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Recent Cases

APPRAISALS—CONCLUSIVENESS OF ENGINEER'S ESTIMATES

*Massman Const. Co. v. Lake Lotawana Ass'n*¹

Plaintiff construction company sued for a balance alleged to be due, under a contract for excavation work. All material removed other than rock was to be paid for at \$1.00 per cubic yard, and all rock at \$8.00 per cubic yard. The contract provisions in issue provided:

“ . . . it shall be the duty of the engineers to . . . make such measurements as will determine payments to the contractor. . . . The Engineer shall . . . make a final estimate of the amount of work done and the Association shall . . . after such final estimate is made, pay the entire sum as found to be due. . . . ”

In preliminary estimates and in the final estimate the defendant's engineer classified none of the material excavated as rock. The controversy between the parties was the engineer's classification of material. At the trial, the plaintiff was allowed to show, over the defendant's objection, that 787.3 cubic yards of the material removed was rock. The defendant made a motion for a directed verdict for the reason that under the terms of the contract the engineer's estimate of material excavated was conclusive on the parties. The motion was refused. Defendant appealed from the judgement of the trial court. Held: judgement reversed.

The decision in the principal case treats the portion of the contract in issue as a provision for appraisal as distinguished from an agreement to arbitrate; apparently it was not contended that it was not an appraisal provision. The difference between the two situations is not clear,² but the distinction is of importance as appraisals are subject to rules different in many respects from those applied to arbitrations,³ and the modern arbitration statutes⁴ are held not to apply to appraisals.⁵

Treating the agreement as an appraisal the law is well settled that parties may contract that an engineer's estimate is to be final and conclusive, and that such

1. 210 S.W. 2d 398 (Mo. App. 1948).

2. It is not within the scope of this note to set out the possible distinctions between appraisals and arbitrations, but the following citations cover the subject thoroughly. *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 226 S.W. 846 (1920); STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* § 7 (1930); 33 *YALE L. J.* 90 (1923).

3. 6 *WILLISTON, CONTRACTS* § 1921A (Rev. ed. 1938); STURGES, *supra* note 2; Hensley, *Arbitration in Missouri*, 13 *Mo. L. REV.* 173 (1948).

4. *MO. REV. STAT.* § 15233 (1939).

5. *Dworkin v. Caledonian Ins. Co.*, *supra* note 2; *WILLISTON, CONTRACTS*, *supra* note 3.

an estimate is binding in the absence of fraud, bad faith, or mistake.⁶ The court found that there was no fraud, bad faith, or mistake in the principal case. The troublesome question that often arises, as it did in the principal case, is whether the words used indicate that the appraisal is to be final and conclusive.⁷

Upon a consideration of the cases interpreting appraisal provisions there seem to be two lines of authority. One asserts that if it is to be necessarily implied from the contract that the engineer's estimates were to be final and conclusive, then it is the equivalent of an express provision to that effect. This rule has been consistently adhered to by the Missouri courts,⁸ is adhered to in the principal case, and is probably the weight of authority.⁹

In the principal case the contract provision that, it shall be the duty of the engineer to make such measurements "*as will determine payments to the contractor,*" and that the engineer should make a final estimate of the work, after which the defendant should "*pay the entire sum as found to be due,*" was held to have the effect of express language that the engineer's estimates were to be final and conclusive.

6. In *Universal Const. Co. v. City of St. Louis*, 284 Mo. 89, 223 S.W. 931 (1920), the contract provision was that the commissioner was to determine classification of materials and his decisions were to be final and conclusive. In dealing with the provision the court said, "The contract is the law, as between the parties, and the commissioner is the judge. No appeal lies from his decision, in the absence of fraud, mistake, or such gross negligence or arbitrariness as would be tantamount to fraud." *Accord*: *Williams v. Chicago S. F. & C. Ry.*, 112 Mo. 463, 20 S.W. 631 (1892); *McGregor v. J. A. Ware Const. Co.*, 188 Mo. 611, 87 S.W. 981 (1905); 9 AM. JUR. § 36; 9 C.J. § § 115, 165, pp. 772, 826; 17 C.J.S. *Contracts* § § 367, 498.

In Indiana a different rule applies. Even express provisions are of no effect, the reason being that to so hold, would tend to oust the jurisdiction of the courts. *McCoy v. Able*, 131 Ind. 417, 30 N.E. 528 (1892).

7. No set form of words is required. As in the construction of any written instrument, it is sufficient if the intent is clear and unambiguous. *United States v. Hurley*, 182 Fed. 776 (C.C.A. 8th 1910); *Chapman v. Kansas City, C. & S. R.R.*, 114 Mo. 542, 21 S.W. 858 (1893).

It might, however, be noted that in the cases examined by the writer that where the phrase "and the engineer's estimate shall be final and conclusive" was used by the draftsman the courts found no difficulty in construing the provision as a binding agreement for an appraisal.

8. In *Chapman v. Kansas City, C. & S. R.R.*, 114 Mo. 542, 21 S.W. 858 (1893), there was a contract for the sale of railroad ties. The defendant's inspector was to determine which ties were acceptable. The court held, "It is not necessary that the contract say, in express terms, that the decision of the third person shall be final. It is enough that the condition which is to be performed before payment is stated." *Accord*: *Mackler v. Mississippi River & B.T. R.R.*, 62 Mo. App. 677 (1895); *Clark v. Diffenderfer*, 31 Mo. App. 232 (1888). There is a collection of the Missouri cases upon this point in the principal case, *supra* note 1.

9. In *Mitchell & Sexton v. Kavanagh*, 38 Iowa 286 (1874), the plaintiff was to be paid for excavation work upon the engineer's estimates. The court said, "This . . . does not in terms make the decision final; yet the force of the language is such as, in our estimation, to leave no doubt that the parties understood that they were both agreeing to abide his decision." *Accord*: *McAvoy v. Long*, 13 Ill. 147 (1851). *But cf.* *Salfisberg & Co. v. City of St. Charles*, 154 Ill. App. 531 (1910).

The other view is that the intention of the parties that the estimate of an engineer shall be final and conclusive must plainly appear from the words used, and such an agreement is not to be implied.¹⁰ This rule is apparently also followed by the federal courts,¹¹ and the reasoning is very similar to that which is applied where agreements for arbitration have been held abortive.¹²

These holdings rest solely upon historical grounds and the opposition of early tribunals to any agreements which would deprive them of jurisdiction.¹³ There would seem to be little justification for the perpetuation of such reasoning, and this has been recognized,¹⁴ but too often the force of precedent prevails.

The rationale behind the rule that seems to have the weight of authority is that appraisals do not oust a court of its jurisdiction,¹⁵ hence there is no reason to avoid carrying out the parties expressed intention.¹⁶

10. One of the earliest applications of this rule appears in the case of *Memphis, Clarksville & Louisville R.R. v. Wilcox*, 48 Pa. 161 (1864). Other cases applying the rule are: *Williams v. Mt. Hood Ry. & Power Co.*, 57 Ore. 251, 110 Pac. 490 (1910); *Zimmerman v. Marymor*, 290 Pa. 299, 138 Atl. 824 (1927), 54 A.L.R. 1252, 1255 (1928). See also 6 R.C.L. § 340 and citations, *infra*, note 11.

11. A leading federal case is *Mercantile Trust Co. v. Hensey*, 205 U. S. 298 (1907), in which the court said, "To make such a certificate conclusive requires plain language in the contract. It is not to be implied."

An earlier federal case was *Central Trust Co. v. Louisville, St. L. & T. Ry.*, 70 Fed. 282 (C.C. D. Ky. 1895), where the contract provided, "When the work is completed and accepted, there shall be a final estimate made by the engineer, of the quantity, character, and value of the work, . . . and upon the contractor's giving a release . . . will be paid in full." The court held that such a provision was not conclusive upon the parties saying, "The court should not imply such an agreement, but should require clear and express language, because it is contracting away the right of the party to appeal to the courts of justice in case of a controversy."

For collection and review of the leading cases supporting both rules of interpretation and dealing with appraisal provisions in general see 10 Ann. Cas. 575; Ann. Cas. 1931A 180; 47 L.R.A. (n.s.) 337; 54 A.L.R. 1255.

12. See authorities cited *supra* notes 10 and 11.

13. In early times when the courts were not overworked and the judges and other court officials received fees for each case they very zealously guarded their jurisdiction. See statements of Lord Campbell in *Scott v. Avery*, 5 H. L. Cas. 811, 25 L.J. Exch. N.S. 303, 10 Eng. Rep. 1121 (1856). The remarks of Lord Campbell have been omitted in the report of the case in 5 H. L. Cas. 811, 851. See also 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 305 (1923); MAITLAND, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 193.

For an excellent review of this ancient dogma see the critical opinion of Judge Hough in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (D.C. S.D. N.Y. 1915).

14. Hough, J., in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, *supra* note 13; Grier, J., in *Fox v. Hempfield R.R.*, 9 Fed. Cas. 627, No. 5010 (W.D. Pa. 1857); Pigott, J., in *Cotter v. Grand Lodge A.O.U.W.*, 23 Mont. 82, 57 Pac. 650 (1899).

15. Parties can provide for third parties to validly decide specific, preliminary, minor, incidental, auxiliary, or collateral questions of fact not going to the root of the cause of action, which are intended simply as an aid and guide to the courts in any litigation that subsequently may ensue over the contract by settling in advance some particular fact, so as to furnish evidence of it at the trial. See:

It is likely that the courts which follow the stricter rule of interpretation will change their position in view of modern conditions,¹⁷ and a growing recognition of the utility of binding appraisals in business relations.¹⁸

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GIFT CAUSA MORTIS—DELIVERY TO THIRD PARTY

*Slager v. Allen*¹

Mrs. Meriwether, knowing she was to undergo a serious operation, two or three days before going to the hospital, caused to be delivered to Mrs. Evans a suitcase and a box containing private papers of the former. Mrs. Evans was instructed by Mrs. Meriwether that if the latter should die the papers were to be delivered to a Mr. Gilbert with instructions that he take them to the Boatmen's Bank, and if she should live to return them to her. Mrs. Meriwether died three days after the operation, and pursuant to Mrs. Meriwether's instructions the parcels containing the papers were delivered to the Boatmen's Bank. Upon the parcels being opened several envelopes and packages were found which contained names of the plaintiffs. There were also instructions that the envelopes, which contained money, were to be mailed and delivered by Mrs. Evans to the persons to whom they were addressed. All of the money contained in the parcels was deposited by the executors of Mrs. Meriwether's estate in the bank to the account of the estate. Plaintiffs brought this action against the executors of the estate asserting that the parcels were given to Mrs. Evans as agent for plaintiffs. The circuit court gave judgment for plaintiffs and defendants appealed asserting that there was no gift causa mortis because there was no delivery sufficient to pass title to the donees and that Mrs. Evans was not the agent of the donees.

The St. Louis Court of Appeals reversed the judgment, stating that delivery to a third person with instructions to deliver to the intended donee at the death of the donor with the donor retaining dominion and control over the property in the meanwhile is ineffectual as a gift causa mortis since the third party is constituted merely the agent or bailee of the donor.

This decision is in accord with the law of Missouri as set forth in *Walter v.*

Scott v. Avery, *supra* note 13; 47 L.R.A. (n.s.) 337 at 380; Burnham, *Arbitration as a Condition Precedent*, 11 HARV. L. REV. 234 (1897).

16. See authorities cited, *supra* note 9.

17. For an interesting treatment of an agreement to submit to arbitration, which the courts find more repugnant than appraisals, see *McCullough v. Clinch-Mitchell Const. Co.* 71 Fed. 2d 17 (C.C.A. 8th 1934), noted in 83 U. of PA. L. REV. 268 (1934). This holding may indicate a change of opinion as to both appraisal and arbitration.

18. Grossman, *Commercial Arbitration in Missouri*, 12 ST. LOUIS L. REV. 229 (1927). While this article deals with arbitration many of the arguments which the author sets forth in favor of arbitration also apply to appraisals.

1. 220 S.W. 2d 752 (Mo. App. 1949).

*Ford*² and *McCord's Administrator v. McCord*.³ These two cases, which are controlling in this state, adopted the less liberal rule as to delivery in gifts causa mortis. In *Walter v. Ford*, the deceased before his death delivered four checks to Ford, one payable to each appellant, with instructions that if deceased died the checks were to be delivered to the parties in whose favor they were drawn, but if he should live the checks were to be returned. The court said that to constitute a valid donatio causa mortis, there must be an actual delivery of the subject of the gift "in the lifetime" of the donor, and delivery to a third person with directions for him to make delivery after the death of the donor and if the donor should recover to return the property to him is not a sufficient delivery of the property.

In *McCord's Administrator v. McCord*, the property was delivered to a third person for safekeeping but the bailee was later told by the bailor that if anything happened to the latter the bailee should divide the money, after paying certain expenses, equally among the bailee and certain other of the donor's children. The court held that since the only delivery made was by way of bailment and not in execution of the gift, the delivery was not sufficient to sustain a gift causa mortis. The court stated that the delivery necessary to sustain a gift causa mortis must be such as in case of a gift inter vivos would invest the donee with title and possession of the property.

Since the first cases arose in Missouri, the courts of this state have upheld the more strict doctrine as to delivery in the case of gifts causa mortis.⁴ As the law stands in Missouri, and a substantial number of other states today, delivery is essential to make an effective gift causa mortis. Delivery cannot be replaced by intention, words, or acts, but intention to make a present gift must accompany the delivery.⁵ Delivery must be such as to invest the donee with title and possession, and the donor must relinquish all control over the property. The delivery may be to a third person, but it must be made under such circumstances as to clearly show that the donor has relinquished all control over the property, and has completely divested himself of title, subject only to the inherent conditions of the gift causa mortis. To be sure, the title which the donee takes is defeasible and is subject to being divested by the donor surviving, but there must be a present, complete, and executed transaction such as would be effectual to make a perfect gift inter vivos. If the delivery is merely to an agent of the donor with instructions for the agent to deliver upon the donor's death and with the donor retaining

2. 74 Mo. 195, 41 Am. Rep. 312 (1881).

3. 77 Mo. 166, 46 Am. Rep. 9 (1882).

4. *Shackelford v. Brown*, 89 Mo. 546, 1 S.W. 390 (1886); *Tomlinson v. Ellison*, 104 Mo. 105, 16 S.W. 201 (1891); *Dunn v. German-American Bank*, 109 Mo. 90, 18 S.W. 1139 (1892); *Bieber's Administrator v. Boeckmann*, 70 Mo. App. 503 (1897); *Godard v. Conrad*, 125 Mo. App. 165, 101 S.W. 1108 (1907); *Reynolds v. Hanson*, 191 S.W. 1030 (Mo. App. 1917); *Gentleman v. Sutter*, 215 S.W. 2d 477 (Mo. 1948).

5. *Bieber's Administrator v. Boeckmann*, *supra* note 4; *McCord's Administrator v. McCord*, 77 Mo. 166, 46 Am. Rep. 9 (1882); THORNTON, GIFTS AND ADVANCEMENTS § 131 (1893); 3 POMEROY, EQUITY JURISDICTION § 1149 (1883).

dominion over the property, the agent has no authority to deliver after the death of the principal.⁶ It should be of no importance whether or not there is a written memorandum in the case of a gift causa mortis.⁷ But while Missouri and a substantial number of the other states have followed this strict rule, other states in the United States have adopted a more liberal rule. The courts of those states following the more liberal rule appear to base validity more upon intention than upon whether or not the donor has relinquished control over the subject of the gift. Where the donor clearly expresses his intention of making a gift to the donee, the courts of those states applying the liberal doctrine will presume, in the absence of countervailing circumstances, that the third party to whom delivery is made took as trustee for the donee and will sustain the validity of the gift even though there was not a completed transaction by which the donor relinquished control over the property.⁸

To understand these divergent rules in the United States it is necessary to consider the history of gifts causa mortis. The doctrine was adopted by the early English courts from the Roman Civil Law with, of course, some modifications. At Roman law, delivery was not necessary, but the gift was perfected as soon as the donor indicated his intention, and the donor was then obligated by law to deliver the subject of the gift to the donee.⁹ Swinburne, writing in 1635, does not mention delivery, thus it is not certain that delivery was required at early common law.¹⁰ But as the doctrine finally emerged at common law, the courts made delivery an essential element.¹¹ The first cases in England were liberal as to what constituted sufficient delivery and seemed to presume that a third party took as agent or trustee for the benefit of the donee. But in 1845, in the case of *Farquharson v. Cave*,¹² the rule that the donor must relinquish all control over the property ap-

6. *Supra* note 4; *Walter v. Ford*, 74 Mo. 195, 41 Am. Rep. 312 (1881); *McCord's Administrator v. McCord*, *supra* note 5; *THORNTON, op. cit. supra* note 5, § § 134, 144, 160, 161, 166; 3 A.L.R. 902 at 917, 918, 922; 1 ALEXANDER, *COMMENTARIES ON WILLS* § 215 (1917); 1 SPENCE, *EQUITABLE JURISDICTION* 196 (1846); 2 KENT, *COMM. *444*; STORY, *EQUITY JURISPRUDENCE* § 606 (13th ed. 1886); 38 C.J.S. 905, *Gifts* § 86; 24 AM. JUR. 747, *Gifts* § § 30, 31; *Basket v. Hassell*, 107 U. S. 602 (1882).

7. *Tomlinson v. Ellison*, 104 Mo. 105, 16 S.W. 201 (1891); 1 ALEXANDER, *op. cit. supra* note 6, § 220; SHERWOOD, *AN INTRODUCTION TO THE PRINCIPLES OF EQUITY* 93 (1885).

8. *Williams v. Guile*, 117 N. Y. 343, 22 N.E. 1071 (1889); *Devol v. Dye*, 123 Ind. 321, 24 N.E. 246 (1889); *Virgin v. Gaither*, 42 Ill. 39 (1886); *Tyndale v. Randall*, 154 Mass. 103, 27 N.E. 882 (1891); *Begovich v. Kruljac*, 38 Wyo. 365, 267 Pac. 426 (1928).

9. *INSTITUTES* 2.7.

10. SWINBURNE, *WILLS *27* (1635).

11. *Drury v. Smith*, 1 P. Wms. 404, 24 Eng. Rep. 446 (1717); *Lawson v. Lawson*, 1 P. Wms. 441, 24 Eng. Rep. 463 (1718); *Ward v. Turner*, 2 Ves. Sr. 431, 28 Eng. Rep. 275 (1752) (leading case).

12. 2 Coll. 356, 367, 63 Eng. Rep. 768, 774 (1845), "A mere delivery to an agent, in the character of agent for the giver, would amount to nothing: it must be a delivery to the legatee, or some one for the legatee."

peared. This rule had been stated in the previous cases,¹³ but the distinction arose in determining when the donor had relinquished dominion over the property—a more strict rule being adopted in *Farquharson v. Cave*. Thus, at that point, the English cases appear to diverge, some cases following the liberal rule, others following the latter and more strict rule. Therefore, it is not surprising that some of the states in this country have adopted the liberal rule while others have adopted the strict rule. The strict rule is best analyzed and applied in the cases of *Basket v. Hassell*¹⁴ and *Nicholas v. Adams*.¹⁵ The rule stated in those cases, and followed by the courts of this state, requires that the delivery be such as to place dominion over the property beyond the donor and invest the donee with title, placing the possession of the property in the donee or in a third party for the donee. Evidence must clearly indicate that this situation exists or the gift will not be sustained. The liberal rule and the reasons for it are ably discussed by the Supreme Court of Wyoming in the case of *Begovich v. Kruljac*,¹⁶ the court stating, "The rule that the gift is valid if the third person is the agent of the donee, but not if he is the agent of the donor, may accordingly be of doubtful value, except, perhaps, in cases where the facts of the previous agency [agency relation between the donor and the third party] clearly indicate that there was no change of possession and no intention of a delivery."

Attempts have frequently been made to set up *Beck v. Hall*¹⁷ as a liberal authority in this state, but the courts have distinguished the facts of that case from the facts of cases where the delivery to the third party was not sufficient to pass title.¹⁸ In the *Beck* case, the delivery was accompanied by language which clearly indicated that it was the intention of the donor to pass the title even though the person to whom delivery was made had previously been the donor's agent and had previously kept the property in his possession. The donor expressed her desire to make the gift to the donees, and the third party gave her the notes upon which the donor wrote the names of the donees. The donor then returned the notes to the third party telling him to take them and take care of them. Thus the facts are distinguishable from *Slager v. Allen* where delivery to the donees was to be made only if the donor died, and if she did not die the property was to be returned, indicating that there was no intent to make a present gift. In the *Beck* case there was no condition that the property was to be delivered only upon the death of the donor.

The strict rule is based upon public policy to prevent mistake, imposition, and perjury. Because of the ease with which fraud could be perpetrated were the requirement of delivery not strictly followed, it seems that justice will best be served by maintaining the strict rule as applied in this state.¹⁹

BRUCE A. RING

13. *Ward v. Turner*, 2 Ves. Sr. 431, 28 Eng. Rep. 275 (1752).

14. 107 U. S. 602 (1882).

15. 2 Whart. 17 (Pa. 1836).

16. 38 Wyo. 365, 267 Pac. 426, 431 (1928).

17. 211 S.W. 127 (Mo. App. 1918).

18. *Genteman v. Sutter*, 215 S.W. 2d 477 (Mo. 1948).

19. *Ibid.*

PLEADING—DEPARTURE

*White v. Sievers*¹

Plaintiff filed a petition for an accounting against the defendants, a bank and its president, alleging he borrowed money from the bank, and had deposited certain instruments as collateral with the bank. He claimed the bank kept the proceeds from those instruments. He sued for an accounting and the return of the collateral, alleging that he had repaid the loan in full. Defendant bank filed a general denial and a counterclaim for \$7,712.50 for principle and interest on a note the bank claimed plaintiff owed it. Plaintiff first filed a general denial in his reply to the counterclaim, then plaintiff filed his second amended petition in which he abandoned his original action for an accounting and in six counts alleged fraudulent conversion of his six instruments given as collateral. He asked for six separate judgments. Defendant filed a motion to dismiss the mended petition on the ground that it substituted claims wholly new and different from the one originally alleged, and it constituted a departure. The motion to dismiss was sustained. From a judgment on the pleadings in favor of the defendant on the counterclaim, the plaintiff appealed.

One of the questions on the appeal was, "Does the new code permit a plaintiff to depart from his original petition and by an amended petition substitute a wholly different claim for the one originally pleaded?"

The court, speaking through Judge Douglas, gave a brief history of the rule against departure and then summed it up as follows, ". . . the rule against departure was intended to confine a case first to a single cause of action, then later to consistent actions which were authorized to be joined in the same petition under the old code."² The court then said that under the new code rule, Section 847.81,³ a plaintiff can depart from his petition by amending it to state a wholly new cause of action. The rule against departure, the court said, was not to be used in determining if the amendment was valid; departure made no difference, the only requirements being those indicated in the statute.

The court ended the discussion by saying, "We expressly hold that the rule against departure is no longer to be enforced. It has been abrogated by the new code."

1. 221 S.W. 2d 118 (Mo. 1949).

2. *Galloway v. Galloway*, 169 S.W. 2d 883 (Mo. 1943). Under the old rule the plaintiff was not allowed (by amendment) to introduce an entirely new cause of action, but could by amendment introduce such additional causes of action as under the provisions of the statute could be united in the same petition. *Wise v. O'Kelly*, 198 S.W. 2d 28 (Mo. App. 1946). The filing of an amended petition abandons the original petition if the amended petition states a different cause of action than the original. *State ex rel. Fechtling v. Rose*, 239 Mo. App. 178, 189 S.W. 2d 425 (1945).

3. Mo. Laws 1943, § 81 p. 378, Mo. REV. STAT. ANN. § 847.81 (Supp. 1948). "A party may amend his pleading as a matter of course at any time before a responsive pleading is filed and served. . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

The balance of this note will deal with two problems. First, what is a departure and second, does this case stand as direct authority for the proposition that the rule against departures in Missouri is abrogated?

"It is . . . a *settled rule*, that the replication must not depart from the allegations in the declaration in any material matter." (italics added) So spoke Chitty in his monumental work on *Pleading* in 1876.⁴ This was the common law rule and, as Chitty said, was a "settled rule" of pleading. In the light of our modern liberal methods of pleading this rule may appear a bit rigid; however, when the rule is considered in the light of the common law rules of pleading and the reasons for those rules, it becomes apparent that it was merely a part of the then existing philosophy of pleading. "This rule was consistent with the common-law purpose of securing a definite limited issue, the achieving of which would be prevented if the parties continually might seek new ground for their respective claims."⁵

Chitty also said, "A *departure* in pleading is said to be when a party quits or departs from the case or defence which he has first made, and has recourse to another; it occurs when the replication or rejoinder, &c. contains matter not pursuant to the declaration or plea, &c. and which does not support and fortify it."⁶ In Black's *Law Dictionary* departure is defined as, "The statement of matter in a replication, rejoinder, or subsequent pleading, as a cause of action or defense, which is not pursuant to the previous pleading of the same party, and which does not support and fortify it."⁷ Or, stated in a different way, there is a departure when the second or subsequent pleading contains matter not pursuant to the former, and which does not support or fortify it.⁸

A departure, therefore, obviously cannot take place until the replication.⁹ "An amendment to a petition . . . is not, technically, a 'departure'."¹⁰

The Missouri courts have seemed at times to follow these general rules. Scattered through the Missouri cases we find such statements as, "a reply can't be used as a substitute for the petition," cannot set up for the first time the cause of action sued on.¹¹ The "plaintiff must recover, if at all, on the cause pleaded in his petition, and on no other cause."¹² And, "a departure is a change of the cause of action by a subsequent pleading in the same lawsuit."¹³

4. CHITTY, PLEADING p. 674 (16th ed. 1876).

5. CLARK, CODE PLEADING p. 698 (2d ed. 1947); CHITTY, PLEADING p. 675 (16th ed. 1876), ". . . if parties were permitted to wander from fact to fact, forsaking one to set up another, no issue could be joined, nor could there be any termination of the suit."

6. *Supra* note 4.

7. BLACK'S LAW DICTIONARY p. 556 (3d ed. 1933).

8. CO. LITT. *304a.

9. STEPHEN, PLEADING p. 410 (9th ed. 1867).

10. BLACK'S LAW DICTIONARY p. 557 (3d ed. 1933), citing several cases, the best of which is *Union Bank & Trust Co. v. Ponder*, 220 Ky. 365, 295 S.W. 140 (1927).

11. *Mathieson v. St. Louis & S.F. Ry.*, 219 Mo. 542, 118 S.W. 9 (1909).

12. *Platt v. Parker-Washington Co.*, 161 Mo. App. 663, 144 S.W. 143 (1912) ("the reply is a purely defensive pleading"); *Rhodes v. Holladay-Klotz Land & Lumber Co.*, 105 Mo. App. 279, 79 S.W. 1145 (1904) (It is not departure

However, there is another line of cases which seem to say it is possible to have a departure by an amendment. In the case of *Jacobs v. Chicago, P. & St.L. R.R.*,¹⁴ the court said:

"There are two well-established tests by which to determine whether an amended petition is in point of fact an amendment or a substitution of a new cause of action. First, will the same evidence support both petitions; and, second, will the same measure of damages apply to each. Both of these questions must be answered in the affirmative to hold the modification an amendment. If either or both of these questions are answerable in the negative, then it must be held there is a *departure* and a substitution of a new cause of action."

This is peculiar, in that these cases seem contrary to the decisions which say a departure can occur only in a reply, or subsequent pleading. These two lines of cases appear to set up two types of departure—departure in the reply, and departure in amendments to the petition. The earliest case found by the author, that hinted at such a deviation from the old rules of pleading, is the case of *State v. Grimsley*¹⁵ decided in 1853. In this case the declaration was on a collectors bond, the breach assigned was that the defendant collected a certain amount which he did not pay over. The plea was that the defendant collected the specified amount named in the breach and paid it over, and that this was all the money collected by him. The replication denied that this was all the money collected by defendant. Held: replication bad because of departure as tending to present an immaterial issue. The court said, "Departure, in pleading, is when a man quits or departs from his case, which he had first made, and has recourse to another *or* when the replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it." (italics added)

This writer submits that the part of the quotation before the word "*or*" may have reference to a change by some method other than by the reply. The language after the word "*or*" clearly considers a departure in the reply. Even if this case does not indicate all this writer submits that it does, the existence of these two lines of cases is beyond argument, and the fact that in Missouri we have two types of departure is clear.

The case under consideration (*White v. Sievers*) involved a departure in an amendment, and the court said the rule as to departure is abrogated. It would seem that this case would be direct authority for the proposition that departure in an amendment is permissible in Missouri, but query if it is authority for the

by reply when the reply contains nothing which could not be given in evidence under the petition, where it only pleads the evidence by which plaintiff hopes to sustain the charges in the petition.); *Booher v. Allen*, 153 Mo. 613, 55 S.W. 238 (1900).

13. *Halloran v. Hackmann*, 160 S.W. 2d 769 (Mo. 1942).

14. 204 S.W. 954 (Mo. App. 1918), cited in 12 WORDS & PHRASES 86. See also *Scovill v. Glasner*, 79 Mo. 449 (1883); *Liese v. Meyer*, 143 Mo. 547, 45 S.W. 282 (1898); *Ross v. Cleveland & A. Mineral Land Co.*, 162 Mo. 317, 62 S.W. 984 (1901); *Purdy v. Pfaff*, 104 Mo. App. 331, 78 S.W. 824 (1904).

15. 19 Mo. 171 (1853).

proposition that departure in the reply is permissible, since, as to that point, the language must be considered a dictum because departure in the reply was not involved in this case.

The holding of the court as to the amendment here was, in this writer's opinion, correct and a notable step toward liberality in the rule of pleading.¹⁶ The new code rules as to amendments are very flexible, and to apply the mechanical rule of departure to amendments would, in effect, destroy the advantages to be gained from the new rule on amendments.¹⁷

JEREMIAH NIXON

TORTS—APPORTIONMENT OF DAMAGES WHERE ONE OF CONCURRING
CAUSES IS AN ACT OF GOD

*Kennedy v. Union Electric Co. of Missouri*¹

Plaintiffs brought an action for damages resulting from flood water alleged to have been caused by the obstruction of the Osage River by the Bagnall Dam owned

16. 4 FED. RULES SERV. 889, discussion of Federal Rule 7a. 23. Federal rules are silent as to the scope of the reply and from this it might be deduced that the historical rule would be followed, but to enforce the departure rule would be inconsistent with the whole spirit of the code because:

1. Pleadings are not relied on as much as they once were for the formulation of issues—pre-trial conferences and discovery do that. PIKE, CASES ON NEW FEDERAL AND CODE PROCEDURE, p. 57-60 (1939).
2. "Amendments are liberally allowed, and the code rule against stating a 'new claim' in an amended pleading is not likely to be followed." Commentray, *Stating New Claim in Amended Pleading*, 3 FED. RULES SERV. 15a 3.
3. "An additional or supplementary claim may be set out as a counterclaim in the reply, or by supplemental pleading. . . Warren v. Indian Refining Co., 30 F. Supp. 281 (D.C. Ind. 1939), 2 FED. RULES SERV. 13.33; Otis Elevator Co. v. 570 Building Corp., 35 F. Supp. 348 (D.C. N.Y. 1940).
4. "The 'theory of the pleadings' doctrine is not followed; plaintiff is not required to pick a particular theory of law or fact and stick to it to the end." Fed. Rules 2, 15b, 54c; *Nester v. Western Union Tel. Co.*, 25 F. Supp. 478 (D.C. Cal. 1938).

For all of these reasons the rule against departure should not be regarded as in force under the federal rules since in most cases the same result could be accomplished by amending the complaint or petition. These rules really reduce the question of following or forgetting the rule to one of formality; whether the facts should be put in an amendment to the petition or in a reply. About the only practical argument for the rule is the fact that the defendant can not answer a reply. If facts are pleaded in the reply the issues would not be as clearly formulated as they would be by the use of the complaint and answer. However, in most cases this factor would be unimportant, and to force plaintiff to plead the facts by way of amendment and refuse his reply on the ground of departure would merely be a useless formality. (But query as to this when plaintiff seeks by a departure in the reply, to put in material not admissible as an amendment, as "unjust" to the defendant).

17. *Welch v. Thompson*, 357 Mo. 703, 210 S.W. 2d 79 (1948). Missouri Civil Code contemplates liberal amendments to pleadings so that trial on the merits may be had.

1. 216 S.W. 2d 756 (Mo. 1948).

and operated by defendant. Plaintiffs contended that the dam caused silt deposits to form in the Osage River and its tributary, the Pomme de Terre. The velocity of these waters was slowed down as they entered the Lake of the Ozarks formed by Bagnall Dam and, due to the low velocity, silt dropped from suspension in the water and deposited in the river beds. Plaintiffs further contended that these silt deposits caused water to back up into their premises at Fairfield, Missouri which is located on the Pomme de Terre, during a flood in May 1943. The defense interposed by the defendants was that plaintiffs' damage was the result of an act of God. The jury found the issues in favor of the plaintiffs. The judgment was affirmed in the Kansas City Court of Appeals,² and in the Missouri Supreme Court.³ On motion for rehearing defendant contended that plaintiffs failed to prove how much damage was due to defendant's obstruction of the stream apart from that damage attributed to the act of God and for that reason a new trial should be granted. The motion was overruled on the ground that there was no apportionment issue in the case.

The principal case was not tried on a theory of negligence in maintaining the dam but on tort in the nature of trespass.⁴ As the court pointed out, the principles covering liability for concurring acts of negligence are applicable in this case, although the theory of the action was not negligence.

Defendant contended that the concurrent negligence rule should not be applied where an act of God and an act of a defendant concur, but that the plaintiff should only recover for that part of his damage traceable to the acts of the wrongdoer. It should be pointed out that this proposition does not involve the question of legal or proximate cause but, on the contrary, whether or not the defendant is to be held for the total damages after the fact of legal cause has been established.

Missouri is in accord with the almost unanimous view that when two negligent acts concur to produce an injury, either actor is liable for the total harm whether both acts were insufficient in themselves to produce the injury or whether either one in itself was sufficient to bring about the injury.⁵ The rule finds its true justification on the ground of the difficulty of apportioning the damages.⁶

Whenever a fair and reasonably accurate basis for apportioning the damage be-

2. *Kennedy v. Union Electric Co. of Missouri*, 203 S.W. 2d 489 (Mo. App. 1947).

3. *Kennedy v. Union Electric Co. of Missouri*, 216 S.W. 2d 756 (Mo. 1948).

4. For the nature of the action see 2 FARNHAM, *WATERS AND WATER RIGHTS* §. 547 (1904).

5. *Carr v. St. Louis Auto Supply Co.*, 293 Mo. 562, 239 S.W. 827 (1922); *Robison v. Floesch Const. Co.*, 242 S.W. 421 (Mo. App. 1922); *Bragg v. Metropolitan St. Ry.*, 192 Mo. 331, 91 S.W. 527 (1905); *Hohimer v. City Light & Traction Co.*, 218 Mo. App. 138, 262 S.W. 403 (1924); *State ex rel. Hauck Bakery Co. v. Haid*, 333 Mo. 76, 62 S.W. 2d 400 (1933); *McWhorter v. Dahl Chevrolet Co.*, 229 Mo. App. 1090, 88 S.W. 2d 240 (1935); *Felber v. Union Electric Light & Power Co.*, 340 Mo. 201, 100 S.W. 2d 494 (1936); 38 AM. JUR. *Negligence* § 64 (1941); 45 C.J. *Negligence* § 487 (1928).

6. *Arnst v. Estes*, 136 Me. 272, 8 A. 2d 201 (1939); PROSSER, *TORTS* § 47 (1941).

tween the tort-feasors can be found, recovery against each tort-feasor is usually limited to that part of the damage directly attributed to him. An illustration of this proposition is the rule followed in Missouri and the great majority of jurisdictions where interferences or obstruction of water courses are involved. In such cases, persons acting independently who place obstructions in water courses are not liable for injuries resulting from other obstructions which contribute to the injury, but each is only liable for the damage done as a result of his own unlawful act.⁷

On the other hand, where two automobiles are negligently operated and collide, producing an injury to a third person, each negligent driver is liable for the whole resulting injury to the third party.⁸ The distinction between these two situations is patent. In the former situation, what part of the injury traceable to the individual tort-feasor can be ascertained with a reasonable degree of certainty. In the latter, it is highly impracticable if not impossible to ascertain just what part of the plaintiff's injury can be traced to an individual tort-feasor.

Where an act of God concurs with a wrongful act of a defendant to produce an injury, the same principles are applicable, *viz.*, where there is a fair and reasonably accurate basis for apportionment, it should be allowed.

In the principal case, both the act of God and the defendant's act were insufficient in themselves to produce plaintiffs' injury. It was necessary for the water to get four feet higher than it ever had before it could reach plaintiffs' buildings and the jury found that the rainfall was not so unusual or extraordinary that it could not have been anticipated. In point of fact, the water rose eight feet higher than it ever had. This leads to the inescapable conclusion that both the defendant's act and the act of God were necessary to produce any injury of plaintiffs. In the majority of jurisdictions and Missouri, the plaintiff is only allowed to recover from the defendant that part of the damage which is traceable to his wrongful act where it concurs with an act of God and part of the injury would have occurred even in the absence of the defendant's wrongful act.⁹ This principle is well illustrated in *Sherwood v. St. Louis S.W. Ry.*¹⁰ Plaintiff contended that defendant's negligence in not leaving a sufficient opening through its roadbed combined with high water from the Mississippi River to cause floodwater to overflow the defendant's embankment and wash away plaintiff's soil. The plaintiff's instruction on the measure of damages authorized recovery for all damages occasioned by the flood. The court said:

7. *Wm. Tackaberry Co. v. Sioux City Service Co.*, 154 Iowa 358, 132 N.W. 945 (1911), 134 N.W. 1064 (1912); *Benson v. City of St. Louis*, 219 S.W. 575 (Mo. 1920); *Martinovsky v. City of Hannibal*, 35 Mo. App. 70 (1889); 56 AM. JUR. *Waters* § 34 (1947).

8. See 131 A.L.R. 605 (1941).

9. *Brown v. Chicago, B. & Q. R.R.*, 195 Fed. 1007 (D.C. Neb. 1912); *Standley v. Atchison, T. & S.F. Ry.*, 121 Mo. App. 537, 97 S.W. 244 (1906); *Pfannebecker v. Chicago, R.I. & P. Ry.*, 208 Iowa 752, 226 N.W. 161 (1929); *Wilson v. Hagins*, 116 Tex. 538, 295 S.W. 922 (1927); *Radburn v. Fir Tree Lumber Co.*, 83 Wash. 643, 145 Pac. 632 (1915); see note 112 A.L.R. 1084 (1938).

10. 187 S.W. 260 (Mo. App. 1916).

"The damages which plaintiff could recover were not necessarily all that were occasioned by the flood as the instruction says, but only such, of any, as would not have occurred except by the opening in the embankment being too small."

It is submitted that the result reached by the court in the *Sherwood* case is sound both upon principle and authority and is in accord with fundamental principles of justice. Plaintiff would have been damaged to some extent in the absence of any negligence on the part of the defendant. While a wrongdoer should not escape liability, he should be subjected to liability only for damage which is attributable to his wrongful conduct. To hold otherwise, would in effect place an absolute liability on a defendant for harm in no way attributable to him and unduly favor a plaintiff by allowing recovery from an innocent and blameless defendant in so far as the damage attributable to the act of God is concerned. A minority and the *Restatement of Torts* are to the contrary.¹¹ It appears that these cases fail to recognize the distinction between the situation just referred to and that which will be discussed presently. Perhaps the best case illustrating the minority view and the oppressive results reached by it is *Inland Power & Light Co. v. Grieger*.¹² Defendant had constructed a dam and below the dam site was situated the plaintiff's farm. Excessive rains had caused water to flood plaintiff's land to a height of about five feet prior to December 22, 1933. On December 22, 1933 after the water was already standing in depth of about five feet on plaintiff's farm, the dam superintendent opened the discharge gates causing the waters to rise five or six inches on plaintiff's farm. The court held that the defendant was liable for all the injury.

A few cases have suggested another possible solution to the problem of apportionment.¹³ Where the defendant seeks to escape liability for the damage attributable to the act of God, these courts have placed the burden upon him to show what part of the damage is attributable to his conduct. If the defendant fails to sustain the burden, he must respond in damages for the entire loss. Such a view is obviously a compromise between allowing and denying apportionment. If it be admitted that apportionment is practicable, there is no good reason for departing from the rule that a plaintiff has the burden of proving his damages. Defendant is no more responsible for the damage caused by the act of God than he is for any other independent cause, and surely even the most biased mind would shrink from a rule requiring a defendant to prove he is not liable rather than placing the burden on the plaintiff to make out his case against the defendant.

An obviously different problem is presented where it appears, as in the principal case, that plaintiff would not have received any damage had it not been for the defendant's wrongful act. The principal case recognizes this distinction and in refusing to allow apportionment of damages, is in accord with the weight of author-

11. RESTATEMENT, TORTS §454 (1934); *Sloss-Sheffield Steel & Iron Co. v. Mitchell*, 161 Ala. 278, 49 So. 851 (1909).

12. 91 F. 2d 811 (C.C.A. 9th 1937), 4 Mo. L. Rev. 83 (1939).

13. *Speyer v. The Mary Belle Roberts*, Fed. Cas. No. 13,240 (D.C. Cal. 1871); *Central of Georgia Ry. v. Evans*, 35 Ga. App. 438, 134 S.E. 122 (1926).

ity.¹⁴ The defendant should be held liable for all of the resulting damage for two reasons: (1) There is no method by which a fair and reasonably accurate apportionment of the resulting harm can be made. The problem is so closely inter-related with that of causation that it is impossible to separate them. (2) The defendant is not morally blameless for a portion of the harm as he is in the situation where the act of God was sufficient in itself to cause a portion of the damage. Had he not been guilty of wrongful conduct, the plaintiff would have suffered no injury and it certainly strains no concept of justice to hold him liable for the consequences.

It is submitted that the result reached by the court in the principal case is sound and in no way unduly burdens a wrongdoer in favor of a plaintiff but, on the contrary, provides for an equitable and just assessment of damages against one who in reason and justice should be required to respond in damages for the total loss.

JAMES E. REEVES

TORTS—ATTRACTIVE NUISANCE DOCTRINE

*Lentz v. Schuerman Building & Realty Co.*¹

This was an action for damages for wrongful death of plaintiffs' three year old son and for hospital and medical expense. On motion of defendant, plaintiffs' petition was dismissed with prejudice and plaintiffs appealed. Thus the case came up on appeal without having been tried and, therefore, the facts had not been fully developed.

Plaintiffs' petition alleged the facts to be that defendant "was the owner of property in a thickly populated area in the City of St. Louis, covering most of a block on which defendant was building residences. There were completed residences on the west side of this block, in one of which plaintiffs lived. Defendant's employees were in the habit of building fires on unfenced portions of the lots in the rear of residences being built by defendant on the south side of the block, east of and adjacent to the rear of plaintiff's residence. There was no fence or obstruction between these partly constructed residences and the occupied residences. It was also alleged that defendant knew or should have known that small children of tender years and immature judgment were playing in, on and around the lots and property where defendant was erecting homes; that defendant knew or should have known that small children of tender years would be attracted to said premises for the purpose of gathering small pieces of lumber and other refuse for use in their play; that defendant permitted small children of tender years to so play and take materials from the rear of said buildings; that on or about the 4th day of December, 1946, defendant's employees caused a fire to be built on the rear of premises located at

14. *Bailey v. Wabash R.R.*, 207 S.W. 82 (Mo. App. 1918); *South Side Realty Co. v. St. Louis & S.F. R.R.*, 154 Mo. App. 364, 134 S.W. 1034 (1911); 38 AM. JUR. *Negligence* § 65 (1941); 169 A.L.R. 536 (1947).

1. 220 S.W. 2d 58 (Mo. 1949). *But cf.* *Angelier v. Red Star Yeast & Products Co.*, 215 Wis. 47, 254 N.W. 351 (1934).

6741 Dale Avenue, at a place where defendant knew, or could have known, that small children were accustomed to play; that defendant negligently permitted said fire to burn and smoulder, unattended and unguarded, in an extremely dangerous condition, at a place where defendant knew, or should have known, that small children were likely to contact said smoldering fire and injure themselves; and that defendant's employees negligently failed to put out said fire before they left said premises on the 4th day of December, 1946. It was further alleged that as a direct and proximate result of such negligence, on that date, plaintiffs' son was caused to come in contact with said smoldering fire and hot ashes and was severely burned, causing his death."

After the hearing on appeal, the Supreme Court of Missouri, Division No. 1, affirmed the decision of the lower court in dismissing plaintiffs' petition with prejudice. A motion for rehearing by the Supreme Court *en banc* was granted, but again the prior decisions were affirmed and the opinion adopted by Division No. 1 was adopted as the opinion of the court *en banc*.

In the course of that opinion, in discussing the possible applicability of the attractive nuisance doctrine, the court said that, of course, it could not be applicable to the case. Since the action was not brought under the attractive nuisance doctrine, and since plaintiffs did not claim that the doctrine was applicable or could be applicable to the case, this part of the opinion was clearly dictum. Under these circumstances, Judge Douglas dissented from the majority opinion on the ground that "the case should be tried to develop the facts fully in order to determine whether the application of the doctrine should be re-examined in view of present living conditions in densely populated urban areas." It is this dissenting opinion

The attractive nuisance doctrine is a method developed by the courts to place liability upon the owners or occupants of land for maintaining, either on their own premises or in a public place, a condition or instrumentality which is likely to cause injuries to trespassing children. The soundest basis upon which to sustain the doctrine is not on a logical legal basis but rather on the justifiable social basis of protecting the children of the community from serious bodily injury by regulating to a certain extent the use of property by its owners.² Considerations of common humanity and social policy are generally considered to outweigh the utility of permitting a possessor of land to use the premises as he pleases.³

Although the attractive nuisance doctrine has been well established for some

2. *Stark v. Holtzclaw*, 90 Fla. 207, 105 So. 330 (1925); *Kelly v. Southern Wis. Ry.*, 152 Wis. 328, 140 N.W. 60 (1913); and *Buddy v. Union Term. Ry.*, 276 Mo. 276, 207 S.W. 821 (1918), in which the court referred to the attractive nuisance doctrine as "a doctrine resting, firmly and beneficently . . . but solely, upon the humane sentiment of putting humanity above property, but otherwise ignoring legal landmarks and all other known and settled grounds of legal liability. . . ."

3. PROSSER, *TORTS* pp. 619-620 (1941).
that is the basis of this inquiry.

time now,⁴ the subject is one upon which there has been a remarkable difference of opinion. A few states have flatly rejected the doctrine, but the majority of the states, including Missouri, have accepted it with some limitations. The broadest view on the subject is adopted by the *Restatement of Tort*.⁵ In protection given infant trespassers, the *Restatement* goes beyond Missouri decisions which lay down two limitations that conflict with the position taken by the *Restatement*. These limitations were imposed in dicta by the Supreme Court of Missouri in *Hull v. Gilliox*.⁶ "(1) The doctrine applies in Missouri only where trespasses are due to the attraction of a dangerous instrumentality or condition, rather than applying to conditions and instrumentalities that the children could not see or know of without first trespassing. (2) The doctrine is limited [in Missouri] to conditions and instrumentalities which are inherently dangerous rather than those in which danger has been created by mere casual negligence under particular circumstances."⁷

The first limitation is in accord with *United Zinc & Chemical Co. v. Britt*.⁸ Under such limitations, there would be no possibility of bringing this action under the attractive nuisance doctrine if the smoldering fire could not be seen by the child so as to attract him onto the premises before he became a trespasser.⁹ Such limitation would be sufficient in itself to defeat plaintiffs' cause of action if it were brought under the attractive nuisance doctrine. However, since the court did not specify that the attractive nuisance doctrine could not be applicable to this case because the smoldering fire could not be seen by the child so as to attract him onto the premises before he became a trespasser, we must assume for purposes of this inquiry that the fire could be seen and did attract the child before he was a trespasser.

4. The attractive nuisance doctrine originated in the English case of *Lynch v. Nurdin*, 1 Q.B. 29. 113 Eng. Rep. 1041 (1841), and was first recognized and adopted in the United States in *Sioux City & P. R.R. v. Stout*, 17 Wall. 657 (U. S. 1873).

5. As stated by the RESTATEMENT, TORTS § 339 (1934): "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

- "a. the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
- "b. the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
- "c. the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
- "d. the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

6. 344 Mo. 1227, 130 S.W. 2d 623 (1939).

7. 7 Mo. L. REV. 474 n. 6 (1942).

8. 258 U. S. 268 (1922).

9. *W. F. Bradley Lumber Co. v. Crowell*, 28 Ala. App. 12, 178 So. 66 (1937).

As to the second limitation,¹⁰ it was specifically recognized and quoted by the court in its opinion as a reason for its statement that the attractive nuisance doctrine could be applicable to this case. The court pointed out that the "fire was a very temporary condition; and the failure to put it out, or to guard it until it went out, could only be casual negligence under any circumstances." Of course, as a result of that holding and the existence of the limitation, the attractive nuisance doctrine is clearly inapplicable to the case.¹¹

In the course of its opinion, the court pointed out that "the fire was upon defendant's own property and plaintiffs' son was not an invitee thereon." At another point, the court said, "This fire was wholly on defendant's own property and to reach it plaintiffs' son came there under circumstances which could make him no more than a licensee, if not a technical trespasser; and defendant, therefore, owed him no duty to guard him from the fire." The cases cited in support of this hold-

10. It has been questioned whether the second limitation is really a limitation at all or whether it is not another way of attempting to define the nature of an attractive nuisance. Since the court will likely conclude that the case is one of "casual or collateral negligence" if it refuses to apply the attractive nuisance doctrine, it would seem that it should be determined what is meant by the phrase "casual or collateral negligence" in order that it may be determined beforehand, with some degree of accuracy, whether the court will conclude that a particular case is one of "casual or collateral negligence," or whether, on the other hand, the court will conclude that the attractive nuisance doctrine is applicable. See Note, 7 Mo. L. Rev. 474 (1942). The Supreme Court of Missouri has discussed at length what constitutes an inherently dangerous condition or instrumentality but has said little as to what constitutes "casual or collateral negligence." Therefore, it seems necessary, in order to arrive at the meaning of "casual or collateral negligence," to consider the meaning of "inherently dangerous." As to what constitutes an inherently dangerous condition or instrumentality, see State *ex rel.* W. E. Callahan Const. Co. v. Hughes, 348 Mo. 1209, 159 S.W. 2d 251 (1941); Emery v. Thompson, 347 Mo. 494, 148 S.W. 2d 479 (1941); Hull v. Gillioz, 344 Mo. 1227, 130 S.W. 2d 623 (1939); 7 Mo. L. Rev. 474 (1942). But see also Comment, 82 U. of Pa. L. Rev. 67 (1933) where it is said, in answer to the question "how dangerous must the allurements be in order that the defendant may be judged negligent in leaving it exposed," that many courts have "imported an artificial test, that of danger 'inhering in the object,' devised by judges who were overly tender towards the rights of land owners and who wished to limit the rights of infants injured while on land of the defendant. . . . The test itself tells us nothing. Nothing is *inherently dangerous*: circumstances, surroundings make it so. If anything, . . . 'inherently dangerous' means probably harmful in its expectable use. The test, then, provides a rule for taking questions of probability of risk, *i.e.*, of negligence, from the jury, and putting them into the judge's hands. It leaves the decision in each close case to the judge, and provides no standard for fitting individual cases into a reasoned system of tort law. The attempt to provide a yardstick for ruling out, as a matter of law, certain instances of alleged negligence, seems likely to produce only conflicting and inconsistent decisions in the future. The test of 'inherent danger' is meaningless; its adoption is to be deplored."

11. For other smoldering fire cases, see Fitzmaurice v. Conn. Ry. & Lighting Co., 78 Conn. 406, 62 Atl. 620 (1905); American Adv. & Bill Posting Co. v. Flannigan, 100 Ill. App. 452 (1902); Penso v. McCormick, 125 Ind. 116, 25 N.E. 156 (1890); Smith v. Illinois Cent. R.R., 177 Iowa 243, 158 N.W. 546 (1916); Roman v. City of Leavenworth, 90 Kan. 379, 133 Pac. 551 (1913); Roman v. City of Leavenworth, 95 Kan. 513, 148 Pac. 746 (1915).

ing¹² were decided before *Hull v. Gillioz*, in which Missouri adopted the *Restatement's* position, which recognizes that protection is socially desirable even though the child is a trespasser. Missouri, by *Hull v. Gillioz*, recognized that the child is a trespasser but that liability would still be imposed under proper circumstances. It is submitted that this recognition that liability may properly be imposed, even though the child is a trespasser, should not be lost sight of since such recognition, necessarily involving the logical abandonment of the fictional implied invitation theory formerly followed in Missouri, was so clearly a step forward in legal analysis.

The attractive nuisance doctrine represents a conflict between the social interest in the protection of the young children of the community from serious bodily injury by dangerous conditions or instrumentalities and the economic interest in the protection of the landowner's unfettered beneficial use of his property. The problem in each particular case is to give the proper weight to each interest. If the greater weight is placed on the social interest, the attractive nuisance doctrine will be applied: if the greater weight is placed on the economic interest, the doctrine will not be applied.

In determining whether any condition or instrumentality falls within the attractive nuisance doctrine one of the tests relied upon by the courts is whether the utility or usefulness to the possessor and society in maintaining the condition or instrumentality outweighs the magnitude of the recognizable risk to trespassing children.¹³ The rule stated in the *Restatement of the Law of Torts* limits the liability of the possessor of land for bodily harm to trespassing children by an instrumentality or other artificial condition to cases in which "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."¹⁴

The magnitude of the recognizable risk to children includes the probability of injury which may be foreseen together with the seriousness of the injury which may be anticipated. The risk of injury may be so slight as not properly to be considered a basis for liability at all, but if the probability of injury is great it may be treated as a basis for liability. An element increasing the chance that conditions or instrumentalities may cause bodily harm to children is their presence in a thickly settled neighborhood, in which there are likely to be many children, as seems to

12. *Ford v. Rock Hill Quarries Co.*, 341 Mo. 1064, 111 S.W. 2d 173 (1937); *Smith v. Jacob Dold Packing Co.*, 82 Mo. App. 9 (1899).

13. *Cahill v. E. B. & A. L. Stone & Co.*, 153 Cal. 571, 96 Pac. 84 (1908); *Chicago & E. R.R. v. Fox*, 38 Ind. App. 268, 70 N.E. 81 (1906); *Erickson v. Minneapolis, St.P. & S.S.M. Ry.*, 165 Minn. 480, 205 N.W. 889 (1925); *City of Shawnee v. Cheek*, 41 Okla. 227, 137 Pac. 724 (1913); and *Chicago, B. & Q. R.R. v. Krayenbuhl*, 65 Neb. 889, 91 N.W. 880 (1902), in which the court, in a discussion of magnitude of the risk against the utility of the object, said that "in the determination of the question of negligence, regard must be had to . . . the purpose for which they [the premises] are used, the probability of injury therefrom, the precautions necessary to prevent such injury, and the relation such precautions bear to the beneficial use of the premises."

14. RESTATEMENT, TORTS § 339 (1934).

have been the situation in this instance since plaintiffs' petition alleged that the accident occurred in a thickly populated area in St. Louis. It is common knowledge that children will enter upon any unguarded property to play, especially in these days when automobiles make the streets a continual source of danger to young children. Where this greater likelihood of the presence of children and of consequent damage to their persons is presented, some courts have taken into consideration the increased probability of injury and have treated the circumstances as imposing a duty of greater care than would have been required if the conditions or instrumentalities had been located in a secluded spot rarely frequented by children.¹⁵ If, in addition, the injury which may be anticipated is serious, liability under the attractive nuisance doctrine may well be imposed. However, although the probability of injury is great, if the anticipated injury is not serious, the courts are naturally reluctant to impose liability under the attractive nuisance doctrine when such threatened liability might tend to restrict the normal operation of worthwhile economic enterprises.

In determining the utility or usefulness to the possessor and society in maintaining the condition or instrumentality, there should be considered, first, the economic usefulness of the dangerous device; second, the cost of removal of the danger; third, the physical difficulties that would be encountered in removing the danger; and fourth, the degree of interference with the possessor's use of his land or property which such removal of the danger would entail. A person maintaining a dangerous condition or instrumentality absolutely necessary for the reasonable operation of his lawful business is not liable for every injury to trespassing children, no matter how great the attraction, if the removal of the danger is impracticable because of prohibitive expense, unreasonably great mechanical difficulties, or unreasonable interference with the operation of the business. The liability of an owner of a condition or instrumentality dangerous and attractive to children bears a relation to the comparative ease or difficulty of preventing the danger, without destroying or impairing the usefulness of the condition or instrumentality.¹⁶ The doctrine will not be applied if the practicability of the condition or instrumentality would be destroyed by the precautions necessary to prevent injury to children attracted by it.

Would it have been reasonably practicable for the defendant company to remove the danger without destroying or impairing the usefulness of its property? The answer seems obvious. It cannot be denied that the economic usefulness of the dangerous condition, the fire, was slight, its only purpose being to consume

15. *Morse v. Douglas*, 107 Cal. App. 196, 290 Pac. 465 (1930).

16. *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S.W. 301 (1911); *Clark v. Pacific Gas & Electric Co.*, 118 Cal. App. 344, 5 P. 2d 58 (1931); *Polk v. Laurel Hill Cemetery Ass'n.*, 37 Cal. App. 624, 174 Pac. 414 (1918); *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113 (1896); *Bicandi v. Boise Payette Lumber Co.*, 55 Idaho 543, 44 P. 2d 1103 (1935); *Ryan v. Towar*, 128 Mich. 463, 87 N.W. 644 (1901); *Stendal v. Boyd*, 73 Minn. 53, 75 N.W. 735 (1898); *Wheeling & L.E. R.R. v. Harvey*, 77 Ohio St. 235, 83 N.E. 66 (1907); *City of Shawnee v. Cheek*, 41 Okla. 227, 137 Pac. 724 (1913).

ordinary waste materials which had accumulated during the construction of the buildings.

Several possibilities for the removal of the danger exist, none of which seemingly involve an exorbitant or unreasonable cost. In the first place, the fire could have been guarded while it was burning and the hot ashes or smoldering embers extinguished, at least before leaving the premises. Another possibility would be the construction of some sort of incinerator in which to burn such waste materials. It nothing else, such waste materials could probably have been easily hauled away from the lots to the city dump for disposal there.

The physical difficulties that would be encountered in removing the danger would vary, as would the cost, depending on the method used. It would seem that less physical difficulties, if any at all, would be encountered by guarding the fire. Hauling the waste materials to the city dump for disposal would involve slightly more physical difficulties since a transportation problem, as well as a loading and unloading problem, would be encountered. However, in neither instance would such difficulties seem to be unreasonable. As to the incinerator, while it could easily be used to remove the danger with respect to a three year old child such as the deceased, it would be more difficult, if not impracticable, to attempt the removal of the danger by such means with respect to older children. Such older children would likely be attracted to such an incinerator and, because of greater ingenuity than younger children, could hardly be prevented either from getting into such incinerator or coming in contact with it, with the possibility of a more or less serious injury resulting in either case. Other than this possibility, the physical difficulties to be encountered would not seem to be unreasonable as to any of the possible methods of removing the danger.

With respect to the degree of interference with the possessor's use of his land or property which such removal of the danger would entail, it does not appear that it would have been unreasonable whether the waste material was hauled away, burned in an incinerator, or the fire guarded and the smoldering embers extinguished. After all, the primary use of the property was for the construction of residences, and it cannot be argued logically that more care in disposing of such waste materials would interfere unreasonably with defendant's use of its property.¹⁷

Usually, where the defendant has been held liable for injury to a child by an attractive nuisance, the danger could have been removed easily and cheaply, with no serious interference with the usefulness of the property of the defendant.¹⁸ On the other hand, where the defendant has been held not liable for injury to a child by an alleged attractive nuisance, the danger usually could have been removed only with difficulty, or with relatively great expense, or even with considerable impair-

17. *Banker v. McLaughlin*, 146 Tex. 434, 208 S.W. 2d 843 (1948).

18. *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S.W. 301 (1911); *Banker v. McLaughlin*, 146 Tex. 434, 208 S.W. 2d 843 (1948).

ment or destruction of the usefulness of the defendant's property.¹⁹ Some cases however, are not disposed of by the courts in accordance with this classification. Such cases include, first, those cases where the defendant was held liable, the court saying that the defendant owed a duty to remove the danger, although it would seem from the facts that the removal of the danger would probably have presented unreasonably great difficulties;²⁰ and second, those cases where the defendant was not held liable although the removal of the danger would probably have been easy.²¹ The principal case seemingly falls in the second of the diverging groups since the defendant would not have been held liable under the attractive nuisance doctrine by the majority of the court although the removal of the danger would have been easy.

Although it seems obvious that the attractive nuisance doctrine could not be applicable to this case in view of the court's holding, under the second limitation, that failure to guard the fire or put it out could only be casual negligence, and also in view of the possibility that upon trial it might not be possible to bring this case within the first limitation, still the application of the attractive nuisance doctrine might well be re-examined from the standpoint of probability of injury in view of present living conditions in densely populated urban areas. Whether expressly stated or not, it seems that some consideration has been and is now given, at least by some courts, to the fact that there is a fundamental difference between sparsely populated rural districts and densely populated urban areas, and it seems that recognition of such distinction is valid in reaching a proper decision in any particular case.

BUELL F. WEATHERS

TORTS—RIGHT OF PRIVACY

*Berg v. Minneapolis Star & Tribune Co.*¹

Plaintiff had obtained a divorce decree which was later set aside by the court which granted the decree. An appeal was taken by the plaintiff, and while the appeal was pending, proceedings were brought regarding custody of plaintiff's children. During a recess in the hearing, a photographer, employed by the defendant newspaper, took a picture of the plaintiff, disregarding his vigorous protests. Plaintiff alleged that publication of the photograph was a violation of his right of privacy. The court held that the plaintiff had become a legitimate subject of public interest due to the divorce and custody proceedings and as a consequence there was no violation of his right of privacy.

19. *Polk v. Laurel Hill Cemetery Ass'n.*, 37 Cal. App. 624, 174 Pac. 414 (1918); *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113 (1896); *Stendal v. Boyd*, 73 Minn. 53, 75 N.W. 735 (1898).

20. *Berg v. B. B. Fuel Co.*, 122 Minn. 323, 142 N.W. 321 (1913).

21. *Erickson v. Great Northern Ry.*, 82 Minn. 60, 84 N.W. 462 (1900).

1. 79 F. Supp. 957 (D. Minn. 1948).

While the federal courts are bound to follow state law,² the court points out that the Minnesota courts have not had occasion to adopt or reject the doctrine of right of privacy. It concludes, however, even if the doctrine were adopted as a part of the Minnesota common law, that there was no violation in the principal case.

Samuel D. Warren and Louis D. Brandeis have generally been acknowledged as having been responsible for the introduction of the right in their well known law review article, "The Right of Privacy," published in 1890.³ Since that time it has been adopted by a majority of jurisdictions by which it has been considered.⁴ It has likewise been looked upon with favor by many legal writers, although there has been a definite variance of opinion as to its basis, scope and extent.⁵

Similarly the right has been subject to many definitions by those who have commented on it,⁶ as well as by many of the courts.⁷ The right of privacy, comprehensively defined, is "The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."⁸

While as yet the right is only in embryonic stage as to the number of cases considered, it has progressed along three principal lines paralleling the aforementioned definition. The three rough categories are, wrongful intrusions in one's private affairs, unwarranted disclosures of one's personal affairs, appearance, likeness and history, which are not a matter of legitimate public concern, and lastly unprivileged appropriations of a person's name, likeness, or history for the primary purpose of commercial gain, other than mere publication value.⁹ Only a limited discussion of the second category is involved in this case.

2. *Sidis v. F-R Publishing Corp.*, 113 F. 2d 806, 807 (C.C.A. 2d 1940); *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (D.C. Cal. 1939); PROSSER, TORTS 1053 (1941).

3. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

4. See Note, 138 A.L.R. 22, 28 (1942), supplemented in Note, 168 A.L.R. 446, 449 (1947).

5. Adams, *The Right of Privacy, and its Relation to the Law of Libel*, 39 AM. L. REV. 37 (1905); Dickler, *The Right of Privacy*, 70 U. S. L. REV. 435 (1936); Fitzpatrick, *The Unauthorized Publication of Photographs*, 20 GEO. L. J. 134 (1932); Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Harper and McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, [1938] WIS. L. REV. 426; Larremore, *The Law of Privacy*, 12 COL. L. REV. 693 (1912); Moreland, *The Right of Privacy Today*, 19 KY. L. J. 101 (1931); Nizer, *The Right of Privacy—A Half Century's Development*, 39 MICH. L. REV. 526 (1941); Ragland, *The Right of Privacy*, 17 KY. L. J. 85 (1929).

6. *Ibid.*

7. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Holloman v. Life Ins. Co. of Va.*, 192 S. C. 454, 7 S.E. 2d 169 (1940).

8. See Note, 138 A.L.R. 22, 25 (1942); this definition quoted with approval in *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1945).

9. Dickler, *The Right of Privacy—A Proposed Redefinition*, 70 U. S. L. REV. 435 (1936). Cases arising under the first category have held the following a viola-

The right to publish matters which are "news" or which are of legitimate public interest is conceded by courts and writers alike.¹⁰ One may become the subject of legitimate public concern voluntarily or may be connected with or involved in an event which the public is legitimately interested unwittingly and unwillingly. Those who intentionally seek public acclaim are usually said to have renounced or surrendered their right of privacy,¹¹ although some courts have correctly held that as to certain unrelated publicity their right still exists.¹² Those who have expressly consented to publicity of the same or like nature are also said

tion of the right of privacy: *Rhodes v. Graham*, 238 Ky. 225, 37 S.W. 2d 46 (1931) (tapping telephone wires of plaintiff); *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E. 2d 810 (1939) (listening to plaintiff's conversations with a dictaphone); *Byfield v. Candler*, 33 Ga. App. 275, 125 S.E. 905 (1924) (entering a woman's bedroom on a steamship); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905), *aff'd*, 117 La. 708, 42 So. 228 (1906) (publication of an innocent man's photograph in Rogues' gallery). The following cases falling under the second category have been held to be violations of the right: *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942), discussed in 8 Mo. L. Rev. 74 (1943) (publication of plaintiff's picture in connection with an article telling of her unusual ailment); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912), *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930) (publications of a photograph of plaintiff's deformed child); *Peed v. Washington Times*, 55 Wash. L. Rep. 182 (1927) (publication of a stolen picture of plaintiff in connection with a scandalous report of an attempted double suicide); *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (D.C. Cal. 1939) (a radio dramatization of a robbery of which plaintiff was the victim); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931) (a motion picture depicting life history of a reformed prostitute who was defendant in a murder trial); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) (publication of the fact that the plaintiff had not paid a debt). The typical cases in the third category are those involving the appropriation of plaintiff's photograph or some element of his personality for some advertising purposes. The following cases along with many others have allowed recovery. *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P. 2d 577 (1942); *Foster-Milburn v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909); see *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918); *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo. 544, 17 P. 2d 535 (1932).

10. *Smith v. Suratt*, 7 Alaska 416 (1926); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939); *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W. 2d 972 (1929); *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E. 2d 753 (1940); *Sidis v. F-R Publishing Corp.*, 113 F. 2d 806 (C.C.A. 2d 1940); *Elmhurst v. Shoreham Hotel*, 58 F. Supp. 484 (D. D.C. 1945), *aff'd sub nom. Elmhurst v. Pearson*, 153 F. 2d 467 (C.C.A. D.C. 1946); *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594 (1911); *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948).

11. *Paramount Pictures v. Leader Press*, 24 F. Supp. 1004 (D.C. Okla. 1939), *rev'd on other grounds*, 106 F. 2d 229 (C.C.A. 10th 1939); *Corliss v. E. W. Walker Co.*, 64 Fed. 280 (C.C. D. Mass. 1893); *Martin v. F.I.Y. Theatre Co.*, 26 Ohio L. Abs. 67, 10 Ohio Ops. 338 (1938); *O'Brien v. Pabst Sales Co.*, 124 F. 2d 167 (C.C.A. 5th 1941), *cert. denied*, 315 U. S. 823 (1942) (alternative holding); *cf. Smith v. Suratt*, 7 Alaska 416 (1926); see *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F. 2d 763 (C.C.A. 5th 1935), *cert. denied*, 296 U. S. 645 (1935).

12. *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909), 137 Ky. 834, 127 S.W. 476 (1910); *Eliot v. Jones*, 66 Misc. 95, 120 N. Y. Supp. 989 (Sup. Ct. 1910), *aff'd*, 140 App. Div. 911, 125 N. Y. Supp. 1119 (1st Dep't 1910); *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908 (1893).

to be precluded from seeking redress.¹³ On the other hand there are those who involuntarily and sometimes by accident become subjects of legitimate public concern by being in some manner connected with crimes and other events of great public interest.¹⁴ One's achievements may bring him into legitimate public concern although he may desire to remain obscure.¹⁵

Courts often refer to those who have in any respect lost their right of privacy as "public figures" or "public characters."¹⁶ This is probably unfortunate terminology and has been criticized as not being an accurate criterion, but rather that the distinction is between public and private interest.¹⁷ The criticism appears to be sound in that one's status as a "public figure" depends upon its relation to the particular interest which is involved.¹⁸ Even the most famous have not completely forfeited their right.¹⁹ However, one may, at least temporarily, be considered a "public figure" in relation to a particular event which is deemed to be of legitimate public interest.

As has been pointed out the final determination of what becomes a matter of legitimate public concern involves a careful weighing of the conflicting interest of the individual's desire to withdraw from the public eye and the right of the public to be the recipients of the published truth in matters to which their interests are attracted.²⁰ This often requires a delicate appreciation of the sociological and psychological factors involved.²¹

13. *O'Brien v. Pabst Sales Co.*, 124 F. 2d 167 (C.C.A. 5th 1941), *cert. denied*, 315 U. S. 823 (1942) (alternative holding); *Thayer v. Worcester Post Co.*, 284 Mass. 160, 187 N.E. 292 (1933); *cf. Marek v. Zanol Products Co.*, 298 Mass. 1, 9 N.E. 2d 393 (1937); see *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. 2d 133 (1945); *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1945); Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 218 (1890).

14. *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948) (plaintiff's father had previously disappeared and an innocent man charged with his murder); *Jones v. Post Herald Co.*, 230 Ky. 227, 18 S.W. 2d 972 (1929) (plaintiff and husband were walking on a city street when plaintiff's husband was attacked and stabbed to death); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939) (plaintiff's wife had committed suicide by leaping from a public building); *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594 (1911) (plaintiff's father was indicted on a charge of conspiracy to use the mails to defraud); *but see Ex Parte Sturm*, 152 Md. 114, 136 Atl. 312 (1927).

15. *Sidis v. F-R Publishing Corp.*, 113 F. 2d 806 (C.C.A. 2d 1940), discussed in 6 Mo. L. REV. 233 (1941). The plaintiff had been a child prodigy, having lectured to distinguished mathematicians at the age of eleven. He later became a recluse, and the defendant corporation published an article concerning his personal history. The court held that his early achievements made him a legitimate subject of public interest, and thus denied recovery.

16. *Corliss v. E. W. Walker Co.*, 57 Fed. 434 (C.C. D. Mass. 1893). *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (D.C. N. Y. 1936); *Bartletta v. McFeeley*, 107 N. J. Eq. 141, 152 Atl. 17 (1930); *Jeffries v. New York Evening Journal Pub. Co.*, 67 Misc. 570, 124 N. Y. Supp. 780 (Sup. Ct. 1910).

17. *Nizer, The Right of Privacy—A Half Century's Development*, 39 MICH. L. REV. 526, 540 (1941); *Ragland, The Right of Privacy*, 17 KY. L. J. 85, 111 (1929).

18. *Id.* 39 MICH. L. REV. at 541, 556; *Id.* 17 KY. L. J. at 113.

19. See note 12 *supra*.

20. *Nizer, The Right of Privacy—A Half Century's Development*, 39 MICH. L. REV. 526, 528 (1941).

The instant case presents the general problem of whether one by using the judicial process may become the subject of legitimate public interest or concern. No other cases have been found which deal directly with one who by mere use of the judicial process, as apart from being a litigant in connection with a crime, has been considered the subject of such a legitimate public interest.²² The courts in the latter instance usually view the interest of the public in crime as paramount to the individual's desire to remain obscure.²³ However, the situation appears quite differently when one bringing or defending a civil action is held to be the subject of legitimate public concern and, consequently, his heretofore private affairs, as well as his personal likeness, are made matters of common knowledge. No doubt countless just claims have been forfeited due to the fact the courts have not as yet made the unwarranted publication of photographs and unessential personal details related to such proceedings an actionable wrong. The court in the present case indicates that the litigation in which the plaintiff was involved had more than routine interest due to its involved nature, but the holding in no respect seems to hinge on this factor. It seems likely the court would probably extend its decisions to less sensational types of litigation and possibly to all judicial proceedings. Such a holding in some situations would probably be objectionable.

Even restricting the holding to its present facts it is open to some question. The court states that "Domestic disputes, controversies between parents and others as to the custody of minor children, allowances of alimony, and the various acts and conduct recognized by the courts as grounds for divorce, are probably of interest to a large number of people because in their own immediate lives, to a greater or less degree, such problems have concerned their friends and acquaintances and sometimes their own immediate families." However, the litigant in such matters is equally desirous of suppressing such matters and is undoubtedly subject to considerable mental torment by their publicity.

It is doubtful that the public benefit derived from the publication of photographs and personal histories of persons involved in this type of domestic dispute is very great. Matters of legitimate public concern have been said to extend beyond mere curiosity.²⁴ Whether the public concern in the instant case goes beyond this is open to some doubt.

Since the question of what constitutes a legitimate public interest cannot be reduced to express rules, the extrinsic facts and circumstances will frequently be

21. *Id.* at 540.

22. *Thayer v. Worcester Post Co.*, 284 Mass. 160, 187 N.E. 292 (1933). The case involves publication of a picture of plaintiff in connection with an article concerning an alleged divorce scandal involving the plaintiff. The court does not indicate that it will accept the doctrine of right of privacy and states that even if the right were accepted there is no violation in the case because the plaintiff voluntarily posed for the picture, thus consenting. However, the plaintiff recovered as the court considered the article libelous.

23. See note 14 *supra*.

24. *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939).

the deciding factor. Any other method of handling the cases might crystalize the law of privacy before it has properly developed.

Lack of judicial precedent should not be controlling;²⁵ neither should the fact that newspapers and magazines have customarily published photographs accompanying reports of court proceedings be conclusive. If this particular aspect of the right of privacy is so governed it might become non-existent.

The court refers to the ". . . traditional rights of the press to print all printable news which appears in the public records of our courts . . .," undoubtedly thinking, in part at least, of the report of judicial proceedings as a defense to a libel action. They thus assume that the report of the trial is legitimate news, and further state that the publication of the plaintiff's picture must also constitute such a legitimate interest. In this connection it might be pointed out that Warren and Brandeis in setting out limitations to the right indicate that the publication of judicial proceedings is not a violation of the right of privacy as it is among the privileged communications constituting a defense to libel and slander.²⁶ This limitation might be at least questionable in that the basis of right of privacy is emotional distress rather than injury to reputation.²⁷ The right of privacy has been said to be a virtual extension of the law of libel in many respects.²⁸ Since the basis of the actions are different it would seem logical that the defense to a libel action should be more carefully examined before being applied to violations of the right of privacy. Of course, it is well settled that truth constitutes no defense to a privacy action.²⁹

Even if it be conceded that publication of judicial proceedings constitute a defense to an action based on right of privacy as well as libel, yet it does not necessarily follow that the publication of the plaintiff's photograph and other incidental data would likewise be such a defense. In allowing publication of judicial proceedings as a defense to a libel, the reason generally advanced is that the public has a legitimate interest in the nature of the judicial process rather than the controversies of the individuals involved.³⁰ Consequently, the fact that reports of the

25. Moreland, *The Right of Privacy Today*, 19 KY. L. J. 101 (1931).

26. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

27. *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. 2d 133 (1945); *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E. 2d 753 (1940); Adams, *The Right of Privacy, and its Relation to the Law of Libel*, 39 AM. L. REV. 37, 39 (1905); Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

28. *Id.* 39 AM. L. REV. at 58; Ragland, *The Right of Privacy*, 17 KY. L. J. 85, 120 (1929).

29. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942); *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1945); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); see *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E. 2d 753 (1940).

30. *Meriwether v. Publishers: George Knapp & Co.*, 211 Mo. 199, 109 S.W. 750 (1908); 17 R.C.L. 344.

judicial proceedings could be published would not seem, without more, to allow the publication of plaintiff's photograph and personal history which is incidental to the nature of the proceedings.³¹

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31. *Cf. Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 217, 50 S.E. 68, 79 (1905), the court in answer to an argument that the right denied freedom of speech and press stated: "The constitutional right to speak and print does not necessarily carry with it the right to reproduce the form and features of an individual."