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Recent Cases

Attorneys—Giving Legal Advice by Laymen as Contempt.

*Murphy v. Townley*1

Application was made to the Supreme Court of North Dakota to assume original jurisdiction in proceedings seeking to punish defendants for contempt of court in what is termed the illegal practice of law. Defendants had been guilty of giving legal advice without having obtained a certificate of admission to the bar. There is a statute in the state making such acts a misdemeanor. An act of the legislature specifically sets forth what acts shall be punishable as contempt, and the offense herein complained of is not included. The court held that the acts charged do not come within the inherent power of the courts to punish as contempt. When the legislature specifically defines what acts shall constitute contempt of court, such legislative act is deemed a limitation on the power of the court.

This case presents the question of whether or not it is within the inherent power of the court to punish as contempt the giving of legal advice without having obtained a certificate of admission to the bar, and whether this power, if any, is subject to be reasonably regulated by statute.

The “practice of law” has been variously defined.2 In *People ex rel. State Bar Association v. People's Stock Yards State Bank*,3 the court adopted, although not finally, the following definition submitted by a committee of the American Bar Association: “Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.” That court further says: “Perhaps the major portion of the actual practice of law under modern conditions consists of the work of attorneys outside of any court and has nothing to do with court proceedings.” It appears from a study of the cases that practice of law means not only court work, but any work requiring legal knowledge or skill.4

1. 274 N. W. 857 (N. D. 1937).
3. 334 Ill. 462, 176 N. E. 901 (1931).
The control of the bar is a matter within the inherent power of the court. It controls the admission of members to the bar, and it seems, should likewise have the inherent power to punish as contempt, the illegal practice of law by persons not licensed to practice. The power to regulate the practice of law seems, in its exercise, to be essentially judicial and not legislative.

The principal case, in holding that the unauthorized practice of law by one not a member of the bar is not within the inherent power of the court to punish as contempt, is in direct conflict with the weight of authority. The following language is representative as to the matter of jurisdiction: "Having inherent and plenary power and original jurisdiction to decide who shall be admitted to practice as attorneys in this state, this court also has all the power and jurisdiction necessary to protect and enforce its rules and decisions in that respect. Having power to determine who shall and who shall not practice law in the state, and to license those who may act as attorneys and forbid others who do not measure up to the standards or come within the provisions of its rules, it necessarily follows that this court has the power to enforce its rules and decisions against offenders, even though they have never been licensed by this court."

In the last mentioned case the power of the court to entertain the original proceedings was questioned because the constitution provided that the original jurisdiction of the supreme court should be limited to certain things and that it should have appellate jurisdiction in all other cases. The court held that this provision did not apply where the practice of law was concerned. Missouri agrees with the majority that it is within the inherent power of the court to punish as contempt any illegal or unauthorized practice of law.

5. In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); Clark v. Austin, 101 S. W. (2d) 977 (Mo. 1937); In re Morse, 98 Vt. 85, 126 Atl. 550 (1924). For discussion of the court's regulation of the bar in Missouri, see Atwood, The Missouri Rule as to Regulation of the Bar (1936) 1 Mo. L. REV. 237; Howard, Control of Unauthorized Practice Before Administrative Tribunals in Missouri (1937) 2 Mo. L. REV. 313.


7. Bowlies v. United States, 50 F. (2d) 848 (C. C. A. 4th, 1931), cert. denied, 284 U. S. 648 (1931) (a disbarred attorney held guilty of contempt for representing a client); People v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931); People ex rel. Chicago Bar Ass'n v. Motorist's Ass'n of Ill., 354 Ill. 595, 188 N. E. 827 (1933) (a corporation held in contempt of court for illegal practice of law even though the legal work was done by a licensed attorney); Clark v. Austin, 101 S. W. (2d) 977 (Mo. 1937); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R. I. 122, 179 Atl. 139 (1935) (an act denounced by statute may be punished as contempt of court, notwithstanding the offender may be punished under a criminal statute); In re Morse, 98 Vt. 85, 126 Atl. 550 (1924).


9. Ex parte Creasy, 243 Mo. 679, 148 S. W. 914 (1912); State ex rel. Selleck v. Reynolds, 252 Mo. 369, 158 S. W. 671 (1913); Clark v. Austin, 101 S. W. (2d) 977 (1937).
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As to whether this inherent power in the court is subject to reasonable regulation by statute, the Missouri Supreme Court has not been entirely consistent. The better view and modern tendency has been that the court is not subject to such regulation. In the case of In re Hagan11, the Missouri Supreme Court said: "In the matter of contempt we have never gone further than to rule that as a matter of comity between the separate departments of the state government we would recognize reasonable restriction imposed by the legislature. We have never ruled that we had to recognize such legislative restrictions." Likewise, in the majority of jurisdictions, the fact that the offense is punishable under criminal statutes will not interfere with the courts power to punish the same acts as contempt of court.12

It seems that the instant case is contrary to the general rule that the courts have original jurisdiction in all matters pertaining to the practice of law and the inherent power to punish violations of its rules.

DAVID R. HARDY

CONSTITUTIONAL LAW—REGULATION THROUGH FEDERAL TAXATION.

Sonzinsky v. United States1

Defendant was convicted of dealing in firearms without the license required by the National Firearms Act of 1934.2 The license fee imposed amounted to two hundred dollars, and defendant contends that Congress exceeded its authority in passing this act, because it was not a tax but regulatory and to a greater extent than Congress was constitutionally capable of. Defendant also cites other parts of the act imposing a two hundred dollar tax upon the transfer of firearms contending that this also illustrates that the measure is regulatory rather than a tax measure. The

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10. Ex parte Creasy, 243 Mo. 679, 148 S. W. 914 (1912); State ex rel. Selleck v. Reynolds, 252 Mo. 369, 158 S. W. 671 (1913); In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933), indicate that the power to punish for contempt is inherent in the court, but this power is subject to reasonable regulation by statute. But in Clark v. Austin, 101 S. W. (2d) 977, 984 (Mo. 1937), Judge Frank in his opinion says that its inherent power to punish for contempt cannot be reasonably regulated by statute because it runs counter to the positive mandate of the constitution which provides that no person or collection of persons, charged with the exercise of powers properly belonging to one department of the government, shall exercise any power properly belonging to either of the others.


12. In People v. People’s Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901 (1931), where there was a statute imposing a penalty for the violation of it, the court said: “The Legislature has not attempted to tie the hands of the courts in dealing with contempts of this kind, and any attempt to do so would be an infringement upon the inherent exclusive jurisdiction of the courts.”; People ex rel. Courtney v. Ass’n of Real Estate Tax Payers, 354 Ill. 102, 187 N. E. 823 (1933); Rhode Island Bar Ass’n v. Automobile Service Ass’n, 55 R. I. 122, 179 Atl. 139 (1935), cited in note 7, supra. Contra: In re Frederick Bugasch, 12 N. J. Misc. 788, 175 Atl. 110 (1934).

1. 57 Sup. Ct. 554 (1937).

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Court held the measure, as far as license tax was concerned, to be constitutional, not committing itself on the rest of the act. The Court said that Congress could choose its subject of taxation; that here there were no regulatory provisions enabling the Court to call the act regulatory; that though there were some regulatory effects that was true of every tax measure; and that so long as a measure was a tax on its face the Court would not inquire into the motives of Congress despite the fact that the act tended to suppress and burden the subject of the measure. Since it did not effect an offensive regulation and since it operated as a tax netting some income, the Court considered the act within the taxing power.

The Supreme Court in a number of cases has classified purported tax measures of Congress into three categories. The first is the situation in which Congress has passed an act taxing some conduct or article with the obvious purpose of regulation or even suppression as distinguished from an attempt to obtain revenue. In *Veazie Bank v. Fenno,* the Court upheld a tax upon the bank notes of state banks, obviously for the purpose of destroying the issue of banknotes of the kind taxed, because they were a source of unsoundness in the national finances. The Court sustained the act as a tax measure and also on the ground that Congress had authority to regulate currency.* In the *Head Money Cases* an act of Congress was involved which imposed a tax upon ship owners of fifty cents per foreign passenger which they brought across. The Court upheld this measure because Congress has authority to regulate immigration.* The laying of tariffs upon imports may be justified as a regulation of foreign commerce over which Congress has control.* Congress may also rely upon its taxing power here.

The Court upheld these so-called taxes, but not so much on the ground that Congress could levy such taxes under the tax power invested in Congress by the Constitution as on the ground that Congress had the power to regulate these activities under regulatory provisions in the Constitution. The assessing of a tax was considered a legitimate method of regulating what Congress could regulate if possibly Congress could not pass such acts under the tax powers.*

In a second classification are the cases in which Congress has passed a tax measure, again with an obvious purpose of regulation, however, taxing subjects not subject to federal regulation. In *In re Kollock* and *McCray v. United States* Congress had laid a tax on butter-colored oleomargarine, in the second case so high that the effect would be to suppress that activity. It was contended that since suppression would be the effect, no revenue could be expected, illustrating that the intent of Congress was not to acquire revenue but to effect regulation. The Court

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3. 75 U. S. 533 (1869).
10. 195 U. S. 27 (1904).
said that the act was on its face a revenue measure and upheld the act. In United States v. Doremus,\textsuperscript{11} the Court considered an act of Congress placing a one dollar license tax upon dealers in narcotic drugs. That was the only revenue feature. The act required dealers to record sales, permitting only physicians licensed and registered to deal in the drugs. The records were to be kept easily accessible to federal investigation. The Court again upheld that act as a tax, explaining the apparent regulatory provisions as methods of facilitating collection of the tax. In the first of these taxes on opium it was found to cost the government more than the revenue derived. However, by the time the Nigro case was decided which approved the Doremus case, the tax had been raised.\textsuperscript{12} A statute passed by Congress levying a destructive tax on manufacturers of certain kinds of matches deleterious to the health of the employees engaged in the manufacture has never been contested in the courts.\textsuperscript{13} The same is true of a tax levied upon contracts concerning cotton futures, the purpose of the act obviously being suppression of gambling in the cotton market.\textsuperscript{14} Again a tax on manufacture, sale and transportation of opium, the purpose of the tax being suppression of such dealings, has not been called in question.\textsuperscript{15} The cases in this group have been upheld on the ground that Congress has power to tax the subject in question, and that since on the face, the acts were revenue measures the Court could not look behind to the motives of Congress or ascribe to Congress an intent which was not expressly placed in the measure, and that though there would result incidental regulation, that was of no matter.

Thus in the first group of cases, a tax was justified as a method of legitimate regulation whereas in the second group an actual regulation is justified as a tax measure.

The third class are the cases in which Congress had assessed a tax measure again with an obvious purpose of regulation or suppression of the subjects of taxation but again not constitutionally liable to federal regulation. But in these cases the Court invalidated the acts. The child labor cases are among the more famous of these. In Hammer v. Dagenhart,\textsuperscript{16} the Court invalidated the attempt to suppress child labor under the interstate commerce clause. This case did not involve the tax problem. In Bailey v. Drexel Furniture Co.,\textsuperscript{17} the Court declared unconstitutional the tax placed upon all manufacturers knowingly using child labor irrespective of the number used. The Court called this a penalty rather than a tax and pointed out that the Secretary of Labor was also involved in the collection of the tax indicating

\textsuperscript{11} 249 U. S. 86 (1919).
\textsuperscript{12} Nigro v. United States, 276 U. S. 332 (1928).
\textsuperscript{13} 37 STAT. 81 (1912), 26 U. S. C. A. § 661 (1928).
\textsuperscript{14} 39 STAT. 476 (1916), 26 U. S. C. A. § 731 (1928).
\textsuperscript{15} 26 STAT. 620 (1890), repealed in 1914 and replaced by a similar provision increasing the tax to $300. 38 STAT. 277 (1914), 26 U. S. C. A. § 1057 (1928).
\textsuperscript{16} 247 U. S. 251 (1918).
\textsuperscript{17} 259 U. S. 20 (1922).
that revenue was not the end aimed at. In *Hill v. Wallace,* the Court held unconstitutional a tax on contracts concerning grain futures as an attempt to regulate beyond federal power under the guise of the tax powers. The case of *United States v. Butler, Receivers of Hoosac Mills Corp.,* involved a tax on processors of certain farm products, the revenue to be used for expenses incurred in the contracts made by the federal government with farmers to decrease production. The Court declared the tax a mere disguise for regulating prices in farm products. The Court rejected the contention of the government that the general welfare clause permitted such a regulation, saying that the matter was intrastate and therefore beyond the constitutional control of Congress. In the recent case of *Carter v. Carter Coal Co.,* an act of Congress was involved declaring the coal industry to be affected with the public interest and also one involving interstate commerce. It prescribed certain codes, fixing prices, wages, hours, and working conditions. A tax was levied on all coal producers but it was provided that something in the nature of a rebate on this would be allowed should the industry consent to the imposition of the code. The tax without the rebate was so high as to make the sale unprofitable unless the benefits of the rebate were acquired. The Court said, besides the part that this was a regulation of intrastate matter beyond the scope of federal power, that the act could not be justified as a tax measure, it being not a revenue measure but on its face a penalty and an attempt to regulate that which Congress could not under regulatory power reach. In *United States v. Constantine,* an act of Congress was declared unconstitutional which in addition to the twenty-five dollar excise tax placed on liquor retailers also imposed a tax of one thousand dollars when their operation was contrary to the law of the locality in which they were carrying on business. The act also provided a fine and imprisonment for failure to pay. The Court said that this was an attempt to penalize and regulate under the guise of the taxing power. It is thus seen that in this situation the Court has, unlike in the second situation, peer ed behind the statute and discerned what was actually intended to be the purpose of Congress in passing the statutes. The Court has done what it refused to do in the oleomargarine and drug cases.

The principal case is one that may be placed in the second classification. Congress had through its taxing power sought to suppress the transactions in firearms and the Court shut its eyes to the real purpose, calling the measure one for revenue and allowed the act to stand. To actually distinguish the facts of many of the cases sufficiently to justify the opposite views of the decisions in cases like the child labor case and the oleomargarine case is difficult. The Court in the principal case dropped a hint at the real distinction. The decision closes with the words that since the act did not effect an offensive regulation and since it operated as a tax, netting

18. 259 U. S. 44 (1922).
some income, the Court could consider it as a tax measure. It seems from many of the cases that the Court is deciding the case on the question whether the regulation is offensive rather than the basis given in the decisions.

There are three further cases which might be classed under the first head because the tax was upheld largely on the ground that Congress could levy such a tax with the desired regulation in view, but they also partake of some of the characteristics of the second head in that the tax was upheld as such. The cases are also important in connection with a consideration of the A.A.A. case and the *Carter Coal* case in that they involve the rebating or crediting provisions found there. Of the three, the case of *Steward Machine Company v. Davis* is the most important. Here the act of Congress was involved which levied a tax upon all employers of eight or more employees, the purpose being an insurance for the unemployed. The measure contained a provision for crediting employees up to ninety percent if the state in which they resided enacted such an unemployment law. Such state law had to be approved by a federal board, the funds collected thereunder had to be deposited with the federal treasury, and funds were to be paid out at the state’s request to federally approved state agencies. Justice Cardozo, writing the opinion, said that though the act was passed for some collateral good, that would not invalidate the act, citing the *Sonzinsky* case. The credit provision was not considered to be an attempt by Congress to force the states to enact laws and thereby effect a regulation in intra-state affairs, because the act did not require any state action, but merely made provision so that an employer would not be doubly taxed. The Court also cited the great extent of the unemployment problem, its national character, and the state’s frequent inability to cope with it individually, therefore deducing that the problem was one for the federal government to assist with. The Court pointed out that it was not holding that Congress could pass an act, unrelated to matters legitimately within federal control, from which the state could only escape by complying with the federal suggestion, indicating again that the tax and problem were national. The Court also said that the various requirements which the state acts had to meet were not invasions of the states rights because the state could avoid them by just not passing any legislation along this line. The four dissenting justices felt that the aim was intra-state and that the federal government had by the method of the credit attempted to coerce the state into regulation of that strictly state problem. The second case involving a state act passed in view of the federal act, went on the same grounds as far as the immediate considerations are concerned. The third case involved the tax on employers for the purpose of paying

25. Justice Cardozo seemed to indicate that even if the act had been passed to encourage states to comply, that would not be a ground for objection.
old age pensions. Justice Cardozo again cited the national scope of the problem and therefrom deduced the federal government's power to exercise control over the situation.

PAUL F. NIEDNER

CRIMINAL LAW—PETTY OFFENSES—RIGHT TO JURY TRIAL.

District of Columbia v. Claways

Defendant was engaged in the business of dealer in return portions of railroad tickets. An act of Congress required a $50 license tax to be paid by persons engaged in that business and failure to pay the fee subjected the violator to a $300 fine or a ninety-day jail sentence. Defendant failed to pay the tax, was tried in the police court, and fined $300. The trial was had without a jury under the act of Congress which provided that in prosecutions in the District of Columbia police court, when the accused was not under the Constitution entitled to trial by jury, he should be tried without a jury except in cases in which the punishment might be more than a $300 fine or a ninety-day jail sentence. The accused demanded a jury trial but this was refused. He contended that Article III and the Sixth Amendment to the United States Constitution guaranteed him a jury trial. The Court held that a jury trial was not essential in this case, saying that it had been the practice to try certain petty offenses without a jury. The Court first discussed the moral turpitude of the offense and its indictability at common law, concluding that the offense was relatively inoffensive and not a crime at common law. The Court discussed the severity of the punishment, indicating that this should here determine the necessity of a jury. The Court cited numerous incidents of confinement some as great as six months without a jury trial in England and also in the state courts. The conclusion reached was that the punishment was not so severe as to require a jury trial. Butler, J., dissenting, believed that the punishment was so great as to make a jury trial necessary.

The two provisions in the Constitution of the United States concerning jury trial seem from their wording to apply to every crime, making no exception of petty offenses. These must be read, however, in the light of their historical background. In the reign of Henry VIII a movement began which dispensed with jury trial in certain petty offenses in which the punishment and the moral turpitude involved were small. The situation was made worse by the difficulty of obtaining an appeal in cases tried by magistrates. The tendency grew, largely under legislation, until some offenses which involved as great as seven years' transportation were triable without a jury. Much of the reason for this was the cumbersomeness of the jury.

1. 57 Sup. Ct. 6, 60 (1937).
2. U. S. CONST. ART. III, § 2: "The trial of all crimes, except in cases of impeachment, shall be by jury..." U. S. CONST. AMENDMENT VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed..."
3. See 22 & 23 Car. II, c. 7 (1671).
The efficiency of summary trials was a necessity in England where criminal offenses were clogging the dockets. The cases accordingly illustrate a tendency to justify the summary trial on the basis of necessity rather than on the nature of the offense. The colonists brought with them this concept of dispensing with jury trial but their tendency was to limit the summary trial to a great extent. This was but natural in view of the fact that the necessity for a quick disposal of cases in order to clear the dockets was not so great in the sparsely settled colonies. The authors of our Constitution had this background in mind, and taking it together with a view of the proceedings in the constitutional convention, it is by no means an illogical inference that the bald constitutional provisions nevertheless contemplated certain cases in which jury trial was not necessary.4

There are several other cases in which the Supreme Court has recognized this qualification to the constitutional provisions. In Schick v. United States,5 a jury was waived in the trial of an offense punishable by fine of $50 involving violation of a law regulating the sale of oleomargarine. The Court held that the offense was of such petty nature that a jury was not necessary, the Court considering the punishment as indicative of the nature of the offense. The Court said that the nature of the offense in addition to the penalty was the basis in the determination. There are two Supreme Court cases that seem to contradict the Schick case somewhat. Callan v. Wilson,6 involving prosecutions for conspiracy in boycotting, the fine for which was $25, and District of Columbia v. Colts,7 involving a thirty-day jail sentence for reckless driving, both held that a jury was requisite. In each of these cases the Court discussed the fact that the offenses were common law offenses and pointed out the seriousness of conspiracy and reckless driving and their great potential dangers rather than the extent of penalty. The Colts case distinguished the Schick case by the fact that in the Schick case the offense was but a statutory violation, no offense at common law and not intrinsically so dangerous nor serious. From these cases it is apparent that the test of determining whether a jury was necessary was the seriousness of the offense; in the Schick case the punishment was greater than in the Callan case and in the Colts case the nature of the offense was discussed, largely ignoring the extent of the penalty. In the principal case the common law nature of the offense was considered, but the severity of the punishment was clearly the basis for the decision. In the trial court it was said that the nature of the offense was no basis for determining the necessity of a jury trial.8 The principal case reversed the trial court but the point on which the reversal came was that the Supreme Court did not consider the punishment so severe as to require a jury trial while the trial court did. This is a different attitude from the earlier cases;

5. 195 U. S. 65 (1904).
7. 282 U. S. 63 (1930).
there is a different basis for determination announced. Of course, to the extent that the nature of the offense usually determines the severity of punishment the two tests amount to the same thing, but there are situations where the different considerations will produce different results.

The constitution of Missouri provides that the accused shall have the right to a speedy, public trial by an impartial jury of the county. Some such provision is present in nearly every state constitution. The Missouri constitution is general and comprehensive in its language. That it contemplated qualifications to the requirement of a jury in every criminal case is as true as in the case of the United States Constitution. It is considered more in the nature of preserving a right than creating one. There are a number of statutes pertaining to justice of the peace courts which permit a trial with a jury of six if this be demanded. The constitution contemplates a jury of twelve and a lesser number cannot constitute a jury in the constitutional sense. These courts are given jurisdiction over misdemeanors and ordinance violations. It might seem from the face of these statutes that a jury could be refused in misdemeanor cases, but that possibility is small. There are no cases construing these statutes in such way and the Supreme Court of the United States has never permitted the denial of a jury to go that far.

There are a number of cases illustrating when the jury need not be granted. In Delaney v. Police Court, a case involving drunkenness on the streets declared by ordinance to be a misdemeanor triable in a police court without a jury, the court said, "Neither the constitution of Missouri nor the constitution of the United States guarantees to a person charged with a violation of a mere municipal police regulation the right of a trial by jury." In the early case of State v. Ledford the court upheld an act declaring assaults, batteries, affrays, riots, routs, and unlawful assemblies not to be indictable but punishable before a justice of the peace in a summary way. In Ex parte Kiburg the defendant was tried in a police court for selling lottery tickets, forbidden by ordinance, and refused a jury. He was convicted and fined, and refusing to pay, was jailed. The court said that in trial of a petty offense cognizable in police courts, a defendant was not entitled to a jury. The waiver of a trial jury is quite another thing from the denial thereof. A jury may be

11. Mo. Rev. Stat. (1929) § 6666 conferring upon municipal judges jurisdiction over ordinance violations gives the accused the right to a jury as in justice of the peace courts which by § 3436 is a jury of six. That is in the case of second class cities and the same is true of third class cities by § 6763 and of fourth class cities by § 6891. As to cities of the first class § 6163 omits the jury requirement but is very clear in allowing an appeal. The justice of the peace courts are given jurisdiction over misdemeanors by § 3414.
15. 3 Mo. 102 (1832).
16. 10 Mo. App. 442 (1881).
waived even in a felony case under the rulings of the United States Supreme Court although the same is not true in Missouri.\textsuperscript{17}

Upon viewing these cases it is apparent that in Missouri there are certain petty offenses which may be tried without a jury and it seems probable that Missouri goes as far as the United States Supreme Court in permitting this.

\textbf{PAUL F. NIEDNER}

\textbf{EXECUTORS AND ADMINISTRATORS—EXHIBITION FOR CLASSIFICATION.}

\textit{Schaefer v. Magel's Estate}\textsuperscript{1}

Within six months after first letters were granted in decedent's estate, the plaintiff filed a claim in probate court for services rendered. Plaintiff exhibited his demand for allowance to the administratrix before the duration of that period but made no exhibition for classification. The administratrix endeavored to defeat allowance by maintaining that the exhibition for classification was necessary before the court could take jurisdiction of the subject-matter. The probate court as well as the circuit court in St. Louis agreed with this contention. The St. Louis Court of Appeals held that although the demand for allowance to both the probate court and the administrator is jurisdictional, the exhibition for classification is not.

The Missouri statutes relating to the exhibition, presentment, and allowance of demands against the estates of decedents have been interpreted by the Supreme Court of Missouri in \textit{State ex rel. Dean v. Dauel}\textsuperscript{2} and \textit{Home Insurance Co. v. Wickham}.\textsuperscript{3} As therein construed the statutes provide for two written exhibitions of a demand \textit{to the executor or administrator} within a year after the first granting of letters. Apparently the same document properly worded may supply the requirements of presentation for both allowance and classification.\textsuperscript{4} 1. The claimant "may"


2. 321 Mo. 1126, 14 S. W. (2d) 990 (1928).
3. 281 Mo. 300, 219 S. W. 961 (1920).
4. The notice given the administrator under the statute [Mo. Rev. Stat. (1929) § 186], in regard to exhibition for classification, often is broad enough to include that which is required under the statute, [Mo. Rev. Stat. (1929) § 187], in regard to exhibition for allowance in which case no further notice to the administrator is necessary; but if it does not state that the claimant will present the claim for allowance at the next regular or adjourned term of court, then it only has the effect of a notice in the first sense which preserves his right to classification under the statute classifying demands [Mo. Rev. Stat. (1929) § 182], and brings it within the one year statutory limitation [Mo. Rev. Stat. (1929) § 183]. See \textit{Van Wagner v. Slane}, 14 S. W. (2d) 710 (1929).
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request classification\(^5\) which is thus deemed permissive rather than mandatory.\(^6\)

2. In order that the probate court get jurisdiction of the subject-matter, an
essential element is that the claimant make a claim to the administrator for the
allowance of a demand.\(^7\) This is necessary so that the administrator may be ap-
prised of the amount of the claim and its origin; he will thus be able to investigate
it intelligently and prevent any further recovery on the same cause.\(^8\)

In addition to the claim for allowance which must be presented to the executor
or administrator, the claimant must present a demand for allowance to the probate
court within the same year after the granting of letters in order that that court have
jurisdiction over the subject-matter.\(^9\) These two requirements for jurisdiction existed
side by side after 1855 and always have been held to serve two distinct purposes.\(^10\)

The Missouri statute\(^11\) in regard to classification of demands presented
against a decedent's estate includes four definitely specified types of preferred
demands, the proper classification of which depends upon the character and identity
of the same. The fifth class includes all demands without regard to quality which
shall be "legally exhibited" against the estate within six months after the date of
granting first letters. The sixth class includes all demands "thus exhibited" after
the end of six months and within one year after the granting of first letters on the
estate.

Unless demands of the first, second, third, and fourth classes are exhibited
within the first six months after the grant of letters, they lose their priority and
fall into the sixth class.\(^12\) All demands except those of the first, second, third, and
fourth classes that are exhibited within the first six months fall into the fifth class;
if exhibited within the second six months they fall into the sixth class. None of the
demands mentioned in the first, second, third, and fourth classes can in any case be
assigned to the fifth class, for if they are exhibited within the first six months, they
must be classified as the statute requires, and if not exhibited within the first six
months they descend in the order of classification to the sixth class.

In order to appreciate the significance of the exhibition for classification it must
be clearly distinguished from the actual classification by the probate court. The
Missouri statute\(^13\) relating to the exhibition for classification does not require
presentation to the probate court for the obvious reason that when there is any ques-

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5. The notice should be in writing, embrace all the items in the claim, and
designate an intention to present same to the court for allowance. Pfeiffer v. Suss,
73 Mo. 245 (1880).
Wickham, 281 Mo. 300, 219 S. W. 961 (1920); Price v. McCause, 30 Mo. App. 627
12. See Walley v. Gentry, 68 Mo. App. 298 (1897).

https://scholarship.law.missouri.edu/mlr/vol3/iss1/15
tion about the classification of a claim the claimant will try to get his claim classified by the probate court in the most advantageous manner possible, and thus is bound to present a petition of this sort. The demand may be established by the order of the probate court or on appeal from such judgment. It is then classified in accordance with the statutory requirements. The claim may be established by the judgment of some other court and in this case the judgment may be presented to the probate court and classified without notice to the administrator. Where there is no contest before the court upon the question of the class to which the claim belongs, there is nothing for the court to do but classify the claim as the law directs. In the allowance and classification of claims against estates the Missouri probate courts are upon the same footing as courts of general jurisdiction.

The exhibition for classification is in no sense the beginning of a legal proceeding based on a demand but is only an exhibition for classification of the claim if and when allowed. For any effective purpose it must be made within the first six months in a situation where the demand for allowance is not made until after the first six months but within the first year after the granting of letters. If a claim falling within one of the first five classes is exhibited for classification in conformance with the statute within the first six months but is not presented to the court for allowance until the second six months it should be assigned to one of the first five classes rather than to the sixth. The exhibition for classification is unnecessary in regard to claims of the sixth class.

The exhibition for classification may vitally affect the payment of the claimant's demand since the statutory provision requires that “all demands against any estate shall be paid by the executor or administrator, as far as he has assets, in the order in which they are classed; and no demand of one class shall be paid until all previous classes shall be satisfied.” This is apparent in a case of an insolvent estate where only certain classes of claims first in the order of priority can be covered by the available assets.

The legislature has provided two slightly repetitious statutes which cover the exhibition for classification and the exhibition for allowance to the administrator

15. Langston v. Canterbury, 173 Mo. 122, 73 S.W. 151 (1903).
20. Johnson v. Beazley, 65 Mo. 250 (1887); Smith v. Simms, 77 Mo. 269, 272 (1883); Henry v. McKerlie, 78 Mo. 416 (1883).
21. See the instant case.
23. Knisely v. Leathe, 256 Mo. 341, 166 S.W. 257 (1913); Walley v. Gentry, 68 Mo. App. 298 (1896); Telephone Co. v. Hamil, 160 Mo. App. 521 (1911).
or executor. There is no practical reason for the exhibition for classification. The exhibition of the demand for allowance gives the administrator or executor ample notice of the extent of the claim and there is no reason why the demand for allowance could not be presented to the administrator or executor at the time when he is able to make an exhibition for classification. By repealing the superfluous exhibition for classification the legislature would remove red-tape from probate procedure and the presentment of claims against estates would be facilitated. Cases such as the instant case would be avoided.

LIPMAN GOLDMAN FELD

FRAUD AND DECEIT—PROMISSORY STATEMENTS—PRESENT INTENT NOT TO PERFORM.

Jeff v. O'Meara

Action for damages for alleged fraud and deceit. The defendant was zone manager for the Chevrolet Motor Co. The plaintiff alleged that defendant, for the purpose of inducing plaintiff to invest $15,000 in the capital stock of the Lindell Chevrolet Co., fraudulently and falsely represented, inter alia: that plaintiff could not lose any money that he invested because the General Motors Holding Company existed for the purpose of taking over failing dealers, and said Holding Company would come to the rescue of any retail dealer in financial trouble and the investors would not lose a dime; and that plaintiff could not lose any money that he might invest in the Lindell Chevrolet Company because the Holding Company had never permitted a licensed dealer to fail in business, or the investors therein to lose their investment. Plaintiff further alleged that defendants made the statements as of their own knowledge, when in fact they did not know whether said statements were true or not; that the representations related to matters peculiarly within the knowledge of the defendants; that defendants in making the representations misstated an existing state of mind. The defendants filed a joint demurrer. The demurrer was overruled, and defendants answered by general denial. Judgment for plaintiff in the lower court, but on appeal the judgment was reversed, and cause remanded. The court said that the statements of defendants were promissory, and too extravagant to be believed; and even when coupled with the allegation that such statements were peculiarly within the knowledge of defendants, were not sufficient to state a cause of action.


26. Pfeiffer v. Suss, 73 Mo. 245 (1880), shows that the exhibition for classification must be practically as complete as the demand for allowance and thus there can be no pretense that an early exhibition for classification enables the claimant to have more time to prepare his case.

27. It should be noted that Mo. Rev. Stat. (1929) § 186 makes no mention of the term "classification" which causes some confusion in the interpretation of the statute. The exhibition for classification may be easily avoided if the administrator is persuaded to waive it when the demand for allowance is presented to him.

By the great weight of authority, fraud must relate to a present or pre-existing fact, and cannot be based on a prediction or promise as to the future course of events. Promises going to the future are not statements of fact on which deceit can be based. The law distinguishes between a representation of existing facts and a representation of facts to come into existence. A statement as to future events cannot very well be false at the time it is made. In the absence of special circumstances courts regard these promissory statements as mere opinion or hope.

But if, coupled with a promissory statement, there is the further allegation that the promisor had no intention of performing, a type of situation is presented on which the courts are not agreed. The majority of courts gets around the general rule as to promissory statements by holding that one's state of mind is a present fact, and, therefore, a misrepresentation upon which fraud may be predicated. "The state of a man's mind at a given time is as much a fact as is the state of his digestion." Missouri, however, holds that fraud cannot be predicated on a promissory statement, even though at the time of making the promise there was an intention not to perform.

In the principal case the court bases its decision on the earlier Missouri decision in Reed v. Cooke, and says that it can see no difference in principle between the conclusion in the case under discussion and the conclusion reached there. Prior to the Reed case there were Missouri cases holding with the majority rule. The Reed case was based on the earlier case of Younger v. Hoge, in which the court said, "A promise, though made without intention to fulfill, is not a misrepresentation of an existing fact." Gantt, J., in his dissenting opinion in the Reed case, very ably disposes of the Younger case by showing that the cases cited in support of it did not involve, as a basis of fraud, a promise made with no intent to perform.

2. (1927) 51 A. L. R. 49.
5. (1927) 51 A. L. R. 63.
7. (1927) 51 A. L. R. 73.
8. 331 Mo. 507, 55 S. W. (2d) 275 (1932).
11. Ibid. at 445, 111 S. W. at 22.
There is another line of cases in Missouri which, while purporting to support the Missouri rule, have produced a more liberal doctrine. In Metropolitan Paving Co. v. Brown-Crummer Inv. Co., the court subscribes to the Missouri rule, but goes on to say that a state of mind may be misrepresented, and thus constitute a misrepresentation of fact. There is still a later case, Collins v. Lindsay, in support of this more liberal rule which states, "A state of mind, an existing purpose, may be misrepresented and thus constitute a misrepresentation of fact." It will be noted, however, that in the Metropolitan and Collins cases the fact situation differs somewhat from the other Missouri cases in point. In these two cases the purpose for which the act of plaintiff is asked is misrepresented, whereas in the cases holding opposite to them the misrepresentation has been as to future events solely, even though there was a present intent not to perform. The narrow and confined exception found in these last two cases will include so few cases as to make it useless; but even so, on this slight difference in the cases the editors of the American Law Reports have attempted to reconcile the Missouri cases. However, it seems like a distinction without a difference, and it would be far better for the Missouri court to recognize the fraudulent nature of a promise made with present intent not to perform than to adhere to its present rule as to promissory statements. Furthermore, it is out of line with the great majority of the cases in other jurisdictions.

JOHN HAMSHAW

FRAUDULENT CONVEYANCES—RIGHTS OF CREDITORS TO LAND CONVEYED WITH INTENT TO DEFRAUD THEM.

Castorina v. Herrmann

Plaintiff obtained a judgment in the justice court against Joe and Caterina Compise on December 4, 1929. On December 7, 1929, a deed dated November 26, 1929, was recorded which conveyed the property involved herein to Harry Roth, who was acting as their attorney. On January 9, 1930, Roth executed a deed of trust and note to defendant, describing the property in question, which was not recorded by the defendant until November 20, 1930. On January 11, 1930, plaintiff filed a transcript of the judgment previously obtained with the clerk of St. Louis county, thereby obtaining a lien on all land in that county belonging to Joe and Caterina Compise, as provided by statute. On May 13, 1930, after Roth conveyed by deed the

14. Collins v. Lindsay, 25 S. W. (2d) 84 (Mo. 1930).
15. Id. at 90.
16. (1927) 51 A. L. R. 73, cited note 7, supra: "While the Missouri court has taken the view that fraud cannot be predicated on an unfulfilled promise, even though at the time it was made there was an intention not to perform it, this doctrine has been limited in its scope to promissory statements, and has been held not to apply to a misrepresentation of intention or purpose, which the court has regarded as a statement of fact."
1. 104 S. W. (2d) 297 (Mo. 1937).
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property to his wife's sister on March 21, 1930, plaintiff brought suit against Roth, his grantee and the Compises, and obtained a judgment by which title was re-invested in the Compises. Plaintiff levied upon the property on May 20, 1931, and, upon sale under execution to satisfy the judgment on June 15, 1931, purchased the property. Plaintiff then instituted the present suit in equity to have the deed of trust to defendant set aside, as fraudulent, and in that way to clear the cloud on his title. The defendant was not a party to the former suit, and there was nothing then on record to show he had any interest in the land. The court found for the defendant and entered a judgment dismissing plaintiff's petition, but during the same term the court sustained plaintiff's motion for a new trial. Defendant appeals from the order granting a new trial, which was based on the belief of the trial court that the verdict was against the weight of evidence.

A judgment creditor in Missouri has two methods of satisfying his judgment in case of a fraudulent conveyance. He can disregard the conveyance as if it never existed and levy upon the land. At the sale of the property it is even permissible for him to become the purchaser. Then, in order to clear the cloud from the title that the fraudulent conveyance has made, the purchaser may bring a bill in equity to set aside and cancel the conveyance, thereby leaving his title clear and free from this cloud. This procedure is allowed on the theory that, by the fraudulent conveyance, no title passed out of the fraudulent grantor so the subsequent sale under execution passes good title to the purchaser. This method of proceeding is objectionable because the purchaser at the sale is aware that he is buying a law suit and, for that reason, he will not pay much for the property.

The better practice, and the one that is considered fairer by the courts to all parties concerned, is for the judgment creditor first to set aside the conveyance, after having obtained judgment and before execution upon the property, thus clearing the title and preventing a possible sacrifice of the property on sale. Then after the title is clear he may levy upon the property and sell it under execution.

No matter which of these two courses is taken, it is necessary to resort to equity if the title is to be cleared. Plaintiff in the principal case proceeded in a manner.

4. Ryland v. Callison, 54 Mo. 513 (1874); see Dalton v. Barron, 293 Mo. 36, 239 S. W. 97 (1922); Bobb v. Woodward, 50 Mo. 95 (1872); Dunnica v. Coy, 28 Mo. 525 (1859); Herrington v. Herrington, 27 Mo. 560 (1858); Rankin v. Harper, 23 Mo. 579 (1856); Eddy v. Baldwin, 23 Mo. 588 (1856); Aspinall v. Jones, 17 Mo. 209 (1832); Howe and Wallace v. Waysman, 12 Mo. 169 (1848); Kinealy v. Macklin, 2 Mo. App. 241 (1876).
7. Welch v. Mann, 193 Mo. 304, 92 S. W. 98 (1906); Lionberger v. Baker, 88 Mo. 447 (1885); see Spindle v. Hyde, 247 Mo. 32, 152 S. W. 19 (1912).
8. Delo v. Johnson, 85 S. W. 109 (Mo. App. 1905); see Dalton v. Barron, 293 Mo. 36, 239 S. W. 97 (1922); Gill v. Newhouse, 178 S. W. 495 (Mo. 1915); George v.
sanctioned by law, although not in the more approved manner. While the facts
do not show that plaintiff had any knowledge of the defendant’s need of trust when
the first suit to set aside conveyances was instituted, he had constructive notice
before the levy by virtue of the recording of the instrument.

His suit brought against the defendant, to remove the cloud from his title, was
unsuccessful on the first hearing, but if on the new trial, which was ordered by the
trial court and the order sustained by the supreme court, the deed of trust should
be found to have been fraudulent and is set aside, then plaintiff’s title will be clear
and free of this encumbrance. On the new trial, if it should be found that this deed
of trust was given in fraud of creditors, then plaintiff’s levy and sale will at least
prove to have been proper, for the plaintiff’s lien will date from the filing of the
judgment with the circuit clerk, even though the property was in the name of a
fraudulent grantee at that time.10

CLIFFORD A. JONES

INSURANCE—INJURIES THROUGH EXTERNAL, VIOLENT AND ACCIDENTAL MEANS.

Gasperino v. Prudential Insurance Company of America1

Action by beneficiary on an insurance policy on the life of her husband. The
policy carried a double indemnity clause which provides for the payment of an
additional sum of $1000 if the insured’s death was “a result, directly and independ-ently of all other causes, of bodily injuries, effected solely through external, violent and
accidental means, of which . . . there is a visible contusion or wound on the exterior
of the body . . . provided, however, that . . . it shall not be payable if the death of
the Insured resulted . . . directly or indirectly from bodily or mental infirmity or
disease in any form . . . .” Insured drank water from the well in his back yard in
preference to water piped to his house by the city because it was cooler and more
refreshing during the hot days of summer. He developed the symptoms of typhoid
fever, whereupon the well water was examined and found to contain typhoid germs.
Within the time named in the policy, he died of typhoid fever. The court held for
the plaintiff.

The chief point in controversy is whether the death was the result of “external,
violent, and accidental means.” The insured intended to drink the water but not
the germs, thus the drinking of the germs was an accident. When he accidentally
drank the germs there was caused thereby a bodily injury. The fatal fever followed

Williamson, 26 Mo. 190 (1858). Contra: Potter v. Adams, 125 Mo. 118, 28 S. W.
490 (1894); but see Chandler v. Bailey, 89 Mo. 641, 1 S. W. 745 (1886).
10. Dalton v. Barron, 293 Mo. 36, 239 S. W. 97 (1922); Slattery v. Jones, 96
Mo. 216, 8 S. W. 554 (1888); Ryland v. Callison, 54 Mo. 513 (1874). On this
general subject see 12 R. C. L. 614; (1929) 64 A. L. R. 790, 794; also (1902) 2 Col.
L. Rev. 421; (1908) 8 Col. L. Rev. 582; (1914) 14 Col. L. Rev. 385; (1890) 3
Harv. L. Rev. 283; (1889) 12 Harv. L. Rev. 283; (1924) 37 Harv. L. Rev. 489;
(1924) 37 Harv. L. Rev. 500.

1. 107 S. W. (2d) 819 (Mo. App. 1937).
as a natural result from such injury. The injury was external as the germs were external and violent and came from the outside to infect insured under circumstances which were accidental, and as a result the typhoid fever developed as incident to such accident. Cracked lips and swollen face formed the "visible contusion or wound," and as the disease was the result of an accident it did not fall within the clause of the policy excluding liability for death by disease.

The phrase "external, violent, and accidental means" is the point around which the trouble centers in allowing recovery in a case like this. Each word taken separately would not seem to present any great difficulty although there are many cases and discussions about each of them. There is a recognized distinction between accidental death and death by accidental means.2 Accidental death is concerned only with accidental results (unexpected and unusual consequences) of intended or unintended means and causes. Death by accidental means requires that death or injury must have resulted from acts, conduct, or circumstances which happened by chance, not as expected, not intended, not foreseen.3 Accidental means are those which produce effects which are not the natural and probable consequences of the act.4 This is fundamentally the same as the foreseeability test in negligence which has been advocated as a test of accidental means.5 The application of these tests, and others not specifically mentioned, may be seen by a review of the cases. The insured, while chopping wood, was struck by a flying splinter and died from blood poisoning caused thereby.6 Ptomaine poisoning from eating mushrooms in a restaurant,7 and by eating bad ice cream,8 typhoid fever from drinking polluted water,9 unintentionally inhaling gas,10 unintentional taking of poison,11 heat prostration,12 lanced pimple introducing germs causing fatal pneumonia13 have all been held to be "accidental means" of death.

As to the meaning of the words "external and violent" the cases are in apparent harmony. The term is broadly interpreted to include accidents and deaths, the cause of which would seem, at first blush, to be neither external nor violent, e. g. the

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2. (1936) 1 Mo. L. Rev. 97; (1925) 9 Minn. L. Rev 669.
ptomaine poisoning case,14 typhoid fever,15 heat prostration,16 and pneumonia.17 On the other hand an overdose of opium has been held not to be external and violent.18 The same is true as to epileptic fits.19 In a New York case it was held that “external, violent and accidental means” does not include death caused by the accidental taking of poison, “since death was not caused by an external act, nor by anything acting externally, and certainly not by any violent external means.”20 There was a strong dissent however.

It has been said that “external means” in an accident policy should be construed to mean that the means or that which caused the injury be external, and not that the injury be external, the court saying that “... while the policy provides that the liability arises when the injury ‘is through external, violent, and accidental means, independently of all other causes,’ it was not designed that there should be such external violence, as a fall, a kick, or a blow, on the person, as would cause death or an injury, before the liability of the company could arise. This language was inserted in the contract to protect the company against hidden or secret diseases, resulting in injury, where there was no manifestation of harm to the external body. . . . It is universally understood, when it is said that one died a violent death, that it was unnatural,—a death not occurring in the ordinary way; . . . and in using this word the insurance company was attempting to prevent the assured from asserting a claim when the injury or death was the result of some natural cause. . . .”21 This view has been widely approved,22 and could easily serve

as a basis for the decision of the principal case. The insurance company was not made liable for a hidden or secret disease, resulting in injury, and still the insured was allowed recovery for death caused by the internal action of germs, which he could reasonably expect to have been covered by his policy.

Charles M. Walker

Negligence—Duty of Care—Causation—Intervening Cause—Liability to Boy Flying Kite for Injuries When Kite String Came in Contact with Electric Wires.

Schneiter v. City of Chillicothe

Plaintiff, a boy of nine, was flying a kite, and when the kite string came in contact with the wires, the string being damp the current came through the string and the plaintiff was burned and shocked. The wires were maintained by the defendant city. Plaintiff claims that they were maintained in a negligent manner in that they were not properly insulated and were not strung high enough. The lot on which the plaintiff was flying the kite was a common lot and he was in a place where he had a right to be. Defendant was charged with knowledge that boys like the plaintiff had been in the habit of flying kites on this lot.

The appellant's case was attacked by the defendant city, on the grounds that there was no duty owing to the boy from the city, that the defendant's act was not the legal cause, and that there was such an intervening agency as to cut off the defendant's liability if any existed.

As to the city's argument that there was no duty owing this plaintiff, it must be realized that from the case of Heaven v. Pender it has been settled that when a reasonable man can foresee a risk of some injury to the plaintiff in the zone of danger, of sufficient seriousness that a reasonable man would use care, a duty arises to use the care of the ordinary reasonable man. Upon applying the facts of the case to this accepted test it becomes apparent that there was a duty owing to the plaintiff and members of his class. For the purpose of determining whether the actor should recognize that his conduct involves a risk, he is assumed to know the qualities and habits of human beings, the qualities, characteristics and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community. Plaintiff in his petition to which the defendant demurred generally, alleges that the wires had been in such a defective condition for such a length of time that the defendant knew or by the exercise of reasonable care should have known of all of said condition in time to have remedied them. It was also alleged that the defendant knew or should have known that children flew kites on this lot, and that on damp days the string which they used could act as a conductor.

1. 107 S. W. (2d) 112 (Mo. App. 1937).
2. 11 Q. B. D. 503 (1885).
3. Restatement, Torts (1934) § 290.
ing this, he owed to the members of the plaintiff's class the duty of putting the wires out of reach. "Negligent conduct may be . . . a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." The actor, as a reasonable man, should know the peculiar habits, traits, and tendencies which are known to be characteristic of certain well-defined classes of human beings. In Missouri, an electrical company "if reasonably chargeable with knowledge, or of facts making it reasonably probable, that persons may lawfully come into close proximity to its wires for purposes of either business or pleasure, is obligated to use every precaution which was accessible to insulate its wires at such places and to use the utmost care to keep them so." Clearly in the light of the law and the facts there was sufficient evidence to send the matter to the jury. Defendant could have foreseen that by leaving the wires hanging in a negligent manner some injury may result, so he was under a duty as to the condition of the wires.

The second contention of the defendant is that the leaving of the wires in the negligent condition was not the legal cause of the plaintiff's injury. The actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm to another. An important consideration in determining whether this negligent conduct of the defendant was a "substantial factor" in producing the harm, is whether "after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm." Considering the facts of which the defendant was charged with knowledge, it does not appear "highly extraordinary" that, leaving the wires uninsulated, one of the children that flew kites might have his string come in contact with them and thereby be injured. If the result is a natural and probable consequence of a negligent act, then that act is the legal or proximate cause. In the instant case the court held that after injury is complete, a person charged with negligence may be held liable for anything which appears to have been the natural and probable consequence of his act or omission. This is the test commonly applied in other Missouri cases. And even if it were true that the light company, at the time it left the wires hanging in a negligent manner, neither realized, or even should have realized, that it might cause harm to the child in the exact manner in which it occurred, it is not of itself sufficient to prevent them from

4. Id. at § 284.
5. Id. at § 290.
7. RESTATEMENT, TORTS (1934) § 431.
8. Id. at § 433.
being liable for the plaintiff’s injury if their conduct was negligent to the plaintiff and was in all other particulars a substantial factor in bringing about the injury.\textsuperscript{11}

The third contention of the defendant is that the injury of the plaintiff was caused by an intervening agency, meaning the kite string, and that this intervening agency was such as to relieve the city from liability. If an act can be apprehended or foreseen, it is not such an intervening agency as will cut off the defendant’s liability.\textsuperscript{12} Even the act of a third person intervening and contributing a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer, if such act could have been foreseen.\textsuperscript{13} In the main case it was thought that the defendant could foresee that the string might come in contact with the wires. The court said, “to overcome or destroy operation of antecedent negligence, intervening cause must be one not ordinarily to have been anticipated in natural and probable order of things, and must have been so unusual and so improbable as not to have been reasonably foreseen or considered by ordinary prudent person.”

The case presents for analysis the chief factors in any action based on negligence, namely, the duty, causation and intervening cause. It does not seem that the court went too far in the conclusions which it reached from the application of these principles to the facts in the instant case.

\textbf{Charles Rehm}

\textbf{NEGLIGENCE—IMPUTING HUSBAND’S NEGLIGENCE TO WIFE.}

\textit{Silsby v. Hinchey}\textsuperscript{1}

While riding in an automobile driven by her husband, plaintiff was injured in a collision with an automobile driven by the defendant. Plaintiff and her husband were, at the time of the accident, on their way to attend a social function. In this action to recover for personal injuries caused by his negligence, defendant contends that there was contributory negligence on the part of plaintiff’s husband and, since she and her husband were engaged in a joint enterprise, that his contributory negligence will be imputed to plaintiff so as to bar her recovery from the defendant. In affirming a judgment in favor of the plaintiff, the court of appeals failed to find a joint enterprise and, in effect, said that where the wife is merely riding with the husband in the automobile, and their purpose was to serve their mutual pleasures, or to transact the affairs of the family, with no equal right to control shown, then the trip is not to be considered a joint enterprise in the sense that the negligence of the husband will be imputed to the wife.

\textsuperscript{11} \textit{Restatement, Torts} (1934) § 435.


\textsuperscript{13} State \textit{ex rel. Kearney v. Finn}, 87 Mo. 310 (1885); Teasdale \textit{v. Beacon Oil Co.}, 266 Mass. 25, 164 N. E. 612 (1929).

\textsuperscript{1} 107 S. W. (2d) 812 (Mo. App. 1937).
This case presents the question of whether or not, when a wife is riding in an automobile driven by her husband, the negligence of the husband, if any, will be imputed to the wife so as to bar her recovery against some third person, whose negligence concurred with that of her husband to bring about the collision in which the wife suffered personal injuries. In Missouri it is well settled that, in such a case, the negligence of the husband will not be imputed to the wife unless there is found a relationship of joint enterprise or agency. This is also the rule in other jurisdictions.

A relationship of joint enterprise is present when there is an equal right to control and a common purpose. If this relationship is found, all jurisdictions hold that the negligence of the husband can be imputed to the wife so as to bar her recovery from a third person. Whether or not the wife had an equal right to control depends, of course, on the facts of the particular case. Some one fact may be very weighty evidence in showing a joint or equal right to control. The great weight of authority holds the fact that the husband and wife were joint owners of the car to be such evidence. Query, would it make any difference whether the wife paid part of the purchase price, or the husband purchased the car and merely had it put in their names jointly? There are a few jurisdictions contra. In Rodgers v. Saxton, the wife was not merely a joint owner, but the sole owner of the automobile. The court held that the negligence of a husband was not imputable to the wife under the circumstances, saying, in effect, that a joint or shared control of an automobile in which a person is riding as a passenger does not necessarily arise from the passenger's marital relationship with the driver or from the

2. Crockett v. Kansas City Rys., 243 S. W. 902 (Mo. 1922); Longan v. Kansas City Rys., 299 Mo. 561, 253 S. W. 758 (1923) (modified on other grounds in 314 Mo. 390, 284 S. W. 455 (1926); Ziegler v. United Rys., 220 S. W. 1016 (Mo. App. 1920); Ross v. Wells, 212 Mo. App. 62, 253 S. W. 28 (1923).
4. Restatement, Torts (1934) § 491.
7. See Southern Ry. v. Priester, 289 Fed. 945 (C. C. A. 4th, 1923); In Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 91 S. E. 632 (1917), the wife was the owner of the automobile and was injured while her husband was driving. The court held that the husband was a gratuitous bailee of the automobile and control over it was absolute.
8. 305 Pa. 479, 158 Atl. 166 (1931). Where the owner of the car is riding in it at the time of the accident, his presence is an important element in showing he had control over its operation. See collection of cases in (1919) 2 A. L. R. 888; (1932) 80 A. L. R. 285.
fact that the passenger is the car's owner. In this case the court reaches its decision on the theory that the husband was the bailee of the automobile and the wife was riding with him as a guest. While perhaps suitable to a particular set of facts, this reasoning seems unsound when applied as a general rule. The fact that the wife was the sole, or even a joint owner of the automobile indicates that she did have the legal right to equal control, though perhaps it was not exercised, and any negligence of the husband should be imputed to her. A showing of sole or joint ownership in the wife should be prima facie evidence of an equal right to control in her.

Where there is no joint ownership, but merely the marital relationship, it is, of course, necessary to find from the facts of the particular case whether or not the wife had such control over the operation of the automobile as to make her husband's negligence attributable to her. The weight of authority holds that where there is nothing appearing other than the marital relationship, there is no ground for imputing the husband's negligence to the wife. But there are some jurisdictions that consider the marital relationship alone to be sufficient to justify such imputation. This view is prevalent in states where the community property system is in effect. In California, the courts hold that all damages recovered for personal injury to the wife are community property, since they were not owned before the marriage nor afterwards obtained by gift, devise, bequest or descent. Thus, in order to prevent the husband from benefitting, the courts prohibit recovery by the wife. This result could also be reached on the basis of the joint ownership of the automobile which would necessarily exist.

The courts often refer to the wife, when she is riding with the husband, as a mere guest or invitee having no voice in directing the movements of the automobile. Practically all courts have refused to impute negligence from the driver of an automobile to his guest. The prevailing view is sound in theory, because there seems to be no basis whatever for imputing negligence where there is no legal right to control.


12. Treadway v. United Rys., 300 Mo. 156, 253 S. W. 1037 (1923); Simrell v. Eschenbach, 303 Pa. 156, 154 Atl. 369 (1931). Michigan is contra. See note (1934) 32 Mich. L. R. 274, pointing out that Michigan imputes negligence to the ordinary guest of an automobile driver. Michigan is the only state going this far.
Of course, if it is found that the husband was acting as agent of the wife, his negligence can always be imputed to her. However, "the agency of the husband for the wife is not to be implied, inferred, or presumed from, or deemed to be created or established by, the marital relationship alone; there must be other proof."13 It is essential to the existence of such a relationship that the wife shall have previously authorized the husband to act as her agent or subsequently, with knowledge of his acts, ratified or adopted them.14

It is very likely that the reason the courts are generally so reluctant to impute the negligence of the husband to the wife unless there is a clear showing of an equal right to control, is that from time immemorial the husband has been considered the head of the household and the courts realize that, while there should be in theory, perhaps, an equal right to control the operation of the family car, it is a rare occasion when the wife's efforts to direct the operation of the car will prevail.

DAVID R. HARDY

WILLS—ADEMPTION OF BEQUEST OF INTEREST IN A BUSINESS BY CHANGE IN THE BUSINESS STRUCTURE.

Hankey v. French1

Testator bequeathed to his wife all of his personal property, with the exception of his interest in the partnership of R. T. French & Sons, which was bequeathed to testator's two sons after a life interest in the widow of the use and income of the testator's share. The testator expressly provided that his interest in the business was not to be sold, but that the business was to be continued. When the will was executed in 1927, the testator was a copartner with his father and brother in the partnership of R. T. French & Sons, each owning an equal share. In 1930 the firm was dissolved and testator's father retired from the business. Testator and his brother then formed a new partnership known as R. S. & T. D. French, in which each had an equal interest. No substantial change was ever made in the assets2 of the business. Testator died in 1936. Reversing the decree of the lower court, it was held that there was no ademption and that the testator's present partnership interest passed to his sons, subject to a life interest in the widow.

The earlier view of ademption by extinction was that the intention of the testator governed as to whether the legacy was adeemed.3 Thus, if the property

14. 30 C. J. 620.
2. Mich. Comp. Laws (1929) § 9866. Although the partnership assets consisted of both personality and realty, it is considered to be personality.
bequeathed was disposed of or destroyed during the lifetime of the testator, the
legatee would receive money or other property equivalent in value to the property
bequeathed, if the testator so intended. The intention of the testator has always
been vital in cases of ademption by satisfaction. But as to ademption by extinc-
tion, the rule generally followed today is that if the article bequeathed is not a part
of the testator’s estate the legacy is adeemed, regardless of the intent of the
testator.

There are two somewhat related matters which must be determined in cases
of this nature: First, what was the thing given by the will; and second, was there
such a substantial change in the thing given as would work an ademption. The
lower court treated this as a bequest of testator’s share or interest in a certain,
specified partnership, that of R. T. French & Sons, which was in existence at the
time the will was executed, and that ademption resulted on the extinction of the
thing or fund given. There can be no quarrel with this decision if the lower court
was correct in determining what the object of the bequest was, for when the
testator died he had no share in the business named in the will which could be a
part of his estate. There was nothing upon which this part of the will could operate.
The appellate court reversed the decree, holding the object passed by the will was
the assets of the business, and as there was no substantial change in the assets, no
ademption resulted.

It is a cardinal rule in the construction of wills that the intention of the testator
is controlling, and if possible, must be ascertained and given effect. While a will
is not operative until the death of the testator, it speaks his intention at the time
of its execution, but this may refer to the situation existing at the time of his death.
Where the legacy can be construed as one of the proceeds of described property, and
the testator conveys the property in his lifetime, it has been held that if the proceeds
can be traced and identified in cash, or securities, the legacy is not adeemed. In
using the words “my interest” testator evidently intended to pass his share of the
assets of this family business, as he expressly provided that the business should be
carried on, for which purpose the assets would be necessary. In common business
understanding the words would ordinarily be broad enough to include the stock,
physical assets, and the like, and an ordinary business man would probably intend
such meaning in referring to his business. If the testator had disposed of his interest

5. Lang v. Vaughn, 137 Ga. 671, 74 S. E. 270 (1912); Succession of Canton,
144 La. 113, 80 So. 218 (1918); Moffatt v. Heon, 242 Mass. 201, 136 N. E. 123
(1922).
6. The facts do not show with what formalities the new partnership was
formed. Apparently the court is influenced somewhat by the fact that this was
a continuation of the family business, and that such partnership agreements are
rather loosely drawn.
7. Field v. Field, 297 Ill. 379, 130 N. E. 748 (1921); Carroll v. Herring, 180 N.
C. 369, 104 S. E. 892 (1920).
Hall, 337 Ill. 232 (1929).
9. Gist v. Craig, 142 S. C. 407, 141 S. E. 26 (1927); In re Black’s Estate, 223
in the partnership, no doubt this legacy would have been adeemed, but it would seem
a violent construction to say the legacy was adeemed because the testator's interest
had been increased through the retirement of his father and the formation of the
new partnership. The testator intended to bequeath his share in the assets,
regardless of by what name the partnership was known, or whether his share of the
assets had been increased.

The application of the rule of ademption by extinction is easy when a specific
bequest of a particular object is made, and then the property is sold or substantially
changed in the lifetime of the testator. But there is also the rule that a slight
change in the form of the property bequeathed will not work an ademption. The
question of whether a change is substantial or of form only is one of degree, and
slightly varying circumstances may lead to decisions that are apparently contra-
dictory. In the principal case, the change was deemed to be in form only and did
not vary the disposition the testator had previously made.

A further question, not raised in the case, is whether the two sons, in taking
over the business must assume the liabilities of the business, or are the debts of the
business, for which the testator is personally liable, payable out of the residuum?
Cases involving an unincorporated individual business show a conflict on this
point. It would seem that the average testator would think of his business as an
entity including debts and credits, as well as physical assets. This would lead to
the position that the legatee must assume the business debts. It would appear the
same reasoning should be applied to a legacy of the testator's interest in a partner-
ship business. Indeed a testator might more readily consider a partnership
as a separate entity than his individual business. The fact that testator might
have realized there must be a separate administration of the partnership affairs is perhaps an added reason for the application of this construction to a bequest of an
interest in a partnership.

HERBERT S. BROWN

WILLS—CONDITIONAL WILLS.

Watkins v. Watkins' Adm'r

Certain heirs contested Watkins' will, claiming that it was contingent in char-
acter and that its effectiveness depended upon the death of the testator while he

11. Goode v. Reynolds, 208 Ky. 441, 271 S. W. 600 (1925); Oakes v. Oakes,
9 Hare's 666 (1852); cf. In re Horn's Estate, 317 Pa. 49, 175 Atl. 414 (1934).
12. Bank of Statesboro v. Simmons, 164 Ga. 885, 139 S. E. 661 (1927), holds
that the debts of an unincorporated business are payable out of the residuum.
Noted in (1928) 76 U. or PA. L. REV. 471. In re Lowe, 206 N. Y. 671, 99 N. E.
722 (1912), holds that the legatee must assume and pay the accounts payable of the
business.
65, 99 N. Y. Supp. 730 (1st Dep't 1906); Schenk v. Lewis, 125 S. C. 228, 118 S. E.
631 (1923).
1. 106 S. W. (2d) 975 (Ky. App. 1937).
was on a trip referred to in the will. The paper in controversy began with the following sentence: "In view of my trip to Kansas City, Missouri, for a short visit, I am leaving this memo Will in case of my passing away for any reason." Then followed provisions for establishing a trust fund in favor of the testator’s wife after payment of debts and stipulations relating to the disposition of the corpus on the wife’s death. The court in affirming probate of the will held that not only were the circumstances, surroundings, and condition of the testator such as to make the will a permanent one, but the strict letter of the instrument "... so clearly bespeaks permanency that we unhesitatingly conclude it was not intended to be conditional or contingent."

The court followed the leading Kentucky case of Walker v. Hibbard quoting therefrom "... if the will is so phrased as to clearly show that it was intended to take effect only upon the happening of the particular event set forth in the paper as the reason for writing it; or, putting it in other words, if it was written only to make provision against a death that might occur on account of or as a result of the specific thing assigned as a reason for writing the will—it will be a contingent will; but, if the causes assigned for writing it are merely a general statement of the reasons or a narrative of conditions that induced the testator to make his will, it will not be a contingent will, although it may set forth probable or anticipated dangers or conditions that induced the testator to write it."

The question as to whether or not a will is conditional is one of construction to be decided by the court. Parol evidence is not admissible to show that a will absolute on its face was intended to be conditional. The court examines the contents of the instrument, and the surrounding circumstances to determine the intention of the testator. If a will is contingent upon the happening of some event and that event is not fulfilled, the will is ineffective and not entitled to probate. It is often true that a future event mentioned may be only the inducement or a statement as to the reason for drawing the instrument at the particular time; this motive may be so poorly expressed as to suggest the possibility that the effectiveness of the will depends upon the occurrence of that event. Some courts have held a will conditional and ineffective because the event has not taken place. Other courts have treated almost identical language as a mere inducement for making the will and so admit the will to probate.

3. Sewell v. Slingluff, 57 Md. 537 (1881). See Hampton v. Dill, 354 Ill. 415, 188 N. E. 419 (1933), where the court held that the testator’s intent must be determined by the language of the will itself, and not from the surmise that he used language to express the intention he had in mind which he failed to express.
5. Tarver v. Tarver, 9 U. S. 174 (1835); Damon v. Damon, 8 Allen 192 (Mass. 1864); In re Poonarian’s Will, 234 N. Y. 329, 137 N. E. 606 (1922); Note (1923) 32 YALE L. J. 851; Note (1923) 23 COL. L. REV. 403.
7. It would be quite useless to cite cases where two courts have interpreted the effect of practically similar phrases differently. See (1921) 11 A. L. R. 846.
At first glance it appears that the decisions are irreconcilable. In some cases this may very well be true. The better view is that the courts should hold such language to be a mere inducement when that construction is possible. This position enables the court in explaining the testator's intention to infer that he intended to die testate rather than intestate. The rule is an aid in the construction of wills and not a presumption.

There is a reason why the same or similar phrases may be construed in different ways by the courts: the decisions are not necessarily contra. Although the finding depends primarily upon the testator's language as expressed in the written instrument, the court puts itself in "the shoes of the testator." Conditions strongly influencing the judge's conclusion may not appear clearly in the reports. A provision will not be implied from indefinite language. The judge will ask himself such questions as—under what circumstances was the will made? Was the type of disposition temporary or permanent? Did the testator treat the will upon his return as though he intended it to be permanent or did he regard the paper as worthless since the contingent event did not occur?

The Kentucky court followed the best rules of construction and interpreted Watkins' will in a manner devoid of criticism. The solution of the Watkins case was not very difficult because the instrument contained a phrase highly suggestive of permanency: "in case of my passing away for any reason." The court maintains that this phrase was general in its nature and "does not refer solely to death during or as a possible result of the trip to Kansas City." Also the circumstances show that "the matter of making a will had been discussed between Mr. and Mrs. Watkins, since it was recited that she had consented for the estate to be left in trust for her. They were childless and naturally the wife was the supreme object of testator's affection and bounty, and to be preferred over collateral kindred."

Robnett v. Ashlock is the only Missouri case directly in point. Here the testator prefaced his will with the following words: "I this day start to Kentucky; I may

10. In Ferguson v. Ferguson, 288 S. W. 833 (Tex. Civ. App. 1926), the court held that "all presumptions are indulged against the will being contingent" but since the construction of the effect of words in a will is for the court, the word "presumption" must be interpreted as an aid or policy of the court rather than as a legal presumption.
13. The determination as to whether the will is conditional or not depends upon testator's intention at the time of making the will, but his treatment of the paper after it is certain that the contingency will not occur, is evidence of this intention. See Likefield v. Likefield, 82 Ky. 589 (1885).
15. 49 Mo. 171 (1872).
never get back. If it should be my misfortune, I give my property to my sisters' children, etc.” The court held that the words referred to imported a condition on the fulfillment of which the will was to become inoperative, and that when the testator returned alive from Kentucky the will was void. The court based its decision upon the construction of the language used and particularly emphasized the word "if." The fact that the testator kept the will among his papers for thirteen years after it was made does not appear to this court to be evidence of an intention to draw a permanent will. The court relied upon certain cases dealing with wills using similar language, but a mere comparison of phrases without express consideration of external circumstances is an inadequate treatment of this problem.

Lipman Goldman Feld

16. The great number of citations in (1921) 11 A. L. R. 846 listing conditional wills under such headings as death on a journey, death on a voyage, death in military service, death from sickness or operation, death away from home, and death before a particular time are of little help in view of the underlying reasons for the decisions.