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Recent Cases

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LANDLORD AND TENANT—PAROL REDUCTION OF RENT UNDER A WRITTEN LEASE—CONSIDERATION—STATUTE OF FRAUDS.

Long Mercantile Co. v. Saffron[1]

Plaintiff executed a lease of certain premises to defendant for five years at an annual rental of $1,500, payable monthly in advance in installments of $125. Due to the recent economic depression, defendant paid only $75 per month. The purpose of this suit is to collect the balance of $50 per month for the period of thirty-two months during which the defendant paid only $75 per month. As a defense, defendant alleged that he made a parol agreement with plaintiff reducing the rent to $75 per month. The evidence was conflicting as to whether such an agreement had ever been entered into. The jury found for defendant, with the exception of allowing plaintiff's claim for one month's rent early in the term, which defendant admitted he owed the plaintiff. The plaintiff moved for judgment *non obstante verdicto,* on the ground that the defendant's answer constituted no defense to the plaintiff's cause of action, in that there was no consideration to support the oral modification of the written lease. This motion was overruled. However, the trial court did sustain plaintiff's motion for a new trial, without assigning any reasons therefor. In affirming the motion for a new trial, the appellate court said, "that if such modified or substituted agreement was thereafter acted upon by both parties, such fact would amount to an abandonment of the old contract, and would of itself serve as valid consideration for the modification."

Two questions are presented: first, was there a valid consideration; and second, was the agreement within the Statute of Frauds.[2] The latter question was not discussed by the court.

The parties to an executory contract may waive it, or any of its terms, and enter into a substituted agreement, provided the same is supported by a valid consideration.[3] According to Missouri authorities, the abandonment of the old contract is sufficient consideration, and would of itself, uphold the modification.[4] The waiving of the original lease is a course the landlord may or may not follow, as he wishes, and it has been held that the lessee agreeing to stay upon the premises in consideration of the landlord's promise to reduce the rent, is a valid consideration for the

1. 104 S. W. (2d) 770 (Mo. 1937).
2. Mo. REV. STAT. (1929) § 2966.
3. *Cf.* Cook v. Cave, 163 Ark. 407, 260 S. W. 49 (1924); Haseltine v. Ausherman, 87 Mo. 410 (1885); Latham v. Douglass, 206 S. W. 392 (Mo. App. 1918).
4. See Lancaster v. Elliot, 55 Mo. App. 249 (1893); Sanders' Pressed Brick Co. v. Barr, 76 Mo. App. 380 (1898); Mulliken v. Haseltine, 160 Mo. App. 9, 141 S. W. 712 (1911); Davis v. Culmer, 221 Mo. App. 1037, 295 S. W. 803 (1927).

landlord's agreement.[5] The Nebraska court has held that no consideration is necessary to support the modification, the consideration which existed for the old being imported into the new agreement.[6] The conclusion seems to be that if the contract, as modified, has been acted upon, the courts will strive to find a valid consideration, although, in reality, none existed. But if the modified contract is executory, and is sought to be enforced, the courts will insist on more than an abandonment of the original lease and substitution of a modified contract. Thus, the supreme court of Minnesota would not enforce a gratuitous promise by the lessor to accept less rent.[7] But there is authority that even where the lessor has accepted a less amount of rent in full payment of that specified in the lease, the promise is void because there is no consideration, and the lessor may recover for the balance of the rent.[8] Williston agrees with the latter view, in that the lessee is doing what he is already obligated to do and, therefore, the lessor has received no valid consideration.[9] The result in the principal case has much authority back of it, but is difficult to accept on recognized principles of consideration.

But, assuming there must be a consideration, there may be a gift by the lessor to the lessee of the balance of money due between the written lease and the parol modification.[10] The New York court held the parties had the right to waive consideration, and the lessor could make a gift of the balance due under the written lease to the lessee, and that such gift could be either parol or written. To make such a gift valid, it must be executed. Therefore, it is a question of the intent of the parties, which may be proved by what occurred between the parties. The New York view seems a logical ground for upholding the parol reduction, and the court does not have to go into the bothersome question of whether there was a valid consideration or not.[11]

The Statute of Frauds presents another difficulty in the principal case. As a lease is required to be in writing by the statutes, a modification of such contract, to be *enforceable,* would also have to be in writing,[12] but when such parol modification is acted upon, and the amount agreed upon by parol has been paid and accepted, the agreement is executed, and the statute is no defense.[13] The parties have exe-

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5. Doherty v. Doe, 18 Colo. 456, 33 Pac. 165 (1893); See Note (1937) 50 HARV. L. REV. 1314, where it is suggested that the result in such cases is in accord with common business understanding and that "whenever there is a change in conditions which renders performance of a contract substantially more difficult than originally contemplated by the parties, an agreement intended to alleviate the hardship on the promisor should be enforced."

6. *Cf.* Bowman v. Wright, 65 Neb. 661, 91 N. W. 580 (1902).

7. Wharton v. Anderson, 28 Minn. 301, 9 N. W. 860 (1881).

8. Pusheck v. Frances E. Willard N. T. H. Association, 94 Ill. App. 192 (1900).

9. 1 WILLISTON, CONTRACTS (1920) § 120.

10. *Cf.* McKenzie v. Harrison, 24 N. E. 458 (N. Y. 1890).

11. The cases are collected in (1926) 43 A. L. R. 1451.

12. See Hoard v. Jones, 119 Kan. 138, 237 Pac. 888 (1925); Rucker v. Harrington, 52 Mo. App. 481 (1893).

13. Bowman v. Wright, 65 Neb. 661, 91 N. W. 580 (1902).

cuted their parol agreement, and there is no power to revoke to either party, unless there be fraud.[14]

HERBERT S. BROWN

NEGLIGENCE—CONCURRENT CAUSATION.

Wurst v. American Car & Foundry Co.[1]

Plaintiff contracted silicosis, a disease caused by silica dust, either while in the employment of the defendant or while employed by two previous employers. Expert testimony showed that plaintiff's weight was greatly decreased, that he was susceptible to colds after the alleged contraction, and they identified his case as silicosis, which is caused by dust produced in surfacing metal. Evidence also showed that defendant had not provided a respirator as was required by law but that his two previous employers had. Doctors testified that silicosis could be contracted in 90 days, and evidence showed that plaintiff worked for defendant for 121 days, stretched over a period of 6 months. Defendant maintained that, since plaintiff also worked for two previous parties at the same occupation and for just so long a time as he had worked for defendant, it was merely a matter of conjecture as to which party actually caused the injury. Held the defendant was liable.

The term "concurrent cause" has been confused by many courts in that they fail to distinguish between the different circumstances to which the doctrine applies. The first situation, and by far the most common one, is that in which there are two or more concurring forces, each of which is necessary in order to produce the injury. It is well settled that any of these so contributing are liable "if without his negligence injury would not have occurred."[2]

The second situation is one in which the conduct of either of the two parties alone is sufficient to produce the injury. It is this one that the courts have failed to recognize and differentiate from the first. In general the rule is that if two forces are actively operating, one due to actor's negligence, the other not due to any misconduct on his part, and each of itself is sufficient to bring about another's injury, then the actor's negligence may be held by the jury to be a substantial factor.[3] In this type of case the defendant cannot relieve himself of liability by showing the other party might have caused the injury by itself but he must prove

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14. The cases are collected in (1922) 17 A. L. R. 10; (1924) 29 A. L. R. 1095; (1932) 80 A. L. R. 534.

1. Wurst v. American Car & Foundry Co., 103 S. W. (2d) 6 (Mo. App. 1937).

2. State *ex rel.* Hauck Bakery Co. v. Haid, 333 Mo. 76, 62 S. W. (2d) 400 (1933); Levins v. Vigne, 98 S. W. (2d) 737 (Mo. 1936).

3. RESTATEMENT, TORTS (1934) § 432 (2): "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about."

that the other's act did actually cause the injury.[4] However the plaintiff need not exclude the possibility that other might have caused it. While all courts recognize liability in the first situation, at least one court has denied liability in the second case, where it could not be shown whether the injury resulted from defendant's negligence in maintaining a sloping sidewalk, or from the fact that there was ice on the sidewalk.[5] If this reason can be set up by one party, then it may be set up by both, with the result that neither party will be held liable to the plaintiff whereas both have been at fault.

But the second situation must be divided again into two very different and distinct types of cases. Where the defendant is guilty of nonfeasance he is not liable if the injury clearly would have resulted even had he taken the necessary precautions. It is not enough however if the injury only might have happened.[6] When, however, the defendant and the third party are each responsible for affirmative acts, each of which is sufficient in itself to bring about the injury, the defendant may be held responsible. He cannot escape liability by showing that the other was sufficient to cause the injury as he could in the case of omission. When the other act is of known origin the courts are quite agreed, but when the other force is of unknown origin some courts hold that the defendant is not liable.[7]

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4. Baltimore & Potomac R. R. v. Reaney, 42 Md. 117 (1874); HARPER ON TORTS (1933) § 109; Beale, *The Proximate Consequences of An Act* (1920) 33 HARV. L. REV. 33; Carpenter, *Concurrent Causation* (1935) 83 U. OF PA. L. REV. 941; Peaselee, *Multiple Causation and Damage* (1934) 47 HARV. L. REV. 1127.

5. Taylor v. City of Yonkers, 105 N. Y. 202, 11 N. E. 642 (1887). Defendant was negligent in having a sloping sidewalk so as to endanger pedestrians. There was also a formation of slick ice on the slope, for which defendant was not responsible, and it was impossible to determine which of the two forces caused the injury to plaintiff. It was held "that the defect, even when a concurring cause, must be such that without its operation the accident would not have happened." In other words, the court says that if in the absence of the defendant's negligence in maintaining a dangerous sloping sidewalk, it would not have happened, then defendant is liable. It is obvious that plaintiff could slip on a perfectly flat walk if it was covered with ice. The instruction and the result are open to criticism.

6. Ford v. Trident Fisheries Co., 232 Mass. 400, 122 N. E. 389 (1919). Even had the defendant furnished life boats for its passengers still they would have drowned because of the heavy storm. Since the injury would have resulted even had defendant taken the necessary precautions the defendant was not liable. See Stacy v. Knickerbocker Ice Co., 84 Wis. 614, 54 N. W. 1091 (1893). RESTATEMENT, TORTS § 432 (1): "Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been negligent."

7. City of Graham v. Moseley, 254 S. W. 130 (Tex. Civ. App. 1923). The defendant city had polluted the water which injured the plaintiff but the water had also been polluted from other sources. Held the defendant was liable even though the injury could have resulted anyway. See also Beauchamp v. Saginaw Mining Co., 50 Mich. 163, 15 N. W. 65 (1883). In the case of fires there seems to be a conflict in the cases. In Cook v. Minneapolis, St. P. & S. S. M. R. R., 98 Wis. 624, 74 N. W. 561 (1898), defendant caused one fire and the origin of the other fire was unknown. They joined before burning plaintiff's property so it was impossible to tell which fire actually caused the harm. The court, although admitting that if both were of known origin both would be liable, said: "No damages in such

The present case presents a new and different fact situation since here the liability of each the defendant and the third party depends on nonfeasance. The court instructed the jury on this point: "Defendant invokes the rule that when plaintiff shows that the injury or disease complained of may have resulted from one or the other of two causes, for one of which but not the other defendant is liable, and it is just as probable that the injury or disease resulted from the one cause as the other, he fails to make out a submissive case. This is a well recognized rule, but it does not mean that to make out a submissible case the evidence must exclude the possibility that the injury or disease may have resulted from a cause for which defendant is not liable. It is only essential that the evidence show with reasonable certainty that the injury or disease resulted from a cause for which the defendant is liable." By way of analogy it would seem the situation in the instant case in legal effect may be like that where the defendant has omitted to act (nonfeasance) and the other tortfeasor has committed an affirmative act. In this situation the defendant, to relieve himself from liability, must show that the other force alone was clearly sufficient to produce the same harm. If the analogy of two affirmative acts is taken, the defendant is even more clearly responsible. It seems that the court could have given more explicit instructions in this case.

BARKLEY BROCK

NEGLIGENCE—HUMANITARIAN DOCTRINE.

Perkins v. Terminal R. R. Ass'n of St. Louis[1]

The Missouri Supreme Court, in *Perkins v. Terminal R. R. Ass'n of St. Louis,* held that, under the humanitarian doctrine, mental obliviousness is not so essential to the plaintiff's case that defendant is entitled to an instruction requiring the jury to find such obliviousness before awarding the verdict to the plaintiff. The majority opinion of this case states that the jury must merely find that plaintiff was approaching a position of imminent peril.

Formerly, it was apparently necessary, for the plaintiff to recover under the humanitarian doctrine,[2] to show that defendant saw or knew, or could have seen

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circumstances can be traced, with reasonable certainty, to wrongdoing as a producing cause. The one traceable to the wrongdoer is superseded by the other cause or condition, which takes the place of it and becomes, in a physical sense, the proximate antecedent of what follows." However in a subsequent case of Kingston v. Chicago Northwestern Ry., 191 Wis. 610, 211 N. W. 913 (1927), it was held that the plaintiff could recover if the second fire was itself set by negligence of a third person or if defendant failed to establish the fact that the second fire was innocently set. The difficulty in establishing the origin of a forest fire is so great that this amounts to a practical, if not actual, reversal of the Cook case. See full discussion of this problem by Carpenter and by Peaselee, both cited *supra* note 4.

1. 102 S. W. (2d) 915 (Mo. 1937).

2. Gaines, *The Humanitarian Doctrine in Missouri* (1935) 20 ST. LOUIS L. REV. 113, 120; Note (1937) 22 WASH. U. L. Q. 581; Otis, *Humanitarian Doctrine*

or known by the use of ordinary and reasonable care, of plaintiff's imminent peril; and that defendant saw or knew, or could have seen and known, by the use of ordinary and reasonable care, of the obliviousness of plaintiff to the peril. There are several Missouri cases[3] clearly stating these requirements. The supreme court, in *Pentecost v. St. Louis Merchants' Bridge Terminal R. R.*,[4] in sustaining a demurrer where the pleadings did not state that plaintiff was oblivious, held that without this obliviousness of the plaintiff, defendant was not negligent, even for failure to sound a whistle. The court in the *Perkins* case, however, distinguished between the *Perkins* and *Pentecost* cases on the purely technical ground that the *Pentecost* case was decided on a demurrer, while the present case was based on the propriety of an instruction to the jury.

In the *Perkins* case, the court goes on to say that obliviousness is not essential to the pleading, and hence, as a necessary corollary, no instruction is needed on the point. The court quotes as its authority for this statement the case of *Banks v. Morris*.[5] However, the opinion of the *Banks* case merely involves the proposition that if obliviousness is the cause of the peril, it must be proved—otherwise, not. If this were not so, the court would seem to be stating that plaintiff could recover in spite of even the most extreme recklessness on his part.[6] But, as one member of the court once said, "He (the plaintiff) had no right to race with death that way."[7]

Ellison, C. J., in his dissenting opinion, maintains that the jury should be required to find the mental obliviousness of the plaintiff, and should not hold defendant liable merely because he ought to have seen the plaintiff, just before the injury, whether plaintiff was oblivious or not, and negligently failed to avert the injury when he could have done so. Otherwise, the law would impose no liability on the plaintiff. He admits, however, that obliviousness has been discarded as a necessary ingredient for recovery under the humanitarian doctrine, in cases since *Banks v. Morris*.

Gantt, J., dissents separately on the ground that the jury instruction in question says the plaintiff must be "in and approaching a position of imminent peril." He maintains that the majority opinion seems to convey the idea that defendant has an absolute duty while the plaintiff is merely approaching the zone of imminent

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(1912) 46 AM. L. REV. 381; Clark, *Tort Liability for Negligence in Missouri* (1916) 12 U. OF MO. BULL. LAW SER. 3; 45 C. J. 984; and see collection of cases in (1934) 92 A. L. R. 47.

3. State *ex rel.* Lusk v. Ellison, 271 Mo. 463, 196 S. W. 1088 (1917); Rashall v. St. L. I. M. & S. Ry., 249 Mo. 509, 155 S. W. 426 (1913); Gabal v. St. L. & S. F. R. R., 251 Mo. 257, 158 S. W. 12 (1913). Although these were all cases of injury to section hands, there is no difference in principle.

4. 66 S. W. (2d) 533 (Mo. 1933).

5. 302 Mo. 254, 257 S. W. 482 (1924). This case held that obliviousness need not be pleaded.

6. Note (1937) 22 WASH. U. L. Q. 581.

7. Graves, J., in Laun v. St. L. & S. F. R. R., 216 Mo. 563, 116 S. W. 553 (1909).

peril. One cannot be *in* and *approaching* the imminent peril zone at the same time.

The dissent of Ellison, C. J., seems to point to the more logical settlement of the point in controversy. The jury should be required to find mental obliviousness if the plaintiff is out of the zone of physical helplessness, and merely in the zone where he could extricate himself physically, should he become aware of his danger. If he is oblivious, he is actually in the "imminent peril zone"—otherwise, he is not actually in peril. Obliviousness merely widens the zone, and puts the plaintiff in danger sooner. Therefore, if the plaintiff were in this extra danger strip when the defendant had his last chance, by the application of an ordinary degree of care, to avert the accident, it would seem the logical thing to do to require the jury to find that such obliviousness actually or apparently existed, to allow plaintiff to recover.

The result of this case shows an extension of the humanitarian doctrine as it has been applied in Missouri. In spite of occasional statements by the court that the humanitarian doctrine is not to be extended, this and at least one other recent case[8] point in the opposite direction. This tendency is, of course, directly opposite the position taken by the Restatement of Torts,[9] which holds the defendant in last chance doctrine only where defendant knew of plaintiff's situation, and realized or had reason to realize that plaintiff was mentally oblivious, and therefore unlikely to discover his peril in time to avoid the harm.

Since the court was so widely split in its views, the case being decided by a four to three majority, and due to the change in the membership of the court since this case was decided, the question may not be entirely settled.

GEORGE W. WISE

NEGLIGENCE—HUMANITARIAN DOCTRINE—ANTECEDENT NEGLIGENCE OF DEFENDANT.

Bumgardner v. St. Louis Public Service Co.[1]

The plaintiff was proceeding eastward in his automobile when he stopped to await a change in a traffic light at an intersection. His automobile had been standing for fifteen to twenty-five seconds when it was struck in the rear by the defendant's street car which was also eastbound. There was no obstruction in the line of vision between the motorman of the street car and the plaintiff's automobile. Conflicting evidence was presented as to whether the street car was proceeding at an excessive rate of speed or not. However, the evidence tended to establish the fact that the motorman could not have stopped the street car in time to avert the collision after he became aware of the danger. Judgment was rendered for the plaintiff, whereupon the defendant carried his appeal to the Supreme Court of Missouri.

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8. Bumgardner v. St. Louis Pub. Service Co., 102 S. W. (2d) 594 (Mo. 1936).
9. RESTATEMENT, TORTS (1934) § 480.

1. 102 S. W. (2d) 594 (Mo. 1937).

The judgment was affirmed with mitigation of damages. The court held that alternate instructions, one based upon the humanitarian doctrine and the other on the defendant's primary negligence, were not inconsistent.

In the opinion it is said that, "The humanitarian doctrine seizes upon a situation as it exists at the time the peril becomes imminent." This is in accord with former cases before the court. Recovery under the humanitarian doctrine is allowed when the defendant knew, or by the exercise of due care could have known of the plaintiff's peril in time to have avoided injury though the plaintiff himself may have been negligent in not discovering his peril in time to avoid his injury.[2] Thus it would seem that if the defendant, in the situation as it is at the time the peril becomes imminent, cannot avoid injury because of his primary negligence, the humanitarian doctrine does not apply. The plaintiff must then base his case on primary negligence and the defendant may interpose the defense of contributory negligence.

But the next statement in the opinion is: "If the street car was being operated at a negligent rate of speed, such primary negligence on the part of appellant extended the danger zone under the humanitarian doctrine; for appellant's street car, if travelling at a slower or non-negligent rate of speed, could have been stopped . . . in a shorter distance. The rate of speed affected the distance in which the street car could be stopped and the instant the humanitarian doctrine seized upon the situation." This would mean that antecedent negligence would have effect under the humanitarian doctrine. There is some evidence of a late tendency towards extension of the doctrine.[3] This is a logical tendency as is pointed out by Professor Bohlen.[4] There are some earlier cases where the court of appeals have included antecedent negligence under the humanitarian doctrine mainly where there has been excessive speed preventing trains from stopping quickly,[5] but these have been expressly repudiated by the supreme court.[6] In *Mayfield v. Kansas City Southern Ry.*, the supreme court held that it was prejudicial error in an instruction submitting humanitarian negligence to require consideration of any antecedent negligence of either plaintiff or defendant which existed prior to the time the humanitarian doctrine commenced to operate.[7] Thus it appears that the court's statement in the

2. Banks v. Morris & Co., 302 Mo. 254, 267, 257 S. W. 482 (1924).

3. Perkins v. Terminal R. R. Ass'n. of St. Louis, 102 S. W. (2d) 915 (Mo. 1937), commented on elsewhere in this issue.

4. (1917) 66 U. OF PA. L. REV. 73, 77; BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 536, 591.

5. Murell v. Mo. Pac. Ry., 105 Mo. App. 88, 79 S. W. 505 (1904); Williams v. Kansas City Elevated Ry., 149 Mo. App. 489, 131 S. W. 115 (1910); Goben v. Quincy, O. & K. C. Ry., 206 Mo. App. 5, 226 S. W. 631 (1920); Smith v. Chicago, R. I. & Pac. Ry., 221 Mo. App. 715, 285 S. W. 524 (1926).

6. Carney v. Chicago, R. I. & Pac. Ry., 323 Mo. 470, 23 S. W. (2d) 993 (1929); State *ex rel* Fleming v. Bland, 322 Mo. 565, 15 S. W. (2d) 798 (1929); Alexander v. St. Louis-San Francisco Ry., 289 Mo. 599, 233 S. W. 44 (1921); Todd v. St. Louis-San Francisco Ry., 37 S. W. (2d) 557 (Mo. 1929); Smithers v. Barker, 97 S. W. (2d) 121 (Mo. App. 1936).

7. 337 Mo. 79, 85 S. W. (2d) 116 (1935), noted in (1936) 1 Mo. L. REV. 103.

instant case is an extension of the doctrine as it has been previously applied in Missouri. However, the extension is not illogical. In most, if not all, of the definitions given by the court, the doctrine is said to seize upon the situation at the time the peril becomes imminent. If there is primary negligence, such as excessive speed, the peril naturally becomes imminent sooner. Thus, it becomes clear what the court meant when it said the primary negligence extends the danger zone under the humanitarian doctrine. True, the humanitarian doctrine is based upon the principle of holding the defendant responsible where, by the exercise of due care, he could have had the last chance to preserve human life, but failed to exercise due care to discover that chance.[8] Yet, if a liberal attitude is maintained and primary negligence will cause the point at which the doctrine will apply to be moved back from the injury, the defendant can be held to the necessity of discovering his last chance earlier so as to avoid the injury in spite of his antecedent negligence.

Therefore, the two statements of the court quoted so far are not necessarily inconsistent. But the opinion continues: "On the other hand, if a peril suddenly arises after a moving object passes that point along its approach to the point of impact . . . where it is impossible on account of the negligent speed to stop and avoid the collision, a defendant is not liable under the humanitarian doctrine for a failure to stop although possibly liable for primary negligence." A careful examination of this statement will show that it can be reconciled to the other two. It applies to a different type of situation. In this situation the peril suddenly arises so that even if the defendant was exercising due care to discover the peril, he could not discover it in time. Thus antecedent negligence can move back the point where the humanitarian doctrine seizes upon the situation just so far and no farther. Here the effect of primary negligence is logically limited. Antecedent negligence does not affect the humanitarian doctrine; it only affects the question as to when the doctrine will apply. Once that is decided, the doctrine does not include it and is not concerned with it. Where there is an obstacle beyond which the defendant could not have had notice of the plaintiff's peril even though he had been exercising greater care in keeping on the lookout for the peril in proportion to his lack of care in his operation of his street car or train, the antecedent negligence cannot carry the point at which the humanitarian doctrine will apply beyond that obstacle. For example, if the defendant's street car is traveling at an excessive speed around a curve, according to the reasoning in these statements, by the court, the antecedent negligence of the defendant may move the point where the humanitarian doctrine seizes upon the situation back to the curve and no farther.

In the opinion of the present case, three situations seem to be recognized where the humanitarian doctrine is concerned, in two of which antecedent negligence presents a problem. The court does not clearly differentiate these situations. The first situation is where there is no antecedent negligence and the plaintiff has been negligent so as to place himself in a position of danger, but the defendant by exer-

8. Haley v. Mo. Pac. Ry., 197 Mo. 15, 25, 93 S. W. 1120, 1123 (1906).

cising due care could have discovered the danger and prevented harm but failed to do so. The second situation is the same as the first with the exception that antecedent negligence on the part of the defendant is present. Here the antecedent negligence changes the point at which the peril becomes imminent and therefore the point where the humanitarian doctrine seizes upon the situation. The third situation is the same as the second with the additional factor that there is an obstruction in the defendant's line of vision so that even had he been alert, he could not have discovered the plaintiff's peril before a certain point. Here the antecedent negligence could operate so as to move the point where the humanitarian doctrine seizes upon the situation up to a certain point but not beyond. This is a logical development of the humanitarian doctrine although it would seem to be a definite extension of it. However, the trend seems to be towards extension and not limitation.

HARRY P. THOMSON, JR.

SALES—WARRANTY—LIABILITY OF MANUFACTURER TO ONE NOT A PURCHASER.

Nemela v. Coca-Cola Bottling Co. of St. Louis[1]

This was an original proceeding by writ of error to have the court review a final judgment entered by the circuit court of St. Louis in favor of plaintiff against defendant Coca-Cola Bottling Company of St. Louis.

Plaintiff and her husband, who operated a tavern, purchased coca-cola from the defendant bottler. A patron requested plaintiff to have a bottle of coca-cola with him, which she did. Upon drinking a portion of the coca-cola, she became ill, and discovered portions of decomposed bugs in the bottle. She brought suit upon the theory of an implied warranty of the fitness of the beverage for human consumption. The court said that the plaintiff having purchased the coca-cola from defendant, there was privity of contract between plaintiff and defendant, regardless of whether or not the patron had paid for the drink.

This presents an interesting question as to what the law would have been if the plaintiff had not originally purchased the coca-cola from defendant, but had been a third person for whom the socially inclined purchaser had bought a drink.

The reason for allowing a recovery on an implied warranty of fitness of food or drink dispensed for immediate consumption, is to protect those consumers who must rely on the fitness of the product for the use for which it is intended. Food and drink are necessary articles, and public policy demands that the helpless consumer, who has no way of knowing the purity of what he eats and drinks, should be allowed to rely absolutely upon those who, by placing such food upon the market, impliedly represent that it is pure, and fit for human consumption.

Some jurisdictions refuse to imply warranties of fitness in favor of a third person other than the purchaser, on the grounds that there is no privity of contract

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1. 104 S. W. (2d) 773 (Mo. App. 1937).

between the parties,[2] but it will be noted that the majority of cases so holding have arisen in New York and in jurisdictions holding that an implied warranty extends only to the immediate vendee, and not to the sub-vendee. This requirement of privity is historically unsound.[3] Williston says in his work on Sales: "A warranty is in many cases imposed by law not in accordance with the intention of the parties; and in its origin was enforced in an action sounding in tort, and based on the plaintiff's reliance on deceitful appearances or representations rather than on a promise. . . ."[4] In spite of this fact we find many courts requiring privity of contract as a requisite for maintaining an action on an implied warranty of fitness of food and drink. Of course, if the implied warranty of fitness be regarded as contractual in nature and as existing only as incident to a *sale* of goods rather than as a liability sounding in tort, and imposed by law upon the basis of consumer protection, there can be no such implied warranty if the injured person has not bought from, or dealt with, the defendant.[4a]

Missouri has apparently broken away from this requirement of privity of contract, by allowing the ultimate consumer who has purchased from a retailer to recover on an implied warranty of fitness against the manufacturer,[5] but so far as the writer has been able to determine, there are no cases in Missouri where a third person, not a purchaser, has brought suit against a manufacturer (or bottler) on the basis of an implied warranty of fitness. However, since the courts in this state have dispensed with the requirement of privity in suits by a sub-vendee against a manufacturer in the case of food sold for immediate consumption, there should be no reason for requiring privity in a suit by a donee of a sub-vendee or a donee of a purchaser. Circumstances that would create a warranty in favor of a vendee, in the ordinary case, should create one in favor of the donee of the vendee, as it is not a requisite of a valid sale that the price be paid by the vendee.[6] In the case of food, especially that sold in the original package, the consumer, be he donee or

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2. Binion v. Sasaki, 41 P. (2d) 585 (Cal. App. 1935); Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785 (1916); Brussels v. Grand Union Co., 14 N. J. Misc. 751, 187 Atl. 582 (Sup. Ct. 1936); Chysky v. Drake Bros. Co., Inc., 235 N. Y. 468, 139 N. E. 576 (1923); Redmond v. Borden's Farm Products Co., 245 N. Y. 512, 157 N. E. 838 (1927); Smith v. Hanson, 228 App. Div. 634 (2d Dep't 1929); Zotto v. Merkel Bros., Inc., 229 App. Div. 793 (2d Dep't 1930); Block v. Empire State Doughnut Corp., 233 App. Div. 774, 250 N. Y. Supp. 440 (2d Dep't 1931); Dickinson v. Sperling, 158 Misc. 905, 286 N. Y. Supp. 934 (City Ct. 1936); Colonna v. Rosedale Dairy Co., 186 S. E. 94 (Va. 1936); Prinsen v. Russos, 215 N. W. 905 (Wis. 1927).

3. (1935) 23 CALIF. L. REV. 621; (1937) 21 MINN. L. REV. 315.

4. 1 WILLISTON, SALES (2d ed. 1924) § 244a.

4a. Note how, in Smith v. Carlos, 215 Mo. App. 488, 247 S. W. 468 (1923), the court finds an "element of sale" in the service of food by a restaurant owner in order to permit recovery against him by a patron who had been injured by eating unwholesome food in his restaurant.

5. Madouros v. Kansas City Coca-Cola Bottling Co., 90 S. W. (2d) 445 (Mo. App. 1936).

6. Parker v. Joslin Dry Goods Co., 52 Colo. 238, 120 Pac. 1042 (1912); (1929) 42 HARV. L. REV. 414.

purchaser, should feel secure in the implied representations of the manufacturer or seller, that the food is pure and fit for human consumption.[7] It has been held, and from the standpoint of public protection, rightly so, that the implied warranty imposed upon a manufacturer either runs with the title, or is available to the ultimate purchaser, and that the manufacturer impliedly warrants the purity of the product to such of the public as become the rightful possessors of it.[8]

Under modern conditions, and viewed from a practical standpoint, there should be no requirement of privity of contract, and a donee of a vendee, or of a sub-vendee, should be allowed a recovery against either the retailer or the manufacturer, on the basis of an implied warranty, regardless of the existence of privity of contract.

OZBERT W. WATKINS, JR.

TRIALS—CONTINUANCES—ATTORNEY IN THE LEGISLATURE.

Federal Land Bank of St. Louis v. Brass[1]

In a cause recently before the Audrain County Circuit Court, the court smashed a long established precedent in the state of Missouri, by rejecting a motion for a continuance sought on the ground that one of the attorneys in the case was a member of the state legislature and attending a session. The action was for contempt and grew out of an ejectment suit brought into this court on a change of venue. A receiver to preserve the property had been appointed in the original county and a motion to vacate the appointment was denied, from which no appeal was taken. Judgment was for the plaintiff in the ejectment suit and the defendants appealed. Pending the appeal the receiver filed a complaint, alleging interference with his possession by the defendants in the ejectment suit. Defendants applied for a continuance on the ground that one of their attorneys was in the legislature.

In denying the motion the trial court noted the statute,[2] providing for the granting of a continuance upon an affidavit filed, when counsel is a member of the general assembly and in attendance on a session. He also called attention to a decision of the Springfield Court of Appeals,[3] in a criminal action, that the statute is mandatory, which is the only judicial interpretation of the statute by the appellate courts of the state. He then ruled that the statute was not intended to interfere with the processes of the court in cases of this nature, or that if it was so intended, it is unconstitutional to that extent.[4] The trial court first pointed out that the contempt case before him was not the original action but an entirely new and dif-

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7. (1937) 21 MINN. L. REV. 315, cited note 3, *supra*, at 324, n58.
8. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

1. Unreported. Ruling made in the Circuit Court of Audrain County, March 22, 1937. The application for the writ of prohibition was entitled State *ex rel.* Brass v. Hughes.
2. Mo. REV. STAT. (1929) § 938.
3. State v. Clark, 214 Mo. App. 536, 262 S. W. 413 (1924).
4. *Cf.* Clark v. Austin, 101 S. W. (2d) 977, 980, 988 (Mo. 1937).

ferent one, the trial court having exhausted its jurisdiction in the ejectment suit and having lost all control of that action. He then added: "But there is another reason that has never been before our courts in the consideration of that statute. Now, a statute may be partially good and partially bad, and any circuit court is going to hesitate a long time before it declares a statute void even on the question of constitutionality. But as to this particular action, I cannot conceive of even the Legislature ever intending that a court should sit and have parties treat it with contempt, you might say with ridicule of its orders; and the court must sit helpless and say, 'I will sit here and be ridiculed and held in contempt because his attorney is in the Legislature.' "[5]

The action of the trial judge in this case should be heartily approved by all who are interested in a speedier and more efficient administration of justice. The ruling was one of common sense interpretation of the statute involved. In fact, it does not seem that the statute should be construed as mandatory in any case. In reaching that conclusion in *State v. Clark*,[6] the Springfield Court of Appeals relied on a change in the wording of the statute from "the court *may* continue" to "the court *shall* continue." But the court is only so required to grant the continuance "if it shall appear to the court, by affidavit, that any party applying for such continuance, or any attorney, solicitor or counsel of such party is a member of either house of the general assembly, and in actual attendance on the session of the same, *that the attendance of such party, attorney, solicitor or counsel is necessary to a fair and proper trial or other proceedings in such suit. . . .*"[7] (italics the authors) True, once the trial court has determined that the presence of a party or counsel is necessary to a fair and proper trial, he has no choice under the changed wording of the statute but to grant the continuance. But that preliminary determination rests in the sound discretion of the trial court, which is the fundamental principle underlying the whole matter of continuance.[8] This is because the trial courts are in closer connection with the case and surrounding circumstances. It does not seem that the statute was intended to alter this principle.

This device has been used for years to obtain delay and obstruct justice. It has been often denounced as dilatory and a subterfuge, but until this ruling it has always been allowed. It is to be hoped that the construction placed upon the statute by this trial judge will be followed by others throughout the state.

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5. Transcript of record. A writ of prohibition to restrain the trial of the case was denied by the supreme court, April 21, 1937. Order denying writ set aside on rehearing and writ granted, July 2, 1937. This order was set aside and writ denied, July 6, 1937.

6. 214 Mo. App. 536, 262 S. W. 413 (1924).

7. Mo. REV. STAT. (1929) § 938.

8. Farmers' and Drovers' Bank v. Williamson, 61 Mo. 259 (1875); 6 R. C. L. 544.

WILLS—INTENTION OF ATTESTING WITNESS.

Baxter v. Bank of Belle, of Belle Maries County[1]

In an action to contest a will the instrument was signed by the testatrix and two witnesses. The notary public who drew the will also added his certificate and signed. The testatrix knew that two witnesses were necessary and she expressly requested that the two persons whose names appeared on the will act as witnesses. One of these, however, was rejected as he did not sign in the testatrix's presence. The proponents contended that the notary should be considered as an attesting witness and that his signature operate to give the will validity. The court held the will was invalid and the notary was not a good attester because he did not intend to sign as a witness and was not requested to so sign by the testatrix. There were also facts pointing strongly to forgery which were considered by the court in reaching this decision.

The problem of the state of mind of a witness necessary to make an attestation valid is a difficult one, and resolves itself into two basic questions, first, just what intent is necessary and, second, does the person signing as a witness have such an intent. The latter is a difficult question of fact as it relates to the state of a person's mind when he did an act at some time in the past.

As to the first, the witness is by statute required to attest the will and subscribe his name.[2] In Missouri the witness attests the will itself; in other words he must know the document is a will.[3] He must also know that the testator signed the will as such.[4] When an attesting witness places his signature on the will, it is a token that he bears witness to these facts. The fact that he places the symbol on the document is evidence that he wishes to give the will validity. Then the state of mind of the attesting witness would appear to be that he knows the document is a will, knows the testator signed it as such, and intends to give the document validity. This is seemingly the *animo attestandi* necessary, and the courts are uniform in holding it a requisite to valid attestation.[5] They are prone, however, to rely on the Latin and not to define the process. Some courts seem to hold that the person signing must contemplate the word "witness" and think of himself as such. The Missouri court in the principal case seems to follow this view. This is the strict

1. 104 S. W. (2d) 265 (Mo. 1937).
2. MO. REV. STAT. (1929) § 519.
3. Cone v. Donovan, 275 Mo. 557, 204 S. W. 1073 (1918); Odenwaelder v. Schorr, 8 Mo. App. 458 (1880); Ortt v. Leonhardt, 102 Mo. App. 38, 74 S. W. 423 (1903). In some states, by statute and judicial decision, the witness need not know the document is a will. In these jurisdictions to attest means only to bear witness to the signature; for a discussion of this subject, see ATKINSON, WILLS (1937) 278.
4. Cravens v. Faulconer, 28 Mo. 19 (1859); Grimm v. Tittman, 113 Mo. 56, 20 S. W. 664 (1892); Ray v. Walker, 293 Mo. 447, 240 S. W. 187 (1922).
5. Keely v. Moore, 196 U. S. 38 (1904); Moale v. Cutting, 59 Md. 510 (1882); Burton v. Brown, 25 So. 61 (Miss. 1898); Boone v. Lewis, 103 N. C. 40, 9 S. E. 644 (1889); Peake v. Jenkins, 80 Va. 293 (1885); *In re* Jones' Estates, 101 Wash. 128, 172 Pac. 206 (1918).

interpretation,[6] and a definite minority. Under it, a notary public or a justice of the peace who knew the document was a will, who knew the testator signed it as such, who signed in the testator's presence and at his request is held not a good attesting witness. Since all the necessary requirements are present, the only basis for the holdings must be that the signer thought of himself as a notary and signed in that capacity, rather than thinking of himself as a witness.

The general rule in these notary and justice of the peace cases is that the official's signature is a valid attestation, and the statement of his official position is mere surplusage and disregarded.[7] This majority view seems the better as the official signs to give the will validity and when he has knowledge of all the necessary facts it seems immaterial whether he thinks of himself as a "witness" or not. The thing of importance is the purpose of attestation and when such purpose has been fulfilled the liberal courts will hold the document valid.

When someone else is permitted to sign the testator's name and after doing so he writes "by" and signs his own name, it is held that this signer is not a good attesting witness.[8] These cases are distinguished from the notary cases in that here the signer has a definite and limited intention in signing, namely, to provide a signature for the testator. He intends to act mechanically as an amanuensis, a wholly different intention from that necessary to attestation.

The fact that testatrix, knowing two witnesses were necessary, expressly requested two, neither of which was the notary, undoubtedly influenced the court in holding the will invalid. This goes to the point of the testatrix's state of mind. While she did not think of the word "witness" in the latter's connection, she obviously intended his signature to give approbation to the will. As to the element of request, the testatrix made no objection when the notary signed and this has been held to be sufficient request to comply with the statute.[9] The reasoning mainly relied on by the court, however, was that the witness did not sign with the intention to witness the will. This follows the strict view, and by a literal interpretation of words and the drawing of fine distinctions as to capacities of signers defeats the broad intention of the parties. The liberal view allows this intention to prevail and endangers none of the safeguards provided by the wills statute.

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6. *In re* Hull's Will, 117 Iowa 738, 89 N. W. 979 (1902); *In re* McDonough's Will, 201 App. Div. 203, 193 N. Y. Supp. 734 (1922).

7. Adams v. Norris, 64 U. S. 587 (1859); Keely v. Moore, 196 U. S. 38 (1904); Payne v. Payne, 54 Ark. 415, 16 S. W. 1 (1891); Murray v. Murphy, 39 Miss. 214 (1860); Bolton v. Bolton, 107 Miss. 84, 64 So. 967 (1914); Tyson v. Utterback, 154 Miss. 381, 122 So. 496 (1929); Merrill v. Boal, 47 R. I. 274, 132 Atl. 721 (1926); Franks v. Chapman, 64 Tex. 159 (1885); see note (1920) 8 A. L. R. 1075.

8. Burton v. Brown, 25 So. 61 (Miss. 1898); Peake v. Jenkins, 80 Va. 293 (1885).

9. Schierbaum v. Schemme, 157 Mo. 1, 57 S. W. 526 (1900); Thomas v. English, 180 Mo. App. 358, 167 S. W. 1147 (1914); Bingaman v. Hannah, 270 Mo. 611, 194 S. W. 276 (1917).