Recent Cases

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Recent Cases

CONFLICT OF LAWS—WORKMEN'S COMPENSATION

Foster v. Denny Motor Transfer Co.¹

The decision of Foster v. Denny Motor Transfer Co. recently rendered by the United States Circuit Court of Appeals for the Seventh Circuit involves a new and interesting question in the application of a workmen's compensation act to an injury received outside the state.

The defendant, an Indiana² corporation, did business in both Illinois and Indiana and was subject to the Workmen's Compensation Acts of both states. The plaintiff, a resident of Illinois, was an employee of an Illinois laundry company, which was also subject to the Illinois Act. Presumably the contract of employment was made in Illinois and by far the greater part of the employment occurred in Illinois. The plaintiff was passing through Indiana in the course of his employment when the car in which he was riding was struck by the defendant's motor truck. In this action in the federal district court in Illinois, brought in consequence of the injuries so received, the defendant sought to amend its plea in order to set up the provisions of the Illinois Workmen's Compensation Act.³ Section 294 of that act provides in substance that where an injury for which compensation would be payable by the employer was caused not by the negligence of the employee or employer but by such conduct of a third party as would create legal liability in the third party, if that third party was also bound by the act, then the right of action against the third person should be vested in the employer only and the employee should be limited to his compensation under the act. By Section 6,⁴ the employee or anyone entitled to damages for his injury is deprived of any recovery other than that provided by the act, and by the title of the act⁵ it is provided that the act should apply to injuries suffered in the course of employment within the state, and without the state where the contract of employment was made within the state. The trial court rejected the proposed amendment and rendered judgment upon the jury's verdict for the plaintiff. On appeal, this judgment was affirmed, the

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1. 100 F. (2d) 658 (C. C. A. 7th, 1938).
2. This statement by the court is supported by the pleading of both parties. On appeal, counsel for defendant asserted that it was a Kentucky corporation, a fact concerning which no evidence appeared in the transcript and which was not discussed by the court, but which, if proved, would have further decreased the concern which any one state other than Illinois might have had in the matter.
4. ILL. REV. STAT. (1937) c. 48, § 166.
5. ILL. REV. STAT. (1937) c. 48, § 143.

(203)
court holding that the Illinois act is inapplicable to these facts and the case was properly tried under Indiana law (common law, as the Indiana Workmen's Compensation Act of 1929 does not purport to cover this situation.)

Rarely, if ever, has it been held that the Constitution of the United States requires a forum to decide a case in accordance with the common law of another state. If it is not a question of federal constitutional law, it must be a matter of local law, for its own law is the only law the forum can enforce. However, the fact of the foreign law may well be the decisive element in determining the rights of liabilities of the parties. This weighing of relevant facts is the determination of the common law rules of conflict of laws, which, like other common law rules, are subject to statutory change. Apparently, under the recent decision of Erie R. R. v. Tompkins, these rules are binding on federal courts sitting within the state, as are other substantive rules of local law.

Thus, the sole issue before the court was whether the Illinois Workmen's Compensation Act purported to cover the fact situation of the present case. If it did not, then the decision is clearly in accord with the generally accepted common law rules of conflict of law which are applied in cases of torts. It is submitted that the court erred in its interpretation of the situation.

The language of the act clearly includes both parties in the instant case. Section 29 imposes no qualification of citizenship on the third party if he has elected to come under its provisions or is engaged in a business automatically subject to the act. The statute does not limit itself to compensation for injuries occurring within Illinois. It seems too clear for argument that, as between employer and employee, the act applies if the contract was made in Illinois, regardless of the domicile of either party. The court strongly emphasized the fact that there was no contract between the employee and the third party here, but it should be recognized that the test imposed by the act (Section 29) is whether the case is one for which compensation is payable by the employer, and which would create a legal liability (meaning a common law liability) in the third person also subject to the act.

7. IND. STAT. ANN. (Baldwin, 1934) § 16,378.
8. See Kryger v. Wilson, 242 U. S. 171 (1916); Stumberg, Conflict of Laws (1937) 64.
10. See in general, Restatement, Conflict of Laws (1934) §§ 378 et seq.
12. Goldsmith v. Payne, 300 Ill. 119, 133 N. E. 52 (1921), holding that where the third party is engaged in both interstate and intrastate commerce, Section 29 may be invoked as a defense only where the injury which is the basis of the action occurred as a result of its intrastate activities, is authority that this defense is not always available to every third party who may in some capacity be subject to the provisions of the act. However, both by the Federal Constitution and the express terms of the act it may not be applied so as to interfere with interstate commerce. It does not follow that a third person who is subject to the act in other aspects may not be within the terms of Section 29 because the injury for which he was legally responsible occurred outside the state. Where the contest is between employee and employer, the test of the
A large number of Workmen's Compensation Acts do not definitely set out their territorial scope. If these acts are elective, it may be proper to make the place of contracting the dominant factor in determining their applicability. Where, under these circumstances, a controversy arises between employer and employee, the weight of authority holds that the rights of the parties are to be determined by the contract of employment, into which the act of the place of contracting is said to be incorporated. Even in its limited application, however, this view is not above criticism. In the first place, it is based on the proposition that the law of the place of contracting necessarily determines the obligations of the contract, a question of conflict of laws concerning which there is a considerable split of authority. In the second place, the elective character of these acts is more illusory than real. Finally, several courts have strongly attacked the proposition that, merely because the contract was made in a certain state, that state necessarily has the greatest concern in the matter. New York, in a suit between employer and employee, has held that its act should apply only when the employee's principal employment was in New York.

application of the Illinois act to extra-territorial injury is whether the contract of employment was made within the state; but again it does not follow that, because there will never be a contractual relationship between employee and third party, there was no intention that Section 29 should cover causes of action arising outside Illinois. By terms of the act, the test here is whether the contract between employer and employee is made within the state, in which case “compensation would be payable by the former” so as to bring the case within the Section. There is no requirement that, should the injury be caused by the third party acting through his agent, the Illinois act should apply to the employer-employee relationship of the third party and his agent. If the agent were also injured—he was in the instant case—he might or might not have a claim against the third party under the Illinois act. The mere fact that he did have a claim against the defendant under the Indiana act is not conclusive. Compensation may be claimed under more than one act, though credit for that received under one act must be allowed in any award under another, (see 2 Beale, Conflict of Laws (1935) §§ 402.1, 403.1, and cases there cited) except as the case falls within the doctrine of Bradford Electric Light Co. v. Clapper, 286 U. S. 145 (1932).

13. Authorities are collected in 2 Beale, Conflict of Laws (1935) § 398.2; and see Stumberg, Conflict of Laws (1937) 189.

14. Following the law of the place of contracting, Scudder v. Union National Bank, 91 U. S. 406 (1875); Reed v. Western Union Telegraph Co., 135 Mo. 661, 37 S. W. 904 (1896). This probably continues to be the prevailing Missouri view. Following the law of the place of performance, Hall v. Cordell, 142 U. S. 116 (1891); see Industrial Acceptance Corp. v. Webb, 287 S. W. 657 (Mo. App. 1926). Following the law intended by the parties to control, Pritchard v. Norton, 106 U. S. 124 (1882); see Fidelity Loan Securities Co. v. Moore, 280 Mo. 315, 217 S. W. 286 (1919). Following the law which will uphold the contract, Seeman v. Philadelphia Warehouse Co., 274 U. S. 403 (1927); see Davis v. Tandy, 107 Mo. App. 437, 81 S. W. 457 (1904). The latter two cases involve the issue of usury, the situation in which the rule there applied is most popular. For an elaborate discussion of the problem, see 2 Beale, Conflict of Laws (1935) c. 8. Cf. Stumberg, Conflict of Laws (1937) c. 8.


Minnesota\textsuperscript{18} and Nebraska\textsuperscript{19} have held their acts should apply if the principal business of the employer was located within their boundaries. These courts consider the acts to be legislative attempts to redistribute as a matter of social policy the burdens of industrial losses due to human injury.

The problem of ascertaining the territorial scope of the act through interpretation of the purposes obviously does not arise where that scope is clearly set out in the act itself.\textsuperscript{20} However, it seems plain, from Section 29 of the Illinois act, that the act is an attempt to provide a completely new system of re-allocation of industrial losses among all those who are subject to the act. To allow the employee to substitute this short cut of suing the defendant directly would seem to prevent the attainment of the goal sought. It is difficult to see why the court held that Illinois had an insufficient interest in, and connection with, the transaction to apply its own act.

The question is not the same here as it would have been had the case arisen in an Indiana court, or in a federal district court for Indiana. There, not only the problem of Indiana conflict of laws rules would arise, but also the problem as to whether full faith and credit must be given to the Illinois statute. In \textit{Henriksen v. Crandic Stages},\textsuperscript{21} almost analogous to \textit{Foster v. Denny}, it was held that where the action was brought in Iowa, Section 29 of the Illinois act would not control as a matter of conflict of laws, and that the doctrine of \textit{Bradford Electric Light Co. v. Clapper}\textsuperscript{22} did not apply. The \textit{Bradford} case has received much criticism, and certainly its scope is not well defined.\textsuperscript{23} However, if the principle underlying the case is recognized and the interpretation given it in the \textit{Alaska Packers'} case\textsuperscript{24} accepted, it would seem a stronger

\begin{itemize}
  \item \textsuperscript{18} State \textit{ex rel.} Chambers \textit{v. Dist. Ct. of Hennepin County}, 139 Minn. 205, 166 N. W. 185 (1918).
  \item \textsuperscript{19} Watts \textit{v. Long}, 116 Neb. 656, 218 N. W. 410 (1928).
  \item \textsuperscript{20} E.g., \textit{Mo. Rev. Stat.} (1929) § 3310 (b).
  \item \textsuperscript{21} 216 Iowa 643, 246 N. W. 913 (1933).
  \item \textsuperscript{22} 286 U. S. 145 (1932), 82 A. L. R. 696 (1933). It was there held that Section 1 of Art. IV of the United States Constitution (the "full faith and credit" clause) required the New Hampshire Court to recognize the purportedly "exclusive" character of the remedy afforded by the Vermont Workmen's Compensation Act, where the plaintiff's decedent had entered into the defendant's employment in Vermont, where both parties were residents of that state and had "elected" to accept its act, and where the defendant's business extended into both states but the decedent's employment was primarily in Vermont, although the defendant had also elected to come under the New Hampshire act (which permitted the employee to retain his common law remedies, if he chose, despite the employer's election) and the fatal injury occurred while decedent was acting in the course of his employment in New Hampshire, so as to bar the common law action before the court. See also \textit{Weiderhoff v. Neal}, 6. F. Supp. 698 (W. D. Mo. 1934).
  \item \textsuperscript{23} See 2 \textit{Beale, Conflict of Laws} (1935) § 401.2; \textit{Goodrich, Conflict of Laws} (1927) 245 ff.
  \item \textsuperscript{24} \textit{Alaska Packers Ass' n v. Industrial Accident Comm.}, 294 U. S. 532 (1935). It was there held that an employee, a resident of neither Alaska nor California, who had in California entered into a contract of employment with defendant, which contract was to be wholly performed in Alaska and which expressly adopted the purportedly exclusive Alaska Workmen's Compensation Act, might on his return from Alaska constitutionally recover under the Cali-
argument could be made for applying it to the Iowa case than was admitted by that court. (Though in justice it must be pointed out that the decision in Henricksen v. Crandic Stages was rendered prior to the decision in the Alaska Packers' case.)

The Indiana Workmen's Compensation Act did not attempt to regulate the rights of these parties. Bradford Electric Light Co. v. Clapper, holding that where the relationship between plaintiff and defendant was both of contract and tort, the purportedly exclusive statutory remedy of the place of contract must be preferred to the common law of the place of tort, is clearly not authority for the proposition that where the relationship is one of tort only, the forum (which is the place of contract and the domicile of the employee and his employer, the principal place of employment of the employee and of the business of the employer, and the place of a substantial part of the business of third party defendant, who has in other respects subjected himself to the operation of its Workmen's Compensation laws) may not disregard the common law of the place of tort. Alaska Packers' Ass'n v. Industrial Comm. fairly implies that it might.

Precedent is largely confined to controversies between employer and employee. Decisions like Solomon v. Call25 and Reutenik v. Gibson Packing Co.26 are not in point, though involving the effect of Workmen's Compensation Acts upon the common law rights of an employee against a third party. They deal with the problem which would have arisen had the action been brought in Illinois for a similar accident occurring in Illinois, the parties being subject only to the Indiana Workmen's Compensation Act. However, a sufficient number of acts contain provisions comparable to Section 29 of the Illinois statute that the precise question of the instant case may be expected to arise again.

GEORGE W. WISE

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—GROSS RECEIPTS TAX APPLIED TO STEVEDORING COMPANY

Puget Sound Stevedoring Co. v. Tax Comm. of State of Washington1

A Washington statute provided that for the privilege of engaging in business activities within the state a tax should be payable by persons so engaged, pay-

1. 302 U. S. 90 (1937).
2. 159 Va. 625, 166 S. E. 467 (1932).
ment to be made according to a designated measure. As to certain forms of business, as, for example, manufacturing and sales at retail or wholesale, the measure was a specially prescribed percentage of the value of the products or the gross receipts of sales. As to all other forms of business there was a general provision that the tax should be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This provision is broad enough to cover the business of a stevedore.

The plaintiff, Puget Sound Stevedoring Company, is a Washington corporation engaged in the general business of stevedoring. At times it contracts with a shipowner or shipmaster to load or discharge a vessel through its own employees, controlling and directing the work itself. At times, however, plaintiff makes a contract by which it does not control, direct and supervise the work; it "merely collects the longshoremen and supplies them to the vessel, advancing their pay at the completion of the job and 'billing the ship and her owner the amount of the pay-roll plus a commission for services.'" All vessels served by plaintiff are engaged in interstate or foreign commerce. A suit by the taxpayer to enjoin the collection of the tax was dismissed by the trial court and the decision was affirmed by the Supreme Court of Washington. On appeal to the United States Supreme Court it was held that the business of appellant, in so far as it consists of loading and discharge of cargoes by longshoremen subject to its direction and control, is interstate or foreign commerce and not taxable but that, in so far as it consists of supplying longshoremen without directing or controlling the work of loading or unloading, it is not interstate or foreign commerce, but rather a local business, and subject to taxation by the state. It is with this latter holding that this note is mainly concerned.

The Court says little analogy exists between this case and the situation found in McCall v. California or Di Santo v. Pennsylvania. The Di Santo case was one in which a state act requiring a license for selling steamship tickets, the license being ostensibly for the purpose of preventing fraud, was held to be unconstitutional, the Court saying: "A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed."

There was a dissent in this case written by Mr. Justice Brandeis and concurred in by Justices Holmes and Stone, in which it was argued that the

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3. 136 U. S. 104 (1890).


5. Id. at 37.
transaction regulated was wholly intrastate. The case was thought to be
distinguishable from the McCall case on the facts, but if it was not, then the
dissenting justices thought the McCall case should be disregarded. It was argued
that the doctrine of *stare decisis* would present no obstacle, for disregarding
the McCall case "would involve merely refusal to repeat an error once made in
applying a rule of law—an error which has already proved misleading as a
precedent." This rule of law is "that a State may not obstruct, discriminate
against, or directly burden interstate or foreign commerce." The considerations
under this rule are, first, is the thing regulated a part of interstate or foreign
commerce, and, second, if so does the regulation "obstruct, discriminate against
or directly burden it"?

In the McCall case it was held that an agent in California of a railroad
operating between Chicago and New York whose duty it was to solicit passenger
traffic over such road was engaged in interstate commerce and could not be
convicted of a misdemeanor for not paying a license tax imposed by the City
of San Francisco. Brandeis' words in the *Di Santo* case would seem to indicate
as his opinion that while this agent was engaged in interstate commerce the
tax under consideration did not directly burden that commerce.

The Court in the case under discussion cites with approval the case of
*Williams v. Fears* in which it was held that labor agents engaged within the
State of Georgia in hiring persons to be employed outside the state were not
engaged in interstate commerce. The Court cites *Hooper v. California*: "If
the power to regulate interstate commerce applied to all the incidents to which
said commerce might give rise and to all contracts which might be made in the
course of its transaction, that power would embrace the entire sphere of mer-
cantile activity in any way connected with trade between the States, and would
exclude state control over many contracts purely domestic in their nature."

The distinction between the McCall case and that of *Williams v. Fears* is
that the agent in the former was engaged in a business directly connected with
interstate commerce; his interest was the promotion of interstate commerce.
In the latter case the agents were engaged in a business not directly connected
with interstate commerce; their interest was in hiring laborers and not primarily
in transporting them, although the transportation of the laborers was eventually
to take place as a result of the contracts made by the agent. The Court, how-
ever, said: "... it does not follow that the emigrant agent was engaged in
transportation or that the tax on his occupation was levied on transportation."

In the case under consideration the contracts made by the stevedoring
company were not directly connected with interstate or foreign commerce even

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6. *Id.* at 41.
Wheat. 419 (U. S. 1827).
8. 179 U. S. 270 (1900).
10. 179 U. S. 270, 276 (1900).
though their performance was incidental to the carrying on of such commerce. The distinction between the business here and that carried on in the McCall case may seem to be very narrow. However, despite some dissenting opinions indicating a feeling that the McCall case should be overruled, there have been no majority opinions questioning its doctrine, and by analogy to Williams v. Fears the instant case would seem to be well decided.

GERALD B. ROWAN

DESCENT AND DISTRIBUTION—MURDER OF ANCESTOR—INTENTION OF THE KILLER

1. Eisenhardt v. Siegel

John Eisenhardt had the right to the contingent remainder in fee of Herman Eisenhardt’s farm, conditioned upon his surviving Herman. John became insane and killed Herman, and the heirs of the latter questioned John’s right to succeed to the land. Admitting that the Missouri law disqualifies the heir who kills his ancestor, the court held the rule did not apply where the killer was insane.

Where the question of the slayer’s right to inherit from his victim has arisen, the courts have, in absence of statute, followed two divergent courses. The weight of authority seems to favor the murderer, on the theory that the statutes of descent and distribution are positive and the courts ought not to engraft exceptions thereon by judicial decisions. The injustice of this view has spurred legislators of at least twenty-three states to enact statutes barring the killer. A strong minority, including Missouri, denies the right of the slayer


2. Eisenhardt v. Siegel, 119 S. W. (2d) 810 (Mo. 1938).


4. The statutes are not uniform. Suffice it to say they are either so narrow or so narrowly construed that they fail effectively to relieve the situation. Smith v. Todd, 155 S. C. 325, 152 S. E. 506 (1930), 70 L. R. A. 1529 (1931) (the statute requiring conviction held not to apply where the killer committed suicide, although he was held to be guilty of murder by a coroner’s jury). Harrison v. Moncravie, 264 Fed. 776 (C. C. A. 8th, 1920) (the killer was convicted in Kansas and the deceased’s land was in Oklahoma. Both states had statutes barring a convicted killer from taking. The killer was allowed to take on the ground the Kansas statute did not apply to a conviction in another state.) See also Wade, Acquisition of Property by Wilfully Killing Another—A Statutory Solution (1936) 49 HARV. L. REV. 715; Note (1934) 44 YALE L. J. 164.

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on the ground that at common law a man could not, for reasons of public policy, profit from his own wrong, and that the statutes of descent and distribution, being largely an embodiment of the common law, should not be construed in derogation of that maxim. This note is concerned only with the latter jurisdictions, the purpose being to inquire into the nature of the wrong that cuts off the heir from his inheritance.

Where the minority view prevails, it is by no means well-settled as to what wrongs preclude the heir from his share. It is agreed that murder is such a serious act as will cut off the guilty heir, while, on the other extreme, a mere civil wrong will never disqualify. The principal case allows the slayer-heir to take, notwithstanding the fact that he is liable for wrongful death—civil liability not being excused by insanity. It is safe to say the wrongful act must be a crime, but beyond this any arbitrary statement must be attended with caution.

In 1891, Fry, L. J., indulged in language that encompassed in the debarring act all crimes, from the merest misdemeanor to murder. This broad announcement does not appear ever to have been adopted in practice, for, as a matter of logic, an heir cannot profit from his wrong unless the ancestor dies, and any criminal killing would amount to a felony. Obviously the crime must amount to a felonious killing at least.

The English courts and respectable authorities in the United States hold the slayer-heir is deprived of his share by all felonious killings—that is, murder and manslaughter, without regard to the degree. It has been suggested that


6. The nature of the act is no problem, of course, in jurisdictions where the slayer-heir is allowed to take. Where statutes have been enacted, the disqualifying act is described variously as a felonious killing, killing for the purpose of inheriting, murder (some add manslaughter), the procuring of the killing, or engaging in a conspiracy to kill. A discussion of the various statutes is not within the scope of this note. See Wade, loc. cit. supra note 4. See also Note (1934) 44 YALE L. J. 164.

7. Cleaver v. Mutual Reserve Fund Life Ass’n, [1892] 1 Q. B. 147, 156 (“It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor.”) See also Lundy v. Lundy, 24 Can. Sup. Ct. 650, 652 (1895).

8. Cleaver v. Mutual Reserve Fund Life Ass’n, [1892] 1 Q. B. 147 (however, the heir was guilty of murder here); In re Hall’s Estate (1914) P. 1.
the killer be denied inheritance if he murdered for the purpose of taking, and not otherwise, but the suggestion has inspired no following. A few American courts require that the felonious killing be willful, and refuse to deny the heir who is guilty only of involuntary manslaughter. This view, notwithstanding the small following it has attracted, appeals to both justice and reason. It would not only seem harsh to bar a son whose negligent driving caused the death of his father, but it would also seem to serve no end of public policy, unless one may be heard to say such a rule promotes careful driving. The better rule requires the killing to be willful and felonious.

JESSE JAMES

INSURANCE—INSURABLE INTEREST—EFFECT OF FAILURE TO COMPLY WITH MOTOR VEHICLE REGISTRATION ACT

Crawford v. General Exchange Insurance Corp.

The Missouri Motor Vehicle Registration Act provides that all sales of motor vehicles shall be made by assigning the certificate of title at the time of the sale and presenting this certificate to the commissioner of motor vehicles for registration. Failure to assign makes the sale void. Failure to comply with the statute is unlawful and subjects the parties to penal liabilities.

Plaintiff sought to recover on an accident policy covering a second-hand truck, the certificate of title to which had been duly assigned to him at the time

1. 119 S. W. (2d) 458 (Mo. App. 1938).
2. Mo. REV. STAT. (1929) § 7774 (c).

In re Wolf, 88 Misc. 483, 150 N. Y. Supp. 738, 742 (Surr. Ct. 1914). A husband had mistakenly killed his wife while attempting to kill her paramour. Fry’s statement, supra note 7, that the act included both manslaughter and murder was criticized as too rigid, and the court proposed as a test, whether or not the killing was for the purpose of inheriting.

9. In re Wolf, 88 Misc. 483, 150 N. Y. Supp. 738, 742 (Surr. Ct. 1914). A husband had mistakenly killed his wife while attempting to kill her paramour. Fry’s statement, supra note 7, that the act included both manslaughter and murder was criticized as too rigid, and the court proposed as a test, whether or not the killing was for the purpose of inheriting.

10. Minasian v. Aetna Life Ins. Co., 3 N. E. (2d) 17 (Mass. 1936) (the killer pleaded guilty to manslaughter, but the court allowed him to show reasons for the killing which might be consistent with innocence, saying the bar did not apply to manslaughter where there was no intentional injury of a kind likely to cause death). Potter v. Potter, 224 Wis. 251, 272 N. W. 34 (1937) (one guilty of negligent manslaughter was held not barred from inheriting a cause of action from the victim). For cases illustrating conflicting views as to intent in jurisdictions having statutes, see In re Johnston’s Estate, 220 Iowa 328, 261 N. W. 908 (1935). Contra: Metropolitan Life Ins. Co. v. Hill, 115 W. Va. 615, 177 S. E. 188 (1934).
of purchase but which he had neglected to register until after the loss occurred. The insurer defended on the ground that the sale was void, that the plaintiff therefore was not the sole and unconditional owner and that he did not have an insurable interest. Strictly construing the terms of the statute, the St. Louis Court of Appeals held that the title passed with the assignment of the certificate alone and the mere failure to register did not invalidate the sale. Therefore, the plaintiff was sole and unconditional owner and had an insurable interest.

The statute concerning assignment of the certificate of title must be strictly complied with or the purchaser is without legal or equitable title. If the sale is executory, the seller may replevy the car or recover damages for conversion. Similarly, the buyer may return the car and recover the money paid.

Registration acts in other states providing that sales not in compliance with the statute are unlawful have been diversely interpreted. All courts agree that the statute is designed to prevent theft of automobiles, and in the view of one line of decisions that purpose can best be served by holding such sales to be invalid, thus adding a civil to a penal impediment to the disposal of stolen cars. Other courts argue that in terms the statute is penal only and does not invalidate sales which do not conform to it. It is true that the sale is unlawful but


8. E.g., see KAN. GEN. STAT. ANN. (1935) c. 8, §§ 135, 149.

9. Morris v. Firemen's Ins. Co., 121 Kan. 482, 247 Pac. 852 (1926); Endres v. Mara-Rickenbacker Co., 243 Mich. 5, 219 N. W. 719 (1928); Stein v. Scarpa, 96 N. J. L. 86, 114 Atl. 245 (1921); Thomas v. Mullins, 153 Va. 383, 149 S. E. 494 (1929). Some state statutes provide that the sale is incomplete until the statute is complied with. The requirements are considered conditions subsequent; failure to comply may defeat the sale. Parke v. Francis, 194 Cal. 254, 228 Pac. 435 (1924); Swank v. Moisan, 85 Ore. 662, 166 Pac. 962 (1917).

10. Forney v. Jones, 76 Colo. 319, 231 Pac. 158 (1924); Comm. Credit Co. v. McNelly, 171 Atl. 446 (Del. 1934); Moore v. Wilson, 230 Ky. 49, 18 S. W. (2d) 873 (1929); Equitable Credit Co. v. Cooper, 111 So. 749 (Miss. 1927); Bond Lumber Co. v. Timmons, 82 Mont. 497, 267 Pac. 802 (1928); Carolina Disc. Corp. v. Landis Motor Co., 190 N. C. 157, 129 S. E. 414 (1925); Comm.
Since title passes under this latter view, it follows as a matter of course that the purchaser has an insurable interest. 12

It should be noted in Missouri the statute as to assignment of the certificate is in terms (and is applied) in accord with the former line of authorities, 13 but as concerns registration, the principle case supports the latter interpretation of statutes which on this issue are similarly worded. 14 Failure to assign the certificate of title in compliance with the Missouri statute apparently leaves the purchaser without an insurable interest. 15 The assignment must be made at the time the policy is issued; otherwise it is void ab initio as a wagering contract and cannot be resuscitated by the mere chance of subsequent perfection of title. 16 Once the invalidity of the sale is determined, the courts have generally assumed that a lack of insurable interest is a necessary correlative. 17

A policy of property insurance is in form a contract of indemnity and there can obviously be no recovery under it by one without insurable interest in the property. Furthermore, the interest must be sufficient to save the contract


13. Nebraska reaches the same result on a statute similar to the Missouri statute. In re Wroth's Estate, 125 Neb. 332, 252 N. W. 322 (1934).

14. It is proper to point out that the decision in the principle case is buttressed by the fact of a distinction in language in the several parts of the Missouri statute. See Wilkinson v. Grugut, 223 Mo. App. 889, 894, 20 S. W. (2d) 936 (1929).


from condemnation as a wager and to remove the incentive to induce the contingency insured against. It would seem that one who purchased a second-hand car in good faith but without obtaining the certificate of title acquired such an interest. He has the complete beneficial use of the vehicle until it is reclaimed by one having superior title, in which case he would be liable for conversion if it had been destroyed. In the absence of (and possibly despite) the all but universal stipulation in the policy for "sole and unconditional ownership" there may be an insurable interest without perfect legal title. A bailee has an insurable interest. By the better view the bona fide purchaser of a stolen car acquires an insurable interest.

It is not perceived how the policy of a statute designed to prevent theft of cars is served by denying the violator an insurable interest. In truth if the car had been stolen, the true owner would best be protected by allowing the last possessor to obtain insurance, to the proceeds of which he could look for compensation.

GIDEON HENRY SCHILLER

18. See VANCE, INSURANCE (2d ed. 1930) 119.
21. The stipulation "sole and unconditional ownership" has been taken to mean legal title. Evens v. Home Ins. Co., 82 S. W. (2d) 111, 117 (Mo. App. 1935). But see, Savarese v. Hartford Fire Ins. Co., 99 N. J. L. 435, 123 Atl. 763 (1924): "The fallacy of this reasoning springs from a misconception of what is understood to be the meaning, in its common acceptation, of the phrase 'unconditional and sole ownership,' as used in the policy of insurance. . . . We think that 'sole ownership,' as used in the policy, can properly mean nothing more than that no one else is interested with the insured in the ownership of the car." Accord: Giles v. Citizens Ins. Co., 32 Ga. App. 207, 122 S. E. 890 (1924); Norris v. Alliance Ins. Co., 1 N. J. Misc. 315, 123 Atl. 762 (Sup. Ct. 1923); Barnett v. London Assur. Corp., 138 Wash. 673, 245 Pac. 3 (1926).
23. See note 22, supra. See also Lucena v. Craufurd, 2 Bos. & P. 269, 323-324 (G. P. 1806).
25. A bailor can recover from his bailee the proceeds of an insurance policy covering the bailed property. Ferguson v. Pekin Plow Co., 141 Mo. 161, 42 S. W. 711 (1897) (agency theory); Beidelman v. Powell, 10 Mo. App. 280 (1881) (trust theory).
Certain employees of the Fansteel Metallurgical Company, a corporation engaged in interstate commerce, presented to the company a proposed contract of employment calling for the exclusive recognition of the international labor union to which they belonged as the sole bargaining representative of the employees. The Fansteel company, which had hired a labor “spy” to investigate the union activities of its employees, rejected the proposal, refused to confer with the committee representing the international union, announced a policy opposed to “outside unions,” and made an abortive attempt to organize a company union. At the time the first proposal was made to the company the committee did not represent a majority of all the employees, but additional men joined the union until a substantial majority was enrolled. When the company again refused to recognize the representative authority of the union and to confer with its committee, some ninety-five men “sat-down” in two of the key buildings of the metallurgical plant, stopping all production. Not all the employees were in sympathy with the conduct. Some who did not “sit-down” supplied those within the building with necessities and conveniences.

Counsel for the company demanded that those within the buildings should evacuate them and upon their refusal to do so announced that “they were discharged for seizure and retention of the buildings.” A mandatory injunction, requiring that possession of the buildings be delivered up, was obtained from the state court but was not obeyed. The first attempt to enforce it, resulting in pitched battle between the strikers and the sheriff and his deputies, was unsuccessful. A second attempt, aided by tear and emetic gas and assuming the proportions of modern warfare, resulted in the eviction of the men and their arrest for contempt of court. Most of them were subsequently fined and/or sentenced to jail.

As production was resumed at the plant, re-employment was offered to many of the former striking employees, some of whom accepted. The company still refused to confer with the union representatives. Another union was formed with company assistance. Former employees who remained on strike or were not offered re-employment petitioned the National Labor Relations Board for relief, which after hearing and upon the above facts ordered the company to desist from interfering with the employees’ union activities, to recognize the international union as the sole bargaining agent of the employees, and to

1. 59 Sup. Ct. 490 (1939).
2. For a history of sit-down strikes, see McClintock, Injunctions Against Sit-Down Strikers (1938) 23 Iowa L. Rev. 149.
re-instate all its former employees with back pay. On the company's petition
the United States Circuit Court of Appeals, by a two to one decision, set aside the
order. Certiorari was granted by the Supreme Court. After hearing, the circuit
court's decision was affirmed.

Chief Justice Hughes, speaking for four members of the court, took the
position that an employer may discharge a striking employee on grounds other
than those involved or caused by the labor dispute. Thus, when the employee
does an illegal act during a strike, such as seizure of the employer's property,
he may be discharged by the employer even though the employer may have
caused the strike by conduct unlawful under the National Labor Relations Act.
He pointed out that the employees had their remedy for the employer's unlawful
conduct in a petition to the labor board. It was also held that where discharge
for illegal acts changed the union membership, it could not be concluded that
the union contained a majority of the corporation's employees. It followed that
if the discharges reduced the membership of the union below a majority of the
employees, the employer need no longer bargain with the union under the
National Labor Relations Act until the union membership again included the
majority of actual employees. Mr. Justice Stone concurred with the majority
opinion in so far as the employer's right to discharge was concerned.

Mr. Justice Reed, with whom Mr. Justice Black concurred, dissented. He
declared that the purpose of the act was to protect the employee from being
discharged because of a labor dispute; that if exercise of the employer's power
of discharge was prohibited only where interference with self-organization or
collective bargaining was attempted, then the purpose of the act could not be
effectuated. The history of labor disputes shows that the controversy inevitably
engenders conduct violating the ordinary standards of propriety. If the act
gives protection only against discharge for cessation of work, and not against
the conduct directly resulting from the strike (which a priori the employer has
induced by his own activity) the protection is more apparent than real.

In this case the unlawful conduct was of extreme character, the violent
seizure of property. But the majority opinion does not limit the employer's
right of discharge to dismissal for participating in a sit-down strike which was
branded illegal. It goes further. It restated the words the court used in the

5. What constitutes an unlawful act would seem to be a matter of local
law. Quaere, whether in the instant case the Supreme Court has enunciated a
general rule capable of application to the varying laws of the several states,
which under the doctrine of Erie R. R. v. Tompkins, 304 U. S. 64 (1938), would
be binding upon the federal courts, or whether the issue must always be one
of interpretation of the National Labor Relations Act and its application to the

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case of National Labor Relations Board v. Jones & Laughlin Steel Corp., and affirmed the right of the employer to exercise his normal right to discharge the employee so long as that right is not used for the purpose of intimidating and coercing the employee in the dispute. This does not limit justifiable discharge to dismissal for illegal acts. The court only needs to find the discharge was not for intimidation or coercion.

If acts unlawful by common, state, or federal law are justification for discharge, then, as the dissenting opinion points out, a wide field of possibilities is opened up. In a labor dispute there can be a large variety of illegal acts. There are acts which are contrary to property and tort law as in the present case. There are acts which subject the persons doing them to prosecution for violation of state and federal criminal laws. Certain acts in labor disputes, notably methods of coercion or intimidation employed by striking employees and fellow workers, may of themselves be unlawful. Picketing which is not peaceful is illegal, and even peaceful picketing in some forms is unlawful. When picketing ceases to be peaceful and becomes violent varies in different jurisdictions. There is a possibility that some union activities could be considered as violations of state and federal anti-trust laws.

Thus it appears that by the decision in the Fansteel case an employer may cause a labor dispute by acts illegal under the Labor Relations Act, which in turn may cause an illegal act on the part of the employee. This would seem to give the employer somewhat of an advantage as the dissenting opinion contended. As a practical matter, it is not difficult for an employer with his usually able attorneys to discover and prove some sort of an illegal act on the part of the employee in the course of a labor dispute. Conceivably, this device could be resorted to as a means for destroying the majority held by any unit of the employees with which the employer is in conflict. This result would seem to contravene the general purpose of the Labor Act to protect the employee and preserve his bargaining unit.

The majority opinion felt that if the employer was not allowed to discharge the employees for participating in the seizure and detention of the corporation's buildings, lawlessness and violence would be encouraged. The dissent felt that the intendment of the act in preserving the bargaining unit was more important. It pointed out the employer had his remedy for lawlessness in the state courts. It should be noted, however, that in large sit-down strikes, the employer's facts of the particular case, so that the federal courts would exercise their independent judgment.

6. 301 U. S. 1, 45, 46 (1937).
7. For a discussion of criminal law applicable to labor, see WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 152-174.
10. See Note (1937) 23 Va. L. Rev. 799, 809, 810.

http://scholarship.law.missouri.edu/mlr/vol4/iss2/6

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normal remedy for illegal acts is often inadequate because of the tremendous number of persons involved. It is a problem of balancing the interests, of discouraging violence and lawlessness and protecting the employee from discharge because of lawful participation in a labor dispute. It is submitted that in a different factual situation where less violence and open lawlessness is involved, a result opposite to the decision of the majority opinion in the present case might be reached.

HARRY P. THOMSON, JR.

LIBEL AND SLANDER—BROADCAST OF TRIAL

Irwin v. Ashurst

The plaintiff, an elderly woman, testified as a witness for the state in a murder trial. In his extemporaneous arguments to the jury, the defense counsel called the witness (now the plaintiff) a dope fiend, and accused her of being lower than a rattlesnake. The entire trial was broadcast over a commercial broadcasting station. Plaintiff sued the judge, defense counsel, the broadcasting company and the manager of the broadcasting company for injury to her reputation. The court assumed the defamatory words constituted libel but recovery was denied because of certain defenses.

Whether broadcasting defamatory matter over the radio constitutes libel or slander is a question that has arisen recently with the rapid and effective development of radio broadcasting. Where the speaker is reading from a written manuscript, the cases are in accord that the broadcasting company is publishing a libel. Where the speaker is speaking extemporaneously, the Irwin case is the first to present this problem. As far as the effect is concerned, there is no difference between broadcasting from a written manuscript and extemporaneous speeches; the person hearing the defamatory matter over the radio does not know the difference. In the case of extemporaneous speeches for the purpose of being reduced to physical form and spread out over the country, active participation is taken by the broadcasting company, which manifestly constitutes conduct on its part. Many cases are on record where defamation has been per-

1. 158 Ore. 61, 74 P. (2d) 1127 (1938).
2. Broadcasting was unknown until the fall of 1920. In 1931 there were 571 stations and major chain companies, having actual investments totaling $48,000,000. (1932) 57 A. B. A. Rep. 455, 461. As recorded by the census of 1930 there were 15,000,000 radio receiving sets with an estimated total of 50,000,000 radio listeners. See U. S. Daily, Oct. 17, 1932, at 1481.
4. Effective broadcasting requires not only utterance by the speaker but much conscious assistance from the broadcaster, especially in rephrasing vocal sounds, adjusting the position of the speaker with reference to the microphone, and where downtown stations are maintained and the program sent over wires to the main station, additional operators are required at the main station to
petrated by conduct. The speaker in such a situation would be liable also because he voluntarily participated with the broadcasting company in publishing the libel. Where the extemporaneous speech is not for the purpose of being reduced to physical form, as was the situation in the principal case, the speaker should be excused because he has not voluntarily participated with the broadcasting company in publishing the libel.

There are several privileges that a defendant may take advantage of in a defamation action. The underlying guide that determines whether or not a defamatory statement is privileged or not, arises from weighing the social interests involved. Conditional privilege is available as a defense when good faith is present and both the speaker and recipient have a personal interest in the statement. The privilege was not applicable in the principal case because the broadcasting company and the radio audience had no personal interest in the statements made by the defense attorney in his arguments to the jury. Reports of public proceedings are privileged so long as they are reported accurately, although the allegations are untrue. This privilege is limited by most courts to reports of legislative and judicial proceedings. A minority have made a desirable extention of this privilege to include the reports of bodies invested with power directly affecting the public, such as medical associations, bar associations, school boards and municipal boards, where they exercise powers that directly affect the public. This privilege is clearly applicable to the principal case, because the entire trial was broadcast and there is not the chance of error being made in the report as in the case of a newspaper report.

Absolute privilege is extended to the judge in judicial proceedings, chief officers in the executive departments, and statements made during legislative proceed-
The only requirement that a judge must meet to avail himself of this absolute privilege is that he must have jurisdiction or color of jurisdiction; and the judge had jurisdiction in the principal case. Counsels, witnesses and parties to the suit are absolutely privileged as to what they say in a judicial proceeding if it is relevant and pertinent to the issues.

The broadcast of judicial proceedings, essentially a question of judicial ethics rather than substantive law, has been condemned by the American Bar Association. It is suggested that the refusal of permission to broadcast legal proceedings will preserve the judicial dignity and aid in the improvement of public relations between the legal profession and the public at large.

HARRY H. BOCK

LITERARY PROPERTY—COMMON LAW COPYRIGHT OF AN ARCHITECTURAL DESIGN—LOSS BY DEDICATION

Kurfiss v. Cowherd

Plaintiff, an architect, devised unique plans for remodelling a house. The house was remodeled according to the plans and was opened for public exhibition. Defendant, with knowledge as to the authorship of the plans, constructed similar dwellings. In an action for damages, held that the exhibition which was unrestricted, was a publication so as to constitute a loss of common law copyright by dedication.

The creator of a unique intellectual production such as a book, play, compilation of facts, work of art, architectural plan, et cetera, has a property right in the thing created. This is a right recognized at common law apart and aside from the statutory copyright and will be protected both in law and in equity against unauthorized use as would any property right. The right is in

12. See a collection of the cases in (1921) 13 A. L. R. 1355.

1. 121 S. W. (2d) 282 (Mo. App. 1938).
8. Jefferys v. Boosey, 4 H. L. Cas. 815, 887 (1854), by Earle, J.: "Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personality in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained. . . ."
the intangible incorporeal idea as distinguished from the paper on which it is embodied. The two are so distinct that ownership may be in separate persons. 6

The common law copyright, commonly called "literary property," is a right of first publication only. 10 If the right of republication is sought, then the statute must be resorted to. 11 The statutory right is of no value until there has been a publication; the common law right is lost as soon as there has been a publication. 12 Legally, publication in this sense means the point at which common law rights are relinquished as distinguished from a mere commitment of the idea to manuscript or print. 13 The courts have divided publication into "general" and "restricted." 14 If the publication is "restricted," then the right is not lost. 15 However, it is agreed that a general publication cannot be made restricted by mere agreement between author and user of the idea if there has been a general publication in fact. 16

As to what constitutes a publication depends on the nature of the subject matter dealt with. General definitions have been attempted 17 but the facts must be looked to. Literary property in a book is lost when the book is put on public sale. 18 Literary property in the news is lost by dissemination through the public press. 19 A public exhibition of a picture might constitute a publication. 20 On the other hand it has been held that a lecture, 21 broadcast, 22 presentation of a drama, 23 private exhibition of a picture, 24 private circulation of confidential

news\textsuperscript{25} are not general publications. Similarly, the submission of literary property for consideration is not a publication.\textsuperscript{26} Between an extreme case such as this and general dissemination there is a hazy middle ground of restricted publication. Diverse factors are sometimes stressed such as intention,\textsuperscript{27} custom,\textsuperscript{28} accessibility,\textsuperscript{29} or tangible distribution to the public,\textsuperscript{30} but they appear to be only make-weights in the individual cases and not standard criteria. While no general rule is submitted, it is suggested that what the courts occasionally do is to bestow some of the advantages of the statute on common law copyright.

The principal case, as it concerns architecture, is quite novel. There are but few American decisions. In \textit{Glendell v. Orr},\textsuperscript{31} it was held that the embodiment of an architectural idea in a novel porch open to the public gaze was a publication. In \textit{Wright v. Eisle},\textsuperscript{32} although there was an actual construction, the court went on the ground that a mere filing of the plans with the building commissioner constituted a publication. It is hard to see how the filing of plans required by law is any more a publication than presenting a book or a play to a public censor. It would seem in the \textit{Wight} case that there has been no publication of an architectural idea until it has assumed its usual form, \textit{i.e.}, insofar as architects are concerned it would mean an actual building,\textsuperscript{33} and, therefore, the emphasis of the court might well be questioned. It might follow from this that an architect's plan could be safely shown under circumstances that would constitute publication for an ordinary picture. This has been criticized as creating too nice a distinction between flat and rounded surfaces,\textsuperscript{34} yet it would seem that the idea is not without merit if architects are to be served in their own fashion as authors and composers are in theirs.

In \textit{Larkin v. Pennsylvania R. R.},\textsuperscript{35} the plaintiff's plans were submitted to the defendant but never were accepted. It was alleged that an appropriation of the ideas was made by architects subsequently employed by the defendant and was embodied in a hotel constructed for the defendant. The court seems to have gone on the basis that, if there was an appropriation of a unique idea, then recovery would be had because there had been no publication; it, therefore, devoted its inquiry as to whether there was an appropriation in fact. None was shown. An

\textsuperscript{26} Thompson v. Famous Players-Lasky Corp., 3 F. (2d) 707 (N. D. Ga. 1925).
\textsuperscript{27} Universal Film Mfg. Co. v. Copperman, 212 Fed. 301, 303 (S. D. N. Y. 1914).
\textsuperscript{28} American Tobacco Co. v. Werckmeister, 207 U. S. 284, 300 (1907).
\textsuperscript{29} D'Ole v. Kansas City Star, 94 Fed. 840, 842 (C. C. W. D. Mo. 1899).
\textsuperscript{30} Suggested in (1903) 16 HARv. L. REV. 226.
\textsuperscript{31} 13 Phila. 191 (Pa. 1879).
\textsuperscript{32} 86 App. Div. 355, 83 N. Y. Supp. 887 (2d Dep't 1903).
\textsuperscript{33} See Kurfiss v. Cowherd, 121 S. W. (2d) 282 (Mo. App. 1938); Glendell v. Orr, 13 Phila. 191 (Pa. 1879).
\textsuperscript{34} COPINGER, LAW OF COPYRIGHT (6th ed. 1927) 34.
\textsuperscript{35} 125 Misc. 238, 210 N. Y. Supp. 374 (Sup. Ct. 1925).
identical problem presented itself in Mackay v. Benjamin Franklin R. & H. Co., but the court did not inquire into the fact of appropriation. It was held that the second architect was an independent contractor for whose torts, if any there were, the defendant was not liable. Inter alia the court confessed difficulty in seeing how recovery could be had on anything so intangible as an idea.

It has been held that there is no literary property in a mere idea for it is published by mere communication; but where the idea has been embodied into a plan or form, then the plan or form will be protected as literary property. It has been said that there is no property right in a mere idea; but literary property is a bona fide property right. Quaere as to the nature of the property right here? When a manuscript is purloined it is a clear enough case, but will such a tangible property concept suffice here? It is manifestly a different one, for when a tangible thing is purloined the owner is deprived of the use of it; but this is hardly the case with literary property, for the author still has his ideas. In Mansell v. Valley Printing Co., the court saw fit to disallow the defense of good faith in an action to enjoin the use of converted literary property. On the other hand, the defense was allowed in resisting an injunction against the use of a trade secret. Without dwelling further in the realm of metaphysics it would seem wise to entertain a caveat as to the soundness of the distinction of an idea as a thing-in-itself and as embodied in a form or plan. Thus, while the Mackay and Mansell cases might be distinguished on a basis of nominal terms employed in each, they seem to be in fact contrary, and the question should be one of policy, not of nomenclature.

The instant case has none of the difficulties of the Larkin and Mackay cases. It is stronger on its facts then the Glendell and Wright cases, for there was not only a completed structure but an unrestricted public exhibition of it as well. The course of the court was clear, for the common law copyright had been relinquished by dedication.

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37. Moore v. Ford Motor Co., 43 F. (2d) 685 (C. C. A. 2d, 1930); Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436 (Ch. 1906); Bristol v. Equitable Life Assur. Soc., 5 N. Y. Supp. 139 (1st Dep't 1889). If the idea is sought to be protected it must be patented if possible. Copinger, Law of Copyright (6th ed. 1927) 2.
39. See note 37, supra.
40. Aronson v. Baker, 43 N. J. Eq. 365, 367, 12 Atl. 177 (Ch. 1887).
41. Mansell v. Valley Printing Co., [1908] 2 Ch. 441.
MALICIOUS PROSECUTION—PROBABLE CAUSE INFERRED FROM CONVICTION REVERSED ON APPEAL.

Addington v. Bates

In this case the supreme court of Colorado held that, in the malicious prosecution action before the court, the defendant had shown probable cause for having had the plaintiff arrested and tried for committing a misdemeanor, by showing that the court of a justice of the peace found the plaintiff guilty of misdemeanor of interring a body without a burial permit, regardless of the fact that on appeal the county court reversed the decision and acquitted the plaintiff. In so deciding, the court follows the majority rule, long accepted, that a prior conviction in a lower court of the plaintiff in the malicious prosecution action is conclusive evidence of probable cause on the defendant's part in having the plaintiff arrested, regardless of the fact that the court of conviction was not a court of record. This rule is an outgrowth of the early feeling among the courts that this type of action should be discouraged as much as practically possible. Lack of probable cause for the defendant's conduct is a necessary element of the plaintiff's cause of action for malicious prosecution, and the more conservative courts have generally found it fairly easy to find probable cause for the defendant's conduct.

There is a strong minority view, however, that holds that such a prior conviction is not conclusive evidence of probable cause, but is merely prima facie evidence of such a factor, rebuttable by any competent evidence which may clearly overcome the presumption arising from the fact of the conviction in the first instance.

The Missouri cases that have been decided on this question are not entirely harmonious. The earliest of these cases was Boogher v. Hough, where the plain-
tiff had been charged with and convicted of criminal libel, but upon appeal, the judgment was reversed. The conviction was in the St. Louis Court of Criminal Corrections, which was a court of record. In the lower court trying the malicious prosecution action, the court gave an instruction ordering the nonsuit of the plaintiff. On appeal, the supreme court said, in dictum only, however, that ordinarily in the absence of fraud in obtaining the conviction of the plaintiff, the conviction would be conclusive proof of probable cause in spite of a reversal in an upper court. However, it was proved that the defendants deprived the plaintiff of his defense in the court of the criminal conviction by the use of fraudulent means, and that such a fact countervailed the force that the conviction of the plaintiff would otherwise have had. Hence the decision of this case cannot be considered as controlling in the discussion of the matter under consideration, because of the fact that the statement concerning the conclusiveness of the evidence of the prior conviction is purely dictum.

Then, in 1917, the court in bane handed down its decision in the case of Hanser v. Bieber. In this case, the plaintiff had been arrested for disturbing the peace of the defendants, and was found guilty before a police court of St. Louis, and fined. In the Court of Criminal Corrections of St. Louis, the judgment was reversed, and the plaintiff acquitted. This malicious prosecution action was then filed. The defendant cited cases seeking to prove the conclusiveness of the evidence of the conviction before the police court as showing probable cause, including the Missouri decision, Boogher v. Bryant. The court, however, distinguished these cases cited from the instant case, on the grounds that they were nearly all instances where the upper court had reversed the judgments of the lower courts merely on review of the records of the proceedings below. In Hanser v. Bieber, however, the court pointed out that there was a trial de novo in the Court of Criminal Corrections. The court said. "To hold otherwise (that is, in favor of conclusiveness of the evidence of prior conviction as probable cause) would be to deny a right of redress to one who perhaps had been illegally arrested and unlawfully detained, simply because in a hurried and perfunctory hearing before a police court following such arrest he had been convicted, although upon a trial de novo the judgment of conviction has been held for naught."
The court also expressed its belief that in this case the conviction in such a court as that of the first instance here does not supply the elements which in the cases cited by the defendant rendered pleas of former conviction, although reversed, conclusive evidence of probable cause in actions for malicious prosecution. The court, however, held the prior conviction of the plaintiff was admissible as prima facie evidence of the probable cause that defendant may prove to defeat plaintiff's cause of action. As was pointed out in a recent Missouri case (the issue of which, however, was different from that in question here),

7. 271 Mo. 326, 197 S. W. 68 (1917).
8. Wilcox v. Gilmore, 320 Mo. 980, 8 S. W. (2d) 961 (1928).
no opinion in *Hanser v. Bieber* received full concurrence of the court. This possibly detracts from the strength of the decision.

In the still later case of *Randol v. Kline’s Inc.*,9 the proceedings in the first instance were heard before a police court, where the plaintiff was convicted and fined for shoplifting. Then, before a jury in the circuit court, the judgment was reversed and the plaintiff acquitted. The hearing in the circuit court was of course a trial *de novo*. The decision here was the same as in *Hanser v. Bieber*, which the court cited and clearly approved in reaching its result.

On the other hand, where the first case was a civil suit the Missouri Supreme Court has held that the prior conviction in the lower court was conclusive evidence of the probable cause needed for a defense.10 This is the position taken by the Restatement,11 and the majority of the jurisdictions throughout the country.

It should be noted that in all the Missouri decisions involving directly the question under consideration, the prior conviction of a crime was reversed by a trial *de novo*, and not by a review of the record. It is impossible to tell what the result would be in a Missouri court if the reversed conviction were adjudged in a court of record. It is quite possible, as indicated by the discussion of the court in *Hanser v. Bieber*,12 that in place of the majority and minority views as already discussed, there might be a third view applied in Missouri, in which the value of the evidence of criminal conviction later reversed varies, depending on the nature of the proceedings in which the conviction is reversed.

GEORGE W. WISE

**NEGLIGENCE—LIABILITY FOR STOPPING AUTOMOBILE ON HIGHWAY WITHOUT LIGHTS AT NIGHT**

*Butts v. Ward*

In an action for personal injury, sustained by the plaintiff when the car which he was driving collided with one driven by defendant W, defendant W cross-complains against defendants B and K for damages to his automobile, and defendants B and K cross-complain against W for contribution under Wisconsin statutory procedure. At the time of the collision the plaintiff was driving south and W north on a certain highway in Wisconsin. A truck driven north by B for the K company had stopped, and was left standing on the concrete in the east lane. Although it was night and within the statutory time requiring them, the truck had no tail lights burning. W, being unable to stop behind the truck when he approached it, was forced to turn left to go around it, whereupon he collided

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9. 18 S. W. (2d) 500 (Mo. 1929).
11. RESTATEMENT, TORTS (1938) § 667(1).
12. 271 Mo. 326, 340, 197 S. W. 68, 72 (1917).
with the car driven by the plaintiff when both cars were opposite the truck. In
the lower court verdict was had for plaintiff, against all the defendants, the
jury finding him not guilty of negligence in any respect. The jury placed the
comparative negligence of the defendants at 5 per cent for W and 95 per cent for
B. Judgment was rendered for the plaintiff on the verdict for the amount found
by the jury, and in favor of W for 95 per cent of his stipulated damages. In his
cross-complaint for contribution, defendant K charged defendant W with negli-
gence in failure of lookout, for turning out into the west lane, and for not turn-
ing out sooner. The jury found W not guilty of negligence in the first two
respects, but did find him negligent in not turning out sooner. Defendant B was
found guilty of negligence in not leaving a space of fifteen feet to the left on the
road, for operation of the truck after it was disabled, for not having lights on
the truck as required by the statute, and for not placing warning flares behind
the truck. The Supreme Court of Wisconsin affirmed the judgment as to the
plaintiff against B and K, but reversed the judgment as to the cross-complaints
of the defendants, allowing W full recovery of his stipulated damages.

Most states have statutes requiring tail lights on the rear of automobiles "in
use" or "in operation" upon the highways after sundown, and before sunrise.
In most jurisdictions the courts have held that violation of such statutes is neg-
ligence per se.2 Almost all courts hold that a parked car is "in use" or "in opera-
tion" on the highway so as to make the statute applicable.3 The Missouri statute
requires such a tail light for the purpose of "revealing its position and direction,
whether the car is in operation or at rest," and that it be functioning during
the time between a half-hour after sunset and a half-hour before sunrise.4 But
a Missouri court has held that in absence of clear evidence as to the time, proof
of darkness is sufficient to bring the case within the application of the
statute.5

The instant case suggests similar fact situations which present various
aspects of this problem. The first of these to be considered is that in which the
parked automobile itself is hit by the defendant's car approaching from the rear.
In such a case, whether the plaintiff is the driver of the parked car or of the
approaching car the questions of both negligence and contributory negligence

2. Nichols v. Watson, 119 Conn. 637, 178 Atl. 427 (1935); Sexton v. Stiles,
15 La. App. 148, 130 So. 821 (1930); Cotton v. Ship-By-Truck Co., 337 Mo. 270,
85 S. W. (2d) 80 (1935); Mostov v. Unkefer, 24 Ohio App. 420, 157 N. E. 714
191 Cal. 195, 215 Pac. 675 (1923), where it is held that if defendant checked his
tail light a short time before the collision and found it burning, and it subsequent-
ly went out, he is not negligent.
3. Koplovitz v. Jensen, 151 N. E. 390 (Ind. 1926); Murphy v. Hawthorne,
244 Pac. 79 (Ore. 1928); Horton v. Benson, 266 S. W. 213 (Tex. Civ. App. 1924).
Contra: Griffin v. McNeil, 198 Iowa 1359, 201 N. W. 78 (1924).
App. 1932).
are, in most jurisdictions, held for the jury. 6 Many cases allow recovery by the plaintiff, where he is the owner of the parked car, and the defendant is guilty of negligence, on the theory of last clear chance. 7 This is true in Missouri under the humanitarian doctrine. 8 There are still other cases in which the driver of the approaching car is found to be wanton and reckless, so that plaintiff's negligence is no defense. 9 Where the plaintiff is the driver of the car approaching from the rear, important factors to be taken into consideration concerning his contributory negligence are the condition of the road, the contour of the road, and the visibility. As to the visibility, most jurisdictions apply the doctrine that it is negligence to operate an automobile in such a manner as not to be able to stop within the range of the driver's vision. 10 A few states, however, either repudiate this doctrine entirely, or limit its application. 11 In connection with this must be

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considered statutes which require head lights on automobiles that give visibility for specific distances.  

Where the plaintiff is a guest or passenger in the car approaching from the rear, and is not contributorily negligent himself, the negligence of the driver of that car is no defense to the defendant who parked his car without lights. In such a case, or where the plaintiff is the driver of the third car which was struck when the driver of the car approaching the parked car through his negligence could not stop and was forced to go around the parked car, the negligence of both the driver of the parked car and the approaching car are concurring causes, and both can be held liable.

In the instant case, defendant K based his defense largely on the contention that W was negligent in not using sufficient care in maintaining a lookout, and was driving at such a speed that he could not stop within the range of his lights. The court discredited that contention on the basis that the doctrine of the case on which the defendant relied had been limited by a subsequent case not to include situations in which the phenomenon of camouflage exists. In the court's language, "... situations are excluded in which 'an object may not reasonably be distinguished, though within the range of the driver's lights, because of its invisibility to a person in the exercise of ordinary care as to lookout.'" The court found that the color of the dark truck blended into the dark background, thereby creating a camouflage. Hence, defendant K could not rely upon the rule urged. The court further held that even though W had been guilty of ordinary negligence, the negligence of B would not have been cut off, for both would have been concurring negligence as to the plaintiff. It was further insisted by the court that to allow defendant's contention of negligence of W would be to allow a defense of the doctrine of last clear chance, which doctrine long has been repudiated by the Wisconsin courts under their doctrine of comparative negligence.


15. Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629 (1909).
17. In the instant case, the opinion of the court included the following statements: "Ward did not notice the truck until he was about 200 feet from it, nor did his seat mate. Both Ward and his seat mate claimed to be watching the road ahead closely. Ward was driving about forty-five miles per hour on his own side of the road. His lights were good and would disclose objects 200 feet
In the Missouri case of Ridenhour v. Oklahoma Contracting Co.,\textsuperscript{18} the plaintiffs were the driver and occupants of the car approaching the parked car from the rear, and were forced to go around, thereupon colliding with a car coming from the opposite direction. There, however, the road machinery was parked unlighted on the plaintiff's side of the road, just a short distance beyond the crest of a hill, rendering it impossible for plaintiff to see as he approached. The plaintiffs testified that had the machine been lighted as required by the statute they would have seen it in time to stop. The Kansas City Court of Appeals affirmed a judgment for the plaintiff, finding the negligence of the defendant in not lighting the machinery the proximate cause of the collision. In their opinion, the court stated that had the plaintiff, by the aid of his head lights, seen the ditching machine in time, by the exercise of ordinary care, to have stopped his automobile instead of driving upon the wrong side of the road, then the absence of a light on said machine could not be said to have contributed to collision as a proximate cause.

In another Missouri case,\textsuperscript{19} the plaintiff had stopped his truck, without lights, and was repairing a tire, when a car driven by the defendant and approaching from behind plaintiff's truck collided with it and injured the plaintiff. The questions of negligence and contributory negligence were held for the jury. Verdict and judgment for the plaintiff were affirmed by the supreme court. In their opinion the court said that if defendant had been looking, the evidence indicated that his lights would have shone upon this bulky object in the road when he was 150 or 200 yards distant; that the jury might infer that he saw what was in plain view, as well as he could have had the light been on the parked car; that unless the failure to place lights on the truck was a proximate or efficient cause of the injury, then the plaintiff should not be nonsuited on that ground; and that if defendant saw the truck and ran into it negligently, then the negligence of plaintiff in having no lights on his truck did not contribute to his injury. In Missouri, the operator of an automobile is under the statutory duty to exercise the highest degree of care,\textsuperscript{20} to keep a constant lookout,\textsuperscript{21} and is held to have seen what he could have seen had he been looking.\textsuperscript{22} So, clearly it was a ques-

\begin{itemize}
  \item 18. 45 S. W. (2d) 108 (Mo. App. 1932).
  \item 19. Davis v. Howell, 324 Mo. 1227, 27 S. W. (2d) 13 (1930).
\end{itemize}
tion for the jury whether the defendant, with his lights shining straight down the road toward that bulky object, saw it in time, with the extraordinary care required by the statute, to swerve to one side and avoid striking it.

The principal case also illustrates the inclusive issues which may be adjudicated under the Wisconsin procedure.23

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