. Kansas City Light and Power Co.*, 299 Mo. 472, 253 S. W. 233 (1923); *Shannon v. Kansas City Light and Power Co.*, 315 Mo. 1136, 287 S. W. 1031 (1926).

a child's tendency to climb trees and that to climb poles equipped with convenient steps. Giving so much greater weight, as the former case does, to property rights than to foreseeable risks of life and limb seems inconsistent with the otherwise liberal policy of the court in respect to injuries from this source.

Thus, in view of the dangers involved, it appears that the court might, with consistency of policy toward protection of human life and limb, if faced squarely by a case where a power company did not use sufficient safeguards to protect infant trespassers, recognize a duty to use such care. While, as before stated, it is difficult to determine the weight given by the court to the statements in the principal case referring to the view taken by the *Restatement of the Law of Torts*, in which such a duty is recognized, yet it seems that it might well be taken as a turning point in the law. At least, the approach to the solution of these cases from the traditional position of the possessor of land seems outmoded and unsatisfactory, particularly where such highly dangerous artificial conditions exist on the premises.

H. L. LISLE

WILLS—CHARITABLE TRUSTS—BEQUEST DIRECTLY TO CHARITY.

*Burrier v. Jones*<sup>1</sup>

This was an action to construe a will which provided for the payment of the testator's debts and funeral expenses, and devised "the remaining part of my estate both real and personal to the Macon County, Mo, (sic) school funds." Plaintiffs, collateral heirs of the testator, contended that this devise was void and could not be construed as creating a charitable trust because of the testator's failure to designate a donee, legatee or beneficiary of said property capable of taking such property under the laws of Missouri, and that the devise was void for uncertainty and impossible of execution; that therefore the testator died intestate as to all property remaining after the payment of his debts and funeral expenses. Judgment below was for defendants. After an unsuccessful motion for a new trial, plaintiffs appealed. Judgment was affirmed, and it was held that the devise created a valid charitable trust, legal title to the property vesting in the statutory custodian of school funds, here the judges of the County Court of Macon County,<sup>2</sup> for the benefit of persons entitled to receive the benefits from school funds.

This case presents facts substantially the same as those in *Robinson v. Crutcher*,<sup>3</sup> wherein it was held by a divided court that no valid charitable trust was created. In the principal case, the Supreme Court gives careful consideration to the *Robinson* case and expressly overrules it, adopting the dissenting opinion of Judge Williams<sup>4</sup> as correctly stating the law applicable to the instant case. In a note in the Missouri Law Series<sup>5</sup> in 1921, the *Robinson* case was strongly criticized on the ground

1. 92 S. W. (2d) 885 (Mo. 1936).

2. MO. REV. STAT. (1929) §§ 12127, 12128, 12129.

3. 277 Mo. 1, 209 S. W. 104 (1919). The will in that case provided:

"4th: The residue of my property of whatsoever kind and wheresoever situate I will and direct shall be divided into three equal parts.

"5th: One of such third parts I give and bequeath to the capital of the township school fund of T. 54, R. 10 in Monroe County, Missouri.

"6th: One of such third parts I give and bequeath to the capital of the public school fund of Monroe County.

"7th: One of such third parts I give and bequeath to the capital of the public school fund of the state of Missouri and I

direct my executor to pay over to the lawful custodians of the several public school funds mentioned in this and the two preceding clauses of this will the several shares given to said school funds as aforesaid."

4. "By the terms of the will the legal estate in the property devised or bequeathed . . . becomes immediately vested in the statutory custodian of the respective school funds, and the equitable title or beneficial enjoyment thereof is vested in the persons who by statutory law become now, or are hereafter entitled, to receive the benefits from the respective school funds." *Id.* at 13, 209 S. W. at 107.

5. (1921) 21 U. OF MO. BULL. L. SER. 31.

that the intention of the testator to vest legal title in the lawful custodians of the existing school funds was sufficiently clear and that the court was unduly technical in holding that the testator's intent was to bequeath to the funds themselves, that equity historically favored charitable trusts and relaxed the strict rules requiring separation of legal and equitable interests as applied to private trusts.<sup>6</sup> It was also suggested that the court might well have found an intent on the part of the testator to create a charitable trust, in which case equity would not allow the trust to fail for want of a trustee.

As the law of charitable trusts developed in England, if there was a trust created by will or otherwise but no trustee was designated (or a trustee was designated who could not take, or who died before the testator), the Chancellor exercised what is termed judicial *cy pres* power and appointed a trustee to administer the trust.<sup>7</sup> The charitable trust intent and the indication of a class of beneficiaries were the essential factors. But where there was no trust expressly mentioned, as in the case of a gift "to charity" generally, or "to the poor," there further being no trustee named, the prerogative *cy pres* power of the crown was necessary to preserve the charity.<sup>8</sup> The court of equity had no power to dispose of the property and could only hold it at the disposal of the crown under sign manual, such a gift being considered too vague and indefinite for the court to execute it. The English courts have adhered to these general rules, leaving to the crown the function of decreeing some charitable use for the property *cy pres* the original purpose of the donor.

Most American courts<sup>9</sup> have exercised the judicial *cy pres* power as part of the regular chancery power, but a question arises as to the existence of the prerogative power in our courts. There is much dicta and some authority to the effect that the prerogative power does not exist in the equity courts of the United States,<sup>10</sup> and some writers have laid it down flatly that if any such power exists it rests with the legislatures.<sup>11</sup> However, Bogert points out that, "When one ignores the mere dicta about the nonexistence of the prerogative power in the American courts, and considers the specific treatment of the types of cases which have given rise to the use of the *cy pres* power in England, one is not so certain that American judges do not exercise powers which are like those of the crown in England."<sup>12</sup>

6. The majority opinion in the *Robinson* case stated: "In the creation of a charitable trust it is essential that there be a separation of the legal estate from the beneficial enjoyment of same. . . . This separation must be indicated by the words of the donor, otherwise the equitable and legal estate will meet in the same person and the trust be extinguished by a merger of the equitable in the legal estate." *Robinson v. Crutcher*, 277 Mo. 1, 8, 209 S. W. 104, 105 (1919).

7. 2 PERRY, LAW OF TRUSTS AND TRUSTEES (7th ed. 1929) § 722 and cases cited; 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 328 and cases cited.

8. 2 PERRY, LAW OF TRUSTS AND TRUSTEES (7th ed. 1929) § 718; 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 434.

9. "In Alabama, Delaware, District of Columbia, Kentucky, North Carolina, South Carolina, and Tennessee, there are decisions or dicta which repudiate the *cy pres* doctrine, both judicial and prerogative. . . . The reasons for the refusal to recognize the *cy pres* power in these states seem to be, first, that the courts have looked upon *cy pres* as a rule of arbitrary disposition, giving the chancellor power to remake

deeds and wills and to allocate capital or income according to his own social or religious views; and, secondly, that *cy pres* in the minds of many judges has come to be associated with royalty and monarchical privileges and hence has become distasteful to officials in a democratic country." 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 433 and cases cited. *Cf.* *Holmes, J.*, in *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839 (1888).

10. Such decisions are to be found in those states in which *cy pres* is not recognized, either in its judicial or prerogative form. Several states, including New York, Pennsylvania, California, Minnesota, Rhode Island, Texas and Wisconsin have prescribed a statutory form of *cy pres*. See 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 433 and citations.

11. "No such power exists in any American magistrates, judicial or ministerial, and none can exist until it is conferred by the legislature." 2 PERRY, LAW OF TRUSTS AND TRUSTEES (7th ed. 1929) § 718, at p. 1223.

12. 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 434, at p. 1301.

Numerous cases decided in the last twenty years<sup>13</sup> indicate at least a tendency to extend the *cy pres* power of American equity courts, although they do not speak either of prerogative or judicial *cy pres* power in most instances. The usual method is to imply an intention on the part of the donor to create a charitable trust, which device is a sufficient basis for the court's appointment of a trustee or even the framing of a scheme for the administration of the trust.

It remains to inquire in which class the principal case properly belongs; whether it is a gift so vague and indefinite as to require the prerogative power formerly exercised by the English crown for its execution, or whether it falls within the judicial *cy pres* power of the court of equity.<sup>14</sup> It is not clear from the opinion just what power is being exercised, the court merely finding an intention on the part of the testator to "vest legal title in the statutory custodian of school funds." It is believed that a bequest to the school funds of a particular county is not so vague and indefinite, either with respect to purpose or intended beneficiaries, as to require any prerogative power to administer the gift, and that therefore this and other cases of gifts to specific existing funds, title to which is vested in trustees or custodians whose duties with respect thereto are clearly defined, are to be distinguished from gifts "to charity" generally, or "to the poor." On the other hand, here is an apt opportunity for implying a trust and appointing a trustee to administer it. Cases of gifts to nonexistent funds<sup>15</sup> or to the poor of a town<sup>16</sup> or county (held valid in American courts) would seem to call for the implication of a trust; but a gift to an existing fund, title to which is held by a trustee or custodian, presents not quite so extreme a situation.

The decision of the principal case is in line with what seems to be the tendency in the United States today in cases of gifts directly to charity or to a charitable fund, despite earlier dicta to the effect that American courts have no power corresponding to the prerogative *cy pres*. The extent of the authority of this case must, of course, remain a matter of conjecture. However, it is well to have the much criticized<sup>17</sup> *Robinson* case out of the way and the Missouri law brought into line with what is believed to be the better view as to the construction of such charitable gifts.

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13. *Heuser v. Harris*, 42 Ill. 425 (1867); *Klumpert v. Vrieland*, 142 Iowa 434, 121 N. W. 34 (1909); *Attorney General v. Goodell*, 180 Mass. 538, 62 N. E. 962 (1902); *French v. Lawrence*, 76 N. H. 234, 81 Atl. 705 (1911); *White v. City of Newark*, 89 N. J. Eq. 5, 103 Atl. 1042 (1918); *Elliott v. Quinn*, 109 Neb. 5, 189 N. W. 173 (1922).

14. The principal case is cited by Bogert as an occasion for the exercise of the pre-

rogative power. 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 434.

15. *Elliott v. Quinn*, 109 Neb. 5, 189 N. W. 173 (1922).

16. *Attorney General v. Goodell*, 180 Mass. 538, 62 N. E. 962 (1902).

17. See Scott, *The Progress of the Law* (1920) 33 HARV. L. REV. 688, 695; 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 434, n. 69.