

Missouri Law Review

Volume 6
Issue 1 *January 1941*

Article 10

1941

Recent Cases

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Recent Cases, 6 Mo. L. REV. (1941)

Available at: <https://scholarship.law.missouri.edu/mlr/vol6/iss1/10>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Recent Cases

AGENCY—RATIFICATION OF SERVANT'S TORTIOUS ACT

*State ex rel. Kansas City Public Service Co. v. Shain*¹

In an assault and battery action against defendant and its employee, the superintendent of the motor coach division, the evidence showed that the employee, while riding home in one of the defendant's streetcars, got off and assaulted the plaintiff, whose car, having been stopped on the streetcar's track by virtue of a red traffic signal, had hindered the streetcar's progress. It was shown also that following the alleged assault the employee was retained in the defendant's employ, that defendant's attorneys, upon the advice of defendant's general solicitor, defended the employee in police court on the charge of assaulting plaintiff, and, in addition, took an appeal for him, all without compensation from the employee-defendant.

Held: In quashing defendant's writ of *certiorari*, evidence that defendant's attorney defended employee in police court and took an appeal from police court to circuit court tended to establish a ratification by defendant of employee's tortious act.

The problem here presented, the master's ratification of a servant's tort and the legal consequences attaching thereto, was commented upon by Mr. Justice Holmes, when sitting on the Supreme Judicial Court of Massachusetts, in the following terms: "If we were contriving a new code today we might hesitate to say that a man could make himself a party to a bare tort in any case by merely assenting to it after it had been committed."² The doctrine is, however, widely accepted today.

Generally it is held that a person, either natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant or principal and agent³ exists between them, whereby the tortious act of the servant can be legally imputed to the master.⁴ The doctrine of ratification, however, proceeds on the theory that while there was no authority prior to the act in question, and hence the relation of master and servant did not in fact exist,

1. 134 S. W. (2d) 58 (Mo. 1939).

2. *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279 (1891).

3. 2 *MICHEM*, *AGENCY* (2d ed. 1914) § 1855, states that the relation of master and servant and that of principal and agent are so much alike that in the field of tort the terms may usually be dealt with interchangeably, though there is a clear distinction between them in other aspects.

Cf. *RESTATEMENT, AGENCY* (1933) § 2: "The words 'master' and 'servant' are herein used to indicate the relationship from which arises the tort liability of an employer to third persons for the tort of an employee." See also *LABATT, MASTER AND SERVANT* (2d ed. 1913) §§ 65, 66, 67, pointing out the distinction between servant and agent.

4. *Painter v. Mayor*, 46 Pa. 213 (1863); *Patton v. McDonald*, 204 Pa. 517 (1903); *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279 (1891).

such relationship may be implied from the subsequent acts and conduct of the parties. When so implied, it is equivalent to previous authority, and results as effectively to establish the relation of master and servant as if the agency had been authorized *ab initio*.⁵ The doctrine is aptly expressed by the well known maxim from the Roman Law "*Ratihabitio priori mandato aequiparatur*," that a subsequent ratification of an act is equivalent to a prior authority to perform such an act.⁶ Ratification, then, may be defined as the affirmance by a person of a prior act which did not bind him but which was done, or professedly done, on his account. As a result, the act is given effect as if originally authorized by him.⁷ This affirmance may be in either express and direct, or in implied and indirect, terms of assent,⁸ but it is constantly emphasized that it must be performed with full knowledge of all the material facts.⁹ As to the requirement that there be "full" knowledge of all the material facts, Judge Sherwood, in his dissenting opinion in *Jones v. Williams*,¹⁰ aptly notes that ". . . a fraction of knowledge can not beget an integer of ratification". Would, however, a master ever ratify if he had, in fact, "full" knowledge of the tort?

The usual dogma is that in order for a master to "ratify" the unauthorized acts of his servant, (meaning that, upon his affirmance, the original transaction shall have the same legal consequences to the master as if it had been originally authorized),¹¹ he must, as pointed out heretofore, do so with knowledge of the facts or knowledge of the wrong.¹² And in the ordinary tort case, the facts that are material within this rule are the time, place, persons affected, nature of the acts done, and the extent of the injury.¹³ Such a statement of the requirement of knowledge, however, is loose and leads to confusion and uncertainty. It is more accurate to say that, *except* in cases in which the master intentionally ratifies without inquiry or wilfully takes a chance on unknown facts, any ratification, in order to be effectual, must have been made by the master with full and complete knowledge of all pertinent facts.¹⁴ Thus, if a master approves the conduct of an unauthorized servant without inquiry, it would not be unreasonable to say that he has deliberately assumed the risk of lack of knowledge, and so it has been held.¹⁵

5. Ballard v. Nye, 138 Cal. 588, 72 Pac. 156 (1903).

6. Palmer v. Yates, 5 N. Y. Super. Ct. 137, 151 (1849).

7. RESTATEMENT, AGENCY (1933) § 82.

8. Bell v. Scranton Trust Co., 282 Pa. 562, 128 Atl. 494 (1925).

9. Noggle Wholesale & Mfg. Co. v. Sellers & Marquis Roofing Co., 183 S. W. 659 (Mo. App. 1916); Mann v. Life & Casualty Ins. Co., 132 S. C. 193, 129 S. E. 79 (1925); Cobb v. Simon, 119 Wis. 597, 97 N. W. 276 (1903); Myers v. Shipley, 140 Md. 380, 116 Atl. 645 (1922).

10. 139 Mo. 1, 77 (1897).

11. RESTATEMENT, AGENCY (1933) § 82.

12. Rogers v. Brummett, 92 Okla. 216, 220 Pac. 362 (1923); Cranston v. West Coast Life Ins. Co., 72 Ore. 116, 142 Pac. 762 (1914).

13. 1 MECHEM, *op. cit. supra* note 3, § 397.

14. 1 MECHEM, *op. cit. supra* note 3, § 395; Cobb v. Simon, 119 Wis. 597, 97 N. W. 276 (1903); *Cf.* Myers v. Shipley, 140 Md. 380, 116 Atl. 645 (1922) (if a person ratifies an act of his agent before he knows the material facts, he may afterwards disaffirm and escape liability).

15. Kelley v. Isensee, 60 N. D. 149, 233 N. W. 245 (1930); Hutchinson Co. v. Gould, 180 Cal. 356, 181 Pac. 651 (1919).

In the case of *Myers v. Shipley*,¹⁶ the court held in a well reasoned opinion that while the doctrine of ratification of the agent's acts applies as well to torts as to contracts, the adoption of a tort must be "explicit" and, of course, with full knowledge of the tort. It is not unlikely that many people feel with Mr. Justice Holmes that it is indeed a harsh rule of law which makes a man a party to a bare personal tort merely by assenting to it after it has been committed.¹⁷ This feeling, if widely held, might justify an interpretation of the word "explicit" in such a case as a requirement that the ratification by the master of the tortious acts of his servant must be more direct and less ambiguous than the ratification of a contract made by an unauthorized agent. But upon examination of the cases we find no square authority to support this interpretation.¹⁸ The distinction suggested, and possibly warranted by the use of the word "explicit," seems in fact not to be made. Ordinarily the cases seem to demand the same qualities of ratification whether in contract or in tort, and it is sometimes specifically stated that they are to be treated alike.¹⁹

Although a corporate master was here involved, the fact is not particularly significant since in modern law the principles as to ratification are, in general, the same for corporations as for individuals,²⁰ in spite of certain early cases such as the Ohio case of *Orr v. Bank of the United States*,²¹ which held that since a corporation could not be sued for an assault and battery, it was incapable of ratifying the assaults of its employees. Hence, a corporation will, generally speaking, be liable for an injury done by its servants if under like circumstances an individual would be responsible, and upon ratification of a servant's tortious act, the corporation likewise becomes liable to the third party injured by servant.²²

As to what acts will constitute ratification, it is usually stated that any words or conduct showing an intention upon the part of the master to adopt the tortious act in whole or in part as his own constitutes ratification.²³ But since in no case we have found has the master expressly ratified the tortious act of his servant, it is necessary to limit the discussion to cases of implied ratification of the servant's tortious acts rendering the master liable therefor.

An implied ratification is often asserted where the employer has retained the tortfeasor in his employ. Whether such a master, who knowingly retains in his employ a servant who has committed a tort, thereby ratifies the tort by implication, is a question upon which the cases are in conflict.²⁴ A great many courts have held that the retention of the servant in the employ of the master, subsequent to the commission of the unauthorized act, is evidence of the

16. 140 Md. 380, 116 Atl. 645 (1922).

17. *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279 (1891).

18. RESTATEMENT, AGENCY (1933) §§ 82, and 218 (do not make the suggested distinction between contract and tort).

19. *O'Neil v. National Oil Co.*, 231 Mass. 20, 120 N. E. 107 (1918).

20. *Dougherty v. Excelsior Springs*, 110 Mo. App. 623, 85 S. W. 112 (1904).

21. 1 Ohio 36 (1822).

22. *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 35 N. E. 776 (1893).

23. TIFFANY, AGENCY (2d ed. 1924) § 53; *Byne v. Hatcher*, 75 Ga. 289 (1885).

24. 1 MECHEM, *op. cit. supra* note 3, § 475.

master's ratification of the servant's unauthorized act²⁵ if the master has full knowledge of the facts.²⁶ Especially has this been true in the cases of railroads and other corporations owing a special duty to the public, where probably because of the special duty involved, slight circumstances, such as retention of servant in the employ of the master, have rendered the latter liable for the servant's unauthorized tortious acts.²⁷

The great weight of authority and the view of a leading textbook writer, however, is that mere retention of the servant in the employ of the master does of itself not constitute ratification,²⁸ nor is it alone evidence of ratification.²⁹ Standing alone, it is ambiguous and does not necessarily imply affirmance and approval, but all courts agree that the retention of the servant in the employment, when taken in connection with other circumstances, evidences a ratification of the servant's unauthorized acts.³⁰

As an example of the many variables which bear upon the arguable approval of a servant's tort by his mere retention, the case of *Grattan v. Suedmeyer*,³¹ is in point. Here it was held that the act of the servant in assaulting a third person was not ratified by the master's continuing the servant in his employ and assisting him in the defense of the action brought by the injured third person. In this case, however, it appeared that the master was the father of the servant, and the court pointed out that it was only natural for the father to defend the son and that he could not be held responsible for the tort of his son merely because he continued to treat him as a father should treat a son.

In the principle case, however, the court was faced with more than mere retention in employ with knowledge. Not only the defense of the servant in the police court, but also the appeal taken by the master to the circuit court from the judgment of the police court, was conduct upon the part of the master which was unequivocal and of such character, we believe, as to evidence clearly an intent to ratify. If the doctrine of the ratification of a tort is to be accepted

25. *Vincent v. Morgan's Louisiana & T. R. & S. S. Co.*, 140 La. 1027, 74 So. 541 (1917); *Rosenberg v. J. C. Penney Co.*, 86 P. (2d) 696 (Cal. App. 1939); *Sullivan v. People's Ice Corp.*, 92 Cal. App. 740, 268 Pac. 934 (1928); *Pullman Co. v. Alexander*, 117 Miss. 348, 78 So. 293 (1918); *McFadden v. Anderson Motor Co.*, 121 S. C. 407, 114 S. E. 402 (1922); *Cobb v. Simon*, 119 Wis. 597, 97 N. W. 276 (1903); *Southern Surety Co. v. Harrisburg Hospital*, 253 Ill. App. 458, 461 (1929).

26. *Edmunds v. Atchison, T. & S. F. Ry.*, 174 Cal. 246, 162 Pac. 1038 (1917); *Tauscher v. Doernbecher Mfg. Co.*, 153 Ore. 152, 56 P. (2d) 318 (1936).

27. *Perkins v. Missouri, K. & T. R. R.*, 55 Mo. 201 (1874); *Graham v. Pacific R. R.*, 66 Mo. 536 (1877); *Pullman Co. v. Alexander*, 117 Miss. 348, 78 So. 293 (1918); *Bass v. Chicago & N. W. Ry.*, 42 Wis. 654 (1877).

28. 1 *MECHEM*, *op. cit. supra* note 3, § 475; *Chaney v. Frigidaire Corp.*, 31 F. (2d) 977 (C. C. A. 5th, 1929) (assault and battery case); *Kastrup v. Yellow Cab & Baggage Co.*, 129 Kan. 398, 282 Pac. 742 (1929); *Edmunds v. Atchinson, T. & S. F. Ry.*, 174 Cal. 246, 162 Pac. 1038 (1917); *Turner v. American Dist. Tel. & Messenger Co.*, 94 Conn. 707, 110 Atl. 540 (1920).

29. *Mann v. Life & Casualty Ins. Co.*, 132 S. C. 193, 129 S. E. 79 (1925).

30. *Edmunds v. Atchinson, T. & S. F. Ry.*, 174 Cal. 246, 162 Pac. 1038 (1917); *Da Ponte v. Ogden*, 161 La. 378, 108 So. 777 (1926); *Case Threshing Mach. Co. v. Beavers*, 261 S. W. 440 (Tex. Civ. App. 1924).

31. 144 Mo. App. 719, 129 S. W. 1038 (1910).

by our courts today, which is beyond argument, its application in the principal case would seem to be fully warranted on the facts.

CHARLES J. McMULLIN

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND PRESS—HANDBILL ORDINANCES

*Schneider v. New Jersey*¹

Ordinances of Los Angeles, Worcester, and Milwaukee forbade distribution of handbills on public streets and other specified public places. An ordinance of Irvington, New Jersey, required the acquisition of a permit from a city officer prior to any distribution or canvass; such officer being allowed to use his discretion in granting the permit. State courts upheld these ordinances as valid regulations of the use of the streets by preventing the littering thereof. The Supreme Court of the United States held the ordinances invalid. "Public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."^{1a}

Fundamentally our freedom of speech springs from the English common law and the liberal ideas of the American Revolution.² The due process clause of the Fourteenth Amendment³ is controlling over all acts done under the authority of a municipal ordinance, as that municipal power has been conferred by the state.⁴ The freedom of speech and press secured by the First Amendment of our national Constitution against abridgment by the United States, is similarly secured to all persons against abridgment by a state, by the due process clause of the Fourteenth Amendment. The argument that prevention of distribution does not affect freedom of the press has been discountenanced by the Supreme Court's declaration that liberty of circulation is as essential as freedom of publishing.⁵ Certainly without the right to circulate, the publication would be of little benefit to the publisher.

Decisions by the state courts in respect to "handbill ordinances" have been varied. However, the tendency of the older cases indicates reasonable police regulations are not to be declared invalid because they might incidentally affect freedom of speech and the press, or other rights guaranteed by the Constitution.⁶

1. 308 U. S. 147 (1939).

1a. *Id.* at 163.

2. Cathcart, *Constitutional Freedom of Speech and of the Press* (1935) 21 A. B. A. J. 595, 598.

3. U. S. CONST. AMEND. XIV, § 1.

4. *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20 (1907); *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278 (1913); *Cuyahoga River Power Co. v. Akron*, 240 U. S. 462 (1916).

5. *In re Jackson*, 96 U. S. 727 (1878).

6. (1917) 12 C. J. § 479: "The constitutional guaranty of free speech does not prevent the government from regulating the use of places wholly within its control. Thus a statute or ordinance which forbids the delivery of addresses

As a contrast, the instant case seemingly emphasizes the individual liberties by stating: "Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution . . ." In the past, state courts have upheld as valid city ordinances designed to prevent littering of the streets by forbidding the distribution of handbills.⁸ Also, the frightening of horses has been declared a valid basis for preventing distribution of such handbills.⁹ Annoyance of travelers by bills blowing about has been declared a ground for validating such regulatory ordinances.¹⁰ Prohibition of the use of streets by persons for any purposes detrimental to the common good have been regarded as reasonable exercises of the police power. Dissemination of handbills has been declared detrimental to the common good.¹¹ Not only has distribution of such to passers-by been used as a basis for these ordinances, but delivery onto porches,¹² or into mailboxes¹³ has been held violative of ordinances designed to prevent littering of the streets. Whenever state courts have adjudged handbill ordinances invalid, the basis for such has been an unreasonable exercise of the police power by the

in the public parks, or on the streets, or which forbids the free distribution of printed matter on the streets, constitutes a valid exercise of the police power." But see *Hague v. Committee for Industrial Organization*, 307 U. S. 496 (1939).

In re Anderson, 69 Nebr. 686, 689, 96 N. W. 149, 150 (1903): "The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition. A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the constitution.

. . . The test in such cases is whether the regulation in question is a *bona fide* exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation. . . . It (the ordinance) has no reference to or connection with freedom of speech or of the press, and its plain purpose is, not to interfere with the publication of sentiments and opinions of individuals, but to promote the cleanliness and safety of the municipality."

Milwaukee v. Kassen, 203 Wis. 383, 234 N. W. 352 (1931).

7. *Schneider v. New Jersey*, 308 U. S. 147, 160 (1939).

8. *People v. Horwitz*, 27 Cr. R. 237, 140 N. Y. Supp. 437 (1912); *Commonwealth v. Kimball*, 13 N. E. (2d) 18 (Mass. 1938); *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275 (1888).

9. *Wettengel v. Denver*, 20 Colo. 552, 39 Pac. 343 (1895); *Philadelphia v. Brabender*, 201 Pa. 574, 51 Atl. 374 (1902); *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275 (1888).

10. *Commonwealth v. Kimball*, 13 N. E. (2d) 18 (Mass. 1938).

11. *People v. Horwitz*, 27 Cr. R. 237, 243, 140 N. Y. Supp. 437, 442 (1912). "The ordinance read: 'That no person shall throw, cast or distribute in or upon any of the streets, avenues or public places, or in front yards or stoops, any hand bills, circulars, cards or other advertising matter whatsoever.' . . . I would put the constitutionality of this ordinance on the ground that a municipality, through its legislative body, has the right to prohibit the use of the streets by persons for any purposes detrimental to the common good, or that may conflict or interfere with the rights of others in the enjoyment of the highways, which should be unincumbered and clean, so as to promote the safety, health and comfort of the public."

12. *People v. St. John*, 288 Pac. 53 (Calif. 1930).

13. *Sieroty v. Huntington Park*, 111 Cal. App. 377, 295 Pac. 564 (1931).

rule-making body.¹⁴ However, these courts have looked hard to find some reasonable exercise of police power whenever possible.

Attempts were made by the proponents of the ordinances in the principal case to distinguish them from the unconstitutional ordinance in *Lovell v. Griffin*.¹⁵ There distribution was forbidden everywhere, while in the instant case only specified public places were stipulated in which distribution was forbidden. Also the Griffin ordinance was not primarily directed at preventing the littering of the city streets. Yet the court in the principal case disregards these distinctions, contending that though such might improve the cleanliness of the streets, still such a ground is insufficient to warrant a curtailment of fundamental rights. Freedom of speech and press are such rights, and the due process clause of the Fourteenth Amendment protects these fundamental liberties from encroachment by state governments.¹⁶

However, there is nothing in the decision of this court to indicate a municipality may not license the circulation of advertising matter where such distribution is for the purpose of private profit. Nor does the guarantee of freedom of speech deprive the city of power to enact regulations against throwing literature broadcast into the street. The thing declared unconstitutional is the absolute bar on distribution of handbills as a means of preventing littering of public streets.

Our Supreme Court has broadened the concept of freedom of speech and press from one of mere prohibition against censorship¹⁷ to any action by the government restricting free and general discussion.¹⁸ For the same purpose, the Court in *Hague v. Committee for Industrial Organization*,¹⁹ forbade the city to abridge the freedom of assembly. That ordinance required permits from the chief of police in order to have public meetings in streets and other public places. This view, however, is diametrically opposed to an earlier view of the court in *Davis v. Massachusetts*.²⁰ There an ordinance requiring a permit from the mayor as a condition precedent to the making of public addresses on public property, was declared valid. The basis was that no one had the right to use the

14. *Chicago v. Schultz*, 341 Ill. 208, 173 N. E. 276, 277 (1930): "If this ordinance should be upheld, every person who hands his card or picture to another while on a public street . . . will be subject to a fine. . . . The ordinance is not a reasonable exercise of its police powers. Its strict enforcement would unreasonably hamper persons in the conduct of their affairs." Attempts to regulate practices of citizens without any reasonable basis for so doing.

In re Thornburg, 55 Ohio App. 229, 9 N. E. (2d) 516, 517 (1936): "This power [police power], however, is limited and confined by the constitutional provision that the citizen shall not thereby unreasonably, arbitrarily, or without due process of law, be deprived of his life, liberty, or property. . . . That is not within powers of the city council to prohibit the distribution of handbills, circulars, cards, or other advertising which are incident to the conduct of a lawful business when the same have not a tendency to obstruct the free flow of traffic."

15. 303 U. S. 444 (1938).

16. *De Jonge v. Oregon*, 299 U. S. 353 (1937); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936); *Lovell v. Griffin*, 303 U. S. 444 (1938).

17. *Patterson v. Colorado*, 205 U. S. 454, 462 (1907).

18. *Near v. Minnesota*, 283 U. S. 697 (1931); 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 886.

19. 307 U. S. 496 (1939).

20. 167 U. S. 43 (1897).

common upon other terms than the legislature should stipulate. The decision of the instant case likewise broadens the concept of this freedom by denying to the municipality the right to regulate distribution of handbills in order to prevent littering the streets. Thus it seems to be in accord with the general tendency of the Court. This emphasis on freedom of speech and press, as opposed to state police power, indicates an entirely new basis for examining the "handbill ordinances." Because of the increasing necessity for keeping large metropolitan streets free from trash and debris, "handbill ordinances" are of extreme importance today. This decision seems to greatly limit the city's power to pass such types of ordinances.

WILLIAM AULL, III

CONSTITUTIONAL LAW—CIVIL LIBERTIES—FREEDOM OF RELIGION—COMPULSORY
FLAG SALUTE

*Minersville School Dist. v. Gobitis*¹

Two children were expelled from public school for refusing, for religious reasons,² to salute the flag when required to do so by the local board of education. The United States Supreme Court reversed the lower federal courts and denied the injunction restraining the enforcement of its expulsion order by the board of education.

Here we have a conflict between reverence for the flag of our country and religious liberty. Reasoning on both of these subjects is greatly obscured by the feeling and emotion which invariably enter in. This is especially so when the two come in conflict, as here.

It is assumed by the Court that the Fourteenth Amendment³ prohibits the states from abridging religious liberties just as the National Government is prohibited by the First Amendment.⁴ In this case it is admitted that the refusal of the children to salute the flag is based on genuine religious beliefs. However, the Court's decision has the effect of depriving them of free schooling, because they refuse to do an act that, according to their religion, amounts to blasphemy.

1. 310 U. S. 586 (1940), *rev'g*, 108 F. (2d) 683 (C. C. A. 3rd, 1939), and 24 F. Supp. 271 (D. C. E. D. Pa., 1938).

2. The children were members of the sect known as "Jehovah's Witnesses," which believes that such a gesture of respect to the flag is forbidden by command of scripture.

3. ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ." The "liberty" in this clause has been assumed to include the protections of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

4. *Gitlow v. New York*, 268 U. S. 652 (1925), was the first case in which it was assumed that the liberty protected from state action by the due process clause of the Fourteenth Amendment included, among other things, the liberties protected from national action by the First Amendment. This fact has since been assumed universally down to the present time.

In reaching this result, the opinion of the Court, which was written by Mr. Justice Frankfurter, does not even consider the fact, which was basic in the decisions of the district and circuit courts, that there is no showing of any clear and present danger⁵ from the conduct of these children. In fact, doubt is even cast on the effectiveness of the law here upheld.⁶ The dissenting opinion of Mr. Justice Stone makes no comment on this omission.

The reasoning in this case appears to follow the same pattern as that in *Gitlow v. New York*.⁷ In that case the Court decided that the state had power to pass an act against criminal anarchy. The reasons in support of this were self-preservation of the state, and other reasons much the same as in the principal case. After the Court decided that the state had the power to pass such a statute, and that the statute did not violate the Constitution, the Court said that the act of the defendant came within this statute and, therefore, the defendant was guilty, regardless of whether his personal liberty of free speech was infringed or not. In the principal case the same line of reasoning is used. The Court here says that the state can prescribe the conduct of its schools to reach the designated ends, and this is such a regulation and, therefore, it is *per se* constitutional. The general outlines and ends of the legislation or regulation are constitutional in both cases and therefore every case that falls within these general outlines is constitutional, no matter how much any individual's personal liberties are encroached upon.

If freedom of religion from control or interference by the state, as supposedly protected by the due process clause of the Fourteenth Amendment, is to have any real meaning, it would seem that only in case of actual necessity as required by the clear and present danger test of Mr. Justice Holmes in the case of *Schenck v. United States*,⁸ would the state be allowed to invade this freedom. In the principal case there was no intimation that such a danger to the safety of the country was even remotely involved.

Recognizing that the judiciary should not concern itself with the wisdom or policy of regulatory measures, the Court, in the principal case, refused to consider whether this regulation reaches the desired result or not, saying: "But the courtroom is not the arena for debating issues of educational policy. . . . So to hold would in effect make us the school board for the country."⁹ The reasoning seems to be, like that in the *Gitlow* case, that the state has a right to regulate its schools, this is such a regulation, and the Court will not look into

5. This clear and present danger test was put forward by Mr. Justice Holmes in connection with freedom of speech in the case of *Schenck v. United States*, 249 U. S. 47, 52 (1919), where he says: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." This test was also contended for in the dissenting opinions of Mr. Justice Holmes in *Abrams v. United States*, 250 U. S. 616, 628 (1919) and *Gitlow v. New York*, 268 U. S. 652, 672 (1925), and was apparently reaffirmed in *Herndon v. Lowry*, 301 U. S. 242 (1937).

6. 310 U. S. 586, 597 (1940).

7. 268 U. S. 652 (1925).

8. 249 U. S. 47, 52 (1919). See note 2, *supra*.

9. 310 U. S. 586, 598 (1940).

the detailed operation to see if it in fact infringes upon the constitutionally protected freedom or not.

Other cases in this same general field of civil liberties do not refuse to look at the actual working of the questioned statute to see if there is in fact any infringement of the liberties protected by the Constitution. In the case of *Schneider v. New Jersey*,¹⁰ Mr. Justice Roberts, in his opinion for the Court, said: "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation."¹¹ The Court then says that legislative judgment may be its own justification in the case of ordinary regulatory measures, but not where the constitutional rights of the people are abridged, and continues: "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."¹² In the case of *Cantwell v. Connecticut*,¹³ Mr. Justice Roberts, again speaking for the Court, says: "Thus the (Fourteenth) Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute . . . but the second cannot be. Conduct remains subject to regulation for the protection of society."¹⁴ . . . In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."¹⁵ The Court then goes on to say that the regulation in this case unduly infringes on the freedom of religion and finds no reason why the Court cannot look into the actual operation of the statute in question to reach this result.¹⁶

In defense of this refusal to look at the facts, the opinion in the principal case says: "Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's habits. . . ."¹⁷ This would seem to contend that the political arena, and not the courts, is the place where the weak and the few are to seek enforcement of their constitutional rights. This statement is made in the face of the fact that the plaintiffs are members of a numerically small and politically impotent group that cannot secure its own relief through the public forum but must rely upon the courts to enforce the provisions of the Constitution that were designed to protect them from just such oppressive laws. Mr. Justice Stone, in his dissent, has this to say on the subject: "History teaches

10. 308 U. S. 147 (1939).

11. *Ibid.* at 161.

12. *Ibid.*

13. 310 U. S. 296 (1940).

14. This was early decided in respect to Congress and the First Amendment in the case of *Reynolds v. United States*, 98 U. S. 145, 164 (1878). Even here it was realized that acts defended on religious grounds could only be regulated when they were "actions which were in violation of social duties or subversive of good order."

15. 310 U. S. 296, 303 (1940).

16. The court held that requirement of a permit to solicit funds for religious organizations was unconstitutional.

17. 310 U. S. 586, 599 (1940).

us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities."¹⁸

The dissenting opinion goes on to point out that: "This seems to me no more than the surrender of the constitutional protection of the liberty of small minorities to the popular will."¹⁹ It then states that it is doubtful if the act in question is effective to achieve the end at which it was aimed—the promotion of loyalty to, and love of, our country. Where governmental regulation and personal liberties conflict, it is the function of the courts to accommodate the two, and such regulation is not important enough to warrant the breach of liberty involved in it. Government cannot, as a mere educational measure, force children by public affirmation to violate their religious conscience. The most important part of the constitutional guarantee of civil liberties is freedom from compulsion in what the individual will say. This is especially so when such compulsion would force that individual to bear false witness to his religion.

This case recognizes and approves the end desired to be reached by this regulation. That end is, in the last analysis, the preservation of the state. To do this the state here takes this means of instilling loyalty to the government in the hearts of the school children and thus attempts to counteract the many influences at large in the world today that work against the democratic form of government and all that our country stands for. The same end was in view in the laws questioned by the cases of *Pierce v. Society of Sisters*,²⁰ and *Meyer v. Nebraska*.²¹ In both of these cases the law was passed to help in the Americanization of children of foreign extraction who were reared in a foreign atmosphere and regularly conversed in a foreign language. The Washington statute, declared unconstitutional in the *Pierce* case, dealt with the situation by requiring all children to go to public schools. The Nebraska statute, invalidated in the *Meyer* case, prohibited teaching of any foreign language to pupils below the eighth grade.

The Court overturned the statute in the *Pierce* case on the ground that it infringed the property rights of private schools, and in the *Meyer* case on the ground that the liberty of a foreign language teacher was interfered with: both as contravening the due process clause of the Fourteenth Amendment. In doing so Mr. Justice McReynolds, for the Court in the *Meyer* case, said: "That the state may do much, go very far, indeed, in order to improve the quality of its citizens . . . is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all . . . a desirable end cannot be promoted by prohibited means."²²

In these cases the Court relied upon the due process clause in its indefinite and uncertain meaning as a protection of property and contract rights, while

18. *Id.* at 604.

19. *Id.* at 606.

20. 268 U. S. 510 (1925).

21. 262 U. S. 390 (1923).

22. *Id.* at 401.

in the principal case its protective force has all of the explicitness of the specific prohibition in favor of religious freedom contained in the First Amendment. In both cases the end to be achieved is substantially the same. It therefore becomes a bit difficult to reconcile the present case with its predecessors, unless the protection of property interests is more jealously guarded against state action than is religious freedom.

Thus it is that the majority of the Court approves the expulsion of these children if they refuse to salute the flag. If the father does not have the money for private schooling, as is the case here, what is to happen to the children? Pennsylvania has a compulsory school law.²³ Will the children be put in a reformatory or other institution for not attending some school? This was the solution reached in Massachusetts.²⁴ It is not religious freedom when the child is faced with the alternative of committing the sacrilegious act or going to a reformatory.

New Jersey has gone one step further. It has enacted a law²⁵ making it a misdemeanor for anyone to influence a school pupil against saluting the flag. It is very probable that some cases may arise from this statute. If so it would seem that the *Gitlow* case would be direct authority for sustaining the statute. The Supreme Court in the principal case has decided that the flag salute can be required and the state can use reasonable means to secure the salute. Thus the law is good and anyone who violates it is guilty as provided. This not only follows the authority of the *Gitlow* case, but also the line of reasoning used in it. Thus by following precedent it is conceivable that the courts could reach the conclusion that the state can prosecute either a parent for teaching his child this religion or any other member of the sect, if not the sect itself as an organization. It is hard to see how this could be called religious freedom. It would rather be persecution.

This flag salute law is not the only method by which the desired ends can be achieved. While it is admitted that the state has a choice of means to an end (and these are laudable ends) in the regulation of the everyday affairs of man, it seems that when the means selected infringe on the constitutionally guaranteed freedom, this freedom should prevail over the selection of the legislature.

It is pleasing to note that in one instance a more rational solution has been applied to the problem here under consideration. It was noted in the press recently²⁶ that Judge Moore of Pontiac, Michigan, had suggested that a pledge of allegiance to the United States itself be used rather than the salute to the flag. This was accepted by both sides in Rochester, Minnesota, where nineteen children had been expelled for refusal to salute the flag, and now all of the children are back in school. While this does not dispose of the legal question

23. PA. STAT. (Purdon, 1936) tit. 24, § 1421.

24. (1939) 24 MASS. L. Q., April-June, p. 4; July-September, p. 1.

25. N. J. Laws 1939, c. 65: "Any person, corporation, society or organization who or which shall influence or attempt to influence any school pupil in this State against the salute to the flag of the United States of America by instruction printed or otherwise shall be guilty of a misdemeanor."

26. Editorial, *St. Louis Post-Dispatch*, November 13, 1940.

involved, it is a very sensible and practical solution and prevents much discomfort and hardship on all sides.

From the foregoing discussion it would seem reasonable to conclude that there should be a return to the clear and present danger test laid down by Mr. Justice Holmes if the constitutional provision protecting freedom of religion is to continue long to have any real meaning.

FRED L. HOWARD

FUTURE INTERESTS—ACCUMULATIONS—DURATION

*Burdick v. Burdick*¹

There are a number of associated rules dealing with restraints on alienation. The rule against perpetuities provides that any interest which might vest more remotely than lives in being and twenty-one years is invalid.² An example of this would be: *A* to *B* and his heirs, but if *St. Pauls'* falls, then to *C* and his heirs.

The rule against the suspension of the power of alienation deals with direct restraints either of a disability type, or of a forfeiture type. Even though the restraint is limited in time, generally any direct restraint against alienation is void.³ An example of this is to be found where the creating instrument directs that the grantee of a fee simple absolute shall not alienate.

A third rule limits the duration of indestructible trusts.⁴ Presumably a trust made for an indefinite period of years can be terminated by an adult beneficiary at the end of lives in being and twenty-one years. An example here would be a trust to continue during, and for two years after, the administration of the testator's estate.

A recent District of Columbia case has raised the related problem as to whether any common law rule limits accumulations of income. The historic case where this problem is first dramatically presented is *Thellusson v. Woodford*,⁵ decided in 1799. There the testator, an English merchant, left over £600,000 in trust for the lives of his then living descendants, including grandchildren. The income was to be accumulated, and on the death of the last surviving descendant there was to be a division between the three eldest male descendants of his three sons. The court reluctantly sustained the trust. Apparently it did so because the postponement of the vesting of a future interest for a like period was permissible under the rule against perpetuities. Actuarial computations indicated that these lives could not be expected to terminate in less than from seventy to eighty-five years and it appeared that the accumulation would amount to £30,000,000. Such a sum would exhaust all the land available in England for

1. 33 F. Supp. 921 (App. D. C. 1940).

2. GRAY, RULE AGAINST PERPETUITIES (3rd ed. 1915) § 201.

3. 2 SIMES, FUTURE INTERESTS (1936) § 451.

4. *Id.* at § 589; Note (1940) 5 Mo. L. REV. 361.

5. 11 Ves. 112 (Ch. 1805).

investment. Immediately there was a storm of protest which resulted the next year in the *Thellusson Act*.⁶ This act permitted accumulations for only four periods, namely, for the life of the donor, for twenty-one years after the donor's death, for the minorities of any persons living at the donor's death, or for the minorities of persons who would be entitled to the income of the fund if no provision for accumulation were made. This act is not a part of our American common law, as it was adopted in England after the Revolutionary War. A number of states, however, have statutes modeled after the English *Thellusson Act*.⁷

If the beneficial interest in a trust for accumulation is contingent, obviously the rule against perpetuities applies. If the beneficial interest is vested but the accumulation extends beyond the permissible period under the rule against perpetuities the answer is not so clear.

There are American cases holding that an accumulation for a period shorter than lives in being and twenty-one years is valid.⁸ A Missouri case has sustained an accumulation for one life.⁹ In that case the trustee was to care for the grantor for life during which there was to be an accumulation. On grantor's death the trust was to be for the benefit of others but without an accumulation. The court said no violation of the rule restricting accumulations was involved.

We have a United States Supreme Court holding that an accumulation for lives in being and twenty-one years is valid.¹⁰ However the importance of this decision as American authority is slight because the court seems to assume that the law of Hawaii was the common law of England "declared in the Judiciary Act of 1892 to be in force here (in Hawaii)." Certainly the *Thellusson* case was a part of the English common law before that date.

Several American cases assert by way of *dicta* that an accumulation must not extend longer than the permissible period under the rule against perpetuities—that is, lives in being and twenty-one years.¹¹ Further we have decisions

6. 39 & 40 Geo. III, c. 98 (1800).

7. ALA. CODE ANN. (Michie, 1928) § 6914; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 2773; CAL. CIV. CODE (Chase, 1935), §§ 722-726; ILL. REV. STAT. ANN. (Smith-Hurd, 1935) c. 30, § 153; IND. STAT. ANN. (Baldwin, 1934) § 13222; MICH. COMP. LAWS (1929) §§ 12956-12960; MINN. STAT. (Mason, 1927) §§ 8066, 8067; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§ 6711, 6712; N. Y. REAL PROPERTY LAW (Consol. Laws, c. 50) § 61, as amended by Laws 1915, c. 670, § 1; PERSONAL PROPERTY LAW N. Y. (Consol. Laws, c. 41) as amended by Laws 1915, c. 670, Laws 1927, cc. 384, 681, Laws 1928, c. 172; N. D. COMP. LAWS ANN. (1913) §§ 5290-5294; PA. 20 PS. § 3251; Public Laws of 1853, 503, § 9, as amended by Public Laws of 1931, No. 27, § 1; S. D. CODE §§ 51.0302-51.0306; WIS. STAT. (1937) §§ 230.36-230.38.

8. *Moeller v. Kautz*, 112 Conn. 481, 152 Atl. 886 (1930); *Melvin v. Hoffman*, 290 Mo. 464, 235 S. W. 107 (1921).

9. *Ibid.*

10. *Fitchie v. Brown*, 211 U. S. 321 (1908).

11. See *Girard Trust Co. v. Russell*, 179 Fed. 446, 452 (C. C. A. 3rd, 1910); *Hoadley v. Beardsley*, 89 Conn. 270, 271, 93 Atl. 535, 539 (1915); *Moeller v. Kautz*, 112 Conn. 481, 488, 152 Atl. 886, 888 (1930); *Wilson v. D'Atro*, 109 Conn. 563, 567, 145 Atl. 161, 163 (1929); *Ingraham v. Ingraham*, 169 Ill. 432, 450, 48 N. E. 561, 566 (1897); *Kasey v. Fidelity Trust Co.*, 131 Ky. 609, 623, 115 S. W. 739, 742 (1909); *Andrews v. Lincoln*, 95 Me. 541, 547, 50 Atl. 898, 900 (1901); *Melvin v. Hoffman*, 290 Mo. 464, 499, 235 S. W. 107, 116 (1921).

which hold accumulations in excess of lives in being and twenty-one years invalid,¹² but these cases may be explained on the alternative ground that the beneficial interest was limited on a contingency which might occur more remotely than lives in being and twenty-one years, hence the limitations violated the rule against perpetuities.

In Missouri we have what may be a holding contrary to the *dicta* above to the effect that an accumulation must not extend longer than the permissible period under the rule against perpetuities.¹³ The court stated that as the "title to the property out of which the income arises is vested, the rule limiting accumulations has no application." If this were literally true, an accumulation, if vested, might extend for one thousand years or indefinitely. Certainly if the court had not gone against the express language of the testator there would have been an accumulation for longer than the permissible period—that is, lives in being and twenty-one years. But, as construed, these accumulations were to terminate within the permissible period. Hence this can hardly be a holding that an accumulation of indefinite duration would be valid. It is clear, however, that the Missouri court goes as far as any authority in rejecting the policy of the English Thellusson Act—that is, the Missouri court seems to favor accumulations.

The case under discussion, a recent Federal District Court case from the District of Columbia, presents a very sharp break in the authority. Testator set up a trust to be effective for twenty-one years after the death of two named nieces. Accumulations of income after payment of annuities were to be re-invested in the fund and the aggregate turned over to the issue of testator's five nieces *per stirpes*. According to the court the accumulation would last for a period probably in excess of sixty years and would increase from a sum of approximately \$2,000,000 to approximately \$12,000,000. After disposing of the question of any possible violation of the rule against perpetuities or the rule against restraints on alienation, the court holds the direction for the accumulation invalid. In order to keep from being bound by *Fitchie v. Brown*, the court dealt

12. *Girard Trust Co. v. Russell*, 179 Fed. 446 (C. C. A. 3rd, 1910); *Wilson v. D'Atro*, 109 Conn. 563, 145 Atl. 161 (1929); *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898 (1901).

13. *Trautz v. Lemp*, 329 Mo. 580, 46 S. W. (2d) 135 (1932). The facts were that the testator devised the residue of his property to trustees for the benefit of named beneficiaries, children of the testator, the trust to "commence immediately on the termination of the administration of my estate." In the event of the death of the named beneficiaries, the trust was to be administered in favor of what the court construed to mean the children of any such beneficiary. The trust was to "continue for a period of twenty years from its beginning." The court construed the instrument contrary to the express direction of the testator that the trust was to commence at the termination of administration, and held the trust commenced at the testator's death, in order to satisfy the rule of law that a trust must come into existence on the effective date of the instrument creating it. It then proceeded to state that both equitable and legal title were vested at testator's death, the trust was to extend but twenty years, and consequently there was no violation of the rule against perpetuities. Otherwise there would have been a violation because of the unpredictable period of time required for administration. A sizable portion of the dividends from the trust property were undisposed of. The court then makes its statement that the rule limiting accumulations has no application as the title of the property out of which the income arises is vested.

with the problem of "reception" of the common law. It pointed out that the common law of England as of 1892, which was adopted in Hawaii, is not necessarily the common law of England applicable to the District of Columbia. The District of Columbia received its law from Maryland which received the common law as of 1776.¹⁴

The court was then justified in the absence of "controlling" precedent in deciding what was the common law by judicial legislation. But it goes even farther. It states that the "common law insofar as it permits accumulations of the character in this suit," is "obsolete and repugnant to our conditions," "inconsistent with the principles of democracy," and aristocratic. In short, it recognizes that it is turning over what is probably our common law authority. Certainly there seems to be social desirability in not allowing property to be tied up unduly without being of beneficial use to anyone. The court is strengthened in view of the fact that the English Thellusson Act was passed for similar reasons. It does not seem desirable that our courts should follow a policy of the English common law of 1799 which has been so greatly modified by later English legislation. Although the court seems to have a dislike for accumulations in general, the direct holding of the case can be little more than: "Under the particular circumstances . . . the provision in respect of accumulations . . . involving as it does the inalienable accumulation of a huge sum of money, probably \$10,000,000 for a period probably in excess of sixty years, is invalid." No doubt the court was influenced somewhat in its decision by the size of the accumulation. It must be remembered that this is a common law decision and that another accumulation of shorter duration and involving less money might consistently be sustained.

We have the Missouri decision and the District of Columbia decision representing the two divergent views. It would appear that in case the opportunity arose, the Missouri court would do well to re-examine its position in view of the fact that the Missouri decision dealt with a limitation which, as construed, would not extend beyond the permissible period.

Under the doctrine of the *Clafin* case,¹⁵ which is followed in a considerable number of jurisdictions, courts will give effect to a provision that a trust shall be indestructible for a given period of time. A provision for indestructibility would probably be held ineffective if the period is in excess of the permissible period under the rule against perpetuities. This rule is one of application to trusts in general. Presumably a trust made for one thousand years could be terminated by an adult beneficiary at the end of lives in being and twenty-one years. It would seem, therefore, that this rule should apply to trusts for ac-

14. MD. CONST. art. V. It is very difficult to say what the common law of England, applicable to America, is. Some courts say the adoption of the common law meant the adoption of it as an indivisible whole. Others say it meant the adoption as of some particular date, so that English cases prior to that time became binding on the courts in this country. An even more difficult problem is to determine what principles of the common law the courts may consider applicable to conditions existing in this country.

15. *Clafin v. Clafin*, 149 Mass. 19, 20 N. E. 454 (1889).

cumulation. This is especially so in view of the fact that in a trust for accumulation both income and principal are tied up rather than principal alone. Of course this rule will have no effect on cases falling within the permissible period, but it does seriously limit the statement in *Trautz v. Lemp* that if the interest from which an accumulation arises is vested there need be no compliance with the usual permissible period.

JOSEPH HARDY

INSURANCE—WAIVER AND ESTOPPEL

*Longo v. John Hancock Mut. Life Ins. Co.*¹

Defendant company, through its local manager and local agent, solicited the plaintiff to take out a policy of life insurance upon his wife. Plaintiff answered that he doubted her eligibility because she had been in the hospital for tuberculosis. The agents assured him it would be all right since the wife was an arrested case. The agents asked the wife some questions and filled out the application themselves. The insured signed it, not knowing that the local manager had inserted false answers to the questions whether insured had ever been in a hospital or had been treated for tuberculosis. The wife was in good physical condition at the time the policy was taken out, but she later contracted a cold which brought back her tuberculous condition, which in turn caused her death. Defendant company contends the policy is void because of false and fraudulent representations made by the wife in answering the questions in the application, and also by reason of the breach of the sound health provision. The court held that if the defendant's own agents intentionally wrote answers in the application which they knew were false, then it necessarily followed that the defendant *waived* the right to forfeit because of the falsity of the answers.

The majority of the American courts, in accord with the present case, hold that if the insured gives true answers to the questions asked in the application, but the agent enters false answers therein, the company is not discharged from liability.² But the question is, upon what grounds? Do the cases use the doctrine of waiver, do they rely on the basis of estoppel, or do they distinguish between the two doctrines at all?

In this most confused field of insurance law, many of the cases in this country use the terms waiver and estoppel synonymously under such circumstances,³ and some courts have expressly held that there is no distinction in

1. 142 S. W. (2d) 871 (Mo. App. 1940).

2. *North American Accident Ins. Co. v. Trenton*, 99 S. W. 740 (Tex. Civ. App. 1907); *Massachusetts Mutual Life Ins. Co. v. Robinson*, 98 Ill. 324 (1881); *Michigan Mutual Life Ins. Co. v. Leon*, 138 Ind. 636, 37 N. E. 584 (1894); *Smith v. Benefit Ass'n of Ry. Employees*, 187 Minn. 202, 244 N. W. 817 (1932).

3. *Northern Assurance Co. v. Grand View Bldg. Ass'n*, 203 U. S. 106 (1906); *Wisdom v. Farm Property Mut. Ins. Ass'n*, 199 Iowa 408, 202 N. W. 4 (1925).

theory.⁴ Even some of our best known writers fail to recognize a difference between the two doctrines and say: "Any unequivocal and positive act by the insurers recognizing the policy as valid and inconsistent with the notion that the company proposes to avail itself of a breach . . . constitutes a *waiver* of all known grounds of forfeiture, and the company is said to be *estopped* from setting them up in defense."⁵ Other opinions on similar situations, however, expressly state that there is a clear distinction between waiver and estoppel.⁶ In some of the cases in this country all evidence of waiver or estoppel under circumstances similar to those in the present case is excluded by a strict application of the parol evidence rule.⁷ Some courts expressly deny the existence of waivers in insurance policies, arguing that any rights which may be asserted must be by way of estoppel to deny the existence of the contract and not upon the theory of waiver of an alleged right to forfeit.⁸ It has been suggested that the term waiver be absolutely abolished, as it is so misleading, and that the word "election" be substituted in its place.⁹ Professor Williston lists at least nine legal relationships to which the term waiver is indifferently applied, which shows the loose use of the term.¹⁰

The Missouri cases also seem uncertain as to the reasons for holding in favor of the insured under circumstances similar to those in the present case. In *Roberts v. American National Assurance Co.*,¹¹ the court expressly states that "waiver and estoppel are by no means synonymous," but it does not explain what the distinction is. Some Missouri cases simply state the rule that an insurer cannot avoid payment on the ground of false answers when the facts were stated to the agent who filled out the application without indicating whether their basis is waiver or estoppel.¹² A typical example of such a case is *Sappington v. Central Mutual Insurance Ass'n*,¹³ in which the court says that when the agent fills out the application, the statements must be taken as statements of the insurer and not the insured and that the agent's knowledge is imputed to the insurer. Other Missouri cases involving similar situations use the term estoppel by saying: "In such a situation the insurer is estopped from asserting the falsity of the answers."¹⁴ Still other cases, like the present case, use the term "waiver," saying that the insured waived the right of forfeiture

4. *Phenix Ins. Co. v. Grove*, 215 Ill. 299, 74 N. E. 141 (1905).

5. RICHARDS, *INSURANCE LAW* (3d ed. 1909) § 134.

6. *Draper v. Oswego County Fire Relief Ass'n*, 190 N. Y. 12, 82 N. E. 755 (1907); *Metcalf v. Phenix Ins. Co.*, 21 R. I. 307, 43 Atl. 541 (1899).

7. *Northern Assurance Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308 (1902); *Deming Inv. Co. v. Shawnee Fire Ins. Co.*, 16 Okla. 1, 83 Pac. 918 (1905).

8. *Ruddock v. Detroit Life Ins. Co.*, 209 Mich. 638, 177 N. W. 242 (1920); *Hopkins v. Northwestern Nat. Life Ins. Co.*, 41 Wash. 592, 83 Pac. 1019 (1906).

9. Ewart, *Waiver in Insurance Cases* (1905) 18 HARV. L. REV. 364.

10. 2 WILLISTON, *CONTRACTS* (1920) § 679.

11. 220 S. W. 996 (Mo. App. 1920).

12. *Bever v. Home Ins. Co.*, 141 Mo. App. 589, 125 S. W. 1184 (1901); *Snyder v. Loyal Protective Ins. Co.*, 196 S. W. 1022 (Mo. App. 1917).

13. 229 Mo. App. 222, 77 S. W. (2d) 140 (1934).

14. *Modern Woodmen of America v. Angle*, 127 Mo. App. 94, 104 S. W. 297 (1907); *Rissler v. American Cent. Ins. Co.*, 150 Mo. 366, 51 S. W. 755 (1899).

when the agent wrote in the answers falsely.¹⁵ In other Missouri cases, the court uses both the terms estoppel and waiver in the same case.¹⁶ The parol evidence rule is avoided by the assertion, "Notwithstanding the rule that parol evidence is inadmissible to vary a written contract, insured may show by parol that the answers to the questions in his application for insurance were not written by him, and that he did not actually know the contents of the application when he signed it."¹⁷

The cases and authorities which make a distinction between waiver and estoppel seem on firmer ground. Their position is well stated in *Metcalf v. Phenix Insurance Co.*:¹⁸ "A waiver arises by the intentional relinquishment of a right by a person or party, or by his neglect to insist upon his right at the proper time, and does not imply any conduct or dealing with another by which that other is induced to act or forbear to his disadvantage; while an estoppel necessarily presupposes some such conduct or dealing." Professor Vance makes the distinction by saying: "Waiver is thus seen to be conventional in its nature resting upon agreement, while estoppel is tortious in quality, being grounded on deceit, or, at least, upon conduct known, or which should be known, to be misleading. A waiver is recognized to give effect to the intention of the party waiving, while an estoppel is enforced to defeat the inequitable intent of the party estopped."¹⁹ Vance points out that the parol evidence rule is not violated by the use of equitable estoppel because the parol testimony rule has no application in a court of equity or to the establishment of equitable remedies even though they be claimed in legal proceedings.

In the case at hand, the Missouri court held that the defendant company *waived* the right to forfeit because of the false answers in the policy. But can it be said that the company intentionally and knowingly relinquished the requirement that the answers in the application be truthful? This depends upon whether or not the local manager had the authority to waive. The court in the instant case seems to think that he did have such authority. If that is so, then there was a waiver within the true meaning of the word, because the company, through its agent acting within his authority, must have intentionally consented to the relinquishment of its right to forfeit. However, if the agent did not have the authority to waive, and such authority in soliciting agents is rare, it would be absurd to say that the company intended to abandon its right to forfeit. Furthermore, it seems that the parol evidence rule would clearly be violated by allowing outside evidence that the terms inserted in the integrated contract were not the ones actually intended to govern the rights of the parties. If the case is decided under the equitable doctrine of estoppel, the parol evidence rule has no application. Here the company through its agent committed a

15. *Coleman v. Central Mut. Ins. Ass'n*, 52 S. W. (2d) 22 (Mo. App. 1932).

16. *Ormsby v. Laclede Farmers' Mut. Fire & Lightning Ins. Co.*, 98 Mo. App. 371, 72 S. W. 139 (1903).

17. *Modern Woodmen of America v. Angle*, 127 Mo. App. 94, 104 S. W. 297 (1907).

18. 21 R. I. 307, 43 Atl. 541 (1899).

19. VANCE, *INSURANCE* (2d ed. 1930) §§ 127-130.

tortious act of deceit by misleading the insured. The defendant falsely represented that the policy was good and the insured reasonably relied on this false representation. The insured, had the court not allowed the evidence as to the true answers to come in, would have been prejudiced by the tortious deceit of the company, in that she would have mistakenly believed herself to be adequately protected under the policy. To this sort of situation the equitable doctrine of estoppel should be applied in preference to the doctrine of consensual waiver which would violate the parol evidence rule.

Though the Missouri cases are confused in their reasoning, they do reach a fair result. The Missouri case of *Coleman v. Caldwell County Mutual Fire Insurance Co.*,²⁰ expresses the true feelings of the court in such cases. "Forfeitures are not favorites of the law. Courts struggle against their enforcement."²¹

PAUL MARGOLIS, JR.

TORTS—HUMANITARIAN DOCTRINE—POSITION OF IMMINENT PERIL

*Roach v. Kansas City Public Service Co.*¹

The plaintiff's husband stood in the street beside the defendant's bus, which was standing still with the door closed. He rapped upon the door to signal to the defendant's driver that he wished to enter the bus. Ignoring his signal, the driver started the bus forward and, because of ice on the street, the bus swerved into the plaintiff's husband, knocking him down and causing him the injuries from which he died. The case was submitted on the humanitarian doctrine. The court instructed the jury, in effect, that in order for the plaintiff to recover under the doctrine, it would be necessary for them to find that at the instant the bus started forward the plaintiff's husband was in a position of imminent peril and not in a position of safety, and that the term "imminent peril" meant a place where there was certain danger and not a place where there was a mere possibility of an injury occurring. From a judgment for the defendant, the plaintiff brought a writ of error based on this instruction. *Held*: judgment affirmed.

The plaintiff hardly could have contended that the position of her husband, as he stood beside the bus while the bus remained motionless, was a position of imminent peril as that expression has been defined by this court.² The case of

20. 125 Mo. App. 643, 103 S. W. 150 (1907).

21. For a good discussion of the whole above subject see, Notes (1908) 16 L. R. A. (N. S.) 1165.

1. 141 S. W. (2d) 800 (Mo. 1940).

2. The expression "imminent peril" was defined by White, J., in *Banks v. Morris & Co.*, 302 Mo. 254, 273, 257 S. W. 482, 486 (1924), as follows: "That does not mean remote, uncertain, contingent, nor (for the person affected) avoidable danger. It is imminent, *immediately* impending; it admits of no time for deliberation on the part of the person in peril between its appearance and the impending calamity." This definition was quoted with approval in *Huckleberry v.*

State ex rel. Vulgamott v. Trimble,³ illustrates how such a contention probably would have been treated if it had been made. In that case, the plaintiff engaged one of the defendant's freight cars. He divided the car into two parts by erecting a partition in the center thereof. The plaintiff rode in one part of the car, as thus divided by the partition, and placed his horses in the other part. Because of the negligence of the defendant's servants in stopping the car too quickly, one of the horses was thrown through the partition upon the plaintiff. The case was submitted on the humanitarian doctrine, the plaintiff contending that he was in a position of imminent peril while he was riding in the freight car. The court, in denying recovery under the doctrine, said of the plaintiff's position: "It was not a safe place to ride, but his position was not so perilous as to bring it within the humanitarian rule. As said, *supra*, we must have imminent danger or peril to invoke such rule. . . . The word 'peril' . . . means something more than a bare possibility of an injury occurring."⁴

In the instant case, as though in anticipation of a contention by the plaintiff that the position of her husband, as he stood beside the motionless bus, was one of imminent peril, the court, in the course of its opinion, used this language: "This court has now settled the proposition that there is no humanitarian case (and no humanitarian negligence) until the person involved is in a position of imminent peril. . . . This is because no duty to act under the humanitarian rule arises merely if such person may soon be in, or is approaching, or is about to come into a position of imminent peril."⁵

However, the plaintiff did not make such a contention.⁶ What the plaintiff in the instant case did contend was that, although her husband might not have been in a position of imminent peril at the very instant the bus started forward, still humanitarian negligence could be found on the theory that he might thereafter by the movement of the bus on its swinging course (due to slipping on the icy street) have been in peril.⁷ To this proposition the court replied: "What plaintiff's contention amounts to is that it was humanitarian negligence to start the bus because the driver should have anticipated that it might slip on the icy street after it began to move and that, if it did, plaintiff might thereafter be in a position of imminent peril. Thus, plaintiff contends that there was humanitarian negligence herein before there was a position of imminent

Missouri Pac. R. R., 324 Mo. 1025, 26 S. W. (2d) 980 (1930); *Baker v. Wood*, 142 S. W. (2d) 83 (Mo. 1940).

3. 300 Mo. 92, 253 S. W. 1014 (1923).

4. *Id.* at 109, 253 S. W. at 1019.

5. *Roach v. Kansas City Pub. Serv. Co.*, 141 S. W. (2d) 800, 802 (Mo. 1940).

6. This language of the instant case is *contra* to the case of *Perkins v. Terminal R. R. Ass'n*, 340 Mo. 868, 877, 102 S. W. (2d) 915, 919 (1937). In the *Perkins* case the court held that the defendant's duty arose when the plaintiff ". . . was about to go into a position of imminent peril. . . ." The *Perkins* case seems to have been overruled by *Buehler v. Festus Merc. Co.*, 343 Mo. 139, 119 S. W. (2d) 961 (1938); *Kick v. Franklin*, 342 Mo. 715, 137 S. W. (2d) 512 (1939); *Hilton v. Terminal R. R. Ass'n*, 137 S. W. (2d) 520 (Mo. 1940); *State ex rel. Snider v. Shain*, 137 S. W. (2d) 527 (Mo. 1940).

7. *Roach v. Kansas City Pub. Serv. Co.*, 141 S. W. (2d) 800, 802 (Mo. 1940).

peril, which is a complete misconception of the fundamental basis of the humanitarian rule."⁸

The plaintiff's theory would make the humanitarian doctrine applicable when the plaintiff was in a situation such that, while not in imminent peril *absent* the negligent act of the defendant, he was in imminent peril if such act were committed. This was held to be the law by this court in at least two cases.⁹ However, these two cases, and the plaintiff's contention in the instant case, overlook the basic elements of the humanitarian doctrine.

The position of imminent peril is the basic fact of the humanitarian doctrine.¹⁰ No duty arises under the doctrine unless and until a position of peril comes into existence.¹¹ When such a position of peril does arise, the doctrine seizes upon the situation as it then exists and requires the defendant to use ordinary care with the means at hand to avert the impending injury.¹² If after the position of peril has arisen, the defendant cannot, by the use of ordinary care and with the means at hand, avert the injury, he is not liable under the doctrine.¹³

Ridge v. Jones,¹⁴ in which the two cases referred to¹⁵ were discussed, presented the identical problem to the court which the instant case presents. The facts in that case were: The plaintiff, after alighting from his car, stood in the

8. *Ibid.*

9. *Bobos v. Krey Packing Co.*, 317 Mo. 108, 117, 296 S. W. 157, 161 (1927). The plaintiff climbed upon the step of the defendant's truck. The driver started the truck so violently and suddenly that the plaintiff was thrown under the wheels. In allowing recovery under the humanitarian doctrine, the court said: "As to this it is sufficient to say that 'perilous position' as used in defining and applying the 'humanitarian rule' is a relative term. The position of plaintiff while in the act of climbing onto the truck, considered with reference to its standing still, or moving slowly, was no doubt a comparatively safe one, but with reference to the truck's being 'suddenly and violently started forward' it was extremely perilous. There was therefore a 'present existence' of plaintiff's perilous position *before* the driver started the truck."

Huckleberry v. Missouri Pac. R. R., 324 Mo. 1025, 1034, 26 S. W. (2d) 980, 984 (1930). The defendant had turned over one of its tank cars causing gasoline to be spilled along its track. Deceased was standing beside the track when the defendant started its engine causing sparks to be emitted therefrom which ignited the gasoline and burned deceased. The court held that the plaintiff made a case under the humanitarian rule: "So in the instant case, it may be said that the position of deceased in the absence of fire was a comparatively safe one, but in the presence of fire it was extremely perilous. When defendant operated its engine so near that sparks and coals of fire therefrom could fall into the gasoline and vapor surrounding the deceased, as the evidence here shows, his peril was imminent, that is, certain, immediate and impending."

10. *Banks v. Morris & Co.*, 302 Mo. 254, 257 S. W. 482 (1924); *State ex rel. Vulgamott v. Trimble*, 300 Mo. 92, 253 S. W. 1014 (1923); *Baker v. Wood*, 142 S. W. (2d) 83 (Mo. 1940).

11. *State ex rel. Fleming v. Bland*, 322 Mo. 565, 15 S. W. (2d) 798 (1929); *Buehler v. Festus Merc. Co.*, 343 Mo. 139, 119 S. W. (2d) 961 (1938); *Hilton v. Terminal R. R. Ass'n*, 137 S. W. (2d) 520 (Mo. 1940); *State ex rel. Snider v. Shain*, 137 S. W. (2d) 527 (Mo. 1940).

12. *State ex rel. Fleming v. Bland*, 322 Mo. 565, 15 S. W. (2d) 798 (1929); *Bumgardner v. St. Louis Pub. Serv. Co.*, 340 Mo. 521, 102 S. W. (2d) 594 (1936).

13. *Harlan v. St. Louis, K. C. & N. Ry.*, 64 Mo. 480 (1877); *Massman v. Kansas City Pub. Serv. Co.*, 119 S. W. (2d) 833 (Mo. 1938); *Clifford v. Pitcairn*, 131 S. W. (2d) 508 (Mo. 1939).

14. 335 Mo. 219, 71 S. W. (2d) 713 (1934).

15. See note 9, *supra*.

icy street very close to its side. The defendant's driver started the car with such suddenness that it swerved into the plaintiff and knocked him down. The contentions of the parties were stated by the court thus: "The only peril that menaced plaintiff was created by the same negligent act of defendant's driver which immediately and without time or opportunity for further action on the driver's part produced the injury. Appellant argues that his negligence under the humanitarian rule must be measured by his acts after the car started and that if the driver negligently started the car as claimed by the plaintiff it constituted primary negligence, entitling him to the benefit of his claim that plaintiff was contributorily negligent, but was not negligence under the humanitarian rule. Respondent contends that, if he was in a position such that to start the car in the manner in which his evidence shows it was started would place him in imminent peril and likely injure him and the driver so knew or should have known before he started the car the humanitarian rule applies even though the same negligent act created the imminent peril and immediately produced the injury."¹⁶ The decision of the court was that the humanitarian doctrine was not applicable and that the case should have been tried on the theory of primary negligence.

*Phillips v. Henson*¹⁷ further illustrates the doctrine which the court is propounding in cases of this type. In that case, the plaintiff was riding a motorcycle westward. The defendant was driving a truck eastward. When the defendant reached the intersection of a north and south street, he suddenly and without any warning turned left across the path of the plaintiff, striking him. The plaintiff sought to submit the case on the humanitarian doctrine. The court said: "Defendant owed plaintiff no duty under the humanitarian rule until he saw or by the exercise of the highest degree of care could have seen him in a position of peril and either oblivious thereto or unable to extricate himself. Plaintiff was not in peril until the truck turned to the left. Defendant's act in turning the truck without giving a signal or warning of his intention so to do, might have been primary negligence, but it was not negligence under the humanitarian rule, because plaintiff was not in peril until the truck turned. Defendant's liability under the humanitarian rule depends upon whether plaintiff's injuries were caused by negligent acts of defendant after he saw or should have seen plaintiff in a position of peril."¹⁸ The court then found that after the truck had turned, and after the plaintiff had been placed in a position of peril, the defendant thereafter had time to avert the injury, and his failure *then* to do so, *after the peril had arisen*, was an act of humanitarian negligence making the doctrine applicable.

It is submitted that the doctrine which underlies the decisions of the cases typified by the instant case can be stated in this manner: The fundamental difference between primary negligence and negligence under the humanitarian doctrine is the present existence of a position of imminent peril. The human-

16. *Ridge v. Jones*, 335 Mo. 219, 224, 71 S. W. (2d) 713, 715 (1934).

17. 326 Mo. 282, 30 S. W. (2d) 1065 (1930).

18. *Id.* at 289, 30 S. W. (2d) at 1067.

itarian doctrine presupposes that a position of imminent peril already exists. If it is necessary for the defendant to commit a negligent act to create the position of peril the doctrine is not applicable unless, thereafter, there is also time for the defendant to avoid the collision in the exercise of reasonable care. Every negligent act creates a position of peril; but if the act which creates the peril is also the act which, immediately and without time or opportunity for further action by the defendant, causes the injury, it is a case of primary negligence rather than humanitarian negligence.¹⁹

LYNDON STURGIS

TORTS—LIABILITY FOR SIDEWALK STRUCTURES PLACED THERE BY THE ABUTTING
OWNER OR OCCUPIER

*Watts v. R. A. Long Bldg. Corp.*¹

Plaintiff was injured as a result of slipping and falling on a metal grate which had been placed in the sidewalk in front of the defendant's office building. The metal plate, or grating, had originally been installed by the property owner for the purpose of letting air into the boiler room of this building. It had not been used for any purpose for several years. The plate had grown slick from pedestrians walking over it for a number of years. It was firmly imbedded in and was flush with the concrete sidewalk. The court held that the defendant was not liable for plaintiff's injury, since the duty of keeping the public sidewalks in a reasonably safe condition is on the municipality. It said that here there was no use of the grill that was foreign to its use as a sidewalk; that as originally constructed it afforded a smooth, unbroken, safe surface, and that regardless of any secondary benefit it might afford the abutting land owner, it was primarily a sidewalk.

The court based its opinion on the case of *Callaway v. Newman Mercantile Co.*,² in which the offending structure in the sidewalk consisted of glass insets for the purpose of admitting light, some of which were broken out, causing an injury to the plaintiff. The court employed the same reasoning as in the principal case.

There is no duty on an abutting property owner to keep and maintain the sidewalks adjoining his property in a safe condition, for this duty rests with the municipality which owns it.³ However, when the abutting owner or occupier con-

19. *Contra* Gaines, *The Humanitarian Doctrine in Missouri* (1935) 20 ST. LOUIS L. REV. 113, 124. After discussing the Bobos and Huckleberry cases, *supra* note 9, Mr. Gaines says: "The two cases point out that the 'danger zone' is sometimes established by the act of the defendant, and although the act of the defendant creating the 'danger zone' and the act of negligence rendering the defendant liable are one and the same, nevertheless the humanitarian doctrine applied."

1. 142 S. W. (2d) 98 (Mo. App. 1940).
2. 321 Mo. 766, 12 S. W. (2d) 491 (1928).
3. RESTATEMENT, TORTS (1934) § 349.

structs any opening or other structure in the sidewalk for his benefit and convenience he does owe a duty to the public as regards this structure.⁴ He must not only construct it in such a manner that it is not a nuisance, but he must also exercise due care in seeing that it is maintained in a reasonably safe condition for use by the public as a thoroughfare.⁵ The courts seem almost unanimous in their views on the liability of an abutting owner for injuries resulting from a negligently maintained sidewalk opening, which is maintained for the benefit of the owner or occupier.⁶ Where the municipality builds a sidewalk structure for some purpose of its own, the duty to maintain and repair it is, of course, placed upon the city, even though there may be a secondary benefit to an abutting occupier.⁷

The Missouri courts have made a distinction in these cases, based on whether or not the use of the sidewalk by the adjoining proprietor is completely foreign to its normal use as a sidewalk. When there is such a foreign use, as a coal-hole, the courts have found the user liable for personal injuries resulting from negligent maintenance of these openings.⁸ But where the private use to be made of the sidewalk structure is in no way foreign to its primary use as a public sidewalk, the Missouri courts have, in a series of comparatively recent decisions,⁹ laid down the rule that there is no duty on the property owner to repair these structures; that this duty is on the municipality, as if the opening were in no way used for the benefit of the adjoining building and had been constructed by the city. In laying down this rule the court has reasoned that although there is a secondary use made of these structures by the abutting proprietor, still the primary use made of them is as public sidewalks; that there is nothing in these secondary uses which is foreign to the use as a public sidewalk. The structure as originally built afforded a reasonably safe public sidewalk, free from any danger to pedestrians. Therefore, since these structures are in reality a part of the public sidewalk, for which the city has the duty of maintenance, there is no reason why the city's duty should not include these various gratings, glass insets, and other types.

4. *Id.* § 350.

5. (1929) 62 A. L. R. 1067.

6. *Runyon v. Los Angeles*, 40 Cal. App. 383, 180 Pac. 837 (1919) (iron grating to admit light and air); *Niehaus v. Caryfield, Inc.*, 240 App. Div. 144, 269 N. Y. Supp. 335 (1934) (glass prisms inserted in the sidewalk, some of which were broken out); *Umphlette v. Silvertown*, 154 Ore. 156, 59 P. (2d) 244 (1936) (metal door covering a sidewalk opening which was slick and smooth on its upper surface); *Citizens Savings Bank v. Covington*, 174 Md. 633, 199 Atl. 849 (1938) (sheet iron cellar door installed flush with the sidewalk); *Kellems v. Schiele*, 297 Ill. App. 388, 17 N. E. (2d) 604 (1938) (opening in sidewalk covered by a loose sheet of iron); *Harrington v. Alessi*, 269 Mass. 433, 169 N. E. 495 (1929) (injury caused by coal hole being improperly closed).

7. *Robbins v. Jones*, 15 C. B. N. S. 221 (1863) (gratings placed in sidewalk area to provide light and air to tenements below).

8. *Mancuso v. Kansas City*, 74 Mo. App. 138 (1898); *Stevens v. Walpole*, 76 Mo. App. 213 (1898).

9. *Breen v. Johnson Bros. Drug Co.*, 297 Mo. 176, 248 S. W. 970 (1923); *Callaway v. Newman Mercantile Co.*, 321 Mo. 766, 12 S. W. (2d) 491 (1928); *Watts v. R. A. Long Building Corp.*, 142 S. W. (2d) 98 (Mo. App. 1940).

Missouri stands alone in its contention; no other jurisdiction has established this distinction between the so-called "coal-hole" cases and cases involving permanent, immovable structures which are part of the sidewalk but benefit the abutting property owner. Other courts in dealing with situations analagous to those on which Missouri courts have based their doctrine, have repeatedly found a duty resting upon the abutting property owner, his tenant, or anyone in complete possession of the property.¹⁰ A strong argument showing the unsoundness of the Missouri rule is that its outcome would be to require the city to provide structures of this kind more elaborate and expensive than the usual necessities of the public would require.¹¹

It would seem that the court in the principal case, and those leading up to it, has drawn an unwarranted distinction between types of sidewalk structures. While it may have reached the proper result in this case, as the facts suggest that the defendant might not have been negligent, still the case should have been tried on that basis, for there clearly should be a duty placed on abutting property holders to use reasonable care in the maintenance of sidewalk structures which are constructed and used for their benefit and convenience.

ELMUS L. MONROE

TORTS—PROXIMATE CAUSE—CAUSATION IN FACT DIFFERENTIATED FROM LEGAL
CAUSATION

*Rose v. Thompson*¹

Three men were driving home from work one afternoon in a model A Ford roadster. Plaintiff was seated on the right hand side of the car, the other

10. In *Monsch v. Pellissier*, 187 Cal. 790, 204 Pac. 224 (1922), the owner of a building maintained a vault under the sidewalk and in the walk above installed light wells consisting of iron gratings and glass, to furnish light to the vault; the court held that despite the fact that the primary use of his structure was as a sidewalk, the property owner was not relieved from a duty to keep the grating in repair, since a secondary use of the grating was for his benefit. They were constructed for a use not contemplated in a normal sidewalk, for the benefit of the property owner, therefore, the law casts a duty of reasonable care on the defendant to keep these structures in a proper and safe condition. See (1922) 10 CALIF. L. REV. 358, where, in approving this decision, it is observed that the property owner's liability did not arise from a duty to repair the sidewalk, but rather from negligently maintaining an obstruction in the sidewalk. This duty arises from the secondary use of the structure as a transom, for the benefit of an individual. The case of *Sanders v. First National Bank*, 183 Okla. 112, 80 P. (2d) 207 (1938), dealt with a sidewalk constructed by the abutting property owner in which glass had been placed to facilitate lighting. Some of this glass had been broken, and as a result the plaintiff was injured. The court, after looking at analagous decisions of other jurisdictions, found that the majority view was that the abutting owner is under a duty to keep such structures in repair, despite the fact that the duty to repair sidewalks is on the city. They cite the Missouri case of *Callaway v. Newman Mercantile Co.*, 321 Mo. 766, 12 S. W. (2d) 491 (1928), but say that the rule is unsound.

11. *Sanders v. First National Bank*, 183 Okla. 112, 80 P. (2d) 207 (1938).

1. 141 S. W. (2d) 824 (Mo. 1940).

passenger in the middle. The driver stopped at the crossing, saw the defendant train approaching and went onto the tracks thinking he could cross before the train reached the crossing. Although the other passenger saw the oncoming train, which was travelling at a rate of twelve to fifteen miles per hour, the plaintiff was unaware of its approach. When the car stalled with its front wheels just touching the far rail, the driver tried to pull it across by the starter. Failing in this, he shouted that, "A train is coming," and that was the first notice plaintiff had of the train's presence. Immediately plaintiff twisted the door handle, but it had jammed and he was unable to open it. Then the passenger in the middle kicked the door open and climbed out over the plaintiff. The driver escaped onto the cowcatcher of the train, but before plaintiff could free himself the train struck the automobile and injured him. Plaintiff proved that the defendant's servants operating the train did not ring the warning-bell, and alleged: (1) primary negligence in failure to give the statutory signals of warning, and (2) humanitarian negligence in failing to give timely warning of the approach of the train and to check the speed of the train. The Supreme Court of Missouri ruled for defendant, stating that plaintiff had not proved the necessary causal connection between the negligence of the defendant servants and the plaintiff injury.

There is no argument with the result of the decision, but rather with the language and reasoning used by the court in reaching its holding. It says: "However, the essential issue in this case turns upon the matter of proximate cause. A negligent act creates no liability for an injury not shown to have been caused thereby. . . . There must be substantial evidence that the negligence for which defendant was responsible caused or contributed to plaintiff's injuries as a direct and proximate cause. . . ." ² What does the court mean by "proximate cause"? Does "proximate cause" mean the same as "caused thereby"? Or does it mean the same as "direct cause"?

Causation at best is a delicate problem, and it has been made more difficult by the use of abstract terminology.³ "Proximate" is an ambiguous word. Causation consists of two distinct elements, actual causation or causation in fact, and legal causation, and the courts must distinguish between them.⁴ The simplest way

2. *Id.* at 828.

3. Rosenberry, C. J., in *Osborne v. Montgomery*, 203 Wis. 223, 234 N. W. 372 (1931); 24 WORDS AND PHRASES (1940) 530: "Negligence instructions may use term 'legal cause,' or perhaps 'substantial factor,' to avoid misleading term 'proximate cause,' all of which are legal concepts, and not synonymous with physical causation . . ."; Green, *Are Negligence and "Proximate" Cause Determinable By the Same Test?*—*Texas Decisions Analyzed* (1923) 1 TEX. L. REV. 243: "It (proximate) is not a word useful as a test. It rather identifies the results of the test."

4. HARPER, TORTS (1933) § 109: "Before any question of proximate or legal cause can arise, it must first appear that the defendant's acts were the actual cause or cause in fact of the harm in question"; Smith, *Legal Cause in Actions of Tort* (1911) 25 HARV. L. REV. 103, 109; Levitt, *Cause, Legal Cause and Proximate Cause* (1922) 21 MICH. L. REV. 34, 43, indicates the confusion of terminology of causation. That aspect of causation to which he refers as "legal cause" is called "actual cause" or "cause in fact" in this note, whereas the "legal cause" of this note is his "proximate cause"; 24 WORDS AND PHRASES (1940) 530; *Osborne v. Montgomery*, 203 Wis. 223, 234 N. W. 372 (1931) (this case summarizes causation

to establish causation in fact is to ask: would the plaintiff have been injured "but for" the negligence of the defendant? This establishes whether the proper causal connection between negligence and injury does exist, that is, whether in fact there is any causal connection. Obviously there will be such connection between many injuries and negligent acts, for not all of which ought the defendants to be held liable in damages. Social policy requires that the defendant must not be held liable for all the consequences of his negligent act, and so actual causation is delimited by legal causation to prevent liability from being carried to unreasonable limits.⁵ The courts hold that the defendant's negligent act must not only be the cause in fact of the plaintiff's injury, but that it must also be the cause in law of that injury, which is tantamount to saying that the court must decide whether defendant should be forced to respond in damages for the particular consequence of his act which was the injury to plaintiff. But not until the cause in fact relation between the injury and the negligence has been established is there any need to examine the problem to discover if the negligent act was also the "legal,"⁶ "efficient,"⁷ "substantial,"⁸ or "proximate" cause of the injury to plaintiff.⁹

It has been pointed out above that it is impossible to discover the precise sense in which the court in the instant case uses the phrase "proximate cause." Is it in the sense of legal causation or of actual causation? When the court says that it must be clear that ". . . absent the negligent act, the injury would not have occurred,"¹⁰ it suggests the simple "but for" test of actual causation, but it cannot be ascertained certainly that such was the test the court finally used. No doubt the reason for the ambiguity of the meaning of "proximate cause"

clearly and accurately); Edgerton, *Legal Cause* (1924) 72 U. OF PA. L. REV. 211, 213; *Pedigo v. Roseberry*, 340 Mo. 724, 737, 102 S. W. (2d) 600, 608 (1937): "The mere fact that injury follows negligence does not necessarily create liability . . . if the evidence merely established that the injury might have resulted from several causes for some but not all of which appellants were liable, the necessary causal connection remained in the realm of conjecture and speculation and respondent's case failed."

5. See *Annin v. Jackson*, 340 Mo. 331, 100 S. W. (2d) 872 (1937): "To authorize recovery, there must not only be a causal connection between negligence charged or hypothesized (and the injury), such that the injury would not have happened but for such negligence, but negligence must be the proximate cause of the injury"; *Mahoney v. Beatman*, 110 Conn. 183, 147 Atl. 762 (1929). This case contains an accurate statement of the principles of causation. Smith, *Legal Cause in Actions of Tort* (1911) 25 HARV. L. REV. 103: "Do not some courts, in laying down the rule of legal cause, proceed upon the supposition that one problem before them is to determine when to exempt a tortfeasor from liability for effects which were in reality caused by his tort?"; Edgerton, *Legal Cause* (1924) 72 U. OF PA. L. REV. 211; *Levitt, Cause, Legal Cause and Proximate Cause* (1922) 21 MICH. L. REV. 34, 43.

6. HARPER, *op. cit. supra* note 4, at 258: ". . . legal cause is, therefore, a delimitation of cause in fact."

7. *Cregger v. St. Charles*, 224 Mo. App. 232, 11 S. W. (2d) 750, 753 (1928).

8. RESTATEMENT, TORTS (1934) § 431. The Restatement is the chief exponent of the "substantial factor" test. *Osborne v. Montgomery*, 203 Wis. 223, 234 N. W. 372 (1931); *Mahoney v. Beatman*, 110 Conn. 184, 147 Atl. 762 (1929).

9. *Schneiter v. Chillicothe*, 107 S. W. (2d) 112 (Mo. App. 1937); *Alabama Power Co. v. Bass*, 218 Ala. 586, 119 So. 625 (1928).

10. *Rose v. Thompson*, 141 S. W. (2d) 824, 828 (Mo. 1940).

as used in this state is that we have three distinct types of cases using the same phrase to denote distinctly different aspects of causation: (a) some cases use the phrase to indicate causation in fact;¹¹ (b) other cases use it to mean legal causation;¹² (c) while still others apply the phrase to connote a jumble of actual causation and legal causation.¹³ For example, in *Kane v. Missouri Pacific Ry.*,¹⁴ plaintiff alleged that he was injured when the train on which he was working was derailed. The derailment occurring as the train was rounding a curve, plaintiff alleged that the accident was caused by splashing water in the tender which upset the center of gravity. He contended that the water would not have splashed had certain devices, called "splashers," been installed in the tender, and alleged that defendant was negligent to omit such installation. The Supreme Court of Missouri ruled for the defendant, saying that plaintiff did not prove that the absence of splashers was the proximate cause of the injury to plaintiff, nor that the injury would have been prevented had the splashers been present. It declared that "proximate cause" is ". . . that (cause) which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred."¹⁵ This definition includes both actual causation and legal causation without differentiation in a case properly determinable solely upon the issue of actual causation, or causation in fact. However, the identical definition is used in *Jenkins v. Springfield Traction Co.*,¹⁶ in a case hinging on legal causation.¹⁷ In that case plaintiff was riding in an automobile participating in a funeral procession. An officer on a motorcycle lead the entourage. A servant of defendant so negligently managed one of de-

11. *Shunk v. Harvey*, 284 Mo. 343, 223 S. W. 1066 (1920); *King v. Rieth*, 341 Mo. 467, 108 S. W. (2d) 1 (1937); *Evans v. Massman Construction Co.*, 343 Mo. 632, 122 S. W. (2d) 924 (1938); *Glenn v. Metropolitan St. Ry.*, 167 Mo. App. 109, 150 S. W. 1092 (1912).

12. *Kennedy v. Independent Quarry & Construction Co.*, 316 Mo. 782, 291 S. W. 475 (1927); *Jenkins v. Springfield Traction Co.*, 230 Mo. App. 1235, 96 S. W. (2d) 620 (1936); *Schneiter v. Chillicothe*, 107 S. W. (2d) 112 (Mo. App. 1937); *Cregger v. St. Charles*, 224 Mo. App. 232, 11 S. W. (2d) 750 (1928); *George v. Kansas City Southern Ry.*, 286 S. W. 130 (Mo. App. 1926); *Jaquith v. Fayette R. Plumb, Inc.*, 254 S. W. 89 (Mo. 1923).

13. *Rose v. Thompson*, 141 S. W. (2d) 824 (Mo. 1940); *Stokes v. Springfield Wagon Co.*, 289 S. W. 987 (Mo. App. 1926); *Hull v. Thomson Transfer Co.*, 135 Mo. App. 119, 115 S. W. 1054 (1909). It is impossible to discover what phase of causation is contemplated by the courts in these decisions. Perhaps some of the cases noted above in notes 11 and 12 should also have been included in this classification, but it appeared as if those courts were certain in their own minds as to what they meant in their discussions of causation, and so they were given the benefit of the doubt.

14. 251 Mo. 13, 157 S. W. 644 (1913).

15. *Id.* at 27, 157 S. W. at 648.

16. 230 Mo. App. 1235, 96 S. W. (2d) 620 (1936).

17. *Jaquith v. Fayette R. Plumb, Inc.*, 254 S. W. 89 (Mo. 1923); *Kennedy v. Independent Quarry & Construction Co.*, 316 Mo. 782, 291 S. W. 475 (1927); *Hull v. Thomson Transfer Co.*, 135 Mo. App. 119, 115 S. W. 1054 (1909); *Rose v. Thompson*, 141 S. W. (2d) 824 (Mo. 1940); *Schneiter v. Chillicothe*, 107 S. W. (2d) 112 (Mo. App. 1937); *Glenn v. Metropolitan St. Ry.*, 167 Mo. App. 109, 150 S. W. 1092 (1912); *George v. Kansas City Southern Ry.*, 286 S. W. 130 (Mo. App. 1926); *Stokes v. Springfield Wagon Co.*, 289 S. W. 987 (Mo. App. 1926); *Cregger v. St. Charles*, 224 Mo. App. 232, 11 S. W. (2d) 750 (1928); *Evans v. Massman Construction Co.*, 343 Mo. 632, 122 S. W. (2d) 924 (1938), are cases utilizing this definition of proximate cause."

fendant's street cars that it struck the officer, knocking him off his motorcycle and necessitating a sudden application of the brakes of the leading automobile in order to avoid striking the officer. In the process of such sudden stopping of the entire procession, the car in which plaintiff was riding was hit by the car immediately behind it and it hit the car immediately in front of it, throwing plaintiff out the door and onto the street, thus injuring him. The court ruled for the plaintiff. There was no question as to the negligence of the defendant nor of actual causation. Legal causation was the only problem before the court. It cited the same definition of proximate cause as the *Kane* court, and gave another definition indicating its cognizance that the problem was one of legal causation.¹⁸ If legal causation and causation in fact are entirely different, how can the same definition be used to determine the presence of both?

The fruit of these two meanings of the phrase "proximate cause" is found in a decision such as the instant case in which it is impossible to discover what the court actually had in mind: whether the element of legal causation was not properly proved, or whether it was causation in fact that was not present. It is suggested that clarity would be more nearly achieved if in cases presenting causation questions, the courts would first establish causation in fact, and if it is present, then decide the limits of liability by some test of legal causation.

JERRED BLANCHARD

18. 230 Mo. App. 1235, 1245, 96 S. W. (2d) 620, 625 (1936).