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Recent Cases

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Criminal Law—Federal Criminal Code—Mailing of Punchboard Not Violation of Lottery Provision

United States v. Halseth[1]

Perry Halseth was indicted for depositing a letter, a circular and a punchboard in the mails in violation of Section 213 of the Criminal Code of 1909.[2] The letter indicated how the addressee might obtain a radio free by selling chances on the punchboard, and how purchasers of lucky numbers would receive a radio and ball-point pens. The merchandise could be obtained by sending the full amount in cash, or by C.O.D., or could be "purchased" by the addressee. The district court sustained the defendant's motion to dismiss the indictment, on the ground that the indictment did not state an offense because the mailing did not concern an existing lottery or scheme to obtain prizes by lot of chance. The United States appealed and the Supreme Court affirmed the district court's decision, holding (1) that the statutory words "concerning any lottery" meant "concerning any existing, going lottery"; that the mere mailing of paraphenalia for or information about a lottery did not violate the statute.

A lottery has been defined as a scheme for the distribution of prizes by lot or chance among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize.[3] The essential elements of a lottery scheme are three: prize, consideration and chance. The prize may be anything of value[4] offered as an inducement to participate in the scheme, and is usually of much higher value than the consideration paid.[5] The consideration may be the doing of

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1. 72 Sup. Ct. 275, 96 L. Ed. 173 (1952).

2. 35 Stat. 1129-1130, 18 U. S. C. § 336, the pertinent parts of which are: "No letter, package postal card, or circular concerning any lottery, . . . or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, . . . or similar scheme offering prizes dependent in whole or in part upon lot or chance; . . . and no newspaper, circular, pamphlet or publication of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery . . . or scheme, whether said list contains any part or all of such prizes, shall be deposited in or carried by the mails of the United States. . . . Who ever shall knowingly deposit . . . anything to be . . . delivered by mail in violation of . . . this section . . . shall be filed or imprisoned. . . ." This statute was revised in form by the 1948 Criminal Code, 62 Stat. 762, 18 U. S. C. A. 1302.

3. Peck v. United States, 61 F. 2d 973 (5th Cir. 1932); 38 C. J. 287.

4. United States v. Purvis, 195 Fed. 618 (N.D. Ga. 1912) (loans at low rate of interest); Glass v. United States, 222 Fed. 773 (7th Cir. 1915) (house, lots).

5. See United States v. Rich, 90 F. Supp. 624, 627 (E.D. Ill. 1950); *and compare* United States v. 83 Cases of Merchandise Labeled "Honest John," 29 F. Supp. 912, 914 (D. C. Md. 1939).

something or giving up of some right, and it need not directly benefit the one offering the prize.[6]

The element of chance is often the determining factor of whether a particular enterprize is a lottery.[7] A definition of chance as an element of a lottery is an "attempt to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity."[8] How much chance is required to make an otherwise lawful scheme into a lottery is a question on which courts differ. When the results of a scheme are determined by lot—*i.e.* a drawing—as in a pure "policy" or "numbers" racket, chance is the sole determining factor, and probably no court would deny the fact. A scheme may be a lottery when chance is not the sole determining factor of the outcome; and the better view seems to be that even though skill, judgment or research may be helpful, nevertheless if chance is the dominant causative factor in determining the results of the scheme, it may be a lottery.[9] Thus a guessing game as to the total popular vote to be cast for the President of the United States,[10] an essay contest wherein no objective standard was established to select the "best" essay,[11] and a cartoon contest[12] were lotteries.

When the word "chance" is used with the word "lot," as in the statute in the case noted, a court may be prone to construe the meaning of "chance" to be controlled by the meaning of "lot." The apparent effect of such judicial interpretation is to restrict the application of the statute to situations in which chance is the sole factor in determining the outcome of the scheme. Thus in *United States v. Rich*[13] defendant, who was engaged in bookmaking, betting on horse races and baseball games, was held not to be engaged in a lottery under 18 U. S. C. A. 1302.[14] The federal district court said that the chance involved in defendant's activities did not resemble the chance involved in the distribution of prizes by lot,[15] but was more like the chance involved in the success of a business enterprize. However, in the older cases, the rule had been stated to the effect that if it is impossible under the circumstances to ascertain information upon which a correct choice *alone* could be made, then chance in the lottery sense existed.[16]

The statute involved in the case noted has been before the lower federal

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6. Brooklyn-Daily Eagle v. Voorhies, 181 Fed. 579 (E.D. N.Y. 1910) (sending of labels was sufficient consideration).
7. *E.g.*, State v. Globe-Democrat Publishing Co., 341 Mo. 862, 110 S.W. 2d 705 (1937).
8. 17 R. C. L. 1223.
9. State v. Globe-Democrat Publishing Co., 341 Mo. 826, 110 S.W. 2d 705 (1937); 38 C. J. § 5, p. 291.
10. Waite v. President Publishing Assn., 155 Fed. 58 (6th Cir. 1907).
11. Brooklyn-Daily Eagle v. Voorhies, 181 Fed. 579 (E.D. N. Y. 1910).
12. State v. Globe-Democrat Publishing Co., *supra* n. 9.
13. 90 F. Supp. 624 (E.D. Ill. 1950).
14. See note 2 *supra*.
15. But see United States v. Jefferson, 134 Fed. 299, 300 (W.D. Ky. 1905) (that congress did not intend any particular method to give effect to lot or chance).
16. Waite v. President Publishing Assn., 155 Fed. 58, 60 (6th Cir. 1907).

courts many times,[17] and was derived from *United States Revised Statutes* Section 3894 as amended,[18] which likewise has been before the federal courts often.[19] The statute was early declared penal and to be strictly construed.[20] The district courts found the intention of congress in the enactment of Section 3894 to be the suppression of the "evil influence" and "pernicious results" of lotteries by preventing lottery dealers from advertising or promoting their schemes by mail.[21] The word "concerning" in the phrase, "letter or circular concerning a lottery," had been interpreted not in its broadest sense of "pertaining to or related to," but in a more restricted sense so that a father writing his son of the evils of a lottery would not be subject to prosecutions.[22]

Whether an averment of the existence of a lottery in an indictment was essential was first considered in *United States v. Bailey*.[23] The court stated that there should be an averment of the existence of a lottery or of an intention to hold a lottery. However, lack of sufficient facts prevents use of the case as an authority under the statute in question.

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17. United States v. Rich, 90 F. Supp. 624 (E.D. Ill. 1950); Boasberg v. United States, 60 F. 2d 185 (5th Cir. 1932), *cert. denied* 287 U. S. 644 (1932); Peck v. United States, 61 F. 2d 973 (5th Cir. 1932); Post Publishing Co. v. Murray, 230 Fed. 773 (1st Cir. 1916); Eastman v. Armstrong-Byrd Music Co., 212 Fed. 662 (8th Cir. 1914); United States v. Purvis, 195 Fed. 618 (N.D. Ga. 1912); Brooklyn-Daily Eagle v. Voorhies, 181 Fed. 579 (E.D. N. Y. 1910).

18. REV. STAT. § 3894, as amended 26 STAT. 465 (1890): "No letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprize offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket, or part thereof, and no check, draft, bill, money, postal note, or money order for the purchase of any ticket, tickets or part thereof, or of any share or any chance in any such lottery or gift enterprize, shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter carrier, nor shall any newspaper, circular, pamphlet, or publication of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprize, whether said list is of any part or of all of the drawing be carried in the mail or delivered by any postmaster or letter-carrier. Any person who shall knowingly deposit . . . [in the mail] in violation of this section . . . shall be punished. . . ."

19. Horner v. United States, 147 U. S. 449 (1893); Commerford v. Thompson, 1 Fed. 417 (C.C. Ky. 1880); United States v. Noelke, 1 Fed. 426 (D. N. Y. 1880); United States v. Mason, 22 Fed. 707 (E.D. Va. 1884); United States v. Clark, 22 Fed. 708 (E.D. Va. 1885); United States v. Zeister, 30 Fed. 499 (N.D. Ill. 1887); United States v. McDonald, 59 Fed. 563 (N.D. Ill. 1893); United States v. Politzer, 59 Fed. 273 (N.D. Calif. 1893); United States v. Wallis, 58 Fed. 942 (S.D. Idaho 1893); United States v. Fulkerson, 74 Fed. 619 (D. Calif. 1896); United States v. Sauer, 88 Fed. 249 (W.D. Mich. 1898); Glass v. United States, 222 Fed. 773 (9th Cir. 1915).

20. Commerford v. Thompson, 1 Fed. 417 (C.C. Ky. 1880).

21. Commerford v. Thompson, *supra* n. 20; United States v. Mason, 22 Fed. 207 (E.D. Va. 1884); United States v. McDonald, 59 Fed. 563 (N.D. Ill. 1893); United States v. Sauer, 88 Fed. 249 (W.D. Mich. 1898). See United States v. Zeisler, 30 Fed. 499, 501 (N.D. Ill. 1887).

22. See United States v. Noelke, 1 Fed. 426, 432 (D. N. Y. 1880).

23. 47 Fed. 117 (S.D. N. Y. 1891).

In *Boasberg v. United States*[24] appellant deposited in the mail one week before the opening night a circular stating that the game of Keno would be inaugurated on February 5, 1930 in New Orleans at the Suburban Gardens with $100 or more to the winner. Appellant was indicted under the same statute as in the case noted for depositing in the mails a circular concerning a lottery, and the indictment was upheld. Under the interpretation of the statute laid down by the Supreme Court in the principal case, the indictment would have been quashed because no "existing, going lottery" was involved.

The Supreme Court relied upon the cases of *France v. United States*[25] and *Francis v. United States*[26] as authority for limiting the application of the statute in question to existing lotteries. The statute involved in those cases was Section 237 of the *Criminal Code* of 1909.[27] A reading of the two statutes indicates that neither the purpose nor the effect of each statute is or was intended to be the same. The court seemed to have been influenced by the fact that congress had not included punchboards in its recent legislation concerning slot machines.[28] Never before had congress enacted legislation concerning interstate transportation of slot machines, but legislation prohibiting the promotion and advertisement of lotteries by mail has a long history.[29] Schemes whereby merchandise is distributed by punchboard have been held to be lotteries for sometime.[30]

It is submitted that full effect can not be given to the intention of congress or to the purpose of the statute under the restricted interpretation placed upon it in the principal case.

ROBERT P. KELLY

FEDERAL INCOME TAXATION—TAXABILITY OF CONTEST PRIZES

U. S. v. Robertson[1]

Plaintiff wrote a symphony during the years 1937-1939 and it remained unpublished for several years thereafter. In 1945 a philanthropist offered three

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24. 60 F. 2d 185 (5th Cir. 1932).
25. 164 U. S. 676 (1897).
26. 188 U. S. 375 (1902).
27. 35 STAT. 1136, 18 U. S. C. 337: "Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interestate or foreign commerce any paper, certificate or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprize, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of or list of the prizes drawn or awarded by means of, any such lottery, gift enterprize, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both."
28. Act of Jan. 2, 1951, P. L. 906, 15 U. S. C. A. 1171.
29. See note 21 *supra.*
30. *E.g.* Helen Ardelle, M. C. v. Fed. Trade Comm., 101 F. 2d 718 (9th Cir. 1939).
1. 190 F. 2d 680 (10th Cir. 1951) *certiorari granted* 342 U. S. 896 (1951).

awards for symphonic compositions, announcing as his purpose the furtherance of understanding among the Pan-American nations. The Detroit Orchestra, Inc., of which he was president, was to get certain exclusive rights to the winning compositions. Plaintiff, upon hearing of the awards, submitted his symphony and won the first prize of $25,000. He paid an income tax thereon and later filed for a refund. The district court concluded that the prize was a gift.[2] On appeal, reversed.

Section 22 (a) I. R. C. broadly defines gross income as ". . . gains, profits, and income derived from . . . compensation for personal service . . . of whatever kind and in whatever form paid." Section 22(b)(3) I. R. C. excludes from gross income "Gifts . . . The value of property acquired by gift. . . ." In construing these sections, there is no longer any policy of resolving doubts in favor of the taxpayer[3]; furthermore, in view of the general purpose to tax all income, specific exemptions are strictly construed.[4]

One of the concepts of taxation law which appears somewhat unusual at first glance is that which holds that income may result from money received for service rendered though there is no obligation owed to the recipient.[5] One example of this is money paid to an employer for some past service which he has rendered.[6] Another is the simple tip given to hat-check girls and waiters.[7] It seems, therefore, that though the presence of consideration will prevent a gift,[8] the absence thereof will not necessarily create one under the income tax statute. The tax can be avoided only if the money or property received is not given as compensation for some service rendered.[9]

If entering a contest such as that described in the principal case constitutes an acceptance of a contractual offer, the prize would seem to be clearly taxable. This facet should not be overlooked since such contests have sometimes been held to create legally enforceable rights.[10] However, it will be assumed in this discussion that the contestant could not reasonably construe the contest rules as an offer to contract thereby presenting the question: When is a voluntary prize or award given to a contestant taxable?

The Commissioner has held that the following are examples of taxable income: Prizes received in a picture identification contest sponsored by a newspaper[11];

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2. 93 F. Supp. 660 (D.C. Utah 1950).
3. White v. United States, 306 U. S. 281 (1938); *cf.* Gould v. Gould, 245 U. S. 151 (1917).
4. Comm. v. Jacobson, 336 U. S. 28 (1949); Helvering v. American Dental Assoc., 318 U. S. 322 (1943).
5. Old Colony Trust Co. v. Comm., 279 U. S. 716 (1928).
6. Fisher v. Comm., 59 F. 2d 192 (2d Cir. 1932), where the corporation treated the payment as a business expense; Nickelsburg v. Comm., 154 F. 2d 70 (2d Cir. 1946), where the corporation did not treat the payment as a business expense.
7. Roberts v. Comm., 176 F. 2d 221, 10 A. L. R. 2d 186 (9th Cir. 1949).
8. Noel v. Parrott, 15 F. 2d 669 (9th Cir. 1926).
9. But see the unusual case of Edwards v. Cuba R. R., 268 U. S. 628 (1925).
10. Anno. 67 A. L. R. 419 (1930).
11. I. T. 1651, II-1 CUM. BULL. 54 (1923).

prizes received in a contest sponsored by a restaurant (tickets given with meals)[12]; prizes received on a radio quiz show where contestant answered a question[13]. These examples all have one thing in common aside from the fact that some "service" was rendered; the award was a part of an advertising scheme negativing any completely donative intent and allowing a finding that participation was a "service" to the "donor" for which the award was compensation. However, the fact that the contest is an advertising scheme alone seems insufficient since the Tax Court has held that when a winner does nothing but accept the money, the prize is a gift, no service having been rendered.[14]

The Commissioner, in a recent I. T., has clearly indicated that the "service" rendered is much more important than the intent involved. I. T. 4056[15] holds fellowships taxable when the recipient applies his skill to research or creative work. However, when the element of competition is not present and the "donee" does not anticipate any benefits from his work (example: Nobel prize), the award is not taxable.[16]

McDermott v. Commissioner[17] was one of the first cases to deal with the particular problem involved in the principal decision. The *McDermott* case held that a prize won by a law professor in an essay contest sponsored by the American Bar Association was a gift on the grounds of policy, intent of the donor and a lack of anticipation of "payment" on the part of the recipient. The Commissioner refused to accept the decision and promulgated I. T. 3960[18] which stated that awards given which required services directly in connection therewith were taxable.

Several decisions have disapproved the *McDermott* case because of the stress which the court put on the intent of the donor.[19] This criticism may be justified in view of the statement in *Helvering v. American Dental Association* to the effect that: "The fact that the motives . . . were those of business or even selfish . . . is not significant. The forgiveness [of a debt] was gratuitous, a release of something . . . for *nothing* . . ." (italics mine).[20] If the converse of this statement is true, then the Supreme Court apparently supports the Commissioner's view that nothing must be done in the way of services regardless of the motive (or intent) of the "donor". However, thus far, the decisions commenting on the *McDermott* case, with the possible exception of the principal case, have distinguished it. The ground for the distinction seems to have been the commercial flavor which the later cases have

12. I. T. 1667, II-1 CUM BULL. 83 (1923).
13. I. T. 3987, 1950-1 CUM BULL. 9.
14. Pauline C. Washburn, 5 T. C. 1333 (1945), where all winner did was answer phone—no questions, appearances or participation.
15. 1951 INT. REV. BULL. 17.
16. VIII-1 CUM. BULL. (1929).
17. 80 U. S. App. D. C. 176, 150 F. 2d 585 (1945).
18. 1949-2 CUM. BULL. 13.
19. Van Dusen v. Comm., 166 F. 2d 647 (9th Cir. 1948); Stein v. Comm., 14 T. C. 494 (1950) (involving brewery's contest for postwar plans for peace); Frederick v. Waugh, P-H 1950 TC MEM. DEC. ¶ 50,095; Strauss v. Strauss, P-H 1947 TC MEM. DEC. ¶ 47,202.
20. Helvering v. Amer. Dental Co., *supra* note 4, at page 331.

had which was not present in the *McDermott* decision. The only case supporting the *McDermott* case also involves such factors and is clearly in conflict with the others decided since then.[21]

Aside from the fact that the *Robertson* case stressed the point that the taxpayer entered the contest with the expectation of receiving payment for his efforts, the *McDermott* decision can be distinguished from the principal case in two possible ways: (1) The Commissioner's course of action since *McDermott* v. *Commissioner* in the examples of fellowship and contest awards where services are rendered has been clarified and consolidated; this administrative past action was given weight in the *McDermott* case and has been accorded weight in others.[22] (2) The "donor" in the principal case received a benefit in procuring the composition for the orchestra of which he was president and the award could more easily be construed as compensation therefor.

At any rate, the analysis of the *Robertson* case seems to involve taxing nearly all gifts on condition precedent if the performance of the condition could possibly be construed as "service." The concept of "income" has been broadened by the courts and the Commissioner to include many things which, as the *McDermott* case pointed out, would not be considered income by anyone not talking law. The principal case, unless reversed by the Supreme Court of the United States which has granted certiorari, fits well into the new concept.

WILLIAM W. SHINN

TORTS—INJURY TO WIFE—HUSBAND'S ACTION—HUMANITARIAN NEGLIGENCE

Rea v. Feeback[1]

"Since the wife could not recover from the defendant because of her contributory negligence, the husband is also barred from recovery in his action for loss of services and medical expenses incurred as the result of the injury." This rule has been, and continues, to be followed in nearly all jurisdictions, despite the attacks and criticisms it has been subjected to by legal writers and attorneys for the husband.[2] And this has been true even though most courts agree that an injury to the wife, by a negligent defendant, gives rise to two separate causes of action, one for injury to the wife and the other in favor of the husband.[3] However, a recent

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21. Amirikian v. United States, 100 F. Supp. 263 (D. C. Md. 1951).
22. Warner Bros. v. Westover, 70 F. Supp. 111 (D.C. Cal. 1947).

1. 244 S.W. 2d 1017 (Mo. 1952).

2. Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services*, 2 U. CHI. L. REV. 173 (1935); Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L. J. 831 (1932); Gilmore, *Imputed Negligence*, 1 WIS L. REV. 193 (1921); Notes, 21 MICH L. REV. 592-1299 (1944); 80 U. PA. L. REV. 1123 (1932); PROSSER, TORTS § 55, pp. 421-422 (1941). Also see argument by Plaintiff's attorney in Emma Callies v. Reliance Laundry Co., 206 N.W. 198, 42 A.L.R. 712 (Wis. 1925); RESTATEMENT TORTS § 494 (1934).

3. Hopkins v. Mobile & O. R.R., 33 S.W. 2d 1009 (Mo. App. 1931); Thompson v. Metropolitan St. Ry., 135 Mo. 215, 36 S.W. 625 (1896); Womach v. City of St. Joseph, 201 Mo. 467, 100 S.W. 433, 10 L.R.A. (N.S.) 140 (1907); Selleck v. City of Janesville, 104 WIS 570, 80 N.W. 944, 47 L.R.A. 697, 72 Am. St. Rep. 892

Missouri decision, the case under discussion, has disclosed a method whereby the contributory negligence of the wife cannot be set up as a defense to the husband's action. The answer lies within the scope of the humanitarian doctrine, where contributory negligence is considered a foreign issue.

In this case the wife had sustained injuries in an intersectional automobile-truck collision, and the husband was seeking $15,570 consequential damages, basing his right to recover and the defendant's liability on humanitarian negligence. The plaintiff (husband) was contending that the defendant "saw or should have seen the wife in a position of peril . . . unable to extricate herself . . . and that the defendant could have slackened the speed of the truck or swerved it and thereby have avoided the collision and the resulting injuries to the wife."

The trial court, at the request of the defendant, give an instruction to the effect that if the wife could not recover against the defendant for her injuries then the verdict should be for the defendant.[4] The jury returned a verdict for the defendant, but upon plaintiff's motion, the lower court granted a new trial upon the ground that it erred in giving this instruction The defendant appealed to the Missouri Supreme Court, the question in issue being whether or not the trial court had abused its discretion in granting the new trial due to the instruction.

In the process of arriving at a conclusion supporting the action of the lower court, the supreme court discussed the instruction and the rules applicable to such actions. The court admitted that a plaintiff-husband could not recover consequential damages resulting to him arising out of an injury to the wife unless the defendant had committed a tort which would also give the wife a right of action against the defendant, and that the plaintiff had the burden of establishing the defendant's negligence.[5] The court noted that such an injury to the wife gave rise to two causes of action and that even though they both arose out of the same transaction, the husband's action was a separate cause of action and an entirety unto itself. Then in examining the instruction in question, the court said it failed to "clearly and explicitly" set forth or explain these principles to the jury.[6] The court felt that the instruction would inform the jury that the husband must stand in his wife's position in the action he brings for loss of services and medical expenses in a case submitted under the humanitarian theory even as he does in a primary negligence case, the latter type being the usual stituation and in which the contributory negligence of plaintiff's wife bars a recovery by him. The court in no

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(1899); Laskowski v. People's Ice Co., 203 Mich. 186, 168 N.W. 940, 2 A.L.R. 586 (1918); RESTATEMENT, TORTS § 693, *Comment* D. (1934). *Cf.* King v. Viscoloid Co., 219 Mass. 420, 106 N.E. 988, Ann. Cas. 1916D (1914).

4. "The Court instructs the jury that the plaintiff's right to recover herein on Count One is dependent upon the right of the wife to recover for her injuries so, therefore, if you find and believe from the evidence that the plaintiff's wife could not recover against the defendant herein for her injuries then you are instructed that your verdict shall be for the defendant herein."

5. Stoll v. First Nat'l. Bank of Independence, 234 Mo. App. 364, 132 S.W. 2d 676 (1939); Thibeault v. Poole, 283 Mass. 480, 186 N.E. 632 (1933); Rossman v. Newbon, 112 N.J.L. 261, 170 Atl. 230 (1934); 41 C.J.S. § 401, p. 895.

6. *Supra.* note 4.

uncertain terms says that since the cause was properly and appropriately submitted on the humanitarian theory, contributory negligence had no place in the case.[7] The instruction was termed "confusing" because of its abstract generality.

When the humanitarian doctrine is examined, one can readily see why contributory negligence on the part of the plaintiff in the usual case, or the wife in the principal case, has no application.[8] This is because that in cases based on this theory, the plaintiff, as well as the defendant, must have been negligent. Thus in an action by the wife, submitted on humanitarian negligence, her contributory negligence would not bar her from recovering from a negligent defendant, and *a fortiori* it should not stand in the way of an action by her husband when he brings an action for loss of services and medical expenses incurred as the result of the defendant's negligence. In view of the fact that even in a case submitted on primary negligence alone there is no logical reason why the contributory negligence of the wife should bar the husband in *his* action, there is certainly good reason for not allowing contributory negligence of the wife to cloud up the scene in a case based on the humanitarian doctrine.[9]

Departing briefly from the principal case, and examining the so-called reasons the courts have advanced to bar the husband-plaintiff in the ordinary negligence actions, it is interesting to note that the courts do not agree in their explanations of such a result. Thus the reason is assigned that "the cause of action is a derivative one, analagous to an assigned contract"; or, "there is only one cause of action, in two parties"; or, "since the husband has relied upon the wife's ability to exercise her own faculties, he must take the consequences of impliedly asserting that she is capable of going abroad alone."[10] Other courts have implied in these reasons that they fear there would be a double recovery against a negligent defendant in some situations. Probably the real reason lying in the background behind these judicail assertions, is that the action for loss of services is itself a historical exception to the rule that one person cannot maintain an action for injury to another, and hence is limited to cases where the other is free from fault.[11] However, there would not seem to be much support for this explanation when the effect is to deny re-

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7. Haverkost v. Sears, Roebuck & Co., 193 S.W. 2d 357 (Mo. App. 1946); Bootee v. Kansas City Pub. Ser. Co., 183 S.W. 2d 892 (Mo. 1944); Doherty v. St. Louis Butter Co., 339 Mo. 996, 98 S.W. 2d 742 (1939); Dilallo v. Lynch, 340 Mo. 82, 101 S.W. 2d 7 (1936); Borgstede v. Waldbauer, 337 Mo. 1205, 85 S.W. 2d 373 (1935); Carney v. Chicago, R.I. & P. Ry., 323 Mo. 470, 23 S.W. 2d 993 (1929); Causey v. Wittig, 321 Mo. 358, 11 S.W. 2d 11 (1928).

8. McCleary, *The Bases of the Humanitarian Doctrine Reexamined,* 5 Mo. L. REV. 56 (1940); McCleary, *The Defense of Sole Cause in The Missouri Negligence Cases,* 10 Mo. L. REV. 1 (1945); Spann, *Sole Cause Negligence Instructions,* 13 Mo. B. J. 19 (1942).

9. *Supra,* note 2.

10. Emma Callies v. Reliance Laundry, 206 N.W. 198 (Wis. 1925); Honey v. Chicago B. & Q. R.R., 59 Fed. 423 (S.D. Iowa 1893); Benton v. Chicago, R. I. & P. R.R., 55 Iowa 496, 8 N.W. 330, 3 Am. Neg. Cas. 349 (1881); Benefant v. Chapdelaine, 131 Me. 45, 158 Atl. 857 (1932). For an interesting classification of cases on this subject see 42 A.L.R. 717.

11. 2 HARPER, READING IN TORTS 858 (1941).

covery to a plaintiff for damage to *his* legally protected interests because another person has been careless.[12]

Returning to the principal case, it is submitted that the Missouri court reached a proper conclusion, and even though the ancient rule that the wife's negligence will bar her husband in an action for consequential damages caused by the defendant remains the law, the humanitarian doctrine and the concepts underlying it do provide the plaintiff-husband a legal route to recovery when he can submit his case on humanitarian negligence.

WILLIAM HOWARD BILLINGS

12. In discussing Section 494 (*supra,* note 2) in Tentative Draft No. 10 (1933), the Council said: "The principle stated in this Section is supported by the greatly preponderating weight of authority. The view here expressed has, however, been subject to a criticism which has much merit. There seems little or no reason to deny recovery to the plaintiff merely because someone in whose services the plaintiff has a legally protected interest is himself careless. The right of such person to be free from injury and the right of the plaintiff to his services are distinct and different. None the less the decisions are so overwhelmingly in favor of the view stated in this section that even if a change in the law is desirable, the task of changing it must be left to the legislature since it is not the function of the Institute to change the law but to state it."