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Recent Cases

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CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE TAXATION ON GROSS INCOME

J. D. Adams Manufacturing Co. v. Storen[1]

The Indiana Gross Income Tax Act of 1933[2] provided for a tax on gross receipts derived from trade, business, commerce, and investments. The tax was to apply to both residents and non-residents who derived income from sources within the state. However, the tax was not applicable to so much of such gross income as is derived from interstate or foreign commerce to the extent that the Constitution prohibits taxation of such commerce. A levy was attempted against a manufacturer of machinery, eighty percent of which was sold in interstate commerce. The Indiana Supreme Court held the exaction was valid.[3]

The United States Supreme Court declared the statute, as thus applied, to be invalid. It was held that this was not a tax on domocile, nor a franchise tax, nor an "in lieu" tax as was suggested by the state supreme court.[4] This was purely a tax on gross receipts. The vice of such a statute, as pointed out by the court, is that if the exaction were lawful

> ". . . it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate Commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by article I, section 8, of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."[5]

Mr. Justice Black, dissenting, contended that the question of validity of the tax turns upon whether or not there is an actual burden on interstate commerce. To condemn such taxes as a class ignores the fact that such a tax might not actually be a burden on commerce. He pointed out[6] that many of the cases relied upon by the majority[7] can be distinguished upon the ground that they deal with transportation companies singled out for taxation. Here the tax was actually not a burden, for it was non-discriminatory, general, and

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1. 58 Sup. Ct. 913 (1938).
2. Indiana Acts 1933, c. 50.
3. Storen v. J. D. Adams Mfg. Co., 7 N. E. (2d) 941 (Ind. 1937).
4. *Id.* at 950.
5. J. D. Adams Mfg. Co. v. Storen, 58 Sup. Ct. 913, 916 (1938).
6. *Id.* at 920, 921.
7. *Id.* at 916, n. 10.

uniform. He pointed out further that while it was true that in the future the tax could be so multiplied as to become a burden, it is a question that can be decided as it arises, for in the absence of such multiplication it is not a burden.

In 1919, the case of the *American Manufacturing Co. v. St. Louis*[8] came before the Court. It involved the validity of a city ordinance providing for a municipal license fee for manufacturing. This was to be measured by the volume of the gross receipts received from the sale of the manufactured product. The appellant's goods were manufactured in St. Louis, shipped into other states, stored, and later sold. It was contended that this exaction constituted a burden on interstate commerce. This contention was rejected by the Court:

> "There is no doubt of the power of the State, or of the city . . . to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. . . . The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, . . . it has postponed ascertainment and payment of the tax until the manufacturer can bring his goods into market."[9]

The majority in the present case did not believe the *American Manufacturing Co.* case to be in point. The cases were distinguished upon the ground that the St. Louis ordinance was an occupation tax; the exaction was not upon sales made, nor the income derived from those sales, but the volume of the sales was merely a method of measuring the value. The city could not have levied a sales tax to include sales consummated in another state.[10] Justice Black, following the view of the Indiana Supreme Court,[11] pointed out that there was no difference in the operative effect of the two taxes.[12]

The view of the majority appears to be that a tax on gross receipts derived from interstate commerce is in effect a tax on the commerce itself.[13] A state cannot tax commerce;[14] then a tax on gross receipts, derived from such commerce, is invalid.[15]

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8. 250 U. S. 459 (1919).
9. *Id.* at 463.
10. J. D. Adams Mfg. Co. v. Storen, 58 Sup. Ct. 913, 916, 917 (1938).
11. 7 N. E. (2d) 941, 946 (Ind. 1937).
12. J. D. Adams Mfg. Co. v. Storen, 58 Sup. Ct. 913, 924 (1938).
13. See Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 295 (1917).
14. Brown v. Maryland, 12 Wheat. 419 (U. S. 1827).
15. The cases relied upon by the Court for this proposition are: Cook v. Pennsylvania, 97 U. S. 566 (1878); Fargo v. Michigan, 121 U. S. 230 (1887); Phila. and So. S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887) (overruling State Tax on Railway Gross Receipts, 15 Wall. 284 (U. S. 1872), which allowed such taxation); Galveston, H. and S. A. Ry. v. Texas, 210 U. S. 217 (1908); Meyer v. Wells, Fargo and Co., 223 U. S. 298 (1912); Minnesota Rate Cases, 230 U. S. 352, 400 (1913) (dictum); Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917); United States Glue Co. v. Oak Creek, 247 U. S. 321, 328 (1918) (dictum); N. J. Bell Tel. Co. v. State Board, 280 U. S. 338 (1930); Fisher's Blend Station v. Tax Comm., 297 U. S. 650 (1936); Western Livestock Co. v. Bureau of Revenue, 58 Sup. Ct. 546 (1938) (dictum). The language appears to grow progressively stronger in the cases. A tax on net income will be sustained. See United States Glue Co. v. Oak Creek, 247 U. S. 321 (1918); Hump Hairpin

However, it is agreed that a state possesses the power to tax property within its jurisdiction even though it be employed in interstate commerce,[16] and in taxing such property the state is not restricted to an *ad valorem* measure but may employ any appropriate means for reaching its actual or full value, such as a tax measured by gross receipts.[17] A state may not only tax the property within its jurisdiction but may tax the occupations of manufacturing, extracting and producing such property, for production is not commerce.[18] Similarly, here too, gross receipts derived from the sale of the goods may be used as a measure of taxation.[19]

It is to be observed then that a tax "measured by" gross receipts will stand if it impinges on taxable property or occupations; but if in the opinion of the Court it does not impinge on one of these, it is to be considered as a tax "on" gross receipts and fails.[20]

At this point one is confronted by a principle of constitutional law that the constitutionality of a law depends not upon how it is characterized but upon its effect.[21] As noted above,[22] both the dissent in the present case and the Indiana Supreme Court have taken the position that there is no difference in the operative effect of the exaction in the *American Manufacturing Co.* case and the Indiana Gross Income Tax. This contention is denied nowhere in the majority opinion. It would appear that if the two taxes have the same opera-

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Mfg. Co. v. Emmerson, 258 U. S. 290 (1922). The soundness of this distinction has been questioned by the dissent in the present case. J. D. Adams Mfg. Co. v. Storen, 58 Sup. Ct. 913, 922 (1938).

16. Western Union v. Atty. Gen., 125 U. S. 530 (1888); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891); Ficklen v. Taxing District, 145 U. S. 1, 22 (1892); Adams Express Co. v. Ohio State Auditor, 165 U. S. 194 (1897); Virginia v. Imp. Coal Sales Co., 293 U. S. 15 (1934). See also, Rottschaefer, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305.

17. This is the so-called "in lieu" tax. It is considered to be a tax on property "in lieu" of general property taxes. United States Express Co. v. Minnesota, 223 U. S. 335 (1912); Cudahy Packing Co. v. Minnesota, 246 U. S. 450 (1918); Northwestern Mut. Life Ins. Co. v. Wisconsin, 247 U. S. 132 (1918); Union Tank Line Co. v. Wright, 249 U. S. 275 (1919). When the general property tax has not been abolished, the tax will not be considered as "in lieu." Johnson v. Wells, Fargo & Co., 239 U. S. 234 (1915); N. J. Bell Tel. Co. v. State Bd., 280 U. S. 338 (1930). Maine v. Grand Trunk Ry., 142 U. S. 217 (1891) has been cited as an "in lieu" tax case, but there is nothing in the language of the opinion to this effect. See comment (1930) 18 CALIF. L. REV. 512, 519. For a criticism see Beale, *Taxation of Foreign Corporations* (1904) 17 HARV. L. REV. 248.

18. Kidd v. Pearson, 128 U. S. 1 (1888); United States v. E. C. Knight Co., 156 U. S. 1 (1895); Oliver Iron Mining Co. v. Lord, 262 U. S. 172 (1923); Utah Power and Light Co. v. Pfost, 286 U. S. 165 (1932).

19. American Mfg. Co. v. St. Louis, 250 U. S. 459 (1919); Hope Natural Gas Co. v. Hall, 274 U. S. 284 (1926); Western Livestock Co. v. Bureau of Revenue, 58 Sup. Ct. 546 (1938).

20. See Brown, *Constitutional Limitations on Progressive Taxation of Gross Income* (1937) 22 IOWA L. REV. 246.

21. Postal Tel. Co. v. Adams, 155 U. S. 688, 697 (1895); United States Express Co. v. Minnesota, 223 U. S. 335, 346 (1912); St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362 (1914); Kansas City, F. S. & M. Ry. v. Kansas, 240 U. S. 227, 331 (1916); Mountain Timber Co. v. Washington, 243 U. S. 219, 237 (1917).

22. See notes 10 and 11, *supra.*

tive effect, they should stand or fall together. The question arises, where is the possible discrepancy?

It has been suggested[23] that where a tax falls on a subject of commerce, the Court considers not the burden of the particular tax before it, but the burden which would result if the subject were taxed to the point of extinction. The tax therefore is held bad. However, when a tax is not on a subject of commerce, it is manifest that only by recourse to its economic effect could it be declared a regulation of commerce.[24] The possible discrepancy appears to be that when the tax is not on a subject of commerce the Court looks to see whether there is actually a burden, but when it is on the subject of commerce it presupposes that a burden results.[25] This appears to be based on Justice Marshall's concept of ultimate sovereignty, *i. e.* if a state had the power to tax, it could exercise this power to the uttermost and hence "the power to tax involves the power to destroy."[26] It has been pointed out that the error in this is that it fails to recognize distinctions of degree,[27] for, as a matter of fact, not every tax is destructive; only unreasonable and discriminatory taxes destroy.[28]

A tax falling on the subject of commerce could be burdensome because it is either discriminatory, or unreasonable, or both. It would appear that a tax falling on a subject of commerce alone, without impinging on taxable property, or without similarly affecting local commerce, would be in fact discriminatory. The dissent brings out the point that many of the cases relied upon by the majority can be so explained,[29] for it is agreed that the slightest discrimination is not permitted.[30]

However, in the present case there is no question of discrimination because the tax similarly affected both local and national commerce. The tax, therefore, must have been unreasonable to have been held bad. It was not contended that the tax was so high as to be a palpable burden on commerce,[31]

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23. Powell, *Indirect Encroachment on Federal Authority By the Taxing Powers of the States. II* (1918) 31 HARV. L. REV. 572, 573.
24. *Ibid.*
25. Notice the language in the present case: ". . . if (the exaction) lawful it may in substance be laid to the fullest extent . . . .". J. D. Adams Mfg. Co. v. Storen, 58 Sup. Ct. 913, 916 (1938).
26. M'Culloch v. Maryland, 4 Wheat. 316, 413 (U. S. 1819).
27. Holmes' dissent in Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 223 (1928).
28. Note (1937) 13 IND. L. REV. 178, 180.
29. J. D. Adams Mfg. Co. v. Storen, 58 Sup. Ct. 913, 920, 921 (1938).
30. Cook v. Pennsylvania, 97 U. S. 566 (1878); Welton v. Missouri, 91 U. S. 275 (1875). The principle of equality is an important safeguard, for legislators will often hesitate to put an undue tax on commerce, if at the same time they must similarly burden their own constituents. See HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) 118.
31. Compare N. J. Bell Tel. Co. v. State Board, 280 U. S. 338 (1930), where a tax for the use of the highways to string poles along amounted to $3200 per mile. It has been suggested that this probably was an influencing factor in deciding the case. See Brown, *State Taxation of Interstate Commerce, and Federal and State Taxation in Inter-governmental Relations* 1930-32 (1933) 81 U. OF PA. L. REV. 247, 253. See notes: (1930) 39 YALE L. J. 750; (1930) 28 MICH. L. L. REV. 1062; (1930) 18 CALIF. L. REV. 512.

nor that the legislature had levied a tax not intended as a fair share of the burden of government.[32] The only reason advanced is that such a tax as this is a burden because it might result in multiplicity of taxation.[33] But on this very point the dissent takes issue:

> "A formula which arbitrarily stamps *every* state gross receipts tax as a violation of the Commerce Clause, on the ground that it can be used for cumulative tax purposes, leaves unanswered the possibility that other taxes, previously held valid, may be used with like effects on interstate commerce; disregards the fact that in many cases, as here, such a tax can be fairly and uniformly applied to both interstate and intrastate commerce; and in effect actually denies a State the privilege of using such a tax unless willing to impose unjust and unequal burdens upon its own citizens engaged in intrastate commerce."[34]

A state under existing constitutional limitations must accommodate itself under the double demand that interstate commerce pay its own way and at the same time it must not burden such commerce with cumulative exactions not similarly laid on local commerce.[35] It appears that the majority in the present case chose to stress the latter point of multiplicity at the expense of leaving some rather pertinent objections unanswered.

GIDEON HENRY SCHILLER

CONSTITUTIONAL LAW—TWENTY-FIRST AMENDMENT—EQUAL PROTECTION

Mahoney v. Joseph Triner Corp.[1]

By Amendment Twenty-One of the Federal Constitution, "The transportation or importation into any State, Territory, or possession of the United States, for delivery or use therein of intoxicating liquors . . . is hereby prohibited."

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32. See Severance, *Gross Earnings Taxes Levied by States* (1921) 7 A.B.A.J. 113, where it is suggested that the Court concerns itself with the intention of the legislature.

33. J. D. Adams Mfg. Co. v. Storen, 58 Sup. Ct. 913, 915 (1938).

34. *Id.* at 924. Compare Helson v. Kentucky, 279 U. S. 245, 253 (1929), in which Stone, J., remarked: "Nor can I find any practical justification . . . for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce." See also, Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252, 259 (1919); N. J. Bell Tel. Co. v. State Board, 280 U. S. 338, 349 (1930); Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1934) 12 N. C. L. REV. 99, 106. The contrary view has been expressed in Robbins v. Taxing District, 120 U. S. 489, 497 (1887): "Interstate Commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce." Subsequent authority for this view has been collected by the majority in the present case at 916. As to what devices the states are now employing to have interstate commerce contribute to the burden of government, see Schlesinger and Warren, *Sales and Use Taxes: Interstate Commerce Pays Its Way* (1938) 38 COL. L. REV. 49.

35. Western Livestock Co. v. Bureau of Rev., 58 Sup. Ct. 546, 553 (1938).

1. 58 Sup. Ct. 952 (1938).

The appellee corporation in this case secured a license from the Liquor Control Commissioner of Minnesota in 1934, and carried on the business of wholesale dealer in liquor in that state. It was an Illinois corporation. In 1935 the Minnesota legislature passed the following act: "No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."[2] The business of the corporation involved the sale of many liquors of more than the twenty-five per cent by volume which had not been registered. An injunction to restrain enforcement of the act was denied by the Supreme Court. According to the Court, the fact that the statute resulted in discrimination against imported liquors, although due to no reasonable classification, did not make the statute invalid, because the equal protection clause of the Fourteenth Amendment did not apply to the control of the liquor traffic, due to the Twenty-First Amendment. The Court stated that no classification recognized by the Twenty-First Amendment would be deemed forbidden by the Fourteenth Amendment.

This case was the third one involving the Twenty-First Amendment that has reached the Court. In the first case, that of *Premier-Pabst Sales Co. v. Grosscup*,[3] a statute of Pennsylvania was involved which required a higher license fee of importers of beer than of those dealers handling the local product. The district court had held the statute to be valid,[4] under the Twenty-First Amendment, even though some of the effects of the regulations might be to favor domestic products. While the district court, however, stated that the commerce clause availed the plaintiff nothing in that case,[5] it went on to say that no privilege or immunity of the plaintiff was violated, and that the fact that some of the regulations favored domestic products did not in itself render the state law obnoxious to the Fourteenth Amendment.[6] It will thus be seen that the district court did not decide that the Fourteenth Amendment did not apply to the regulation of liquor traffic due to the Twenty-First Amendment. On appeal, the Supreme Court refused to consider the constitutional question, the plaintiff being deemed without standing to present it,[7] and the decision of the district court was affirmed.

The next case was that of the *State Board of Equalization of Cal. v. Young's Market Co.*[8] In that case a tax discriminating against foreign manufacturers of liquor was upheld as being valid. It was the plaintiff's contention in the case that the equal protection and commerce clauses were violated. The Court

2. Minn. Laws 1935, c. 390, p. 720.
3. 298 U. S. 226 (1936).
4. Premier-Pabst Sales Corp. v. Grosscup, 12 F. Supp. 970 (E. D. Pa. 1935).
5. *Id.* at 972.
6. *Id.* at 972, 973.
7. Premier-Pabst Sales Corp. v. Grosscup, 298 U. S. 226, 227 (1936).
8. 299 U. S. 59 (1936), noted in (1937) 2 Mo. L. REV. 92.

admitted that the statute would have been unconstitutional prior to the Twenty-First Amendment, as it would have been in violation of the commerce clause, but it was stated that the Twenty-First Amendment allowed such discrimination.[9] It was in this case that the Court first said that a classification recognized by the Twenty-First Amendment could not be deemed forbidden by the Fourteenth. However, the Court also said that the classification rested on conditions requiring different treatment.[10] Query, as to whether the Court considered the Fourteenth Amendment to be abrogated, as to the control and regulation of the liquor traffic, by the Twenty-First Amendment. Certainly, the language of the Court is not clearly decisive one way or the other. It may be noted in passing that the Supreme Court, in deciding the *Young's Market* case as it did, overruled the district court. The lower court had stated definitely that the Twenty-First Amendment did not except liquor from the commerce clause or from other constitutional limitations.[11]

In the principal case the Court has decided the chief remaining question left by previous decisions, and it is now settled that the equal protection clause of the Fourteenth Amendment does not apply in cases involving the regulation of intoxicating liquors by a state. Obviously, if this one clause of the Fourteenth Amendment no longer applies, then neither will the due process clause of the same amendment. The effect is to give to states complete and autonomic control over the regulation of liquor.

Prior to the Eighteenth Amendment Congress had acted to remove the liquor traffic from the protection of the commerce clause. These acts were the Wilson Act in 1890,[12] the Webb-Kenyon Act in 1913,[13] and the Reed Amendment in 1917.[14] The effect of these acts was only to remove liquor from the protection of the commerce clause, and no more. Considering the fact that the wording of the Webb-Kenyon Act and that of the Twenty-First Amendment are almost identical, it may well have been the purpose of Congress to remove liquor from the protection of the commerce clause and divest it of its interstate character, and nothing further. Some of the discussion in Congress at the time of the passage of the Amendment would indicate as much, at any rate.[15] True enough, the Webb-Kenyon Act was still in effect at the time of the passage of the Twenty-First Amendment,[16] but the purpose of making the provision part of the Constitution may have been to guard against repeal of the provision by some future Congress.

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9. *Id.* at 62.
10. *Id.* at 64.
11. Young's Market Co. v. State Board of Equalization of Cal., 12 F. Supp. 140 (S. D. Cal. 1935).
12. 26 STAT. 313 (1890), 27 U. S. C. § 121 (1937), upheld in *In re* Rahrer, 140 U. S. 545 (1891).
13. 37 STAT. 699 (1913), 27 U. S. C. § 122 (1937), upheld in Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311 (1917).
14. 39 STAT. 1069 (1917), 18 U. S. C. § 341 (1927), upheld in United States v. Hill, 248 U. S. 420 (1919).
15. 76 Cong. Record 2198, 4140-4141, 4170-4172 (1933).
16. McCormick & Co., Inc. v. Brown, 286 U. S. 131 (1932).

While the Court may be justified in a literal interpretation of the words of the Twenty-First Amendment, at least there may be a reasonable difference of opinion as to whether the amendment should have been so construed. Prior to the decision in the *Young's Market case*, in some of the federal district courts it had been held that neither the equal protection nor the commerce clauses were abrogated by the Twenty-First Amendment,[17] and in other federal district court cases it had been held that the equal protection clause was still applicable to the regulation of liquor by a state.[18] Subsequent to the *Young's Market* case, it was still held that the regulation of intoxicating liquors was subject to the equal protection clause.[19]

There is one further question which has not been decided by the Supreme Court. In certain states statutes have been passed, discriminating not between local and outstate liquor, but between classes of outstate liquor. Two such cases have reached the federal district courts, and in both cases it was decided that such discrimination was constitutional, due to the Twenty-First Amendment.[20] Both of these cases were decided after the decision of the Supreme Court in the *Young's Market* case. On the basis of decided cases, it is fair to assume that these decisions will be upheld by the Supreme Court.

JOHN P. HAMSHAW

CRIMINAL LAW—POSSESSION OF RECENTLY STOLEN PROPERTY—QUESTION FOR JURY

State v. Tisher[1]

The principal evidence offered by the state in a larceny case was to the effect that the stolen property was found in the defendant's home a short time after it had been stolen. The defendant attempted to explain his possession of the stolen property by testifying that, while intoxicated, he had purchased the property from a stranger. The defendant contends on appeal that the evidence offered by the state was insufficient to sustain the conviction. The supreme court, after determining that the evidence was sufficient to sustain the verdict, quoted

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17. Joseph Triner Corp. v. Arundel, 11 F. Supp. 145 (D. Minn. 1935); Young's Market Co. v. State Board of Equalization, 12 F. Supp. 140 (S. D. Cal. 1935); Pacific Fruit and Produce Co. v. Martin, 16 F. Supp. 34 (W. D. Wash. 1936).

18. Premier-Pabst Sales Corp. v. Grosscup, 12 F. Supp. 970 (E. D. Pa. 1935); General Sales and Liquor Co. v. Becker, 14 F. Supp. 348 (E. D. Mo. 1936); Dugan v. Bridges, 16 F. Supp. 694 (D. N. H. 1936).

19. Zukaitis v. Fitzgerald, 18 F. Supp. 1000 (W. D. Mich. 1936) (*semble*); Joseph Triner Corp. v. Mahoney, 20 F. Supp. 1019 (D. Minn. 1937).

20. Indianapolis Brewing Co., Inc. v. Liquor Control Comm., 21 F. Supp. 969 (E. D. Mich. 1938); Joseph S. Finch & Co. v. McKittrick, 23 F. Supp. 244 (W. D. Mo. 1938).

1. 119 S. W. (2d) 212 (Mo. 1938).

with approval the following, taken from a previous case:[2] "The inferences to be drawn from the exclusive possession by accused of property recently stolen are entirely a matter for the jury. Such possession, even though unexplained, raises no presumption of guilt as a matter of law. . . . The reasonableness and credibility of the explanation given by accused as to the manner in which he acquired possession of the stolen property is a question of fact to be considered by the jury, or the judge before whom the case is tried without a jury, in connection with the other facts and circumstances in evidence. The improbability of the explanation does not remove it from his or their consideration; nor on the other hand does its plausibility, although uncontradicted by the state, require an acquittal."

The courts are in complete discord as to what effect the unexplained possession of recently stolen goods has upon the guilt of the accused.[3] Missouri at one time held that the possession of recently stolen property raised a conclusive presumption of guilt, unless rebutted or refuted by the circumstances of the taking, or by reasonable proof that such possession was innocently or honestly acquired. It was not a mere presumption of fact to be weighed with other evidence.[4] Today the Missouri court has changed its position and holds, in agreement with the trend of authorities, that recent unexplained possession of stolen property warrants an inference that the possessor was the thief, such inference to be considered by the jury with the other evidence offered.[5]

This opinion declares that the plausibility of the explanation, although uncontradicted by the state, does not require an acquittal. This view is supported by some authority,[6] although it seems contrary to the usual rule, in both civil and criminal cases, that if reasonable men could not conclude otherwise the court will direct a verdict.[7] In accordance with the latter principle, other courts

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2. State v. McLane, 55 S. W. (2d) 956 (Mo. 1932). This quotation was in turn taken from 36 C. J. 920, 921.

3. 5 WIGMORE, EVIDENCE (2d ed. 1923) 509; 36 C. J. 870-920; 2 WHARTON, CRIMINAL EVIDENCE (10th ed. 1912) 1508; Ewbank, *Possession of Stolen Property as Evidence of Guilt* (1897) 45 CENT. L. J. 388.

4. State v. Kelly, 73 Mo. 608 (1881); State v. Owens, 79 Mo. 619 (1883); State v. Phelps, 91 Mo. 478, 4 S. W. 119 (1886); State v. Moore, 101 Mo. 316, 14 S. W. 182 (1890); State v. Owsley, 111 Mo. 450, 20 S. W. 194 (1892).

5. State v. Swarens, 294 Mo. 139, 241 S. W. 934 (1922); State v. Slusher, 301 Mo. 285, 256 S. W. 817 (1923); State v. Wagner, 311 Mo. 391, 279 S. W. 23 (1925); State v. Bryant, 24 S. W. (2d) 1008 (Mo. 1930); State v. Plaster, 43 S. W. (2d) 1042 (Mo. 1931); State v. Weaver, 56 S. W. (2d) 25 (Mo. 1932); State v. Enochs, 339 Mo. 953, 98 S. W. (2d) 685 (1936).

6. Tucker v. State, 86 Fla. 36, 96 So. 10 (1923); Bargesser v. State, 95 Fla. 401, 116 So. 11 (1928); State v. Carter, 144 Iowa 280, 121 N. W. 694 (1909); State v. Seitz, 194 Iowa 1057; 187 N. W. 695 (1922); State v. Moore, 101 Mo. 316, 14 S. W. 182 (1890); State v. Owsley, 111 Mo. 450, 20 S. W. 194 (1892); State v. McLane, 55 S. W. (2d) 956 (Mo. 1932); State v. Willette, 46 Mont. 326, 127 Pac. 1013 (1912); State v. Gurr, 40 Utah 162, 120 Pac. 209; State v. Smith, 179 Wis. 170, 190 N. W. 905 (1922).

7. Chesapeake & O. Ry. v. Martin, 283 U. S. 209 (1931); *In re* Fleming's Estate, 199 Cal. 750, 251 Pac. 637 (1926); Ankeney v. Brenton, 214 Iowa 357, 238 N. W. 71 (1931); Field v. Hamm, 254 Mass. 268, 150 N. E. 3 (1926); Torrel v. Hardy, 196 S. W. 1100 (Mo. 1917); State v. Frisby, 204 S. W. 3 (Mo. 1918);

hold that if the defendant can show by uncontradicted explanation that his possession was innocent, a conviction is unwarranted.[8]

It is suggested that this difference of viewpoint may be partially explained on the theory that the Missouri, and other courts in accord, although saying that it is the unexplained, exclusive, and recent possession which warrants the inference of guilt, in reality allow the inference to be drawn from the exclusive and recent possession whether there is an explanation or not; while the courts holding to the contrary allow the inference of guilt to arise only from the failure to satisfactorily explain the exclusive and recent possession.

In the light of what has been said, it seems that the Missouri court is looking too hard at the possession of the recently stolen goods. It would be better to consider the picture in its entirety. The explanation should be considered in connection with the possession, and if the explanation is plausible, consistent with innocence, and not attacked by the state, a directed verdict is warranted.

JAMES H. OTTMAN

HOMESTEADS—WIFE'S PRIVILEGE TO CLAIM IN ESTATE BY THE ENTIRETY

Ahmann v. Kemper[1]

Record title to an eighty acre tract of land stood in the name of Mary E. Summers, and record title to an abutting eighty acre tract of land stood in the names of Edwin J. and Mary E. Summers, as husband and wife. Subsequently the husband and wife borrowed $2,200 from plaintiff on their unsecured note. After Edwin J.'s death, defendant and her minor son continued to occupy the two tracts as their homeplace. Defendant conveyed the homestead to John Kemper for $1.00 and other considerations, and nine days later married John Kemper. Plaintiff obtained a judgment against defendant, acquired the deed to the land at a sheriff's sale without giving defendant notice to claim her homestead, then brought suit in this case to have the deed to Kemper invalidated and title vested in plaintiff, and also to have ejected from possession the tenants on the land at the time of the suit. It was held that the defendant had homestead rights in her own land and also the land originally held with her husband

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State v. Kinnamon, 314 Mo. 662, 285 S. W. 62 (1926); Masdon v. Stine, 66 S. W. (2d) 579 (Mo. App. 1933). Of course, a verdict of guilty cannot be directed in a criminal action. United States v. Taylor, 11 Fed. 470 (C. C. D. Kan., 1882); State v. McNamara, 212 Mo. 150, 110 S. W. 1067 (1908); State v. Picker, 64 Mo. App. 126 (1895); People v. Walker, 198 N. Y. 329, 91 N. E. 806 (1910).

8. Davis v. State, 50 Ga. App. 103, 176 S. E. 901 (1934); State v. Delanty, 211 Iowa 50, 230 N. W. 436 (1930); State v. McKinney, 76 Kan. 419, 91 Pac. 1068 (1907), commented on in (1908) 6 MICH. L. REV. 263; Brown v. State, 126 Tex. Crim. Rep. 9, 70 S. W. (2d) 192 (1934).

1. 119 S. W. (2d) 256 (Mo. 1938).

in the entirety; that the transfer of said interest was valid, and that this interest is exempt from all debts.

A debt of one spouse, or even judgment upon the debt of one spouse and execution thereon, could, according to Missouri courts, in no way affect land held by the entirety, for neither husband nor wife has a separate interest to the exclusion of the other.[2] This rule codifies the common law rule as to estates by the entirety in which neither owner has an interest to the exclusion of the other; but where the whole is owned by each, and upon the death of one, the other continues to own the whole.[3] In jurisdictions where the common law estate by the entirety is obsolete or abolished, there are two ways in which courts treat a creditor of one of the tenants: some allow the creditor of one to take that tenant's right of survivorship; others even allow the creditor to take a present right to one-half the rents and profits of the property.[4]

Where there is a joint indebtedness on the part of tenants in the entirety, there seem to be no reasons why there should not be recovery for the benefit of the creditors.[5] The cases hold that estates are subject to execution on such joint debts,[6] and to hold otherwise would be overextending the very technical rules of tenancy by the entirety.

The right of homestead exemption[7] from all creditors presents somewhat of a problem in the case of an estate by the entirety. It is established law that the right of a homestead cannot take precedence over a pre-existing debt,[8] and it is equally well settled that an existing homestead is unaffected by any liability thereafter created.[9] The question of when the surviving spouse acquires his or her homestead rights in an estate by the entirety raises a difficult problem.

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2. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67 (1918); Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S. W. 72 (1918); Mahen v. Ruhr, 293 Mo. 500, 240 S. W. 164 (1922); Kingman v. Banks, 251 S. W. 449 (Mo. App. 1923); City of Laclede to use of Abell v. Libby, 221 Mo. App. 703, 285 S. W. 178 (1926); Notes (1923) 27 A. L. R. 826, (1925) 35 A. L. R. 147.

3. Bains v. Bullock, 129 Mo. 117 , 31 S. W. 342 (1895); Frost v. Frost, 200 Mo. 474, 98 S. W. 527 (1906); Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67 (1918); Wimbush v. Danford, 292 Mo. 588, 238 S. W. 460 (1922).

4. Wilkerson, *Creditors' Rights Against Tenants by the Entirety* (1933) 11 TENN. L. REV. 139.

5. Comment (1929) 43 HARV. L. REV. 312.

6. Phillips v. Krakower, 46 F. (2d) 764 (C. C. A. 4th, 1931); Montz v. Reutter, 268 Mich. 357, 256 N. W. 351 (1934); Dickey v. Thompson, 323 Mo. 107, 18 S. W. (2d) 388 (1929); Arch Street Bldg. and Loan Ass'n v. Sook, 104 Penn. Super. 269, 158 Atl. 595 (1931).

7. Mo. REV. STAT. (1929) § 608, Mo. STAT. ANN. § 600, p. 4221, provides: "The homestead of every housekeeper or head of a family, consisting of a dwelling house and appurtenances . . . shall . . . be exempt from . . . execution . . .; such homestead in the country shall not include more than one hundred and sixty acres of land, or exceed the total value of fifteen hundred dollars. . . ."

8. Stivers v. Horne, 62 Mo. 473 (1876); Creath v. Dale, 69 Mo. 41 (1878); Kelsay v. Frazier, 78 Mo. 111 (1883); Butler v. Roer, 163 Mo. App. 283, 146 S. W. 811 (1912); Mo. REV. STAT. (1929) § 615, Mo. STAT. ANN. § 615, p. 4234.

9. Maupin v. Longacre and Bank of Kingsville, 315 Mo. 872, 288 S. W. 54 (1926); Mo. REV. STAT. (1929) § 615, Mo. STAT. ANN. § 615, p. 4234.

Such an estate is the same in Missouri now as was the common law estate by the entirety, where husband and wife were considered as one person and could not take by moieties.[10] At common law, both the husband and wife were seized of the entirety "per tout et non per my."[11] Such facts would seemingly lead one to believe that the husband and wife each get the entire estate at the time of the grant, at which time the homestead right in the property accrues, and the death of one, despite the right of survivorship, does not give to the one living a greater or any different estate than he or she held while both were alive. This reasoning can be differentiated from the reasoning of the court in the case of *Morrow v. Zane*,[12] where the husband did not die, but conveyed his interest to his wife. There, an indebtedness which was incurred subsequent to the estate by the entirety was held to be an indebtedness incurred prior to the acquisition of the newly conveyed property, and the wife could not claim a homestead exemption in the share conveyed. From the common law estate by the entirety, it seems that in the case of survivorship, the homestead attaches upon the recording of the grant of the estate and not upon the death of the husband. As between the husband and wife there can be but one homestead right which must be asserted in the name of the husband while the marriage relations exist, for he is the head of the family within the meaning of the statute concerning exemptions.[13] The wife may invoke the laws on exemption on her husband's property if he fails to do so,[14] and upon her own property if her husband has not yet claimed exemption.[15] In the case of land held by the entirety, if no homestead has yet been claimed by the husband or wife to be exempt from debts, and one spouse dies, then the other, if he or she still be head of a family, i.e. manages the affairs of the family,[16] gets a homestead in the land. Such homestead belongs to the head

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10. Bains v. Bullock, 129 Mo. 117, 31 S. W. 342 (1895); Frost v. Frost, 200 Mo. 474, 98 S. W. 527 (1906); Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67 (1918); Wimbush v. Danford, 292 Mo. 588, 238 S. W. 460 (1922). *Contra*: Fulbright v. Phoenix Ins. Co. of Hartford, Conn., 329 Mo. 207, 44 S. W. (2d) 115 (1931).

11. Hunt v. Blackburn, 128 U. S. 464 (1888).

12. 185 Mo. App. 111, 170 S. W. 918 (1914).

13. Gladney v. Berkley, 75 Mo. App. 98 (1898); White v. Smith, 104 Mo. App. 199, 78 S. W. 51 (1904).

14. MO. REV. STAT. (1929) § 2998, MO. STAT. ANN. § 2998, p. 5055, provides: ". . . a married woman may invoke all exemption and homestead laws. . . . for the protection of personal and real property owned by the head of a family, except . . . where the husband has claimed such exemption and homestead rights for the protection of his own property." Crouch v. Holterman, 272 Mo. 432, 199 S. W. 193 (1917); Gladney v. Berkley, 75 Mo. App. 98 (1898).

15. Rouse v. Caton, 168 Mo. 288, 67 S. W. 578 (1902); Sharp v. Stewart, 185 Mo. 518, 84 S. W. 963 (1904); Gladney v. Berkley, 75 Mo. App. 98 (1898); White v. Smith, 104 Mo. App. 199, 78 S. W. 51 (1904); Ludwig v. Carr, 210 Mo. App. 489, 240 S. W. 515 (1922).

16. Broyles v. Cox, 153 Mo. 242, 54 S. W. 488 (1899); Jarboe v. Jarboe, 106 Mo. App. 459, 79 S. W. 1162 (1904); Forbes v. Groves, 134 Mo. App. 729, 115 S. W. 451 (1909); Elliot v. Thomas, 161 Mo. App. 441, 143 S. W. 563 (1912); Hyde v. Honiter, 175 Mo. App. 583, 158 S. W. 83 (1913); Peterson v. National Council of Knights and Ladies of Security, 189 Mo. App. 662, 175 S. W. 284 (1915).

of the family, and, since the same is exempt from execution, creditors have no right to complain of the disposition thereof;[17] and any conveyance, regardless of lack of consideration cannot be a fraud on the creditors. Of course, if the land conveyed without consideration exceeds the amount allowed for a homestead, the excess can be levied upon in execution; but if the land is sold on execution without giving notice to the owner of his homestead right, the sale is void.[18]

Such facts being considered in the light of the case under discussion, one may say that the established law in Missouri points to the facts that the land held by the entirety did constitute the homestead of defendant at the date of her conveyance of said land to Kemper; that as such the conveyance could not be fraudulent as to existing creditors of defendant, and the title acquired by plaintiff in the sheriff's sale was void. Query: could defendant, having thus acquired one homestead as provided by statute, during her first marriage, have acquired another homestead on subsequently acquired land, to be exempt from subsequently accrued indebtedness and new creditors on the basis of her second marriage with Kemper, by asserting that as to this second marriage there had not yet been a homestead claimed?

RALPH J. TUCKER

HOMICIDE—KILLING IN ATTEMPT TO COMMIT FELONY

State v. Wright[1]

The State's evidence tended to show that the defendant committed homicide while robbing the deceased's drug store. The defense offered evidence that the supposed robbery was a fake, carried out at the instigation of the deceased, in order to collect robbery insurance. The trial court instructed regarding first degree murder and a verdict of guilty was returned. On appeal the supreme court, reversing and remanding the case,[2] said that an instruction should also be given on second degree murder on the possible theory that the appellant killed

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17. Bank of Versailles v. Guthrey, 127 Mo. 189, 29 S. W. 1004 (1895); Macke v. Byrd, 131 Mo. 682, 33 S. W. 448 (1895); Creech v. Childers, 156 Mo. 338, 56 S. W. 1106 (1900); Stam v. Smith, 183 Mo. 464, 81 S. W. 1217 (1904); Armor v. Lewis, 252 Mo. 568, 161 S. W. 251 (1913); Pocoke v. Peterson, 256 Mo. 501, 165 S. W. 1017 (1914); May v. Gibler, 319 Mo. 672, 4 S. W. (2d) 769 (1928); Farmers Bank of Higginsville v. Handly, 320 Mo. 754, 9 S. W. (2d) 880 (1928).

18. Creech v. Childers, 156 Mo. 338, 56 S. W. 1106 (1900).

1. 112 S. W. (2d) 571 (Mo. 1937).

2. State v. Wright, 337 Mo. 441, 85 S. W. (2d) 7 (1935). See (1936) 1 Mo. L. REV. 87, for a discussion of the court's disposition of the case on the ground that there might be inferred from the defendant's testimony such consent on the part of the victim as to negative any robbery. The writer there expresses the opinion that there was no robbery, not because the victim consented, but rather because the accused did not intend to rob.

while *perpetrating a conspiracy to defraud.* The accused was again convicted of first degree murder and he again appealed, complaining of the court's failure to charge on manslaughter.

The question was whether the appellant, granting his testimony to be true, was committing anything less than a felony[3] when the homicide occurred. It was concluded that the acts, at the very least, constituted an attempt[4] to defraud the victim's insurer. The attempt was not affected by the fact that there was no insurer to defraud.[5] Further, the attempt to defraud is a felony by statute,[6] and therefore the appellant was guilty, at least, of murder in the second degree.[7] It was, therefore, proper to omit an instruction upon manslaughter.

Unfortunately, however, the court had said on the first appeal that if the appellant's testimony was true, he killed while "engaged in the perpetration of a conspiracy to defraud," and that this offense was such a felony as to place the homicide in the second degree murder pigeon-hole. Attempt was not mentioned. Oddly enough, the second holding agreed with the defendant that, there being no insurer, the accused could not be said to have been perpetrating a conspiracy to defraud. Thereupon the court hastily retreated to the refuge of the attempt theory.

The readiness of the court to admit the vulnerability of its prior holding gives rise to the question: What was meant by the words, "perpetration of a conspiracy to defraud?" There are three alternatives. First, was this the statutory crime of conspiracy,[8] the unlawful agreement? Unquestionably the answer is no, because that crime is only a misdemeanor,[9] whereas the court speaks of a felony. The word conspiracy was probably used in the popular, rather than the technical, sense. Second, was this a crime that went beyond mere attempt to

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3. The Missouri courts adhere to the concept that generally a homicide committed during the perpetration of a felony is murder, the felony taking the place of the necessary intent. The felonies of rape, burglary, arson, robbery, and mayhem are designated by statute to be so serious as to replace both intent and deliberation, thereby making the killing first degree murder. Homicide during all felonies, other than those mentioned, is regarded as murder in the second degree even though unintentional. If the unlawful act is a misdemeanor, the unintentional homicide committed in the perpetration thereof is manslaughter. See State v. Meyers, 99 Mo. 107, 12 S. W. 516 (1889); State v. Robinett, 279 S. W. 696 (Mo. 1926); State v. Lindsey, 333 Mo. 139, 62 S. W. (2d) 420 (1933). Mo. REV. STAT. (1929) §§ 3982, 3983, 3988.

4. State v. Block, 333 Mo. 127, 131, 132, 62 S. W. (2d) 428, 431 (1933).

5. State v. Mitchell, 170 Mo. 633, 71 S. W. 175 (1902); State v. Block, 333 Mo. 127, 62 S. W. (2d) 428 (1933); Mo. STAT. ANN. §§ 4041, 4442, pp. 2846, 3048; Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction* (1930) 40 YALE L. J. 53; Strahorn, *The Effect of Impossibility on Criminal Attempts* (1930) 78 U. OF PA. L. REV. 962; Curran, *Criminal and Non-Criminal Attempts* (1931) 19 GEORGETOWN L. J. 185; 1 WHARTON, CRIMINAL LAW (12th ed. 1932) §§ 221, 224; 16 C. J. § 96, p. 116.

6. Mo. REV. STAT. (1929) §§ 4095, 4304.

7. State v. Robinett, 279 S. W. 696 (Mo. 1926), cited note 3, *supra.*

8. State v. Porter, 199 S. W. 158 (Mo. 1917); State v. Dalton, 134 Mo. App. 517, 114 S. W. 1132 (1908); Mo. REV. STAT. (1929) §§ 4460, 3686, 4243, 4244.

9. Mo. REV. STAT. (1929) §§ 4460, 3686, 4243, 4244.

defraud,[10] that the illusory line between attempt and consummation was crossed and that the felony was consummated? True, this is the only interpretation that admits of a defense of impossibility,[11] and the second opinion allows such a defense. Notwithstanding this, certainly the court did not presume, contrary to all the facts, that the defendant's testimony indicated such success. Third, did the court mean to say that the appellant killed while he was *attempting* to perpetrate a fraud? Of the three interpretations this is most apt to be the one intended and is the best. Obviously, the accused was in the process of committing the felony. He was executing acts which tended toward the completed crime but which fell short of the goal. This can be no more than attempt. The only consequence of this view is that the first opinion speaks of attempt, but under the name of perpetration of a conspiracy to defraud; then the second opinion presumes to dispose of it on the ground of impossibility, and comes back to the same theory, attempt, but under no disguises.

It would have been a happier solution if the court had specifically said on the first appeal that the appellant committed homicide while in the perpetration of, or in the attempt to perpetrate, a fraud. The crime would have all the requisites of second degree murder and the superfluous talk about the nonexistence of an insurer would rightly have had no place in the decision. The accused was being tried for murder, and not fraud. The attendant offense had no significance other than that it was given the force by statute to take the place of the intent necessary to murder, and to that end attempt is as potent as the finished crime. The Missouri legislature recognized this in phrasing the first degree murder statute so as to give the attempt to rob, rape, *et cetera*, the same effect as the completed crime in establishing the murder.[12]

JESSE D. JAMES

MALICIOUS PROSECUTION—EFFECT OF ACQUITTAL, DISCHARGE, AND ABANDONMENT ON PROBABLE CAUSE

Groda v. American Stores Co.[1]

In the criminal case, information was made by defendant charging plaintiff with larceny. The case against plaintiff was dismissed before the alderman

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10. The next step beyond attempt is the completion of the attempted crime. Curran, *loc. cit. supra* note 5 (the completed crime and the attempt are mutually exclusive). 1 WHARTON, CRIMINAL LAW § 212 (the attempt must be unfinished, otherwise the indictment would be for a completed crime). See Columbian Ins. Co. v. Modern Laundry, 277 Fed. 355, 359 (C. C. A. 8th, 1921) (an attempt to defraud must fail, whereas a fraud must be completed; that is, there must be deceit and injury.)

11. 1 WHARTON, *loc. cit. supra* note 5.

12. MO. REV. STAT. (1929) § 3982.

1. 315 Pa. 484, 173 Atl. 419 (1934), 94 A. L. R. 738 (1935).

for lack of evidence. Plaintiff brought trespass for malicious prosecution and obtained a verdict. Upon appeal, the court, in holding that it was error to charge the jury that the burden of showing probable cause shifted to the defendant when plaintiff had been discharged in the criminal case, said: "Neither an acquittal of the defendant in a criminal prosecution, nor the ignoring of the bill against him by the grand jury, nor his discharge by the examining magistrate, constitutes proof of want of probable cause, or shifts the burden of proof to the defendant in the civil action."

The effect of the termination of the criminal proceedings in favor of the plaintiff would seem logically to depend upon the nature of the proceedings in which the suit was terminated. If the issue was the probable guilt of the accused, as is the case in a preliminary hearing, then evidence of a discharge would seem to be pertinent to show want of probable cause for instituting the proceedings. The majority of authorities are in accord with this view and do not support the principal case.[2] The Missouri authorities are not in agreement with the principal case in this respect.[3]

Where the issue was not whether there was probable cause for holding the accused, but whether he was guilty, and where he may have been dismissed for lack of evidence, or for failure to prosecute, as where an acquittal terminated the proceedings or where they were terminated at the instance of the prosecuting attorney or the prosecuting witness, evidence of the acquittal or dismissal should not be competent to show want of probable cause. In such a situation the case may have terminated in favor of accused for a variety of reasons, none of which indicates that there was want of probable cause for instituting the proceedings. Here again the majority of the courts are in accord with the logical rule.[4]

The Missouri courts, however, have sometimes held that the evidence of an acquittal should be considered by the jury along with other circumstances on the question of the want of probable cause.[5] It has been said that evidence of an acquittal is *persuasive* evidence of the want of probable cause.[6] Just how much

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2. The cases are collected in (1923) 24 A. L. R. 261; (1935) 94 A. L. R. 744; (1938) 114 A. L. R. 873. See also, RESTATEMENT, TORTS (Proposed Final Draft No. 3, 1937) § 1210 (1).

3. Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650 (1902); Smith v. Glynn, 144 S. W. 149 (Mo. App. 1912); DeWitt v. Syfon, 202 Mo. App. 469, 211 S. W. 716 (1919). See State *ex rel.* Mann v. Trimble, 290 Mo. 661, 232 S. W. 100 (1921); Christian v. Hanna, 58 Mo. App. 37 (1894).

4. The cases are collected in (1923) 24 A. L. R. 261; (1935) 94 A. L. R. 744; (1938) 114 A. L. R. 873. See also RESTATEMENT, TORTS (Proposed Final Draft No. 3, 1937) 1214 (2).

5. Williams v. Vanmeter, 8 Mo. 339 (1844); Christian v. Hanna, 58 Mo. App. 37 (1894); Rosendale v. Market Square Dry Goods Co., 213 S. W. 169 (Mo. App. 1919), where the court speaks of discharge, though plaintiff was really acquitted before a jury in justice's court. But see Eckerle v. Higgins, 159 Mo. App. 177, 140 S. W. 616 (1911), where the logical argument is employed (but the case was one where there was a dismissal); Harris v. Quincy, O. & K. C. R. R., 172 Mo. App. 261, 157 S. W. 893 (1913) (proof of failure of proceedings against plaintiff held not to be evidence of want of probable cause).

6. Hanser v. Bieber, 271 Mo. 326, 197 S. W. 68 (1917) (where there had been a conviction in a police court reversed on appeal with a trial *de novo,* the

weight is given to this evidence is sometimes said to depend upon the particular way in which the verdict was rendered.[7]

The Missouri law is not clear with regard to the question of the effect to be given to an abandonment of the criminal proceedings. Here again the courts sometimes intimate that some effect should be given to evidence of a dismissal by the prosecuting witness or the prosecuting attorney.[8]

GERALD B. ROWAN

MALICIOUS PROSECUTION—PROBABLE CAUSE—FUNCTIONS OF JUDGE AND JURY

La Font v. Richardson[1]

In a malicious prosecution action defendant appealed from a judgment for plaintiff, the only assignment of error being that the court erred in denying defendant's demurrers to the evidence offered at the close of plaintiff's case and at the conclusion of the whole testimony. The defendants, prior to the instigation of the criminal proceedings against the plaintiff for burglary and larceny, consulted the prosecuting attorney and contended that this fact should exonerate them as it showed probable cause for the prosecution. In affirming the judgment of the circuit court, the appellate court said that if the prosecuting witnesses consulted the prosecuting attorney in good faith, communicated to him all the ascertainable facts, and acting on his advice instituted criminal proceedings, they

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court in this case holds that the first conviction is not conclusive evidence of probable cause and, furthermore, that acquittal on the trial *de novo* is persuasive evidence of want of probable cause). But see Wilcox v. Gilmore, 320 Mo. 980, 8 S. W. (2d) 961 (1928) (where doubt is cast on Hanser v. Bieber as an authority).

7. Brant v. Higgins, 10 Mo. 728 (1847), in which the court said, ". . . if a jury should render their verdict from the jury box, without deliberation, this would be a circumstance to give weight to that verdict, as evidence of the want of probable cause."

8. State *ex rel.* Mann v. Trimble, 290 Mo. 661, 232 S. W. 100 (1921) (where an instruction was upheld which told the jury that "the dismissal of the information by the prosecuting attorney was evidence that the prosecution was without probable cause"). Citing Hanser v. Bieber, 271 Mo. 326, 197 S. W. 68 (1917), the court says: "Hence, if an acquittal is persuasive evidence of want of probable cause, by a parity of reasoning the same rule should apply upon the dismissal of a criminal information." Also see Eagleton v. Kabrich, 66 Mo. App. 231 (1896). In Polk v. Missouri-Kansas-Texas R. R., 341 Mo. 1213, 111 S. W. (2d) 138 (1937), the court said that the dismissal of a criminal prosecution did not conclusively establish want of probable cause. In Eckerle v. Higgins, 159 Mo. App. 177, 140 S. W. 616 (1911), a dismissal by prosecuting attorney was held insufficient to make a *prima facie* case of lack of probable cause. In Higgins v. Knickmeyer-Fleer Realty & Inv. Co., 335 Mo. 1010, 74 S. W. (2d) 805 (1934), voluntary dismissal by prosecuting attorney said not to be evidence of want of probable cause. Also, Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223 (1888), where the court held that the dismissal by the prosecuting attorney of an illegal warrant of arrest does not raise, in a suit for malicious prosecution, any inference of want of probable cause.

1. 119 S. W. (2d) 25 (Mo. App. 1938).

should be exonerated; that it clearly appears they did not communicate to him all the ascertainable facts; and that there was nothing in the plaintiff's conduct that would create a suspicion that she had committed a crime. The court then concludes its opinion by stating that when there is evidence of malice and want of probable cause, these questions, "under proper instructions," are for the jury, and that it is error to refuse to submit them to the jury.

In this country, the question of whether want of probable cause in a malicious prosecution action is for the determination of the court or the jury seems well settled. When the facts in the case are undisputed, almost all courts hold this matter is for the court to decide.[2] If the facts are not in dispute, in no case should the issue of probable cause be submitted to the jury. When the facts are in dispute, their existence is for the jury to determine, but whether those facts constitute probable cause is a matter for the court.[3] When the facts are in dispute, the court in submitting them to the jury has two alternatives, either to ascertain the facts in the form of a special verdict, and from those facts determine whether or not probable cause exists, or to give the jury hypothetical instructions that certain facts, if they so find them, will satisfy the requirements, while if other facts are found the requirements will not be satisfied.[4]

The reason for this procedure is that the courts disfavor actions for malicious prosecution, in that they discourage the bringing of criminals to justice. If each time a man is prosecuted and is acquitted, he will bring an action against his prosecutor, people will be much more reluctant to bring such prosecutions against those whom they believe have committed a crime. Hence the courts take this issue out of the hands of the jurors, who may be swayed by sentiment and feelings for the innocent prosecuted. By this method there is judicial control of malicious prosecution actions.[5]

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2. Stewart v. Sonneborn, 98 U. S. 187 (1878); Murphy v. Russell, 40 Ariz. 109, 9 P. (2d) 1020 (1932); Moore Dry Goods Co. v. Mann, 171 Ark. 350, 284 S. W. 42 (1926); Ball v. Rawles, 93 Cal. 222, 28 Pac. 937 (1892); Foster v. Banks, 112 Cal. App. 622, 297 Pac. 106 (1931); Anderson v. Bryson, 94 Fla. 1165, 115 So. 505 (1927); Hearn v. Batchelor, 47 Ga. App. 213, 170 S. E. 203 (1933); Hendrie v. Perkins, 240 Ky. 366, 42 S. W. (2d) 502 (1931); Randall v. Fenton Storage Co., 117 Pa. Super. 212, 177 Atl. 575 (1935); GREEN, JUDGE AND JURY (1930) 342. *Contra*: Heyne v. Blair, 62 N. Y. 19 (1875). This case reverses the former New York decisions, and holds that if the facts are capable of more than one inference the question of probable cause is for the jury to determine. The court bases its decision on the statement that, "Such is the rule in all questions of the like character, and there is no reason why this class of action should form an exception to the rule." See also Wilson v. Thurlow, 156 Iowa 656, 137 N. W. 956 (1912); Bennett v. Pillion, 105 N. J. L. 359, 144 Atl. 601 (1929).

3. See cases cited note 2, *supra*.

4. Stewart v. Sonneborn, 98 U. S. 187 (1878); Helwig v. Beckner, 149 Ind. 131, 46 N. E. 644 (1897); Erb v. German American Ins. Co., 112 Iowa 357, 83 N. W. 1053 (1900); Burton v. St. Paul, Minn. & M. Ry., 33 Minn. 189, 22 N. W. 300 (1885); L. R. A. 1915D, 12.

5. Ball v. Rawles, 93 Cal. 222, 28 Pac. 937 (1892); GREEN, JUDGE AND JURY (1930) 342; Note L. R. A. 1915D, 11.

The Missouri holdings substantially conform to the general practice,[6] but in discussing the rule the courts of this state have used rather loose and ambiguous language. It is clear in Missouri that, when the facts are undisputed, probable cause is a matter of law for the court.[7] In one case the Supreme Court of Missouri held that, where the facts are disputed, the question is one of law, based upon the hypothetical findings of the jury; yet, in absence of a request by either party that the court charge the jury what facts will or will not amount to probable cause, the omission to so charge is mere non-direction, and hence not reversible error.[8] Another case held that, for the court merely to define probable cause and leave the determination of that element to the jury, was reversible error.[9] In still another decision the court said that probable cause is a mixed question of law and fact, and whether facts and inferences show probable cause is a question of fact for the jury; whether facts, if true, develop probable cause is an issue of law determinable by the court.[10] But the Missouri courts do not say how the disputed facts and the matter of probable cause should be presented to the jury. To sustain the sound reason and spirit of the rule, the most effective method seems to be that of the special verdict, which clearly separates the function of the court from that of the jury on this matter. The difficulty of instructing in the hypothetical is that often in such cases the facts are many and involved, which makes the task of correctly framing the instructions to the jury a difficult and impracticable burden on the court. Also, even though such instructions are correctly framed by the court, there is a great possibility of the confusion of the jury in applying the facts found to the instructions.

In the instant case,[11] the court expressed the view that the issue of probable cause, when the facts are disputed, should be submitted to the jury "under proper instructions." However, the court seems to arrive at the conclusion that the facts were sufficiently undisputed to conclude that there was want of probable cause. As the jury must have found in rendering a verdict for the plaintiff, there was no reversible error and the result of the case seems correct. Yet the language of the opinion is ambiguous, if not misleading, as it does not indicate the nature and form of instructions proper upon the issue of probable cause.

THOMAS E. DEACY, JR.

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6. Miller v. Brown, 3 Mo. 127 (1832); Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650 (1902); Thomas v. Smith, 51 Mo. App. 605 (1892).
7. See cases cited note 6, *supra*.
8. Thomas v. Smith, 51 Mo. App. 605 (1892).
9. Meysenberg v. Engelke, 18 Mo. App. 346 (1885).
10. Randol v. Kline's Inc., 322 Mo. 746, 18 S. W. (2d) 500 (1929).
11. La Font v. Richardson, 119 S. W. (2d) 25 (Mo. App. 1938).

NEGLIGENCE—EXTENT OF LIABILITY WHERE DEFENDANT'S ACT CONCURS WITH ACT OF GOD

The Inland Power & Light Co. v. Grieger[1]

This case involves the question of the extent of the liability of a defendant when his negligence concurs with an act of God to cause an injury. A dam was constructed on the Lewis River in the state of Washington by the Inland Company. The plaintiff owned a farm situated on a bend of the river below the damsite. For many days prior to December 21, 1933, the rainfall in the surrounding watershed was excessive. On December 21, the resulting high waters flooded the plaintiff's farm to a height of about five feet. Up to this point, the dam was in no way a cause of the flood conditions below it. On December 22, the superintendent of the dam, thinking it best to retard the rise of the impounded waters, opened the discharge gates to their maximum. This increased the height of the waters below the dam five or six inches. Before the increase, erosion of plaintiff's farm had already begun. It continued after the rise caused by the opening of the discharge gates. The plaintiff requested that all the damage subsequent to the opening of the gates be assessed against the owner of the dam. He was successful in the trial court, and the defendant appealed to the circuit court of appeals. The majority opinion held that where damage results from the defendant's negligence and an act of God as concurring causes, the defendant is liable to the same extent as though the damage had been caused by his negligence alone. Judge Denman dissents vigorously, contending that the impossibility of measuring the damage done by each separate cause is no ground for holding the defendant liable for damage he did not cause.

Where damage is the result of two concurring causes, one of which is the defendant's negligence and the other another person's negligence, the defendant is liable to the same extent as though he alone had caused the damage.[2] This is true whether it required the combined acts to produce the harm or whether either alone was sufficient. The majority opinion contends the rule is no different where one of the concurring causes is an innocent one, such as an act of God.[3]

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1. 91 F. (2d) 811 (C. C. A. 9th, 1937), 112 A. L. R. 1075 (1938).

2. Adams v. Price, 45 Ga. App. 862, 166 S. E. 260 (1932); Owen Motor Freight Lines v. Russell's Adm'r, 260 Ky. 795, 86 S. W. (2d) 708 (1935); Carr v. St. Louis Auto Supply Co., 293 Mo. 562, 239 S. W. 827 (1922); Willi v. United Rys. of St. Louis, 205 Mo. App. 272, 224 S. W. 86 (1920); Crespin v. Albuquerque Gas & Elec. Co., 39 N. M. 473, 50 P. (2d) 259 (1935); Northup v. Eakes, 72 Okla. 66, 178 Pac. 266 (1918); Oklahoma Ry. v. Mount, 155 Okla. 275, 9 P. (2d) 11 (1932); Woodcock's Adm'r v. Hallock, 98 Vt. 284, 127 Atl. 380 (1925).

3. Salton Sea Cases, 172 Fed. 792 (C. C. A. 9th, 1909); American Coal Co. v. DeWese, 30 F. (2d) 349 (C. C. A. 4th, 1929); Arkansas Land & Lbr. Co. v. Cook, 157 Ark. 245, 247 S. W. 1071 (1923); Ryan Gulch Reservoir Co. v. Swartz, 83 Colo. 225, 263 Pac. 728 (1928); Watts v. Evansville, Mt. C. & N. Ry., 191 Ind. 27, 129 N. E. 315 (1921); Ford v. Wabash Ry., 318 Mo. 723, 300 S. W. 769 (1927); City of Richmond v. Cheatwood, 130 Va. 76, 107 S. E. 830 (1921).

But there is a respectable line of authority supporting the view of the minority opinion that, where one of the concurring causes is irresponsible, there is an exception to the general rule of holding the defendant liable for the total damages.[4] In the cases relied upon by the majority opinion, the problem is approached mainly by the consideration of whether the defendant's act was a legal cause of the injury. This goes to the fundamental problem of whether the defendant can be held responsible at all. But having once decided the defendant's conduct is a legal cause of the harm, there still remains the question as to what extent he is liable. There is quite a difference in the two propositions.[5] The cases agreeing with the minority opinion seem to recognize this difference. However, the majority opinion makes no such distinction. Likewise, the Restatement of Torts applies the same principles in determining whether the defendant's negligence was a legal cause or not as it does in determining the extent of the damages for which the defendant is liable.[6]

There are considerations which might well be taken to distinguish between the situation where the acts of two negligent parties are concurring causes and the situation where one of two concurring causes is irresponsible.[7] In the latter case, since the plaintiff would have been injured to some extent regardless of the defendant's actions and the plaintiff could not have recovered any damages caused by the irresponsible cause had it acted alone, the plaintiff should bear this loss himself. His recovery from the defendant should be limited to the damage caused by the defendant's negligence.

On the other hand, it may be said that by excusing the defendant from any responsibility for damage arising from the irresponsible cause, one is applying the "but for" test, which is properly used in determining when a cause is a cause in fact of an injury, to determine the extent of the defendant's liability.[8] This is a misapplication of that test. It has been suggested, in requiring the plaintiff to prove that the defendant's acts were a substantial cause of the injury, there is sufficient protection for the defendant. Perhaps the defendant should not escape liability for the total loss, where his wrongful acts substantially contributed to the injury, merely because other causes, some innocent and some wrongful, contributed as well, for after all he was at fault. To hold otherwise may unduly penalize an innocent plaintiff in favor of a wrongdoer. In com-

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4. Note (1938) 112 A. L. R. 1084; Memphis & C. R. R. v. Reeves, 10 Wall. 176, 190 (U. S. 1869); Law v. Gulf States Steel Co., 229 Ala. 305, 156 So. 835 (1934); McAdams v. Davis, 200 Iowa 204, 202 N. W. 515 (1925); Pfannebecker v. Chicago, R. I. & P. Ry., 208 Iowa 752, 226 N. W. 161 (1929); Superior Coal & Builders' Supply Co. v. Board of Education, 260 Ky. 84, 83 S. W. (2d) 875 (1935); Sherwood v. St. Louis S. W. Ry., 187 S. W. 260 (Mo. App. 1916); Chicago, R. I. & G. Ry. v. Martin, 37 S. W. (2d) 207 (Tex. 1931); Republican Valley R. R. v. Fink, 18 Neb. 89, 24 N. W. 691 (1885); Radburn v. Fir Tree Lbr. Co., 83 Wash. 643, 145 Pac. 632 (1915).
5. Note (1938) 112 A. L. R. 1084.
6. RESTATEMENT, TORTS (1934) §§ 431, 454.
7. Peaslee, *Multiple Causation and Damage* (1934) 47 HARV. L. REV. 1127.
8. Carpenter, *Concurrent Causation* (1935) 83 U. OF PA. L. REV. 941.

paring the two theories, the difference in emphasis again appears: one approaches the problem from the standpoint of the defendant and favors the apportionment of damages; the other adopts the viewpoint of the plaintiff, emphasizing mainly the defendant's causal relation, and does not favor apportionment due to difficulties of proof.

Disregarding the authorities which seem to be divided, the equities of the problem favor the apportionment of damages where one of two concurrent causes is an irresponsible one. Just as the plaintiff should be compensated for the destruction of his property caused by the wrongful acts of the defendant, so the defendant should not be made to pay for damage he did not cause. The difficulty in determining the degree of apportionment is not a satisfactory reason for imposing a responsibility on the defendant for damage he did not cause.

HARRY P. THOMSON, JR.

NEGLIGENCE—LIABILITY OF SUPPLIER OF CHATTELS MANUFACTURED BY THIRD PERSONS

Shroder v. Barron-Dady Motor Co.[1]

In this case, the defendant motor agency sold automobiles manufactured by another organization. One of the agency's salesmen took a car which had been tested and driven by the motor company and drove it to the Shroder residence. There he turned the car over to Mr. Shroder so that it could be driven on a trip by the Shroders as a part of the demonstration of its superior qualities. The salesman, in turning the car over to the Shroders, said it was in perfect condition. The next morning after having received the car, the Shroders began a trip to Emporia, Kansas, from Kansas City, Missouri. While on the trip, the car driven by the Shroders collided with another automobile. In the wreck Mrs. Shroder was injured and she now sues for damages from personal injuries. The cause of the collision was in dispute but the plaintiff's contention was that the wheels of the car in which she was riding were packed with defective grease so that the grease leaked onto the brake lining of one of the wheels causing unequal braking pressure. Thus, when her husband applied the brakes hoping to prevent the wreck, the car swerved into the path of the approaching automobile. The packing of the grease in the wheel bearings was done by the manufacturer of the car. The Supreme Court of Missouri assumed that the grease with which the wheel bearings were packed was defective, but even so it was held that the defendant motor company was not liable for harm caused by latent defects not discoverable by reasonable inspection of the chattels it lent, and internal inspection of parts which appear externally to be in proper operating condition was not necessary.

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1. 111 S. W. (2d) 66 (Mo. 1937).

The court discusses the case as though it was one involving a vendor's liability to his customer. Yet the facts of the case show that a sale was merely contemplated by the parties. It was never completed. The placing of the automobile in the hands of the prospective customer was to the interest of the dealer, but the transaction remained one of bailment. However, it is justifiable, as the court did in this case, to discuss the liability of a supplier, who is a bailor for his own benefit, for defects in articles bailed by him without distinguishing it from the liability of a supplier who is a vendor of chattels for defects in articles sold by him, since there seems to be no fundamental difference in the liability of each, particularly where there is privity of contract.[2] Where the bailment is regarded as only a step in the total transaction looking toward a sale, this would seem especially true.

Where the supplier is to derive a benefit from supplying a chattel to another, there are two theories upon which it is possible to base his liability for damage caused by the chattel which he has supplied. One theory is that the supplier impliedly warrants the article which he is supplying to be free from any hidden defect whereby rendering it dangerous for the use to which it may be expected to be put.[3] The average buyer or bailee of a chattel should be entitled to rely to some extent upon the reputation and the representations, implied and express, of his supplier. The other theory commonly applied to these situations is negligence.[4]

For obvious reasons the duty of a dealer in chattels differs from that of a manufacturer of chattels. He cannot be expected to have the same opportunity for discovering defects.[5] But he is liable if he knew of the defect,[6] or could have discovered the dangerous character of the article by reasonable inspection.[7] Of course, the nature of the article and the supplier's peculiar knowledge and opportunity for inspection will enter into determining what is a reasonable inspection. This does not place too great a burden on him. However, a dealer need not take apart the product he is selling so as to destroy its unity in order to discover latent defects and dangers. Thus a supplier cannot be held for the

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2. RESTATEMENT, TORTS (1934) §§ 388-390, 399; Spelky v. Kissel-Skiles Co., 54 S. W. (2d) 761 (Mo. App. 1932); and annotation in (1935) 99 A. L. R. 241.

3. Annotations where the supplier is a bailor in (1921) 12 A. L. R. 774; (1929) 61 A. L. R. 1336. And see L. J. Smith Construction Co. v. Mullins, 198 Mo. App. 501, 201 S. W. 602 (1918); Where the supplier is a manufacturer see Feezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles* (1938) 37 MICH. L. REV. 37; Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409 (1932) (shatter proof glass causing injuries).

4. Kearse v. Seyb, 200 Mo. App. 645, 209 S. W. 635 (1919); Smith v. Anderson Motor Service Co., 273 S. W. 741 (Mo. App. 1925); Spelky v. Kissel-Skiles Co., 54 S. W. (2d) 741 (Mo. App. 1932).

5. 24 R. C. L. 509, § 802; 45 C. J. 890, § 328; *Id.* at 893, § 332.

6. Note (1920) 5 A. L. R. 248; Bosserman v. Smith, 205 Mo. App. 657, 226 S. W. 608 (1920); Clarke v. Army & Navy Co-op. Society, [1902] 1 K. B. 155.

7. RESTATEMENT, TORTS (1934) § 402; Spelky v. Kissel-Skiles Co., 54 S. W. (2d) 761 (Mo. App. 1932); West v. Emanuel, 198 Pa. 180, 47 Atl. 965 (1901).

dangers of a secret formula when he does not know the formula.[8] Nor is a dealer liable for the dangerous nature or condition of contents of sealed containers when to discover the danger he would have to break into the container.[9] In such cases the dealer has performed his duty to the buyer if he has taken every precaution to see from the package's outside appearance that it is not dangerous, in the absence of special information.

The opinion in the *Shroder* case bases the dealer's liability upon negligence principles; but the court held the defendant not liable, not because it owed no duty to see that the car was safe before it was turned over to the Shroders, but because that duty was reasonably performed when the car was tested by the agency's mechanics. The court said the agency should not be required to take apart appliances which were found to be properly working under actual operation by them. The fact that the agency's salesman told the Shroders the car was in perfect condition when he turned it over to them might be a factor in favor of considering the case on the basis of implied or even express warranty. But the salesman's statement may be regarded as part of the usual sales talk that accompanies the normal attempted sale, particularly where he could not be expected to have more information about the car than that it was in good running order. The opinion in the *Shroder* case is well reasoned and is the view expressed by the Restatement.[10]

HARRY P. THOMSON, JR.

NEGLIGENCE—LIABILITY OF A SUPPLIER OF CHATTELS: WHERE ONE CONNECTING CARRIER DELIVERS TO ANOTHER

Brady v. Terminal Railroad Ass'n of St. Louis[1]

Defendant, largely a transfer or switching railroad, delivered to the Wabash railroad a string of fifty cars on the latter's track. Plaintiff, employed by the Wabash as an inspector, was directed by his employer to inspect the cars for the purpose of discovering whether or not they were in good repair, in conformity with the Safety Appliance Act and the rules and regulations of the Interstate Commerce Commission. While inspecting an empty car belonging to the Wabash, plaintiff climbed a ladder on the car and seized a grabiron on the roof. Because of the decay and rottenness of the wood to which it was fastened, the grabiron

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8. Peaslee-Gaulbert Co. v. McMath's Adm'r, 148 Ky. 265, 146 S. W. 770 (1912); Clement v. Rommeck, 149 Mich. 595, 113 N. W. 286 (1907).

9. Stone v. Van Noy R. R. News Co., 153 Ky. 240, 154 S. W. 1092 (1913); Noonan v. Great Atlantic & Pacific Tea Co., 104 N. J. L. 136, 139 Atl. 9 (1927), 56 A. L. R. 590 (1928); West v. Emanuel, 198 Pa. 180, 47 Atl. 965, 53 L. R. A. 329 (1901).

10. RESTATEMENT, TORTS (1934) § 402.

1. 340 Mo. 841, 102 S. W. (2d) 903 (1937). Some of the facts for the statement of the case were taken from Brady v. Wabash Ry., 329 Mo. 1123, 49 S. W. (2d) 24 (1932).

tore loose, and plaintiff fell to the ground, receiving injuries. Plaintiff sued the Wabash, founding his cause of action on the Federal Safety Appliance Act. Recovery was denied on the ground that when plaintiff was injured the car was not being used within the meaning of the act.[2] In the instant case against the Terminal, plaintiff based his theory of recovery on the Safety Appliance Act and on common-law principles of negligence. It was held that, since the car was not being hauled or used within the meaning of the act, defendant was not absolutely liable for the injuries received by plaintiff, as having violated the act;[3] that since defendant had relinquished control of the cars (though, in the legal sense, the court says, the cars were in possession of defendant), and, since the cars were rejected by the Wabash and returned to defendant only if they were defective and unfit to continue their journey, inspection by the Wabash was not a joint-enterprise of the two railroad companies, a matter of mutual interest and concern, and the Wabash was a licensee of the defendant [for purposes of inspection?], and defendant was a licensee of the Wabash, and that, therefore, defendant owed no duty to the Wabash to make an inspection of the cars and to warn the Wabash of any defects that there might be in the cars, and, it follows, no duty to plaintiff, who stood in the position of his employer.

It is an established principle of law that in a bailment of mutual benefit and interest, or to the interest and benefit of the bailor, the bailor has the duty to prepare the chattel bailed so that the bailee can use it with reasonable safety for the purpose for which it was designed and intended, or to exercise reasonable care to discover defects in the chattel bailed and to warn the bailee of those defects. This duty is owed to the bailee and to all those who the bailor can foresee might use the chattel with the consent of the bailee.[4] Accordingly, the general rule is that a railroad supplying cars to a shipper to be loaded with freight and delivered to a consignee is charged with a duty to exercise ordinary care to provide that the cars are in such state of repair that employees of the shipper and of the consignee, while exercising ordinary care, can enter them with reasonable safety for the purpose of loading and unloading the cars.[5] The principle extends to the carrier delivering cars to the consignee, the delivering carrier owing the consignee and his servants a duty to exercise due care to examine the cars and to ascertain whether or not they are in such repair that servants of the consignee, in the exercise of reasonable care, can unload them with reasonable safety; and if cars are defective or in a dangerous condition, to make the neces-

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2. Brady v. Wabash Ry., 329 Mo. 1123, 49 S. W. (2d) 24 (1932).
3. On *certiorari*, the Supreme Court of the United States reversed this portion of the opinion, holding that the car was being used within the meaning of the Act. 58 Sup. Ct. 426 (1938).
4. Notes (1921) 12 A. L. R. 774; (1929) 61 A. L. R. 1336; Comment (1930) 78 U. OF PA. L. REV. 413; RESTATEMENT, TORTS (1934) § 392.
5. Roddy v. Mo. Pac. Ry., 104 Mo. 234, 15 S. W. 1112 (1891); Sasnowski v. Mobile & O. R. R., 207 S. W. 865 (Mo. App. 1919); Doering v. St. Louis & O'Fallon Ry., 63 S. W. (2d) 450 (Mo. App. 1933); RESTATEMENT, TORTS (1934) § 392.

sary repairs or to notify the consignee of the unsafe condition before delivering them to him.[6] But the principles governing the respective rights and duties among connecting or intermediate carriers are not clear and definite, are not general and uniform; and the language of the courts in considering problems relating to these rights and duties is, in many cases, ambiguous—indeed, enigmatic. Two conflicting rules appear: (1) the receiving carrier owes its employees a duty to inspect cars tendered to it by another carrier before accepting them, and the receiving carrier's failure to discharge this duty intervenes to cut off whatever liability may attach to a delivering carrier for delivering defective cars and breaks the causal connection between whatever negligence the delivering carrier is guilty of in tendering defective cars and injuries to employees of the receiving carrier resulting from the defects;[7] (2) the delivering carrier owes employees of the receiving carrier a duty to inspect cars before delivering them and to provide that cars are safe and in good repair or to warn the receiving carrier of whatever defects there may be, and is liable for injuries resulting from defects to employees of the receiving carrier, even though the receiving carrier owes a duty to its employees to inspect and provide safe cars.[8] There is no Mis-

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6. Sykes v. St. Louis & S. F. R. R., 178 Mo. 693, 77 S. W. 723 (1903); Hawkins v. Mo. Pac. Ry., 182 Mo. App. 323, 170 S. W. 459 (1914); see Doering v. St. Louis & O'Fallon Ry., 63 S. W. (2d) 450, 451 (Mo. App. 1933); Markley v. Kansas City Southern Ry., 338 Mo. 436, 90 S. W. (2d) 409 (1936).

7. In Glynn v. Central R. R. of N. J., 56 N. E. 698 (Mass. 1900), plaintiff was the employee of a connecting carrier to whom defendant had delivered a defective car. The court held that since the car had passed out of possession and control of defendant and had passed the point where plaintiff's employer was to inspect it, defendant's liability for the defect had ceased. In Lellis v. Mich. Cent. R. R., 124 Mich. 37, 82 N. W. 828 (1900), defendant was the receiving company and plaintiff was its employee who was injured by reason of a defective car delivered to defendant by another railroad. The court said that the delivering carrier would not be liable, whatever its duty, but that defendant was liable for breach of its duty owed plaintiff to discover and repair defects of cars delivered to it by another company. In M. K. & T. Ry. v. Merrill, 65 Kan. 436, 70 Pac. 358 (1902), it was held that a delivering carrier was not liable to employees of a receiving carrier for injuries resulting from defective cars, because it was the duty of the receiving company to inspect the cars for the purpose of preventing injuries to its employees, and the delivering company's liability was cut off by the receiving company's failure to inspect, or by its careless inspection. It is also suggested that defendant was not liable because there was no contractual relationship between defendant and plaintiff, so that defendant owed plaintiff no duty at all.

8. In Moon v. Northern Pac. R. R., 46 Minn. 106, 48 N. W. 679 (1891), defendant was held liable for death of plaintiff's intestate resulting from a defective car which defendant had delivered to employer of plaintiff's intestate. Though there was a traffic arrangement between the two carriers whereby both companies were to inspect the cars and necessary repairs were to be made by defendant, and though the receiving company would undoubtedly have been liable to its employees for breach of its duty to inspect and reject defective cars, yet the receiving company's failure to inspect, or its faulty inspection of, the car causing the death did not operate as an intervening cause to cut off defendant's liability. The court indicated that defendant's duty to plaintiff's intestate was not necessarily founded on the contract between defendant and employer of plaintiff's intestate, but that defendant would have had the same duty even if transportation between the two lines had been carried on in obedience to a statute or in performance of their common-law duties as carriers. In Penn.

souri case involving the precise question of the rights and duties of connecting carriers, but there are indications in some of the cases that the rule may well be the first of the two propositions which we have induced of the cases.[9]

It may be suggested that in the instant case the court should have discussed and disposed of the problem as involving the rights and duties of intermediate carriers, rather than to have invoked principles and rules governing duties owed to and rights of invitees and licensees, which principles and rules apply to the occupation of land, and not to the possession and ownership of chattels.[10] Because of the peculiar relationships of the carriers and plaintiff—that the cars were still in the possession of defendant, though in the control of the Wabash, and had been tendered by defendant for the purpose of inspection, to be accepted by the Wabash or returned to defendant, depending on the results of the inspection (which plaintiff was to conduct); that the cars had not been actually delivered or received at the time of the accident, and plaintiff was not injured while the

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R. R. v. Snyder, 55 Ohio St. 342, 45 N. E. 559 (1896), it was held that, even though the receiving company, employer of plaintiff, had a duty to inspect cars before accepting them from defendant, the delivering company was liable to plaintiff for injuries resulting from a defective car delivered to plaintiff's employer; and that plaintiff could sue either company, at his election. Although there was a traffic agreement between the two lines the court stated that such contract was not necessary to raise defendant's duty to inspect and provide safe cars, but that defendant was liable on pure negligence principles.

9. *Dicta* in several of the cases point to what probably would be the Missouri rule. In Sykes v. St. Louis & S. F. R. R., 178 Mo. 693, 77 S. W. 723, 728 (1903), there is a statement to the effect that it is the duty of an intermediate carrier to examine a car tendered to it to discover whether it is in a reasonably safe condition to be hauled by it to its terminus, and there to be in "such a condition that its connecting intermediate or ultimate carrier would be bound to receive it for transportation from such intermediate carrier." In this case plaintiff was an employee of the consignee and defendant was a connecting carrier. Defendant was not held liable for injuries resulting to plaintiff from a defective car transported through one stage of the journey by defendant. The language certainly does not clearly indicate the extent of the duty owed to employees of a connecting carrier receiving a car from defendant, but the suggestion is that it is not very onerous. The opinion, however, does state that an intermediate carrier owes no duty to servants of the consignee, because it has no power of selection of the cars and cannot be charged with knowledge that servants of the consignee will unload them. In Brady v. Wabash Ry., 329 Mo. 1123, 49 S. W. (2d) 24, (1932), there is a statement that it is the duty of the receiving carrier to inspect for itself before accepting cars tendered to it by another carrier, for the purpose of ascertaining whether or not the cars are safe for transportation on its lines or for any other manner of handling. In Doering v. St. Louis & O'Fallon Ry., 63 S. W. (2d) 450, 451 (Mo. App. 1933), the court declares that an intermediate carrier has a duty only to examine a car tendered to it for the purpose of determining whether or not it is reasonably safe to be hauled by it to its terminus or connecting point, and there to be delivered to the next succeeding carrier. The court also states the duty of a connecting carrier to the consignee and his servants as does the court of Sykes v. St. Louis & S. F. R. R., *supra*. It is submitted, then, that the first of our two general propositions concerning the rights and duties of intermediate carriers may well be the Missouri rule.

10. Glaser v. Rothschild, 221 Mo. 180, 120 S. W. 1, (1909); Roman v. King, 289 Mo. 641, 233 S. W. 161 (1921), 25 A. L. R. 1263 (1923); Main v. Lehman, 294 Mo. 579, 243 S. W. 91 (1922); Achter v. Sears, Roebuck & Co., 105 S. W. (2d) 959 (Mo. App. 1937).

cars were being hauled or used on its line by the receiving carrier—it is difficult to conjecture what result would have been obtained even if the court had applied the principles relating to the rights and duties of connecting carriers. Perhaps the real basis of the holding is, as the court intimates in the closing paragraphs of the opinion, that plaintiff's injury was the result of "his own voluntary exposure of himself to known and appreciated danger incident to the work in which he was engaged."[11]

SAM BUSHMAN

NEGLIGENCE—LIABILITY OF SUPPLIER OF CHATTELS TO PERSONS OTHER THAN PERSON SUPPLIED

Isbell v. Biederman Furniture Co.[1]

Plaintiff's husband purchased a wooden bed from defendant, a corporation engaged in conducting a retail furniture store. Plaintiff's petition alleged that the bed was not reasonably safe by reason of the fact that a piece on which boards or slats of the bed rested was weak in that it contained a knot, was insufficiently attached and of insufficient strength for use by plaintiff, and was of insufficient strength for the use to which it was intended. Plaintiff's petition further alleged that defendant knew, or by the exercise of ordinary care would have known, that said bed was not reasonably safe for use by plaintiff and was negligently sold by defendant to plaintiff's husband for use by him and plaintiff, all without protection or notice of any kind to plaintiff or husband. Plaintiff further alleged that by reason of such defect the bed broke, whereby plaintiff was caused to fall and suffer injuries. The trial court sustained a demurrer to the petition on the allegation that it did not state facts sufficient to state a cause of action and plaintiff appealed. The court of appeals held that a bed was not an inherently or imminently dangerous article, that the purchaser usually inspects the article and might acquire some information of the defective construction, and that there was lack of privity between the plaintiff and defendant.

This case falls under the general situation of the liability of a supplier of chattels. However, the law has not developed equally as to all forms of suppliers. In the bailment cases, straight negligence principles have always been applied and the bailor's obligation varies with the benefit the bailor is to receive.[2] Where

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11. Lucey v. Hannibal Oil Co., 129 Mo. 32, 31 S. W. 340 (1895); Minnier v. Sedalia, W. & S. W. Ry., 167 Mo. 99, 66 S. W. 1072 (1902); Miller v. Mo. & Kan. Tel. Co., 141 Mo. App. 462, 126 S. W. 187 (1910); Allen v. Mo. Pac. Ry., 294 S. W. 80 (Mo. 1927); Davis v. City of Independence, 330 Mo. 201, 49 S. W. (2d) 95 (1932).

1. 115 S. W. (2d) 46 (Mo. App. 1938).

2. See cases collected in Notes (1921) 12 A. L. R. 774; (1924) 31 A. L. R. 540; (1929) 61 A. L. R. 1336; (1935) 99 A. L. R. 240. For railroad cases, see Roddy v. Mo. Pac. Ry., 104 Mo. 234, 15 S. W. 1112; Sykes v. St. Louis & S. F.

a duty exists on the part of the bailor, his responsibility extends to persons who might be injured in the vicinity of its use and also to anyone who would use it with the consent of the original bailee.[3]

The earlier Missouri approach in the liability of suppliers, such as manufacturers and vendors, was by the orthodox privity of contract rule,[4] broadened greatly by engrafting certain exceptions.[5] In *McLeod v. Linde Air Products Co.*[6] these exceptions were extended until it would seem that the same result would be reached as if straight negligence were applied.[7]

An examination of recent Missouri decisions leaves some doubt as to just what approach Missouri is taking in the vendor cases. In the recent supreme court case of *Shroder v. Barron-Dady Motor Co.*,[8] straight negligence was applied. However, there the sale had not yet been consummated; hence the case may more properly be considered a bailment. In *Tayer v. York Ice Machinery Corp.*,[9] the court talks both privity of contract and straight negligence, but it would seem that the latter and better approach is controlling. In *Jacobs v. Frank Adams Electric Co.*,[10] the St. Louis Court of Appeals applied straight negligence. The principal case seems to revert back to the older approach.[11] From a review of the recent cases, however, it would seem that Missouri has almost discarded the older position. However, a definite stand should be taken on one approach or the other.

Assuming straight negligence was applied in the principal case, the retailer might not have been negligent in failing to discover this defect. Most courts hold that, where goods are purchased from a reputable manufacturer, it is not

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R. R., 178 Mo. 693, 77 S. W. 723 (1903); Applegate v. Quincy, O. & K. C. R. R., 252 Mo. 173, 158 S. W. 376 (1913); Allen v. Larabee Flour Mills Corp., 328 Mo. 226, 40 S. W. (2d) 597 (1931); Fassbinder v. Mo. Pac. Ry., 126 Mo. App. 563, 104 S. W. 1154 (1907); Strayer v. Quincy, O. & K. C. R. R., 170 Mo. App. 514, 156 S. W. 732 (1913); Hawkins v. Mo. Pac. Ry., 182 Mo. App. 323, 170 S. W. 459 (1914); Doering v. St. Louis & O. Ry., 63 S. W. (2d) 450 (Mo. App. 1933). For automobile cases, see Smith v. Anderson Motor Service, 273 S. W. 741 (Mo. App. 1925); Spelky v. Kissel-Skiles Co., 54 S. W. (2d) 761 (Mo. App. 1932).

3. See Note (1930) 78 U. OF PA. L. REV. 413.

4. Winterbottom v. Wright, 10 M. & W. 109 (Ex. 1842).

5. Heizer v. Kingsland and Douglass Mfg. Co., 110 Mo. 605, 19 S. W. 630 (1892); Tipton v. Barnard and Leas Mfg. Co., 302 Mo. 162, 257 S. W. 791 (1924); See collection of cases in Notes (1921) 13 A. L. R. 1170; (1922) 17 A. L. R. 672; (1925) 39 A. L. R. 992; (1926) 42 A. L. R. 1243; (1929) 60 A. L. R. 371; (1929) 63 A. L. R. 340; (1931) 74 A. L. R. 343, 347; (1933) 86 A. L. R. 947; (1934) 88 A. L. R. 527; (1936) 105 A. L. R. 1502; (1937) 111 A. L. R. 1239.

6. 318 Mo. 397, 1 S. W. (2d) 122 (1927).

7. See McCleary, *The Restatement of the Law of Torts and the Missouri Annotations* (1937) 2 Mo. L. REV. 28, 38. See also the beverage cases Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001 (1925); Madouros v. Kansas City Coca Cola Bottling Co., 230 Mo. App. 275, 90 S. W. (2d) 445 (1936); Nemela v. Coca-Cola Bottling Co. of St. Louis, 104 S. W. (2d) 773 (Mo. App. 1937); and Note (1937) 2 Mo. L. Rev. 73; also critical notes in (1937) 2 Mo. L. Rev. 235, 370 and 528.

8. 111 S. W. (2d) 66 (Mo. 1937).

9. 119 S. W. (2d) 240 (Mo. 1937).

10. 97 S. W. (2d) 849 (Mo. App. 1936).

11. 115 S. W. (2d) 46 (Mo. App. 1938).

negligence for the retailer to fail to inspect to discover latent defects.[12] In the case of canned or sealed goods purchased from reputable manufacturers, a cursory inspection seems to be sufficient. A retailer may in the cursory inspection which he gives to the goods while handling them for sale have an opportunity to discover defects. It is his duty to utilize his special opportunities and competence; failure to inform his vendees that the goods are, or are likely to be, dangerous is not excused by his ignorance, where such ignorance is due to his failure to use his special opportunities and exert his special competence in discovering the condition of the goods.[13] If the consumer is to be protected further on the grounds of social policy and convenience, it may be done on a basis of implied warranty, but in applying this theory of liability Missouri seems to require privity of contract, except in the food and drink cases.[14]

It might well be that under these principles the court reached the correct result in the instant case. It would hardly seem, if the retailer purchased the bed from a reputable manufacturer, that he was negligent in failing to test the tensile strength of the piece on which the slats of the bed rested to discover this defect. This basis for the decision seems more to accord with modern principles of liability than that employed by the court.

J. BAIRD REYNOLDS

WILLS—CONTRACTS NOT TO REVOKE JOINT AND MUTUAL WILLS

Plemmons v. Pemberton[1]

Crockett and George Wall executed wills in which each gave to the other a life estate in both personal and real property with remainder to their sister and her children. Crockett died and George had his will probated, receiving the benefits thereunder. Subsequently, George made a second will disposing of his estate in a different manner. The children of the sister sue to enforce the provisions of an agreement between George and Crockett Wall not to revoke their wills. Evidence was offered that the wills were identical in terms; that both were drawn on the same day, at the same place, and witnessed by the same persons; that each knew of the provisions of the other's will and that the brothers had told several parties that they had made an "agreement" so that none of their property would go to certain relatives, as some of the property of a deceased brother had gone. The court held that the evidence was sufficient to establish an agreement to make joint wills and not to revoke the same, and was

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12. (1938) 22 MINN. L. REV. 743; 24 R. C. L. 509.
13. RESTATEMENT, TORTS (1934) § 402; Shroder v. Barron-Dady Motor Co., 111 S. W. (2d) 66 (Mo. 1937).
14. See the cases and law review materials, cited *supra* note 7.

1. 117 S. W. (2d) 392 (Mo. App. 1938).

therefore enforceable. The court said that the evidence need not be "direct" but must be "clear, definite, convincing, unequivocal and satisfactory evidence."

The courts are not consistent in their usage of the terms "joint will," "mutual wills," "reciprocal wills," "joint and mutual wills," *et cetera.* For purpose of discussion it is necessary to set forth some distinction between these expressions. A "joint will" will be taken to refer to a single instrument executed jointly by two or more persons devising either separate or common property. "Mutual wills" are ordinarily those in which two or more persons execute two or more wills with reciprocal testamentary provisions in whole or in part, but they need not be executed jointly or simultaneously. All other terms are merely variations of these two principal types.[2]

The majority of cases hold that the question of whether there is a contract not to revoke joint or mutual wills does not arise on probate,[3] but must be brought up in a suit to establish a trust. Equity will not decree specific performance of the contract to make a will,[4] nor will it compel a court of probate to probate a revoked will.[5] What equity does is to make the party who, because of the revocation, gets that for which he pays nothing hold in trust for and convey to the other party who would have taken under the will if it had not been revoked.[6] Some courts, however, consider it useless to force a party to go into equity merely for the sake of retaining the principle that all wills are revocable in their very nature.[7]

The right to revoke joint or mutual wills made in pursuance to a contract not to revoke must be divided into two classes, namely those where one party revokes before the death of either, and, secondly, those where one tries to revoke after the death of the other. In the former situation most courts have held that all makers of joint or mutual wills are privileged to revoke them in their lifetime,[8] especially where notice is given.[9] This means that the contract itself can

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2. Partridge, *Revocability of Mutual or Reciprocal Wills* (1929) 77 U. OF PA. L. REV. 357-368; 1 GARDNER, WILLS (2d ed. 1916) 77.

3. ATKINSON, WILLS (1937) 175; Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699 (1893); *In re* Keep's Will, 2 N. Y. Supp. 750 (Surr. Ct. 1888); Note (1926) 39 HARV. L. REV. 663.

4. Van Meter v. Norris, 318 Pa. 137, 177 Atl. 799 (1935).

5. Eagleton, *Joint and Mutual Wills* (1931) 15 CORN. L. Q. 358-389.

6. Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession* (1915) 28 HARV. L. REV. 237, 246-51; Sumner v. Crane, 155 Mass. 483, 29 N. E. 1151 (1892); Keasey v. Engles, 259 Mich. 178, 242 N. W. 878 (1932); Morgan v. Sanborn, 225 N. Y. 454, 122 N. E. 696 (1919); *In re* Gloucester's Estate, 11 N. Y. Supp. 899 (Surr. Ct. 1890); Williams v. Williams, 96 S. E. 749 (Va. App. 1918).

7. Baker v. Syfritt, 147 Iowa 49, 125 N. W. 998 (1910); Warwick v. Zimmerman, 126 Kan. 619, 270 Pac. 612 (1928); *In re* McGinley's Estate, 257 Pa. 478, 101 Atl. 807 (1917).

8. Humane Society v. McMurtrie, 229 Ill. 519, 82 N. E. 319 (1907) (the court, as many courts do, called the will a "joint and mutual will" but it was really a joint will with mutual provisions for disposition); Notes (1936) 102 A. L. R. 491; (1937) 108 A. L. R. 867.

9. Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216 (1909) (joint will with mutual dispositions).

be rescinded.[10] The purpose of notice is to allow the other party to revoke. Therefore if one secretly revokes and dies first, that is a good revocation because the survivor can also revoke.[11] As to the second situation where one party tries to revoke after the death of the other, it is held that he may do so even though he accepted the benefits of the decedent's will because a will is in its nature revocable.[12] However, equity will impose a trust in favor of the beneficiaries of the decedent's will.[13] Of course, if there is no contract, then the parties may revoke in either of the two situations just mentioned.[14]

An important question is raised by the principal case as to what sort of evidence is necessary to establish a contract not to revoke. Such contracts may be evidenced in a number of ways. First, there may be a written agreement, separate from the will, not to revoke the same, or there may be an express contract to make joint or mutual wills.[15] While these are different in form they would seem to have the same legal objective, for a contract to make joint or mutual wills would seem to imply a contract not to revoke the same.

Secondly, the wills themselves may recite the agreement,[16] but the mere fact that the wills say they "have agreed to and with each other and do hereby will, direct and devise" does not show a contract not to revoke.[17] If in the will they agree not to revoke without consent of the other, then at least after the death of one the survivor may not lawfully revoke.[18] At least one court has attached importance to the fact that the will contained the statement, "surviving testator of the covenant," saying that the word "covenant" was evidence of a contract not to revoke.[19]

In the third place the courts may find that the mere execution of a joint will is evidence that there is a contract. As to mutual wills it seems well settled that the mere execution is no evidence of a contract not to revoke, because the wills might very well have been made without either party knowing that the other was

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10. Rastetter v. Hoenninger, 214 N. Y. 66, 108 N. E. 210 (1915) (joint will with mutual dispositions); Anderson v. Anderson, 164 N. W. 1042 (Iowa 1917) (mutual wills).
11. McClanahan v. McClanahan, 77 Wash. 138 (1913) (mutual wills).
12. Cawley's Estate, 136 Pa. 628, 20 Atl. 567 (1890) (mutual wills); Aniol v. Aniol, 127 Tex. 576, 94 S. W. (2d) 425 (1936) (joint will).
13. Keasey v. Engles, 259 Mich. 178, 242 N. W. 878 (1932); Williams v. Williams, 96 S. E. 749 (Va. App. 1918).
14. Wilson v. Gordon, 73 S. C. 155, 163, 53 S. E. 79, 82 (1905).
15. Buehrle v. Buehrle, 291 Ill. 589, 126 N. E. 539 (1920) (mutual); *In re* Krause's Estate, 173 Wash. 1, 21 P. (2d) 268 (1933) (mutual and contract provided either could make a new will).
16. Warwick v. Zimmerman, 126 Kan. 619, 270 Pac. 612 (1928) (joint); Rice v. Winchell, 285 Ill. 36, 120 N. E. 572 (1918) (mutual); Brown v. Brown, 101 Kan. 335, 166 Pac. 499 (1917) (joint); Sage v. Sage, 230 Mich. 477, 203 N. W. 90 (1925) (joint with mutual dispositions); Moore v. Moore, 198 S. W. 659 (Tex. Civ. App. 1917) (joint).
17. *In re* Hoffert's Estate, 65 Pa. Super. 515 (1917).
18. Sage v. Sage, 230 Mich. 477, 203 N. W. 90 (1925).
19. Curry v. Cotton, 356 Ill. 538, 191 N. E. 307 (1934) (joint will). See very vigorous dissent in this case.

executing a similar will.[20] However, where joint wills are involved, there is great confusion in the cases as to the importance of the execution. The majority and the better view is that mere proof of execution without further evidence is not enough;[21] but there is something to be said for the other line of authority which holds the mere execution is evidence of a contract because parties will not ordinarily enter into a joint will unless they have some sort of an agreement as to how they intend to leave their property.[22] Some courts say that only where there is a "joint disposition" of property does the will itself evidence a contract not to revoke.[23]

Still another method of establishing a contract not to revoke is by showing all the surrounding circumstances of its execution. The authorities are in accord with the principal case in holding that the degree of proof must be "clear and definite,"[24] the same rule that applies to ordinary contracts to make wills.[25] As to what constitutes "clear and definite" proof must depend on each particular case. Courts have found a contract from the mutual exchange of wills and the delivery to a third party beneficiary,[26] and from the fact consideration was furnished by the beneficiary.[27] But the fact that the parties merely stated before the time of making the will that they intended to leave it to certain persons is not enough.[28] However, the fact that parties executed mutual wills because they

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20. Knox v. Perkins, 86 N. H. 66, 163 Atl. 497 (1932); Flower v. Flower, 32 Ohio App. 350, 166 N. E. 914 (1928); Ridders v. Ridders, 156 Ore. 165, 65 P. (2d) 1424 (1937). But see Rastetter v. Hoenninger, 214 N. Y. 66, 108 N. E. 210 (1915) (says it is revocable before death, but after death of one, the other could not revoke).

21. Rolls v. Allen, 204 Cal. 604, 269 Pac. 450 (1928) (joint with mutual dispositions); Menke v. Duwe, 117 Kan. 207, 230 Pac. 1065 (1924) (joint with mutual dispositions); *In re* Rhodes Estate, 277 Pa. 450, 121 Atl. 327 (1923) (court called it mutual but it was joint); Ross v. Sechler, 272 N. W. 854 (Wis. 1937) (joint).

22. Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216 (1909); Baker v. Syfritt, 147 Iowa 49, 125 N. W. 998 (1910); Bower v. Daniel, 198 Mo. 289, 95 S. W. 347 (1906), but in Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027 (1914), the Missouri court disapproves of the Bower case on ground that, since wills are ambulatory and revocable at any time during the life of the testator, an agreement not to revoke must be established by the most clear and satisfactory evidence; Hermann v. Ludwig, 186 App. Div. 287, 174 N. Y. Supp. 469 (2d Dep't 1919); Seat v. Seat, 113 S. W. (2d) 751 (Tenn. 1938); Williams v. Williams, 96 S. E. 749 (Va. App. 1918); Underwood v. Myer, 107 W. Va. 57, 146 S. E. 896 (1929); Dufour v. Pereira, 1 Dick. 419 (Ch. 1769).

23. Beveridge v. Bailey, 53 S. D. 98, 220 N. W. 462 (1928).

24. Herrick v. Snyder, 27 Misc. 462. 59 N. Y. Supp. 229 (Sup. Ct. 1899); *In re* Rosenblath's Estate, 146 Misc. 424, 263 N. Y. Supp. 303 (Surr. Ct. 1933) ("full and satisfactory proof").

25. McElvain v. McElvain, 171 Mo. 244, 71 S. W. 142 (1902); Grantham v. Gossett, 182 Mo. 651, 81 S. W. 895, (1904); *In re* Rich's Estate, 199 Iowa 902, 200 N. W. 713 (1924); Brewer's Exr. v. Smith, 242 Ky. 175, 45 S. W. (2d) 1036 (1932); Anderson v. Collins, 222 S. W. 451 (Mo. 1920).

26. Chase v. Stevens, 34 Cal. App. 98, 166 Pac. 1035 (1917); Chambers v. Porter, 183 N. W. 431 (Iowa 1921); Eagleton, *Joint and Mutual Wills* (1931) 15 CORN. L. Q. 358, 389.

27. Mayfield v. Cook, 201 Ala. 187, 77 So. 713 (1918).

28. Elmer v. Elmer, 271 Mich. 517, 260 N. W. 759 (1935).

wanted to exclude certain parties is an indicia of an agreement not to revoke.[29] As a whole, the courts have been liberal in finding contracts not to revoke joint or mutual wills.[30]

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29. Harris v. Morgan, 12 Tenn. App. 445 (1930) (mutual wills).

30. Stevens v. Myers, 91 Ore. 114, 177 Pac. 37 (1918) (mutual); Larrabee v. Porter, 166 S. W. 395 (Tex. Civ. App. 1914) (joint); Heller v. Heller, 233 S. W. 870 (Tex. Civ. App. 1921) (joint); see also Eagleton, *Joint and Mutual Wills* (1931) 15 CORN. L. Q. 358.