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Recent Cases

AGENCY—PRESUMPTION FROM NAME OF DEFENDANT ON TRUCK.

*Ross v. St. Louis Dairy Co.*¹

Personal injury was inflicted on the plaintiff by the negligence of an alleged agent of the St. Louis Dairy Co. The injury occurred when a truck driven by the alleged agent collided with the automobile in which the plaintiff was riding. Inscribed on the side of the truck was the name "St. Louis Dairy Co." The plaintiff brought suit against the dairy company on the theory of respondeat superior. At the trial the plaintiff presented evidence of the collision and the fact that the truck bore the name of the *Dairy Co.* The defendant offered evidence that the driver of the truck was the agent of an independent contractor, who was under contract with the *Dairy Co.* to haul milk, and that defendant held no property interest in the truck, but for advertising purposes had its name on the truck, together with the name of the independent contractor.

At the close of all the evidence the trial court gave a peremptory instruction directing a verdict for the defendant, whereupon the plaintiff took an involuntary nonsuit, with leave to move to set the same aside. Plaintiff duly filed such motion which was overruled and plaintiff appealed. Judgment was affirmed for defendant.

Appellant contends that the presentation of the evidence showing the name of defendant was on the truck raised a presumption that the truck was being operated by defendant through its agents, and made a prima facie case that could not be taken from the jury regardless of defendant's evidence. The Missouri Supreme Court held that such presumption does not entitle the plaintiff to go to the jury in the face of strong rebutting evidence.

By prima facie case, or presumption, the courts usually mean that, without more evidence, the party making out the same, is entitled to a verdict.² (In cases involving the situation presented in the instant case the courts seem to use the term "prima facie" and the word "presumption" synonymously.³) The apparent conflict in the cases arises when the defendant introduces rebutting evidence which to the satisfaction of the court overcomes the prima facie case, or presumption, and still the plaintiff insists on going to the jury.

It is settled law in Missouri that a plaintiff who introduces evidence that the name of the defendant was written on the vehicle that caused his injury, thereby makes out a prima facie case of ownership of the vehicle and the agency of the driver.⁴

1. 98 S. W. (2d) 717 (Mo. 1936).

2. 5 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2490, 2494.

3. (1937) 2 MO. L. REV. 100; (1936) 1 MO. L. REV. 359.

4. Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854 (1917); O'Malley v. Heman

There is a line of authority in Missouri to the effect that a prima facie case once made out must go to the jury regardless of the conclusiveness of the defendant's evidence. Under this authority the plaintiff argues that the credibility of the defendant's witnesses is to be determined solely by the jury, and the court can not take the case from the jury by directing a verdict.

The best authority for this proposition is the case of *Barz v. Fleischmann Yeast Co.*⁵ This case, a four to three decision, held that a prima facie case once made out can not be taken from the jury. Evidence offered by the defendant to overcome the prima facie case must be presented to the jury, so that they may pass on the credibility of the witnesses and the weight to be given their testimony. In the case of *Peterson v. Chicago & A. Ry.*,⁶ which was cited as authority for the holding in the *Barz* case, Judge Woodson said, "That is, after a prima facie case is once made out, the case can never be taken from the jury." There are other cases that could be cited as authority for this proposition outside the field of vicarious liability.⁷

The *Barz* case as well as the *Peterson* case went too far in their holdings as to the nature and effect of a prima facie case. What is called a prima facie case seems, by later decisions, to be nothing more than a rule of procedure which requires a case to go to the jury in the absence of rebutting evidence of such weight that reasonable men would not draw different conclusions.

The court in the principal case has cleared up the uncertainty that arose from the *Barz* case, at least as to instances where liability is predicated upon the master-servant relation and where the existence of such relation rests upon a presumption.

S. PAUL KIMBRELL

BANKRUPTCY—VOLUNTARY PETITION IN ANTICIPATION OF DEATH TO DEFEAT CREDITORS.

*In re Hall*¹

The Bankrupt, an heir under his father's will, filed his petition in bankruptcy one hour and forty-five minutes before his father's death with full knowledge of his father's impending death and with the obvious intention of preventing his creditors reaching the expectant interest under the will. It was held that irres-

Construction Co., 255 Mo. 386, 164 S. W. 565 (1914); Veatch v. Tiernan, 251 S. W. 420 (Mo. App. 1923); Rockwell v. Standard Stamping Co., 210 Mo. App. 168, 241 S. W. 979 (1922); Fleishman v. Polar Wave Ice and Fuel Co., 148 Mo. App. 117, 127 S. W. 660 (1910).

5. 308 Mo. 288, 271 S. W. 361 (1925).

6. 265 Mo. 462, 178 S. W. 182 (1915).

7. Whittington v. Westport Hotel Operating Co., 326 Mo. 1117, 33 S. W. (2d) 963 (1930); Gannon v. Laclede Gas Light Co., 145 Mo. 502, 46 S. W. 968 (1898); Kenny v. Hannibal & St. Joseph R.R., 80 Mo. 573 (1883); Davis v. Missouri Electric Power Co., 88 S. W. (2d) 217 (Mo. App. 1935).

1. 16 F. Supp. 18 (W. D. Tenn. 1936).

pective of the bankrupt's intent, his trustee in bankruptcy cannot reach the interest acquired under the will as an asset of the estate.

The Bankruptcy Act provides that the trustee shall be vested with the title of the bankrupt to "property which prior to the filing of the petition he [the bankrupt] could by any means have transferred or might have been levied upon and sold under judicial process against him."² Whether an expectant interest, then, passes to the trustee in bankruptcy depends on whether or not such interest comes within the above language. Some jurisdictions have adopted the view that the expectant interest of a person under a will can be transferred,³ thus bringing such interest within the language of the Bankruptcy Act.⁴ An expectant interest has been held to be transferable⁴ by assignment,⁵ by sale,⁶ or by release,⁷ and it is subject to execution.⁸ In these jurisdictions, the result of the case under consideration might have been different. In many jurisdictions, however, an heir's expectant interest is ordinarily not recognized as property that can be transferred or levied upon.⁹

The question then suggests itself whether an exception can be made where, as here, the petition was filed for the very purpose of keeping the interest under the will away from the trustee. True, as the court expressly said, "the statute makes no provision for exceptional instances based on bad motive or fraudulent intent of the bankrupt in filing a petition." But if the court believes that such a practice by bankrupts is fraudulent and should be prevented, is it helpless to do any thing about it? Logically, "the Act must be construed, if the language reasonably permits such a construction to avoid an interpretation which permits a dishonest or tricky debtor to escape its provisions."¹⁰ It does not seem to be asking too much that the petition in bankruptcy be filed in good faith. The courts have read into the Bankruptcy Act the requirement of good faith on the part of the bankrupt in a number of situations where that element is not provided for in the letter of the Act. It has

2. BANKRUPTCY ACT, § 70 a (5); 11 U. S. C. A. § 110 (a) (5).

3. *Moore v. Little*, 41 N. Y. 66 (1869); *National Park Bank of N. Y. v. Billings*, 203 N. Y. 556, 96 N. E. 1122 (1911); *Clowe v. Seavey*, 208 N. Y. 496, 102 N. E. 521 (1913). See Note (1925) *Col. L. R.* 215, 216.

4. *Reilly v. Makenzie*, 151 Md. 216, 134 Atl. 502 (1926); *Watkins v. Biglow*, 93 Minn. 361, 101 N. W. 497 (1904); *Simpson v. Miller*, 7 Cal. App. 248, 94 Pac. 252 (1907); *Clarke v. Fay*, 205 Mass. 228, 91 N. E. 328 (1910); *Clowe v. Seavey*, 208 N. Y. 496, 102 N. E. 521 (1913).

5. *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149 (1912).

6. *Gary v. Newton*, 201 Ill. 170, 66 N. E. 267 (1903); *Hudson v. Hudson*, 222 Ill. 527, 78 N. E. 917 (1906).

7. *Bolin v. Bolin*, 245 Ill. 613, 92 N. E. 530 (1910); *Simmons v. Ross*, 270 Ill. 372, 110 N. E. 507 (1915); *Edler v. Frazier*, 174 Iowa 46, 156 N. W. 182 (1916); *Blackwell v. Harrelson*, 99 S. C. 264, 84 S. E. 233 (1914).

8. *Eneberg v. Carter*, 98 Mo. 647, 12 S. W. 522 (1889); *Williams v. Lobban*, 206 Mo. 399, 104 S. W. 58 (1907); *Higgins v. Downs*, 91 N. Y. Supp. 937 (1905); see *Mantz v. Kistler*, 221 Pa. 142, 70 Atl. 545 (1908).

9. 7 C. J. 119; see Note (1926) 36 *YALE L. J.* 272; (1927) 48 *A. L. R.* 795.

10. See *Hills v. F. D. McKinniss Co.*, 188 Fed. 1012 (N. D. Ohio 1910).

been held that a bankruptcy court will not hear a petition of one who had acquired a residence in a jurisdiction other than his bona fide one with the intent of defeating his creditors by claiming the higher exemptions at the forum.¹¹ Likewise, the courts have avoided preferences made more than four months prior to the filing of the petition where the bankrupt had delayed the filing of the petition with the sole motive of perfecting the preference and thus defeating other creditors.¹²

It would not then be a radical departure from bankruptcy principles to require good faith in the filing of a petition in bankruptcy.¹³ If so, a court ought to reach a different result from that of the case under consideration when it is reasonably clear that the petition was filed solely to keep the expectancy away from creditors.¹⁴

M. A. CORNELL, JR., '37

BILLS AND NOTES—TIME OF PRESENTMENT OF LOCAL CHECK TO HOLD DRAWER.

*Farm & Home Savings & Loan Ass'n of Mo. v. Stubbs*¹

This was an action on a note, to which the defense was payment by check which was accepted by the agent of the plaintiff. The check was delivered to the agent on Friday at 1:45 p. m. and indorsed by her with the name of the payee, plaintiff, and delivered to a depository bank for collection on Saturday morning but too late on that day to be cleared by the clearing house, which had met at ten a. m. On the morning of the following Monday the drawee bank failed to open for business; the check never was presented. The agent and the drawee bank were located in the same town. Held, the check operated as payment of the note. The court said that where a check is delivered by the drawer to the payee in the same city where the bank on which it is drawn is located, reasonable time for its presentment, where no cause for delay appears, is within banking hours on the day of its delivery or on the next day after its delivery. Section 2814 of the Revised Statutes of Missouri, which discharges the drawer if an unreasonable time elapses, and section 2824 of the Revised Statutes, which states that the nature of the instrument, the circumstances, and the usage of trade and business are to be taken into consideration, were so construed. The court pointed out that section 557 of the Revised Statutes (Uniform Bank Collection Code), which gave the collecting bank until the day after deposit of a local check to present it to the drawee, applied only as between the depositor and the collecting bank and had no effect on the drawer of the check.

11. *In re Garneau*, 127 Fed. 677 (C. C. A. 7th, 1904).

12. *In re Spelman. Bank of Sturgeon v. Stewart*, 13 F. (2d) 645 (W. D. Mo. 1926).

13. See Note (1931) 29 MICH. L. R. 915, 920.

14. In accord with the instant case, see *In re Seal*, 261 Fed. 112 (E. D. N. Y. 1919).

1. 98 S. W. (2d) 320 (Mo. App. 1936).

While it appears on the face of these facts that the plaintiff had two days and part of a third within which to present this check, the exact day on which this transaction occurred should be noticed carefully. The third day, Sunday, cannot be considered as part of that time which is reasonable, either at common law or under the Negotiable Instruments Law, which provides that when the last day for doing any act required by that statute falls on Sunday the following secular day will suffice.² That leaves Saturday and part of Friday, at best a day and a half. It may quite legitimately be doubted whether Saturday should be included. The Missouri statute says of instruments "falling due or becoming payable" on Saturday that they may be presented for payment on the following business day.³ This is a departure from the Uniform Negotiable Instruments Law, section 85, which says that paper falling due Saturday is to be presented on Monday, except demand paper which may at the option of the holder be presented on Saturday morning. It is arguable that the check here was an instrument "falling due or becoming payable" on Saturday; indeed the language of the court was to that effect, so it would seem from the statute that presentment the following Monday might suffice. This reasoning is also somewhat supported by the remainder of that same statute which says that if payment of a check is made on Saturday it would not be invalid. That language is permissive, giving grounds to an inference that it is optional with the holder whether to present the check on Saturday or Monday. On the basis of that interpretation the holder ought not be penalized for not exercising his option affirmatively. A possible interpretation, and one which would not clash with the holding in the principle case, would be that since the statute does not specifically mention demand paper, the statute is to refer to time paper only. The weakness in that is that the statute goes on specifically to say that *checks* may be presented on Saturday.

The most important aspect of the case, however, is that the court refused to allow a time for presentment which would give legal sanction to customary collection by merchants in the ordinary and normal course of business. The holder here actually deposited the check in his own bank the very next morning after he received it from the drawer. It is frequently stated to be the general or even universal rule that where the drawee and the payee and the drawer are in the same city, presentment, to be made in a proper time, must be made on the day of issue or at least on the day after.⁴ But upon an examination of the cases it is discovered that this may with more accuracy be termed universal *dictum*. The cases in which the statement as above made is actually applicable are comparatively infrequent; the delay is usually from five or six days up to years. And in those infrequent cases where the rule would be applicable there is some difference of opinion. The majority of the cases do make allowance for the ordinary usages of business men by permitting

2. MO. REV. STAT. (1929) § 2825.

3. MO. REV. STAT. (1929) § 2713.

4. 5 R. C. L. 509, § 32.

the payee to deposit the check in a local bank for collection on the day *after* he receives it and by permitting presentment to the drawee on the day *after that*.⁵ Only two cases *contra* have come to the writer's attention.⁶ Of course, even in the majority of jurisdictions the extra day must be due solely to the collection feature; mere circulation is not enough to extend the time, nor is a mere holding of the check and subsequent delayed presentation. However, there are at least three cases where the deposit for collection was made on the day following the issue but the presentment to the drawee did not occur until two days after, and this period was *not held to discharge the drawer*.⁸ The opposite has been held where the payee holds the check during all of the second day after receipt, deposits it for collection a third day, and the bank presents it the day after that.⁹ The instant case has then added itself to that very small minority that will not even take into consideration the time necessary for collection through a clearing house system. The case is one of first impression in Missouri, though the dictum has appeared before.¹⁰ The question has not been decided by the Supreme Court of Missouri; and so it is not impossible to conceive of an ultimate contrary rule in Missouri.

The actual basis for the haste required in the presentment of checks seems to be rooted in a theory of negligence, or, perhaps more accurately, that the loss caused by the unbusinesslike delay should in these commercial matters be borne by the delayer. Now, where a holder of a check retains it for two or three days during which time it could be discharged by the bank and then presents it after the bank has closed, there would be grounds for considering this a delay for which he himself should bear the loss, as between him and the drawer. But when a business man takes in

5. Fed. Land Bank of St. Louis v. Goodman, 173 Ark. 489, 292 S. W. 659 (1927); McFadden Bros. Agency v. Keesee, 179 Ark. 510, 16 S. W. (2d) 994 (1929); Bistline v. Benting, 39 Idaho 534, 228 Pac. 309 (1924); Clarke v. Davis, 48 Idaho 214, 281 Pac. 3 (1929); Johannsen v. Evans, 271 Ill. App. 372 (1933); Village of Lombard v. Anderson & Glens Falls Indemnity Co., 280 Ill. App. 283 (1935); Md. Title Guarantee Co. v. Alter, 167 Md. 244, 173 Atl. 200 (1934); Spencer v. Burakiewicz, 192 N. E. 616 (Mass. 1934); Bay City v. Concordia Mut. Fire Ins. Co., 260 Mich. 611, 245 N. W. 532 (1932); Zaloom v. Ganim, 72 Misc. 36, 129 N. Y. Supp. 85, *aff'd*, 148 App. Div. 892, 132 N. Y. Supp. 1151 (1911); Scott v. Board of Educ. of Union Free Schools, 241 App. Div. 883, 272 N. Y. Supp. 20 (1934); Loland v. Nelson, 8 P. (2d) 82 (Ore. 1932); Loux v. Fox, 171 Pa. 68, 33 Atl. 190 (1895); Willis v. Finley, 173 Pa. 28, 34 Atl. 213 (1896).

6. Edmiston v. Herpolsheimer, 66 Neb. 94, 92 N. W. 138 (1901); Dorchester v. Merchant's Nat. Bank of Houston, 106 Tex. 201, 163 S. W. 5 (1914).

7. Koch v. Sanford Loan & Realty Co., 220 Mo. App. 396, 286 S. W. 732 (1926); Sugnet v. Board of Educ. of Union Free Schools, 241 App. Div. 883, 272 N. Y. Supp. 21 (1934); Hawks v. Board of Educ. of Union Free Schools, 241 App. Div. 880, 272 N. Y. Supp. 24 (1934).

8. Johannsen v. Evans, 271 Ill. App. 372 (1934); Scott v. Board of Educ. of Union Schools, 241 App. Div. 883, 272 N. Y. Supp. 20 (1934). *Contra*: Lowell Co-op. Bank v. Sheridan, 287 Mass. 338, 188 N. E. 636 (1934).

9. Viles v. Warren Co., 132 Me. 277, 170 Atl. 501 (1934).

10. Koch v. Sanford Loan & Realty Co., 220 Mo. App. 396, 286 S. W. 732 (1926).

a number of checks on one day and on the following day deposits them for collection in a customary fashion so that in the normal course presentment would usually be made on the succeeding day, no unbusinesslike delay would seem to have occurred.¹¹ Mercantile law should adapt itself to legitimate business practices, rather than force business practices into legal moulds.¹² Law exists for business, not business for law.

PAUL F. NIEDNER

CONSTITUTIONAL LAW—APPLICATION OF GOLD LEGISLATION TO LEASES CONTAINING
“GOLD CLAUSES.”

*Holyoke Water Power Co. v. American Writing Paper Co.*¹

Between the years of 1881 and 1897 thirteen leases were executed by the Holyoke Water Power Company to the American Writing Paper Company for the enjoyment in perpetuity of water power rights and privileges in consideration of an annual rental. With variations immaterial for present purposes, the provision for rental is the same in all the leases. By concession the following form has been accepted as typical: the grantee shall yield and pay unto the grantor as rent “a quantity of gold which shall be equally in amount to fifteen hundred (\$1,500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency.” In June, 1934, the dollar having been devalued [48 STAT. 337, 31 U. S. C. A. § 441 (1934)], and the Joint Resolution having been adopted [48 STAT. 112 (1933)], the lessee became insolvent and filed a petition in bankruptcy which was approved. The lessor intervened and prayed that the amount due it under the several leases be determined. The lessee contended that by force of the Joint Resolution, the debt was dischargeable, dollar for dollar, in the then prevailing currency. The lessor did not deny that the law declines to give effect to contracts whereby debts are made payable in gold coin, or in currency varying with the gold basis of the dollar, but instead argued that the

11. One should be careful to distinguish between the discharge of a drawer and the discharge of an indorser; the latter is only discharged if an unreasonable delay occurs after the last *negotiation*. Section 2699 of the Revised Statutes of Missouri so reads concerning a bill of exchange payable on demand, and by section 2813, the provisions applicable to a bill of exchange payable on demand apply to a check. The corresponding sections of the Uniform Negotiable Instruments Law are respectively sections 71 and 185.

12. Generally a check drawn on a bank in another place must be forwarded on the day after receipt and presented to the drawee the day after arrival at the situs of the drawee. *Swift & Co. v. Miller*, 62 Ind. App. 312, 113 N.E. 447 (1916). However, that time intervening will vary with the system of collection customary and it is not always necessary that the check be sent by the shortest route if there is a customary clearing system used. *Sublette Exch. Bank v. Fitzgerald*, 168 Ill. App. 240 (1912).

1. 57 Sup. Ct. 485 (1937).

covenant here in question was not for the payment of a debt, but for the sale of a commodity, or if viewed as a covenant for payment that the standard was the commodity value of bullion, not the value of the coin as money. The District court held for the lessee and the Circuit Court of Appeals affirmed this judgment. Upon certiorari the Supreme Court of the United States held the obligation was one for the payment of money and not for the delivery of gold as upon the sale of a commodity. The situation of the parties, their business needs, and expectations must be considered, in gauging their intention. The lessor was a water power company and thus there could be no pretense that it was a stipulation for gold to be used in art or in industry. The gold was a standard with which to stabilize the value of the dollar; the dollar was not a yardstick with which to measure the quantity of the gold. A contract for the payments of gold as the equivalent of money, and *a fortiori* a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution and equally within its spirit. While it is true that the Joint Resolution frustrates the expectation of the parties, that payment should be made in a standard which would remain constant and is to this extent abortive; yet the disappointment of expectations and the frustration of contracts may be a lawful exercise of power when the expectation and contract are in conflict with public welfare.

This decision further clarifies the application of the Joint Resolution which was dealt with in *Norman v. Baltimore and Ohio R. R.*,² and *Perry v. United States*.³ The foregoing cases having determined the constitutionality of the act, questions of applicability remained to be determined.

It appears that Mr. Justice Cardozo has set up a criterion for determining whether or not an obligation containing a "gold clause" is an obligation for the delivery of gold as a commodity, i.e. the sale of gold as a commodity, and thus exempt from the Joint Resolution, or whether it was an obligation for the payment of money and thus within the provisions of the resolution.⁴ The statement in the opinion, "We must consider the situation of the parties, their business needs and expectations, in gauging their intention,"⁵ followed by, "Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction,"⁶ appears to be a particularly useful test in view of the susceptibility of "gold

2. 294 U. S. 240 (1935).

3. 294 U. S. 330 (1935).

4. Executive Order of Apr. 5, 1933, promulgated under Section 3 of the Emergency Banking Relief Act, 48 STAT. 2, 12 U. S. C. A. § 248n (1933), requiring possessors to deliver any gold held over the amount of \$100 to Federal Reserve Banks. This order permitted the holding and acquisition of gold only for use in art, industry, rare coin collection, and for export, and provided for licensing transactions. This was held valid in *Nortz v. United States*, 294 U. S. 317, 328 (1935).

5. 57 S. Ct. 485, 488 (1937).

6. 57 S. Ct. 485, 488 (1937).

clauses" to variations in phraseology.⁷ This type of interpretation is not without precedent.⁸

Mr. Justice Cardozo interprets the intention of Congress as expressed in the Joint Resolution⁹ as including transactions whereby gold, coined or uncoined, is to be delivered in satisfaction of a debt, payment and not a *bona fide* sale being the end to be achieved, and also those obligations whereby the debt is dischargeable in dollars varying in number with the gold basis of the currency. This would seem a reasonable interpretation of the act, since the wording is "*gold* or a particular kind of coin or currency of the United States." (Italics the writer's).

The effect of the decision then appears to be to limit the scope of the commodity exception to the Joint Resolution, to those transactions wherein the parties intend a *bona fide* sale of gold for art or industrial purposes; the intention of the parties when inserting the clause to be governing at all times.

Relying upon the principal case for the proposition that the purpose of insertion and not the wording of a "gold clause" is the determinative factor in testing the applicability of the Joint Resolution, it would seem that the recent case of *Emery Bird Thayer Dry Goods Co. v. Williams*¹⁰ would be governed by the principal case. The "gold clause" provision in this lease, which was made in 1890, provided that rental payments were to be made in currency during the first six years and after that in quarter annual payments of 139,320 grains of pure gold. The lessors were given the privilege, however, of demanding \$6,000 in currency in lieu of gold. Currency had been accepted by the lessor until 1933, at which time they demanded bullion or, in the alternative, the payment of \$10,185.75, which was the price the government was then paying for newly-mined gold. The court held that the lease called for the delivery of a commodity and was therefore not affected by the Joint Resolution as it

7. The clause may provide for payment in an amount of gold measured in a certain number of gold dollars of the weight and fineness of a certain year; or in a number of gold dollars of the weight and fineness of a certain year; or in an amount of currency determined upon the gold content of the dollar of a certain year; or it may provide for payment in grains of gold of a certain fineness with an option in the lessor of taking currency. All these expressions result in a hedging provision to guard against depreciation of the dollar.

8. Bradley, J. in *The Legal Tender Cases*, 12 Wall. 457, 566 (1870).

9. The preamble to the Joint Resolution, 48 STAT. 112 (1933), states the declared intention of Congress as follows: "provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in payment of debts." The Resolution then provides that such obligations shall be discharged upon payment dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. The term "obligation" is defined in Sub-section (B) of the Resolution as an obligation payable in *money* of the United States. (Italics the writer's).

10. 15 F. Supp. 938 (W. D. Mo. 1936).

applied only to "money obligations;" that this was a contract for the delivery of bullion and not gold coin and that limitations which inhere in the ownership of gold coin do not inhere in the ownership of bullion any more than in other property. In determining what would satisfy the lessee's obligation the court held that although delivery of bullion was impossible, yet payment of \$10,185.75 would satisfy the contract requirement of payment in gold, since the lessors were interested in gold only as a "symbol of value."

For the purpose of declaring the Joint Resolution inapplicable, Judge Otis considers the "gold clause" as calling for the delivery of a commodity, but for the purpose of determining the amount of rental to be paid by the lessee, states that the "patent meaning" of the language of the clause was to regard gold as a "symbol of value" in order to secure the lessor against depreciation in the value of the dollar. The latter statement seems to be an admission that this was a money obligation measured in terms of gold and not an obligation for the sale of gold as a commodity. These two views are inconsistent. The former is vulnerable to the line of reasoning applied by Mr. Justice Cardozo in the principal case and to common understanding. It is difficult to conceive of the lessor being interested in gold as a commodity and not as money in view of the fact that the lessor was not a dealer in gold or an artisan interested in gold for commercial purposes but rather was a landlord interested in rental. Considering the position taken by the court to the effect that the parties were regarding the gold as a "symbol of value" and were specifically contracting against the possibility of depreciation by making the number of dollars measurable in terms of gold, the clause falls precisely within the express terms of the Resolution according to Mr. Justice Cardozo's interpretation and \$6,000 dollars in the present currency should discharge the lessee's quarterly rental.

In answering the lessee's contention that the case of *Perry v. United States* is governing, Judge Otis points out that that case dealt with gold coin and further stated that no limitations inhere in the ownership of bullion which do not inhere in the ownership of all property. In the portion of the opinion headed "Conclusion,"¹¹ it is stated that when parties have contracted for the payment of rent in grains of gold or their value and not in depreciated dollars, no judge, the President, or Congress has the power to change this type of contract. In these two statements the court overlooks the declaration of the Supreme Court in *Norman v. Baltimore and Ohio R. R.*,¹² where it was held that special significance attaches to the ownership of gold and silver since it is the standard of our medium of exchange, that "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity."¹³ The power

11. 15 F. Supp. 938, 946 (W. D. Mo. 1936).

12. 294 U. S. 240 (1935).

13. 294 U. S. 240, 307, 308 (1935).

of Congress to enact laws for the purpose of protecting the monetary standard in the interest of the general welfare has been consistently upheld by the Supreme Court.¹⁴

However much the abortive nature of the Joint Resolution may shock the judicial senses of those advocates of sanctity and strict construction of contracts, the fact remains that the express intention of Congress being to make inoperative such "gold clause" provisions in the interest of public welfare and the means chosen to achieve this intention having been held a valid exercise of legislative power by the Supreme Court,¹⁵ nothing remains to be done but to enforce it.

H. L. LISLE

CORPORATIONS—INFORMAL CORPORATE ACTION— DECLARATION OF DIVIDENDS.

*Brown v. Luce Mfg. Co.*¹

The plaintiff entered into a contract of employment with the defendant corporation, which contained a provision for the sale to the plaintiff by the defendant of 100 shares of its stock, to be paid for out of dividends which might be declared thereon. The stock was not to be transferred to the plaintiff until thus paid for, and, in the event that the employment terminated before that time, the company agreed to pay the amount of such dividends to the plaintiff in cash. The corporation was a family affair, Mrs. Luce and her two sons being the sole stockholders and directors, and conformed only to such laws and regulations relative to the corporation as was necessary to keep the charter alive. There was no formal meeting of the board of directors during the time that the plaintiff was connected with the defendant, but the affairs were discussed informally between the stockholders occasionally; and one of the sons was in active charge of the company's business. He authorized, at the end of one fiscal year, a credit to the plaintiff (and to one other employee but not to stockholders generally) on the corporate books of 4% of the net profits for that year. The company lost money in subsequent years and this credit was removed. At the termination of the employment, the plaintiff's demand for the sum, as a declared dividend, was refused, and he instituted this suit. The court held that no particular formality was necessary for the declaration of a dividend, the crediting of the stockholder on the books of the corporation with a portion of the profits being sufficient to indicate a severance of the amount from the assets of the corporation so as to become the sole and exclusive property of the stockholder. The court found that the individual character of the credit and the losses of the corporation in subsequent years were not controlling factors; and, in

14. *The Legal Tender Cases*, 12 Wall. 457 (1870); *Perry v. United States*, 294 U. S. 330 (1935); *Norman v. Baltimore and Ohio R. R.*, 294 U. S. 240 (1935).

15. *Norman v. Baltimore and Ohio R. R.*, 294 U. S. 240 (1935).

1. 96 S. W. (2d) 1098 (Mo. App. 1936).

answering the contention of the corporation that the dividend, if any, had not been authorized by the board of directors, said: "Of course, primarily the directors only have power to declare a dividend but in the case at bar the directors turned over their authority in respect to the functions of the corporation to its president who declared the dividend (and it may be inferred that this was done with the acquiescence, if not the consent, of the only other active officer and director of the company). Under such circumstances the dividend was properly declared by the president."

This case clearly demonstrates the informal manner in which the internal affairs of a family corporation are often managed. Mrs. Luce and her two sons had created a corporation to conduct the business, with the advantages incident to such incorporation. But, as a practical matter, the mother took no active part in the business and the sons operated it as their own private enterprise, one of them being president and active manager. These three were the only stockholders and constituted the necessary number of directors. But there were no meetings of the directors as a board; the affairs of the corporation were discussed only informally among the stockholder-directors from time to time, with authorization given the president to exercise what powers the corporation possessed.

One question presented was whether there had been a "declaration" of a dividend. It is well established that no part of the profits of a corporation amounts to a dividend until in some manner set apart or designated to the use of the stockholders.² Until then the profits are assets of the corporation as such and do not belong to the individual stockholders.³ It is also well settled that no particular formality or phraseology in the declaration of a dividend is necessary.⁴ The crediting of a stockholder on the books of the company with a portion of the profits indicates such a "severance" of the amount from the assets of the company as to create a debtor-creditor relation between corporation and stockholder.⁵ Although a declared dividend usually inures to the benefit of all the stockholders alike, with an exception, of course, in the case of preferred stockholders, it may be for the benefit of certain ones, if their distinctive position justifies such a preference.⁶ Such was clearly the position of the plaintiff in this case. And if a dividend were actually declared, the fact that the company lost money in subsequent years was not, without more, a valid ground for withdrawing the dividend by cancellation of the credit.⁷

2. *Hayes v. St. Louis Union Trust Co.*, 317 Mo. 1028, 298 S. W. 91 (1927); 11 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (Rev. and Perm. ed. by Jones, 1932) § 5319.

3. *Gibbons v. Mahon*, 136 U. S. 549 (1890).

4. *Hadley v. Comm. of Internal Revenue*, 36 F. (2d) 543 (App. D. C. 1929); 11 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (Rev. and Perm. ed. by Jones, 1932) § 5350.

5. *Spencer v. Lowe*, 198 Fed. 961 (C. C. A. 8th, 1912), note (1913) 26 HARV. L. REV. 370.

6. *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274, 58 Atl. 313 (1904).

7. *McLaren v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819 (1906).

The seemingly most controversial point in the case, from the point of corporate theory, is the manner in which the dividend was declared. Did the "corporation" declare the dividend? Ordinarily the management of a corporation is placed in the hands of the board of directors with the determination of dividend policy being considered a matter peculiarly within their special province.⁸ And, as a general rule, the directors must act as a board in a matter which requires director's action, else it is often said that the "corporation" has not acted. Here the directors did not act as a board, but what they did was acquiesced in by all the stockholders. This dispenses with the real reason requiring *board* action. At this point, some would argue that the stockholders are not the "corporation," relying on an alleged rule of corporation law (which is really nothing more than a convenient legal jingle), viz: a corporation is an entity separate and distinct from its stockholders.⁹ That alleged rule is not the legal force which really decides a controversy, and in fact courts do not permit this concept to obscure their vision of the actualities involved in a particular situation.¹⁰ The court in the instant case reached a desirable result by courageously throwing off the strictures of technicality and deciding that the stockholders (they and the directors being identical) had either authorized, or acquiesced in, the management of the corporation's affairs, including the matter of declaration of the dividends by the president, and therefore the "corporation" had acted. There could be no sound basis for releasing the corporation from the obligations thus incurred. "Courts are not to shut their eyes to the realities of business life. Here was a small corporation controlled by a single family. Its business was run without formality. None the less it was run, and responsibility must be centered somewhere."¹¹

WARNER G. MAUPIN

CRIMINAL LAW—CRIME WITHOUT *Mens Rea*.

*Osaka Shosen Kaisha Line v. United States*¹

The Immigration Act² made it a duty of every person "bringing an alien to, or providing a means for an alien to come to, the United States, to prevent the landing

8. Mo. Rev. Stat. (1929) § 4942; 14 C. J. 807.

9. LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* (1936) c. 2.

10. *Smith v. Moore*, 199 Fed. 689 (C. C. A. 9th, 1912); *Wenban Estate v. Hewlett*, 193 Cal. 675, 227 Pac. 723 (1924); note (1925) 13 CALIF. L. REV. 235; *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 127 N. W. 752 (1910); *Jones v. Williams*, 139 Mo. 1, 39 S. W. 486 (1897); *Gerard v. Empire Square Realty Co.*, 195 App. Div. 244, 187 N. Y. Supp. 306 (1921); *Moore v. Aetna Casualty & Surety Co.*, 155 Va. 556, 155 S. E. 707 (1930); note (1931) 17 VA. L. REV. 516. All these are cases of valid *informal* corporate action, though the reasoning is often couched in "entity" language.

11. Per Cardozo, J., in *Barkin Construction Co. v. Goodman*, 221 N. Y. 156, 161, 116 N. E. 770, 771 (1917).

1. 57 Sup. Ct. 356 (1937).

2. Immigration Act of 1917, sec. 10(a), as amended, 8 U. S. C. A. sec. 146(a).

of such alien in the United States at any time or place other than as designated by the immigration officers." Failure to comply constitutes a misdemeanor punishable by fine or imprisonment or both. At the option of the Secretary of Labor a fine of \$1,000 may be imposed and a lien upon the vessel may be created for which it shall be libeled.

The Santos Maru came into the port of New Orleans carrying an alien passenger, who was enroute from Brazil to Japan, on a through ticket. A written order was issued to the steamship to hold the alien on board at all United States ports. A few days later, the ship arrived at the port of Galveston, Texas; and there by the negligence of those in charge of the ship the alien passenger was allowed to escape and land in the United States. A libel was filed in behalf of the United States, praying a decree for the \$1,000 penalty and to enforce the lien against the ship. A decree was entered for the United States. The Supreme Court *held* that when a ship enters a United States port with a passenger on board that passenger has been brought to the United States. The court thought this was the only possible construction of the statute and therefore it was immaterial whether or not there was an intent to leave the alien in the United States.³

The concept that there can be a crime in the absence of any criminal intent or *mens rea* has grown up rapidly in recent years. In earlier times courts and writers often declared that there could be no crime without criminal intent.⁴ Since these declarations many statutory crimes have been created which are silent as to intent. Some of these the courts have interpreted as requiring no criminal intent or *mens rea*. The court in *Commonwealth v. Raymond*⁵ said, "The defendant is bound to know the facts and obey the law at his peril." In nearly all jurisdictions the courts in the face of an almost unbroken line of authority have upheld this doctrine in connection with certain types of crime. In *State v. Bruder*,⁶ for example, the defendant was prosecuted under a Missouri statute that prohibited the sale of intoxicating liquors to minors. The court held that the act was prohibited absolutely and the fact the defendant thought the purchaser was of age was no defense.

The difficulty that the problem presents is that of ascertaining which crimes require a criminal intent and which do not. The intent has not been required⁷ in

3. The Osaka Kaisha Line based its contention that such an intent was necessary, on *Taylor v. United States*, 207 U. S. 120 (1907). The Supreme Court distinguished that case from the instant one in that the alien in the earlier case was a sailor and not a passenger. In such a case an intent to leave the alien would be necessary before the provision was violated, because the sailor is one of the agencies which brought the ship in, and it is necessary that some of the crew of a vessel go ashore to perform various duties.

4. 4 BL. COMM. *21; 1 BISHOP, CRIMINAL LAW (9th ed. 1930) § 287; *The Queen v. Tolson*, 23 Q. B. D. 168 (1889); *State v. Weisman*, 225 S. W. 949 (Mo. 1920); *People v. Parker*, 38 N. Y. 85 (1868).

5. 97 Mass. 567 (1867).

6. 35 Mo. App. 475 (1889).

7. Sayre, *Public Welfare Offenses* (1933) 33 COL. L. R. 55.

illegal sale of liquors,⁸ sales of impure foods and drugs,⁹ violations of anti-narcotic acts,¹⁰ criminal nuisances,¹¹ and offenses against traffic regulations.¹² Many writers and courts have classed these and other statutory crimes in which no intent is required as crimes that are *mala prohibita* as opposed to *mala in se*.¹³ These terms are fine sounding Latin phrases and look well in opinions, but when analyzed they are broad and general and in effect mean nothing. Another concept that has been used is that crimes which do not involve moral turpitude do not require a criminal intent or *mens rea*.¹⁴ Again we have a classification that is of very little help. The question is as to what is moral turpitude and, since conviction of any crime carries a certain moral taint, what degree of moral turpitude is sufficient to require a criminal intent. A third test has been formulated by Professor Sayre.¹⁵ He says that criminal intent is not required in "public welfare offenses." The test that is used is a balancing of the necessity for regulation and the benefit to the public against the hardship on the individual. This seems to be the best and most useful test available, when one considers that the real reason for any system of criminal law is the regulation of society in order to afford the greatest protection to all. A greater number of criminal statutes are today being interpreted as not requiring criminal intent, because of the increasing complexity of civilization. The types of crime that the doctrine has been applied to are all violations of the sort of regulation that is necessary to a well ordered society. As an example, we have statutes which require automobiles to show certain lights at night. This is a regulation necessary to the safety of other travelers and the drivers themselves, due to the heavy automobile traffic on modern highways. If the prosecution were required to show that each offender knew his lights were not working properly, convictions would be scarce, and the law easily evaded. The courts have shown wisdom in adopting a statutory interpretation that is progressive and necessary due to changing conditions.

In the noted case the Supreme Court felt that the great social importance of preventing unauthorized aliens from landing in the United States justified the extension of the doctrine to another type of crime. At first glance it might appear that this case could be explained on negligence, in that such negligence supplied the *mens rea*.¹⁶ This, however, is not the basis of the decision, as the opinion clearly

8. Commonwealth v. Goodman, 97 Mass. 117 (1867); State v. Field, 119 S. W. 499 (Mo. App. 1909).

9. State v. Huber, 4 Boyce 259, 88 Atl. 453 (1913); Commonwealth v. Farnen, 91 Mass. 489 (1864); St. Louis v. Ameln, 235 Mo. 669, 139 S. W. 429 (1911).

10. United States v. Balint, 258 U. S. 250 (1922).

11. State v. Wells, 70 Mo. 635 (1879); People v. High Ground Dairy Co., 166 App. Div. 81, 151 N. Y. Supp. 710 (2d Dept. 1915).

12. Goodwin v. State, 63 Tex. Cr. 140, 138 S. W. 399 (1911).

13. People v. Johnson, 288 Ill. 442, 123 N. E. 543 (1919); 1 WHARTON, CRIMINAL LAW (12th ed. 1932), § 399.

14. Howell v. Stewart, 54 Mo. 400 (1873).

15. Sayre, *loc. cit supra* note 7.

16. Tift v. State, 17 Ga. App. 663, 88 S. E. 41 (1916); Peay v. Commonwealth, 181 Ky. 396, 205 S. W. 404 (1918).

indicates that the defendant had an absolute duty to prevent the alien from landing, and his landing would result in a violation of the statute regardless of defendant's fault.

DONALD H. CHISHOLM

HOMICIDE—DEATH RESULTING FROM IMPROBABLE CAUSE.

*State v. Frazier*¹

In committing an assault and battery on the deceased, the defendant struck with his fist only one moderate blow, which ordinarily would not have been dangerous to life. Unknown to the defendant, however, the deceased was afflicted with hemophilia, a condition of the blood such as prevents coagulation and thereby permits bleeding to go unchecked. Because of this condition a hemorrhage from the slight laceration in the deceased's mouth caused by the blow ensued which lasted ten days, ending in death. The Supreme Court of Missouri affirmed a conviction of the defendant of manslaughter.

The case presents an interesting problem in legal causation, particularly in so far as causation is concerned with "foreseeability." If the injury had been caused by a negligent rather than an intentional act, and the action had been one in tort, then different causation formulae would probably produce opposite results. If the "natural or direct" formula were applied, then the defendant would be liable,² as there was undoubtedly causation in fact and no problem of an intervening force is involved. The same results may even be reached if liability were made to depend upon whether the negligent act was a "substantial factor" in producing the death.³ If, on the other hand, it were made to depend upon foreseeability, as under the "natural and probable" formula used in Missouri,⁴ then it would seem that a directed verdict for the defendant would be proper.⁵

1. 98 S. W. (2d) 707 (Mo. 1936).

2. *Mann Boudoir Car Co. v. Dupre*, 54 Fed. 646 (C. C. A. 5th, 1893); *Baltimore City Passenger Ry. v. Kemp*, 61 Md. 74 (1883).

3. RESTATEMENT, TORTS (1934) §§ 431, 461.

4. *Diehl v. A. P. Green Fire Brick Co.*, 299 Mo. 641, 253 S. W. 984 (1923); *American Brewing Co. v. Talbot*, 141 Mo. 674, 42 S. W. 679 (1897); *Saxton v. Mo. Pac. Ry.*, 98 Mo. App. 494, 72 S. W. 717 (1903).

5. *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157 (1909). The principal case is to be distinguished on the ground that the consequences were less foreseeable, from cases in which death results from the negligence of a physician in treating the injury, such as *Horney v. St. Louis & N. E. Ry.*, 165 Ill. App. 547 (1911); or cases in which death results from bloodpoisoning, as in *Armstrong v. Montgomery St. Ry.*, 123 Ala. 233, 26 So. 349 (1898). See also cases collected in (1914) 48 L. R. A. (N. S.) 93. The consequences in the principal case would also seem less foreseeable than in cases where the injury merely aggravates a latent pre-existing disease, such as *Herndon v. City of Springfield*, 137 Mo. App. 513, 119 S. W. 467 (1909); *Hillard v. Chicago City Ry.*, 163 Ill. App. 282 (1911); or cases where the injury merely hastens inevitable death from a disease, as in *Herke v. St. Louis & S. F. Ry.*, 141 Mo. App. 613, 125 S. W. 822 (1910). See also cases collected in 48 L. R. A. (N. S.) 119 (1914).

If the principal case, where the defendant's conduct was not merely negligent, but was intended by him to cause bodily harm, had been in tort, then it would seem clear that the defendant would be liable.⁶ When a defendant's conduct was intended to cause bodily harm, he is liable for the actual consequences of his acts, and it matters not that the result was unforeseeable or highly extraordinary, or even that there was an intervening force.⁷

The same result is reached in criminal cases. Here too the defendant is liable for the actual consequences of his intentional act even though such consequences were not intended and could not reasonably have been foreseen by him.⁸ If the defendant intentionally causes an injury which produces a disease resulting in death, the defendant is criminally liable for the death.⁹ Even if the disease, or a feeble condition, existed at the time of the injury, the defendant is liable if the injury accelerated or contributed to the death, although the injury alone would probably not have been fatal and although the disease itself would eventually have been fatal.¹⁰ Moreover, it is immaterial that the defendant did not know of the disease or feeble condition,¹¹ or could not reasonably have anticipated that death would result from his act.¹²

It would seem, therefore, that the holding in the principal case is proper. While this would not be true if the primary reason for punishing a defendant were because of his having had an evil mind, yet if the real concern is with the fixing of responsibility for an injury which has occurred to society, possible hardship and lack of reasonable foreseeability should be disregarded. Many authorities, however, believe that the object of punishment is to protect society. If the application of this theory would not result in an acquittal of the defendant on the charge of homicide, it would at least make the principal case a proper one for the use of the indeterminate sentence and individualization of treatment, based on scientific knowledge, after the conviction of the defendant.¹³

SESCO V. TIPTON

6. *Watson v. Rinderknecht*, 82 Minn. 235, 84 N. W. 798 (1901); *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403 (1891).

7. RESTATEMENT, TORTS (1934) § 279; *Hickey v. Welch*, 91 Mo. App. 4 (1901); *Bouillon v. Laclede Gas Light Co.*, 148 Mo. App. 462, 129 S. W. 401 (1910).

8. MILLER, CRIMINAL LAW (1934) §§ 23 to 27.

9. *State v. Block*, 87 Conn. 573, 89 Atl. 167 (1913); see also cases collected in 29 C. J. 1080, § 55.

10. *People v. Lanagan*, 81 Cal. 142, 22 Pac. 482 (1889); see also cases collected in 29 C. J. 1082.

11. *Cunningham v. People*, 195 Ill. 550, 63 N. E. 517 (1902); 29 C. J. 1082.

12. *Baker v. State*, 30 Fla. 41, 11 So. 492 (1892); 29 C. J. 1082.

13. *Glueck, Principles of a Rational Penal Code* (1928). 41 HARV. L. REV. 453. It is often suggested that this treatment should be applied by a board composed largely, at least, of scientists in different fields.

INSURANCE—DEATH WHILE VIOLATING LAW.

*Provident Life and Accident Ins. Co. v. Eaton*¹

Insured died from injuries received in an automobile accident when he drove his car off the road and over an embankment. He had been driving at an excessive rate of speed and there was some evidence that he had been drinking. The accident insurance policy did not cover death or injuries sustained by the insured "while intoxicated, or under the influence of an intoxicant, or while violating law." It was held that the intoxication of the insured at the time of the accident, or the violation of the law at that time, need not contribute to, or cause the death or injuries, in order to exempt the insurance company from liability on the policy; therefore, if the insured was intoxicated, or under the influence of an intoxicant, or speeding in violation of the law at the time when the injuries were received, the company was not liable.

The holding that no causal connection is necessary between the injuries or death of the insured and the insured's intoxication is in accord with the majority view under the same type of intoxication clause found in the principal case.² In a Missouri case where an accident policy provided that if the injury was sustained while the insured was under the influence of an intoxicant, his recovery should be one-eighth of what it otherwise would be, it was held that the provision was to apply without regard to whether or not the intoxication caused the injury. The court said that the insurance company had, by its policy, refused to insure the insured against accidental injury while he was intoxicated.³ However, a recent Ohio case held that even under the "while intoxicated" clause there must be causative connection; otherwise, there would be a legal fraud practiced on the insured, since if the insured was in an intoxicated condition and was struck by lightning, the insurance company would not be held liable under the policy.⁴ That case is contrary to the majority view, and is the only case found by the writer to that effect.

As for the "violation of law" clause, this has generally appeared in the litigated cases, in substantially this form: the insurance company shall not be liable if the injury or death of the insured occurs in consequence of, or resulting from violation of the law. This provision has been construed the same in both the accident and the life insurance policies.⁵ It is held that under such a provision there must be some

1. 84 F. (2d) 528 (C. C. A. 4th, 1936).

2. *Flannagan v. Provident Life and Accident Ins. Co.*, 22 F. (2d) 136 (C. C. A. 4th, 1927); *Order of United Commercial Travelers of Am. v. Greer*, 43 F. (2d) 499 (C. C. A. 10th, 1930); *Murdie v. Maryland Casualty Co.*, 52 F. (2d) 888 (D. C. Nev. 1931); *Shader v. Ry. Passenger Assurance Co.*, 66 N. Y. 441 (1876); 1 C. J. 457.

3. *Mossop v. Continental Casualty Co.*, 137 Mo. App. 399, 118 S. W. 680 (1909).

4. *Washington Fidelity Nat'l Ins. Co. v. Herbert*, 49 Ohio App. 151, 195 N. E. 492 (1934).

5. 6 COOLEY, BRIEFS ON INSURANCE (2d ed. 1928) 5201.

causative connection between the act which constitutes the violation of the law and the death or injuries of the insured,⁶ and whether there is or not, is a question for the jury.⁷ The provision of the policy in the principal case contains no words of causation. Yet, even in such a policy the courts have held that, to exempt the insurance company, the injury must be caused by or result from the violation of the law.⁸ Why courts reach different results under the "while intoxicated" clause from those reached under the "while violating the law" clause is not clear. Perhaps it is due to the indignation of the courts against a person driving a car while intoxicated (some of the cases have been automobile cases). Perhaps it is due to the feeling that, though intoxication may have really contributed to the accident, the causal connection is not clear and the jury will find none if permitted to pass upon the question.

The principal case is the only one found by the writer which holds contrary to the majority view under the "violation of the law" clause—or rather, purports to hold to the contrary, since the decision can be sustained on the "intoxication" clause.

6. *Modern Woodmen of Am. v. Ingram*, 362 Ind. 350, 198 N. E. 798 (1935); *Rowe v. United Commercial Travelers' Ass'n*, 186 Iowa 454, 172 N. W. 454 (1919); *Sovereign Camp, W. O. W. v. Hunt*, 136 Miss. 156, 98 So. 62 (1923); *Accident Ins. Co. of North Am. v. Bennett*, 90 Tenn. 258, 16 S. W. 723 (1891); *Guy v. Grand Lodge, Colored Knights of Pythias of Texas*, 46 S. W. (2d) 1057 (Tex. Civ. App. 1932). Note (1922) 17 A. L. R. 1005.

In *Landry v. Independent Nat'l Life Ins. Co.*, 17 La. App. 10, 135 So. 110 (1931), insured was employed to conduct poker games, in violation of law. He ordered a player who was marking the cards to leave the game, whereupon the player shot him. His policy provided that he was not covered for death resulting from violation of law. It was held that the direct and proximate cause of the killing arose out of and resulted from violation of law.

The death or injury may be due proximately to the violation of the law. It is not necessary that it be the direct result. *Travelers' Ins. Co. v. Seaver*, 86 U. S. 531 (1873); *Bloom v. Franklin Ins. Co.*, 97 Ind. 478 (1884).

7. *Davilla v. Liberty Life Ins. Co.*, 299 Pac. 831 (Cal. App. 1931); *Rowe v. United Commercial Travelers' Ass'n*, 186 Iowa 454 (1919).

8. *Davilla v. Liberty Life Ins. Co.*, 299 Pac. 831 (Cal. App. 1931); *Fisher v. Midland Casualty Co.*, 189 Ill. App. 486 (1914); *Matthes v. Imperial Accident Ass'n*, 110 Iowa 222, 81 N. W. 484 (1900); *Washington Fidelity Nat'l Ins. Co. v. Herbert*, 49 Ohio App. 151, 195 N. E. 492 (1934); *Life and Casualty Ins. Co. v. Hargraves*, 169 Tenn. 388, 88 S. W. (2d) 451 (1935).

In those policies which contain no provision exempting the insurer from liability with regard to the insured's violating the law, the insurer is liable, notwithstanding the fact that he may have been injured as the result of violation of the law, if it does not appear that the policy was obtained in contemplation of such violation and the danger consequent thereon. *Zurich General Accident and Liability Ins. Co. v. Flickinger*, 33 F. (2d) 853 (C. C. A. 4th, 1929); *Jordon v. Logia Suprema de la Alianza Hispano-Americana*, 23 Ariz. 584, 206 Pac. 162 (1922). Some violations of the law have been held to exempt the insurance company on the ground of public policy. *Piotrowski v. Prudential Ins. Co.*, 141 Misc. 172, 252 N. Y. Supp. 313 (1931) (felony); *Wells' Adm'r v. New Eng. Mutual Life Ins. Co. of Boston*, 191 Pa. 207, 43 Atl. 126 (1889) (abortion); see *Metropolitan Life Ins. Co. v. Roma*, 97 Colo. 493, 496, 50 P. (2d) 1142, 1143 (1935) (gangster killed by person unknown).

What constitutes a "violation of law" under the policy? It must be a violation of a state law; a violation of a city ordinance is not sufficient to avoid the policy.⁹ Massachusetts has held that the violation refers only to criminal and not civil law.¹⁰ The Supreme Court of Indiana said: "A known violation of a positive law, whether the law is a civil or criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law . . . does not avoid the policy if the natural and reasonable consequence does not increase the risk."¹¹ On the basis of the intention of the parties this would seem to be the better view.

The court in the principal case cites *Flannagan v. Provident Life and Accident Ins. Co.*,¹² in which, under substantially the same policy provision, where the insured was driving his car while in an intoxicated condition, in violation of a statute which made driving a car while intoxicated a misdemeanor, and was injured when the car ran off the road, it was held that the policy was avoided. The court said that there need be no causative connection between the intoxicated condition and the injury. It did not pass upon the question whether there had to be causative connection between the violation of law and the injury, since it was not necessary to do so.

How far is the court prepared to go? Under its reasoning it would seem that if the insured was driving his car without a rear license tag, and he was injured in a collision at an intersection, the insurance company would not be liable under the terms of the policy. This interpretation, obviously, is not the intention of the parties.

MILTON I. MOLDAFSKY

MASTER AND SERVANT—LIABILITY OF MASTER TO SERVANT'S WIFE INJURED BY THE
SERVANT IN SCOPE OF EMPLOYMENT.

*Rosenblum v. Rosenblum*¹

This was the action by the wife against her husband's employer for injuries sustained in an automobile accident, as a consequence of the husband's negligence,

9. *Washington Fidelity Life Ins. Co. v. Herbert*, 490 Ohio App. 151, 195 N. E. 492 (1934).

10. *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen 308 (Mass. 1886).

11. *Bloom v. Franklin Ins. Co.*, 97 Ind. 478, 484 (1884); *cf. Conner v. Union Auto. Ins. Co.*, 122 Cal. App. 105, 9 P. (2d) 863 (1932).

12. 22 F. (2d) 136 (C. C. A. 4th, 1927). The court also cites for a discussion of the *Flannagan* case, *Travelers Protective Ass'n of Am. v. Prinsen*, 291 U. S. 576 (1934), where the assured had a certificate of membership in a fraternal benefit association, providing benefits for accidental death. The certificate exempted the association if death occurred "when" a member was "participating" in the transportation of explosives. The assured was riding on a truck carrying dynamite caps when it was struck by a train. The assured was blown to pieces. It was held that to exempt the insurer, it was not necessary to find a causative connection between the death and the forbidden act, since the effect of that act was to aggravate the hazard in the very event that happened. Compare this Supreme Court case with *Bloom v. Franklin Ins. Co.*, 97 Ind. 478 (1884).

1. 96 S. W. (2d) 1082 (Mo. App. 1936).

while the wife was accompanying the latter on a business trip within the scope of his employment. Held, that the action could be properly maintained by the wife against the employer.²

On the familiar doctrine of *respondeat superior* the employer would have been liable if the servant, the driver of the car, had been a stranger to the plaintiff. The question, then, is whether the rule of liability is different where the servant is the husband of the plaintiff. In Missouri, the law to the effect that an action of tort for personal injury by the wife against her husband cannot be maintained has never been changed.³ If then, under Missouri law, a husband is incapable of committing a personal tort against his wife, or the wife against the husband, and the doctrine of *respondeat superior* may be said to impose liability upon the master only in those cases in which the servant is liable to the third party, it would seem to follow that no liability can attach to the master for injuries to the wife occasioned by the negligence of the servant-husband. Some courts, possibly approaching the problem by an unexpressed literal translation of *respondeat superior*, hold that unless the servant is liable there can be no liability on the part of the master.⁴

However, a contrary result has been reached in New York,⁵ a state in which the common law doctrine forbidding personal tort actions by one spouse against the other prevails,⁶ in a case which held that the husband's employer is liable to the wife for injuries occasioned by the husband's negligence, notwithstanding that the wife could not have maintained an action therefor against her husband.

Additional support for the principal case is to be found in the comparatively recent cases of *Chase v. New Haven Waste Material Corporation*,⁷ and *Poulin v. Graham*.⁸ The principal case is closely analogous to the case of *Lusk v. Lusk*,⁹

2. The identical principle was approved in the very recent case of *Mullally v. Langenberg Bros. Grain Co.*, 98 S. W. (2d) 645 (1936), by the Missouri Supreme Court. The court recognized the right of a recovery, under similar facts to the principle case, but held the defendant to have been acting outside the scope of his authority at the time of the alleged injury.

3. *Rogers v. Rogers*, 265 Mo. 200, 177 S. W. 382 (1915); *Butterfield v. Butterfield*, 195 Mo. App. 37, 187 S. W. 295 (1916); *Ex Parte Badger*, 286 Mo. 139, 226 S. W. 936 (1920); *Willott v. Willott*, 333 Mo. 896, 62 S. W. (2d) 1084 (1933).

4. *Maine v. James Maine and Sons*, 198 Iowa, 1278, 201 N. W. 20 (1924). The court apparently reasons that since the liability of the master logically is grounded solely on the negligence of the servant, the master cannot be liable where the servant is not negligent; and, by analogy, if there can be no recovery by the plaintiff against the servant there can be no recovery against the master. *Emerson v. Western Seed and Irrigation Co.*, 116 Neb. 180, 216 N. W. 297 (1927); *Riser v. Riser*, 240 Mich. 402, 215 N. W. 290 (1927) "If the servant is not liable the master is not liable." Hence the master is not liable for injuries sustained by the wife of the servant.

5. *Schubert v. August Schubert Wagon Co.*, 249 N. Y. 253, 164 N. E. 42 (1928).

6. *Perlman v. Brooklyn City R. R.*, 191 N. Y. Supp. 891 (1921).

7. 111 Conn. 377, 150 Atl. 107 (1930).

8. 102 Vt. 307, 147 Atl. 698 (1929).

9. 113 W. Va. 17, 166 S. E. 538 (1932).

a West Virginia case, wherein the court allowed a recovery against an insurance company by a minor plaintiff, injured by the negligence of his father, who was insured with the defendant insurance company. A similar right of action was upheld by the Supreme Court of New Hampshire in *Dunlap v. Dunlap*.¹⁰

Possibly an understanding of the true basis of the so called doctrine of *respondereat superior* will more readily enable one to determine what result ought to be reached in the instant case. If the basis of such a doctrine be the theory of identification (the owner does what his employee does¹¹), then we might well argue that the master would not be liable under circumstances imposing no liability on the servant. However, the better explanation of *respondereat superior* lies in the entrepreneur theory. According to this view, it is socially more expedient to distribute among a large group of the community, through the medium of the employer, the losses which experience has taught are inevitable in the carrying on of industry, than to let the loss lie where it falls.¹² The employee, the actual tortfeasor, is typically execution proof. The justification of this policy is reflected in workman's compensation laws, wherein the loss to wage earners resulting from the accidents of industry is regarded as an expense of production which the employer should bear, just as he bears the other expenses of production. Since the burden falls on all employers alike he will be able normally to absorb and distribute the loss through the differential between price and production cost.

The principal case breaks away from the strict, syllogistic logic of *respondereat superior*, as does the modern trend of authority. There is little reason of policy that denies a recovery against the master by an injured spouse simply because a marital relation prohibits a recovery against the negligent party. Certainly it is doubtful that marital peace would be endangered thereby; at all events it would be outweighed by contrary considerations. And as to the more technical aspects, weight is no longer given to the outworn concept of the common law that husband and wife are one. Nor is it a sufficient answer to urge that in view of the fact that the master may recover over against the servant, a suit against the former would be in effect an indirect action by the wife against her husband—a thing which she is directly forbidden to do. To deny relief because of such an argument would be to impose a present hardship upon the wife, with only the possibility of a future hardship upon the husband; in most instances the servant-husband is execution proof. Perhaps the only argument to the contrary, with reference to policy in this case, is that to permit such an action by the wife against the employer opens the door to collusion and fraud between husband and wife.

WILLIAM VAN MATRE

10. 84 N. H. 352, 150 Atl. 905 (1930).

11. Criticized in BATY, VICARIOUS LIABILITY (1916) 147.

12. Smith, *Frolic and Detour* (1923) 23 COL. L. REV. 444; Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 YALE L. REV. 584.

SALES—WARRANTY—LIABILITY OF WHOLESALER OF FOOD TO CONSUMERS.

*Degouveia v. H. D. Lee Mercantile Co.*¹

Plaintiff, injured by eating a can of salmon which contained a black fly, sued the retail grocer, her immediate vendor, and the H. D. Lee Company, wholesaler, joining them as defendants in the action for breach of implied warranty as to the fitness for human consumption of the salmon. The salmon was purchased by the Lee company from the Pacific American Fisheries, a Washington corporation, and was packed for the wholesaler by an Alaskan plant of the corporation. The can was sold under the Lee label, although it did state that the salmon was "packed for" the Lee company. The question presented on appeal was whether or not there was enough evidence to go to the jury concerning the liability of either of the defendants. *Held*: The action will not lie against the Lee company because the parties are not privies in contract. Suit remanded to proceed against the retail grocer.²

The case is of interest because it is seemingly one of first impression in the United States, and the determination that a wholesaler of food is not liable to a remote purchaser in implied warranty for lack of privity of contract, follows by a few months a decision by the same court holding a manufacturer of beverage liable to a remote purchaser on the warranty theory though privity of contract was lacking.³ Obviously these two pronouncements provoke inquiry into the nature of a recovery for breach of implied warranty in food cases to facilitate, if possible, an understanding of how the privity requirement may be ignored in the one case and embraced in the other.

Apparently one of the earliest bases in English law for recovery for injury suffered by eating bad food, was an action on the case for deceit.⁴ At that time criminal statutes made dealers in food and drink for immediate human consumption liable to punishment for selling unwholesome merchandise.⁵ The action in case for civil reparation for the same dereliction was based on this penal liability and closely resembled an action on a warranty because no scienter needed to be proved.⁶ Later an action for breach of warranty, express or implied, bottomed on the same penal liability as was

1. 100 S. W. (2d) 336 (Mo. 1936).

2. The scope of this article is limited to a discussion of that portion of the opinion which deals with the liability of the wholesaler, and is concerned with the liability of such wholesaler for food sold in sealed containers.

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

4. 3 *HOLDSWORTH, HISTORY OF ENGLISH LAW* (3rd ed. 1923) 386 and 448; *HOLMES, THE COMMON LAW* (1881) 184. There was also a liability of innkeepers, and others whose callings were of a quasi public character, for want of skill in the exercise of their callings, enforced by an action in tort on the custom of the realm.

5. 1 *WILLISTON, SALES* (2d ed. 1924) § 241; *MELICK, THE SALE OF FOOD AND DRINK* (1936) c. 1; Ames, *History of Assumpsit* (1888) 2 *HARV. L. REV.* 1, 9.

6. Ames, *History of Assumpsit* (1888) 2 *HARV. L. REV.* 1, 8; *MELICK, THE SALE OF FOOD AND DRINK* (1936) 8; 1 *CHITTY, PLEADINGS* (16th Am. ed. 1876) 154.

the action on the case, was afforded an additional remedy in *assumpsit*.⁷ When or why the general rule that privity of contract was necessary to sue on a warranty as to chattels arose, is not known,⁸ but the concept attained a universal scope and was applied to warranties of food as well as warranties of other chattels.⁹

Today an injured consumer of foods may seek remedy against his vendor or a manufacturer by two methods other than warranty, namely an action for deceit,¹⁰ or an action for negligence.¹¹ In the latter action the old requirement of privity of contract¹² has been abrogated in food cases¹³ as in many others.¹⁴ Theoretically, at least, the action for negligence differs from an action for breach of warranty because in the latter there is an absolute liability for lack of the warranted qualities, and the existence or absence of fault is immaterial.¹⁵

The *Madouros* case,¹⁶ which dispensed with privity in suit by a remote purchaser in implied warranty against the Kansas City Coca-Cola Bottling Company, by disclaiming that if privity of contract was needed such "exists in the consciousness and understanding of all right-thinking persons," is far from being an orphan in the digests.¹⁷ Other food cases have similarly rendered the privity requirement innocuous by finding a third party beneficiary contract,¹⁸ or a warranty running with the

7. 1 WILLISTON, SALES (2d ed. 1924) § 195. The earliest reported decision of an action on a warranty being brought in *Assumpsit* was in 1778 in the case of *Stuart v. Wilkins*, 1 Doug. 18.

8. Among the suggested reasons for the growth of the privity requirement have been the following: 1. privity actually existed in the early warranty cases; 2. the use of *assumpsit* as a remedy may have led the courts to regard warranty as a contractual obligation; 3. this was a manifestation of a policy to protect a manufacturer against liability to unknown persons. See comments (1932) 7 WASH. L. REV. 351, 356; (1937) 21 MINN. L. REV. 315, 323.

9. For a statement as to the general privity rule in Missouri see *Ranney v. Meisenheimer*, 61 Mo. App. 434 (1895); *Crocker v. Barron*, 234 S. W. 1032 (Mo. App. 1921). Decisions applying the requirement to food cases are so numerous as to make a complete listing impractical. For examples see *Newhall v. Ward Baking Co.*, 240 Mass. 434, 134 N. E. 625 (1922) (decision subsequent to adoption of Sales Act); *Chysky v. Drake Bros.*, 235 N. Y. 468, 139 N. E. 576 (1923) (decision subsequent to the adoption of the Sales Act); and *Thomason v. Ballard and Ballard*, 208 N. C. 1, 179 S. E. 30 (1935) (Sales Act not adopted in this state).

10. *Niles v. Danforth*, 97 Vt. 88, 122 Atl. 498 (1923).

11. See comment (1937) 2 Mo. L. REV. 73.

12. *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

13. *Birmingham Chero-Cola Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64 (1921); *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314 (1908).

14. (1937) 21 MINN. L. REV. 315, 318; (1937) 2 Mo. L. REV. 73, 74.

15. 1 WILLISTON, SALES (2d ed. 1924) § 237.

16. 90 S. W. (2d) 445 (Mo. App. 1936).

17. See for example *Davis v. Van Camp Pkg. Co.*, 189 Iowa 775, 176 N. W. 382 (1920); *Challis v. Hartloff*, 136 Kan. 823, 18 P. (2d) 199 (1933); *Nock v. Coca-Cola Bottling Works of Pittsburgh*, 102 Pa. Super. Ct. 515, 156 Atl. 537 (1931); *Mazetti v. Armour and Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

18. *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N. E. 557 (1928).

goods.¹⁹ Obviously from the viewpoint that privity of contract is necessary in a warranty action the *Madouros* case and the case under discussion cannot be reconciled. Perhaps, however, this juggling of the minor premise may be justified on grounds of policy.

It is evident from a reading of the *Madouros* case that the court, though granting relief on a petition declaring on a warranty basis,²⁰ denied the privity restriction because it felt that a manufacturer should be held as an insurer of its food or drink.²¹ Manifestly a simple way of creating the status of insurer is to allow the suit in warranty because neither fault nor a misrepresentation is necessary to be proved, but only that the seller knew the purpose for which the goods were purchased and that the purchaser relied on the seller to furnish merchandise fit for that purpose. The policy motivating the court to impose absolute liability was probably the conviction that the control of a manufacturer over his product subjected him to being held to the rigid standard of public guardian, coupled with the notion that this liability is one that can properly be borne as an incident of the business.

Recognizing this policy as the basis for ignoring the absence of privity in the above case, the pith of the *Degouveia* decision stands in the declaration that "When the salmon in question was purchased by the H. D. Lee Mercantile Company it was sealed with no opportunity for that company to inspect it and discover whether it contained the foreign matter found in its contents by the plaintiff. Consequently, that company was in a different situation than the manufacturer, whose duty it was to see that no harmful matter got into the food when it was being packed." Evidently the court felt that a wholesaler should not be held to the absolute standard, and so invoked the privity rule, because, as aforementioned, duty and fault are not components of a recovery in warranty.²²

A consideration of these two cases leads a reader to one of two alternatives. From the standpoint of respecting the form of the present day action in implied warranty, the privity requirement, historically unsound though it may be, should be adhered to in all cases, and the practice of abrogating it through various fictions in opinions based on concepts of duty and fault should be discontinued. From a standpoint of using the action as a means of apportioning liability to the marketing agency that is conceived of as being the proper one to be subjected to a rigid stan-

19. *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927); *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932); *Ward v. Morehead City Sea Food Co.*, 171 N. C. 33, 87 S. E. 958 (1916).

20. See p. 448 of the opinion which says, "It will be observed, however, that the petition herein does not declare on negligence, hence we need not spend time on the case as if it were submitted on that theory. The petition sets out all the facts . . . In these, neither fraud nor deceit is pleaded . . ."

21. Comment (1937) 2 Mo. L. Rev. 73.

22. See MELICK, *THE SALE OF FOOD AND DRINK* (1936) c. 9 for a statement of the cases applying the same principle as the *Madouros* case and an analysis of them purporting to show that the overwhelming majority sound in tort though tried in warranty.

dard and is best able to redistribute losses,²³ it is economically unsound to arbitrarily classify manufacturers and wholesalers in different groups. The large wholesaler who brands the products of various small manufacturers and sells them as his own, is in a position to gain market control through the integration of manufacturing with marketing.²⁴ Such a wholesaler is very apt to control production and may even maintain an inspector at the establishment of the manufacturer.²⁵ In such case the policy which permits recovery by a remote vendee against a manufacturer of the type in the *Madouros* case, should as well permit recovery against a branding jobber.²⁶ Following this approach to the problem, even if it be conceded that the wholesaler is not the proper party to be ultimately held liable, a denial to the consumer of the right to sue the jobber, especially when it and the dealer are joined as defendants,²⁷ serves only to multiply the suits and costs necessary to the ultimate recovery.

In fine, it is submitted that for clarity of opinion and certainty of precedent, it is desirable for the courts to pursue one of the two choices. An intermediate course is neither judicially consistent nor economically sound.

O. S. BREWER

SEARCH AND SEIZURE—SCOPE OF OFFICER'S PRIVILEGE WITHOUT A WARRANT.

*State v. Raines*¹

A laundry was robbed and several articles taken therefrom. Defendant was seen near the laundry on the eve of the robbery, and several persons reported having seen him with the stolen goods. An officer on this information secured a search warrant and proceeded to the home of the defendant where he arrested him, searched his room, and found there the stolen goods. The defendant objected to the introduction of the stolen goods in evidence, saying that the warrant was void because

23. For comments dealing with the feasibility of requiring privity in suits against a manufacturer, see (1933) 18 CORN. L. Q. 445; (1932) 7 WASH. L. REV. 351, 358; (1937) 21 MINN. L. REV. 315.

24. See CLARK, PRINCIPLES OF MARKETING (1926) 154; BECKMAN, WHOLESALING (1926) c. III and IV.

25. For a well documented note dealing with the economic approach to consumer protection see (1937) 37 COL. L. REV. 77.

26. That this idea has in part been recognized in the field of tort law is exemplified by section 400 of the Restatement of the Law of Torts, which provides that one who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer. This rule, though, is limited to those cases where it appears from the labels that the brander is the sole manufacturer and will not permit recovery where "packed for" etc. is included in the label. *Degouveia v. H. D. Lee Mercantile Co.*, 100 S. W. (2d) 336 (Mo. App. 1936).

27. The joinder here corresponded in fact to a situation where an impleader is used to avoid circuity of action.

1. *State v. Raines*, 98 S. W. (2d) 580 (Mo. 1936).

it did not sufficiently describe the premises to be searched. The court said, however, that since the officer had kept the warrant in his pocket all the time and had not mentioned or disclosed it to the defendant, all evidence admissible if the warrant had not been secured would be allowed. The court then admitted in evidence the stolen goods. On appeal, the decision was affirmed, the appellate court saying that "since the arrest was lawful, the search of defendant's room, in which the arrest was made, the search being made after the arrest and incident thereto, was authorized; and that the articles seized, being things of evidentiary value tending to show defendant's guilt of the offense for which he was arrested, were lawfully taken and properly admitted in evidence at the trial."

The search and seizure clauses found in the Constitution of the United States and in the constitutions of the various states present more practical difficulties than problems of policy. The federal² constitution in its fourth amendment declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The original occasion for this constitutional provision will probably be found in the abuse of executive authority and in the unwarrantable intrusion of executive agents seeking to obtain in the houses and among the private papers of individuals evidence of political offenses either committed or designed.³ This interference much felt in England before the American Revolution was also suffered in the United States at that time through writs of assistance given to revenue officers in the colonies to search suspected places for smuggled goods.⁴ Undoubtedly it was with this in view that the people inserted in the federal constitution the search and seizure clause.⁵ The states followed suit and provided for the same or a similar clause in their constitutions.⁶ It was felt that near in importance to the exemption from any

2. This clause of the federal constitution applies only as a protection against federal officers and federal agents, and not as protection against state officers. The Fourteenth Amendment does not change this. *Johnson v. State*, 152 Ga. 271, 109 S. E. 662 (1921). The clause applies only to governmental action, and not to individual action. *Weeks v. U. S.*, 232 U. S. 383 (1914).

3. COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed. by Carrington, 1927) 612.

4. COOLEY, *op. cit. supra* note 3, at 612.

5. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures* (1925) 25 COL. L. REV. 11, 19: "The privilege against self-incrimination is frankly a barrier thrown up to protect the person against governmental infringement on privacy, in order to preserve a healthy relationship between the people and the government. The people in adopting the constitution, the courts and the legislatures, have deemed it more important to protect certain relationships than to discover the truth by the straining of these relationships." Is not this also the purpose of the search and seizure clause? For a historical discussion of the clause see, 2 WILLOUGHBY, *CONSTITUTIONAL LAW* (2d ed. 1929) § 720.

6. MO. CONST. art II, § 11.

arbitrary control of the person was the protection against unreasonable searches and seizures.⁷

Because of the broad language of the clause the concept of what is an unreasonable search and seizure is and must be judicial. The courts have interpreted the scope of what is reasonable in the light of common law traditions.⁸ And although they have come to use certain words to define it, it is nevertheless incapable of exact definition from an abstract point of view, since it must depend on the interpretation of such phrases as "immediate presence," "immediate control," or "immediate surroundings," of the person arrested.⁹ Each particular case must be determined on its own facts and circumstances. There is no general rule.¹⁰ As a guiding principle, however, the clauses "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous, executive officers."¹¹ An occasional dictum may be found to the effect that no search can ever be justified under the federal laws without a warrant,¹² but these dicta were not intended to be taken literally and are without support.¹³ The accepted rule is that an officer, as an incident of a lawful arrest and without a search warrant, has the right to search the person and the immediate premises under the control of the person arrested, and to seize articles found on him or on the premises, such as weapons and evidence of the crime charged.¹⁴

Though, as stated above, the courts agree upon the fundamental principles involved, the cases often differ in the practical application of those principles. In a West Virginia case¹⁵ the search was confined by the court to the very room in which the defendant was arrested. A federal case¹⁶ allowed the search to be made of the

7. COOLEY, *op. cit. supra* note 3, at 610.

8. O'Connor v. U. S., 281 Fed. 396, 398 (D. C. N. J., 1922): "It is little more than the affirmance of a great constitutional doctrine of the common law." The immunity from searches and seizures is not from all searches and seizures, but from searches and seizures unreasonable in the light of common law traditions. Gouled v. U. S., 255 U. S. 298 (1920).

9. See the cases collected in (1931) 74 A. L. R. 1387; (1933) 82 A. L. R. 782. (1933).

10. Dibello v. U. S., 19 F. (2d) 749, 750 (C. C. A. 8th, 1927): "Each particular case involving the question of an unreasonable search and seizure must be determined by its own facts and circumstances."

11. Gouled v. U. S., 255 U. S. 298 (1920); Lefkowitz v. U. S., 285 U. S. 452 (1932).

12. U. S. v. Rembert, 284 Fed. 996, 1006 (S. D. Tex. 1922), where the court said in summing up the case: "As to private residences, no search can ever be justified under the federal laws without a warrant."

13. See the cases collected in (1924) 32 A. L. R. 680; (1927) 51 A. L. R. 424; (1931) 74 A. L. R. 1387; (1933) 82 A. L. R. 782.

14. Agnello v. U. S., 269 U. S. 20 (1925); State v. Turner, 302 Mo. 660, 259 S. W. 427 (1924); The cases are collected in the annotations cited *supra*, note 13.

15. State v. Adams, 136 S. E. 703, 103 W. Va. 77, 51 A. L. R. 407 (1927).

16. Sayers v. U. S., 2 F. (2d) 146 (C. C. A. 9th, 1924).

person arrested, of the hotel room in which he was arrested, and of those adjacent hotel rooms under his control. In an Oregon case¹⁷ the search was deemed reasonable where the defendant was arrested in his apartment and the officers searched his car in the apartment garage, and there found the evidence used. So, also, it is generally held not to be an unreasonable search where one is arrested for a traffic violation, and the automobile is searched.¹⁸ A New York case¹⁹ allowed officers to search an article of clothing the defendant had temporarily set aside in the hallway, after the defendant was arrested in his room. In another federal case²⁰ when the defendant's clothing was searched and a railroad trunk check was found in them, the court held that the trunk might be obtained from the railroad checking office. The Missouri Supreme Court points out that "a search is not unreasonable nor unlawful, so far as the defendant is concerned, when made on the premises of other persons."²¹ And clearly the clause does not protect against searches made in open fields.²² The arrest may not, however, be made merely as an excuse for a general exploratory search.²³

As asserted above, it is best that the constitutional provision be construed liberally even in these days of highly organized crime. And although the courts should not be averse to considering modern conditions in determining the "reasonableness" of a particular type of search,²⁴ they should still allow the full protection of the guaranty contained in the amendment, for though it does sometimes shield the guilty, its origin shows that its purpose is the giving of protection at just such a sacrifice.²⁵ Those states that follow the federal rule²⁶ of exclusion of the evidence when it is obtained through an unreasonable search and seizure do so to guarantee further the protection intended by the amendment.²⁷ While they feel that the probative value of the article taken is the same regardless of the reasonableness of the

17. *State v. One Buick Automobile*, 120 Ore. 640, 253 Pac. 366 (1927).

18. *Haverstick v. State*, 196 Ind. 145, 147 N. E. 625 (1925); *Jameson v. State*, 196 Ind. 483, 149 N. E. 51 (1925); *State v. Williams*, 14 S. W. (2d) 434 (Mo. 1929); *State v. Deitz*, 136 Wash. 228, 239 Pac. 386 (1925).

19. *People v. Manko*, 189 N. Y. Supp. 357 (1921).

20. *U. S. v. Wilson*, 163 Fed. 338 (S. D. N. Y. 1908).

21. *State v. Pinto*, 312 Mo. 99, 107, 279 S. W. 144 (1925).

22. *Hester v. U. S.*, 265 U. S. 57 (1924).

23. *Go-Bart Importing Co. v. U. S.*, 282 U. S. 344 (1931).

24. *Carroll v. U. S.*, 267 U. S. 132 (1925) (fast moving automobiles).

25. *U. S. v. Bookbinder*, 278 Fed. 216 (E. D. Pa. 1922); *U. S. v. 1013 Crates of Empty Old Smuggler Whiskey Bottles*, 52 F. (2d) 49, 51 (C. C. A. 2d, 1931).

26. Missouri follows the federal rule: *State v. Owens*, 302 Mo. 348, 259 S. W. 100 (1924). The court in that case said: "The federal rule is the result of years of mature consideration, during which the question at issue was before the federal courts under varying circumstances of fact, so that it has been tested and applied to nearly all conceivable conditions. Sec. II, art. 2, of our constitution is almost identical in language and exactly identical in purport with Amendment No. 4 to the federal Constitution."

27. "... there is no adequate remedy available to the person injured whereby he may obtain redress after the act. He would have an action for an unlawful trespass or for assault at common law. The Constitution adds nothing to his rights in

search, yet they realize that as a practical matter unless such articles are excluded as evidence, the abstract prohibition will not exert much actual force toward restraining over-zealous officials.²⁸

In the instant case clearly there was a lawful arrest, and it is submitted that even under a very strict interpretation of the scope of the protection guaranteed by the search and seizure clause, the search was a reasonable one, properly incident to the lawful arrest of the defendant.

ELMO HUNTER

TAXATION—TAX ON INCOME DERIVED FROM LAND IN ANOTHER STATE.

*New York ex rel Cohn v. Graves*¹

The New York income tax laws imposed a tax upon the entire net income of all residents,² including rents derived from property located outside the state.³ The appellants income consisted in part of money received as rents from land located outside the state, and interest on bonds secured by mortgages on real estate located in another jurisdiction. It was contended the taxing of that part of her income which was derived from property located in another state, and that part derived from bonds secured by mortgages on real estate located in another jurisdiction was in violation of the due process clause of the fourteenth amendment because the tax was: (1) retroactive in its application; (2) on bonds which had a business situs in another jurisdiction; (3) on property located in another state.

The court refused to consider the objection to the retroactive operation of the law because the point was not raised in the state court.

The contention that the bonds had acquired a business situs in New Jersey was dismissed by the court on the grounds that the burden of proving that they had

that respect. The only remedy that can possibly benefit him is a preventive one." *State v. Owens*, 302 Mo. 348, 375, 259 S. W. 100, 108 (1924). *Accord*: *Weeks v. U. S.*, 232 U. S. 383 (1914); *Gould v. U. S.*, 255 U. S. 298 (1921); *Taylor v. State*, 129 Miss. 815, 93 So. 355 (1922); *Hoyer v. State*, 180 Wis. 407, 193 N. W. 89 (1923); *Wiggin v. State*, 28 Wyo. 480, 206 Pac. 373 (1922). See the cases on admissibility of evidence obtained by illegal search and seizure collected in (1923) 24 A. L. R. 1408; (1924) 32 A. L. R. 408. See *Atkinson, supra*, note 5.

28. Prosecutors are naturally loath to proceed against the officers who have furnished them the convicting evidence. "What prosecutor will go out of his way to find grounds for criminal charge against the officers, whose delictual diligence has raised the prosecutor's batting average? And, as has been humorously remarked, what U. S. marshal is going to be confined on prison fare?" *Atkinson, supra* note 5, at 23. "There is in fact *no remedy*, no method, by which the citizen can receive the protection of the Constitution except the method here contended for. . . ." (suppression of the unlawfully obtained evidence). *State v. Owens*, 302 Mo. 348, 375, 259 S. W. 100 (1924).

1. 57 Sup. Ct. 466 (1937).

2. New York . . . N. Y. Tax Laws, Consol. Laws, § 351 of Article 16, c. 60 (as added by N. Y. Laws 1919 c. 627).

3. New York . . . N. Y. Laws c. 933 §359 (1935).

acquired such a situs rested upon the appellant and the record did not show that she had sustained this burden. Further, even though the bonds had acquired a business situs in another state that fact would only place them in the same position as the real estate involved in the case.

The important question decided by the court was whether a state may tax one of its citizens upon income derived from property located in another state.

The power of the state to tax its citizens is based upon the assumption that the state will render an equivalent to the taxpayer in protection.⁴ If the state is not in a position to render the protection it has no power to tax. One state may not tax property of its citizens located in another state because it is not in a position to give the benefits of government to that property.⁵ From this fact does it follow that a state should be prohibited from taxing the income of its citizens derived from property located in another state?

The Supreme Court of the United States has said, "The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and his enjoyment of it when received."⁶ The citizen of a state receives these benefits of government by virtue of his residence within a state irrespective of whether he owns any income yielding property within or without the state. To hold a tax on income derived from real estate located in another jurisdiction in violation of the due process clause because a tax on the property itself would be a taking of property without due process of law would be unreasonable. The basis for declaring the tax on the property unconstitutional is that the state offers no protection to the property. The state does protect the receipt and enjoyment of the income, the taxpayer receives an equivalent in protection from the state; therefore, the state is not taking property without due process of law.

An income is not necessarily immune from taxation whenever the source from which that income is derived is not taxable. In *Safe Deposit and Trust Co. v. Virginia*⁷ the court held that a property tax on intangible property with a definite tax-

4. "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares . . ." *Union Transit Co. v. Kentucky*, 199 U. S. 194, 202 (1905); Accord: *Kirtland v. Hotchkiss*, 100 U. S. 491 (1879); *Fidelity and Columbia Trust Co. v. City of Louisville*, 245 U. S. 54 (1917); *Maguire v. Trefry*, 253 U. S. 12 (1919); *Lawrence v. State Tax Comm.*, 286 U. S. 276 (1931).

5. "If the taxing power be in no position to render these services . . . the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law." *Union Transit Co. v. Kentucky*, 199 U. S. 194, 202 (1905); *Safe Deposit and Trust Co. v. Virginia*, 280 U. S. 83 (1929).

6. *Lawrence v. State Tax Comm.*, 286 U. S. 276 (1931).

7. *Safe Deposit and Trust Co. v. Virginia*, 280 U. S. 83 (1929).

able situs at the residence of the legal title holder could not be taxed at the residence of the equitable owner if he lived in another state, because the other state was not in a position to offer the advantages to this property which justify the exercise of the taxing power. In *Maguire v. Trefry*,⁸ a Massachusetts income tax was held valid as applied to income derived from the equitable interest in intangible property which was located in another state, for the income was enjoyed, received and protected in Massachusetts and should bear its share of the costs of government.

State governments do not have the power to tax interstate commerce. Such a power would interfere with Congressional power to regulate commerce between the states.⁹ A tax on the gross receipts derived from interstate commerce would be open to the same objection because it would be in the power of the state to make such business profitable or unprofitable. However, a tax on the net income derived from interstate commerce is valid because it is not levied unless profits are shown, making it impossible for the state by the exercise of this power to interfere with the regulation of commerce between the states.¹⁰ Following the above reasoning a tax on the gross income from foreign commerce is invalid because it would interfere with the right of Congress to regulate foreign commerce,¹¹ and a tax on the net income is valid because it would not interfere with the Congressional power.¹²

If the nature of property taxes and income taxes was the same there would be some justification for limiting the power of the state to exercise the one in the same way it is limited in exercising the other. However, "Neither tax is dependent upon the possession of the taxpayer of the subject of the other."¹³ Income may be taxed though the taxpayer owns no property, property may be taxed though it produces no income. The amount of the one tax is ascertained by determining the income re-

8. "The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the fourteenth amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state." *Maguire v. Trefry*, 253 U. S. 12, 17 (1919).

9. *Philadelphia and S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326 (1886); *Leloup v. Port of Mobile*, 127 U. S. 640 (1888); *Lyng v. Michigan*, 135 U. S. 161 (1889); *Crutcher v. Kentucky*, 141 U. S. 47 (1891); *Pacific Exp. Co. v. Seibert*, 142 U. S. 339 (1891); *Ashley v. Ryan*, 153 U. S. 436 (1893).

10. "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax can not be heavy unless the profits are large." *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321, 323 (1917).

11. *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917).

12. *Peck and Co. v. Lowe*, 247 U. S. 165 (1917).

13. *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429 (1894).

ceived, the other by determining the value of the property. Income may be taxed but once; property may be taxed many times. The power of the state to levy an income tax is based upon the protection rendered to the citizen in his person, the power to levy a property tax is based upon the protection rendered to the property. The nature of the two taxes being different it is not possible to say that an income tax is a property tax, and since a tax on the property would be invalid the tax on the income is likewise invalid.

Mr. Justice Stone in writing the majority opinion considered why a state has the power to levy a tax on incomes. He found the reason for granting this power present under these circumstances. From decisions in previous cases he found an income is not always entitled to the same immunity from taxation as its source. Finally he found the characteristics of these two taxes are not the same. From these findings, he concluded that to impose the same restriction upon the state's power to levy an income as that imposed upon its power to levy a property tax would be an unreasonable interpretation of the fourteenth amendment.

Mr. Justice Butler in his minority opinion placed a tax on income derived from property in the same category as a tax on the property itself, citing as authority for this proposition *Pollock v. Farmers' Loan and Trust Co.* and subsequent cases interpreting that opinion. Declaring that the appellant's right to own the land and to collect the rents was not protected by New York law, he concluded that the tax was in violation of the due process clause of the fourteenth amendment.

It is submitted that it is very fortunate that the majority of the court followed Mr. Justice Stone rather than Mr. Justice Butler. Since it is desirable to think of the law as based upon sound reasoning, whenever a court decides a new question of law it is desirable to place the decision upon a reasonable basis. Justice Stone in his commendable opinion determined the reason for allowing a state to tax incomes and placed his answer to the problem on this basis. Justice Butler attempted to automatically decide the question from previous decisions. Not only is the approach used by Justice Butler an inferior one, but the premises upon which he based his conclusions are erroneous. The cases which he cited for the proposition that an income tax is in "legal effect" a tax on the property itself do not so hold.¹⁴ The *Pollock* case holds, "that taxes on real estate being indisputably direct taxes, taxes on the rent or income of real estate are equally direct taxes."¹⁵ The subsequent cases hold that an income tax is a direct tax on the property for the purpose of determining whether it should be apportioned according to population. But in no place is it said that an income tax is for all purposes in legal effect or otherwise a direct tax on the property itself.¹⁶ It is true that the New York laws do not protect the appellant's

14. The cases are collected in Justice Butler's dissenting opinion.

15. *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429 (1894).

16. "... it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate

right to own the land or to collect the rents. The state in which the land is located protects the incidents of ownership of the property; for this reason this state alone can assess a tax on the property.¹⁷ However, Mr. Justice Butler failed to consider that the rents were brought into New York and were there protected by the laws of the state. It is upon this protection of receipt and enjoyment of the income which New York claimed the power to tax, and the Supreme Court upheld its power to tax.¹⁸

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es nomine." Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 580 (1894). On rehearing the Court adhered to the opinion already announced that, taxes on real estate being indisputable direct taxes, taxes on the rents or income of real estate are equally direct taxes. 158 U. S. 601, 627-628. "The suggestion that such a tax on the cattle constitutes a tax on the lands within the reasoning in the case of Pollock v. Farmers' Loan and Trust Co., is purely fanciful. The holding there was a tax on rents derived from lands was substantially a tax on the lands." Thomas v. Gay, 169 U. S. 264, 274 (1897). "The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned." Knowlton v. Moore, 178 U. S. 41, 82 (1899). "The ground of the decision in the Pollock Case was that a tax upon income received from real estate and invested in personal property (as distinguished from income received from the transaction of business) was in effect a direct tax upon the property itself, and therefore invalid unless apportioned according to population." McCoach v. Minehill R. R., 228 U. S. 295, 306 (1912). "This court has decided in the Pollock Case that the income tax law of 1894 amounted in effect to a direct tax upon property, and was invalid because not apportioned according to population as prescribed by the constitution." Stratton's Independence v. Howbert, 231 U. S. 399, 414 (1913). "... the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, . . ." Brushaber v. Union Pac. R. R., 240 U. S. 1, 16-17 (1915). "In Pollock v. Farmers' Loan and Trust Co., it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the States according to population, as required by Art. 1, 2, cl. 3, and 9, cl. 4 of the original Constitution." Eisner v. Macomber, 252 U. S. 189, 205 (1919). "The matter then came before this court in Pollock v. Farmers' Loan and Trust Co.; and the decision when announced disclosed that the same differences in opinion existing elsewhere were shared by the members of the court,—five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned." Evans v. Gore, 253 U. S. 245, 260

TORTS—LIABILITY OF MANUFACTURERS TO THIRD PARTIES FOR ARTICLES NEGLIGENTLY MADE.

*Jacobs v. Frank Adams Electric Co.*¹

Plaintiff sued for damages for personal injuries allegedly caused by the negligence of the defendant in manufacturing an electric panel board. While engaged in installing the board upon the premises of a purchaser who had bought it from a jobber, the plaintiff sought to test the board in the usual manner by turning on the current and observing if the results were satisfactory. Due to defective insulation, the turning on of the current caused a loud explosion, and a flash from the board temporarily blinded the plaintiff, causing the injuries to his eyes for which he brought this action. Plaintiff, not having any contractual relations with defendant, sued on the theory that defendant was negligent in delivering the board improperly insulated in that such defect rendered the article dangerous and conducive to injury to any person using it for the purposes for which it was intended. Defendant contended that, not having any contractual relations with plaintiff, it was liable only if it knew of the defect and that there was no evidence tending to show actual knowledge (no such evidence was produced). Defendant appealed from an adverse verdict but the judgment was affirmed in the St. Louis Court of Appeals. The court based its decision upon the contention that Missouri has aligned itself with that group of authorities which holds the manufacturer liable for injuries due to the negligent construction of the product while such product is being used for the purpose for which it was intended.²

An examination of the Missouri decisions in which the liability of a manufacturer to a consumer has been in issue shows that our courts have followed the traditional doctrines and have held the manufacturer liable in negligence only in those instances where there was privity of contract or where the exceptions to that rule

1. 97 S. W. (2d) 849 (Mo. App. 1936).

2. As to the liability of a manufacturer to a consumer for personal injuries received from unwholesome food and beverages as extended in Missouri, see Comment (1937) 2 Mo. L. REV. 73.

(1919). In *Lake Superior Mines v. Lord*, a tax was levied upon royalties received from mineral lands. The court held, that the "enactment may be reasonably interpreted as laying a tax upon interests in mineral lands." This tax, however, was levied on the gross income from the land not the net income. 271 U. S. 577, 581 (1925). In *Senior v. Braden*, the state of Ohio levied a tax upon the equitable interest in land held by one of its citizens. The value of the interest was measured by the income received. The court held the tax to be invalid because it was a tax on property located outside the state. This was not an income tax. 295 U. S. 422 (1935).

17. *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905).

18. Problem of double taxation was not considered by the court because the appellant did not allege that New Jersey had levied or threatened to levy a tax on the income.

were applicable. However the court in the principal case, by its interpretation of the prior Missouri cases, has discarded the outworn doctrine that a manufacturer is only liable to those with whom he is in privity of contract.³ It remains to be seen whether the Missouri Supreme Court will approve of this interpretation. One of the leading cases in Missouri upon the subject is that of *Heizer v. Kingsland & Douglass Mfg. Co.*⁴ In that case, the plaintiff's husband was killed by a defective thresher made and sold by defendant to another. In rendering a judgment for defendant the court adhered to the old privity of contract doctrine, as set out in the famous case of *Winterbottom v. Wright*,⁵ with the words, "The plaintiff's case tends to show no more than negligence, and an action based on that ground must be confined to the immediate parties to the contract by which the machine was sold."⁶ However, the court did take cognizance of the exceptions which were developing, eventually to destroy the privity of contract rule, but it further held that the fact situation in issue did not come within any of the exceptions.⁷ Seemingly by this decision Missouri

3. *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916); *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878 (C. C. A. 2d, 1919); *W. T. Pate Auto Co. v. Westbrook Elevator Co.*, 142 Miss. 419, 107 So. 552 (1926); *Heckel v. Ford Motor Co.*, 101 N. J. L. 385, 128 Atl. 242 (1925); *White Sewing Machine Co. v. Feisel*, 28 Ohio App. 152, 162 N. E. 633 (1927); *Collette v. Page*, 44 R. I. 26, 114 Atl. 136 (1921); *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N. W. 855 (1928).

4. 110 Mo. 605, 19 S. W. 630 (1892).

5. 10 M. & W. 109 (1842). This case enunciated a doctrine which became widely accepted and was followed for many years by courts unwilling to see the duty of manufacturers extended to the general public with regard to negligently made articles (or, at least, to as much of the public as might reasonably be expected to come in contact with the article). In this case, defendant contracted to supply mail coaches to the government. Plaintiff was hired to drive the coach and was lamed for life when the coach broke down due to its negligent construction. The court laid down the general rule that a manufacturer is not liable for negligence to third parties who have no contractual relations with him. The main reason advanced by the court was that they did not wish to see a flood of litigation in a new field arise. The doctrine of this case was adopted by older American decisions when the question was first presented. *Savings Bank v. Ward*, 100 U. S. 195 (1879); *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400 (C. C. A. 7th, 1894); *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109 (C. C. A. 3rd, 1898); *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457 (1896); *Necker v. Harvey*, 49 Mich. 517 (1883); *Marvin Safe Co. v. Ward*, 46 N. J. L. 19 (1884); *Loop v. Litchfield*, 42 N. Y. 351 (1870); *Loose v. Clute*, 51 N. Y. 494 (1873); *Curtin v. Somers*, 140 Pa. 70, 21 Atl. 244 (1891); *Barnes v. Deliglise*, 78 Wis. 628, 47 N. W. 1129 (1891).

6. 110 Mo. 605, 617, 19 S. W. 630, 634 (1892).

7. With the increasing complications and widespread industrialization of our modern economic system it was inevitable that such a strict rule as the privity of contract rule would undergo some change. The law is peculiar in that, when it has a rule or doctrine which has become outmoded, it doesn't take direct action to replace such a rule by a more modern one. Instead the courts gradually, sometimes very indirectly and almost imperceptibly, destroy the effectiveness of the outmoded rule by affixing exceptions to it. This process was followed with regard to the tort liability of manufacturers. The various exceptions which grew up around the privity of contract rule were summarized by Judge Sanborn in *Huset v. Case Threshing Machine Co.*, 120 Fed. 865 (C. C. A. 8th, 1903). The three exceptions as laid down by

became aligned with those courts which adhered to the doctrines of *Winterbottom v. Wright* but which recognized the various exceptions which grew up around the privity of contract rule.⁸

In 1924 the Supreme Court of Missouri seemingly disregarded the numerous decisions adhering to the privity of contract rule and held defendant liable for negligence when one of its beer bottles exploded and injured plaintiff.⁹ The court said that defendant's liability was based on tort and not on contract and that lack of contractual relations was, therefore, irrelevant. The court completely disregarded the *Heizer* case, even though it was cited to them by defendant's counsel. Had this decision been followed, we might well say that Missouri was one of the states which has completely discarded the privity of contract rule with regard to

Judge Sanborn (note that the *Heizer* case preceded the *Huset* case and recognized every exception laid down by Judge Sanborn) are as follows: (1) Every one is bound to avoid acts or omissions imminently dangerous to the lives of others, said acts being committed in the preparation or sale of an article intended to preserve, affect, or destroy human life; (2) An owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner; (3) One who sells or delivers an article, which he *knows* to be imminently dangerous to life or limb to another without notice of its qualities, is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. As stated and if strictly applied, these exceptions would have been quite arbitrary. However, by one device or another, these exceptions have been extended. The arbitrary categories of "articles intended to preserve, destroy or affect human life" have been extended by merely superficial analogies to include articles which have clearly no pre-eminent tendency to do so. Thus an air gun, made as a toy for children has, apparently by an analogy to fire arms, been brought within the exception. *Herman v. Markham Air Rifle Co.*, 258 Fed. 475 (E. D. Mich. 1918). The bottles in which effervescent drinks are put up are regarded as in the same class as the drink which they contain. *Grant v. Graham Chero-Cola Bottling Co.*, 176 N. C. 256, 97 S. E. 27 (1918). Even soap and a coffee urn have been brought within this exception. Another method has been adopted to extend the liability of manufacturers. Cases have been brought within the exception which allows recovery where the manufacturer knows that the article which he has made and is selling is latently defective, by holding that he is to be regarded as knowing of any defect which could have been discovered by care taken in its manufacture. *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1924). Clearly the privity of contract rule has been whittled away by these exceptions until little, if any, of its original form remains. For a discussion of these exceptions see *Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendees* (1929) 45 L. Q. REV. 343; *The Basis of Affirmative Obligations in the Law of Torts* (1903) 53 AM. L. REV. 337; *Studies in the Law of Torts* (1926) 33, at 109.

8 Although the far-reaching decision of Judge Cardozo in *MacPherson v. Buick*, 217 N. Y. 382, 111 N. E. 1050 (1916), had been issued seven years before, the Missouri court in 1923 still remained loyal to the narrow rule under discussion. In *Tipton v. Barnard & Leas Mfg. Co.*, 302 Mo. 162, 257 S. W. 791 (1923), plaintiff was injured while installing a moving belt in the *Excello Feed Milling Co.*, sold the latter by defendant. The belt was defective and caused plaintiff to be injured. But the evidence failed to show that defendant knew of the defect, and in the absence of such a showing, the court held defendant not liable, thus following the *Heizer* case.

9. *Stolle v. Anheuser-Busch*, 307 Mo. 520, 271 S. W. 497 (1924).

liability of manufacturers to third parties. However in 1927 there arose the case of *McLeod v. Linde Air Products Co.*,¹⁰ upon which the court in the present case bases its decision. In the *McLeod* case, plaintiff sued and recovered for defendant's negligence in delivering a tank of oxygen to the welding shop of the plaintiff's father, this negligence resulting in the explosion of the tank and subsequent injuries to plaintiff. The court followed the privity of contract rule with the three exceptions hereinbefore mentioned. There was no showing that defendant knew of the defect in the tank. However, the court extended the exceptions to include things which, though not inherently dangerous, become imminently dangerous, if defectively made, when put to their intended use. Upon the basis of this extension of the exception the court held defendant liable.¹¹

As expressed before, the court in the principal case stated that the *McLeod* case had aligned Missouri with that group of authorities which holds the manufacturer liable for injuries due to the negligent construction of the product while such product is being used for the purpose for which it was intended. The principal case is decided on the understanding that Missouri has abolished the privity of contract rule with regard to manufacturers' liability to third parties. On the contrary, the *McLeod* case specifically set out the privity of contract rule as being the general rule and referred to its ruling as an extension of one of the exceptions to the general rule. In view of the specific declarations of the *McLeod* case the interpretation placed upon that decision by the principal case seems a bit strained. However, the court reached a desirable result. The extension of the exceptions to the general rule as announced in the *McLeod* case is of such a far-reaching nature that it is hard to visualize a situation which the test laid down would not cover, thus reaching a result virtually identical with that which would be reached by courts applying straight negligence principles. What, then, is left of the privity of contract rule which the court in the *McLeod* case asserted to be the general rule? It is submitted that the rule laid down in the *McLeod* case, purporting to be an exception to the general rule, is, in reality, so comprehensive that it practically destroys the rule. The court in the principal case (although not ostensibly) recognizes this situation and is, therefore, justified in classifying Missouri with the modern trend of decisions which now realize that a manufacturer's liability to third parties need not arise solely out of contract but may arise out of violation of a duty which the manufacturer owes to every member of the public whom he can reasonably foresee as coming in contact with the article and whom he should reasonably know may be injured if the article is defectively made. This is the position taken by the Restatement of the Law of Torts.¹²

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10. *McLeod v. Linde Air Products Co.*, 318 Mo. 397, 1 S.W. (2d) 122 (1927).

11. It is to be noted that the court makes mention of the case of *Stolle v. Anheuser-Busch*, but doesn't regard it as controlling, seemingly not regarding it as directly in point. To the writer there appears no valid distinction between the cases. The court might well have held that the *Stolle* case put Missouri squarely in line with Judge Cardozo's opinion in *MacPherson v. Buick*.

12. RESTATEMENT, TORTS (1934) § 395.

TORTS—LIABILITY FOR THE CONSEQUENCES OF FRIGHT RESULTING IN PHYSICAL INJURY.

*Mitnick v. Whalen Bros., Inc.*¹

Two automobiles driven by the defendants collided by reason of the negligence of both drivers while the plaintiff was on the sidewalk close to them. As a result, she was badly frightened and immediately fainted. She later had a miscarriage and suffered pain and nervous shock. The court held that the jury might have found that the plaintiff had just reached the intersection where the collision occurred, and, having heard the crash, she looked and saw a car turned toward her, whereupon she screamed, fainted, and fell; and that on the finding of these facts, the jury might reasonably have found that the drivers' negligence was the proximate cause of the plaintiff's injury, and might have allowed recovery by her. The court evaded the problem of whether physical injury is required by finding it was present in the bruises the plaintiff suffered when she fainted. From the text of the opinion, however, it appears that Connecticut would not require physical impact, if the question should arise in the jurisdiction.

The authorities are quite divided on the question of whether a plaintiff can recover for physical injuries caused by fright and nervous shock, such fright and shock being the result of the defendant's negligence. The more modern view allows recovery if the plaintiff shows the defendant was negligent, and that his negligence was the proximate cause of the plaintiff's fright. Such fright must be shown to have caused the physical injury. In the jurisdictions that take this view the courts attack the problem by finding whether the defendant owed a duty to refrain from such conduct, that is whether he could, as a reasonable man, foresee harm to the plaintiff. These courts do not consider the damages too remote because fright is an element, and they have expressed their theory to be that fright was but a link in the chain of causation leading to the physical injury.² The Restatement favors this view and states the preferable rule of law to be as follows: "If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock or other similar and immediate emotional disturbances, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability."³

1. 115 Conn. 650, 163 Atl. 414 (1932).

2. For other courts that follow this view see: *Central of Georgia Ry. v. Kimber*, 212 Ala. 102, 101 So. 827 (1924); *Baltimore & O. R. R. v. Harris*, 121 Md. 254, 88 Atl. 282 (1913); *Lesch v. Great Northern Ry.*, 97 Minn. 503, 106 N. W. 955 (1906); *Arthur v. Henry*, 157 N. C. 438, 73 S. E. 211 (1911); *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 Atl. 202 (1907); *Mack v. South Bound R. R.*, 52 S. C. 323, 29 S. E. 905 (1898); *Sternhagen v. Kozel*, 40 S. D. 396, 167 N. W. 398 (1918); *Memphis Street Ry. v. Bernstein*, 137 Tenn. 637, 194 S. W. 902 (1917); *Price v. Yellow Pine Paper Mill Co.*, 240 S. W. 588 (Tex. Civ. App. 1922); *Pankopf v. Hinkley*, 141 Wis. 146, 123 N. W. 625 (1909).

3. RESTATEMENT, TORTS (1934) § 436 (2).

The other view allows recovery for the physical injuries resulting from fright caused by defendant's negligence only when there has been some physical impact or immediate physical injury. Here the courts attack the problem as one of causation, holding that the damages, where there is no physical impact, are too remote and speculative, and that the physical consequences of the fright are not the proximate results of the defendant's negligence. *Spade v. Lynn & B. R. R.*,⁴ is the leading case on this subject. It admits that a physical injury may be directly traceable to fright, and so may be caused by it. It vindicates the rule that physical injury is necessary, in that it is unreasonable to hold that persons who are merely negligent should anticipate and guard against fright and its consequences; and also in that a wide door for unjust claims would be opened if the rule were not applied.⁵

In Missouri this view has been followed.⁶ From the Missouri decisions the settled law seems to be that the plaintiff cannot recover for fright or distress or the physical results therefrom, unless there is external physical injury. In other jurisdictions where the rule is applied, the impact may be very slight. In Missouri, however, the language of the court seems to imply that a more serious physical injury is required. The jolting of the plaintiff while riding as a passenger in an elevator which fell, has been held insufficient.⁷ In another case, the plaintiff's husband was shot and caused to fall against her. The court denied recovery on the ground that there was no physical wound.⁸ In a New Jersey case the plaintiff testified that something struck the back of her neck and dust got in her eyes. The court held that either of these was sufficient physical injury.⁹ There are many cases in which a recovery was allowed when the injury was very slight, and, in relation to the damages suffered, trivial.¹⁰

4. 168 Mass. 285, 47 N. E. 88 (1897).

5. For other states that refuse recovery on these grounds see: *Haile v. Texas & P. R. R.*, 60 Fed 557 (C. C. A. 5th, 1894); *St. Louis, I. M. & S. Ry. v. Bragg*, 69 Ark. 402, 64 S. W. 226 (1901); *Southern Ry. v. Jackson*, 146 Ga. 243, 91 S. E. 28 (1916); *West Chicago St. Ry. v. Liebig*, 79 Ill. App. 567 (1899); *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742 (1912); *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335 (1889); *Crutcher v. C. C. C. & St. L. R. R.*, 132 Mo. App. 311, 111 S. W. 891 (1908); *Porter v. Delaware, L. & W. R. R.*, 73 N. J. L. 405, 63 Atl. 860 (1906); *Mitchell v. Rochester Ry.*, 151 N. Y. 107, 45 N. E. 354 (1896); *Miller v. Baltimore & O. S. W. R. R.*, 78 Ohio St. 309, 85 N. E. 499 (1908); *Chittick v. Philadelphia Rapid Transit Co.*, 224 Pa. 13, 73 Atl. 4 (1909).

6. *Porter v. St. Joseph R. L. H. & P. Co.*, 311 Mo. 66, 277 S. W. 913 (1925); *McCardle v. Peck Dry Goods Co.*, 271 Mo. 111, 195 S. W. 1034 (1917). See more exhaustive treatment of liability in Missouri for the physical consequences resulting from emotional disturbance. Comment (1937) 2 Mo. L. Rev. 67.

7. *McCardle v. Peck Dry Goods Co.*, 271 Mo. 111, 195 S. W. 1034 (1917).

8. *State ex rel. Renz v. Dickens*, 95 S. W. (2d) 847 (Mo. 1936).

9. *Porter v. Delaware, L. & W. R. R.*, 73 N. J. L. 405, 63 Atl. 860 (1906).

10. For an extensive examination and criticism of this view, see Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact* (1902). 41 AM. L. REG. (N. S.) 141.

In comparing these two rules, the one which does not require physical impact seems to be the more desirable. The second view denying recovery fails to observe the fact that medical science can ascertain if the physical injuries suffered are a result of the fright, and if such fright was genuine. The law, as has often been said, is a progressive science, and it should develop and change with changing conditions and the contemporary development of other sciences.¹¹

The second rule, requiring physical impact, verges on absurdity when such slight injuries are allowed to satisfy it. Why should a plaintiff be allowed to recover for mental distress, loss of memory, and miscarriage resulting from fright, when she suffered a slight physical impact, and recovery be denied when such impact is absent? This result seems illogical on its face. If the policy behind this view is to prevent fabricated claims, the Missouri requirement of physical injury from without, even though arbitrary, does give a foundation to the claim.

DONALD H. CHISHOLM

TRIAL—APPEAL BY PLAINTIFF AFTER HIS OWN "INVOLUNTARY" NONSUIT.

*Boonville Nat. Bank v. Thompson*¹

At the close of plaintiffs' evidence, the defendant requested the court to give a peremptory instruction in the nature of a demurrer to the evidence. The court marked the instruction "given," although it was not read to the jury. Plaintiffs thereupon took a nonsuit with leave to set the same aside. When the motion to set the nonsuit aside was overruled by the lower court, plaintiffs appealed. Defendant filed a motion to dismiss the appeal, contending that the nonsuit was voluntary and hence not appealable. The Supreme Court, however, overruled this motion to dismiss the appeal, saying that the defendant's peremptory instruction was "given" by the court below so that plaintiffs were precluded from recovery, and that therefore the nonsuit taken by plaintiffs was an involuntary nonsuit from which an appeal would lie.

The rule followed in this case seems to be firmly established in Missouri,² despite the fact that it creates an anomalous procedural situation. Under ordinary

11. Goodrich, *Emotional Disturbances as Legal Damage* (1922) 20 MICH. L. R. 497.

1. 99 S. W. (2d) 93 (Mo. 1936).

2. Hageman v. Moreland, 33 Mo. 86 (1862); Layton v. Riney, 33 Mo. 87 (1862); Martin v. Fewell, 79 Mo. 401 (1883); Nivert v. Wabash R. R., 232 Mo. 626, 135 S. W. 33 (1911); Arp v. Rogers, 99 S. W. (2d) 103 (Mo. 1936); Netzow Mfg. Co. v. Baker, 137 Mo. App. 670, 119 S. W. 450 (1909); Bushyager v. Hammond Packing Co., 142 Mo. App. 311, 126 S. W. 985 (1910). North Carolina and Florida also follow the Missouri view evidently on the theory that to force plaintiff to suffer final judgment to go against him after a ruling of the trial court which will preclude him from recovery is a hardship on plaintiff and "a waste of time." Alabama, because of statute, has reached the Missouri result in many instances. The cases from these jurisdictions are collected in 9 ANN. CAS. 632; 3 C. J. 501.

circumstances, a voluntary nonsuit is one which the plaintiff requests at some stage of the trial, usually up to the time when the case is submitted to the court or jury.³ Plaintiff, having asked to be nonsuited, cannot thereafter appeal from the order granting the nonsuit.⁴ In the case of an involuntary nonsuit, which is granted by the court either on its own motion or that of defendant (usually because plaintiff has failed to state or prove facts sufficient to constitute a cause of action), the plaintiff may appeal from the order granting the nonsuit, and if he suffers an adverse ruling on appeal, is free to bring another action later.⁵ Under the ruling of the instant case, however, we have this situation: plaintiff puts on his case, and then upon seeing that some ruling of the court will prevent him from recovering,⁶ he is permitted voluntarily to request a nonsuit with leave to set the same aside. When the motion to set the nonsuit aside is made, the court ordinarily overrules it. Plaintiff then appeals from the judgment of dismissal entered after the order overruling this motion. The appellate court in deciding this appeal must necessarily decide the question of whether or not the ruling which precluded plaintiff from recovery was rightfully given by the lower court. If it decides that the ruling was correct, then plaintiff, instead of being barred from further action (as he would have been had a judgment been entered on the adverse ruling or a verdict brought in as a result of it) is in a position, since he has merely been nonsuited, to bring another action on the same facts. In reality then, he is permitted to take a voluntary nonsuit and yet have the right to an appeal, simply because the court chooses to call a voluntary nonsuit an involuntary one.

The justification for this rule is difficult to see. The earliest Missouri decision on the point neither cites cases in accord nor attempts to justify the rule with reason.⁷ It merely passes the problem off with the statement that "It is only where the action of the court, on the trial, is such as to preclude the plaintiff from a recovery that it is proper to suffer a nonsuit. In no other case will this court interfere, as has been decided again and again."

3. MO. REV. STAT. (1929) § 960. In other jurisdictions, the stage at which a voluntary nonsuit may be taken as a matter of right varies greatly. There is an excellent discussion and collection of cases in 18 C. J. 1153 ff.

4. *Howell v. Pitman*, 5 Mo. 246 (1838); *Chouteau v. Rowse*, 90 Mo. 191, 2 S. W. 209 (1886); *Hogan-Sunkel Heating Co. v. Bradley*, 320 Mo. 185, 7 S. W. (2d) 255 (1928). The cases holding this long-established point are collected in 3 C. J. 501.

5. This rule, too, is established in practically every jurisdiction beyond a question of doubt. There is a long collection of cases in 3 C. J. 497 ff.

6. The principal case decided by division two and *Arp v. Rogers*, 99 S. W. (2d) 103 (Mo. 1936), decided the same day by division one, settle previous doubts as to whether the peremptory instruction must be actually read to the jury. It now seems clear that the court's marking of the instruction "given" is sufficient basis for calling the nonsuit involuntary, regardless of whether the instruction was read to the jury. See also, *Wallace v. Woods*, 102 S. W. (2d) 93 (Mo. 1937).

7. *Hageman v. Moreland*, 33 Mo. 86 (1862).

The view of the Federal courts that such a nonsuit, being requested by the plaintiff, is a voluntary one from which no appeal will lie, seems to be the better one.⁸ So strongly are the federal courts opposed to the Missouri rule that they have refused to apply it in a case arising in the Missouri District Court.⁹ Most of the state courts have never considered the question, seemingly because they feel that a nonsuit voluntarily requested by a plaintiff is in fact a voluntary nonsuit, and to contend that it is involuntary is an absurd position.¹⁰

Ordinarily when judgment is entered upon a verdict brought in as a result of a peremptory instruction, that judgment is final unless reversed on appeal. Under the rule followed in the principal case, plaintiff is not barred from further action even if an appellate court decides that the peremptory instruction was rightfully given. He is merely nonsuited, and may later bring another action on the same facts. The practical effect of the rule is this: as long as plaintiff does not have sufficient facts to allow his case to go to the jury, the defendant has no chance of getting a judgment which is *res judicata* on the facts alleged and proved. To give such an advantage to a plaintiff appears to be unwarranted and unjust to defendant.

KIRK JEFFREY

8. *Chicago, M. & St. P. Ry. v. Metalstaff*, 101 Fed. 769 (C. C. A. 8th, 1900); *Francisco v. Chicago & A. R. R.*, 149 Fed. 354 (C. C. A. 8th, 1906).

9. *Francisco v. Chicago & A. R. R.*, 149 Fed. 354 (C. C. A. 8th, 1906).

10. Except for North Carolina, Florida, and Alabama, mentioned *supra* note 2, the direct point involved in the principal case does not seem to have been discussed by other jurisdictions.