Missouri Law Review

Volume 7
Issue 1 *January 1942*

Article 11

1942

# Recent Cases

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CONSTITUTIONAL LAW—REGULATION OF BUSINESS BY THE STATE THROUGH PRICE CONTROL

*Olsen v. State of Nebraska*[1]

The respondents, operators of a private employment agency, had sought a writ of *mandamus* ordering the Secretary of Labor of Nebraska to issue a license to them. The secretary had refused to issue such license because of respondents' refusal to comply with the Nebraska Statute[2] providing for a maximum compensation of 10% of the first month's salary or wages of the person for whom the employment was obtained. The Nebraska Supreme Court in reliance upon *Ribnik v. McBride,*[3] held the statute unconstitutional[4] and the case was taken to the United States Supreme Court on *certiorari.*

That court reversed the decision of the Nebraska Supreme Court and sustained the validity of the statute. The opinion was indicative of the court's present attitude of being careful not to encroach upon the legislative domain. The court made it clear that it was not concerned with the wisdom, need or appropriateness of the legislation, that difference of opinion on that score suggested a choice which should be left where it was left by the constitution—to the states and to Congress. And the court in so saying specifically overruled the case of *Ribnik v. McBride.*

*Ribnik v. McBride* declared unconstitutional a New Jersey statute[5] regulating the keeping of employment agencies, and attempting to confer on the commissioner of labor power to fix prices which employment agents should charge for their services. The reasoning upon which the decision was based was clearly a departure from the previously established test of determining the validity of state legislation regulating business under the police power.

The court based its decision on an analogy to the case of *Tyson & Brother v. Banton,*[6] where the court denied the right of the state to regulate the resale price of theatre tickets by scalpers, and held that employment agencies were not affected with a public interest because they were traditionally of a private character. These holdings in effect repudiated all previous decisions on cases involving this particular type of situation from *Munn v. Illinois,*[7] on down to the *Tyson &*

1. 61 S. St. 862 (1941).
2. NEB. COMP. STAT. (1929) § 48.
3. 277 U. S. 350 (1928).
4. State *ex rel.* Western Reference & Bond Ass'n v. Kinney, 138 Neb. 574, 293 N. W. 393 (1940).
5. N. J. Laws 1918, c. 227, p. 822.
6. 273 U. S. 418 (1926).
7. 94 U. S. 113 (1876).

*Brother v. Banton* case, and in effect adopted the dissenting opinion of Mr. Justice Field in the *Munn* case, *i.e.,* the only business affected with the public interest are the public utilities.

The cases of *Munn v. Illinois,* and *Budd v. People of New York,*[8] were the first cases on this proposition decided by the United States Supreme Court. The court in those cases emphasized monopoly and held that grain elevators were subject to price control. In *Brass v. North Dakota,*[9] the court showed a tendency to extend the principle of the *Munn* case, and completely disregarded the reasons which the court gave for its decision in that case. Thus, grain elevators were held subject to price fixing legislation irrespective of monopolistic tendencies, and the court laid down the proposition that the purpose of the legislation was presumed to be legitimate until proven otherwise.[10]

In *German Alliance Insurance Co. v. Lewis,*[11] the court pointed out that business might be affected with the public interest so as to permit price regulation, although no public trust was impressed upon the property and although the public might not have a legal right to demand and receive service, *i.e.,* the mere fact the business was not in the nature of a public utility would not relieve it from regulation should the need for it arise.

In the rent cases[12] it was held that rents could be regulated in times of emergency. But in 1924, when a case of rent fixing in absence of an emergency[13] came before the court, the reasons for the decisions in those cases, *viz.* an emergency, were not disregarded as were the reasons for the *Munn* decision in *Brass v. North Dakota,* and it was held that an emergency must exist to bring rent fixing within the legislative power. Thus in 1894, the court had a tendency to extend the public interest doctrine, while in 1924, it had a tendency to restrict it to the exact reasoning of the previous cases on the question. So with the trend toward restricting the power of the state to legislate—it was easy for the court to fall into the backward step of the *Tyson* and *Ribnik* cases.

In denying the power of the state to regulate the resale of theatre tickets (in *Tyson v. Banton*), Mr. Justice Sutherland, speaking for a majority of the court, purported to take judicial notice that amusements were not clothed with a public interest. In the *Ribnik* case, Mr. Justice Sutherland, again speaking for a majority of the court, pointed out that activities of a ticket broker were involved in the *Tyson & Brother v. Banton* case, and the state was not allowed to regulate, so it was clear that you could not regulate prices charged by a broker, no matter what type of business he may be in. This restrictive and compartment type of

8. 143 U. S. 517 (1892).
9. 153 U. S. 391 (1894).
10. "But we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota." Brass v. North Dakota, 153 U. S. 391 (1894).
11. 233 U. S. 389 (1914).
12. Block v. Hirsh, 256 U. S. 135 (1921); Marcus Brown Co. v. Feldman, 256 U. S. 170 (1921); Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242 (1922).
13. Chastleton Corp. v. Sinclair, 264 U. S. 453 (1924).

reasoning by the court, as to price regulation was applied to the subsequent cases of *Williams v. Standard Oil Co.*,[14] and the *New State Ice Co. v. Liebmann*.[15]

But a trend toward the less restricted view had begun to show itself. The case of *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,[16] had been decided the year before the *New State Ice Co.* case. There the court sustained a statute limiting agent's commission on fire policies of insurance. The majority held to the old view of the *Brass* case that the presumption of constitutionality must prevail, whereas the minority maintained that this was far past the *German Alliance Ins. Co.* case—that case being set as a guide post in *Tyson & Brother v. Banton* as the extent to which a state might go in regulating prices. The holding of the majority clearly repudiated the reasoning in *Tyson & Brother v. Banton, Ribnik v. McBride,* and *Williams v. Standard Oil Co.* cases[17] and started a resurgence of the liberal attitude by the court that, with the exception of the *New State Ice Co.* case, has never been halted.

In 1934, the case of *Nebbia v. New York*,[18] and the subsequent milk price regulation cases[19] together with the *Townsend v. Yeomans* case,[20] sapped the restricted cases of any vitality they might have had. The *Nebbia* case stated that "affected with public interest" was merely another way of saying "subject to the police power" and the only restrictions on regulation by such power were that such exercise be not arbitrary or unreasonable, and this reasoning was applied in the *Townsend v. Yeomans* case.[21]

Thus it is apparent that at the time the principal case was decided, the only thing left of the *Ribnik* case was the actual holding and it required only a similar fact situation to overrule that.

The decision in the principal case shows the attitude of the present supreme court. The *Ribnik* case is overruled, and the reasoning of the *Tyson & Brother v.*

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14. 278 U. S. 235 (1929).
15. 285 U. S. 262 (1932).
16. 282 U. S. 251 (1931).
17. Some writers on the O'Gorman case have gone on the assumption that the majority reached their opinion on the basis that insurance had previously been adjudicated as being affected with a public interest in the case of German Alliance Ins. Co. v. Lewis, and the court was liberal in extending the analogy. See Notes (1931) 44 U. OF MO. BULL. L. SER. 53, (1931) 9 TEX. L. REV. 602. Compare with Note (1931) 41 YALE L. J. 262, wherein the writer points out how the method of approach as applied by the majority, presuming in favor of validity, was largely responsible for the final result.
18. 291 U. S. 502 (1934).
19. Hegeman Farm Corp. v. Baldwin, 293 U. S. 163 (1934); Bordens Farm Products Co. v. Ten Eyck, 297 U. S. 251 (1936).
20. 301 U. S. 441 (1937).
21. "There is no principle of constitutional law which nullifies action taken by a state legislature, otherwise competent, in the absence of special investigation. The result of particular legislative inquiries through commissions or otherwise may be most helpful in portraying the exigencies to which legislative action has been addressed and in fortifying conclusions as to reasonableness. But the legislature acting within its sphere is presumed to know the needs of the people of the state." Townsend v. Yeomans, 301 U. S. 441 (1937).

*Banton, Williams v. Standard Oil Co.,* and the *New State Ice Co. v. Liebmann* cases are repudiated and stripped of all authority. the court gives the impression that the state should be left free to remedy any problems, both economic and social that might confront them, and there will be no artificial or dogmatic restriction thrown in their path, the only requirements being that they be reasonable and not arbitrary and that the legislation bear a reasonable relationship to the evil to be corrected.

J. B. BEAVERS

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CRIMINAL LAW—APPLICATION OF "HABITUAL CRIMINAL" STATUTE

*State v. Held*[1]

Defendant, having been formerly convicted of robbery in Illinois, was subsequently convicted of a similar offense in Missouri under an information purportedly drawn under our Habitual Criminal Act.[2] His punishment assessed by the jury was thirty-five years. On appeal, defendant contended that the information was fatally defective because it did not allege his discharge from the prior conviction before the alleged commission of the second offense, and that therefore the subsequent conviction in Missouri was erroneous. The court replied, in sustaining this conviction, that although the case cited[3] by defendant held such an information insufficient to prosecute a person under the Habitual Criminal Act, still it "did not hold that the information was insufficient to charge a first degree robbery *without* a prior conviction," of which the jury had apparently found him guilty. The court remarked that the defendant could not complain,[4] since the punishment

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1. 148 S. W. (2d) 508 (Mo. 1941).

2. Mo. REV. STAT. (1939) § 4854 "If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

3. State v. Christup, 337 Mo. 776, 85 S. W. (2d) 1024 (1935).

4. State v. Peterson, 130 S. W. (2d) 505, 506 (Mo. 1939) (*held,* where allegation of information concerning previous conviction of accused was shown by jury's verdict to have been disregarded in that jury assessed the minimum punishment, questions raised by alleged error pertaining to the allegation were moot).

he received showed that he had not been convicted under the Habitual Criminal Statute. Here he received only thirty-five years in the penitentiary, whereas he would have been sentenced to life imprisonment under the statute, the construction of the statute permitting even a death penalty[5] in some instances.

The Habitual Criminal Statute was enacted "because the offender by his persistence in the perpetration of crime has evinced a depravity which merits a greater punishment, and needs to be restrained by severer penalties, than if it were his first offense";[6] and it was held that this statute was not repealed[7] by reason of its inconsistencies with a subsequent act.[8] In dealing with persons formerly convicted in another state,[9] mere "substantial similarity"[10] of offenses is enough to subject the accused to our Habitual Criminal Statute. The majority of states have similar types[11] of statutes, as do also many foreign countries,[12] and the constitutionality of these American statutes has been repeatedly upheld in both the federal[13] and state[14] courts.

Inasmuch as these statutes are highly penal in character, they are therefore strictly construed,[15] it having been said as in the principal case that they "are not designed to make a prior conviction a substantive part of an offense subsequently committed," but are intended merely to increase the punishment.[16] Due to this policy of strict construction it has been held that the state must carefully[17] allege

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5. State v. Krebs, 336 Mo. 576, 580, 80 S. W. (2d) 196, 198 (1935).
6. State v. Young, 345 Mo. 407, 133 S. W. (2d) 404, 408 (1939); Note *Attempts to Combat the Habitual Criminal* (1932) 80 U. of PA. L. REV. 565.
7. State v. Taylor, 323 Mo. 15, 18 S. W. (2d) 474 (1929).
8. Mo. Laws 1927, p. 173, § 1.
9. Mo. REV. STAT. (1939) § 4855. "Every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in a foreign country, of an offense which, if committed in this state, would be punishable by the laws of this state by imprisonment in the penitentiary, shall, upon conviction for any subsequent offense, within this state, be subject to the punishment herein prescribed upon subsequent convictions, in the same manner and to the same extent as if such first conviction had taken place in a court in this state."
10. State v. Young, 345 Mo. 407, 133 S. W. (2d) 404 (1939).
11. Legis. (1937) 51 HARV. L. REV. 345, in which it is said that there are four types of provisions: the "habitual criminal acts," the "second offense" statutes, the "third offense" statutes, and those dealing with persons repeatedly convicted for petty offenses.
12. Timasheff, *The Treatment of Persistent Offenders Outside of the United States* (1939) 30 J. CRIM. L. 455; note (1938) 86 L. J. 59 (use of the same jury at different times, in England).
13. Moore v. Missouri, 159 U. S. 673 (1895).
14. State v. Taylor, 323 Mo. 15, 18 S. W. (2d) 474 (1929); State v. Collins, 266 Mo. 93, 180 S. W. 866 (1915); McCuaig, *Modern Tendencies in Habitual Criminal Legislation* (1929) 15 CORN. L. Q. 62; legis. (1937) 51 HARV. L. REV. 345; note (1927) 36 YALE L. J. 1019 (validity of the Baumes Laws of New York).
15. State v. Young, 345 Mo. 407, 133 S. W. (2d) 404 (1939).
16. State v. Murphy, 345 Mo. 358, 133 S. W. (2d) 398 (1939); State v. Bresse, 326 Mo. 885, 33 S. W. (2d) 919 (1930); State v. Austin, 113 Mo. 538, 21 S. W. 31 (1893).
17. State v. Austin, 113 Mo. 538, 21 S. W. 31 (1893) (the mere averment that defendant "complied with his sentence" being insufficient).

and prove the defendant's prior conviction, discharge, and subsequent offense.[18] And although "parole" does come within the meaning of "pardon,"[19] so as to bring accused within the terms of the statute, an "escape" is not within the connotation of "discharge."[20] In criticism of this failure to make escaped criminals subject to the increased punishment, it has been suggested that the legislature amend the statute.[21]

As seen in the case at bar, although an information may be insufficient for the purpose of bringing the defendant under the Habitual Criminal Act, it may still be sufficient as charging the offense for which the accused is on trial.[22] In conjunction with this, the court here intimated that even if the information had been sufficient to subject the accused to the provisions of the statue, it was still within the power of the jury to disregard[23] the state's allegations and proof of defendant's prior conviction and to find the accussed guilty of and to punish for only the offense with which he was charged. This rule has been applied even where the defendant admits[24] his former conviction; it is still a question of fact for the jury.[25] In view of this holding, the statute has been termed as being merely a rule of evidence;[26] and although this power of the jury has been upheld throughout the Missouri decisions, some jurisdictions allow the court to rule on the former conviction and discharge as a matter of law.[27] In Missouri, if the jury do find the

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18. State v. Sumpter, 335 Mo. 620, 73 S. W. (2d) 760 (1934); State v. Schneider, 325 Mo. 486, 29 S. W. (2d) 698 (1930); notes (1940) 14 TEMP. U. L. Q. 386 (discusses four other methods of procedure besides the general custom), (1936) 35 MICH. L. REV. 143, (1941) 132 A. L. R. 91, 107.

19. State v. Asher, 246 S. W. 911, 913 (Mo. 1922) (holding a parole to be a conditional pardon, citing 29 CYC 1562, notes (1899) 45 L. R. A. 502 and (1902) 56 L. R. A. 658); Wiehofen, *The Effect of a Pardon* (1939) 88 U. of PA. L. REV. 177, 184; notes (1936) 5 FORDHAM L. REV. 166, (1938) 11 So. CALIF. L. REV. 368, (1930) 3 So. CALIF. L. REV. 438, (1930) 78 U. of PA. L. REV. 561.

20. State v. Christup, 337 Mo. 776, 779, 85 S. W. (2d) 1024, 1025 (1935), Judge Leedy saying, "The legislature . . . probably had in mind that an escape should not be subjected to the rigorous and more severe penalties provided for habitual offenders—those to whom punishment is not a deterrent—because his reformation was not complete. But whatever may have been the reason . . . (an escape) is not within the act . . . it being manifest that its non-applicability is not a distinction of construction, but the plain letter of the statute."

21. *Id.* at 780, 85 S. W. (2d) at 1025.

22. State v. Bagby, 338 Mo. 951, 93 S. W. (2d) 241 (1936); State v. Hefflin, 338 Mo. 236, 89 S. W. (2d) 938 (1935).

23. State v. Murphy, 345 Mo. 358, 133 S. W. (2d) 398, (1939); State v. Hefflin, 338 Mo. 236, 241, 89 S. W. (2d) 938, 941 (1935); State v. McBride, 334 Mo. 890, 894, 68 S. W. (2d) 688, 690 (1934).

24. State v. Sumpter, 335 Mo. 620, 627, 73 S. W. (2d) 760, 763 (1934).

25. State v. Cardwell, 332 Mo. 790, 60 S. W. (2d) 28 (1933); State v. Dalton, 23 S. W. (2d) 1 (Mo. 1929); State v. McBroom, 238 Mo. 495, 141 S. W. 1120 (1911); notes (1933) 82 A. L. R. 345, 365.

26. Murphy, *The Habitual Criminal Act in Missouri—A Rule of Evidence* (1936) 4 KAN. CITY L. REV. 120.

27. Note (1922) 31 YALE L. J. 440; compare the discussion there with Ryan v. Nygaard, 297 N. W. 694 (N. D. 1941) (where the proceedings under the statute "may be had either before judgment and sentence, or at any time after judgment and sentence and before the judgment and sentence has been executed").

allegations of former conviction, discharge, and guilt to be proved to their satisfaction, then it is mandatory that the jury assess the maximum punishment.[28] But the effect of the provision for mandatory application of the statute is obviously greatly weakened by the absolute power of the jury to ignore the most indisputable evidence of accused's former conviction,[29] including accused's own admission of it.

There are several other important aspects of the Habitual Criminal Statute in Missouri which were not involved in the principal case, such as those dealing with the giving of alternative instructions,[30] with allegedly prejudical statements,[31] with the necessity of special findings as to the former and subsequent convictions,[32] with the wording of the jury's verdict,[33] or with the non-applicability of the statute to possession of liquor cases.[34] However, excepting seemingly minor inconsistencies,[35] the court's repeated adherence to previous decisions seems to have firmly established the principles to be followed in dealing with this statute. The case at bar is supported firmly by authority in every respect.

PAUL D. HESS, JR.

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28. State v. Mosier, 102 S. W. (2d) 620, 624 (Mo. 1937); State v. Bagby, 338 Mo. 951, 968, 93 S. W. (2d) 241, 250 (1936); State v. Taylor, 323 Mo. 15, 26, 18 S. W. (2d) 474, 478 (1929); State v. Jackson, 99 Mo. 60, 66, 12 S. W. 367, 368 (1899); E. H. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (3rd ed. 1939) p. 531 ("These habitual criminal laws of the mandatory type developed after the World War as a result of various crime commissions. They had the purpose of depriving courts and parole boards of the authority to fix penalties in these cases").

29. State v. Murphy, 345 Mo. 358, 133 S. W. (2d) 398 (1939).

30. State v. McBride, 334 Mo. 890, 894, 68 S. W. (2d) 688, 690 (1934); State v. McBroom, 238 Mo. 495, 501, 141 S. W. 1120, 1121 (1911) (the court saying, ". . . the instructions should present to the jury, in the alternative, the issue of former conviction, so that the jury could find for or against the defendant on that issue, as distinct from the question of guilt or innocence of the crime charged . . .").

31. State v. Mosier, 102 S. W. (2d) 620, 623 (Mo. 1937); State v. Jones, 339 Mo. 893, 895, 98 S. W. (2d) 586, 587 (1936).

32. State v. Sumpter, 335 Mo. 620, 626, 73 S. W. (2d) 760, 762 (1934); State v. Baldwin, 214 Mo. 290, 306, 113 S. W. 1123, 1127 (1908); compare note (1938) 116 A. L. R. 209, 234 (Mo. among the minority, requiring special findings) with note (1929) 58 A. L. R. 20, 93 (Mo. among the majority).

33. State v. Bagby, 338 Mo. 951, 967, 93 S. W. (2d) 241, 250 (1936) (verdict of "guilty as charged" not import conviction under habitual criminal statute where jury not instructed under that statute and punishment was less than could have been assessed under the statute); State v. McBroom, 238 Mo. 495, 499, 141 S. W. 1120, 1121 (1911).

34. State v. Lee, 298 S. W. 1044, 1045 (Mo. App. 1927).

35. In State v. Hefflin, 338 Mo. 236, 89 S. W. (2d) 938 (1935) the court seemed to exclude "parole" from the meaning of the statute, saying "the parole did not operate as a discharge, and the information need not have said anything about it"; although in State v. Murphy, 345 Mo. 358, 133 S. W. (2d) 398 (1939) the court said ". . . a parole is a conditional pardon . . ." The explanation must be that in the former case, the accused had been returned to the reformatory for his violation of parole, and later discharged on expiration of sentence; see note 19 *supra*. Also, as criticized by Murphy, *supra* note 26, at 121, there are actually two permissible types of instructions; compare those of State v. Cardwell, 332 Mo. 790, 60 S. W. (2d) 28 (1933) with those of State v. English, 308 Mo. 695, 274 S. W. 470 (1925).

LIBEL—HEADLINES

*Hylsky v. Globe Democrat Publishing Company*[1]

Defendant published in its newspaper a report of a confession of an alleged murderer, with the following headline—"Officer Working Alone Solves Case, Trapping Own Friend." The rather lengthy and detailed article concerned the apprehension of the supposed felon, at a time when charges were pending against others for the offense. The plaintiff (the police officer mentioned in the caption) contends that the word "trapping," as used in the heading, implies "deception and subterfuge." The court held, however, that the article must be read and considered as a whole, and when so observed, the word "trapping" means no more than that the officer had caught or apprehended the murderer, and that a confession had been obtained.

The decision raises the general question of what part headlines do play in making an article libelous. The art of headline writing has developed simultaneously with the growth of journalism. Specially trained men have developed the skill of "fishing for circulation." Often, in an attempt to add to the allurement value of an article, an editor will go a little too far; hence, the law of headlines in libel developed.

The cases in which headlines have been considered fall into various categories. There are writings which are privileged with headings which are not,[2] and writings which are true, with headings which are not.[3] There are other cases in which the headlines rendered innocuous what otherwise possibly was a libelous article.[4]

Most cases, including the instant case, fall in the group in which the caption determines the extent of the libel of the article. In other words, the heading and the item to which it is attached, are considered together, each going towards the degree of the defamation. They are interpreted together in determining whether the article is libelous, to establish the character of the libel, and to find against whom the libel is directed. Included in this division is the case where the headline, though perhaps defamatory when considered alone, is rendered innocuous when construed along with the body of the article.

In the recent case of *Paris v. New York Times*,[5] the doctrine of the group is

1. 152 S. W. (2d) 119 (Mo. 1941).

2. *Libel and Slander*, 33 AM. JUR. § 88; Shubert v. Variety, Inc., 128 Misc. 428, 219 N. Y. Supp. 233 (1926); also, see Notes (1926) 40 A. L. R. 583, at 586, (1929) 59 A. L. R. 1061.

3. Jones v. Pulitzer Pub. Co., 195 S. W. 80 (Mo. App. 1917); Lawyers' Co-op Pub. Co. v. West Pub. Co., 32 App. Div. 585, 52 N. Y. Supp. 1120 (1898); also, see Notes (1926) 40 A. L. R. 583, at 586, (1929) 59 A. L. R. 1061.

4. Tate v. Nicholson Pub. Co., 122 La. 472, 47 So. 774 (1908).

5. 170 Misc. 215, 9 N. Y. S. (2d) 689 (Sup. Ct. 1939). For other late cases see: Little v. Allen, 149 Kan. 414, 87 P. (2d) 510 (1939); Grossman v. Globe-Democrat Pub. Co., 149 S. W. (2d) 362 (Mo. 1941); Black v. Nashville Banner Pub. Co., 24 Tenn. App. 137, 141 S. W. (2d) 908 (1939); Lancour v. Herald and Globe Ass'n, 17 A. (2d) 253 (Vt. 1941); also, see Notes (1926) 40 A. L. R. 583, (1929) 59 A. L. R. 1061.

well demonstrated. The plaintiff, an attorney, had been guilty of submitting three forged affidavits to the court and the article written by the defendant newspaper contained the following headlines:

"Davis Paris Guilty on Forgery Charge
Assemblyman Barred from Practice in Federal Courts for 5 Years
Affidavits Held Forged"

The article set out very clearly the exact charge of which the plaintiff had been found guilty. It left no doubt that he had been adjudged guilty, not of forgery, but of unprofessional conduct bearing on forgery. The court held that when you consider the headnote and article together, observing plaintiff's connection with the charge of forgery, the heading was "a fair and true headnote of the article published."

The Restatement[6] recognizes that the meaning of the words are determined by construing them together with their context, and defines context (of a defamatory imputation) as including "all parts of the communication which are ordinarily read with it." But it does not consider the text of a newspaper article as ordinarily being part of the context, even though such article explains or qualifies the defamatory imputation conveyed, when the heading is read alone. The reason given for this view is that the "public frequently read only the headlines of a newspaper or read the article itself so hastily or imperfectly as not to realize the full significance thereof."

In the instant case, it is very clear that the whole article must be considered with the headline to see if the headline is libelous, because the plaintiff's name is not mentioned in the heading.[7] Obviously, an officer who had not been officially connected with the case before, could not be libeled by the mere mention of his official capacity as an officer in connection with a libelous statement. The plaintiff's name was not mentioned until far down in the article, and in order to get to it, a reader would have to read the bulk of the article, which, as a whole, was distinctly commendatory to the plaintiff.

EUGENE SACKIN

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PERSONAL PROPERTY—SUSTAINING AN IMPERFECT GIFT AS A TRUST

*Cartall v. St. Louis Union Trust Co.*[1]

Litigation[2] regarding various types[3] of personality has necessitated considering whether certain conduct of an alleged donor has created a perfect gift or whether,

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6. RESTATEMENT, TORTS (1938) § 563, comment *d.*

7. Schoenfeld v. Journal Co., 204 Wis. 132, 235 N. W. 442 (1931) ("Warrant for Pastor in Fur Thefts . . ." held not libelous, because, *inter alia,* plaintiff's name is not mentioned in headline).

1. 153 S. W. (2d) 370 (Mo. 1941).

2. Williston, *Is the Right of An Assignee of a Chose in Action Legal or Equitable?* (1916) 30 HARV. L. REV. 97; Cook, *The Alienability of Choses in Action* (1916) 30 HARV. L. REV. 449, (1916) 29 HARV. L. REV. 816; notes (1917) 30 HARV. L. REV. 486, (1899) 12 HARV. L. REV. 498, (1917) 26 YALE L. J. 304.

3. Notes (1933) 84 A. L. R. 558 and (1926) 40 A. L. R. 1249 (gift of

though the gift fails, he has created a trust in favor of the alleged beneficiary. In the instant case the plaintiff, the alleged donee or beneficiary of her testate husband, supported her contentions for either of these possibilities with the following facts. Although there had been no mention or actual delivery to her of the corporation shares, her deceased husband had made declarations to others of his intention that she have these shares; certain interest checks had been issued to her name though they were cashed by the husband; certain of the shares had been transferred to her name on the books of the corporation; and she had authority to enter her husband's deposit box where the shares were found at his death. This property would go to the residuary legatee under the husband's will if the wife failed to show either a gift or a trust. The trial court gave judgment for the plaintiff on the theory of a valid gift; but on appeal, in reversing this judgment, the court said there had been neither a delivery of the property such as to create a valid gift nor the establishment of a perfected trust.

Concerning the allegation of a gift to the plaintiff, it had been stated in *Irons v. Smallpiece*[4] that delivery was essential to make an effective gift.[5] Although later this principle was temporarily doubted,[6] it was finally definitely established in *Cochrane v. Moore*,[7] the original conception of delivery being modeled after the formality of livery of seisin.[8] Thus at first there had to be a manual tradition of the property intended to be given, but this conception was soon enlarged to include delivery by deed,[9] constructive[10] and symbolical[11] delivery, and even de-

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savings deposit by delivery of pass book), (1925) 37 A. L. R. 1144 (gift or part thereof by creditor to debtor), (1922) 20 A. L. R. 174 (donor's own check as subject of gift), (1921) 14 A. L. R. 707 and (1919) 3 A. L. R. 933 (gift of debts of third person not evidenced by commercial instrument), (1893) 19 L. R. A. 700 (delivery of bank book for gift of money in bank).

4. 2 B. & Ald. 551, 106 Eng. Rep. R. 467 (K. B. 1819).

5. Reynolds v. Hanson, 191 S. W. 1030 (Mo. App. 1917); Jones v. Falls, 101 Mo. App. 536, 73 S. W. 903 (1903); Roberts, *The Necessity of Delivery in Making Gifts* (1926) 32 W. VA. L. Q. 313.

6. *In re* Ridgway, L. R. 15 Q. B. D. 447 (1885); Danby v. Tucker, 31 W. R. 578 (1883).

7. L. R. 25 Q. B. D. 57 (1890).

8. Note, *Necessity of Delivery in Gifts of Personal Property* (1924) 24 COL. L. REV. 767, 768.

9. McEwen v. Troost, 1 Sneed 186 (33 Tenn. 1853) (deed for cabinet and library); BROWN, PERSONAL PROPERTY (1936) 107; Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments* (1926-1927) 21 ILL. L. REV. 341, 457, 568; Pollock, *Gifts of Chattels Without Delivery* (1890) 6 L. Q. REV. 446; notes (1940) 126 A. L. R. 924, (1920) 5 A. L. R. 1664 (whether deposit of deed in mail operates as a delivery).

10. Newman v. Bost, 122 N. C. 324, 29 S. E. 848 (1898) (bed-stricken donor delivered keys to donee; gift allowed concerning articles present and incapable of manual delivery); Snidow v. Brotherton, 140 Va. 187, 124 S. E. 182, 40 A. L. R. 1246 (1924) (donor delivered key of receptacle containing pass book showing savings deposits, directing that pass book be delivered to donee); Mechem, *supra* note 9, at 469 and 482; see note 3, *supra*.

11. Teague v. Abbot, 51 Ind. App. 604, 100 N. E. 27 (1912) (disclosure of combination of safe, donor assuming stocks certificate was in safe; upheld through certificate later discovered elsewhere); Waite v. Grubbe, 43 Ore. 406, 73 Pac. 206

livery by ordinary writings.[12] And it is considered that there is no difference between gifts *inter vivos*[13] and *causa mortis*[14] concerning the requirement of delivery.[15] Although it has been said that the requirement of delivery is psychologically unsound,[16] it seems well settled that delivery, to either the donee or a third person[17] for purpose of delivery to the donee, is essential to the validity of the gift.[18] The perpetuation of this doctrine is reputedly due "to the reluctance of courts to sanction the transfer of ownership of chattels, when the transferee pays no consideration for the chattel, without more cogent evidence of the transaction than the mere proof of an intention to make a gift."[19] However, it is thought by some that the tendency of the law is "toward making delivery of evidentiary value only, and . . . (that) if there is clear cogent evidence of an intent to pass title, the transfer should be complete."[20] If valid delivery has been made, such gift is not revocable by the donor unless he has reserved power to revoke or has obtained the consent of those beneficially interested.[21]

In conflict with the principal case, the Pennsylvania court in *Robert's Appeal*[22] held that a transfer of the shares on the books of the corporation "stand[s] in place of delivery"; but the majority of courts hold to the contrary,[23] some saying further that "if the thing be a chose in action, the law requires an assignment or some

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(1903) (invalid pointed out places where money was secretly buried); Hillebrant v. Brewer, 6 Tex. 45, 55 Am. Dec. 757 (1851) (cattle branded and brand recorded in name of child donee).

12. Matter of Frothingham, 161 Misc. 317, 291 N. Y. Supp. 656 (1936); *In re* Cohn, 187 App. Div. 392, 176 N. Y. Supp. 225 (1919); BROWN, *op. cit. supra* note 9, at 113; Mechem, *supra* note 9, at 578. *But see* note (1929) 63 A. L. R. 537, at 550.

13. Costigan, *Gifts Inter Vivos of Choses in Action* (1911) 27 L. Q. REV. 326; notes (1921) 34 HARV. L. REV. 664, (1926) 3 WIS. L. REV. 494, (1939) 121 A. L. R. 426.

14. Schouler, *Oral Wills and Death-Bed Gifts* (1886) 2 L. Q. REV. 444; notes (1932) 32 COL. L. REV. 702, (1913) 11 MICH. L. REV. 409, (1891) 11 L. R. A. 684.

15. Ewing v. Ewing, 2 Leigh 337, 341 (Va. 1830); Noble v. Smith, 2 Johns 52 (N. Y. 1806); Rundell, *Gifts of Choses in Action* (1918) 27 YALE L. J. 643.

16. Mechem, *Gifts of Corporation Shares* (1925) 20 ILL. L. REV. 9.

17. Smith v. Simmons, 99 Colo. 227, 61 P. (2d) 589 (1936); Albrecht v. Slater, 233 S. W. 8 (Mo. 1921); *In re* Soulard, 141 Mo. 642, 43 S. W. 617 (1897); notes (1929) 60 A. L. R. 1054, (1923) 25 A. L. R. 642, (1919) 3 A. L. R. 902.

18. Bryant v. Parker, 188 Ark. 598, 66 S. W. (2d) 1061 (1934); Perry v. First Nat. Bank, 228 Mo. App. 486, 68 S. W. (2d) 927 (1934); Brooks v. Brooks, 54 Ga. App. 276, 187 S. E. 687 (1936); note (1937) 4 OHIO ST. L. J. 134.

19. Note, *Delivery in Gifts of Personal Property* (1920) 20 COL. L. REV. 196, 197 (discussion by H. F. Stone). Other reasons for the survival of this doctrine are presented by Pound, *Juristic Science and Law* (1918) 31 HARV. L. REV. 1047, 1055.

20. Hillebrant v. Brewer, 6 Tex. 45, 55 Am. Dec. 757 (1851); FRYER, PERSONAL PROPERTY (3rd ed. 1938) 779; see note 12, *supra*.

21. Skillin v. Skillin, 133 Me. 347, 177 Atl. 706 (1935); Alderman v. Alderman, 178 S. C. 9, 181 S. E. 897 (1935); note (1937) 4 OHIO ST. L. J. 134.

22. 85 Pa. St. 84, 87 (1877); note (1924) 24 COL. L. REV. 767.

23. Besson v. Stevens, 94 N. J. Eq. 549, 120 Atl. 640 (1923); Richardson v. Emmett, 61 App. Div. 205, 211, 70 N. Y. Supp. 546 (1901).

equivalent instrument, and (that) the transfer must be actually executed."[24] Thus it seems that in accordance with this orthodox requirement of delivery, which apparently can be changed only by legislative action,[25] the court in the present case was correct in denying the validity of the alleged gift.

However, as is admitted by this case, the failure to establish a perfect gift *inter vivos* does not preclude the donee from showing and having enforced a perfected valid trust;[26] but this view has been criticized because it gives more weight to "I hold in trust for you" than it does to "I give" plus "I accept" if the latter is without delivery.[27] A "gift" is distinguished from a "voluntary trust" in that the legal title itself passes to the donee where there is a gift, while in the case of a trust the actual, beneficial, or equitable title passes to the beneficiary, while the legal title and possession are retained by the person creating it to hold for the purpose of the trust.[28]

The court in the case of *De Leuil's Ex'rs v. De Leuil,* made a composite statement of the requirements of a trust where it said,[29] "The owner of property can make himself a trustee of it for another by conduct alone,[30] without words,[31] without a writing,[32] without a delivery of the property,[33] without receiving consideration,[34] without that other being apprised of the creation of the trust in his behalf,[35] without the owner's knowing that what he was creating was called a trust,[36] and wihout making any communication to any other person."[37] Or, as presented by other courts, "four requisites must concur to create a trust: (1) sufficient words to create it; (2) a definite subject; (3) a definite object; (4) the terms of the trust should be sufficiently declared."[38] The only difference of opinion between

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24. Bond v. Bunting, 78 Pa. St. 210 (1875) (rather broad conclusions); *accord,* Cummings v. Bramhall, 120 Mass. 552 (1876).

25. Labatt, *The Inconsistencies of the Law of Gifts* (1895) 29 AM. L. REV. 361, 372.

26. Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629 (1905); notes (1926) 39 HARV. L. REV. 368, 372, (1931) 15 MINN. L. REV. 484.

27. Pound, *Consideration in Equity* (1919) 13 ILL. L. REV. 667, 670; FRYER, *op. cit. supra* note 20, at 915; Labatt, *supra* note 25, at 368.

28. Linder & Boyden Bank v. Wardrop, 291 Ill. App. 454, 10 N. E. (2d) 144, 145 (1937).

29. 255 Ky. 406, 74 S. W. (2d) 474, 476 (1934).

30. BROWN, *op. cit. supra* note 9, at 154 and 156.

31. Smith's Estate, 144 Pa. St. 428, 22 Atl. 916 (1891).

32. Lane v. Ewing, 31 Mo. 75, 86, 77 Am. Dec. 632 (1860); 1 PERRY, TRUSTS AND TRUSTEES (6th ed. 1911) No. 86; notes (1914) 51 L. R. A. (N. S.) 1208, (1908) 12 L. R. A. (N. S.) 547.

33. Korompilos v. Tompras, 251 S. W. 80, 81 (Mo. App. 1923) (collection of Mo. authorities); notes (1928) 37 YALE L. J. 1133, (1941) 131 A. L. R. 967, (1930) 66 A. L. R. 881, (1927) 48 A. L. R. 189.

34. *Supra* note 29.

35. Stoehr v. Miller, 296 Fed. 414, 423 (C. C. A. 2d, 1923); notes (1924) 33 YALE L. J. 789, (1929) 59 A. L. R. 975, (1907) 10 L. R. A. (N. S.) 616.

36. Note (1924) 24 COL. L. REV. 767, 770.

37. 1 SCOTT, TRUSTS (1939) 150.

38. *In re* Soulard, 141 Mo. 642, 43 S. W. 617 (1897); Smith's Estate, 144 Pa. St. 428, 22 Atl. 916 (1891).

these statements and those of other courts seems to be that some courts hold that the settlor must have had the intention to create *a trust as such,*[39] though intention alone is insufficient.[40] A valid declaration of trust cannot be revoked except by an expressed intention of the creator, either directly or indirectly,[41] and the Statute of Frauds does not apply to a trust touching personalty.[42] The acceptance of the beneficiary is presumed[43] and relates back to the creation of the trust.[44]

The shortlived[45] policy of sustaining imperfect gifts as valid trusts originated in the case of *Ex parte Pye,*[46] and was followed by a few cases.[47] However, such policy was soon discarded,[48] the reason for its rejection being that "then every imperfect instrument would be made effectual by being converted into a perfect trust."[49] Thus, although the courts will enforce a valid trust, the courts will not enforce an imperfect gift as a trust.[50] The fact that the settlor retained a beneficial interest in the property during his life,[51] or the fact that he reserved the right to interest from the property,[52] is not inconsistent with the making of a valid trust; but although the absence of the power of revocation creates no presumption against the trust,[53] such absence has been held to be suspicious.[54] In applying these trust principles to the present case, inasmuch as the only element in favor of the alleged beneficiary was the strongly expressed intention of the husband to give, and not

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39. Eschen v. Steers, 10 F. (2d) 739, 741 (C. C. A. 8th, 1926) (collection of Mo. authorities).

40. Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940 (1889); Ginn's Adm'x v. Ginn's Adm'r, 236 Ky. 217, 32 S. W. (2d) 971 (1930); PERRY, *op. cit. supra* note 32, at 111; notes (1939) 123 A. L. R. 1335, (1935) 96 A. L. R. 383.

41. Haulman v. Haulman, 164 Iowa 471, 145 N. W. 930 (1914); Irving Bank-Columbia Trust Co. v. Rowe, 213 App. Div. 281, 210 N. Y. Supp. 497, 501 (1925); note (1925) 39 A. L. R. 37.

42. MO. REV. STAT. (1939) § 3494; MO. STAT. ANN. (1939) § 3494, p. 822; Wiehtuechter v. Miller, 276 Mo. 322, 331, 208 S. W. 39 (1918); concerning realty, Scott, *Conveyances Upon Trusts Not Properly Declared* (1924) 37 HARV. L. REV. 653.

43. Roberts v. Taylor, 300 Fed. 257, 260 (C. C. A. 9th, 1924).

44. Stoehr v. Miller, 296 Fed. 414 (C. C. A. 2d, 1923).

45. Note (1895) 9 HARV. L. REV. 213.

46. 18 Ves. 140, 34 Eng. Rep. R. 271 (1811).

47. Morgan v. Malleson, L. R. 10 Eq. 475 (1870); Richardson v. Richardson, L. R. 3 Eq. 686 (1867); Parks, *Declarations of Trusts and the Statute of Uses* (1923) 27 U. OF MO. BULL. L. SER. 3, 8.

48. Heartley v. Nicholson, L. R. 19 Eq. 233 (1875); Richards v. Delbridge, L. R. 18 Eq. 11 (1874); Kekewick v. Manning, 1 De G. M. & G. 176, 42 Eng. Rep. R. 519 (1851).

49. Milroy v. Lord, 4 De G. F. & J. 264, 45 Eng. Rep. R. 1185 (1862).

50. Perry v. First Nat. Bank, 91 S. W. (2d) 78 (Mo. App. 1936); Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634 (1880); Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446 (1878); Moore v. Moore, L. R. 18 Eq. 474 (1874); 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) 2188.

51. Notes (1939) 118 A. L. R. 481, (1931) 73 A. L. R. 209.

52. Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629 (1905). *But cf.* Eschen v. Steers, 10 F. (2d) 739 (C. C. A. 8th, 1926). Scott, *Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 525.

53. Sands v. Old Colony Trust Co., 195 Mass. 575, 81 N. E. 300 (1907).

54. Northrip v. Burge, 255 Mo. 641, 164 S. W. 584 (1914).

to create a trust, it appears that the court was well substantiated by authority in its refusal to acknowledge the creation of a perfected trust.

PAUL D. HESS, JR.

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TAXATION—THE USE TAX—EXTRASTATE COLLECTION

*Nelson v. Sears, Roebuck & Co.*[1]

An Iowa statute created a use tax which was complementary to its retail sales tax. The tax is on the use of tangible personal property in Iowa, and is assessed at the rate of 2% of the purchase price. Every retailer maintaining a place of business in the state and selling goods for use in Iowa is required to collect the tax at the time of making the sale, whether within or without the state. The amount of such tax is a debt owed by the retailer to the state, and if the tax is not collected and paid into the state treasury his retailer's permit may be revoked, and, in the case of a foreign corporation, also its permit to do business in the state.[2] The Sears, Roebuck Company is a New York corporation which had been authorized since 1928 to do business in Iowa. It maintains several retail stores in Iowa, and pays sales tax for goods sold at retail there, as well as tax on goods ordered at such stores from out-of-state branches. It refused to collect the tax sought to be applied on orders by Iowa customers sent directly to the outstate branches, and brought suit for an injunction, alleging that the statute if applied to such transactions would burden interstate commerce and deprive the company of its property without due process of law. The Supreme Court of Iowa held the statute as so applied invalid.[3] In reversing, the United States Supreme Court through Mr. Justice Douglas held the statute valid, with two justices dissenting.

Today, the financial burdens of the states are constantly increasing, and to meet such increased burdens the states must either increase the revenue from old sources of taxes or tap new sources.[4] One of these relatively new sources is a tax on the use of property, which is now clearly established as being valid.[5] The doctrine of the use tax is of comparatively recent development, its first real test occurring in 1936, in the *Silas Mason* case.[6] So the contention of the Sears Company in the present case that the tax burdened interstate commerce was lightly brushed aside by saying "The validity of such a tax, so far as the purchaser is concerned, 'has been withdrawn from the arena of debate.' "[7]

"So the hub of the present controversy centers on the use of respondent as collection agent for Iowa. The imposition of such a duty, however, was held

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1. 85 L. ed. 522 (1941).
2. IOWA CODE (1939) § 329.4.
3. Sears, Roebuck v. Roddewig, 228 Iowa 1273, 292 N. W. 130 (1940).
4. See Wisconsin v. J. C. Penney, 311 U. S. 435, 442 (1940).
5. Henneford v. Silas Mason Co., 300 U. S. 577 (1936).
6. *Ibid.*
7. See note 1, *supra,* 524.

not to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co. v. Johnson,* 292 U. S. 86, and *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U. S. 62."[8] This statement clearly indicates that the problem which presents itself in this case is the requirement that a foreign corporation collect a use tax outside Iowa and send it into Iowa.

Mr. Justice Douglas says the present case is governed by the *Monamotor* and the *Felt & Tarrant* cases. It is submitted that a careful examination should be made of the authority of those cases, both as to factual similarity and legal principle. In the *Felt & Tarrant* case the California use tax was involved, the tax being on property to be used in California and collectible by corporations maintaining a place of business in California, whether the sale was made extrastate or not. The tax was to be collected by the seller at the time of the sale and remitted to California. The taxpayer was an Illinois corporation selling comptometers, and it maintained an office and salesmen in California. Orders were taken locally by the salesmen, filled in Illinois, then sent to the salesmen for distribution or sent directly to the customer in California. The court, speaking through Mr. Justice McReynolds, upheld the tax without argument or reason other than citing the *Monamotor* case, *Bowman v. Continental Oil Co.,*[9] and the *Silas Mason* case.[10] The authority of the *Monamotor* case will be examined shortly.

The *Bowman* case involved a tax by New Mexico on the sale of gasoline in that state. The taxpayer had thirty-seven stations so selling. As to the gasoline not sold in the original package, the tax was upheld. It is clear that here the tax was collected by a corporation selling in the state from retail outlets in the state to buyers in the state. Thus there was no extrastate problem. In the *Silas Mason* case a use tax was placed by Washington on all articles used there not previously taxed by a sales tax—the compensating use tax. It involves no problem of collection as exists either in the principal case or the *Felt & Tarrant* case, inasmuch as there is no extrastate attempt to collect—the tax being paid by the user after the chattel is brought into the state. So neither the *Bowman* case nor the *Silas Mason* case passes on the point whether extrastate collection of the use tax by the seller is valid, inasmuch as neither New Mexico nor Washington contemplated such collection. So it would seem that the *Felt & Tarrant* case must fall or stand upon the *Monamotor* case, if the above observations are correct. And since the principal case rests upon these two cases for its case authority, it also must rest upon the *Monamotor* decision.

In the *Monamotor* case, an Iowa statute applied a three cent tax on gasoline sold for use in Iowa. The tax was to be paid by any distributor *importing*[11] gasoline into Iowa for sale or use there, allowing certain deductions for evaporation and destruction. The taxpayer was an Arizona corporation maintaining storage points and retail stations in Iowa. Suit was brought for not reporting a number

8. *Ibid.*
9. 256 U. S. 642 (1920).
10. See note 5, *supra.*
11. Italics the author's.

of cars of gasoline imported from a Nebraska refinery which formerly stood in Iowa, but which, due to the changing of the river boundary, now stood in Nebraska. The corporation sought an injunction which was denied. In affirming the denial, the court, through Mr. Justice Roberts, who dissented in the principal case, said that there was no denial of due process: "Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement."[12] It is important to note that the tax became due and payable after the gasoline came into Iowa, and was collected in Iowa.

In the *Monamotor* case, and in the cited cases supporting the above quotation,[13] there are two salient features. First, there was no separation of goods as regards sales by different divisions of the taxpayer. All articles taxed resulted from sales negotiated or begun by local representatives. In the principal case this is not true—there was a separate division of the taxpayer not doing any local business at all in the taxed goods, but doing only interstate business. Second, the articles being taxed were within the state when taxed. This is not true in either the *Felt & Tarrant* case or the principal case.

Taking the *Felt & Tarrant* case as authority for the proposition that the articles need not be in the taxing state when the tax is collected, but bearing in mind that the interstate sales were solicited in the state by local agents in that case, the question of greatest importance then becomes whether the taxpayer in the principal case was maintaining a local business intimately and closely connected with its mail-order business. And if such connection exists, can it be made the basis for making such extrastate collection allowable under the state's power to regulate business within the state? It is interesting that in facing this point the principal case does not even mention *Western Union v. Kansas*,[14] which has long stood for the proposition that a state is denied the power to impose on a foreign corporation, as a condition to do local business, the relinquishment of some constitutional right or the assumption of some unconstitutional obligation. Under that doctrine it would seem that the obligation to pay the tax cannot be imposed as a condition to the right to carry on the local business unless the tax would be valid aside from the grant of the permit to do local business within the state. Mr. Justice Douglas deals with the point by saying: "Whatever may be the inspiration of these mail orders, however they may be filled, Iowa may rightly *assume*[15] that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business, though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amounts of benefits which respondent is receiving from

12. Monamotor Oil Co. v. Johnson, 292 U. S. 86 (1933).
13. Citizen's Natl. Bank v. Kentucky, 217 U. S. 443 (1909); Pierce Oil Co. v. Hopkins, 264 U. S. 137 (1923); Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S. W. 753 (1922); Standard Oil Co. v. Jones, 48 S. D. 482, 205 N. W. 72 (1925).
14. 216 U. S. 1 (1910).
15. Italics the author's.

Iowa business is to conform to business facts. . . . Respondent cannot avoid that burden though its business is departmentalized."[16]

Thus the Supreme Court of the United States says that Iowa may "assume" the business in dealing in the articles in controversy is one and the same with the local business, and upon that assumption may require a foreign corporation in Illinois to collect a use tax on an article the sale of which is consummated in Illinois. And this requirement, which is certainly pushing the state's taxing power to an extreme not previously sanctioned, is to be allowed since the state may force compliance by revoking the right to do local business because it "assumes" the connection. The opinion in the principal case bases its finding upon that assumption. It appears to make no attempt to develop any real argument upon which such a finding can be predicated. There is nothing more than the fiat statement. How is the present case to be construed? Would the same "assumption" be upheld if the retail stores sold feed and agricultural supplies while the mail-order establishment out-of-state sold clothing? It is submitted that the mere fact that the same type articles are sold by both is not a sufficient basis. Is the governing basis of the allowed assumption to be the fact that occasionally the retail clerks would tell a customer that he could mail an order to the out-of-state mail order house? Many retail stores refer customers to other retail stores or mail-order houses, yet it has never been said that such activity causes the business to be related.

The whole tenor of the principal case seems to indicate that the underlying basis of the decision may be found in the following words of Mr. Justice Douglas: "In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.'"[17] It is apparently this that leads the court to its statement that Iowa can assume that the taxpayer is one entity, no matter how the business is divided or what type business is done. The admitted truth of this statement cannot be denied, but it should not become a phrase upon which unique tax schemes should be upheld without argument or reason. The practicalities contemplated here by the court did not include the fact that to allow this tax would cost the taxpayer about $38,000 a year in tax collection,[18] a cost of collection which Iowa has been allowed to shift upon an Illinois corporation making sales in Illinois totally unrelated to any benefit which it might get from Iowa law. This burden is by the majority lightly disposed of by the statement that there was an equal burden in the *Monamotor* and *Felt & Tarrant* cases,[19] neither of which really tries to justify such methods. Keeping books is one thing, doing the entire job of collection is another. The taxpayer in the principal case is paying every kind of Iowa tax for its local sales in Iowa. Now since it does local business, it is forced

16. See note 1, *supra*, 524.
17. Citing Lawrence v. Tax Comm., 286 U. S. 276 (1931); Southern Pacific Co. v. Gallagher, 306 U. S. 167 (1939); Wisconsin v. J. C. Penney Co., 311 U. S. 435 (1940).
18. The dissenting opinion of Mr. Justice Roberts, note 1, *supra*, 526.
19. See note 1, *supra*, 525.

to pay even more taxes which like corporations doing a mail order business do not have to pay because they do not have any local connection at all in Iowa and hence in no way pay any local tax.

Perhaps in any expanding system of taxation such contributions as here exacted must be allowed. But before any such terrific extension of the concept of jurisdiction to tax is allowed in the *Felt & Tarrant* and principal cases, the supreme court should be careful to tell us why it is allowing such an extension. Decision by fiat has never been the basis for any enlightened advancement of the law, especially in the field of taxation.[20] The case of *Nelson v. Montgomery Ward*[21] goes no further in explanation than does the principal case. Taxation may be a practical matter, but surely the taxpayer himself is entitled to some measure of supreme court practicality.

ROBERT J. FOWKS

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TORTS—RIGHT OF ONE SPOUSE TO SUE OTHER FOR PERSONAL TORT

*Scotvold v. Scotvold*[1]

Plaintiff and defendant are wife and husband and, for some time prior to the time in question, the defendant had been employed as a traveling evangelist. Although plaintiff was under no contract with either the church or the defendant to do so, for a number of years she had accompanied defendant and had assisted in his work. In returning to the city where defendant was conducting meetings, from the funeral of defendant's cousin-in-law (at which defendant had taken part in the ceremony, and his wife, plaintiff, had quoted scripture and offered prayer) plaintiff was injured through defendant's negligent operation of the automobile. The court held that a civil action was maintainable in that state between husband and wife for damages for personal torts committed by one against the other. But the court entered judgment for the defendant, because, in point of law, plaintiff was a "guest" of her husband, "without payment for such transportation," and therefore acquired no cause of action against him.

In reaching their decision, the court had to construe two statutes, both of

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20. The law of taxation is not simple. Before practicing lawyers, courts, teachers or students can understand the import of a decision, the reasons for that decision should be made clear. Intelligent advice to client or student must be based upon reason. Any tendency on the part of the present court to make bare statements of what the law is without any reason therefor should not be regarded as conducive to the best interests of the law or the nation. That the present case is not the only example of such tendency becomes apparent from the cases of Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83 (1929), as compared to Pennsylvania v. Stewart, 61 Sup. Ct. 445 (1941), *aff'g* 338 Pa. 9, 12 A. (2d) 444 (1940) by memorandum opinion.

21. 85 L. ed. 529 (1941). This case was substantially the same as the principal case, with the additional fact that the corporation also advertised within the state.

1. 298 N. W. (2d) 266 (S. D. 1941).

which exist in some form or other in most states. The statutes involved are the Married Women's Statute (or Emancipation Act),[2] and the Automobile Guest Statute.[3] With the latter we are not concerned here.

The right of one spouse to maintain an action against the other for a personal injury depends on how far the Married Women's Act has abolished the common law rule that one spouse could not sue the other at law.[4] This rule was a necessary incident to the concept of the unison of the husband and wife in one personality. Although there are many variations in the decisions of the country as to the right to sue, the majority view denies the action.[5] The courts taking this view hold, in effect, that the legislature confers on the married women a status similar to that of unmarried women, but incomplete, with exceptions as between her and her husband. There is, however, a strong minority of courts that recognizes a right of action in favor of one spouse against the other for torts affecting primarily the person.[6]

Several reasons have been advanced by courts as the basis for recognizing or denying a cause of action under these circumstances.[7] Probably the strongest contention in favor of the majority view is the domestic tranquillity argument. But under an interpretation of the married women's statutes taken by many courts, suits are permitted between spouses based on breach of contract or involving property, and concern for domestic tranquillity is not controlling.[8] In the case of the tort of negligence, it is not probable that the tranquillity would be disturbed, as the wife would not be likely to sue the husband except for purposes of shifting the loss to his insurance. In fact, domestic happiness may be furthered where insurance money is available to pay for the medical, hospital, and other expenses made necessary in many injuries.[9] This may even be a reason for encouraging drivers

2. S. D. CODE (1939) § 14.0201 *et seq.* See: AM. JUR., *Husband & Wife,* § 591; note (1930) 43 HARV. L. REV. 1031, at 1036.

3. S. D. CODE (1939) § 44.0362. The "willful and wanton" provision of this act was construed in its strictest sense in Melby v. Anderson, 64 S. D. 249, 266 N. W. 135 (1936).

4. For discussion of the matter at common law, see note (1930) 43 HARV. L. REV. 1030, at 1031.

5. 27 AM. JUR., *Husband & Wife,* § 582. See notes (1924) 29 A. L. R. 1482, (1934) 89 A. L. R. 118; (1923) 3 B. U. L. REV. 115; (1924) 19 ILL. L. REV. 198; (1923) 21 MICH. L. REV. 473.

6. Thompson v. Thompson, 218 U. S. 611 (1910); (1914) 22 YALE L. J. 250; Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S. W. (2d) 696 (1931); Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Earle v. Earle, 198 N. C. 411, 151 S. E. 884 (1930); Fitzmaurice v. Fitzmaurice, 62 N. D. 191, 242 N. W. 526 (1932); Pardue v. Pardue, 167 S. C. 129, 166 S. E. 101 (1932); Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926); 27 AM. JUR., *Husband & Wife,* § 593. See Austin v. Austin, 136 Miss. 61, 100 So. 591, at 593 (1924) (dissenting opinion).

7. See note (1930) 43 HARV. L. REV. 1030, at 1054.

8. See note (1930) 43 HARV. L. REV. 1030, at 1036; 27 AM. JUR., *Husband & Wife,* § 587. For Missouri cases, see: Regal Realty & Ins. Co. v. Gallagher, 188 S. W. 151 (Mo. 1916); Grimes v. Reynolds, 184 Mo. 679, 83 S. W. 1132 (1904).

9. See note (1935) 48 U. OF MO. BULL. L. SER. 42 (concerning analogous situation of parent suing her infant child in tort with reasoning equally applicable to situation in instant case).

of cars to carry accident liability protection, for it is usually some member of the family who is riding in the car at the time of the accident. Nevertheless, most courts have held that the fact that there is insurance should make no difference,[10] on the theory that the insurance contract is one of indemnification, and the company should not be liable unless the insured would be liable. Of course, this begs the entire question as to when the insured is liable.

Although the courts of Missouri, as to the right of one spouse to sue the other for personal injuries, follow, in general, the prevailing view, and make no exceptions where there is insurance;[11] yet a wife has an action against her husband's employer for personal injuries sustained on account of negligence of her husband while he is acting within the scope of his employment.[12] It might be argued that insurance rates would be greatly increased under the other view. However, a comparison of the rates in this state with those in states adopting the minority view refutes this argument.[13]

It might well be asked what good is insurance protection as to those who may be injured while riding in a car, if it does not apply to members of the family, the very persons often, if not usually, subjected to the harms of the driver. Another man's wife has no difficulty in suing where the insured driver was negligent.

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10. Harvey v. Harvey, 239 Mich. 142, 214 N. W. 305 (1927).

11. Willott v. Willott, 333 Mo. 896, 62 S. W. (2d) 1084 (1933); Butterfield v. Butterfield, 195 Mo. App. 37, 187 S. W. 295 (1916). For Missouri statutes involved, see MO. REV. STAT. (1939) §§ 704, 2998.

12. Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S. W. (2d) 645 (1936); Rosenblum v. Rosenblum, 231 Mo. App. 276, 96 S. W. (2d) 1082 (1936). Also see note (1937) 2 MO. L. REV. 232. For majority view on this point see: Maine v. Maine & Sons Co., 198 Iowa 1278, 201 N. W. 20 (1924); Emerson v. Western Seed & I. Co., 116 Neb. 180, 216 N. W. 297 (1927); Riser v. Riser, 240 Mich. 402, 215 N. W. 290 (1927); notes (1925) 37 A. L. R. 165, (1928) 56 A. L. R. 331, (1930) 64 A. L. R. 296.

13. The following rates are what are called "A" classification, which means the car (Ford, Plymouth or other light car) is used for pleasure and family use. Rates are for "remainder of state" where listed; where not listed, they are the lowest rate in the state. They are on a $5,000/$10,000 bodily injury policy, and on a $5,000 property damage policy. All of the following states (except Missouri) adopt the "minority view," and allow one spouse to sue the other for personal torts.

| | Bodily Injury | Property Damage |
|---|---|---|
| Alabama | $26.40 | $6.40 |
| Arkansas | 22.40 | 5.60 |
| Connecticut | 22.40 | 5.60 |
| North Dakota | 18.40 | 5.60 |
| South Carolina | 24.80 | 6.40 |
| South Dakota | 12.80 | 4.60 |
| Wisconsin | 20.00 | 5.60 |
| MISSOURI | 25.60 | 5.60 |

It has been suggested that the substantially higher rates in Missouri are due to the humanitarian doctrine. See McCleary, *The Bases of the Humanitarian Doctrine Reexamined* (1940) 5 MO. L. REV. 56, at 87.