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## Recent Cases

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# Recent Cases

## ATTORNEY AND CLIENT—WHAT CONSTITUTES THE “PRACTICE OF LAW”—GOVERNMENT INVESTIGATION.

### *Spier v. Thomas*<sup>1</sup>

One month after being admitted to practice law in the state and federal courts of Nebraska, the defendant entered the service of the Federal Bureau of Investigation of the Department of Justice. A requirement for appointment to this service was that the applicant should have been admitted to the bar. The defendant's principal work was to discover evidence to be used in the trial of government cases, and to prepare summaries and briefs of the facts. Sometimes he sat at the counsel table with the district attorney, but he did not examine any witnesses, make any argument, or become an attorney of record in any case. Almost all of the defendant's activity was carried on in states other than Nebraska, but he was not admitted to practice in any other state. After remaining in the government service for about three years, the defendant returned to Nebraska where he engaged in private practice for a similar period of time. He then became a candidate for judge of the municipal court of Omaha. A Nebraska statute declares that no person shall be eligible to this office unless he shall have been a regularly admitted and practicing attorney in the state of Nebraska for at least five years. In an action by the plaintiffs for a declaratory judgment, the lower court declared the defendant ineligible, and the Supreme Court of Nebraska affirmed the judgment. The decision was based on two grounds: first, that the defendant was not “practicing law” during the period of his service for the government, and second, even if he was he was not so engaged in Nebraska during this period.

The second ground of the decision is undoubtedly correct and this alone would have been sufficient to declare the defendant ineligible. The question as to whether the defendant's work for the government was practice of law, is not so free from difficulty. It may be argued in support of the decision that inasmuch as the defendant was not employed to give legal advice, or to prosecute or defend an action in court, or to prepare and draft instruments in legal form, the relation between him and the government was not one of attorney and client, but merely one of principal and agent.<sup>2</sup> On the other hand, even though a statute prohibited any associate judge from practicing law, one who had been associate judge of a municipal court was recently deemed to have thereby met the requirement of the same statute that one must have practiced law to be eligible for the office of chief justice of this court, it being held that the definition of the term “practice

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1. 269 N. W. 61 (Neb. 1936).

2. 6 C. J. 631, § 126; *McCreary v. Hoopes*, 25 Miss. 428 (1853); *McKeel v. Mercer*, 118 Okla. 66, 246 Pac. 619 (1926).

of law" may vary according to the manner in which it is used.<sup>3</sup> Moreover, another case has held one who had been a law professor in another state to have been practicing law therein, and hence eligible for admission to the bar without examination.<sup>4</sup>

In addition to the questions of eligibility for judicial office or admission to the bar of another state, other questions might arise concerning the status of one engaged in government investigation. Must or should such a person pay organized bar dues in the state where he has been admitted to practice, if he conducts investigation in that state? While undoubtedly one engaged in ordinary private detective work is not practicing law, surely at some point preparation of a case for use in court becomes the practice of law. If one not authorized to practice law was engaged by someone other than the federal government to do the type of work done in the principal case, would it amount to the illegal practice of law?<sup>5</sup> Since the purpose for the requirement that there have been a practice of law is different here than in cases involving eligibility for a judicial office, it would not necessarily be inconsistent if opposite results were reached in these two types of cases, or, indeed, in any two of the types of cases under discussion.<sup>6</sup> For a clearer illustration, suppose, instead of being a candidate for judge, the defendant was a candidate for county attorney, an office in which, differing from a judgeship, experience in government investigation would be very valuable—and a state statute provided that such a prosecutor must have practiced law for five years. Under these circumstances should not an opposite result have been reached in the principal case? If not, it would seem unfortunate that one who had been engaged solely in drawing deeds and examining titles would nevertheless be eligible for such an office.

Assuming that a state court decides that obtaining evidence does constitute the practice of law, could it punish one employed by the federal government but not authorized to practice law in the state, for doing the work?<sup>7</sup> Could it punish a federal district attorney for performing his duties if he had not, and a federal statute provided that he need not, become a member of the state bar?

While it is not necessary that one acting under the supervision of an attorney be admitted to the bar, is a law clerk so acting, who is actually a member of the bar, practicing law for the purpose of eligibility for judicial office and for other

3. *Gazan v. Heery*, 187 S. E. 371 (Ga. 1936). See also annotation in (1937) 106 A. L. R. 508.

4. *Cockerill v. State Bar of Calif.*, 212 Cal. 439, 298 Pac. 807 (1931) (facts unreported).

5. See *Meuier v. Bernich*, 170 So. 567 (La. App. 1936).

6. *Gazan v. Heery*, 187 S. E. 371 (Ga. 1936).

7. Cf. AMERICAN BAR ASSOCIATION, COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES (1937) 170, Opinion 31; see on federal admission and disbarment, Waterman, *The Federal Bar: A Decentralized System of Admission and Disbarment* (1934) 20 A. B. A. J. 762.

purposes? Suppose his only work was of the type done in the principal case. Would a court distinguish the supposed case from the principal one?

While doubtlessly correctly decided, the principal case suggests several important problems not adequately considered by the courts, grievance committees, or other writers: (1) the extent to which a person not admitted to practice may engage in the activities of gathering evidence and preparing a case for trial, when not supervised by a member of the bar, (2) the status in the legal profession of a person who is admitted to the bar and who is regularly employed (a) by a law firm, or (b) by a private person or corporation to perform certain services narrow in scope and not amounting to a "general" practice of law, or (c) by the state or federal government in similar restrictive types of legal work. The recent increase of governmental activities has made the latter question one of considerable moment, though its solution leans upon the handling of the other suggested problems, which have been with us for some time.

SESCO V. TIPTON

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CONSTITUTIONAL LAW—MINIMUM WAGE LEGISLATION.

*West Coast Hotel Co v. Parrish*<sup>1</sup>

The recent decision of the United States Supreme Court in the case of *West Coast Hotel Co. v. Parrish* calls attention again to the problem of the power of a state to regulate wages. This case involves a minimum wage law, applicable to women and minors, enacted by the legislature of the state of Washington in 1913. In holding this statute constitutional the court expressly overruled its prior holding in the case of *Adkins v. Childrens Hospital*<sup>2</sup> and thereby either extended the state police power, or justified its use in regulating wages of women and minors. The court seems also to have modified the effect, according to prior interpretation, of the word "liberty" as used in the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court has held that *hours of labor* could be regulated by a state through its inherent power to legislate to protect the health, safety, morals and general welfare of its people. In these cases,<sup>3</sup> if the legislature of a state found that in a particular industry, long hours of work were detrimental to health, a statute limiting such hours of labor was held a valid exercise of the police power. However, in these cases the exercise of the police power was challenged as a violation of the Fourteenth Amendment and its implication of freedom of contract.

With the recognition of the validity of state regulation of hours of labor came

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1. 57 Sup. Ct. 578 (1937).

2. *Adkins v. Childrens Hospital*, 261 U. S. 525 (1923).

3. *Holden v. Hardy*, 169 U. S. 366 (1898); *Muller v. Oregon*, 208 U. S. 412 (1908); *Bunting v. Oregon*, 243 U. S. 426 (1917); *Miller v. Wilson*, 236 U. S. 373 (1915); *Radice v. New York*, 264 U. S. 292 (1924) (legislation prohibiting employment of women in restaurants between 10 o'clock at night and 6 o'clock in the morning was held to be a proper exercise of state police power).

state statutes attempting to regulate wages. Prior to the *West Coast Hotel Co.* case the law had rested on the precedents established by the decisions in the *Adkins* Case and the case of *Morehead v. People of New York ex rel. Tipaldo*.<sup>4</sup> These cases held that the word "liberty" as used in the Fourteenth or the Fifth Amendment, as the case might be, meant that an individual was free to contract for any wage that he, or she, might see fit. A state statute seeking to regulate such wage was held to be a violation of the guarantee of freedom of contract as interpreted from the due process clause of the Federal Constitution, and was not a proper regulation under the state power to protect health, safety, and morals, inasmuch as no relation between wages and health, safety or morals could be found.

The law today, in the light of the holding of the *West Coast Hotel* case, seems to be that a state by virtue of its power to protect health, safety, morals, and welfare of the people, may by statute provide for minimum wages for women and minors. This case holds that freedom of contract as guaranteed by the Fourteenth and Fifth Amendments means a reasonable, as distinguished from an absolute, freedom. The Supreme Court also recognizes current economic conditions and the effect thereof on the reasonableness of the exercise of the police power by a state in aid of health, morals, and welfare.

The use of the police power for the purpose of regulating wages of women and minors is justified on what is sometimes termed "inequality of bargaining power." According to this principle, the employee, because of his unequal economic and bargaining position, is at the mercy of the employer and is forced to accept whatever wage the employer sees fit to give. This principle was first advanced in 1898 in the case of *Holden v. Hardy*,<sup>5</sup> which held constitutional a Utah statute limiting hours of labor for workers in mines and ore smelters. The dissenting opinions in the *Adkins* and *Morehead* cases also pointed out this inequality and its effect on freedom of contract. With the modern position of labor unions, and the indication of their further advancement, we are apt to wonder if there is at the present the same inequality of bargaining power between employer and employee.

The dissenting opinion in the *West Coast Hotel* case declares that if the Constitution is to be construed differently in view of each change in current economic conditions, it "is to rob that instrument of the essential element that continues it in force as the people have made it until they, and not their official agents, have made it otherwise."<sup>6</sup> It is further declared that women are as free to contract as men, and that the statute provides for setting a wage without relation to earning power of the individual or the difference in needs of different individuals to protect adequately their health and morals. For these and other reasons the opinion declares that the statute is arbitrary and unreasonable.

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4. *Morehead v. New York ex rel. Tapaldo*, 298 U. S. 587 (1936).

5. *Holden v. Hardy*, 169 U. S. 366 (1898).

6. *West Cost Hotel Co. v. Parrish*, 57 Sup. Ct. 578, 587 (1937).

What will be the effect of this construction of the due process clause of the Fourteenth and Fifth Amendments? The dissenting opinion in the *West Coast Hotel* case points out that there seems to be no reason why women should be singled out for minimum wage legislation and to do so is to discriminate arbitrarily. It is generally recognized that there are physical differences between men and women that might be deemed to require women to have shorter hours of labor than do men for the protection of health,<sup>7</sup> but do the physical differences between the sexes justify a minimum wage for women and not for men?

The effect of this case on future legislation and decisions of the Supreme Court may conceivably involve more than regulation of wages, and extend to a new interpretation of the due process clause and the police power of the state.

PAUL S. KIMBRELL

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#### CRIMINAL LAW—STATUTORY CONSTRUCTION.

##### *United States v. Giles*<sup>1</sup>

The accused, a bank teller, in order to cover up his cash shortage, withheld deposit slips and failed to turn them over to the bookkeeper to be entered in the usual course of the bank's business. As his bank was a member of the Federal Reserve System, he was indicted under a federal statute which provides: "Any officer, director, agent, or employee . . . of any member bank [of Federal Reserve System], . . . who *makes* any false entry in any book, report, or statement of such . . . bank, . . . with intent . . . to injure or defraud such . . . bank, . . . or to deceive any officer of such . . . bank, . . . or any agent or examiner appointed to examine the affairs of such . . . bank . . . shall be deemed guilty of a misdemeanor. . . ."<sup>2</sup> (Italics the writers). The accused was convicted in the district court. In the circuit court of appeals the conviction was reversed. The Supreme Court granted certiorari. It was held that although the accused did not write any false entries in the books or reports, the words employed in the statute and the evident intent of Congress was to include a false entry by an innocent intermediary, viz., the bookkeeper. Judgment of the circuit court of appeals was reversed, and judgment of the district court affirmed.

The long settled rule in the construction of penal statutes is that they are to be strictly construed, that is, interpreted strictly against the government and liberally in favor of the defendant.<sup>3</sup> This rule grew up in the early common law in England at a time when death was the usual penalty for a felony. Its purpose, then, was to temper the severity of the penalty.<sup>4</sup> Reasons advanced to support

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7. *Muller v. Oregon*, 208 U. S. 412 (1908).

1. 57 Sup. Ct. 340 (1937).

2. 40 STAT. 972 (1918), 12 U. S. C. A. § 592 (1936).

3. See 25 R. C. L. 1081 (1919) and cases there cited.

4. Hall, *Strict or Liberal Construction of Penal Statutes* (1935) 48 HARV. L. REV. 748, 750.

it in modern times, after the death penalty has ceased to be the chief mode of punishment for serious crimes, are as follows: (1) the power of making punitive laws is vested in the legislative and not in the judicial department;<sup>5</sup> (2) since the state makes the laws, they should be most strongly construed against it;<sup>6</sup> (3) "the courts should be particularly careful that the bulwarks of liberty are not overthrown, in order to reach an offender who is, but who perhaps ought not to be, sheltered behind them";<sup>7</sup> (4) if the purpose behind criminal law is admitted to be revenge, no harm can be done if the state fails to get an eye for an eye in the particular case;<sup>8</sup> (5) the statute should be construed to give fair warning of what the law prohibits in language that no one will misunderstand;<sup>9</sup> (6) the severe punishment carried by a few statutes as compared with the acts sought to be punished should be tempered;<sup>10</sup> (7) the law regards the rights of the individual with tenderness.<sup>11</sup> Although the strict rule is generally modified to the extent that statutes are not to be construed so strictly as to defeat the obvious intention of the legislature,<sup>12</sup> yet even with this modification the courts are prone to follow the old rule whenever they are in doubt, no matter how reluctant they are to do so.<sup>13</sup>

In the past century there has been a movement away from the rule. Statutes have been passed in about one-fourth of the states expressly repudiating the common law rule and providing for a liberal construction of penal statutes.<sup>14</sup> Recently writers have criticized the strict rule and have suggested that liberal construction statutes be adopted in those states which do not have them.<sup>15</sup> Reasons are given as follows: (1) it is not necessary to go beyond the intent of the legislature to obtain a liberal construction; (2) the state is presumably acting in the public interest in enacting statutes and need not be subjected to a rule of construction designed to secure justice between private parties in the interpretation of private contracts;

5. *United States v. Wiltberger*, 18 U. S. 574, 575 (1820).

6. See *Lane v. State*, 120 Neb. 302, 305, 232 N. W. 96, 98 (1930).

7. See *Moore v. State*, 53 Neb. 831, 848, 74 N. W. 319, 324 (1898).

8. For material dealing with the purpose behind the criminal law, see *Miller, Criminal Law—An Agency for Social Control* (1934) 43 YALE L. J. 691; *Harno, Rationale of a Criminal Code* (1937) 85 U. OF PA. L. REV. 549.

9. *McBoyle v. United States*, 283 U. S. 25, 27 (1931). The court in this case held that the National Motor Vehicle Theft Act, 41 STAT. 324 (1919), 18 U. S. C. A. § 408 (1927), defining a motor vehicle as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails" did not include an airplane.

10. In Maine where by a statute the punishment for knowingly and willfully defiling a spring may be life imprisonment, it was held by a strict construction that the statute did not include stirring up the mud in the bottom of the spring with a clean stick. *State v. Blaisdell*, 118 Me. 13, 105 Atl. 359 (1919).

11. *United States v. Wiltberger*, 18 U. S. 574, 575 (1820).

12. *Ibid*; see 25 R. C. L. 1084 (1919), and cases there cited.

13. *Kuhn v. Kuhn*, 125 Iowa 449, *In re Kuhn's Estate* 101 N. W. 151 (1904); *West v. State*, 27 Okla. Cr. 125, 225 Pac. 556 (1924).

14. For a list of the states, statutes, and decisions, see Hall, *supra* note 3, at 771.

15. Hall, *supra* note 3, at 768; *Comment* (1934) 32 MICH. L. REV. 976.

(3) we need no bulwark against tyranny in a country where both the legislature and the executive are elected by the people; (4) most statutes give a fair warning that certain conduct is criminal, but notwithstanding that fact, no warning is necessary in crimes like murder and theft; (5) the revenge theory upon which the rule is justified is outmoded and rejected as a basic theory of criminal law; (6) although the law regards the rights of the individual with tenderness, yet the court should not close its eyes to the intention of the legislature when it decrees that a certain act by an individual is against the public welfare; (7) respect for the criminal lay is being destroyed by technical acquittals required by strict construction; (8) an attitude of liberal construction goes far to make the law appear rational. It is agreed that where the strict construction rule is used for the salutary purpose of tempering an unduly severe statutory penalty, it should be retained.

The liberal construction of the statute in the principal case seems to be a definite step in the right direction. Perhaps, according to Mr. Justice Holmes' approach in *McBoyle v. United States*,<sup>16</sup> which was that the statute should be interpreted so as to give people warning that they are violating the law, the defendant here had no explicit warning since he "made" no false entry in the physical meaning of the word. Yet since he had an intent to defraud which was consciously against the interests of others, he did not need a warning. It seems obvious that Congress intended to punish the person who conceived and carried out the fraudulent scheme, not the bookkeeper who innocently "made" the record.

Missouri has persistently retained the strict construction doctrine.<sup>17</sup> One example of its application is *State v. Reid*,<sup>18</sup> in which a statute made it a felony for officers of "banks" or "banking institutions" to receive deposits when the institution was insolvent. The accused, an officer of a trust company which received deposits like a bank, accepted deposits while the trust company was insolvent. The court held that although the trust company exercised some functions of a bank, it was not a "bank" or a "banking institution", and the accused did not fall within the terms of the statute.

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16. 283 U. S. 25, 27 (1931).

17. *State v. Howard*, 137 Mo. 289, 38 S. W. 908 (1897); *State v. Butler*, 178 Mo. 272, 77 S. W. 560 (1903); *State v. Owens*, 268 Mo. 481, 187 S. W. 1189 (1916); *State v. Bartley*, 304 Mo. 58, 263 S. W. 95 (1924). In *State v. McMahon*, 234 Mo. 611, 137 S. W. 872 (1911), the defendant was charged under a statute with having carnal knowledge of an unmarried female of "previous chaste character" between the ages of fourteen and eighteen years. It was shown that the prosecutrix was of previous chaste character until defendant began having sexual intercourse with her four years before the filing of the information. The action was held to be barred by the three year statute of limitations, since when the action accrued three years before the filing of the information, the prosecutrix was not of "previous chaste character." The statutory term "previous chaste character" was thus construed as referring strictly and solely to the condition of the prosecutrix at the time when the offense alleged in the indictment was committed.

18. 125 Mo. 43, 28 S. W. 172 (1894).



In a recent Missouri case<sup>19</sup> involving a statute which provides that "No motor vehicle . . . the gross weight of which including the load is more than 24,000 pounds . . . shall be operated on the highways of this state," the defendant operated a truck train consisting of a tractor, a semi-trailer, and a trailer. The trailer weighed in excess of 24,000 pounds. It was held that the trailer attached to and propelled by such a motor vehicle, is itself in a broad sense a motor vehicle and that, therefore, the defendant was guilty under the statute. The court said: "The legislative act should be given such construction as to suppress the mischief, and advance the remedy, to suppress subtle evasions for continuance of the mischief, and for private gain, and to add force and life to the cure and remedy, for the public good. It is true that a criminal statute is construed liberally in favor of the defendant, and strictly against the state, but this rule affords no warrant for a construction out of harmony with the manifest purpose and intent of the statute." Though this case is a court of appeals decision only, and though under the rule of strict construction there can be some individualization without a departure from the principle, and though a subsequent supreme court case has applied the strict doctrine,<sup>20</sup> it is believed that the Missouri courts are to some extent breaking away from the outmoded rule of strict construction. The decision of the United States Supreme Court in the principal case may have some influence in furthering that trend.

MILTON I. MOLDAFSKY

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SALES—WARRANTY—LIABILITY OF RETAILER FOR SALE OF GOODS IN SEALED CONTAINERS.

*Degouveia v. H. D. Lee Mercantile Co.*<sup>1</sup>

Plaintiff, injured by eating a can of salmon which contained a black fly, sued the retail grocer for breach of an implied warranty that the salmon was fit for human consumption. *Held*: recovery allowed.<sup>2</sup>

It is interesting to observe that within the space of a few months the Kansas City Court of Appeals had occasion to decide, for the first time in this state, three important questions concerning the remedies afforded to injured consumers of bad food or drink.<sup>3</sup> Although previously it had been decided in Missouri that

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19. *State v. Schwartzman Service, Inc.*, 225 Mo. App. 577, 40 S. W. (2d) 479 (1931).

20. *State v. Holder*, 335 Mo. 175, 72 S. W. (2d) 489 (1934).

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

2. The scope of this note is limited to the liability of a retailer for goods sold in sealed containers. The other portion of the opinion, dealing with the liability of the jobber, is noted in (1937) Mo. L. REV. 235.

3. *Madouros v. Kansas City Coca-Cola Bottling Co.*, 90 S. W. (2d) 445 (Mo. App. 1936) (liability of manufacturer in warranty to a remote vendee); *Degouvei v. H. D. Lee Mercantile Co.*, 100 S. W. (2d) 336 (Mo. App. 1936). The opinion in the principal case deals also with the wholesaler's liability.

an implied warranty of fitness for human consumption ran from manufacturer to dealer in a purchase of canned tomatoes,<sup>4</sup> the liability in warranty of a retailer to a consumer in the sale of food in sealed containers had not been determined until the advent of the principal case.

As noted by the court, the authorities in the United States, both under the common law and the Uniform Sales Act, are in hopeless conflict on the point in issue.<sup>5</sup> Decisions denying the liability of a retailer of goods in sealed packages, do so on the ground that the retailer is blameless, being incapable of ascertaining the quality of the goods, and that in such situation there is no permissible reliance upon the vendor by the injured vendee<sup>6</sup>. Other cases meet this argument by saying that the dealer is in the better position to recoup the loss, that he is also in the better position to determine the responsibility of the manufacturer, and that to deny the warranty is to engraft an exception to the general rule that a dealer is liable in warranty for a sale of injurious food.

An examination of the two positions leads one to several considerations. The cases refusing to find an implied warranty have found vigorous support in the theory that there can be no reasonable reliance upon a dealer when it is patent that the dealer's ignorance of the contents of a can is as great as that of the consumer. In this behalf, it is also asserted that the consumer has an adequate remedy against the manufacturer, and that no public policy justifies an imposition of liability on the dealer.<sup>7</sup> It is apparent that such an analysis is couched in

4. Crocker Wholesale Grocer Co. v. Evans, 272 S. W. 1017 (Mo. App. 1925).

5. Cases denying the warranty are: Coca-Cola Bottling Co. v. Swilling, 186 Ark. 1149, 57 S. W. (2d) 1029 (1933) (common law); Great Atlantic & Pacific Tea Co. v. Gwilliams, 189 Ark. 1037, 76 S. W. (2d) 65 (1934) (common law); Scruggins v. Jones, 207 Ky. 636, 269 S. W. 743 (1925) (common law); Bigelow v. Maine Cent. R. R., 110 Me. 105, 85 Atl. 396 (1912) (common law); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933) (common law); Julian v. Laubenberger, 38 N. Y. Supp. 1052, 16 Misc. 646 (1896) (common law); Aranowitz v. Woolworth Co., 236 N. Y. Supp. 133, 134 Misc. 272 (Sales Act). Cases affirming the warranty are Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932) (Sales Act); Chapman v. Roggenkamp, 182 Ill. App. 117 (1913) (common law); Sloan v. Woolworth, 193 Ill. App. 620 (1915) (common law); Bowman v. Woodway Stores, 258 Ill. App. 307 (1930) (common law); Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N. E. 225 (1918) (Sales Act); Lieberman v. Sheffield Farms-Slawson-Decker Co., 191 N. Y. Supp. 593, 17 Misc. 531 (1921) (Sales Act); Ryan v. Progressive Grocery Stores, 255 N. Y. 388, 175 N. E. 105 (1931) (Sales Act) (note that judgment is given under subdivision of the section defining warranties). The law of England is in accord with this view: Frost v. Aylesbury Dairy Co., [1905] 1 K. B. 608 (Sale of Goods Act); Jackson v. Watson & Sons, [1909] 2 K. B. 193 (Sale of Goods Act).

6. This determination has not been confined to food cases. Compare those authorities denying that a dealer impliedly warrants any goods against latent defects. For example, see White v. Oakes, 88 Me. 367, 34 Atl. 175 (1896).

7. Waite, *Retail Responsibility and Judicial Lawmaking* (1936) 34 MICH. L. REV. 494. Note also the fear expressed that this would give rise to a false claim racket. In this regard see note (1937) 37 COL. L. REV. 77, 86; and Llewellyn, *On Warranty of Quality, and Society, II* (1937) 37 COL. L. REV. 341, 406.

terms of fault, and, if fault should be necessary to the recovery in warranty, the reasoning is correct.

The justification for a decision such as the principal case, finds its hypostasis in the view that the problem is fundamentally one of consumer protection.<sup>8</sup> The obvious corollary to such approach is that the fault of the dealer is immaterial.<sup>9</sup> The adequacy of the consumer's remedy against the manufacturer certainly is subject to question.<sup>10</sup> Where the jobber or manufacturer is so situated that the dealer is enabled to recover over (thus placing the loss where it ultimately should be borne) it seems eminently just to insure the consumer's protection by allowing the warranty action against the retailer.<sup>11</sup> Conceding that a situation might arise in which a dealer would be precluded from recovering over,<sup>12</sup> recompense to the consumer demands that this risk be borne by the retailer as incidental to his business, which business the consumer supports. It is submitted that the redress of a consumer of canned goods is consonant with the absolute liability imposed upon tavernkeepers, vintners, and the like, by the early common law.<sup>13</sup> Consumer protection has been exemplified by the enactment of pure food and drug regulations, consumer redress is exemplified by the principal case.

O. S. BREWER

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TAXATION—EXEMPTION OF INCOME DERIVED FROM AN AUXILIARY OF A FEDERAL INSTRUMENTALITY.

*People of New York ex rel. Rogers v. Graves*<sup>1</sup>

The relator is general counsel for the Panama Rail Road Company, a corporation, the stock of which, except for thirteen qualifying shares held by directors,

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8. Llewellyn, *On Warranty of Quality, and Society, II* (1937) 37 COL. L. REV. 341, 406; Note (1937) 37 COL. L. REV. 77, 84.

9. Considering the form of action, solely, recovery in warranty should not be predicated upon negligence. WILLISTON, SALES (2d ed. 1924) §§ 237, 242; (1937) 2 MO. L. REV. 235.

10. States holding a manufacturer as insurer by allowing a remote vendee to sue him in implied warranty are, due to the privity objection, still in the minority. (1937) 2 MO. L. REV. 235. Conceding that the manufacturer is amenable to service or close enough to make suit feasible, the difficulty that a consumer will have in proving negligence depends entirely upon the rules as to proof obtaining in the particular jurisdiction. (1937) 2 MO. L. REV. 73; (1937) 21 MINN. L. REV. 315. The consumer's success against a jobber is illustrated by the principal case, noted in (1937) 2 MO. L. REV. 235.

11. In a jurisdiction where privity of contract is required in a warranty action, refusal to allow recovery against the retailer would deprive the consumer of the implied warranty remedy altogether. Waite, *supra* note 7, would absolve a dealer from liability unless he was negligent, even in the case of inspectable goods.

12. The writer has no data concerning the average proximity of dealers with their jobbers or manufacturers.

13. Note (1937) 2 MO. L. REV. 235.

1. 57 Sup. Ct. 269 (1937).

is wholly owned by the United States government in the name of the Secretary of War. The road is used chiefly in connection with the operation of the Panama Canal, although it does some carrying of private freight and passengers. On the theory that the company, being a wholly owned instrumentality of the United States, is exempt from state taxation, the relator contends that fixed salaries paid to its officers and employees are also exempt from the New York state income tax. Holding that the operation of the Panama Canal is a governmental function and well within the power of Congress to provide for under the commerce clause of the Constitution,<sup>2</sup> and that the railroad is an auxiliary primarily designed and used to aid in its management and operation, relator's salary was held not taxable. The court, having established to its satisfaction that the railroad company was exercising functions of a governmental nature, proceeded to apply the old doctrine laid down in *Dobbins v. Commissioners of Erie County*<sup>3</sup> that a state is without authority to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper<sup>4</sup> means to execute its sovereign power.

The blanket application of the doctrine of the *Dobbins* case, built up from the "power to tax is the power to destroy" aphorism in *McCullough v. Maryland*,<sup>5</sup> has been criticized by many able writers<sup>6</sup> and commended by a few.<sup>7</sup> This writer, while concurring in the criticism of the doctrine, wishes here merely to point out the extension which is being made of it. It is difficult to see what limitation will be put upon this tax-exemption rule if the courts continue to use the formula for

2. The court also suggests, although it does not emphasize the point, that the railroad is justifiable under the war powers clause in the Constitution.

3. 16 Pet. 435 (1842).

4. It is interesting to note the inconsistencies in the application of the government instrumentalities doctrine to the taxation of federal and state instrumentalities. Thus it has been stated that immunity will be granted only to those state agencies which are *strictly* governmental, *South Carolina v. United States*, 199, 461 U. S. 437 (1905); or are *related to the essential* governmental functions of the state, *Flint v. Stone Tracy Co.*, 220 U. S. 107, 172 (1911); or which do not constitute a departure from *usual* governmental functions, *Helvering v. Powers*, 293 U. S. 214, 225 (1934); or which involve the *exercise of essential* governmental functions, *Brush v. Commissioner of Internal Revenue*, 57 Sup. Ct. 495 (1937). The inconsistencies may also be noted in Powell, *National Taxation of State Instrumentalities* (1937) 20 ILLINOIS STUDIES IN THE SOCIAL SCIENCES (No. 4) and Brown, *State Taxation of Interstate Commerce, and Federal and State Taxation in Intergovernmental Relations* (1933) 81 U. OF PA. L. REV. 247.

5. 4 Wheat. 316 (1819).

6. Boudin, *The Taxation of Governmental Instrumentalities* (1933) 22 GEO. L. J. 1, 254; Burns, *Taxation of Federal and State Instrumentalities* (1932) 10 TAX MAGAZINE 208; Hughes, *Tax Exemptions* (1935) 13 TENN. L. REV. 79; Comment (1930) 30 COL. L. REV. 92; Comment (1931) 44 HARV. L. REV. 829; Comment (1931) 79 U. OF PA. L. REV. 948; (1931) 38 W. VA. L. Q. 59.

7. The best argument seems to be the one made by Cohen and Dayton, *Federal Taxation of State Activities and State Taxation of Federal Activities* (1925) 34 YALE L. J. 807.

deciding the cases that was used in the instant case; that is, that if the function is within the power of Congress to provide for, and there is an auxiliary primarily designed and used to aid in its management and operation, a salary derived from the auxiliary is not subject to a state income tax. If the court is going to continue to insist that such a tax would be a burden upon the federal government, it would seem that there should be some limit in sense to the doctrine. Whatever burden there might be under the fact situation in the instant case would appear to be so small as to be almost non-existent. This writer cannot see that there is any burden at all. If the tendency toward greater exemption continues, along with the tendency of the government to enlarge the scope of its activities<sup>8</sup> (almost any of which may be regarded as "necessary", or "proper" in time), there would seem to be the possibility of a more real burden imposed by the exemptions. That is, the burden will be placed upon the state which is not allowed to tax the income of an increasingly large group of its citizens, solely because of the fact that they are employed by the federal government or one of its instrumentalities.

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TORTS—LIABILITY TO BUSINESS GUEST FOR INJURIES RESULTING FROM A FALL ON A WAXED FLOOR.

*Ilgenfritz v. Missouri Power & Light Co.*<sup>1</sup>

The plaintiff went into the defendant's office to pay her light bill. The floor which was covered with linoleum was slightly wavy and uneven, although not enough so to be noticeable. This linoleum had been waxed and had a glossy and slick appearance. In walking over it the plaintiff fell and was injured. She sued the defendant for damages, alleging the floor was slippery and was dangerous and unsafe for persons to walk thereon, and that she was injured by the negligence of the defendant in permitting and causing the floor to be in that condition. It was held that it is not negligence to have an office floor waxed, when such waxing is obvious, and when no unusual amount or kind of wax is used. Persons using it were only required to walk over it in an ordinary careful way.

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8. It is difficult to get exact figures which would suggest the amount of taxable income that might be exempted from taxation under the doctrine of these cases. However, the Federal executive civil service employees numbered 824, 259 in 1936 as compared with 515, 772 in 1923 according to figures in the New York Times for May 17, 1937. The increase in the national debt from \$16,026,000,000 in 1930 to an estimated \$35,001,000,000 in 1938 also suggests a possible proportionate increase in the amount of tax exempt income. It is also of interest that, although there has been a greater limitation on the immunity of state instrumentalities from federal taxation, there is still a tendency to widen the scope of immunity as is illustrated by the recent case of *Brush v. Commissioner of Internal Revenue*, 57 Sup. Ct. 495 (1937), in which it was held that the operation of a municipally owned water system is a governmental function so that the salaries of its officers and employees are not taxable by the Federal government.

1. 101 S. W. (2d) 723 (Mo. 1937).

A business visitor<sup>2</sup> is a person who is permitted or invited to enter land in possession of another for a purpose connected with business dealings between them.<sup>3</sup> The occupier of the premises is liable for any injury to such a visitor caused by an unsafe condition on the premises, which is known to the possessor and not to the visitor, and which he had suffered to exist without giving warning of the danger to the visitor.<sup>4</sup> A possessor has a duty imposed upon him to give such warning, and failure to do so is negligence on his part. There is no liability for injuries resulting from obvious dangers or those well known to the person injured.<sup>5</sup> Cases on this point in all jurisdictions hold that the proprietor is not an insurer of his customers' safety, but is liable only for injuries resulting from his negligence.<sup>6</sup>

The court in the principal case follows this general theory in holding that the defendant was not negligent. The floor was waxed with ordinary floor wax which was applied in the usual manner. The floor was so nearly level that a mechanical test would be necessary to find any incline. To hold a defendant negligent for causing and permitting such a condition as this would virtually make him an insurer. Evidence was admitted to show that from 1,500 to 2,000 persons walked over this floor every month and that only one had fallen and that person had snow on his shoes. The court said, "This shows a condition which would not be reasonably anticipated to be the cause of injury to customers in the usual exercise of ordinary care for their own safety."

The visit is or may be financially beneficial to the possessor, and the business visitor may reasonably expect that the possessor will take reasonable care to know the condition of the premises and either make them safe or warn him of the dangerous conditions. In view of this the visitor is not required to be on the alert to discover defects, and is not guilty of contributory negligence unless the dangers are obvious.<sup>7</sup> But in the instant case the appearance of the floor was glossy and obviously waxed, and anyone walking upon it would be held to notice the condition and be required to use the reasonable care necessary for his safety.

Notions of convenience in the care and preservation of linoleum on floors in places of business, as well as customary practices, impel the conclusion that it would be imposing too great a liability if it should be held that waxing a floor was in itself negligence; however, the court said that waxing a floor might be negligence under some circumstances, such as waxing a floor before an elevator

2. The business guest and the duty owed to him is discussed by McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land* (1936) 1 Mo. L. Rev. 45, 58.

3. RESTATEMENT, TORTS (1934) § 332.

4. *Vogt v. Wurmb*, 318 Mo. 471, 300 S. W. 278 (1927).

5. *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1104 (1897); 20 R. C. L. 56, 57.

6. The cases are collected in (1924) 33 A. L. R. 181.

7. RESTATEMENT, TORTS (1934) § 343, the liabilities of a possessor to a business guest as set forth concisely in this section are: "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial

entrance or at an escalator landing. Here the magnitude of the risk outweighs considerations of utility to the possessor.<sup>8</sup>

The application of these considerations in the instant case seems to accord with our present notions of fairness to both parties. The customer or invitee is amply protected from dangerous hidden conditions on the premises.

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condition thereon if, but only if, he

(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and,

(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and,

(c) invites or permits them to enter or remain upon the land without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled, to receive, if the possessor is a public utility."

8. RESTATEMENT, TORTS (1934) § 291, where it is stated that "... the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done."

For more Missouri decisions, see Missouri Annotations to § 343. These annotations and the Restatement's connection with Missouri law are discussed by Professor McCleary, who prepared the Missouri Annotations, in *The Restatement of the Law of Torts and the Missouri Annotations* (1937) 2 Mo. L. Rev. 28.