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Comments

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—FEDERAL CONTROL OF CHILD LABOR AS SUGGESTED BY THE RECENT CONVICT LABOR CASES.—In *Kentucky Whip and Collar Co. v. Illinois Central R. R.*,[1] the United States Supreme Court held constitutional an act of Congress[2] making it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor when they were intended to be received or used in violation of the laws of the state into which they were shipped. The act further provided that packages containing convict-made goods had to be plainly labeled so as to show the names and addresses of the shipper and consignee, the nature of the contents, and the name and location of the penal institution where produced. The petitioner in this case manufactured horse collars and harness with convict labor and tendered them to respondent, a common carrier, for transportation in interstate commerce. The packages were not labeled and some of them were consigned to states where the sale of convict-made goods was prohibited. Respondent refused to accept the shipment. Petitioner sued respondent, denying the constitutionality of this congressional act and asking for an injunction to compel the transportation.

The court discussed congressional power under the commerce clause, showing that this right to control commerce is complete within itself[3] and that in certain instances the right to absolutely prohibit interstate commerce has been upheld.[4] It was further pointed out that Congress had lawfully restricted interstate commerce when there was an inherent evil in the thing transported,[5] when the purpose of the transportation was wrongful,[6] and when Congress desired to give effect to its own policies of interstate commerce which might, incidentally, be shaped in a manner to aid the enforcement of state laws.[7] The fact that the goods involved in the interstate transportation were harmless was held to be irrelevent in determining whether Congress had the right to regulate.[8]

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1. 57 Sup. Ct. 277, 81 L. Ed. 183 (1937).
2. Ashurst-Sumners Act, 49 STAT. 494 (1935), 49 U. S. C. A. §§ 61-64 (1929).
3. Gibbons v. Ogden, 22 U. S. 1 (1824).
4. The court cited the following cases in support of this contention: Champion v. Ames, 188 U. S. 321 (1903) (lottery tickets); Hipolite Egg Co. v. United States, 220 U. S. 45 (1911) (adulterated articles); Hoke v. United States 227 U. S. 308 (1913) (women for immoral purposes).
5. Hipolite Egg Co. v. United States, 220 U. S. 45 (1911).
6. Champion v. Ames, 188 U. S. 321 (1903); Hoke v. United States, 227 U. S. 308 (1913).
7. Brooks v. United States, 267 U. S. 432 (1925); Gooch v. United States, 297 U. S. 124 (1936)
8. This conclusion was drawn after referring to several cases where the thing transported was harmless and yet the control over state commerce was held to be valid. Brooks v. United States, 267 U. S. 432 (1925) (stolen cars); Gooch v. United States, 297 U. S. 124 (1936) (kidnaped persons).

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Reference was made to the similarity of methods used in controlling interstate transportation of intoxicating liquors. By the Wilson Act,[9] passed in 1890 and upheld in *In re Rahrer,*[10] intoxicating liquors transported into any state were subjected upon arrival to the operation of state laws to the same extent as though they had been produced within the state. Convict-made goods were treated in the same manner by the Hawes-Cooper Act[11] passed in 1929. In 1913 the Webb-Kenyon Act[12] was passed, prohibiting the transportation of intoxicating liquors into any state when it was intended that they should be received, possessed, or sold in violation of the laws of that state. Its constitutional validiy was upheld in *Clark Distilling Co. v. Western Maryland Ry. Co.*[13] These holdings made it easier for the court to find the convict labor act constitutional.

Previously in *Hammer v. Dagenhart*[14] the court held unconstitutional a law restricting the shipment in interstate commerce of goods made by child labor. It was contended that the *Dagenhart* case was a precedent for the *Whip & Collar Co.* case and that the congressional provision involved in the latter would be declared unconstitutional on the strength of the former.[15] But the court distinguished them on the basis that the act of Congress in the *Dagenhart* case had as its aim the placing of local production under federal control, while the purpose of the act in the *Whip & Collar Co.* case was to assist the states in shutting out commerce in products which they themselves had a constitutional right to bar from production or sale. The court in *Hammer v. Dagenhart* observed that in each instance where there had been a valid regulation of interstate commerce the use of the facilities of interstate commerce was necessary to the accomplishment of harmful results.[16] This observation was referred to in the *Whip & Collar* case. The court apparently assumed that the child labor act was passed solely for the purpose of controlling local production and therefore concluded that evils at which this control of interstate commerce was aimed were not necessarily the results of the use of the facilities of interstate commerce. Thus, by the observation of the court in the *Dagenhart* case, there was justification in holding this act unconstitutional. On the other hand, the court recognized that the act concerning convict-made goods was intended to prevent unfair competition caused by importation into a state where convict labor was prohibited. The evil in this situation did necessarily result from the use of the facilities of interstate commerce, and, by reference to the above observation, the court justified its holding that the act was constitutional. The reasonableness of this distinction might be challenged since one of the purposes of restricting child

9. 26 STAT. 313 (1890), 27 U. S. C. A. § 121 (1927).
10. 140 U. S. 545 (1891).
11. 45 STAT. 1084, 49 U. S. C. A. § 60 (1929).
12. 37 STAT. 699 (1913), 27 U. S. C. A. § 122 (1927).
13. 242 U. S. 311 (1917).
14. 247 U. S. 251 (1918).
15. The petitioner in the *Whip & Collar Co.* case relied upon *Hammer v. Dagenhart* as authority for asserting that the regulation provided in the Ashurst-Sumners Act was unconstitutional.
16. 247 U. S. 251, at 271, 272, cited note 14, *supra.*

labor was apparently overlooked—that purpose being to prevent unfair competition within the state into which the goods were to be shipped. But the distinction, whether weak or strong, did enable the court to uphold the restriction on convict-made goods without overruling the holding in the child labor case.

The decision in the *Whip & Collar Co.* case was heralded by some as suggesting a constitutional method for federal control of child labor.[17] To determine the merits of this proposition the problems of child and convict labor should be compared. The objection to the use of convict labor in manufacturing is that the products of convict labor can be sold much cheaper than the products of paid labor with the result that the manufacturer using paid labor is injured.[18] Child labor restrictions are advocated both because of the ill effect such labor has upon the child[19] and because of competition caused thereby due to the cheapness of that labor.[20] The states clearly have the power to control both convict labor and child labor within their borders. The convicts, being under the care and supervision of the state, there is, of course, no doubt but that the state can control their employment.[21] Child labor could be controlled under the exercise of the state's police power, since such control is a health measure and is also for the economic good of all in that it prevents unfair competition in marketing the finished product.[22]

In either case, however, state control alone cannot prevent the unfair competition caused thereby. As to convict-made goods produced within the state it is true such competition could be ended. But the prohibition of the use of convict labor within state A will not prevent state B from using such labor and from shipping convict-made goods into state A where the labor is prohibited. State A could prevent the sale of convict-made goods after they left the original package, but control of the goods after they are in the state and have been taken

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17. St. Louis Post-Dispatch, January 6, 1937, § C, at 2: "The unanimous decision of the United States Supreme Court in favor of the Ashurst-Sumners law, forbidding the shipment of convict-made goods into states which bar their sale, may turn out to be of far-reaching importance.

"It seems clear to us that this decision—which fits into the pattern of the court's findings a year ago on the Hawes-Cooper Act—opens the way, under the Constitution as it now stands, to an effective attack on the exploitation of children in industry." St. Louis Globe-Democrat, January 5, 1937, § A at 4: "The victory of the Ashurst-Sumners Act immediately raised hopes in some congressional quarters that the court may after all permit federal legislation to regulate wages and hours without a Constitutional Amendment.

"Senator O'Mahoney of Wyoming who wants to carry out such regulation by means of a system of doing interstate business said today's decision 'places the seal of constitutionality' on his plan."

18. Ward v. City of Little Rock, 41 Ark. 526 (1883); Note (1931) 6 IND. L. J. 518; Legis. (1931) 44 HARV. L. REV. 846.

19. Jones, *The Child Labor Decision* (1918) 6 CALIF. L. REV. 395.

20. Lawson, *Child Labor and the Constitution* (1922) 56 AM. L. REV. 733.

21. McKelvey, *The Prison Labor Problem* (1934) 25 J. CRIM. L. 254.

22. Sturges & Co. v. Beauchamp, 231 U. S. 320 (1913); *cf.* Holden v. Hardy, 169 U. S. 366 (1898); Muller v. Oregon, 208 U. S. 412 (1908); Bunting v. State of Oregon, 243 U. S. 426 (1917). Broad legislative supervision over minors is sup-

out of the original package is difficult. The convict-made goods could not be prohibited in the original package because of their interstate character.[23] To fill this gap in the state control and thereby assist the state in eliminating the evils of the sale of convict-made goods, Congress passed the previously mentioned Hawes-Cooper Act January 19, 1929.[24] Its constitutionality was upheld in *Whitfield v. State of Ohio.*[25] The act provided that convict-made goods transported into any state and remaining there for consumption should upon arrival in such state, be subject to the operation and effect of the laws of such state to the same extent as goods manufactured within the state and should not be exempt therefrom by reason of being introduced in the original package. On July 24, 1935 the Ashurst-Sumners Act[26] was passed. It was later held constitutional by the *Whip & Collar Co.* case. With the aid of these federal acts, state control over the manufacture and sale of convict-made goods is effective to prevent the unfair competition caused thereby.

The child labor problem is very similar to the convict labor situation. Child labor is much cheaper than adult labor;[27] thus while a state certainly has the power to prohibit any form of child labor within its territory it will still be subject to competition of child-made goods imported from other states. Such competition would make it difficult for the state to exercise its power to restrict even if such

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ported by the view that they are wards of the state and subject to its control: People v. Ewer, 141 N. Y. 129, 36 N. E. 4 (1894); State v. Shorey, 48 Ore. 396, 86 Pac. 881 (1906). Many states have statutes limiting child labor. ILL. REV. STAT. (1923) c. 48, § 44: "No minor under the age of fourteen years shall be employed, permitted or suffered to work at any gainful occupation in, for or in connection with, any theatre, concert hall or place of amusement, or any mercantile institution, store, office, hotel, laundry, manufacturing establishment, mill, cannery, factory or workshop therefor within the State. . . ." IOWA CODE (1931) § 1526: "No person under fourteen years of age shall be employed with or without compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in any livery stable, garage, place of amusement, or in the distribution or transmission of merchandise or messages; but nothing in this section shall be construed as prohibiting any child from working in any of the above establishments or occupations wher operated by his parents." KAN. REV. STAT. (1923) § 38-601: "That no child under fourteen years of age shall be at any time employed, permitted, or suffered to work in or in connection with any factory, workshop, theater, mill, cannery, packing house, or operating elevators. . . ." MO. REV. STAT. (1929) § 14084: "It shall be unlawful for any child in this state under the age of fourteen years to be employed, permitted or suffered to work at any gainful occupation except in, (a) The sale and distribution of newspapers, magazines and periodicals, (b) Agricultural labor and domestic service, or any service performed for parent or guardian."

23. Bowman v. Railway Co., 125 U. S. 465 (1888); Leisy v. Hardin, 135 U. S. 100 (1890); Schollenberger v. Pennsylvania, 171 U. S. 1 (1897).

24. 45 STAT. 1084, 49 U. S. C. A. § 60 (1929).

25. 297 U. S. 431 (1936).

26. 49 STAT. 494 (1935), 49 U. S. C. A. §§ 61-64 (1929).

27. Lawson, *Child Labor and the Constitution* (1922) 56 AM. L. REV. 733.

restriction was desired solely as a health measure.[28] It would, therefore, seem that national restriction of child labor, uniform in all the states, would be the only adequate solution of the problem. An attempt was made by Congress in 1916 to control child labor by grounding the restriction on the commerce clause of the constitution.[29] The act prohibited the shipment in interstate commerce of any article produced by child labor within thirty days after its production. This avenue of control was declared unconstitutional in *Hammer v. Dagenhart.*[30] In 1919 Congress attempted to control child labor through the taxing power by imposing a tax of ten per cent of the net profits of the year upon employers who knowingly employed during any portion of the taxable year a child within the age limits therein prescribed.[31] In *Bailey v. Drexel Furniture Co.*,[32] this act was declared unconstitutional. In 1924 a constitutional amendment giving Congress power to limit, regulate, and prohibit the labor of persons under eighteen years of age was passed by Congress and was submitted to the states for ratification.[33] Since that time only twenty-eight states have declared for the amendment.

The similarity between the convict and child labor problems can easily be seen. In view of the apparent inability of Congress to control child labor and in view of the slowness with which states are ratifying the amendment, it is natural that the convict labor cases would be studied with the hope that a constitutional method of child labor control through congressional enactment might be devised. By following the procedure taken in the case of convict labor, it is reasonable to assume that transportation of child-made goods into a state where such was prohibited could be constitutionally prevented. Thus an act subjecting child-made goods to the laws of the state into which they are shipped regardless of whether they are in the original package would probably be sustained. In such a manner the evils of unfair competition within a state could be eliminated by state control.

There is an element in the control of child labor, however, that is not found in the convict labor problem. The manufacturers of many states depend largely upon marketing their products in states other than where the factories are located. Should state A pass an act prohibiting child labor, its manufacturers, who depend for their markets upon states B and C where child labor was not prohibited, would be forced to compete with manufacturers in states B and C or manufacturers in any other state doing business in states B and C who produce with the cheaper child labor. State A might therefore find it inadvisable to put its own industries at such a disadvantage by prohibiting child labor or might find such prohibition

28. Jones, *The Child Labor Decision* (1918) 6 CALIF. L. REV. 395.
29. Child Labor Law, 39 STAT. 675 (1916).
30. 247 U. S. 251 (1918).
31. Tax on Employment of Child Labor, 40 STAT. 1138 (1919).
32. 259 U. S. 20 (1922).
33. 43 STAT. 670 (1924): "Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

impossible due to pressure brought to bear by its manufacturers. Thus it would seem that this method of federal control would not completely solve the problem.[34]

JOHN H. FOARD

FEDERAL DECLARATORY JUDGMENT LAW—CONSTITUTIONALITY AND APPLICATION.—A recent United States Supreme Court case, *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*,[1] involved a dispute between insurer and insured as to their respective rights under several life insurance contracts made between them. The policies provided for total disability benefits. Insured ceased making premium payments, claiming he had been totally disabled, of which alleged disability he gave the insurer notice in due time. He contends, therefore, that by the terms of the insurance agreements the policies remain in full effect despite stoppage of premium payments. The insurance company denies that insured was at any time totally disabled. Further, insurer states that the loan value of the policies has been consumed to meet premiums as they fell due, leaving only one policy, with a value of $45 as extended insurance, upon which insured can assert any claim. The insurance company brought suit in a federal court upon the issues of insured's disability and the continuance of the company's policy obligations despite insured's non-payment of premiums. It asked a declaratory judgment under the Federal Declaratory Judgment Act,[2] urging that delay in adjudication would be detrimental to its interests, resulting in loss of evidence through dispersion of witnesses, and requiring the company to maintain reserves in excess of $20,000. The complaint was dismissed in the district court for lack of a "controversy" in the constitutional sense. This dismissal was affirmed in the circuit court of appeals. On certiorari the United States Supreme Court held the declaratory judgment law constitutional, and found that a justiciable controversy was involved. This is the first clear cut holding by the Supreme Court squarely upon the validity and effect of the Federal Declaratory Judgment Act.

Several courses were open to the Supreme Court when the instant case came before it. I. It could hold the Declaratory Judgment Act unconstitutional as an attempt to extend the court's jurisdiction to fact situations not involving a case or controversy in the constitutional sense.[3] II. It could hold the law constitu-

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34. St. Louis Globe-Democrat, January 7, 1937, B at 2: "What the latest decision by the Supreme Court of the United States does emphasize is that the powers of Congress are available to the states in helping them to shut out commerce in products which they themselves have a constitutional right to bar from production or sale. This is a long way from saying that all the states have to do to improve labor standards is to pass a law prohibiting the entry into their sctates of products which have been made in factories with standards less favorable to labor than those of the original state. No such control over production in another state rests in any state or comes within the meaning of commerce as it has been defined in the precedents of the Supreme Court of the United States."

1. 57 Sup. Ct. 461 (1937).
2. JUD. CODE § 274 d, 28 U. S. C. A. § 400, 49 STAT 1027 (1935).
3. U. S. CONST., ART. 3 § 2. The following Supreme Court cases have by dicta

tional, but limit its scope to (a) fact situations where consequential relief was a ready alternative,[4] or (b) instances where no coercive relief would readily be granted.[5] III. It could hold the law constitutional and extend its application to all fact situations, regardless of whether or not coercive relief would have been available to either party to the controversy.[6]

How far does the holding of the instant case go? The court holds the law to be constitutional. It finds that defendant would have been entitled to bring an action for damages for benefits under two of the insurance contracts, and could have sued in equity for a decree to declare all the policies still in being. Since one of the parties was thus entitled to seek coercive relief, the court finds that there was a justiciable controversy in the constitutional sense. It recognizes the power

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inferred that there could be no constitutional procedure for declaratory judgments, since such procedure contemplated the rendering of judgments in disputes that are not "cases" or "controversies" in the constitutional sense. Liberty Warehouse Co. v. Grannis, 273 U. S. 70 (1927); Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Ass'n, 276 U. S. 71, 89 (1928); Willing v. Chicago Auditorium Ass'n, 277 U. S. 274 (1928); Arizona v. California, 283 U. S. 423, 464 (1931). But a holding of unconstitutionality in the instant case would have been unlikely in view of Nashville, Chattanooga Ry. v. Wallace, 288 U. S. 249 (1933), in which case the court held, when squarely confronted with the problem, that it possessed the power to review a declaratory judgment originating in a state court.

4. In the Nashville case (*ibid*), declaration by a state court of the constitutionality of a state excise tax had been asked by plaintiff, who appealed to the United State Supreme Court after the state court declared the tax valid. In reviewing the state court's declaratory judgment the Supreme Court found that the facts would clearly consitute a "case" or " controversy" if raised in a suit for an injunction against collection of the tax, though by statute plaintiff was barred from injunction relief in the state court. See note 7, *infra*. It has been argued, (1932) 45 HARV. L. R. 1089, that the court will limit its approval of declaratory judgments to the special facts of the Nashville case, i. e., to situations where an injunction might have been asked, but not to situations where no "wrong" had been committed or was immediately threatened so that coercive or executory relief would be possible.

5. A few state holdings have reached this result. Kaleikau v. Hall, 27 Hawaii 420 (1923); Kaaa v. Waiakea Mill Co., 29 Hawaii 122 (1926); Brindley v. Meara, 198 N. E. 301 (Ind. 1935); Miller v. Siden, 259 Mich. 19, 242 N. W. 823 (1932); Stewart v. Herten, 125 Neb. 210, 249 N. W. 552 (1933); Lisbon Village Dist. v. Town of Lisbon, 85 N. H. 173, 174, 155 Atl. 252, 253 (1931); List's Estate, 283 Pa. 255, 129 Atl. 64 (1925); Kariher's Petition, 284 Pa. 455, 131 Atl. 265 (1925); Matter of Dempsey, 288 Pa. 458, 137 Atl. 170 (1927); Leafgreen v. LaBar, 293 Pa. 263, 142 Atl. 224 (1928); Ladner v. Siegel, 294 Pa. 368, 144 Atl. 274 (1928); Taylor v. Haverford, 299 Pa. 402, 149 Atl. 639 (1930); *In re* Sterrett's Estate, 300 Pa. 116, 150 Atl. 159 (1930); Nesbitt v. Manufacturer's Casualty Ins. Co., 310 Pa. 374, 165 Atl. 403 (1933); Bell Tel. Co. v. Lewis, 313 Pa. 374, 169 Atl. 571 (1934); Allegheny County v. Equitable Gas Co., 321 Pa. 127, 183 Atl. 916 (1936); *In re* Loughlin's Estate, 103 Pa. Super. 409, 157 Atl. 494 (1931); American Nat. Bank & Trust Co. of Danville v. Kushner, 162 Va. 378, 174 S. E. 777 (1934). There is much uncertainty, contradiction and confusion in Pennsylvania decisions. See Borchard, *Declaratory Judgments in Pennsylvania* (1934) 82 U. of PA. L. REV. 317.

6. This is the majority view both in the United States and England. See BORCHARD, DECLARATORY JUDGMENTS (1934) 24-26, 147-149.

of Congress to provide new remedies where there is such a controversy. Thus the Supreme Court goes as far as II(a) above.[7]

Will the court in future decisions extend the scope of the declaratory judgment law to include fact situations where no coercive relief would be available to either party? There is no dictum in the *Aetna* case disclosing a disposition on the part of the court to go beyond the limit of the present holding. Yet, an extension of the act to III above seems not only within the scope of the judicial power, but also in accord with the legislative intent, and with precedent.

The power to decree some form of coercive or executory relief is not necessary to the existence of a case or controversy in the constitutional sense. A "case" or "controversy" can exist where no consequential relief is possible. Instances are naturalization proceedings,[8] suits of quia timet,[9] boundary disputes,[10] disputes as to the title of property,[11] appointment of a trustee[12] or receiver, [13] suit by a trustee for instructions,[14] and others.[15] In many of these examples the court's power to give the declaration sought is vested in it by statute (for example, naturalization proceedings and the appointment of receivers). The constitutionality of these measures is well established. So it is definitely within the scope of Congress' power to create by legislation some sort of remedy declaratory in nature where no coercive relief is ordinarily possible, and endow the federal courts with jurisdiction in such instances. There is no apparent reason why this power should be abridged in respect of declaratory judgments, so long as Article 3, Section 2, of the Constitution limiting the judicial power to "cases" and "controversies" is complied with.

The requirements of a "case" or "controversy" in the constitutional sense, as summarized in the *Aetna* case,[16] are a dispute "appropriate for judicial determina-

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7. Compare this holding to Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249 (1933), in which the court was asked to review a Tennessee declaratory judgment, brought under the Tennessee Uniform Declaratory Judgment Act, holding a tax valid under the commerce clause and the 14th Amendment of the United States Constitution. The Supreme Court assumed jurisdiction, finding that the issues would clearly have constituted a "case" or "controversy" if brought in the form of a suit to enjoin the collection of the tax. However, by Tennessee statute no injunction would have been available in the state court. TENN. CODE (Shannon, 1932) § 1138.

8. Allen v. U. S., 47 F. (2d) 735 (C. C. A. 3d, 1931).

9. Southern Ry. Co. v. North Carolina R. R., 81 Fed. 595 (W. D. N. C. 1897); Twin City Power Co. v. Barrett, 126 Fed. 302 (C. C. A. 4th, 1903).

10. Louisiana v. Mississippi, 202 U. S. 1 (1906); Arkansas v. Tennessee, 246 U. S. 158 (1918); Georgia v. South Carolina, 257 U. S. 21 (1922); Oklahoma v. Texas, 272 U. S. 21 (1926); Michigan v. Wisconsin, 272 U. S. 398 (1926).

11. Sharon v. Tucker, 144 U. S. 533 (1892).

12. Williamson v. Suydam, 73 U. S. 723 (1868).

13. Republican Mountain Silver Mines v. Brown, 58 Fed. 644 (C. C. A. 8th, 1893).

14. Williams v. Gibbles, 61 U. S. 571 (1858).

15. See Borchard, *The Supreme Court and the Declaratory Judgment* (1928) 14 A. B. A. J. 633.

16. 57 Sup. Ct. 461, 464 (1937).

tion," as "distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." To be sure, in the ultimate analysis (to paraphrase a statement of Chief Justice Hughes) a case or controversy is what the Supreme Court says it is. And it is conceivable, in view of the court's reluctance to recognize declaratory judgments in the past,[17] that the court may say that no case or controversy exists where relief could not be granted in the absence of the declaratory judgment law.

But the requirements of a case or controversy set forth above appear to be broad enough to encompass some situations where no remedy other than a declaratory judgment would be available. Examples are: a dispute between parties to a contract as to whether plaintiff is bound to perform for a future period;[18] a dispute as to the abrogation of a contract by war;[19] a dispute as to the kind of currency in which payments falling due under a contract are to be made;[20] a dispute as to whether one party is subject to the regulatory provisions of a statute alleged to be unconstitutional;[21] and others.[22] In all these instances the parties are asserting opposing legal interests, and there is a definite, concrete and substantial controversy admitting of conclusive relief by a declaratory judgment. In short, by the test quoted from the *Aetna* case, the dispute is in every sense justiciable.

Each of the examples in the preceding paragraph has been held an appropriate situation for a declaratory judgment. It is notable that in every case the controversy is legal rather than equitable in its nature. But if the plaintiffs had been entitled to equitable relief, they could have obtained an adjudication by the court of their disputed rights by virtue of the equity power to grant conditional relief dependent

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17. Liberty Warehouse Co v. Grannis, 273 U. S. 70, 74 (1927), contains dictum to the effect that a declaratory judgment law required the rendering of advisory opinions. Willing v. Chicago Auditorium Ass'n, 277 U. S. 274, 289 (1928), contains dictum to the effect that a declaratory judgment law requires the determination of a moot case. Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Ass'n, 276 U. S. 71, 89 (1928). It can be argued that the Supreme Court in Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249 (1933), was driven to construe a state declaratory judgment as rendered in a "case" or "controversy" to escape the anomaly of a state court passing on the constitutionality of a measure with no jurisdiction in the federal field to review the holding.

18. Societe Maritime et Commerciale v. Venus Steam Shipping Co., 9 Com. Cas. 289 (1904).

19. Ertel Bieber & Co. v. Rio Tinto Co. [1918] A. C. 261.

20. Russian Commercial & Industrial Bank v. British Bank for Foreign Trade [1921] 2 A. C. 438.

21. Erwin Billiard Parlor v. Buckner, 156 Tenn. 278, 300 S. W. 565 (1927).

22. For further examples see BORCHARD, DECLARATORY JUDGMENTS (1934) 25.

upon future events and acts of the parties.[23] It seems, therefore, that the declaratory judgment law does not enlarge the judicial power in cases where equity has jurisdiction, but extends it only in the common law field where the traditional procedure allows nothing more than a judgment calling for immediate execution and refuses to adjudicate a controversy where no "wrong" has yet been committed.[24]

While it was not done in the *Aetna* case, it is customary, in determining the effect to be given a statute, to give some regard to the intent of its framers. In the debate on the Declaratory Judgment Act at the time it passed the House of Representatives, its protagonists assumed that it would extend the jurisdiction of federal courts to cases where no consequential relief would be possible, and a declaration of right would be necessary to prevent one party from jeopardizing his position.[25] The report of the Senate Judiciary Committee with regard to the Federal Declaratory Judgment Act clearly sets forth the committee's understanding and intention that the measure extend to the situations under III above.[26]

It is also customary, in determining the effect to be given to a statute, to give some regard to the attitude of other jurisdictions regarding similar measures. If the United States Supreme Court extends the application of the Federal Declaratory Judgment Act to its broadest limits, it will not only be holding in accord with the courts of England,[27] from which country we borrowed our declaratory judgment law, but with the overwhelming majority of American authority.[28] True, the "case" or "controversy" requirement which must be met by federal courts is unique, but as has been pointed out,[29] the tests of justiciability applied in state courts are quite as severe as the case or controversy test of the federal courts.

In summary, it is urged that the Supreme Court extend its holding in the case of *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth* (i.e., that the Declaratory Judgment Act is applicable in the instance of disputes where one party would be entitled to some relief in the absence of the declaratory judgment law) to situations where no consequential relief would be granted but for the declaratory judgment law. Such disputes, provided they do not involve too remote contingencies which

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23. As examples of decrees granting such conditional relief, see Willard v. Tayloe, 75 U. S. 557 (1869); Talbot v. Hill, 261 F. 244 (App. D. C. 1919); Farwell v. Harding, 96 Ill. 32 (1880); Lindell v. Lindell, 150 Minn. 295, 185 N. W. 929 (1921); Bank of Alma v. Hamilton, 85 Neb. 441, 123 N. W. 458 (1909); Comstock v. Johnson, 46 N. Y. 615 (1871); United Cigarette Mach. Co. v. Brown, 119 Va. 813, 89 S. E. 850 (1916).

24. See BORCHARD, DECLARATORY JUDGMENTS (1934) 3 *et seq.*, 308.

25. 69 CONG. REC. 2108 (1928).

26. SEN. REP. No. 1005, 73d CONG., 2d. SESS., May 10, 1934. Excerpts from the report: The declaratory judgment "enables parties in dispute over their rights over a contract, deed, lease, will or any other written instrument to sue for a declaration of rights without breach of contract, etc., citing as defendants those who oppose their claims of rights. It has been employed . . . where it was not possible or necessary to obtain an injunction."

27. Guaranty Trust Co. of New York v. Hannay & Co., [1915] 2 K.B. 536.

28. 9 U. L. A. (1932) 121 *et seq.*

29. BORCHARD, DECLARATORY JUDGMENTS (1934) 272.

must occur before coercive relief could be asked, should be considered justiciable in their nature, and within the scope of the law as intended by its framers and as interpreted by other jurisdictions.

VICTOR C. WOERHEIDE

MASTER AND SERVANT—FROLIC AND DETOUR.—When a servant causes injury to a third person while in the conduct of his master's business, courts have for many years placed liability for this injury on the master. Writers have experienced difficulty in finding legal justification for this doctrine of *respondeat superior*, the best explanation—a social justification—probably being Dean Smith's analogy to the workmen's compensation statutes[1] and the feeling that it is more desirable socially to distribute losses occurring from the conduct of business over a large group of the community rather than upon the injured party—the servant being typically judgment proof. "It is reasoned that if this new cost item is added to the expense of doing business, it will be ultimately borne by the consumer of the product; that the consumer should pay the costs which the hazards of the business have incurred."[2] Dean Smith feels that *respondeat superior* has accomplished an end similar to that of the workmen's compensation statutes. Just as workmen's compensation distributes losses that inevitably occur to employees engaged in industry, so *respondeat superior* spreads those resulting to third persons from some act of an employee. This idea is often referred to as the entrepreneur theory of vicarious liability.[3] Under this theory losses will be distributed either by means of insurance or an adjustment of the profit differential between costs and price-to-the-public.[4]

The question to be here discussed is the liability of the master for the acts of a servant in those cases commonly known as the "frolic and detour" cases.[5] These cases involve the question of vicarious liability for torts of a servant which occur when the servant is driving a vehicle in the course of his employment, but deviates from the prescribed (express or implied) route. It is at this point that the words "frolic" and "detour" serve to designate what the servant has done. The problem is to determine whether the acts of the servant amounts to a mere "detour" or whether the servant is on a "frolic" of his own. When will a servant's deviation take the case out of the rule of master's liability? Obviously, industry should not bear the cost of all torts committed by its servants. If a truck driver

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1. Smith, *Frolic and Detour* (1923) 23 COL. L. REV. 444, 716.
2. Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 YALE L. J. 584, 586.
3. TIFFANY, AGENCY (Powell's 2d ed. 1924) 100-105; Douglas, *supra* note 2, at 585.
4. It should, perhaps, be noted that the frolic and detour principles purport to apply both to industrial and *individual* servants—which shows that the entrepreneur theory does not fully account for vicarious liability.
5. This language may seem strange to Missouri lawyers, as the reported Missouri cases seldom employ the terms, but legal writers have long used them in classifying the cases in this particular field of the law of master and servant.

purposely injures his personal enemy to satisfy a personal grudge, this cost is not one properly allocable to industry. Industry should not bear the burden of losses which, for lack of better designation, can be said to have occurred outside the "scope of employment."[6] It is with this feeling, very likely, that courts inquire whether the servant has left the employment of his master and has embarked upon the performance of some business of his own—a "frolic" of his own—or whether the deviation is so slight as to be merely a "detour" in the performance of the master's business.

The idea behind "frolic and detour" is to determine when to limit liability under the doctrine of *respondeat superior.* To what extent do the cases immunize an employer? Various tests have ben suggested for use in determining if the deviation of the servant amounted to a "frolic" or if it was a mere "detour."

Among the suggested tests are the motivation-deviation and zone-of-risk tests. In motivation-deviation the requisite factors for liability are said to be:[7] "(1) Satisfactory evidence that the employee in doing the act, in the doing of which the tort was committed, was motivated in part at least by a desire to serve his employer; and (2) Satisfactory evidence that the act, in the doing of which the tort was committed, was not an extreme deviation from the normal conduct of such employees." Thus this test requires a consideration of the motive of the servant and of the extent of his deviation, and would not hold a master liable if the servant has discarded the thought of performing his master's business (with a view, say, to doing something not for the master), especially if he has departed from what would normally be the route taken.[8] But if the servant does not go too far off the route and is still motivated, at least to some extent, by a desire to serve his master, the master will be held liable.[9] It is at once apparent that the application of this test leaves a difficult question to be determined, namely, what is the crucial extent of the deviation; and that predictability of what a court (*a fortiori,* a jury) will do, is, in many cases, impossible.

The "zone-of-risk" test is based more on foreseeability. Here, though the servant be at the particular place of the tort as result of a deviation from the prescribed route, the master is said to be responsible for accidents that occur in the zone in which he can reasonably anticipate a servant to be, given the habits and experiences of individuals generally and possibly of types of servants specifically.

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6. Smith, *supra* note 1, at 461; Guthrie v. Holmes, 272 Mo. 215, 241, 198 S. W. 854, 860 (1917): "It is elementary that the master is not liable for injuries occasioned to a third person by the negligence of his servant while the latter is acting beyond the scope of his employment for his own purposes, although he may be using the vehicle furnished him by the master with which to perform the ordinary duties of his employment."

7. TIFFANY, *op. cit. supra* note 3, at 106.

8. *Ibid.*

9. *Ibid.* Query, however, if the master should escape liability when the servant has not deviated, but is motivated by a purpose only of his own. Fidelity & Casuality Co. of New York v. Kansas City Rys., 207 Mo. App. 137, 231 S. W. 277 (1921); Douglas, *supra* note 2, at 587.

Dean Smith suggests this approach rather than that of inquiring into the servant's motive in doing the act or considering whether the act was done in furtherance of the particular work the servant was employed to do.[10] He feels this would confine the master's liability to deviations of the servant which were probable, in view of his employment, and that factors of motivation and deviation would merely aid in determining this, i. e., motive, and measure of distance, time and direction of the deviation. This consideration of what the master could reasonably expect, however, leaves us with as unpredictable a basis as does the motivation-deviation test.

Professor Douglas[11] views both these tests as a bit arbitrary in that they state distinctions that, *per se,* have little significance from the administration of risk angle, which has four important aspects—avoidance, prevention, shifting, and distribution. He feels that the principal question to be considered by the courts is what limitations should be put on the master's cost of doing business and suggests that the emphasis be placed upon attention to the function which the judicial process is performing—the allocation of losses—always with an eye to avoidance, prevention, shifting and distribution of risk. Again, it will be noticed, absolute legal certainty is beyond reach.

A study of the Missouri cases reveals very little that can be interpreted either as a conscious acceptance of the social problem of risk administration and cost allocation or of the zone-of-risk or motivation-deviation tests.[12] There is frequent reiteration of an inquiry into "whose business is being done" by the servant at the time of the act giving rise to the suit,[13] an inquiry which seems to tie in very well with the entrepreneur theory, but the courts do not announce the method by which they determine this question.[14] Nor do the opinions in the reported cases reveal that charges to the jury are, or should be, made in terms any more specific than

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10. Smith, *loc. cit. supra* note 1.

11. Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 YALE L. J. 584.

12. In some of the Missouri cases the facts fail to reveal the exact circumstances under which the accident occurred, i.e., whether the servant was on the route or off the route; thus making it impossible to determine the applicability of any test. Fidelity & Casuality Co. of N. Y. v. Kansas City Rys., 207 Mo. App. 137, 231 S. W. 277 (1921); Vanneman v. Walker Laundry Co., 166 Mo. App. 685, 150 S. W. 1128 (1912).

13. Cable v. Johnson, 63 S. W. (2d) 433 (Mo. App. 1933); Nagle v. Alberter, 53 S. W. (2d) 289 (Mo. App. 1932); Ursch v. Heier, 210 Mo. App. 129, 241 S. W. 439 (1922).

14. The following statement shows the general approach to the problem: "In some cases the deviation might be so slight as to authorize the court as a matter of law to declare that the servant is still executing the master's business. Where the degree of deviation is marked and unusual, such as where the chauffeur takes his employer's car on a frolic of his own or on a joy ride, the court as a matter of law would declare that he has departed from the scope of his employment. . . . The cases falling between these extremes will be regarded as involving a question of fact to be left to the jury." Fidelity & Casuality Co. of New York v. Kansas City Rys., 207 Mo. App. 137, 231 S. W. 277 (1921).

to find "whose business is being done." There is, seemingly, no test given them in the court's instructions by which they are to make their findings.

It is difficult to reconcile the cases. In the case of *Anderson v. Nagel*,[15] defendant, a farmer, sent his son to a neighbor's house to inquire about borrowing a hayrake. Defendant lived off the highway and the neighbor lived on the highway at the intersection of the road which the son followed in getting on the highway. When the boy left the neighbor's house, instead of returning home, he drove down the highway a short distance to ask about a ball game, for his own personal ends. On the way back to his home, but before reaching the place he was to turn off the highway, the plaintiff was injured by the son's negligence. The court, in reversing the trial judge for not sustaining a demurrer to the evidence of plaintiff, said that the son had completely abandoned his employment; that this was not so slight a deviation that it could be said that he was still serving his father while serving himself.[16]

In *Slothower v. Clark*,[17] the facts are practically analogous, but the court reached a different result. Here defendant's chauffeur, after taking his master to church, was told to go to the Commerce Building to get defendant's son and come back to the church. The chauffeur drove several blocks in the opposite direction from the Commerce Building to collect some money owed him. After getting his money he started for the Commerce Building and on the way negligently injured plaintiff. It was not shown how close he was to the Commerce Building, nor how far off the route, at the time of the accident. The Kansas City Court of Appeals upheld a verdict for $2,500 against defendant, saying that the chauffeur had not quit sight of defendant's business. "He had defendant's directions in mind all the while and was executing them, only going a roundabout way to do so" (i.e., "detour").

These cases can hardly be reconciled under either the motivation-deviation or zone-of-risk tests, although there is one difference in the facts that might possibly account for the decisions. In the *Slothower* case the servant had not, at the time of the deviation and accident, arrived at the place he was directed to go, while in the *Anderson* case the son had already performed what he was told to do before departing from the route for his own purpose. It is doubtful that any legal effect should follow from this distinction, but it may have some effect. It seems far-fetched to believe that the defendant in the *Anderson* case would have been held liable if the son had gone on past the neighbor's house to go see about the ball game before inquiring about the hayrake, and had had the accident on the way back, at the identical spot.

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15. 214 Mo. App. 134, 259 S. W. 858 (1924).

16. The son "completely abandoned his employment. There was no duty of his employment to be subserved upon this excursion. There was no business of his master to be promoted by going in the opposite direction from that in which his duty as servant required him to go. He was not making a mere incidental detour or deviation on an errand of his own from the strict course of duty, so that while thus going *extra viam* he was serving his master while serving himself. . . ." Anderson v. Nagel, 214 Mo. App. 134, 148, 259 S. W. 858, 861 (1924).

17. 191 Mo. App. 105, 179 S. W. 55 (1915).

And yet this very distinction might account for the case of *Ursch v. Heier*,[18] where the defendant, an undertaker, told his driver to take a coffin-box to a cemetery, leave it, and return. The servant took the box to the cemetery, then picked up some members of his family and started out in the country to get some pears for his personal use. The accident in which the plaintiff was injured occurred while the servant was on his way to get the pears. The court held that defendant's demurrer to the evidence should have been sustained and said that no part of the master's business was being served, but that the servant was on his way in pursuance of his own purpose and that it appeared as a matter of law that he had departed from the scope of his employment. But suppose that here the servant had gone after the pears before leaving the box at the cemetery and had injured plaintiff on the way to the cemetery? Would the court have said, as in the *Slothower* case, that the servant was executing his master's orders, only going in a roundabout way to do so?[19]

In so far as the above cases intimate that the master is liable when the servant has deviated before performing his master's business, they seem to lean to the motivation-deviation test. There would, seemingly, be no such distinction drawn under the zone-of-risk test, but there is not much indication in the Missouri cases to tell us whether the latter test is accepted or rejected.

There may well be a tendency to give a plaintiff relief against a large corporation (or the master of a chauffeur)[20] when recovery would be denied in similar circumstances against an individual. The New York case of *Riley v. Standard Oil Co.*[21] may be a demonstration of this. In that case the truck driver for Standard Oil was ordered to go from his master's mill to a certain freight yard to pick up some barrels of paint and return at once to the mill. After the truck was loaded, the driver, for no purpose that could conceivably serve the master, picked up some pieces of fire wood, put them on the truck and took them to his sister's house, which was four blocks in the opposite direction from the mill. After delivering the wood he started back along the same route, but before he had reached the freight yards

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18. 210 Mo. App. 129, 241 S. W. 439 (1922).

19. Of course, the extent of the deviation would surely be considered, as there certainly should be no liability on the master if the servant was to go six blocks on an errand, but went by way of a town fifty miles away, for a purpose solely of his own. One of the weaknesses of the Ursch case, as precedent, is that the extent of the deviation is not shown; but the court, on page 442, says this is not the decisive question. In fact the Missouri cases seldom speak of the extent of the deviation, and the language in this case would indicate that it is not of much importance, but it would surely be a factor to be considered in determining whose business was being done.

20. For instance, the New York Workmen's Compensation Law, in the 1931 amendment, excluded from the operation of the Compensation Law all domestic servants *other than* chauffeurs in New York City. N. Y. CON. LAWS (Cahill, Supp. 1931) c. 66, §3. In Missouri, however, domestic servants, *including* chauffeurs, are specifically inculded. MO. REV. STAT. (1929) § 3303.

21. 231 N. Y. 301, 132 N. E. 97 (1921).

he negligently ran over the plaintiff. The court here allowed the case to go to the jury, who, apparently, found that the driver was "in the scope of his employment." These facts are very similar to the *Anderson* case.[22] Would the *Riley* case have been decided the same way by the Missouri court, the Standard Oil Company being the defendant? True the entrepreneur theory fits in well with liability of a commercial employer, from the angle of risk administration, while it is not satisfactory when applied to a non-commercial employer. The Missouri cases, however, do not furnish satisfactory data for determining whether this line of cleavage is recognized.[23]

Other Missouri cases present no different facts upon which to base a discussion of the problem. The decisions involve only a finding by the court or jury that the servant was, or was not, engaged in the performance of his master's business and acting within the scope of his employment.[24] Nearly all of the cases have been decided by the Courts of Appeal, there being only one or two decisions of the Supreme Court on the subject[25] (and not particularly helpful, at that). Until the Supreme Court has ruled on more of the cases it will be impossible for a lawyer to know definitely what factors are to be the motivating factors for Missouri courts. Of course, the very nature of the problem is such that predictability of whether a court will let a case go to the jury is difficult,[26] no matter whether (1) the court frankly approaches the problem from the angle of risk allocation; or (2) back-handedly does so under verbal cover of so-called tests like motivation-deviation, etc.; or (3) really applies the motivation-deviation test, or the zone-of-risk test, as if those tests revealed rules which are ends in themselves. Nevertheless, it would be somewhat of a

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22. But it will be recalled that the defendant master in the Anderson case was a farmer.

23. In addition to cases already cited, see: Kaufman v. Baden Ice Cream Mfrs., Inc., 7 S. W. (2d) 298 (Mo. App. 1928); Tutie v. Kennedy, 272 S. W. 117 (Mo. App. 1925); Gorry v. Boehmer Coal Co., 241 S. W. 976 (Mo. App. 1922); Schulte v. Grand Union Tea & Coffee Co., 43 S. W. (2d) 832 (Mo. App. 1931).

24. Wrightsman v. Glidewell, 210 Mo. App. 367, 239 S. W. 574 (1922); Pinteardd v. Hosch, 233 S. W. 81 (Mo. App. 1921). Also, several of the cases involved a slightly different problem, i.e., the case of a salesman or representative who is furnished a car by his employer and has no specific route to follow: Brunk v. Hamilton-Brown Shoe Co., 334 Mo. 517, 66 S. W. (2d) 903 (1933); Kilroy v. Charles L. Crane Agency Co., 203 Mo. App. 302, 218 S. W. 425 (1920).

25. Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854 (1917); Brunk v. Hamilton-Brown Shoe Co., 334 Mo. 517, 66 S. W. (2d) 903 (1933).

26. If it does go to the jury, it is error to tell the jury that if the chauffeur was returning the truck by the most direct route and in the scope of his employment, the master would be liable even though the servant drove the truck away from the master's plant for a purpose of his own. Kaufman v. Baden Ice Cream Mfrs., Inc., 7 S. W. (2d) 298, 300 (Mo. App. 1928). An instruction in Tutie v. Kennedy, 272 S. W. 117, 122 (Mo. App. 1925), was held proper which told the jury that if Lilly (the servant) was in the performance of the duties of his employment and had not abandoned or forsaken the performance of such duties, they might find that at the time of the collison he was acting within the scope of his employment, even though they might also find that at the time he was taking Frazier (a friend of Lilly) home.

guide-post to know which of these theories (or maybe some other theory) motivates the court.

E. C. CURTIS

PLEADING AND PRACTICE—PROOF OF ESSENTIAL MATTER AS AFFECTING FAILURE TO STATE CAUSE OF ACTION.—A plaintiff's petition fails to allege some fact essential to his cause of action. At the trial, however, plaintiff introduces evidence which tends to prove that fact and proceeds to prove his cause. A verdict in favor of plaintiff is returned and judgment is entered accordingly. Defendant then discovers the absence of the essential allegation and appeals on the ground that plaintiff's petition failed to state a cause of action. An unbroken line of Missouri cases holds that regardless of whether defendant objected to the introduction of this evidence or was in any way surprised or misled by it, this judgment must be reversed and the case remanded, with leave to plaintiff to amend.[1] The obvious reason is that failure to state a cause of action is a defect that is never waived and can be raised at any stage of the trial. This ancient legal shibboleth provides the coin for the judicial slot machine and out comes a reversal with perfect mechanical regularity, regardless of the circumstances of the particular case. Not only is there a reversal, but the cause must now be retried *in toto*,[2] with the accompanying expense, delay and burden on the trial court.

The reasons given for such strict application of the rule are said to be that a defendant should not be required to meet issues not raised by the pleadings and of which he therefore has no notice, and that failure to state a cause of action presents a defect which is jurisdictional in its nature. Another ground not so often mentioned in the cases but which must be taken into consideration is the fact that there should be a clear and intelligible record of what was involved and decided in a given case.

The first reason suggests a basis on which some of the decided cases could have been distinguished, had not the rule been applied so mechanically to all cases of failure to state a cause of action. If a defendant is not surprised or misled by the introduction of evidence on a given issue, why should he not be required to meet that issue? A helpful analogy is to be found in the cases of immaterial variance between pleadings and proof[3] and the statute[4] on that subject which provides that a variance is not material unless the advers party has been misled to his prejudice and that it can be taken advantage of only by affidavit showing wherein he was

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1. O'Donnell v. Wells, 323 Mo. 1170, 21 S. W. (2d) 762 (1929); Lee v. St. Louis Public Service Co., 337 Mo. 1169, 88 S. W. (2d) 337 (1935); Heinrichs v. Royal Neighbors of America, 292 S. W. 1054 (Mo. App. 1927); Chandler v. Chicago & Alton R. R., 251 Mo. 592, 158 S. W. 35 (1913); O'Toole v. Lowstein, 177 Mo. App. 662, 160 S. W. 1016 (1913).

2. Chandler v. Chicago & Alton R. R., 251 Mo. 592, 158 S. W. 35 (1913).

3. Fischer v. Max, 49 Mo. 404 (1872); Bammert v. Kennefick, 261 S. W. 78 (Mo. 1924); Aetna Inv. Corp. v. Barnes, 52 S. W. (2d) 221 (Mo. App. 1932).

4. Mo. REV. STAT. (1929) § 817. Cf. Hibbler v. K. C. Rys., 292 Mo. 14, 237 S. W. 1014 (1922) (holding statute inapplicable).

misled. But the reason underlying this statute and these decisions has not been applied where matter essential to the cause of action was not pleaded.[5] The rule operates automatically to defeat the offending pleader. The same result is reached in cases in which the question arises in connection with instructions or the admissability of evidence. Missouri has repeatedly held that instructions must embrace only issues within both the evidence and the pleadings, that they must confine themselves to issues raised by the pleadings even though the evidence may take a wider range[6]—this without regard to how the evidence was received or whether or not defendant objected or claimed surprise. And the same has been held with respect to the admissability of evidence on issues not raised by the pleadings: it may be reversible error to admit such evidence.[7] It is submitted that all these questions should have been decided on the basis of notice to the opposite party, particularly in view of the Code provisions for amending pleadings to conform to proof. These statutes will be considered below.

The second reason given seems the only logical ground for such consistent application of the rule: namely, that failure to state a cause of action is a jurisdictional defect.[8] Yet, while this view may provide a logical basis for the cases, it seems unreasonable and unsound in view of the present day functions of pleadings. At early common law, the writ was indeed jurisdictional: one paid for the issues he had determined. And later when the pleadings came to perform the function of the early writ, the common law view developed, as a hang-over from the earlier time, that the pleadings were jurisdictional. However, there seems no other valid reason for so considering them where the facts upon which relief depends are proven to exist. If lack of jurisdiction were the only ground for reversing these cases, one would need only to look to the cases where the amount involved is falsely pleaded to see the courts looking to the actual facts rather than to the words of the pleadings to determine whether jurisdiction actually exists, and the fallacy would be plain enough.

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5. Rundelman v. Boiler Works, 178 Mo. App. 642, 161 S. W. 609 (1913).

6. Overton v. Webster, 26 Mo. 332 (1858); Nugent v. Kauffman Milling Co., 131 Mo. 241, 33 S. W. 428 (1895); Degonia v. St. Louis, I. M. & S. Ry., 224 Mo. 564, 123 S. W. 807 (1909); Rosenweig v. Wells, 308 Mo. 617, 273 S. W. 1071 (1925); Krelitz v. Calcaterra, 33 S. W. (2d) 909 (Mo. 1930). In two cases, Stottle v. Chi., R. I. & P. Ry., 321 Mo. 1190, 18 S. W. (2d) 433 (1929), and North Nishnabotna Drainage Dist. v. Morgan, 323 Mo. 1, 18 S. W. (2d) 438 (1929), opinions by Judge White, indicated a relaxation of the strictness of the rule with respect to instructions. These two cases are out of line with previous interpretations of Mo. REV. STAT. (1929) § 1099, the so-called statute of jeofails, and apparently have not been followed. See, for example, O'Donnell v. Wells, 323 Mo. 1170, 21 S. W. (2d) 762 (1929), in which failure to state a cause of action brought the classic reversal with leave to amend. In the latter case, there was an objection to the introduction of testimony, but this was overruled and the evidence accepted, the defendant making no claim that he was surprised or misled.

7. Hibbler v. K. C. Rys., 292 Mo. 14, 237 S. W. 1014 (1922).

8. Chandler v. Chicago & Alton R. R., 251 Mo. 592, 599, 158 S. W. 35, 36 (1913).

The third reason for the rule raises the question of amending the pleadings and the statutory provisions in that regard.[9] It is said that one of the functions of the pleadings is to provide a record of what was involved and decided in a given case, and the importance of this function is obvious. It was to provide for this that the amendment statutes were put into the Code. But another provision in the statutes preserved the rule that failure to state a cause of action was a defect never waived and available at any stage of the trial,[10] and this rule has rendered useless any provision for the amendment of the pleadings in this respect after judgment has been rendered in the trial court. In *O'Toole v. Lowenstein*,[11] the action was trover and plaintiff failed to allege possession or the right to possession. From the report, it is not clear whether or not plaintiff introduced evidence on this issue, but the language of the opinion indicates that he must have done so. Judge Nortoni writes: "It is quite probable that the legislature intended amendments should be made here" (i.e. in appellate court) in cases of this character. But he goes on to say that the amending statutes[12] must be considered in connection with section 1804, Revised Statutes of Missouri, 1909,[13] which provides that failure to state sufficient facts is an objection available at any time, either in the trial or appellate court. Thus the amending statutes have been construed as not permitting amendment to supply an essential allegation in the appellate court, even if it was the intention of the legislature that this should be possible. Essential matter may be inserted

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9. The Code provisions with respect to amendments, Mo. REV. STAT. (1929) §§ 817, 818, 819, 821, 822, 831, 941, 1099 and 1100 are very broadly worded but have been strictly construed by the Missouri appellate courts.

10. Mo. REV. STAT. (1929) § 774.

11. 177 Mo. App. 662, 160 S. W. 1016 (1913).

12. Mo. REV. STAT. (1929), § 1099, enumerates various omissions and imperfections which shall not be ground for reversal after verdict, among which are: "want of any allegation or averment on account of which omission a demurrer could have been maintained," and omission of "any allegation . . . without proving which the triers of the issue ought not to have given such a verdict." This is followed by section 1100, which provides that imperfections and omissions enumerated in section 1099 shall be supplied and amended, if they do not alter the issues between the parties, either in the trial court or the appellate court. It is with respect to these two sections that Judge Noroni said that the legislature probably intended that amendments supplying essential matter should be allowed in the appellate court. Section 1099 is the so-called statute of jeofails and has been interpreted as merely declaring the common law rule that verdict will aid a cause of action defectively stated but not a defective cause of action. Welch v. Bryan, 28 Mo. 30 (1859). And ever since Andrews v. Lynch, 27 Mo. 167 (1858), it has been held that omission of an essential averment is not cured by this section.

The doctrine of Ford v. Wabash Ry., 318 Mo. 723, 300 S. W. 769 (1927), that where plaintiff would have been entitled to amend his petition to conform to facts proven the appellate court will treat the petition as having been amended, was held not to apply where the omitted allegation was essential to the cause of action in Lee v. St. Louis Public Service Co., 337 Mo. 1169, 88 S. W. (2d) 337 (1935).

13. Mo. REV. STAT. (1929) § 774.

in the trial court, even after verdict[14] or on hearing of a motion in arrest;[15] but thereafter no such amendments may be made. If such amendments may be made before judgment in the trial court, no good reason is seen why they should not be permitted in the appellate court if the fact was proved at the trial and the defendant was neither surprised nor misled so that he was unable to litigate the issue and disprove the fact if he could. No Missouri case has been found in which both parties met the issue and litigated it; but the language of the *O'Toole* case is such that it seems unlikely that an amendment would be permitted even in such a case.

It is to be noted that the principle of aider by verdict is not applicable in these situations. It has been expressly determined that this principle and the so-called statute of jeofails[16] will cure a cause of action defectively stated but not a defective cause of action.[17] The entire absence of allegation is an objection equally fatal both before and after verdict.

A few means of avoiding the extremity of some of these decisions are suggested. One method which would lessen if not avoid the hardship is the remanding of the case for retrial on the single issue which was omitted from the pleadings. This course is adopted by several states[18] and has even been approved by the Supreme Court of the United States,[19] usually conservative in matters involving trial by jury. The common sense of the device is obvious, and it has the added advantage of doing no violence to traditional concepts of pleading. The record is put in order, the partial new trial must be to a large extent a brief formality in most cases, while if defendant actually can meet the issue he has full opportunity to do so. But the Supreme Court of Missouri has expressly forbidden this procedure in actions at law, although it has allowed it in suits on the equity side of the court.[20] This distinction seems an unsound one, particularly in view of the supposed fusion of law and equity under the Code. The dire consequences of permitting it, foreseen by Judge Lamm,[21] seem

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14. Merrill v. Mason, 159 Mo. App 605, 141 S. W. 454 (1911).
15. Golden v. Moore, 126 Mo. App. 518, 104 S. W. 481 (1907).
16. Mo. REV. STAT. (1929) § 1099. See note 12, *supra,* for contents of this section.
17. Welch v. Bryan, 28 Mo. 30 (1859); Andrews v. Lynch, 27 Mo. 167 (1858).
18. L. R. A. 1915 E, 240, and cases there collected. Remanding for trial of a single issue is provided for by statute in some states and by judicial decisions in others.
19. Gasoline Products Co. v. Champlin Co., 283 U. S. 494 (1931).
20. See 19 U. OF MO. BULL. L. SER. 38, for a complete discussion of the Missouri holdings on the subject.
21. In Chandler v. Chicago & Alton R. R., 251 Mo. 592, 158 S. W. 35 (1913) Judge Lamm wrote: "In equity where the issues rest with the chancellor, and a jury fills no office of substance, that course is sensible where occasion demands. But in a case at law triable to a jury, to send the case below on one question of fact to be tried out before another jury, leaving other issues of fact foreclosed by a former verdict, is contrary to our statutory scheme for jury trials. (This is apparently Lamm's own notion, for he cites no authority for this view.) It would result in awkward situations and complications not conducive to the orderly administration of justice." A better approach to the problem is taken by Justice Stone in Gasoline Products Co v. Champlin Co., 283 U. S. 494 (1931). Referring to the common law rule which did not permit this procedure he writes: "Lord Mansfield, in applying

not to have materialized even in actions at law in those jurisdictions in which this procedure is adopted. However, the method of partial new trial leaves much to be desired and is in reality only a makeshift concession to common sense in an attempt to preserve traditional forms.

A better method would be for the appellate court to affirm the judgment and allow an amendment in the appellate court (or order such amendment to be made), thus protecting the record; but, as above noted, Missouri expressly forbids this procedure. This seems the most feasible scheme, but requires a more liberal construction of the amendment statutes than the courts of this State have been willing to give.

A final possibility would be for the appellate court simply to affirm the judgment, and hold the record of a case not conclusive in later actions and permit the introduction of parol evidence to show what issues were actually litigated. This would perhaps be a dangerous method—parol evidence will not always be available for this purpose. But it would result in more economical justice in a given case.[22]

The Missouri view of this question is taken by the great majority of states in which code pleading is the form of procedure.[23] Only a small minority[24] feel that proof of a fact in the trial court can make up for its absence from the allegations in the pleadings. And while it is to be noted that no Missouri case has been found in which both parties actually introduced evidence on and fully litigated the issue,

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the common law rule where the verdict, correct as to one issue, was erroneous as to another, said: '. . . for form's sake, we must set aside the whole verdict.' Edie v. East India Co., 1 W. B. 295, 298. But we are not now concerned with the form of the ancient rule. . . . All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. Beyond this, the Seventh Amendment . . . does not . . . require that an issue once correctly determined . . . be tried a second time. . . ."

22. Another method whereby these results are often avoided is the practice of courts to interpret pleadings very liberally after verdict and if possible find that essential facts are to be implied from facts actually alleged. See, for example, Martin v. St. L. S. F. Ry., 227 S. W. 129 (Mo. App. 1921).

23. Ozark Fruit Growers' Assn. v. Tetrick, 130 Ark. 165, 197 S. W. 30 (1917); Dodge Brothers v. Central Vt. Ry., 92 Vt. 454, 104 Atl. 873 (1918); Self v. Gilbert, 105 Okla. 140, 231 Pac. 870 (1924); Przybylski v. Remus, 207 Ill. App. 106 (1917).

24. Farmers' Sav. Bank v. Planters' Elev. Co., 200 Iowa 434, 204 N. W. 298 (1925). The court said: "While it is true that the pleadings do not raise such an issue, yet issue was raised and met by both sides in the trial of the case; hence the issue was a voluntary one met by the evidence, and therefore was properly instructed upon."

yet there are cases very nearly approaching this situation[25] and the language of the cases is strong enough to indicate that the Supreme Court would very likely reverse the judgment in such a case and "remand with leave to plaintiff to amend." The cases indicate a strictly professional attitude toward pleadings and a slavish adherence to form regardless of function. The results in these cases seem not only undesirable but unnecessary and avoidable even under our present system of procedure.

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25. In Heinrichs v. Royal Neighbors of America, 292 S. W. 1054 (Mo. App. 1927), an instruction was based on a by-law of an insurance company, the by-law not having been expressly pleaded. A stipulation had been entered into, however, which provided that the by-laws should be admitted without further proof, and the by-law in question was admitted in evidence without objection. On appeal this instruction was held bad as being based on issues not raised by the pleadings. This was an insurance case and the holding was necessary to the affirmation of a judgment for plaintiff insured; but it shows the extent to which Missouri courts have gone in applying the rule that instructions must not be broader than the pleadings, the only exception apparently being the almost universal view that the court may instruct as to contributory negligence even though defendant has not pleaded it, when plaintiff's own evidence shows such negligence on his part. But even here Missouri is strict and holds that plaintiff's evidence must *clearly* establish his own negligence. See Pim v. St. Louis Transit Co., 108 Mo. App. 713, 84 S. W. 155 (1904), and Collett v. Kuhlman, 243 Mo. 585, 147 S. W. 965 (1912).