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Recent Cases

CONSTITUTIONAL LAW—EXCLUSION FROM INTERSTATE COMMERCE ARTICLES MANUFACTURED IN VIOLATION OF FAIR LABOR STANDARDS ACT

*United States v. F. W. Darby Lumber Co.*¹

Appellees were indicted for violation of the Fair Labor Standards Act of 1938.² The Act prevented the shipment in interstate commerce of products and commodities produced in the United States under labor conditions as respects wages and hours which failed to conform to standards set up by the Act. Appellees are engaged in manufacturing lumber in Georgia, a large part of which is shipped in interstate commerce. Their demurrer challenged the validity of the Act under the Commerce Clause and the Fifth and Tenth Amendments. The district court quashed the indictment on the grounds that the Act as a regulation of manufacturing within the states is unconstitutional. The case came to the Supreme Court on a direct appeal.

The Court reversed the decision of the lower court and sustained the validity of the Act. The Court said that the power to regulate included regulations which prohibited commerce, as well as those which aided and protected it. They here allow a prohibition of shipment in interstate commerce of goods and articles not harmful in themselves, and in so doing specifically overrule the case of *Hammer v. Dagenhart*.³

Hammer v. Dagenhart,⁴ a misfit since the day the opinion was written, declared unconstitutional an act of Congress intended to prevent interstate commerce in the products of child labor.⁵ The Court based this decision on the ground that this act was an invasion of a power reserved to the states and to which the power over commerce granted to Congress did not extend. They said that the power to regulate interstate commerce did not include the power to prohibit interstate commerce in particular commodities except where the use of interstate commerce was essential to the accomplishment of harmful results.⁶ The factor in controlling the majority's decision seems to have been

1. 61 Sup. Ct. 451 (1941).

2. 52 STAT. 1060 (1938).

3. "The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled." *United States v. F. W. Darby Lumber Co.*, 61 Sup. Ct. 451, 458 (1941).

4. 247 U. S. 251 (1918).

5. 39 STAT. 675 (1916).

6. The Court thus distinguishes the situation before them from the similar situations which had existed in the *Lottery Case*, 188 U. S. 321 (1903); *Hipolite Egg Co. v. United States*, 220 U. S. 45 (1911) (Pure Food and Drug Act); *Hoke v. United States*, 227 U. S. 308 (1913) (White Slave Traffic Act).

their desire to protect the state's power to control their own local matters and the fear of the complete loss of this power to the Federal Government as the result of such legislation as was involved here.⁷

This decision did not follow the doctrine of the cases which preceded it, and in turn, it was not followed by the subsequent decisions dealing with this problem of the right of Congress to regulate by prohibition.

In *Gibbons v. Ogden*,⁸ Chief Justice Marshall set out the doctrine which has been followed by the Court from that time on, that the power of Congress over commerce was the power to regulate and to prescribe the rule by which commerce was to be governed, subject to no limitations except those within the Constitution itself. In pursuance of this doctrine, the Court has held repeatedly that this power to regulate commerce between the states includes the power to prohibit commerce in particular articles.

The Lottery Case,⁹ *Hoke v. United States*,¹⁰ and *Hipolite Egg Co. v. United States*,¹¹ were all cases concerning legislation which attempted to control interstate commerce by prohibiting such commerce in certain articles. These were all sustained by the Court. They set out repeatedly the idea that Congress has plenary power over such commerce and that Congress may adopt not only means necessary but also those convenient to the exercise of this power. The Court states that the state clearly has control over these matters, but only within the state; that power of Congress reaches where the state's cannot, and does not encroach on the jurisdiction of the state.

Despite these cases, the Court, in deciding *Hammer v. Dagenhart*, refused to apply a similar doctrine to the act involved, although it was set up in terms almost identical to those of the acts previously mentioned that were sustained. The Court distinguished them on the ground that there the articles banned from interstate commerce were harmful in themselves, whereas products of child labor did not have these attributes. The Court refused to adopt an economic theory of the harm caused by such articles from the point of view of the states into which the goods were shipped. This idea of injury to the state of destination, and for which the suffering state itself had no remedy due to the interstate nature of the shipment, was adopted by the Court in the recent case of *Kentucky Whip & Collar Co. v. Illinois Central Ry.*¹² This case involved a prohibition of the shipment of convict-made goods into a state in violation of the laws of that state. The Court based its decision sustaining this act almost

7. "The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed." *Hammer v. Dagenhart*, 247 U. S. 251, 276 (1918).

8. 9 Wheat, 1, 196 (U. S. 1824).

9. 188 U. S. 321 (1903).

10. 227 U. S. 308 (1913).

11. 220 U. S. 45 (1911).

12. 299 U. S. 334 (1936).

entirely on this argument of the economic harm resulting from such use of interstate commerce.

This harm results when goods manufactured by cheap labor, such as convicts or children, are shipped into a state which does not permit such labor and are sold in competition with the goods of this state; the result is that the state with the higher labor standards is faced with competition which it cannot meet, and yet the state government is powerless to protect its own manufacturers.

A situation analagous to this arose when individual states attempted to prohibit the importation of liquor. Again the fact that interstate commerce was the particular province of the Federal Government prevented the states from prohibiting the importation of this commodity which they considered undesirable. Congress, to aid them, passed a series of acts which prohibited the carrying of liquor in interstate commerce into a state which did not desire it. These acts were sustained¹³ and add another illustration of the fact that the Court has never followed the doctrine of *Hammer v. Dagenhart*.

Also, the cases sustaining the National Motor Vehicle Theft Act¹⁴ and the Kidnaping Acts¹⁵ threw more doubt on the doctrine of *Hammer v. Dagenhart*. These acts both looked to the Commerce Clause for their Constitutional justification, and both involved a prohibition of a certain type of interstate commerce; both were sustained by the Court without dissent as proper applications of the power of Congress over interstate commerce. The purpose of these acts was to discourage certain actions within the state of origin, just as in the Child Labor Act the purpose had been to discourage child labor within the state of origin by stopping the interstate commerce which made this type of labor profitable. The same means to a similar end were sustained in these acts as had been declared bad when applied to child labor.

The decision handed down in the principal case shows the greatly changed and broadened viewpoint of the Court in dealing with attempts by Congress to regulate by the use of the commerce power. The Court, which leaned over backwards to protect the right of the state to control its own internal affairs in *Hammer v. Dagenhart*, now seems to have adopted the idea that the Federal Government is the proper agency for dealing with many problems that were formerly considered to be of purely local concern. The Court, as well as Congress, has seen that progress has knit the entire country so closely together that any regulation attempted must operate across state lines to be effective. They have also seen that the economic harms, which all now realize must be reckoned with, cannot be remedied by either the State or Federal Government unless Congress is allowed to do so by denying the freedom of interstate commerce to the agents of these economic harms.

ELMUS L. MONROE

13. *Clark Distilling Co. v. Western Maryland R. R.*, 242 U. S. 311 (1917) (*Webb-Kenyon Act*); *United States v. Hill*, 248 U. S. 420 (1919) (*Reed "Bone Dry" Amendment*).

14. *Brooks v. United States*, 267 U. S. 432 (1924).

15. *Gooch v. United States*, 297 U. S. 124 (1935).

PLEADING—PARTIES—NON JOINDER OF CO-OBLIGEE—WAIVER BY FAILURE TO DEMUR

*State ex rel. Elmer v. Hughes*¹

P, the plaintiff, and one Chitwood, attorneys at law, made a joint written contract with *D*, the defendant, to collect a sum of money due *D* on an insurance policy. After *P* and Chitwood had filed suit against the insurance company, they were discharged by *D*. *P* sued *D* for breach of the contract of employment and, because Chitwood refused to join him in such suit as plaintiff, *P* joined Chitwood as a defendant alleging in his petition the reason therefor. In the trial court *P* recovered a judgment, which on appeal to the St. Louis Court of Appeals was reversed for *D*, the court holding: (1) that the statute providing that all joint contracts shall be construed as joint and several, does not change the common law rule requiring all the obligees to join in a suit wherein there is a joint obligation to them under the contract; (2) that where it appears from the face of the petition that the plaintiff was a joint obligee with another who would not join as a party plaintiff, this did not reveal merely a defect of parties plaintiff, but failed to state a cause of action, and hence the defect was not waived by failure of the defendant to demur to the petition, but that the defendant could take advantage of the defect by a demurrer to the evidence.² The case was brought before the supreme court on a writ of *certiorari*. HELD: writ quashed.

As a joint obligee, Chitwood was clearly an indispensable party to an action on the contract.³ Both upon the basis of reason and upon the authorities cited in the opinion, the substantive law statute⁴ making all joint contracts joint and several relates only to obligors and not to obligees.⁵ If *P* had sued *D* without joining Chitwood either as plaintiff or defendant, there would have been a defect of parties. As the defect appeared on the face of the petition, *D* could have demurred to the petition.⁶ If the defect had not appeared on the face of

1. 146 S. W. (2d) 889 (Mo. 1941).

2. *Elmer v. Copeland*, 141 S. W. (2d) 160 (Mo. App. 1940).

3. *Slaughter v. Davenport*, 151 Mo. 26, 51 S. W. 471 (1899); *McLaran v. Wilhelm*, 50 Mo. App. 658 (1892); *White v. Dyer*, 81 Mo. App. 643 (1899); *Frumberg v. Haderlein*, 167 Mo. App. 717, 151 S. W. 160 (1912); CLARK, CODE PLEADING (1928) § 57, p. 250 (cases collected in note 50).

4. MO. REV. STAT. (1929) § 2953; 3 MO. STAT. ANN. (1932) § 2953, p. 1820; MO. REV. STAT. (1939) § 3340: "All contracts which, by the common law, are joint only, shall be construed to be joint and several."

5. *Dewey v. Carey*, 60 Mo. 224 (1875); *Parks v. Richardson*, 35 Mo. App. 192 (1889); *Townsend v. Roof*, 210 Mo. App. 293, 237 S. W. 189 (1922); *Welch-Sandler Cement Co. v. Mullins*, 31 S. W. (2d) 86, 91 (Mo. App. 1930) ("The distinction has been fully recognized by the courts, and it is well settled that all to whom a joint obligation is due must join as plaintiffs, but that a plaintiff may sue any one or more of those who are liable upon a joint obligation.") Cf. *Priest v. Oehler*, 328 Mo. 590, 603, 41 S. W. (2d) 783, 788 (1931).

6. MO. REV. STAT. (1929) § 770; 2 MO. STAT. ANN. (1932) § 770, p. 1000; MO. REV. STAT. (1939) § 922: "The defendant may demur to the petition, when it shall appear upon the face thereof . . . fourth, that there is a defect of parties plaintiff or defendant . . ."; *Dewey v. Carey*, 60 Mo. 224 (1875); *Ellis v. Springfield-S. W. Ry.*, 130 Mo. App. 221, 109 S. W. 74 (1908); CLARK, CODE PLEADING (1928) § 57, p. 251; BLISS, CODE PLEADING (3rd ed. 1894) § 411.

the petition, *D* could have raised the nonjoinder in his answer as a special defense,⁷ or by a demurrer to the evidence on the theory of a variance between the pleadings and the proof.⁸

If *P* alone could not sue *D*, and if Chitwood refused to join *P* as a plaintiff in such suit, what was *P* to do? Was he to be deprived of his claim against *D* because Chitwood refused to press the claim? A section of the Missouri Code of Civil Procedure, following the old equity rule, has solved the dilemma with which a plaintiff such as *P* was faced, by providing that: "Parties who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the petition. This section shall apply to both actions at law and suits in equity."⁹

Apparently *P* had done his utmost to follow this statutory provision. His petition alleged that Chitwood was a party united in interest who should have been joined as a plaintiff; that Chitwood refused to be joined as a plaintiff; that for that reason he had been joined as a defendant.¹⁰ In their opinions, neither of the courts made any reference to this statute. Yet cases were cited as authority for the proposition that one joint obligee cannot sue the obligor and join as defendant an obligee who refused to join as plaintiff.

The first case cited is *Clark v. Cable*,¹¹ which the court of appeals said is *stare decisis* in the law of our state.¹² The facts in the *Clark* case were: *C* made a joint contract with *A* and *B* to sell them an interest in a boat. *A* sued *C* for breach of this contract, joining *B*, his co-obligee, as a defendant, alleging that *B* refused to join as plaintiff. *C*'s demurrer to the petition was sustained and the supreme court affirmed this holding. At first sight the *Clark* case seems to hold that one joint obligee cannot sue and join his co-obligee as a defendant. However, on a careful reading of the *Clark* case, it appears that the petition alleged that after the contract had been made, *B* had repudiated it. If this be the true situation, it is not unreasonable to say that the *Clark* case was not decided on principles of pleading at all, but rather that it was decided on the principle of substantive contract law that a discharge of a joint right by one obligee

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7. Mo. REV. STAT. (1929) § 774; 2 Mo. STAT. ANN. (1932) § 774, p. 1010; Mo. REV. STAT. (1939) § 926: "When any of the matters enumerated in section 770 (922) do not appear upon the face of the petition, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action;" *Lemon v. Wheeler*, 96 Mo. App. 651, 70 S. W. 924 (1902); CLARK, CODE PLEADING (1928) § 57, p. 251.

8. *Peters v. McDonough*, 327 Mo. 487, 37 S. W. (2d) 530 (1931); *Culver v. Smith*, 82 Mo. App. 390 (1900).

9. Mo. REV. STAT. (1929) § 702; 2 Mo. STAT. ANN. (1932) § 702, p. 913; Mo. REV. STAT. (1939) § 853.

10. *Elmer v. Copeland*, 141 S. W. (2d) 160, 162 (Mo. App. 1940); *State ex rel. Elmer v. Hughes*, 146 S. W. (2d) 889, 890 (Mo. 1941).

11. 21 Mo. 223 (1855).

12. *Elmer v. Copeland*, 141 S. W. (2d) 160, 163 (Mo. App. 1940).

destroys the right of all.¹³ The *Clark* case has been cited in many later Missouri cases as so holding.¹⁴ In two other cases¹⁵ cited in the principal opinion, *Rainey v. Smizer*,¹⁶ and *Ryan v. Riddle*,¹⁷ the court was of the opinion that the *Clark* case had determined that it was improper for one joint obligee to sue and join another obligee as a defendant. In both of these cases the court said the statutory provision allowing such procedure was applicable only to actions formerly equitable and was not applicable to actions formerly legal. In the *Ryan* case there was a vigorous dissent¹⁸ condemning the two decisions as being against the spirit of the new code and suggesting that the *Clark* and *Rainey* cases be overruled.

At the time these three cases were decided, the statutory provision¹⁹ in question did not contain the words: "This section shall apply to both actions at law and suits in equity." This sentence was added by the Legislature in 1889,²⁰ perhaps because of these three decisions. The amendment unmistakably shows that the intention of the Legislature was in harmony with the dissenting opinion of the *Ryan* case.²¹ Other code jurisdictions have found no difficulty in applying the statute in its original form to legal as well as equitable causes.²² The *Clark*, *Rainey*, and *Ryan* cases have never been overruled. They are still cited for various propositions.²³ No Missouri case can be found which squarely

13. 2 WILLISTON, CONTRACTS (1936) § 343, p. 1014.

14. *Henry v. Mount Pleasant Township*, 70 Mo. 500 (1879) (the obligor paid one of the joint obligees the full amount of the contract price and it was held that this payment discharged the obligation and was a complete satisfaction of it. The *Clark* case was cited as authority); *Townsend v. Roof*, 210 Mo. App. 293, 237 S. W. 189 (1922) (citing the *Clark* case, it was held that one of the joint obligees to a contract could release and discharge the whole contract); *Hamrick v. Lasky*, 107 S. W. (2d) 201, 203 (Mo. App. 1937) ("It is hornbook law that payment in full by the obligor to one of two joint obligees discharges the obligation and is a complete satisfaction of it. . . . *Clark v. Cable* . . .").

15. In addition to the *Clark*, *Rainey*, and *Ryan* cases, the court cited *Henry v. Mount Pleasant Township*, 70 Mo. 500 (1879), cited note 14, *supra*; *Slaughter v. Davenport*, 151 Mo. 26, 51 S. W. 471 (1899); *Peters v. McDonough*, 327 Mo. 487, 37 S. W. (2d) 530 (1931).

16. 28 Mo. 310 (1859).

17. 78 Mo. 521 (1883).

18. *Id.* at 524.

19. MO. REV. STAT. (1855) c. 128, art. 2, § 5. The statute was the same in MO. REV. STAT. (1879) § 3466. For the original statute, which was fundamentally the same, see MO. LAWS 1848-9, art. 3, § 7, p. 76.

20. MO. REV. STAT. (1889) § 1994.

21. See footnote (f) to MO. REV. STAT. (1889) § 1994: "The last clause extending the section to both actions at law and suits in equity changes the law as declared in 21 Mo. 223; 28 Mo. 310; 78 Mo. 521." These citations are the *Clark*, *Rainey* and *Ryan* cases.

22. *Nichols v. Melton & Melton*, 141 Okla. 210, 284 Pac. 642 (1930) (suit by attorneys on joint contract of employment); *McGinnis v. General Exchange Ins. Corp.*, 142 Kan. 338, 46 P. (2d) 876 (1935) (suit on insurance policy issued to three persons jointly); CLARK, CODE PLEADING (1928) § 57, p. 251 (cases in note 53); BLISS, CODE PLEADING (3rd ed. 1894) § 61, p. 98, and § 77, p. 122, 123 (notes 23 and 24).

23. In *Dewey v. Carey*, 60 Mo. 224 (1875), *Parks v. Richardson*, 35 Mo. App. 192 (1889), and *Townsend v. Roof*, 210 Mo. App. 293, 237 S. W. 189 (1922), these cases are cited for the proposition that the joint and several statute does not apply to obligees. In *McLaran v. Wilhelm*, 50 Mo. App. 658 (1892), *Culver v. Smith*, 82 Mo. App. 390 (1900), *Ellis v. Springfield-S. W. Ry.*, 130 Mo.

holds that it is proper for one joint obligee to sue the obligor and join a co-obligee as defendant, although there are cases which indicate by *dicta* that such procedure is proper.²⁴ No case can be found, unless it be the instant case, which suggests a return to the doctrine of the *Clark*, *Rainey*, and *Ryan* cases that such procedure is improper.

Since, then, *P* had joined Chitwood as a defendant, in compliance with the statutory provision, there was in fact no defect of parties. But assuming once more that *P* had not joined Chitwood either as plaintiff or defendant, so that there was a defect of parties, we come to the second question decided by the court, that is, was this nonjoinder waived by the failure of *D* to demur to the petition? The court held that the nonjoinder was not merely a defect of parties but was a failure to state a cause of action and hence not waived. It is difficult to see how the court reached this decision. In a case from another jurisdiction,²⁵ one of the six obligees of a contract of employment sued the obligor without joining the other five obligees either as plaintiffs or defendants. The nonjoinder appeared on the face of the petition, as it did in the instant case. The defendant failed to demur to the petition as he should have done under a statute similar to our Section 770,²⁶ but tried to raise the nonjoinder by a demurrer to the evidence, claiming that the nonjoinder had not been waived under a statute similar to our Section 774²⁷ because the nonjoinder constituted a failure to state a cause of action. The court held that the nonjoinder was not a failure to state a cause of action and had been waived. Our own court has held that the nonjoinder of parties plaintiff appearing on the face of the petition is waived by failure to demur to the petition.²⁸

As to the substantive law point the holding in the instant case seems eminently correct. As to the two procedural points the decision of the court of appeals seems at variance with the plain wording of the applicable statutes.

App. 221, 109 S. W. 74 (1908), the three cases are cited for the proposition that one joint obligee cannot sue without joining the other obligees either as plaintiffs or defendants. For cases citing the three cases for the proposition that a discharge of a joint right by one joint obligee destroys the right of all, see the cases in note 14, *supra*.

24. See *McAllen v. Woodcock*, 60 Mo. 174, 180 (1875); *Overton v. Overton*, 131 Mo. 559, 567, 33 S. W. 1, 3 (1895) ("If a party who is united in interest with those who wish to bring such an action refuses his consent thereto, he may be made a defendant, in accordance with the code provision to that effect."); *Simpson v. Bantley*, 142 Mo. App. 490, 498, 126 S. W. 999, 1001 (1910) ("The plaintiff should have requested the bank, who was then the holder of the notes, to join with him in this action as plaintiff, and had it refused to do so, he should have made the bank a party defendant, as provided by statute.")

25. *Anderson v. East Oregon Lumber Co.*, 106 Ore. 459, 211 Pac. 937 (1923).

26. Ore. Laws 1920, § 68. This statute is substantially the same as Mo. REV. STAT. (1929) § 770, cited note 6, *supra*.

27. Ore. Laws 1920, § 72. This statute is substantially the same as Mo. REV. STAT. (1929) § 774, cited note 7, *supra*.

28. *State ex rel. Kansas City L. & P. Co. v. Trimble*, 262 S. W. 357 (Mo. 1924) (father sued for loss of services of a child without joining mother); *Byrd v. Bankers & Shippers Ins. Co.*, 224 Mo. App. 451, 28 S. W. (2d) 423 (1930) (one of several parties in interest sued on an insurance policy); *Todd v. Fitzpatrick*, 222 S. W. 888 (Mo. App. 1920) (one tenant by the entirety failed to join the other).

Inasmuch as the supreme court has never passed on the question of joining an unwilling co-obligee as a defendant under the present statute,²⁹ the ruling of the court of appeals must stand, so far as *certiorari* is concerned, for there is no conflict, and it is immaterial in *certiorari* whether the ruling of the court of appeals is correct³⁰ As to the question of waiving the nonjoinder of plaintiffs by failure to demur, there appears to be a conflict with a prior supreme court decision,³¹ although it does not appear that this decision was called to the supreme court's attention.³²

LYNDON STURGIS

SALES—TRANSFER OF PROPERTY

*Clark v. Crown Drug Co.*¹

Defendant, a drug company located in Springfield, had a license to sell liquor at its place of business pursuant to a Missouri statute.² Orders for liquor were placed by telephone with defendant in accordance with a standard procedure requiring affirmative answers to the following questions: "May we at this time consider the sale of the intoxicating beverage just ordered as a completed transaction and that delivery of this product is not a condition precedent to the completed sale? Are you 21 years of age or older?" Liquor would then be selected in accordance with the order, delivered by defendant's boy, and the price collected. Plaintiff, the operator of a taproom in Springfield, secured an injunction in the circuit court prohibiting such transactions. On appeal the Springfield Court of Appeals affirmed the decision.

It is a general principal of the law of sales that title passes when the

29. See note 24, *supra*.

30. On *certiorari* to quash the court of appeals opinion for conflict, the supreme court determines only whether such opinion conflicts with prior controlling decisions of the supreme court. It is immaterial what the supreme court thinks of the question as an original proposition; the judgment can be quashed only where there is a conflict with one or more of its decisions. 4 HOUTS, MISSOURI PLEADING AND PRACTICE (1937) § 1411; McBaine, *Certiorari from the Missouri Supreme Court to the Courts of Appeals* (1916) 13 U. OF MO. BULL. L. SER. 30, 74; Graves, *Certiorari in Missouri* (1922) 24 U. OF MO. BULL. L. SER. 3.

31. See note 28, *supra*.

32. See Missouri Supreme Court Rule 34. Cf. 4 HOUTS, *op. cit. supra* note 30, at p. 712.

1. 146 S. W. (2d) 98 (Mo. App. 1940).

2. Mo. Laws Ex. Sess. 1933-34, § 5, p. 80: "No person, agent or employee of any person in any capacity shall sell intoxicating liquor in any other place than that designated in the license, or at any other time or otherwise than is authorized by this act and the regulations herein provided for."

parties so intend.³ Missouri has followed the general rule.⁴ The question of intention as to when title passes is one of fact.⁵

There may be contracts for the sale of either ascertained or unascertained goods.⁶ When goods are unascertained because they are part of a mass of similar goods, title may pass when particular goods satisfying contract description are separated from the mass by the seller with the assent of the buyer for the purpose of fulfilling the contract to sell.⁷ The whole transaction, with the transfer of title, is known as appropriation. The time when appropriation, with transfer of property, takes place is determined by the intention of the parties.⁸ Missouri has followed the orthodox view that intention will govern, and title may pass before either delivery or payment.⁹

It is submitted that the following is a proper analysis of the principal case under orthodox sales principles. What was the intention of the parties in the principal case? It is difficult to see how the parties could have more clearly expressed their intention as to when property should pass. Intention is plainly shown by the questions asked and the affirmative answers. Thus we have the assent of the buyer at the time of the telephone call to the appropriation to be made by the seller. Upon removing the liquor from the shelf in the drug store, segregation from the mass took place and the property in the goods passed. Thus, under orthodox application of sales principles, property and title have passed in the drug store and the sale is complete there.

But the court did not reach this orthodox result. The court says: "In our opinion, it is the intention of the legislature, as expressed in the statute, and not the intention of the parties, that controls."¹⁰ What the court means by this is not clear. Unquestionably the legislature can expressly make any rule as to the passage of title in liquor sales that it desires. But there are no express words laying down a special intention. If the court here means that the legislature meant something special in the words "shall sell,"¹¹ such special intent does not reveal itself in the statute.¹² The word sale in ordinary legal meaning refers to the transfer of property.¹³ Statutes must be construed so

3. 1 WILLISTON, SALES (2d ed. 1924) § 261.

4. *Glass v. Blazer Bros.*, 91 Mo. App. 564 (1902); *Consolidated Flour Mills Co. v. Farmers' Elevator Co.*, 247 S. W. 480 (Mo. App. 1923); *Turner Looker Liquor Co. v. Hindman*, 232 S. W. 1076 (Mo. App. 1921); *State v. Crumes*, 319 Mo. 24, 3 S. W. (2d) 229 (1928).

5. 1 WILLISTON, SALES (2d ed. 1924) § 262.

6. Uniform Sales Act, §§ 17 and 18.

7. *American Metal Co. v. Daugherty*, 204 Mo. 71, 102 S. W. 538 (1907).

8. *Hoffman v. Gosline*, 172 Fed. 113 (C. C. A. 6th, 1909); *O'Farrel v. McClure*, 5 Kan. App. 880, 47 Pac. 160 (1897).

9. *Holly v. St. Louis, K. C. & Colo. Ry.*, 34 Mo. App. 202 (1889).

10. 146 S. W. (2d) 98, 103 (Mo. App. 1940).

11. See note 2, *supra*.

12. Such a special interpretation of sale was used in the Missouri Sales Tax Law, passed at the same session of the legislature at the same time. Mo. Laws Ex. Sess. 1933-34, § 1b, p. 156: "'Sale' means any transfer, exchange or barter, conditional or otherwise . . ."

13. *Curtis v. Truitt*, 7 S. W. (2d) 383 (Mo. App. 1928); Uniform Sales Act, § 1.

as to give effect to the ordinary meaning of the words.¹⁴ If the court means that the legislature considered all liquor sales morally bad, and, therefore, that "sale" should be so interpreted as to restrict liquor sales, again such special intention does not reveal itself.

The court says in the principal case: ". . . the legislature intended, by this statute, that the sale, of which the *delivery* constituted an essential part, was permitted to be made *only* at the defendants' place of business, as designated in defendants' license."¹⁵ This language would seem to indicate that to the court the matter of delivery is the all-important criterion as to whether the "sale" is licensed.¹⁶ Yet the court in the principal case poses the following hypothetical statement: "If, in the instant case, instead of ordering the liquor over the telephone, the purchaser had called at defendants' store, purchased a bottle of liquor, had it separated and set apart from the rest of the stock, and had paid for it, its subsequent delivery by defendants to the purchaser's residence would not have prevented the sale from having been consummated at defendants' place of business."¹⁷ This statement of the court, however *obiter* it may be, would seem to indicate, on the contrary, that the court does not consider that delivery is the important criterion in deciding the case. Delivery, then, is not the *sine qua non* of a legal sale of liquor.

Inasmuch as the court has said that delivery is, and is not, necessary, what then is necessary, in the mind of the court, for the sale to be consummated on the licensed premises? Is it payment? The court makes no mention of the necessity for cash payment in the store as being necessary.¹⁸ Is it the presence of the buyer in the store? This is the apparent object of the holding in the principal case, especially in view of the *obiter* discussed above.¹⁹ Would the requirement of the court be met if the buyer were in the store personally in the morning and selected several bottles to be sent out in the afternoon? Would the requirement of the court be met if the buyer on Monday selected his week's supply, and had one or more bottles a day sent out? If the court were met with such cases, it then might require that the buyer carry his liquor home with him, even in the face of its own hypothetical *obiter*. It is questionable public policy to require buyers to carry liquor about with them on their persons.

The court says the carrier cases do not apply.²⁰ But such cases are but clear examples of appropriation, prior assent of the buyer being given and the intent of the parties being that title shall pass upon delivery to the carrier.²¹

14. *State ex rel. Gass v. Gordon*, 266 Mo. 394, 181 S. W. 1016 (1915).

15. 146 S. W. (2d) 98, 103 (Mo. App. 1940).

16. *Contra: Glass v. Blazer Bros.*, 91 Mo. App. 564 (1902).

17. 146 S. W. (2d) 98, 102 (Mo. App. 1940).

18. The court does not discuss the doctrine of cash sale which has gone further in Missouri than any other state. *Strother v. McMullen Lumber Co.*, 200 Mo. 647, 98 S. W. 34 (1906); *Crocker State Bank v. White*, 226 S. W. 972 (Mo. App. 1920). The wisdom of the cash sale doctrine in the face of intention that title pass beforehand is questionable. See (1940) 5 Mo. L. Rev. 256.

19. 146 S. W. (2d) 98, 102 (Mo. App. 1940).

20. *Ibid.*

21. *State v. Rosenberger*, 212 Mo. 648, 111 S. W. 509 (1908).

The court uses as case authority for the decision of the principal case the cases of *State v. Houts*²² and *State v. Young*.²³ The *Houts* case was not decided on sales principles, but declared that the intention of the legislature was to block any delivery of liquor. Since the *dictum* of the principal case admits that delivery is not the *sine qua non*, and since the present case purports to reach its decision primarily on sales principles, the authority of the *Houts* case would not seem strong. The *Young* case is very close to the principal case on its facts, but the intention of the parties was not there so clear as in the principal case. Furthermore, the holding in the *Young* case was fourteen lines long and made no use of any argument whatever—neither sales principles nor legislative intent. Such a fiat decision would seem questionable authority.

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22. 36 Mo. App. 265 (1889).

23. 70 Mo. App. 52 (1897).