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Recent Cases

CONSTITUTIONAL LAW—TWENTY-FIRST AMENDMENT AND INTERSTATE COMMERCE.

*State Board of Equalization of California v. Young's Market Co.*¹

The suit challenges the validity of the California statute imposing a license fee of five hundred dollars for the privilege of importing beer into the state. Plaintiffs were wholesale dealers in beer brought in from other states and contended that the statute was an interference with interstate commerce; and was a violation of equal protection in that the wholesalers of beer manufactured within the state were not required to pay such a fee. The Court said that there was no discrimination against the wholesalers of imported beer, for they could, as any wholesaler, sell beer but that the plaintiffs were protesting payment for the privilege of importing beer, not selling. The Court pointed out that prior to the Twenty-First Amendment² the states could not lay a burden on interstate commerce in this fashion, but that this Amendment prohibited the importation of intoxicating liquors in violation of state law, and therefore as to intoxicating liquors such a tax was not an unconstitutional burden. The Court rejected the contention that the Amendment permitted the state to exclude intoxicating liquor only if the manufacture of intoxicants within the state was forbidden. The Court further said that a complete exclusion was not necessary, but that a regulation was permissible; and that it was so whether or not the state established a monopoly of the liquor trade. To the contention that the statute violated equal protection the court answered that a distinction which the constitution itself set up could not be considered unreasonable.

This situation arose in this case in the United States district court in California,³ where it was held that the Twenty-First Amendment did not make of liquor an exception to either the commerce clause or any other restriction on the state police power imposed by the Constitution. In another case that arose in the United States district court in Minnesota,⁴ that court held in effect that this Amendment did make of intoxicating liquor an exception to the commerce clause, but said at the same time that intoxicants did not constitute an exception to the rest of the restrictions on the state police power imposed by the Constitution. In fact the court here held that requiring liquors imported to be registered with the federal government while not requiring the same of liquor manufactured in the state was a

1. *State Board of Equalization of Cal. v. Young's Market Co.*, 57 Sup. Ct. 77 (1936).

2. The relevant section of the Twenty-First Amendment, § 2, follows: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

3. *Young's Market Co. v. State Board of Equalization of Cal.*, 12 F. Supp. 140 (S. D. Cal. 1935).

4. *Triner Corp. v. Arundel*, 11 F. Supp. 145 (D. Minn. 1935).

violation of equal protection, there being no reasonable basis for the distinction made.⁵ The Supreme Court of the United States in the principal case overruled the district court in California, and held in effect what was held by the district court in Minnesota: that is, that an exception to the commerce clause was made by the Twenty-First Amendment with respect to intoxicating liquors; but it refused to consider whether a general exception to the restrictions on the police powers existed by the Amendment, merely saying, "The question for decision requires no such generalization."

As pointed out by the Court, in the absence of the Twenty-First Amendment this statute would have been an unconstitutional burden upon interstate commerce. In fact, the doctrine set down in two cases⁶ which arose before 1890 gave an interpretation to the commerce clause⁷ which deprived the state of any control over transportation of intoxicants into the state, and over traffic therein, so long as they remained in the original package.⁸

In view of the fact that control of sales by the states was thus almost impossible so long as liquor could be shipped in, Congress, by several acts, attempted to give to the state some power of restraint.

By the Wilson Act of 1890⁹ intoxicants made in other states were subjected to state law upon arrival in the state to the same extent as liquor manufactured in the state, and were no longer exempt because of being in the original packages. The statute was upheld in the case of *Re Rahrer*¹⁰ as one removing an impediment upon state control of liquor within the state. By judicial construction the statute was held not to give the state the right to prohibit importation by consumers for their own use.¹¹ In certain C. O. D. orders the contract was held to have been made in the state of the manufacturer and the state was forbidden to interfere with such contracts in other states.¹² It was also held that the state was powerless as to

5. The following cases, in which the courts differed as to the effect of the Twenty-First Amendment are illustrated by the two district court cases discussed: *Premier-Pabst Sales Corp. v. Grosscup*, 12 F. Supp. 970 (E. D. Pa. 1935); *Pacific Fruit and Produce Co. v. Martin*, 16 F. Supp. 34 (W. D. Wash. 1936).

6. *Bowman v. Chicago & Northwestern Ry.*, 125 U. S. 465 (1888); *Leisy v. Hardin*, 135 U. S. 100 (1890).

7. U. S. CONST. ART. I, § 8, cl. 3: "Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

8. The "Original Package Doctrine" was set down in the case of *Brown v. Maryland*, 12 Wheat. 419 (1827), which was a case involving a state statute imposing a tax upon the right to sell commodities imported from foreign ports. The Court found this an interference with foreign commerce and said that so long as commodities were in the original package of manufacture and remained in possession of the importer himself they were not subject to regulation by the state police power. The doctrine by subsequent decisions was applied to interstate shipments not involving foreign commerce.

9. 26 STAT. 313 (1890).

10. *In re Rahrer*, 140 U. S. 545 (1891).

11. *Vance v. Vandercook*, 170 U. S. 438 (1898).

12. *American Express Co. v. Iowa*, 196 U. S. 133 (1905).

the liquor in the carrier's warehouse, because it was not considered to have arrived.¹³

In 1913 Congress passed the Webb Kenyon Act¹⁴ which provided that the shipment or transportation of liquor by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original packages or otherwise, in violation of the state law, was prohibited. In *Adams Express Co. v. Kentucky*,¹⁵ the Court appeared to assume by way of dicta that the statute was constitutional, but held that it was inapplicable to the facts of that case. In the Wilson Act, after arrival, intoxicants were subject to state law; by the Webb Kenyon Act Congress prohibited all interstate commerce in intoxicants where they were to be used in violation of state law. However, as to personal use this state did not change the situation under the Wilson Act so long as personal use was not a violation of state law. In the *Adams Express Co.* case,¹⁶ the Court said that since personal use was not a violation of state law, the state could not prevent the importation of it for that purpose. In a subsequent case,¹⁷ the Supreme Court held that where the state forbade the procurement of liquors for personal use, then the Webb Kenyon statute would permit the prohibition on the importation for that purpose. It has also been held that the protection afforded interstate shipments until shipment had terminated was withdrawn by the Webb Kenyon Act.¹⁸ Where the disposal by the consignee is one that is unlawful in the state, the very shipment is prohibited, and therefore even C. O. D. orders could be prohibited, for Congress is not limited by the case of *American Express Co. v. Iowa*,¹⁹ where the state was forbidden to interfere with contracts made in another state.

In 1917 the "Reed" Amendment to the Post Office Appropriation Act of 1917²⁰ was passed, forbidding the use of mails to advertisers of intoxicants and forbidding absolutely the transportation of intoxicants in interstate commerce except for certain non-beverage purposes, with the additional provision that no shipments should be made contrary to state law. The latter part of the statute was upheld in *United States v. Hill*.²¹ By this act Congress itself exerted authority over interstate commerce, no longer making the shipments depend upon state law as in the two prior acts.

By the Eighteenth Amendment liquor was completely outlawed. The adoption of the Twenty-First Amendment, which also repealed the Eighteenth Amendment, makes the interpretation given the first two acts of Congress of new importance. Actually the language of this amendment is much like the language of the Webb

13. *Heyman v. Southern Ry.*, 203 U. S. 270 (1906).

14. 37 STAT. 699 (1913).

15. 238 U. S. 190 (1915).

16. *Ibid.*

17. *Clark Distilling Co. v. Western Md. Ry.*, 242 U. S. 311 (1917).

18. *State of Maine v. Intoxicating Liquors (McAdoo, Claimant)*, 119 Me. 1, 109 Atl. 257 (1920).

19. *American Express Co. v. Iowa*, 196 U. S. 133 (1905).

20. 39 STAT. 1058, 1069 (1917).

21. *United States v. Hill*, 248 U. S. 420 (1919).

Kenyon Act. It simply prohibits the transportation of intoxicants into a state for use or delivery there in violation of the law of that state. In addition, Congress has since passed an act with the exact wording of the Webb Kenyon Act.²² The United States district court in Missouri held under this act and the Twenty-First Amendment that a state statute prohibiting a foreign dealer from selling liquor except to wholesalers within the state was not an unconstitutional burden on interstate commerce.²³

A possible remaining question is the extent of the exception made in respect of intoxicating liquor to the restrictions upon the state police power. Counsel in *Young's Market Co. v. State Board of Equalization of California*²⁴ and in *Triner Corp. v. Arundel*,²⁵ raised the objection that if an exception were made to the commerce clause with respect to intoxicating liquor, a general exception to the constitutional restrictions on the police power of the states must follow. The United States district court in Minnesota refused to recognize any exception beyond the commerce clause, but the Supreme Court did not expressly reject such a general exception. It left the matter unanswered, with a hint that no such exception was meant. The Supreme Court has not committed itself, and it is conceivable, but hardly probable, that if the question comes up the Court might sustain the argument for a general exception.

PAUL F. NIEDNER

CORPORATIONS—PRACTICE OF OPTOMETRY BY.

*State v. Gate City Optical Co.*¹

By agreement between a department store corporation and an optical corporation, the latter was to operate optical departments in the former's two stores through graduate optometrists who were subject to the department store's employee regulations and paid by salary plus commission. The optical company furnished all equipment; the department store corporation advertised in its own name, though the advertisements set forth the names of the licensed optometrists. In *quo warranto* against both corporations, it was held that the defendants were not engaged in the "practice of optometry" in violation of Missouri statutes relating to such practice.

At the outset there is a problem of interpreting the Missouri statute involved.² This statute exempts from the laws governing the practise of optometry: (1) persons and corporations who sell eye-glasses in a store on prescription from a licensed optometrist; and (2) persons and corporations who manufacture or deal in eye-

22. 49 STAT. 877 (1935), 27 U. S. C. A. § 122.

23. *General Sales and Liquor Co. v. Becker*, 14 F. Supp. 348 (E. D. Mo. 1936).

24. *Young's Market Co. v. State Board of Equalization of Cal.*, 12 F. Supp. 140 (S. D. Cal. 1935).

25. *Triner Corp. v. Arundel*, 11 F. Supp. 145 (D. Minn. 1935).

1. 97 S. W. (2d) 89 (Mo. 1936).

2. MO. REV. STAT. (1929) § 13502.

glasses in a store, unless they practise optometry. A possible interpretation of the first class of exemptions is this: all persons and corporations are exempt who, though they admittedly (let it be assumed) engaged in the practice of optometry by employing an optometrist, sell eye-glasses in their store on that employee's prescription. A second and equally reasonable interpretation is the following: persons and corporations are exempt who merely sell glasses on an *independent optometrist's* prescription and are not otherwise engaged in optometry. Although the statute is poorly drawn, unless the second interpretation is adopted we are faced with the question: why should the legislature exempt group (1) in the statute even though that group engages in the practice of optometry, and not similarly exempt group (2)? The West Virginia Supreme Court of Appeals³ in construing an identical statute adopted the second construction above, saying that to construe the statute otherwise would be to attribute to the legislature an "absurd, unreasonable and inconsistent intention."⁴ Nevertheless, the Missouri court in the instant case adopts the opposite construction, apparently feeling that the purpose of the statute was to protect the public from unqualified practitioners rather than to protect optometrists from the encroachment of corporations into their practice. It seems sensible to construe the statute in the public interest rather than in the interest of a special minority (although the interests need not always be in conflict). The construction of the Missouri court can, therefore, be justified.

Apart from statutes regulating optometry, can a corporation be chartered to engage in optometry? In some states the corporation statutes say that a corporation may be formed to engage in any lawful "business" purpose.⁵ If optometry be considered a learned *profession*, it would appear fitting to refuse the charter on the ground that there is no authority in the statutes for granting a charter to an enterprise that is not a *business*.⁶ By the minority view, optometry is a business.⁷ By the majority view, (aided often by the implication of statutes relating to optometry) it is a learned profession.⁸ In other states corporations may be formed for any "lawful purpose" or (in Missouri) for any "purpose intended for pecuniary profit, or gain."⁹ This might be construed to include professional as well as business purposes. Nevertheless, the general rule, based upon public policy is that a corpora-

3. *Eisensmith v. Buhl Optical Co.*, 115 W. Va. 776, 178 S. E. 695 (1934).

4. *Id.* at 777, 178 S. E. at 696.

5. NEW YORK STOCK CORPORATION LAW (1909) §5.

6. A corporation derives all its lawful powers by grant of the sovereign legislature. *Orpheum Theatre and Realty Co. v. Seavey and Flarsheim Brokerage Co.*, 197 Mo. App. 661, 199 S. W. 257 (1917). A corporation can lawfully exercise only those powers expressly or impliedly granted to it. *St. Louis v. Russell*, 9 Mo. 507 (1845); *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496 (1907); *State v. Missouri Athletic Club*, 261 Mo. 576, 170 S. W. 904 (1914).

7. *Dvorine v. Castleberg Jewelry Corp.*, 185 Atl. 562, (Md. 1936); *Saunders v. Swann*, 155 Tenn. 310, 292 S. W. 458 (1927).

8. *State v. Kindy Optical Co.*, 216 Iowa 1157, 248 N. W. 332 (1933); *Stern v. Flynn*, 154 N. Y. Misc. 609, 278 N. Y. Supp. 598 (Sup. Ct. 1935); *Eisensmith v. Buhl Optical Co.*, 115 W. Va. 776, 178 S. E. 695 (1934).

9. Mo. REV. STAT. (1929) §4940.

tion may not engage in the practice of a learned profession.¹⁰ The professions of law,¹¹ medicine¹² and dentistry¹³ are embraced in this category, and it has been extended to include optometry as well.¹⁴

Assuming that a corporation is prohibited from engaging in a certain activity, when does it so engage? By the general rule, it so engages when it hires employees to carry on such activity for it.¹⁵ This rule has been applied to the practice of optometry.¹⁶ In Missouri, it was held in *State v. Lewin*¹⁷ that while a corporation may not actually practise medicine through its servants, it may (with proper charter provisions) contract with a licensed physician to treat persons applying to the corporation for medical attention.¹⁸ A few other jurisdictions are in accord with the Missouri view.¹⁹ However, most courts would probably hold to the contrary.²⁰

There is undoubtedly a technical distinction between an employee and an independent contractor²¹ upon which the result reached by the Missouri court in the *Lewin* case can be based, if the question is merely to determine in the abstract what is "engaging" in a profession. But, looking to the realities, the difference is very slight, since the corporation solicits the business and handles the income in both instances. Rather, the question seems to be whether the public policy factors which forbid a corporation engaging in an activity through its employee are or are not satisfied by the corporation acting through the device of an independent contractor. True, the master has throughout more control over his servant than he has

10. *People v. John H. Woodbury Dermatological Institute*, 192 N. Y. 454, 85 N. E. 697 (1908); *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910).

11. *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910).

12. *People v. John H. Woodbury Dermatological Institute*, 192 N. Y. 454, 85 N. E. 69 (1908).

13. *Painless Parker v. Board of Dental Examiners of California*, 216 Cal. 285, 14 P. (2d) 67 (1932); *People v. Painless Parker Dentist*, 85 Colo. 304, 275 Pac. 928 (1929).

14. *Stern v. Flynn*, 154 N. Y. Misc. 609, 278 N. Y. Supp. 598 (Sup. Ct. 1935).

15. *People v. Merchant's Protective Corp.*, 189 Col. 531, 209 Pac. 363 (1922); *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910); *Matter of Bensen*, 68 N. Y. Misc. 70, 124 N. Y. Supp. 726 (1910); *State ex rel Lundin v. Merchants' Protective Corp.*, 105 Wash. 12, 177 Pac. 694 (1919).

16. *Stern v. Flynn*, 154 N. Y. Misc. 609, 278 N. Y. Supp. 598 (Sup. Ct. 1935).

17. 128 Mo. App. 149, 106 S. W. 581 (1907).

18. The fact that the manager of the corporation was employed to furnish the medical treatments to patients contracting for them was held not to affect the corporation's legal status.

19. *State Electro-Medical Institute v. State*, 74 Neb. 40, 103 N. W. 1078 (1905); *State Electro-Medical Institute v. Platner*, 74 Neb. 23, 103 N. W. 1079 (1905). *State v. Brown*, 37 Wash. 97, 79 Pac. 635 (1905), held unconstitutional a statute requiring that all persons who "own, run or manage" a dentist office be licensed on the ground that such ownership was no threat to the public health and welfare providing the dental operations were performed by licensed practitioners.

20. *State v. Bailey Dental Co.*, 211 Iowa 781, 234 N. W. 260 (1931); *In re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910); *People v. John H. Woodbury Dermatological Institute*, 192 N. Y. 454, 85 N. E. 697 (1908).

21. *Fidelity and Casualty Co. of New York v. Industrial Accident Comm. of California*, 191 Cal. 404, 216 Pac. 578 (1923).

over an independent contractor;²² but a large measure of control is often reserved in the contract itself. Moreover, so large a part of an "independent" practitioner's work may come from the corporation that he is, as a matter of fact, as much under its control as an employee; the fear of losing the profitable contract may be as effective as the fear of losing a job. The evils of commercialization would seem equally present in both instances; though the importance of this consideration varies with the type of "profession" involved; for example, commercialization may be a social evil in the practice of law and not be so in the practice of optometry.

It is notable that the cases involving the practice of optometry by a corporation are all of recent origin; and the growing tendency on the part of the legislatures and the courts is to countenance such practice.²³

VICTOR C. WOERHEIDE

CRIMINAL LAW—CONTROL OF THE COURT OVER SENTENCE AFTER TERM.

*In re Edelson*¹

The defendant was convicted and sentenced to imprisonment for one year and one day, at the March term, 1936. On July 14, 1936, a petition was presented in behalf of the defendant "for hearing for the purpose of review and reduction of the sentence." The defendant contended that notwithstanding the fact that the term at which he was sentenced had gone by, the court had power to grant probation. It was held that since the term at which the defendant was sentenced had expired, the court was without jurisdiction to reduce the sentence; but that under the Probation Act,^{1a} the court had power to grant probation even after expiration of the term at which the defendant was sentenced, provided the defendant has not begun serving the sentence.

An early principle of the common law recognized that a court may amend its judgment during the term at which the judgment was rendered and that the power of a trial court to amend a sentence pronounced by it ceases at the end of the term at which the sentence was imposed.² The modern law is, generally speaking, in accord as to changes or amendments of sentences after the term of court has ended,

22. *Metzger v. Western Maryland Ry. Co.*, 30 F. (2d) 50, 51 (C. C. A. 4th, 1929).

23. *Dvorine v. Castleberg Jewelry Co.*, 185 Atl. 562 (Md. 1936); *Jaecle v. L. Bamberger & Co.*, 119 N. J. Eq. 126, 181 Atl. 181 (1935), *aff'd*, 184 Atl. 520 (N. J. 1936); *Dickson v. Flynn*, 286 N. Y. Supp. 225, (App. Div., 3rd Dep't. 1936). NEW YORK EDUCATION LAW (1910) §1432-a, as added by Laws 1928, c.379, §1.

1. 15 F. Supp. 1086 (M. D. Pa., 1936).

1a. 43 STAT. 1259 (1925), 18 U. S. C. A. §724 *et seq.*

2. "... yet during the term wherein any judicial act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when the terme is past, then the record is in the roll, and admitteth no alteration, averment, or prooffe to the contrarie." CO. LITT. (Hargrave and Butler ed.) 260a.

particularly those substantially changing the sentence or increasing punishment.³ In jurisdictions where the term system does not prevail, the sentence cannot be altered or modified after the sentence becomes final.⁴

Some variations in the general rule might well be considered in this connection. While partial execution of a valid sentence is an obstacle to a court's power to alter a sentence either during or after the term,⁵ yet it has been held by some courts that the imposition of a void sentence which has been partially served is not an obstacle to the court in imposing a new and legal sentence at a later term, since the cause is regarded as pending until disposed of by imposition of a lawful sentence.⁶ Still another group of cases indicates that where the sentence is merely erroneous and not absolutely void, it is beyond the power of the court to impose a valid sentence at a subsequent term.⁷ While there is apparently only one reported case⁸ directly in point, it appears that the Missouri court makes no distinction between a void and a partially invalid or erroneous sentence. This case held that the imposition of a sentence of imprisonment when by the statute a fine only could be imposed, thus making the sentence void, prevented the court from imposing a lawful sentence at a subsequent term.

The United States courts clearly hold that a court may not mitigate a sentence after term,⁹ yet North Carolina arrives at the opposite result on the ground that anything done for one convicted cannot be made the ground of an adverse action.¹⁰ Still another group of cases holds that changes in a sentence at a subsequent term which do not affect the punishment but only change the place of its infliction, may be made.¹¹ When a court has imposed a sentence and the case is appealed upon exceptions and is affirmed by the appellate court, the trial court may revise its

3. *U. S. v. Mayer*, 235 U. S. 55 (1914); *U. S. v. Benz*, 282 U. S. 304 (1931); *U. S. v. Malone*, 9 Fed. 897 (S. D. N. Y. 1881); *Ex parte Minto*, 187 Ala. 671, 65 So. 516 (1914); *Saleen v. People*, 41 Colo. 317, 92 Pac. 731 (1907); *In re Beck*, 63 Kan. 57, 64 Pac. 971 (1901); *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892 (1905); *Commonwealth v. Foster*, 122 Mass. 317 (1877); *Ex parte Cornwall*, 223 Mo. 259, 122 S. W. 666 (1909); *Commonwealth v. Mayloy*, 57 Pa. 291 (1868).

4. 16 C. J. 1314, 1316.

5. *Ex parte Lange*, 85 U. S. 163 (1873); *Minto v. State*, 9 Ala. App. 95, 64 So. 369 (1913); *State v. Meyer*, 86 Kan. 793, 122 Pac. 101 (1912); *Commonwealth v. Foster*, 122 Mass. 317 (1877).

6. *Bryant v. U. S.*, 214 Fed. 51 (C. C. A. 8th, 1914); *Hammers v. U. S.*, 279 Fed. 265 (C. C. A. 5th, 1922); *U. S. v. Harman*, 68 Fed. 472 (Kan. 1895); *Ex parte Booth*, 44 Cal. App. 660, 186 Pac. 841 (1919); *Jackson v. Commonwealth*, 187 Ky. 760, 220 S. W. 1045 (1920); *McCormick v. State*, 71 Neb. 505, 99 N. W. 237 (1904).

7. *Ex parte Lange*, 85 U. S. 163 (1873); *People v. Conley*, 27 Cal. App. 362, 150 Pac. 412 (1915); *State v. Addy*, 43 N. J. L. 113 (1880).

8. *Ex parte Cornwall*, 223 Mo. 259, 122 S. W. 666 (1909).

9. *U. S. v. Benz*, 282 U. S. 304 (1931); *U. S. v. Mayer*, 235 U. S. 55 (1914).

10. *State v. Whitt*, 117 N. C. 804, 28 S. E. 452 (1895).

11. *People v. Finucan*, 151 App. Div. 92, 135 N. Y. Supp. 936 (1912); *Kingen v. Kelley*, 3 Wyo. 566, 28 Pac. 36 (1891).

judgment even at a subsequent term, upon the theory that the cause remains with the court and the first judgment is not final.¹²

In a vast number of cases it has been held that courts of record have control over their own judgments and orders either during or after term to correct apparent or proved clerical errors and misprisions in them.¹³

By statute the United States courts having original jurisdiction of criminal cases have the power, after a plea of guilty or *nolo contendere* to an indictment for any crime or offense not punishable by death or life imprisonment, to suspend imposition or execution of the sentence and to place a defendant on probation.¹⁴ The statute has been interpreted to give the court power to grant probation even after the term at which the defendant was sentenced has passed, providing he has not started serving the sentence.¹⁵ The Missouri law is in accord to the extent that it has been held that a court acting by virtue of a statute¹⁶ may grant parole after a conviction for misdemeanor at a prior term.¹⁷

H. L. LISLE

EVIDENCE—TAXATION—PRESUMPTION OF POSSIBILITY OF ISSUE.

*Ninth Bank & Trust Co. v. United States*¹

The executors and trustees under a will sued the United States to secure a decree authorizing the deduction from the gross estate, for tax purposes, of the amount of a designated bequest to charity, which was to vest if life beneficiaries died without issue. Held, that evidence that the female life tenants had respectively reached the ages of 67, 63, and 57, were unmarried, and had each experienced the physical change which females experience, which betokens an inability to bear children, was admissible to rebut the presumption that a woman may bear a child at any time during her life, and that the bequest to the charity had, therefore, vested, so that the deduction was proper.

At the early common law, a possibility of issue was always supposed to exist, in law, unless extinguished by the death of the party.² By the great weight of American authority a person is conclusively presumed to be capable of having issue as long as he or she lives.³ Both the American and the English authorities

12. *Commonwealth v. Lobel*, 187 Mass. 288, 72 N. E. 977 (1905); *State v. Schierhoff*, 103 Mo. 47, 15 S. W. 151 (1890).

13. See note (1917) 10 A. L. R. 526, for collection of cases.

14. Probation Act, 43 STAT. 1259 (1925), 18 U. S. C. A. §724 *et seq.*

15. *Nix v. James*, 7 F. (2d) 590 (C. C. A. 9th, 1925); *Kreibel v. U. S.*, 10 F. (2d) 762 (C. C. A. 7th, 1926).

16. MO. REV. STAT. (1929) §§ 3809, 3811.

17. *State ex rel. Gentry v. Montgomery*, 317 Mo. 811, 297 S. W. 30 (1927).

1. 15 F. Supp. 951 (E. D. Pa. 1936).

2. CO. LITT. (Hargrave and Butler ed.) 28a; 2 BL. COMM.* 125.

3. *Hill v. Sangamon Loan & Trust Co.*, 295 Ill. 619, 129 N. E. 554 (1920); *May v. Bank of Hardinsburg & Trust Co.*, 150 Ky. 136, 150 S. W. 12 (1912); *List v. Rodney*, 83 Pa. 483 (1887); see annotation, (1930) 67 A. L. R. 538; SIMES, FUTURE INTERESTS (1936) §747. *Contra*: *Male v. Williams*, 48 N. J. Eq. 33, 21 Atl. 854 (1891); *Whitney v. Groo*, 40 App. D. C. 496 (1913).

agree that for the purpose of the application of the rule against perpetuities the presumption of possibility of issue is irrebuttable as long as the person lives.⁴

There seems, however, to be a tendency, both in America and in England, to break away from the old rule, at least in certain situations. In the cases in which the distribution of property depends upon the possibility of issue being extinct, the American authorities are divided,⁵ rebutting evidence being admitted in some cases and excluded in others. Sometimes distribution has been permitted and the distributees required to execute a bond to cover the contingency of possible birth of issue.⁶

The American courts have generally refused to admit evidence of incapacity in the cases involving termination of trusts and distribution of trust property.⁷ Likewise, by the weight of authority, the presumption is held to be irrebuttable where the marketability of a title is in issue,⁸ as, for example, where a vendor seeks specific performance of a contract for the sale of land and the vendee's defense is that the vendor's title is subject to being defeated by subsequent birth of issue.⁹

A somewhat different attitude has been taken by the English courts, which have refused to exclude rebutting evidence indiscriminately. They have considered the question of admissibility of such evidence in the light of the circumstances of each particular case, giving the rule a considerable degree of flexibility and refusing to give to it a conclusive effect in a large number of cases. The English courts have frequently admitted evidence of advanced age or sterility of women to prove their incapacity to give birth to children in cases involving the time of termination of a trust,¹⁰ or distribution of property to members of a class.¹¹ Sometimes such evidence has been admitted in suits for specific performance of land contracts.¹²

Apparently the United States courts have adopted the English attitude in cases which involve tax deductions for charitable bequests contingent upon subse-

4. *Jee v. Audley*, 1 Cox Ch. 324 (1787); *Loud v. St. Louis Union Trust Co.*, 298 Mo. 148, 249 S. W. 629 (1923); see GRAY, *RULE AGAINST PERPETUITIES* (3d ed. 1915) §§ 215, 215a. *Contra*: *Cooper v. Laroche*, L. R. 17 Ch. Div. 368 (1881), criticised in GRAY, *op. cit. supra*, §215a.

5. *Cf. Riley v. Riley*, 92 N. J. Eq. 465, 113 Atl. 777 (1921), with *Male v. Williams*, 48 N. J. Eq. 33, 21 Atl. 854 (1891).

6. *Frank v. Frank*, 153 Tenn. 215, 280 S. W. 1012 (1925).

7. *Fletcher v. Los Angeles Trust & Savings Bank*, 182 Cal. 177, 187 Pac. 425 (1920); *May v. Bank of Hardinsburg & Trust Co.*, 150 Ky. 136, 150 S. W. 12 (1912).

8. *List v. Rodney*, 83 Pa. 483 (1887); *Rozier v. Graham*, 146 Mo. 352, 48 S. W. 470 (1898). *Contra*: *Whitney v. Groo*, 40 App. D. C. 496 (1913); *Re Tinning and Weber*, 8 Ont. L. R. 703 (1904).

9. *E. g.*, see *Rozier v. Graham*, 146 Mo. 352, 48 S. W. 470 (1898).

10. *Re Summers's Trusts*, 30 L. T. R. (n. s.) 377 (V. C. M. 1874); *In re White*, [1901] 1 Ch. 570; *cf. Conduit v. Soane*, 24 L. T. R. (n. s.) 656 (V. C. W. 1871).

11. *Leng v. Hodges*, Jac. 585 (1822); *In re Belt's Settled Estates*, 37 L. T. R. (n. s.) 272 (Ch. Div. 1878); *In re Wide Streets Commissioners*, 7 Ir. Eq. R. 484 (1845).

12. *Browne v. Warnock*, L. R. 7 Ir. Eq. 3 (1880).

quent birth of issue. In the case of *Provident Trust Co. v. United States*,¹³ evidence of an operation which rendered the life tenant incapable of bearing children was admitted to show the vesting of the remainder in a charity. No deduction having been made from the gross estate for this charitable bequest, the trustee was permitted to recover the overpayment of taxes. In a later case where the income from an estate was left to testator's daughter for life and the principal to a charity in the event of her death without living issue, evidence that the daughter was 59 years old at the death of the testator was admitted to prove her incapacity to give birth to issue and to authorize a recovery of part of an estate tax previously paid without deduction having been made for the charitable bequest.¹⁴ In the case of *Farrington v. Commissioner of Internal Revenue*,¹⁵ which was decided prior to the decisions in the two preceding cases, evidence that the female life tenant was 52 years of age was held inadmissible to negative the possibility of future issue. While the last mentioned holding is in accord with the general American doctrine, it is submitted that the better view is that of the principal case. Although the female life tenant in the *Farrington* case was only 52 years old, and, therefore, the probability of subsequent issue was greater than where the female life tenant was 57 years old, this fact does not seem to afford a sufficient basis for distinguishing the cases.¹⁶

Various reasons have been advanced for excluding evidence of incapacity to give birth to children. Uncertainty of the result and detriment to public morals are the principal reasons that have been given for exclusion. It is said that the uncertainty involved would tend to unsettle titles, and that the admission of proof of surgical operations might lead to their use for mercenary purposes. Sometimes it has been said that such evidence should be excluded because of the indelicacy of an investigation of the type of evidence that is necessary. It is apparent that little weight should be given to this argument, for facts of equal indelicacy are proved in court daily. If the fact of incapacity is known to the medical profession, it is at least arguable that proof of it should be admitted in the same manner as proof of other facts.

It has been suggested as a general test of admissibility that, if devolution of a title depending upon *possibility* of issue is involved, evidence as to incapacity to bear children should be excluded, because it would be unfair to preclude the claims of an unborn person upon the basis of that evidence, but that evidence might well be admitted where the question involved is merely that of the *probability* of the woman ever having issue, rather than that of the *possibility* of her having issue.¹⁷ The conclusive presumption of capacity to have issue had its origin at a time

13. 2 F. Supp. 472 (Ct. Cl. 1933), *aff'd* United States v. Provident Trust Co., 291 U. S. 272 (1934).

14. City Bank Farmers' Trust Co. v. United States, 5 F. Supp. 871 (S. D. N. Y. 1934), *aff'd* 74 F. (2d) 692 (C. C. A. 2d, 1935).

15. 30 F. (2d) 915 (C. C. A. 1st, 1929).

16. See *infra* note 18.

17. 3 SIMES, FUTURE INTERESTS (1936) §747.

when relevant scientific knowledge was meager. Since that time has come the discovery of anaesthetics and, following that discovery, a great expansion of scientific knowledge of surgical operations. Birth registration has become common in the more advanced countries of the whole world. Birth statistics of the United States Department of Commerce covering the years 1923 to 1932, inclusive, show that of a total of 20,389, 873 births recorded, not one of this number was born to a woman 55 years of age or over.¹⁸ It is believed that the better view has been enunciated by Justice Sutherland, who said, “. . . the binding effect, in respect of particular situations, of the ancient rule precluding proof of facts to the end of avoiding supposed injurious results thought to be of greater consequence than the predominance of truth over error, still remains a proper subject of judicial inquiry to be made and resolved in the light of such further experience and knowledge.”¹⁹

WM. D. RUSSELL

EXECUTORS AND ADMINISTRATORS—PROOF OF EXTRA STATE CLAIMS IN ANCILLARY ADMINISTRATION—PRIVILEGES AND IMMUNITIES.

*First National Bank of Appleton, Wis. v. Braun's Estate*¹

Domiciliary administration of Braun's estate was pending in the state of Washington, and ancillary administration of the estate was pending in the state of Michigan. The estate as a whole was insolvent, although assets in Michigan were in excess of the claims allowed to Michigan creditors. The appellees, residents of Wisconsin and Washington, presented claims to the Michigan administration which, if allowed, would render the ancillary estate insolvent. *Held*: Resident creditors of an insolvent estate are entitled to receive only pro rata payment of their claims, the same as other creditors. To provide by statute or judicial decision that local creditors were to be paid in full when other creditors were not, would be violative of the United States Constitution, Art. IV, § 2, and the Fourteenth Amendment, § 1.²

The judicial decisions of the several states regarding the right of a non-resident creditor to present his claim in an ancillary administration are far from uniform.

18. United States Bureau of Census, Birth, Stillbirth, and Infant Mortality Statistics. The age at which a woman's capacity for bearing children ceases is variable, depending upon climate, race, and family peculiarities and other conditions. In temperate climates women rarely become pregnant after reaching the age of 45 years. There are, however, records of rare cases in which women have given birth to children after the menopause or at the age of 60 years or older. J. B. DELEE, *PRINCIPLES AND PRACTICES OF OBSTETRICS* (4th ed. 1924) 18; GOULD AND PYLE, *ANOMALIES AND CURIOSITIES IN MEDICINE* (1897) 38, 39.

19. *United States v. Provident Trust Co.*, 291 U. S. 272, 282 (1934).

1. 276 Mich. 598, 268 N. W. 890 (1936).

2. It was further held that the local creditors should be paid their pro rata to the full extent that other creditors would be paid out of the whole estate of the deceased before nonresident creditors would be permitted to participate in Michigan assets.

Some states have held that a foreign creditor might sue in the ancillary administration when both the domiciliary and the ancillary administrations were solvent.³ Others have denied the foreign creditor this privilege.⁴ Where the estate as a whole is insolvent, the great weight of authority has allowed a foreign creditor to sue in the ancillary administration,⁵ there being, some dicta notwithstanding, but one reported decision in the United States to the contrary.⁶

The contention of the appellants in the case at bar was that the Michigan creditors should be paid in full, and that the excess of the ancillary assets, if any, should be remitted to the domiciliary estate. Thus the court decided that a state has not the power to prefer its own citizens, by allowing them the payment in full of their claims, over the citizens of other states who would have to take a proportionately lesser percentage of payment of their debts than the resident creditors, because of the insolvency of the estate as a whole.

The Supreme Court of the United States, in the case of *Blake v. McClung*,⁷ held that a Tennessee statute which gave a priority to the residents of that state over simple contract creditors resident in other states and countries, in the distribution of assets of a foreign corporation which had become insolvent, violated Art. IV, § 2, of the Constitution of the United States. Mr. Justice Harlan, speaking for the majority of the court, said: "If a state should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors citizens of other states, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens of other states as such, and because they were such, privileges granted to citizens of the state enacting it. Can a different principle apply, as between individual citizens of the several states, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the power to contract with citizens residing in states other than the one in which it is located? . . . We hold such discrimination against citizens of other States to be repugnant to the second section of the Fourth Article of the Constitution of the United States. . . ."

*Blake v. McClung*⁸ presents a persuasive analogy to the case at bar; however, the laws for the settlement of insolvent estates of deceased persons, are not regarded

3. *McKee v. Dodd*, 152 Cal. 637, 93 Pac. 854 (1908); *Carroll v. McPike*, 53 Miss. 569 (1876); *Buckingham Hotel Co. v. Kimberly*, 138 Miss. 445, 103 So. 213 (1925).

4. *Shegogg v. Perkins*, 34 Ark. 117 (1879); *Barry's Appeal, Foster's Estate*, 88 Pa. 131 (1878); *In re Middleby's Estate, Appeal of Marshall Auto Co.*, 249 Pa. 203, 94 Atl. 820 (1915); *In re Middleby's Estate, Appeal of Timken-Detroit Axle Co.*, 254 Pa. 328, 98 Atl. 889 (1916).

5. *Ramsay v. Ramsay*, 196 Ill. 179, 63 N. E. 618 (1902); *Miner, Beal and Hackett v. Austin*, 45 Iowa 221 (1876); *Dawes v. Head*, 3 Pick. 128 (Mass. 1825); *Davis v. Estey*, 8 Pick. 475 (Mass. 1829); *Goodall v. Marshall*, 11 N. H. 88 (1840); *Tyler v. Thompson*, 44 Tex. 497 (1876); *Prentiss v. Estate of Van Ness*, 31 Vt. 95 (1858); *In re Hanreddy's Estate*, 176 Wis. 570, 186 N. W. 744 (1922).

6. *Owsley v. Bowden*, 161 Ga. 884, 132 S. E. 70 (1926).

7. 172 U. S. 239 (1898).

8. *Ibid.*

as general insolvency laws;⁹ hence the *Blake* case cannot be said to control directly the situation presented by the principal case on the basis of stare decisis. Strangely enough, while several cases have mentioned the possible application of Art. IV, § 2 of the United States Constitution to prevent priorities being granted to resident creditors of a decedent's insolvent estate,¹⁰ the principal case stands almost alone in predicating its decision on the constitutional basis.¹¹

Disregarding for the moment the constitutional question, the principal case is in accord with that line of cases which has been considered the better view. The reasons underlying the decisions in these cases are clearly enunciated in the case of *Dawes v. Head*¹² by Chief Justice Parker, who writes as follows: "We cannot think, however, that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government. . . . There cannot be then a right in any one or more of our citizens, who may happen to be creditors, to seize the whole of the effects which may be found here, or claim an appropriation of them to the payment of their debts, in exclusion of foreign creditors."

Not all so-called privileges of citizens come within the protection of Art. IV, § 2 of the Constitution of the United States. Mr. Justice Washington, referring to that provision in the case of *Corfield v. Coryell*,¹³ said: ". . . what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; . . . and the enjoyment of . . . [which] by the citizens of each state in every other state, was manifestly calculated 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the union'." It appears that the privilege to sue or file a claim on a debt, in the situation presented by the principal case, is such a privilege as may be termed "fundamental." Unless a foreign claimant is allowed to participate in the assets of an ancillary administration so that he may share pro rata with the resident creditors, he is being denied a privilege which grows out of the right to acquire property, namely, the privilege of every citizen to apply to the courts to enforce his contracts. A state should not grant this privilege to its own citizens, and deny it to the citizens of other states. The court,

9. *Hawkins v. Learned*, 54 N. H. 333 (1874).

10. *Miner, Beal and Hackett v. Austin*, 45 Iowa 221 (1876); *Dawes v. Head*, 3 Pick. 128 (Mass. 1825); *Goodall v. Marshall*, 11 N. H. 88 (1840).

11. See, however, the dissenting opinion of Chancellor Ridgely in the case of *Douglass, Adm'r., v. Stephens*, 1 Del. Ch. 465 (1821). In that case a majority of the court held that a statute prohibiting the payment of any foreign debt by an executor or administrator till debts due Delaware inhabitants were paid, was constitutional. In his dissent Ridgely gives a fine discussion of the objects and construction of Art. IV, §2, of the United States Constitution.

12. 3 Pick. 128 (Mass. 1825).

13. Fed. Cas. No. 3, 230, at 546, 551 (E. D. Pa. 1823).

in the case under discussion, has applied the same principles of law to decedents' insolvent estates, as the Supreme Court of the United States in *Blake v. McClung*¹⁴ has applied to general insolvency cases. It is submitted that this result is correct.¹⁵

O. S. BREWER

INSURANCE—DELAY IN ACTING UPON APPLICATION AS CONSTITUTING ACCEPTANCE.

*Zielinski v. General American Life Ins. Co.*¹

Plaintiffs' son filed an application for a double indemnity accident rider to be attached to a life insurance policy which he had with defendant's predecessor in business. There was a clause in the policy which read, ". . . the Company shall incur no additional liability under the aforesaid policy until this application . . . shall have been approved at the Home Office of the Company, and until the premium for this additional benefit has been paid." Plaintiffs and their son, knowing of this clause, signed the application, and it, along with the premium, was given to the company's agent on May 15. On May 28, the applicant was drowned. On May 29, a favorable inspection report was received by the company from its actuarial department, but the application was marked declined because of the death of the applicant.

Plaintiffs sued as beneficiaries, contending that "the company had so unreasonably delayed final action upon the application as to warrant the inference that it had in fact accepted the same prior to the death of the insured, and as to estop defendant from thereafter insisting to the contrary." Held: that the delay in acting upon the application did not warrant the inference of acceptance since it did not constitute a "waiver in the nature of an estoppel."

The court distinguished the case from the earlier case of *Witten v. Beacon Life Association*.² In the *Witten* case, the plaintiff, on July 10, signed two applications for certificates of life and disability insurance with defendant company. The agent forthwith mailed the applications to defendant's home office, 30 miles away. Plaintiff was injured on July 20, three days before the policies were issued. On July 23, when they were issued, the defendant had not yet learned of the injury, and later notified plaintiff that they were not in effect. In holding for plaintiff the court said, ". . . we think there was such a delay in issuing the policies after receipt of

14. 172 U. S. 239 (1898).

15. It is to be noted that the principal case says that to deny a foreign claimant the privilege of presenting his claim in the ancillary administration when the estate as a whole is insolvent, is also violative of § 1 of the Fourteenth Amendment of the United States Constitution. Whether a foreign claimant's privilege to sue in the situation presented by the case at bar is one which is secured to him by the Fourteenth Amendment has never before been mentioned. For this reason, and because a determination of this question is unnecessary in considering the effect of the principal case, a discussion on this point is omitted.

1. 96 S. W. (2d) 1059 (Mo. App. 1936).

2. 225 Mo. App. 110, 33 S. W. (2d) 989 (1931).

the application as to raise a reasonable presumption of its acceptance . . . and this is especially true in the light of the fact that no showing is made on the part of defendant that the delay was due to any cause other than mere negligence.”

The court in the instant case distinguished the two cases principally on the ground that no explanation was made by the insurance company in the *Witten* case, for the delay; while in the instant case the delay was shown to be due to investigation being made by the defendant, and not to mere negligence. Though the court draws this distinction, it seems to question the doctrine of the *Witten* case. It says that the company's mere delay in passing upon the application will not be sufficient in and of itself to warrant the inference of an *acceptance* of the application; but that a delay, plus a showing of “attendant and accompanying facts and circumstances” may create an *estoppel* or a “waiver in the nature of an estoppel” on the company's part to assert that the application was not in fact accepted and approved by it. The elements of estoppel were not present in the instant case and need not be discussed. As for the doctrine of “waiver in the nature of an estoppel” which the court brings forth, it is difficult to analyze. The court says that such a waiver arises when the company retains “the application . . . for such an unreasonable and unwarranted length of time, with its delay wholly unexplained and unaccounted for, and under such attendant and accompanying facts and circumstances as to justify the legitimate inference that notwithstanding the lack of a formal acceptance, it had nevertheless actually accepted the application and had assumed the risk so as to have rendered it liable for the loss which subsequently occurred.” The court does not explain why it regards such facts as constituting a “waiver in the nature of an estoppel.”

Does the above, in truth, do more than conceal the fact that there may be an acceptance by silence?³ Does it not say in effect that unexplained and unreasonable delay in acting upon the application will be considered as an acceptance? As is well known, the doctrine of acceptance by silence has been limited to a very few fact situations by the courts. Usually the doctrine is applied in cases where there have been previous dealings between the parties, or where there are other circumstances which would make it reasonable for the offeror to expect an acceptance in this manner;⁴ or where there is an express agreement that silence will constitute an acceptance.⁵ It has seldom been applied to silence resulting merely from delay in acting upon an application; the *Witten* case is a notable exception.⁶

3. See Funk, *The Duty of An Insurer to Act Promptly on Applications* (1927) 75 U. OF PA. L. REV. 207.

4. RESTATEMENT, CONTRACTS (1932) §72; 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 91b and cases cited; see also Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations* (1917) 26 YALE L. J. 169.

5. 1 WILLISTON, CONTRACTS §91c, and cases cited.

6. Other cases which are often cited as standing for the proposition that silence resulting from delay can constitute an acceptance are in fact distinguishable from the *Witten* case. Among these are Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986 (1889), in which the home office had agreed to issue the policy but was withholding it until the premium should be forwarded by the local agent;

The vast weight of authority is that delay in acting upon an application for insurance raises no implication of its acceptance;⁷ and some say that the remedy is in tort and belongs to the applicant, or his personal representative if such actions are permitted to survive.⁸ When the doctrine of acceptance by delay arises in future Missouri cases, it would seem better either to reject it flatly or to accept it openly. To indicate that it should be rejected and yet to leave an opening by way of "waiver in the nature of an estoppel" is confusing.

KIRK JEFFREY

MUNICIPAL CORPORATIONS—CONDITIONS NECESSARY FOR LIABILITY AS TO INJURIES ARISING FROM DANGEROUS CONDITIONS OF STREET BECAUSE OF SNOW AND ICE.

*Barrett v. Town of Canton*¹

Plaintiff was injured from a fall caused by slipping on ice and snow on the defendant's sidewalk. The conditions were as follows: there had been an eight or nine-inch snow a week before the accident, followed by successive periods of freezing and thawing; the sidewalk where the plaintiff fell was covered with week-old ice made rough by indentations and ridges from two to five or six inches high. Evidence was introduced to show that many sidewalks had been cleaned off prior to the date of plaintiff's injury, but, in general, the same condition was prevalent over the entire city. In an action for damages arising from the injury, it was held that there was sufficient evidence to go to the jury on the question of negligence.

Stearns v. Merchants' Life & Casualty Co., 38 N. D. 524, 165 N. W. 568 (1917), in which the company reserved a twenty day period in which to decline the application but did not do so, and later issued the policy; Lechler v. Montana Life Ins. Co., 48 N. D. 644, 186 N. W. 271 (1921), in which the application was for reinstatement and the court decided that there had been a waiver by the agent which was binding upon the company; Richmond v. Travelers' Ins. Co., 123 Tenn. 307, 130 S. W. 790 (1910), which was decided on the basis of estoppel after there had been a showing of failure to apply for other insurance in reliance upon representations that the application would be accepted; see Robinson v. U. S. Benevolent Society, 132 Mich. 695, 698, 94 N. W. 211, 212 (1903); Funk, *loc. cit. supra* note 3.

7. There are numerous cases which hold this way. The cases are collected in Funk, *loc. cit. supra* note 3, *passim*; 14 R. C. L. 896; and VANCE, INSURANCE (2d ed. 1930) 188. Vance says that, "The mere delay of the insurer, however unreasonable, in acting upon an application for insurance, raises no implication of its acceptance. Nor does such delay estop the insurer from denying the existence of the contract. This rule is sound in principle, as the application is a mere offer which requires some overt act of acceptance by the insurer to change it into a contract."

8. Duffie v. Bankers' Life Ass'n, 160 Iowa 19, 139 N. W. 1037 (1913); Boyer v. State . . . Hail Ins. Co., 86 Kan. 442, 121 Pac. 329 (1912); Wilken v. Capital Fire Ins. Co., 99 Neb. 828, 157 N. W. 1021 (1916); see VANCE, *op. cit. supra* note 7, at 190; Funk, *loc. cit. supra* note 3; Note (1913) 13 COL. L. REV. 647; Note (1913) 11 MICH. L. REV. 606; Note (1924) 22 MICH. L. REV. 846; Note (1924) 34 YALE L. J. 102. *Contra*: Savage v. Prudential Life Ins. Co. of America, 121 So. 487 (Miss. 1929).

1. 93 S. W. (2d) 927 (Mo. 1936).

There is a duty by a city to keep its streets and sidewalks in a reasonably safe condition for the purposes for which they have been designed, and it is liable to one who, while properly using the streets, suffers injuries in consequence of its dangerous condition, provided that the city had a reasonable opportunity to remove the danger.² Whether a city is negligent in performing its duty, where the sidewalks are unsafe due to ice and snow, depends upon many circumstances, "as, for example, the nature and extent of the ice formation, the length of time it had previously existed, the conditions that prevailed generally during that time as to the presence, or absence of snow and ice, the location of the walk, and its frequent, or infrequent use, by travelers."³ In general, courts are likely to find negligence where there is an obstruction of the sidewalk.⁴ An obstruction may exist where ice is made rough by frozen footprints in the snow,⁵ or it may be a smooth, slick piece of ice.⁶ Ridges and projections of ice two to four inches in height have constituted a sufficient obstruction to carry the case to the jury.⁷ Other cases have required that the ice be simply "rough."⁸ Ridges one-half inch to one inch in height, where the same condition existed over the city generally, were held not a sufficiently dangerous condition to constitute an obstruction.⁹

The time within which a city has, in the exercise of due care, to remove ice varies with conditions. The impracticability of removal is a significant factor. It has

2. *Reedy v. St. Louis Brewing Ass'n*, 161 Mo. 523, 61 S. W. 859 (1901); *Albritton v. Kansas City*, 192 Mo. App. 574, 188 S. W. 239 (1916).

3. *Suttmoeller v. City of St. Louis*, 230 S. W. 67, 69 (Mo. 1921).

4. *Suttmoeller v. City of St. Louis*, 230 S. W. 67 (Mo. 1921); *Jackson v. Kansas City*, 181 Mo. App. 178, 167 S. W. 1150 (1914); *Seeber v. City of Hannibal*, 288 S. W. 974 (Mo. App. 1926); *Harding v. City of St. Joseph*, 7 S. W. (2d) 707 (Mo. App. 1928).

5. *Quarles v. Kansas City*, 138 Mo. App. 45, 119 S. W. 1019 (1909); *Young v. City of St. Joseph*, 4 S. W. (2d) 1104 (Mo. App. 1928); *Harding v. City of St. Joseph*, 7 S. W. (2d) 707 (Mo. App. 1928).

6. *Reedy v. St. Louis Brewing Ass'n*, 161 Mo. 523, 61 S. W. 859 (1901); *Studer v. City of St. Joseph*, 185 S. W. 1196 (Mo. App. 1916).

7. *Suttmoeller v. City of St. Louis*, 230 S. W. 67 (Mo. 1921) (ridges 3 to 6 inches high); *Quinlan v. Kansas City*, 104 Mo. App. 616, 78 S. W. 660 (1904) (ridges 2 to 6 inches high); *Seeber v. City of Hannibal*, 288 S. W. 974 (Mo. App. 1926) (ridges 6 to 8 inches high); *Young v. City of St. Joseph*, 4 S. W. (2d) 1104 (Mo. App. 1928) (ridges 2 to 5 inches high).

8. *Quarles v. Kansas City*, 138 Mo. App. 45, 119 S. W. 1019 (1909); *Jackson v. Kansas City*, 181 Mo. App. 178, 167 S. W. 1150 (1914); *Harding v. City of St. Joseph*, 7 S. W. (2d) 707 (Mo. App. 1928); *cf. Coy v. Kansas City*, 243 S. W. 418 (Mo. App. 1922).

9. *Gist v. City of St. Joseph*, 220 S. W. 722 (Mo. App. 1920); *cf. Harding v. City of St. Joseph*, 7 S. W. (2d) 707 (Mo. App. 1928). Those conditions, which might not be an obstruction if ice and snow are over the entire city, might conceivably be one if the ice is caused by the draining of water on to the sidewalk from a defective gutter of an adjacent building, since the city might show due care in the former case in allowing the ice to remain there, because of the impracticability of its removal, while in the latter case it might have been a reasonable burden upon the city to require it to remove the ice within a reasonable time. See *Reedy v. St. Louis Brewing Ass'n*, 161 Mo. 523, 537, 61 S. W. 859, 862 (1901). For a discussion of the same problem, see (1917) 15 U. OF MO. BULL. LAW SER. 33.

been held, where there was a snow throughout the city, that two days were insufficient time for the city to remove it from the streets.¹⁰ Seven days have been considered sufficient time for the city to have had notice of the condition and to have remedied it.¹¹ Where the ice condition was caused by water escaping from a defective gutter on an adjacent building and freezing on the sidewalk, one-half day's notice was found sufficient notice to the city, since the same condition had occurred each year for nineteen years.¹² Where there are concurrent causes (for example, a defect in the sidewalk in addition to ice and snow) very little time is given to the city for removal of the ice and snow; thus three days were held to be sufficient time to remove the obstruction.¹³ The question of impracticability of removal of ice and snow by the city is a question for the jury.¹⁴

The location of the sidewalk and the degree of travel by the public upon it do not seem to receive much attention in the consideration by the courts of conditions necessary to find negligence.¹⁵ But the magnitude of the risk is always a very important factor in determining the unreasonableness of the risk and the question of negligence.¹⁶

MILTON I. MOLDAFSKY

NEGLIGENCE—LIABILITY OF POSSESSOR OF PREMISES TO GOVERNMENTAL EMPLOYEES.

*Paubel v. Hitz*¹

Plaintiff, a postman, was injured by an unsafe condition while delivering mail on a runway, which was the sole method of approach to defendant's place of busi-

10. *Armstrong v. City of Monett*, 228 S. W. 771 (Mo. 1921); *Vonkey v. City of St. Louis*, 219 Mo. 37, 117 S. W. 733 (1909) ($\frac{1}{2}$ day's notice).

11. *Reno v. City of St. Joseph*, 169 Mo. 642, 70 S. W. 123 (1902) (30 days); *Suttmoeller v. City of St. Louis*, 230 S. W. 67 (Mo. 1921) (14 days); *Quarles v. Kansas City*, 138 Mo. App. 520, 119 S. W. 1019 (1909) (35 days); *Barker v. City of Jefferson*, 155 Mo. App. 390, 137 S. W. 10 (1911); *Roberts v. City of St. Joseph*, 185 S. W. 1197 (Mo. App. 1916) (30 days); *Young v. City of St. Joseph*, 4 S. W. (2d) 1104 (Mo. App. 1928) (14 days); *Harding v. City of St. Joseph*, 7 S. W. (2d) 707 (Mo. App. 1928) (14 days).

12. *Beane v. City of St. Joseph*, 215 Mo. App. 554, 256 S. W. 1093 (1923). One day's notice was held sufficient time to remove the obstruction where water which fell from a broken pipe of an adjacent building froze smooth on the sidewalk. *Reedy v. St. Louis Brewing Ass'n*, 161 Mo. 523, 61 S. W. 859 (1901).

13. *Rice v. Kansas City*, 16 S. W. (2d) 659 (Mo. App. 1929).

14. *Barrett v. Town of Canton*, 93 S. W. (2d) 927 (Mo. App. 1936).

15. However, they are mentioned in *Suttmoeller v. City of St. Louis*, 230 S. W. 67 (Mo. 1921), and in *Reedy v. St. Louis Brewing Ass'n*, 161 Mo. 523, 61 S. W. 859 (1901).

16. RESTATEMENT, TORTS (1934) §§ 291, 293. In §293, it is said: "In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important: (a) the social value which the law attaches to the interests which are imperiled; (b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member; (c) the extent of the harm likely to be caused to the interests imperiled; and (d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm."

1. 96 S. W. (2d) 369 (Mo. 1936).

ness. While judgment for the plaintiff in an action for the injury was reversed on grounds of contributory negligence, the court held the postman to have the status of a business visitor.

A licensee is a person who is privileged to come upon land by virtue of the possessor's invitation or permission.² A business visitor is a person who is invited or permitted to come upon land for a purpose directly or indirectly connected with business dealings between him and the possessor.³ Any licensee other than a business visitor is a gratuitous licensee.⁴ In Missouri a possessor is not liable to a gratuitous licensee for injuries caused by conditions on the premises which existed at the time the license was granted.⁵ In the case of a business visitor, however, a possessor who has no reason to believe that the visitor will discover the condition or realize the risk involved owes a duty to make safe or warn of dangerous conditions on the land which he knows about or could have discovered by a reasonable inspection.⁶

The problem then becomes one of classification of the person injured while on the premises of the defendant. The principal case is apparently the first in Missouri to involve the status of governmental employees who are injured on the premises of another while in the performance of their duty. The holding is in accord with other cases which involve postmen in classifying them as business visitors,⁷ and this conclusion has also been reached in the cases of United States revenue agents,⁸ city water inspectors,⁹ federal sanitary inspectors in meat packing plants,¹⁰ and in most of the other instances where governmental employees have been injured while on the premises of another in the performance of their duties,¹¹ with the exception of policemen and firemen. These two types of employees are, by the weight of authority, deemed mere gratuitous licensees.¹² It is possible to distinguish this result from that in the cases involving postmen on the ground that postmen have no absolute right to enter the premises of another, and the possessor may prevent them from doing so.¹³ Thus, if he fails to do so, it is possible to find an implied invitation.

2. RESTATEMENT, TORTS (1934) § 330.

3. *Id.* § 332.

4. *Id.* § 331.

5. *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1 (1909); *cf.* RESTATEMENT, TORTS (1934) § 342; HARPER, LAW OF TORTS (1933) § 95.

6. See cases collected in Mo. DIG. (1930) tit. NEGLIGENCE, §§ 32, 48; RESTATEMENT, TORTS (1934) §343.

7. *Sutton v. Penn*, 238 Ill. App. 182 (1925); *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978 (1890).

8. *Anderson & Nelson Distilling Co. v. Hair*, 103 Ky. 196, 44 S. W. 658 (1898).

9. *Kennedy v. Heisen*, 182 Ill. App. 200 (1913).

10. *Mitchell v. Barton & Co.*, 126 Wash. 232, 217 Pac. 993 (1923).

11. 45 C. J. 817; *cf.* *Ross v. Becklenberg*, 209 Ill. App. 144 (1917).

12. *Casey v. Adams*, 234 Ill. 350, 84 N. E. 933 (1908) (policeman); *Lunt v. Post Printing & Pub. Co.*, 48 Colo. 316, 110 Pac. 203 (1910) (fireman); 45 C. J. 794. *Contra:* *Meiers v. Fred Koch Brewery*, 229 N. Y. 10, 127 N. E. 491 (1920).

13. POSTAL LAWS AND REGULATIONS OF THE UNITED STATES (1932) § 782.

Obviously, however, there is no such basis for a distinction between policemen or firemen and governmental employees generally. Furthermore, the reason ordinarily given for not considering policemen and firemen business visitors is that they have a right to enter the premises irrespective of any permission from or benefit which may result to the possessor. This reason should apply, if at all, to other governmental officers as well. It would seem that the element of a reasonable anticipation by the possessor of the presence of the injured person at the place and time of the injury forms the only possible basis for the distinction between policemen or firemen and governmental employees generally.¹⁴ However, the fact that the possessor should reasonably expect a governmental officer to be on the premises does not make him a business visitor, nor even a gratuitous licensee. In fact, there is no logical reason for giving any governmental employees, with the possible exception of postmen, either of these two classifications,¹⁵ since they do not come upon the land by virtue of any invitation or permission given by the possessor, but rather by virtue of a privilege given by law. They are, nevertheless, protected. Undoubtedly this is because they cannot be classified as trespassers and because they are performing their duties in the interest of the public and, in addition, often bestow a direct benefit upon the possessor. These reasons apply to policemen and firemen with equal, if not with greater force than to other governmental employees. While the fact that there is less anticipation of the presence of policemen and firemen on the premises would make liability to them more of a hardship to the possessor, it would nevertheless seem that since they are on the premises in the larger social interest, if not for the benefit of the possessor as well, they should be given the same amount of protection as business visitors and other governmental employees.¹⁶

In view of the holding in the instant case it would seem that the Missouri courts should give all governmental employees the status of business visitors in cases arising in the future which present this question.

SESCO V. TIPTON

PROCEDURE—VALIDITY OF AN UNDATED SUMMONS.

*Al G. Barnes Amusement Co. v. District Court*¹

An undated summons was issued in a North Dakota assault action. A statute required that the summons be substantially in the form therein set forth, which form contained a place for the date of issue.² Defendant, appearing specially, made

14. 45 C. J. 819; see *Boneau v. Swift & Co.*, 66 S. W. (2d) 172, 175 (Mo. App. 1934). It should be noted that the responsibility of the possessor extends only to injuries received on ordinary approaches. *Meiers v. Fred Koch Brewery*, 229 N. Y. 10, 127 N. E. 491 (1920).

15. BOHLEN, *STUDIES IN THE LAW OF TORTS* (1925) 186.

16. McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land* (1936) 1 Mo. L. REV. 45, 56; *Meiers v. Fred Koch Brewery*, 299 N. Y. 10, 127 N. E. 491 (1920).

1. 268 N. W. 897 (N. D. 1936).

2. N. D. COMP. LAWS (1913) § 7422.

motion to quash the writ on the ground that it failed to comply with this statutory requirement. Before a hearing was had on defendant's motion, the court, upon application of plaintiff, allowed the date to be added by amendment of the summons. Defendant objected to the latter order, claiming that he had no notice of the application to amend and that such order was improper while the motion to quash was pending. The court found that the summons, though defective in form, gave defendant sufficient information concerning the action against him and was therefore valid irrespective of whether the amendment was proper.

Many statutes set out specific requirements for the summons.³ Courts say that these requirements must be substantially followed.⁴ Thus a summons that deviates from the statutory form to such an extent that it fails to give defendant adequate notice of the suit and the time within which to answer is generally held to be void.⁵ True it appears from the cases that defects which would invalidate the summons in some jurisdictions are considered immaterial in others.⁶ This apparent difference of opinion can be explained on the ground that courts do not agree as to what constitutes adequate notice. For instance, where a summons lacks a seal which is required by statute courts are divided as to its validity.⁷ It might be argued on one hand that defendant would not have adequate notice because he could not

3. KAN. REV. STAT. (1923) § 60-2501: "The summons shall be issued by the clerk, upon a written praecipe filed by the plaintiff; shall be under the seal of the court from which the same shall issue, shall be signed by the clerk, and shall be dated the day it is issued . . ."; MO. REV. STAT. (1929) § 725: "Every such original writ shall be dated on the day it is issued, and made returnable, on the first day of the next term thereafter; . . ." NEB. COMP. STAT. (1929) §§ 22-302: "The summons shall be dated the day it is issued and signed by the clerk of the court . . ."; OKLA. COMP. STAT. (1931) § 233 (same as Kansas statute).

4. *Glasmann v. Second Dist. Court*, 80 Utah 1, 12 P. (2d) 361 (1932).

5. *Bull v. Chicago, M. & St. P. Ry.*, 6 F. (2d) 329 (W. D. Wash. 1925); *Ward v. Ward*, 59 Cal. 139 (1881); *Pinkham v. Jennings*, 123 Me. 343, 122 Atl. 873 (1923); *Hamilton v. George*, 129 Me. 474, 152 Atl. 631 (1930); *Israelson v. Gallant*, 154 Atl. 574 (Me. 1931); *State v. Bates*, 286 S. W. 420 (Mo. App. 1926); *Hamlin v. Coppel*, 9 N. J. Misc. R. 651 (1931); *State v. Parks*, 34 Okla. 335, 126 Pac. 242 (1912); *Jacobs v. Queen Ins. Co. of Am.*, 51 S. D. 249, 213 N. W. 14 (1927); *Smith v. Buckholts State Bank*, 193 S. W. 730 (Tex. Civ. A. 1917).

6. Cases holding that an erroneous return date on the summons is a material error: *Hamlin v. Coppel*, 9 N. J. Misc. R. 651, 155 Atl. 676 (1931); *State v. Parks*, 34 Okla. 335, 126 Pac. 242 (1912); *Smith v. Buckholts State Bank*, 193 S. W. 730 (Tex. Civ. A. 1917). Cases holding that an erroneous return date on the summons is not a material error: *Hogan v. Hogan*, 148 Ga. 151, 95 S. E. 972 (1918); *Young v. Newbold*, 114 Kan. 86, 217 Pac. 269 (1923); *Land v. Christenson*, 109 Neb. 101, 189 N. W. 838 (1922); *Elder v. Morse*, 212 N. Y. Supp. 581, 214 App. Div. 632 (1925). Cases holding that the failure of the clerk to sign the summons in compliance with the statute was material error: *Pinkham v. Jennings*, 123 Me. 343, 122 Atl. 873 (1923); *Israelson v. Gallant*, 154 Atl. 574 (Me. 1931). Case holding absence of the clerk's signature was not material error: *Hooker v. Forbes*, 202 N. C. 364, 162 S. E. 903 (1932).

7. *Pinkham v. Jennings*, 123 Me. 343, 122 Atl. 873 (1923) (omission of seal invalidates summons); *Hamilton v. George*, 129 Me. 474, 152 Atl. 631 (1930) (omission of seal invalidates summons); *Jump v. McClurg*, 35 Mo. 193 (1864) (omission of a seal makes the summons irregular but not void).

be sure of the authenticity of the writ. On the other hand, it might be said that defendant had adequate notice since the writ sufficiently described plaintiff's action and clearly set the answer day. When it is once decided, however, that the defect in a summons is such as to prevent the defendant from having sufficient notice, the summons will generally be held invalid. Such a void writ cannot be corrected by amendment.⁸ It might be argued in this connection that a material defect would be cured by a special appearance of the defendant, for his appearance in court would show that he had notice. Rather clearly this argument would not be accepted, for defendant should have the right to be brought into court substantially as the statute requires.⁹

A summons, which gives the defendant adequate notice of the action and of answer time will be considered valid in most jurisdictions even though it is not in the form required by the statute.¹⁰ Some courts say that the statutory requirement is merely directory.¹¹ In those jurisdictions an amendment would not be necessary.¹² It would probably be advisable to amend, however. Other courts say the statutory requirement is formal and thus the defect must be amended.¹³

A very strict view is followed in Texas. There a summons which varies from the statutory requirements is void and unamendable even though the defect is immaterial.¹⁴

An omission of, or error in the date of issuance of the summons, as illustrated by the present case, will thus not invalidate the writ in most jurisdictions, even though it is expressly required by statute unless the answer time depends upon that date.¹⁵ The Missouri statute requires that the summons bear the date of

8. *Bull v. Chicago, M. & St. P. Ry. Co.*, 6 F. (2d) 329 (W. D. Wash. 1925); *Pinkham v. Jennings*, 123 Me. 343, 122 Atl. 873 (1923); *Hamilton v. George*, 129 Me. 474, 152 Atl. 631 (1930); *Israelson v. Gallant*, 154 Atl. 574 (Me. 1931); *Hamlin v. Coppel*, 9 N. J. Misc. R. 651, 155 Atl. 676 (1931); *Jacobs v. Queen Ins. Co. of Am.*, 51 S. D. 249, 213 N. W. 14 (1927).

9. Adherence to such an argument would tend to take the control over giving defendant notice entirely out of the court. Valid notice might be given over telephone or by other informal methods if that doctrine were carried a little further.

10. *Neidhold v. Henry*, 210 Mich. 598, 178 N. W. 30 (1920); *Flanery v. Kusha*, 143 Minn. 308, 173 N. W. 652 (1919); *In re Morningstar's Will*, 257 N. Y. Supp. 240, 143 Misc. Rep. 620 (1932).

11. *Hirsch v. De Puy*, 11 N. J. Misc. R. 500, 166 Atl. 720 (1933).

12. *Young v. Newbold*, 114 Kan. 86, 217 Pac. 269 (1923); *Hirsch v. De Puy*, 11 N. J. Misc. R. 500, 166 Atl. 720 (1933).

13. *Hogan v. Hogan*, 148 Ga. 151, 95 S. E. 972 (1918); *Grand Lodge, K. P. v. Massey*, 35 Ga. App. 140, 132 S. E. 270 (1926); *Bay State Wholesale Drug Co. v. Whitman*, 280 Mass. 188, 182 N. E. 361 (1932); *Land v. Christenson*, 109 Neb. 101, 189 N. W. 838 (1922).

14. *Hoff v. Clark*, 200 S. W. 431 (Tex. Civ. A. 1918); *Beck v. Nelson*, 17 S. W. (2d) 144 (Tex. Civ. A. 1929); *Boulevard Undertaking Co. v. Breaker*, 42 S. W. (2d) 451 (Tex. Civ. A. 1931).

15. *Emmons v. Marbelite Plaster Co.*, 193 Fed. 181 (C. C. D. Nev. 1910) (absence of date held immaterial where answer time depended upon date of service and not on date of issuance of summons); *Hirsch v. De Puy*, 11 N. J. Misc. R. 500, 166 Atl. 720 (1933) (absence of date is an immaterial defect); *Porter v. Building Associates*, 12 N. J. Misc. R. 42, 169 Atl. 515 (1933) (answer time depended upon date of issue of summons, thus omission of date of issue was material error).

issuance,¹⁶ but the answer date is made to depend upon the date of service and not upon the date when the summons was issued.¹⁷ It is probable, therefore, that should the question of validity of an undated summons arise in Missouri a holding similar to that in the principal case would be reached.¹⁸

JOHN H. FOARD

TRESPASS—UNJUST ENRICHMENT—MEASURE OF DAMAGES.

*Edwards v. Lee's Adm'r.*¹

P and D are owners of adjoining parcels of land in the cavernous region of Kentucky. Some time in 1916, D discovered on his land the entrance to a cave. He explored the cave, lighted it, improved the avenues and built up a profitable business exhibiting it to tourists. About one-third of the cave so exhibited is under land belonging to P. By a series of suits,² P had his rights declared to one-third of the net profits earned by the cave. His share was approximately twenty-five thousand dollars. D appealed solely on the measure of damages used. In affirming the judgment, the following observations, among others, were made: "The proof likewise clearly indicates that the trespasses were willful. . . . Appelles brought this suit in equity, and seek an accounting . . . as well as an injunction against future trespass. In substance, therefore, their action is *ex contractu* and not . . . simply an action for damages arising from a tort." The Court said further: "Whether we consider the similarity of the case to (1) the ordinary actions in *assumpsit* to recover for the use and occupation of real estate, or (2) the common-law action of trespass for mense profits or (3) the action to recover for the tortious use of a trade-name or other similar right, we are led inevitably to the conclusion that the measure of recovery in this case must be the benefits, or net profits. . . ."

However one regards the maxim, *cujus est solum, ejus est usque ad coelum et ad infernos*,³ whether as the vaporings of a common law logician, or a fundamental

16. MO. REV. STAT. (1929) § 725.

17. MO. REV. STAT. (1929) § 726.

18. The question of the validity of an undated summons has never come up in Missouri. Missouri cases where defects in the summons were considered material: *Holliday v. Cooper*, 3 Mo. 286 (1834) (summons ordered defendant to appear a month before court opened); *Sanders v. Rains*, 10 Mo. 770 (1847) (writ ordered defendant to appear in less time than statute allowed). Missouri cases where defects in the summons were considered immaterial: *Wilson v. Wilson*, 255 Mo. 528, 164 S. W. 561 (1914) (defendant ordered to appear "before" instead of "at" the day fixed in the summons); *Ward v. Morton*, 294 Mo. 408, 242 S. W. 966 (1922) (summons served in less than fifteen days before the return date).

1. 96 S. W. (2d) 1029 (Ky. 1936).

2. *Edwards v. Lee*, 230 Ky. 375, 19 S. W. (2d) 992 (1929); *Edwards v. Sims, Judge*, 232 Ky. 791, 24 S. W. (2d) 619 (1930); *Edwards v. Lee*, 250 Ky. 166, 61 S. W. (2d) 1049 (1933).

3. To whomsoever the soil belongs, his it is also to the center of the earth and the sky above—the maxim upon which the defendant is held to be a trespasser.

proposition in the law of property,⁴ he is driven to the conclusion that, from the historical point of view, the various analogies used by the court for measuring the damages leave something to be desired.

(1) It has been frequently stated that the action of assumpsit for use and occupation of real estate does not lie absent a relationship of landlord and tenant, either express or implied.⁵ Though the rule is historical only, and the reason behind it purely arbitrary, the measure of damages used in that action is spoken of as applicable here, a situation where traditionally the action does not lie.⁶

(2) The measure of damages applied in an action of trespass for mense profits is next mentioned. The reason for the existence of this form of action should suggest its limitations. It grew up to afford substantial damages to a successful plaintiff in an action of ejectment when, the action being purely nominal, the measure of damages was likewise only nominal. Relief was given by way of this auxiliary action and seems largely to have been restricted to a situation in which ejectment would lie,⁷ though the actual formal judgment in ejectment was not vital. In the principal case there are clearly no facts to support ejectment. It

4. One turns to the treatment accorded the maxim in what seems to be a nearly parallel field, aviation, and finds in POLLOCK on TORTS (12th ed. 1923) 352: "It does not seem possible on the principles of the common law to assign any reason why an entry above the surface should not also be a trespass, unless indeed it can be said that the scope of possible trespass is limited by that of possible effective possession, which might be the most reasonable rule." It is true that the portion of the cave under P's land might be possessed, but it is not very likely that it would be.

5. Ames, *Assumpsit for Use and Occupation* (1889) 2 HARV. L. REV. 377. The peculiarities of rent (2 GEO. II, c. 19, § 14 (1729)) and the reluctance of the common law courts to enlarge a statute in derogation of the common law probably account for the narrowness of the view. However, by far the majority of the cases in this country make this requirement: *Carpenter v. U. S.*, 84 U. S. (17 Wall) 489 (1873); *Hamby v. Wall*, 48 Ark. 135, 2 S. W. 705 (1886); *Emerson v. Weeks*, 58 Cal. 439 (1881); *Barnes v. Shinholster*, 14 Ga. 131 (1853); *Richmond & Lexington Turnpike Road Co. v. Rogers*, 70 Ky. (7 Bush) 532 (1870); *Aull Savings Bank v. Aull's Adm'r*, 80 Mo. 199 (1883). 2 TIFFANY, LANDLORD AND TENANT (1910) 1857. In this work, many of the cases are collected. In a few states, the action seems to be permitted. Alabama: *Smith's Ex'rs v. Houston*, 16 Ala. 111 (1849) (one enjoying the premises, and apparently willing to pay rent to the rightful owner, a unique way of implying some relation of landlord and tenant). Mississippi: *Newberg v. Cowan*, 62 Miss. 570 (1885) (on the basis of a statute). Washington: Here one finds also a statute providing for a "reasonable rental" in almost all situations. BALL. ANN. CODES & STAT. (1897) § 4571. Finally, it is considered that the action would lie in Kentucky: *Ill. Cent. R. R. v. Ross*, 26 Ky. 1251, 83 S. W. 635 (1904) (although the construction seems strained, the point not being squarely in the case).

6. The court in negating the possibility of an action of assumpsit for use and occupation suggests a different reason from that given here, *i. e.*, that there has been no real occupation, but rather many individual trespasses.

7. ADAMS, EJECTMENT (1846) 379; 3 SEDGWICK, DAMAGES (1912) § 906; 9 R. C. L. 939; *Green v. Biddle*, 21 U. S. 346 (1823); *Young, Adm'r v. Downey*, 145 Mo. 261, 46 S. W. 1086 (1898); *Stump v. Hornback*, 109 Mo. 272, 18 S. W. 37 (1891); *Cape Girardeau & T. B. T. R. R. v. St. L. & Gulf Ry.*, 222 Mo. 461, 121 S. W. 300 (1909); *Murphy v. Guion's Exe.*, 2 Murphy 238 (N. C. 1813); *Thompson v. Bower*, 60 Barb. (N. Y.) 477 (1872); *Aslin v. Parkin*, 2 Burr. 665, 97 Eng. Rep. 501 (1758).

does appear that the rule has been relaxed in some states to permit an action "in the nature of" trespass for mense profits.⁸ It may be that those cases are being followed here; if so, the court goes a step beyond the length to which those cases have gone.

(3) In the language of the court, "The philosophy of all these decisions is that a wrongdoer shall not be permitted to make a profit from his own wrong," which language is an apt transition into the last possible measure of damages suggested by the court, namely, unjust enrichment. Plaintiff has sustained at most only nominal damages by virtue of an invasion of his construed right to undisturbed possession. Defendant has carried nothing away.⁹ He is, at most, guilty of several purely technical trespasses which netted him a profit of seventy-five thousand dollars. In abandoning the defined paths of the common law actions and entering the field of unjust enrichment, the court again furnishes at best, an imperfect analogy.¹⁰ It strains one's imagination to catch the resemblance of the right sought to be protected here, and the right protected in a trade name or "other similar right."

The case presents a novel application of the familiar principle that one is not permitted to keep something merely because he has been able to get it. If in equity or good conscience, a portion of the profits received from third persons by virtue of a wrongful use of P's property, belongs to P, it will be given to him, technical difficulties to the contrary notwithstanding. But conceding that part of the profit was made from land belonging to P, as well as the right of P to some share of it, the absolute inutility of that land to him and the enterprising activity of D should not be ignored in computing "windfall" damages.

FRANCIS E. CROSBY

8. Notably Minnesota and Oregon. *Blew v. Ritz*, 82 Minn. 530, 85 N. W. 548 (1901) (where there had been occupation and cropping for three successive seasons); *Irwin v. McElroy*, 91 Ore. 232, 178 Pac. 791 (1919) (also an action "in the nature of" trespass for mense profits. Again a situation where ejectment would have lain). It is submitted that it is one step to permit the action, or use its measure of damages if an action of ejectment might have been brought, and quite another to ignore the question of the ejectment situation and proceed with the measure of damages there usable.

9. This suggestion might be made, that to the extent that tourists have been taken onto the land and their appetites for esthetic appreciation of the caprice of nature have been satiated, to that extent, assuming that P might at some time have access to the cave and to the lucrative tourist business, D by robbing P of part of his market, has done P a substantial injury. The suggestion is too refined to be sound. Further, the fact that throughout D acted as entrepreneur and made any profit whatever available is ignored. In economic circles at the present time, no inconsiderable importance is attached to the position occupied by the entrepreneur in a business enterprise.

10. Apparently the court relies to some extent upon § 136 of the PROPOSED FINAL DRAFT, RESTATEMENT OF RESTITUTION AND UNJUST ENRICHMENT. The choice seems most unfortunate. The protection of trade names depends upon user; arrogation of trade secrets is so easy and so common that only in a clear case will the court award damages, then on a showing of injury to the plaintiff on the basis of unfair competition. Unless one finds some peculiar efficacy in the vague nomenclature, "or other similar right," he must still seek a valid analogy.