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Recent Cases

AGENCY—CONTROL OR "THE RIGHT TO DIRECT" AND "THE BORROWED SERVANT DOCTRINE"

Wills v. Belger

In the recent case of Wills v. Belger, a grocery company used two trucks to make deliveries, one of which was regularly furnished by the defendant trucking company. As the grocer’s truck was in the shop for repairs, the defendant furnished an additional truck with a driver. The plaintiff, who was employed by the grocer and normally drove the latter’s truck, was sent along with the defendant’s driver to show him where to make the deliveries. While standing on the back of the truck to help hold the groceries in, the plaintiff was thrown out and injured when the defendant’s driver negligently hit the curb while turning a corner at an intersection.

The evidence showed that the negligent driver was paid by the defendant; selected by the defendant for the particular job; punched a time card at the defendant’s office each day; and during the course of his deliveries was controlled by the grocery company only as to what he should haul, how much, and where he was to go.

The defendant, relying on the “borrowed servant doctrine,” unsuccessfully contended that the evidence showed, as a matter of law, that he had surrendered all right to control the acts of the driver which caused the injury; that the grocery company had sole and exclusive control of the driver; and that the driver was engaged in the business of the grocery company.

The court, in affirming judgment for the plaintiff, indicated that the question of liability is determined by who had control or the right to control or direct at the time of the accident. The solution of the problem is for the jury, though prior Missouri decisions show that the evidence may be so clear the general employer, for example, had no control that it may be ruled on as a matter of law.

The cases leave no doubt that control is it. Other factors such as the right

1. 212 S.W. 2d 736 (Mo. 1948).
2. Ibid.
4. Vert V. Metropolitan Life Ins. Co., 342 Mo. 629, 117 S.W. 2d 252 (1938). Hyde, C., very logically points out that the power to direct indicates the closer relationship an employer has to a servant engaged in physical activities as opposed to the agent who is authorized to enter into contractual relationships for his principal, and where his methods in so doing are not closely directed by the employer.
of selection,7 and who pays the wages8 are considered only in helping to establish who had the right to direct, or "...the degree or extent of such severance and transfer of the right to direct."9 In some instances these factors merely determine who the general employer is and have no further significance.

The court in the Wills case quoted two statements from O'Brien v. Rindskopf10 which run through a sufficient number of Missouri cases to warrant noting. "While it is true one may be in the general service of another, and, nevertheless, with respect to particular work, may be the servant of another, who may become liable for his acts, yet to escape liability the original master must surrender full control of the servant in the performance of said work."11 The second statement is practically a reiteration of the first. "To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person."12

Eliminating other considerations momentarily and reading these phrases literally could it be said that we have a rule which attaches liability to the general employer in the absence of other facts? Does the establishment of the relationship of the general employer make him prima facie liable, regardless of the existence of a special employer? Would there then fall upon the defendant general employer the burden of showing that he had relinquished all control, in contrast to the plaintiff being required to show that the defendant special employer had assumed control? Such questions can only be answered by discovering the meaning of the right to direct or control and the full surrender of such rights as reflected in the cases.

It has been suggested that there is "...broad control, control in the broad sense of hiring, training, and firing; and spot control; ... the man who says when and where to go and how fast."13 Keeping the Wills case in mind, we might increase the types of "spot" control to include what to carry, and how much to carry, while the phrase "how fast" could be included under another type of spot control which could be called "how" it is to be carried, i.e. the manner of driving.

7. Wills v. Belger, 212 S.W. 2d 736, 742 (Mo. 1948) "We think that the jury, in determining the issue of control and right of control at the time respondent was injured could properly consider the admitted fact that the appellant from day to day selected the servant to send to Morgan (the grocer)."

8. Ellegood v. Brashear Freight Lines, 236 Mo. App. 971, 162 S.W. 2d 628 (1942); Gorman v. A. R. Jackson Kansas City Showcase Works Co., 19 S.W. 2d 559 (Mo. App. 1929) (defendant didn't pay wages, but court said this was not conclusive); Bertino v. Marion Steam Shovel Co., 64 F. 2d 409 (C.C.A. 8th 1933) (wages may have carried some weight).


10. 334 Mo. 1233, 70 S.W. 2d 1085 (1934).


Every general employer must have some control in the "broad" sense for that is the sole justification for calling him a general employer; without it he would not exist as such an employer. Therefore, unless the general employer is always liable, his responsibility does not arise because of his broad control, which is ever present, but because he has retained a certain "type" of spot control. This spot control does not need to be exercised, nor does it require the employer's personal supervision. As mentioned supra it may be present in the form of a "right" to direct.14

As a general employer does not become liable merely from the fact that he has retained a broad control, it is submitted that he also does not become liable because he retains the right to direct certain types of spot control. At first glance it would seem that to have a "full suspension" of control by the general employer or "exclusive" control in the special employer, the general employer must be powerless to direct any type of activity in which his servant might engage while in the employ of the special employer. This does not follow.

"Full suspension" of control must pertain to the particular "type" of spot control which contributes to the accident. To illustrate, suppose the special employer had control of type #1, where to go. In the exercise of that control he directs the driver into a hazardous spot to unload his wagon or truck and the employee is injured, or injures someone else as a result. The special employer is liable.15 The general employer may still have some control.16 He may have the right to direct type #2, how to drive, but as to type #1 which actually caused the injury there has been a "full surrender" of control and the general employer is not liable.

In the Wills case17 it is said that, "...the question is whether there was any evidence from which a jury could infer and find that the general employer retained any control over the borrowed servant at the very time the accident occurred."18 Thus we have added the time element, or when the accident occurred. Keeping in mind our types of spot control, it would seem that the retention of any control on the part of the general employer would mean any of those types which actually were present and contributing to the plaintiff's injury. If the special employer controls where the driver is to go, and the general employer has retained control of how he should drive, and the accident occurs in spite of due care, the general employer has still surrendered full control as to the factors contributing to the injury at the time of the injury and should not be liable.

14. Smith, supra, seems to have intended that spot control refer only to that control possessed by the special employer on the spot, but the "right to direct" gives the general employer on the spot control also.
15. Clayton v. Wells, 26 S.W. 2d 969 (Mo. 1930) (special employer directed driver into hazardous corner of a shed to unload wagon—special employer liable for injuries of driver as the latter's employee).
16. Italics added.
17. Supra note 1, at p. 741.
18. Italics the court's.
19. Italics the writer's.
A case might be envisioned where two factors under spot control combined to cause the accident. This could arise where the general employer had control of "how much" to haul, but had surrendered to the special employer all control as to "how to drive." If it were shown that overloading, combined with careless driving, caused the plaintiff's injury, then the general employer would be liable. The control factors which caused the accident would not have been fully surrendered by the general employer. Though the special employer would have partial control, still the general employer would be liable. In this instance, and this alone, would the scales seem to be weighted against the general employer; though this might be one of the exceptional cases where both employers could be liable without being engaged in a joint enterprise. 20

At this point it is interesting to note as further justification for dividing control into types, that to reason otherwise would result in a clash with the age old doctrine that "no man can serve two masters," 21 unless they are engaged in a joint enterprise. 22 Both the special and general employer could not direct a servant how to drive, or where to drive, but there could be a valid and non-conflicting "division" of control as to where to drive and how to drive, with liability resting on either employer depending upon the facts.

It is interesting to read the statement made in Charles v. Barrett 23 in the light of what has been said. In that case the general employer's truck and driver were used by the special employer in transporting goods, but the latter had no control over the driver between the loading and unloading points. In reversing a judgment against the special employer Cardozo, J. said, "The rule now is that, as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division." To escape liability in New York the surrender would have to be full in every sense of the word as far as spot control is concerned. Division of control would be impossible. Responsibility would still rest with the general employer, even though he surrendered the "how" of operating the vehicle, which was the contributing factor in the accident, and retained, we will assume, only the right to determine "when" the deliveries were to be made. 24

As mentioned supra, the phrase "full surrender of control" when literally read implies the retention of only a sufficient amount of broad control to qualify as a general employer. Perhaps this is why the general employer in the Wills case alleged that exclusive control was vested in the special employer, inferring that from

22. Gorman v. A. R. Jackson Kansas City Showcase Works Co., 19 S.W. 2d 559 (Mo. App. 1929) (instructions permitted jury to find both general and special employers liable; not reversible error where jury disregarded them in finding special employer liable); Clayton v. Wells, 26 S.W. 2d 969 (Mo. 1930).
24. See Smith, supra note 13 at p. 1240 for comment on the fate of Cardozo's rule.
the time the driver left the place of business of the general employer until the time he returned the special employer had the right to direct him in every detail. This interpretation might be buttressed by the fact that this is what happened in the McFarland case.25 There the driver and a bulldozer were used for several months on a WPA project with the general employer apparently surrendering all the factors in spot control. The evidence summed up to indicate "a severance of the servant's employment from his general employer, of a very complete and permanent character." The facts showed a surrender of all spot control, thus indicating that the sub-factor in spot control, how the tractor was to be operated, was clearly within the direction of the special employer. The completeness of the severance simply made it easier to see that the general employer had fully surrendered the "how" of tractor operation, so easy, in fact, that a verdict was ordered for the defendant as a matter of law.

In answer to the questions asked earlier, it would seem that Missouri has remained fairly clear of any arbitrary presumptions or general propositions. One phrase has appeared in a few of the cases. "The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. And it is true as a general proposition, that when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."26 It is interesting to observe that this phrase appears only where the special employer is found liable, and usually where the manner in which the vehicle was operated was not involved.27

A few cases have raised a presumption of control on the part of the general employer on the basis of the ownership of the vehicle.28 Almost invariably if the

25. 348 Mo. 341, 153 S.W. 2d 67 (1941).
26. Clayton v. Wells, 26 S.W. 2d 969 (Mo. 1930); Karguth v. Donk Bros. Coal & Coke Co., 299 Mo. 580, 253 S.W. 367 (1923); 35 AM. JUR. Master and Servant § 541 (1941).
27. Exceptions are McFarland v. Dixie Machinery & Equipment Co., supra note 25; Ellegood v. Brashear Freight Lines, 236 Mo. App. 971, 162 S.W. 2d 628 (1942) (in both cases the manner of operating a vehicle was involved but there was a complete suspension of control on the part of the general employer).
28. Burke v. Shaw Transfer Co., 211 Mo. App. 353, 243 S.W. 449, 451 (1922). The court said, "It is conceded the fact that the cab was owned by defendant, and the driver was under the general employment of defendant, would raise a presumption that the driver was defendant's servant, and the defendant therefore, liable for his acts." In Boroughf v. Schmidt, 259 S.W. 881 (Mo. App. 1924) one finds "... in the absence of an express contract, the defendant will not be presumed to have given up the control and management of the automobile truck ... when he sent his own chauffeur for the special purpose of retaining its management." In RESTATEMENT, Agency § 227, comment b. (1933) it is said "In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it." Cf. § 227, comment c. I Labatt's Master and Servant § 53 at p. 176 (2d ed.
injury is caused by the negligent operation of an instrumentality the general employer is liable, but this is to be expected since almost invariably the right to direct the operation of the vehicle is retained by the general employer.29 If other activities, apart from the operation of the instrumentality, are engaged in, the special employer is generally liable.30 Variations on close cases where the special employers were liable are explainable by the fact that the jury or the court decided that the right to direct the operation of the vehicle was in the special employer.31

Since the phrase “Whose was the right to control at the time of the accident?” is frequently supplemented by a second question, “In whose business was the servant engaged?”32 it is worth-while to check the relationship of the two phrases to each other. Their use together seems to have originated in the case of The Standard Oil Co. v. Anderson.33 If the same meaning is retained to-day, the latter phrase was used only to differentiate between an independent contractor and one who furnishes laborers to the special employer along with the right to control them.

It might be argued that the control factor is being abandoned when “In whose business was the servant engaged?” is considered by a court, and that this is a tacit recognition that “every business should pay its own way.” Were this question determinative it would seem that the special employer would generally be liable, since it is his business which is being done by the use of facilities and men furnished

1913) “. . . a servant sent to take charge of an instrumentality owned by his master, . . . is presumed to remain the servant of his general employer, and that some special circumstances apart from the mere fact of the hiring of the chattel must be put in evidence in order to overcome this presumption.” § 58, supra indicates that it should be inferred that general employer was still in control even though no instrumentality was involved.

29. State ex rel. Chapman v. Shain, 347 Mo. 308, 147 S.W. (2d) 457 (1941); O'Brien v. Rindskopf, 334 Mo. 1233, 70 S.W. 2d 1085 (1934); Scherer v. Bryant, 273 Mo. 596, 201 S.W. 900 (1918); Borough v. Schmidt, 259 S.W. 881 (Mo. App. 1924); Burke v. Shaw Transfer Co., 211 Mo. App. 353, 243 S.W. 449 (1922), aff'd State ex rel. Shaw Transfer Co. v. Trimble, 250 S.W. 384 (Mo. 1923).

30. Maher v. Donk Bros. Coal & Coke Co., 323 Mo. 779, 20 S.W. 2d 888 (1929) (driver dumped coal in the street after dark); Clayton v. Wells, 26 S.W. 2d 969 (Mo. 1930) (special employer directly intervened in directing where to drive); Karguth v. Donk Bros. Coal & Coke Co., 299 Mo. 580, 253 S.W. 367 (1923) (driver threw shovel full of coal on pl.); Winklesblack v. Great Western Mfg. Co., 187 S.W. 95 (Mo. App. 1916) (driver was helping load wagon and injured himself); Yelloway v. Hawkins, 38 F. 2d 731 (C.C.A. 8th 1930) (involved operation of a bus, but an exceptional amount of control over borrowed servant assumed under the contract).


32. McFarland v. Dixie Machinery & Equipment Co., 348 Mo. 341, 153 S.W. 2d 67, 71, 72 (1941); O'Brien v. Rindskopf, 334 Mo. 1233, 70 S.W. 2d 1085 (1934); Simmons v. Murray, 209 Mo. App. 248, 234 S.W. 1009 (1921); Bertino v. Marion Steam Shovel Co., 64 F. 2d 409 (C.C.A. 8th 1933) (where the question was of real significance).

33. 212 U. S. 215, 221 (1909) “To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work.”
by the general employer. Only indirectly is the general employer’s business being done. This is particularly true in the Wills case where the grocer normally made part of the deliveries in his own truck and with his own servant, indicating that he considered it part of his business. If such a view were followed, appropriate exceptions would have to be made for the liability of an independent contractor.\textsuperscript{34}

In reality the phrase “Whose business was being done?” is only considered as a factor in determining who had control. In the sense that if the servant is working outside the normal scope of his employment as far as the general employer is concerned, it is certainly a good indication that the general employer does not have the right to direct. The phrase might have a very effective application where the general employer makes a gratuitous loan of his servant or his servant and instrumentality.\textsuperscript{35}

The McFarland case\textsuperscript{36} gives recognition to the “Whose business is it?” test, but re-emphasizes that “Clearly our decisions have made this right of control, or direction, of the physical activities in performing service, the essential test to determine either who is the master of a particular servant as to any questioned act, or whether the relationship is that of servant or independent contractor. Some courts have also emphasized the test of whose business is being done.”

From all appearances it is impossible to get away from the control element in Missouri, which extends, it might be added, even into the field of Workmen’s Compensation where the borrowed servant is injured.\textsuperscript{37}

An arbitrary rule that the general or special employer is liable might be easier to apply, but the borrowed servant problem still comes within the doctrine of respondeat superior, and the foundation-stone of respondeat superior, despite many exceptions, is still control. This alone should be sufficient justification for its use.

\textbf{Richard J. Watson}

\footnotesize{\textsuperscript{34} See Smith, supra note 13 at p. 1236.  
\textsuperscript{35} See Note 42 A.L.R. 1446 (1929) “But in respect to cases where the automobile is loaned, the tendency is to hold that the chauffeur becomes the servant of the borrower, thus bearing out the suggestion . . . that decisions holding that the chauffeur remains the servant of the owner where the car is hired have no application to the case where it is loaned for a purpose not connected with the owner’s business.”  
\textsuperscript{36} Supra note 32.  
\textsuperscript{37} Ellegood v. Brashear Freight Lines, 236 Mo. App. 971, 162 S.W. 2d 628 (1942); Bernat v. Star-Chronicle Pub. Co., 84 S.W. 2d 429 (Mo. App. 1935); Rendleman v. East Texas Motor Freight Lines, 355 Mo. 287, 196 S.W. 2d 171 (1946) (intent of parties also important); Nolan v. Joplin Transfer & Storage Co., 203 S.W. 2d 740 (Mo. App. 1947); see Note 58 A.L.R. 1467 (1929).}
1949]  

**RECENT CASES**

**CONFLICT OF LAWS—FULL FAITH AND CREDIT—DEGREE OF DIVORCE NOT SUBJECT TO COLLATERAL ATTACK WHEN COURT, IN CONTESTED HEARING, FOUND THAT IT HAD JURISDICTION OF THE SUBJECT MATTER AND THE PARTIES**

*Sherrer v. Sherrer¹*

*Coe v. Coe²*

Separate Dissent³

No attempt is made in this note finally to dispel the confusion surrounding decrees of divorce rendered by courts without jurisdiction, or to resolve the many conflicts arising from the sometimes concurrent applicability of the full faith and credit clause of the Constitution,⁴ the principle of *res judicata,*⁵ the ancient doctrine that a decree rendered by a court without jurisdiction is a nullity,⁶ something resembling estoppel,⁷ and the widely accepted doctrine that domicile is an essential basis of jurisdiction to grant a divorce.⁸ The present purpose is simply to suggest the effects, apparent and potential, of *Sherrer v. Sherrer* and *Coe v. Coe* on the requirement of full faith and credit as applied by the Supreme Court to decrees of divorce.

Prior to these cases, the later views of the Supreme Court appear to have been set out in *Davis v. Davis,*⁹ *Williams v. North Carolina* (1942),¹⁰ and *Williams v. North Carolina* (1945).¹¹ In *Davis v. Davis,* the wife tried to attack collaterally in the District of Columbia a divorce granted to the husband in Virginia after the wife appeared, challenged the domicile of the husband, and raised the issue of the court's jurisdiction. The Supreme Court held that she could not do so, though it is not clear whether the ground of the decision was the doctrine of *res judicata* or the rule of full faith and credit:¹² By federal statute the rule of full faith and credit binds "every court within the United States."¹³

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1. 68 Sup. Ct. 1087 (1948).
2. 68 Sup. Ct. 1094 (1948).
3. 68 Sup. Ct. 1097 (1948).
5. See *Davis v. Davis,* 305 U. S. 32, 118 A.L.R. 1518 (1938); *Keller v. Keller,* 352 Mo. 877, 179 S.W. 2d 728 (1944).
6. Thompson v. Whitman, 18 Wall. 457 (U. S. 1873); *Wright v. Wright,* 350 Mo. 325, 165 S.W. 2d 870 (1942).
7. See, e.g., *In re Ellis v. Ellis,* 55 Minn. 401, 56 N.W. 1056 (1893).
12. The court says, "... the record shows that she submitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties. ... Petitioner is entitled as a matter of right to have the Virginia decree given effect in the courts of the District of Columbia." 305 U. S. 32, at 43. And see annotation 157 A.L.R. 1936 at p. 1422.
In the Williams case, the defendants left their respective spouses in North Carolina, journeyed to Nevada, obtained divorces after remaining the requisite period of time, and then married. Service on the spouses was constructive. After marrying, defendants returned to North Carolina and were there convicted of bigamy, North Carolina, on the authority of Haddock v. Haddock,14 refusing to recognize their divorces. The Supreme Court held that the Nevada decrees were entitled to full faith and credit even though service was only constructive, and that the question of where the marital fault lay was irrelevant. It appeared from the opinion, however, that the Supreme Court recognized a right in North Carolina to question the jurisdiction of the Nevada court, and that it would be competent for North Carolina to refuse to recognize the decrees if the issue of domicile were fairly tried and resulted in a specific finding that the Nevada petitioners were not bona fide domiciled in Nevada, even though the decrees of divorce recited findings of bona fide domicile. Accordingly, on retrial, North Carolina submitted evidence to the jury, showing that in fact the parties had not in good faith established domicile in Nevada. The jury returned a verdict of guilty, with a specific finding that the parties had failed to establish bona fide domicile in Nevada. The convictions this time were upheld by the Supreme Court, the majority stating flatly that domicile is a jurisdictional fact and that North Carolina had the right to determine the existence of that fact as well as any other, provided the issue was fairly submitted to the jury and fairly tried.15 Shortly afterward, the Supreme Court upheld Pennsylvania in a similar attack on a Nevada divorce when the husband to whom the divorce was granted applied to the Pennsylvania courts for relief from a support order previously made by the Pennsylvania courts. The attack on the divorce was in the name of the state but actually made by the wife against whom the husband asked that the decree be enforced. Pennsylvania was held entitled to refuse to recognize the divorce on the ground of a finding that the Nevada court lacked jurisdiction. Concurring in the result, Mr. Justice Douglas argued that the support order and the marital status were separate issues and that Pennsylvania could therefore enforce the support order even if she chose to recognize the Nevada divorce.16 This view has recently been adopted by the court as the basis of decision in similar controversies.17

Perhaps the most striking feature of this state of the law is the possibility that a person may be bound at the same time by a decree of divorce and by the marriage which that decree was intended to dissolve—bound by the divorce because he appeared and unsuccessfully contested the petitioner's domicile and the court's juris-

15. See also 27 C.J.S. Divorce, § 332 (b), 335 (a) and (b).
17. Estin v. Estin, 68 Sup. Ct. 1213 (1948); Kreiger v. Kreiger, 68 Sup. Ct. 1221 (1948). In these cases, the Supreme Court affirmed decisions of the Court of Appeals of New York, in which that court recognized the validity of Nevada divorce decrees but nevertheless held in favor of enforcement of support orders issued by New York courts before the divorces were obtained in Nevada.
diction," and bound by the marriage because the state may later question the jurisdiction of the court which entered the decree of divorce. It is also probably still true that interested third parties may attack the decree of divorce by showing that the court lacked the necessary jurisdiction.

What effect, if any, then, are the new cases likely to have on this situation? In *Sherer v. Sherer*, the wife went from Massachusetts to Florida, where, after the necessary time had passed, she filed suit for divorce. The husband was served by mail, but retained counsel, who entered a general appearance and filed an answer denying the allegations of the complaint, including that of residence. After hearing, the court entered a decree of divorce, specifically finding that petitioner was a *bona fide* resident of Florida and that the court had jurisdiction of the parties and the subject matter. Petitioner then married again in Florida and not long after returned to Massachusetts to live with her new spouse. The former husband sued in the probate court of Massachusetts, alleging, among other things, that the Florida divorce was invalid, and asking permission to convey his property as if sole. The relief was granted, and the decision upheld by the Supreme Judicial Court of Massachusetts on the ground that the requirements of full faith and credit did not prevent the courts of Massachusetts from reexamining the finding of domicile made by the Florida court. Reversal by the Supreme Court was based largely on the *Davis* case, and the *Williams* case was distinguished, not on the ground that the state was a party in that action and attacked the divorce in a criminal prosecution, but on the ground that in the *Williams* case the decree was entered and the finding of *bona fide* residence made in *ex parte* proceedings, whereas in the instant case the issue of jurisdiction was determined in a contested hearing.

The facts in *Coe v. Coe* are sufficiently like those of *Sherer v. Sherer* to obviate the need for restatement. After the divorce, the wife moved to have the husband punished by the Massachusetts court for contempt for failure to comply with the terms of a support order previously issued in Massachusetts, and asked modification of the support order. The husband set up the Nevada divorce in bar. Modification of the Massachusetts support order was granted, the courts of that state refusing to recognize the Nevada divorce. The Supreme Court reversed for the same reasons as in the *Sherer* case.

Mr. Justice Frankfurter, with whom Mr. Justice Murphy concurred, filed a separate dissenting opinion applicable to both cases. The argument of the dissent was based principally on *Williams v. North Carolina*. It failed to mention the Davis case, and disregarded the distinction made by the majority between an *ex parte* proceeding, as in the *Williams* case, and one in which both parties appeared, as in the divorce actions involved in the present cases. Domicile, they argued, is a jurisdictional fact, on which depends the power of a court to affect the marriage

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18. Note that the same may also be true of one who took-no part in the proceedings but merely accepted or acted on the decree; see for example, Bruguiere v. Bruguiere, 172 Cal. 199, 155 Pac. 988 (1916).
relationship; and a state which is asked to enforce a decree may always determine whether the court which granted it had the power to do so. Consideration must, of course, be given to the findings of the court which rendered the decree in question. The dissenting justices appeared clearly of the opinion that power over the marital status of domiciliaries was reserved to the states, that each state therefore has the right to define the terms on which it will grant a divorce or recognize divorces granted by other states to parties who remain its domiciliaries, that each state has an interest in the marital relationships of its domiciliaries which the parties cannot foreclose by act or agreement so long as they remain domiciliaries, that this interest should survive even proceedings which might foreclose parties in other types of litigation. The dissenting justices stated, moreover, that the result should be the same whether the state was asserting its interest in a criminal prosecution or simply through its courts in a civil action.\(^\text{20}\) If the argument of the dissenting opinion were accepted, it would appear that the issue of jurisdiction would always be subject to reexamination when a decree of divorce, rendered by a sister state, was sought to be enforced in a state of the parties' domicile, regardless of the type of proceeding, because of the emphasis placed on that state's interest in the marital relation.

On the surface, these decisions would seem to have no effect on the rules established by the previous cases mentioned. They purport to follow the decision of the \textit{Davis} case and to distinguish the \textit{Williams} case. But on the other hand, the language used appears to leave the way open for fairly definite changes. By the facts and the language of the opinions in the \textit{Davis} and \textit{Williams} cases when written, the distinction appeared to be that the first was a civil action between individuals who were parties to the prior divorce proceedings, while the latter was a criminal prosecution by the State of North Carolina. The same distinction exists between the facts, and thus presumably the decisions, of the present cases and the \textit{Williams} case. But that distinction is disregarded in the majority opinion of the present cases, while the dissenting opinion flatly states that it makes no difference. On the contrary, the majority says that the important distinction is that between an \textit{ex parte} proceeding and one in which both parties appear.\(^\text{21}\)

Further, the instant cases

\(^{20}\) The dissenting justices say, "While the State's interest may be expressed in criminal prosecutions, with itself formally a party as in the Williams case, the State also expresses its sovereign power when it speaks through its courts in a civil litigation between private parties. \textit{Cf.} Shelley \textit{v.} Kraemer, \textit{334} U. S. \textit{1}, 68 S. Ct. 836." 68 Sup. Ct. 1097 at 1100 (1948).

\(^{21}\) At p. 1093, the court says, "It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in \textit{ex parte} proceedings. It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings ... in which the defendant has participated." This distinction appears also to be the one made by the Missouri Court. \textit{Wright \textit{v.} Wright}, \textit{supra} note 6, involved an attack on an \textit{ex parte} divorce granted in Nevada to husband who lacked good-faith domicile; the Missouri court refused to recognize the divorce. In \textit{Keller \textit{v.} Keller}, \textit{supra} note 5, attack was made on a divorce rendered in Nevada after contested hearing. The Missouri court said that a Nevada divorce decree may
say little or nothing of the effect of adjudication in terms of individuals, but rather speak in terms of the power of a state to disregard adjudications by courts of other states.\textsuperscript{22}

Thus, the language of the opinions in these two cases is strong enough to suggest that, were the issues now raised, the Supreme Court might hold: (1) that a decree of divorce rendered after hearings in which both parties appeared and after findings that plaintiff was domiciled in good faith in the state is, by virtue of the full faith and credit clause, proof against attack by anyone, regardless of whether or not the plaintiff was in fact a \textit{bona fide} domiciliary; and (2) that a decree of divorce rendered \textit{ex parte}, if attacked in the state of domicile, either in a civil action or a criminal prosecution, is not entitled to full faith and credit if the plaintiff is not a \textit{bona fide} domiciliary, regardless of findings by the court entering the decree that plaintiff had the requisite domicile. In other words, the Supreme Court seems to be pretty near to making "full faith and credit" simply another way of saying \textit{res judicata} so far as this type of case is concerned, a result which may not be too surprising after the indefiniteness of the grounds on which the decision was based in the \textit{Davis} case. Whether or not the court will go so far remains to be seen.

These things appear certain: (1) if an \textit{ex parte} divorce is granted a petitioner who lacks good-faith domicile, the state of domicile may, in a criminal prosecution, impeach that divorce if it finds as a fact the absence of the requisite domicile; (2) if a divorce is granted after appearance of both parties and full opportunity to litigate the issue of domicile, the divorce is entitled to full faith and credit, and neither party may thereafter in a civil action question its validity.\textsuperscript{23}

These things appear uncertain: (1) if a divorce is granted after appearance of both parties and litigation or opportunity to litigate the question of domicile, has another state the right in a criminal prosecution to impeach the divorce by finding that petitioner lacked the necessary domicile? (2) If an \textit{ex parte} divorce is granted to one who lacks good faith domicile, may the defendant who did not appear and not be set aside by the Missouri courts on the ground that the plaintiff was not a \textit{bona fide} resident of Nevada when the wife alleges that she was present and testified. The issue is \textit{res judicata} and the Nevada decree is binding on the Missouri courts under the full faith and credit clause of the U. S. Constitution. In 1948 the same parties were again before the Missouri court, the wife alleging in her petition the additional facts that after the Nevada divorce, husband returned to Missouri and there resumed practice of his profession. The court reaffirmed its former position, holding the divorce entitled to full faith and credit, and stating that the new evidence alleged had no effect on the operation of the principle of \textit{res judicata}.

22. At p. 1093, the court says, "We believe that in permitting an attack on the Florida divorce decree which again put in issue petitioner's Florida domicile and in refusing to recognize the validity of that decree, the Massachusetts courts have asserted a power which cannot be reconciled with the requirements of due faith and credit."

raise the issue of jurisdiction later attack the validity of that divorce in a civil action despite the court's finding that it had jurisdiction of the parties and subject matter. 24. (3) May an interested third party, such as an heir or grantee, attack on jurisdictional grounds a decree of divorce entered by the court of another state after appearance of both parties when neither was in fact a domiciliary of that state? If the distinction set out in the instant cases is followed, the answer to the first question would seem to be no, the answer to the second, yes, and the answer to the third, no.

Olen W. Burnett

Contracts—Statute of Limitations—Action by Third Party Beneficiary

United States v. Scott 1

In the principal case the defendant (promisor) had agreed in writing to pay all of the existing personal debts of the promisee. The United States, as creditor beneficiary, brought an action against the promisor for unpaid income tax of the promisee, basing its right to sue on the contract between the promisor and the promisee.

The Government's original cause of action against the promisee had been barred by a six year statute of limitations. 2 The court held that the six year statute was applicable only to "liabilities imposed by law and not to any liability which a party may voluntarily impose upon himself." As a consequence, the contract obligation of the defendant promisor was governed by the Missouri ten year statute of limitations 3 and recovery on the part of the Government was permitted.

The problem of barred tax liabilities seems to arise under four different circumstances. Most of the cases involve bonds which are posted pending a decision on claims for the abatement of taxes. 4 Then there are suits against distributees or transferees of the assets of dissolved corporations for unpaid taxes which have been barred 5 and suits against fiduciaries such as receivers 6 and administrators 7 who have failed to pay tax claims. The liability of fiduciaries and transferees, being imposed by law, is barred when the cause of action against the taxpayer is barred.

24. There is language in Williams v. North Carolina 8 (1942), supra, suggesting that an interested third party might attack such a decree. The same conclusion is implied by the decision in the Davis case, supra, that a finding of jurisdictional fact in a contested hearing is conclusive. The question appears to be left open, however, by the decision of the first Williams case, supra, that an ex parte divorce is entitled to full faith and credit if it complies with the requirements of due process of law. See 17 Am. Jur., Divorce § 742.

1. 167 F. 2d 301 (C.C.A. 8th 1948).
2. Int. Rev. Code § 276(c). This provides that income tax is to be collected, or a court proceeding begun, within six years after assessment of the tax.
A fourth category, and one in which the Scott case may be placed, is where the taxpayer's debts are assumed by a third person. This involves the old question of whether a third party beneficiary can sue the promisor when his cause of action against the promisee is barred.

The question may be approached from the standpoint of intent of the parties to the contract with reference to possible defenses the promisee may have to an action by the third party beneficiary and also from the standpoint of the theory upon which the third party beneficiary's right to recover is based.

There would seem to be a clear intent, where a bond is involved, that the Statute of Limitations is not to bar recovery. It is less clear where there is a contract to assume debts. Probably as a result of this lack of clarity the following distinction has been suggested: "Where a promise is to pay a particular claim the proper interpretation of the promise will generally be that no supervening defenses to the claim shall excuse the promisor. His undertaking is not discharged by such circumstances as the promisee's subsequent discharge in bankruptcy or the running of the Statute of Limitations in favor of the promisee. Where, however, the promise is to assume the debts of the promisee . . . the interpretation will often be proper that the promisor undertakes to pay only creditors who have valid claims when they assert them." Though there were several claims assumed by the promisor in the Scott case, and the court noted the Restatement's comment, it seems to have carried little weight. Perhaps this was not deemed a proper occasion for such an interpretation. Perhaps intent is immaterial.

The theory under which the Government could recover as a third party beneficiary, like intent, is related directly to the fact that the Government's claim against the promisee is barred.

Under Williston's well reasoned, widely quoted, but seldom accepted "asset theory," the third party beneficiary has an interest in the nature of an intangible asset of the promisee-debtor which should be reached by the third party in a suit similar to the creditor's bill. This interest is derivative, being limited to the

9. United States v. Renrolds, supra note 4, used the following hypothetical case: "... if C should undertake in writing to A that he (C) would pay A for all merchandise sold in open account to B, and A thereafter sell B such merchandise, but fail to collect from B within a five-year statutory limitation upon open accounts," the ten year statute would be applicable to C. The case involved recovery on a bond, but it is to be observed that in the hypothetical case, as well as in the bond cases, the third party beneficiary contract problem is not involved. The promise to pay the debt is made directly to the creditor.
10. United States v. John Barth Co., supra note 4, "The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government."
11. Italics added.
12. RESTATEMENT, CONTRACTS § 136, Comment (1), subsection (2) (1932).
interest the third party has in the assets of the promisee. 14 It is to be noted that if this theory were followed there could be no recovery in the Scott case, while a direct action permits such recovery.

There is no doubt that a third party beneficiary in Missouri 15 as well as in most jurisdictions 16 has a direct right of action against the promisor. Doubt does arise, however, as to the theoretical basis of this direct right. Whether correctly or incorrectly, the case of Ellis v. Harrison 17 has been frequently cited as Missouri's answer to the question.

In the Ellis case, the court cited prior Missouri cases indicating that the question was settled that a third party creditor beneficiary could recover, but added, "Moreover by our Code of Procedure, it is provided that every action shall be prosecuted in the name of the real party in interest, with certain exceptions,—one of which is that the trustee of an express trust may sue in his own name. The statute then declares that a trustee 'shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.'" 18 The court says that, "Reading these sections together, it would seem to be clearly implied that the beneficiary in such a contract is to be regarded as a real party in interest, and that, as such, he may sue thereon in his own name. . ." The two statutes do readily lend themselves to an interpretation which would give the third party beneficiary a right to sue. Since the person in whose name the contract was made (promisee) is considered a trustee, it would seem to follow that the third party beneficiary would be considered a cestui que trust. 19 As a cestui que trust he would have the substantive rights of a real party in interest 20 and could sue under the statute.

Under the 1943 Code of Civil Procedure the two statutes have been combined. The present statute now reads, "Every action shall be prosecuted in the name of the real party in interest, but . . . (a) trustee of an express trust (and) a person with whom or in whose name a contract has been made for the benefit of another, . . . may sue in his own name. . ." 21 The person with whom or in whose name a contract is made is no longer a trustee, and the beneficiary can no longer be considered as a cestui que trust. It may still be implied that the third party beneficiary is a real party in interest, but when he can no longer be considered as a cestui que

14. 2 id. § 364.
17. 104 Mo. 270, 16 S.W. 198 (1891).
19. Corbin, Contracts for the Benefit of Third Persons, 46 L. Q. Rev. 12 (1930). In an analysis of the trust theory in England as a basis for a third party beneficiary recovering, Corbin says at p. 41, "No one is made a trustee unless some one else is by the same facts made a cestui que trust."
20. A real party in interest has been defined as "...one who by substantive law has the right of action." Clark, Code Pleading § 22 (2d ed. 1947).
trust the inference is materially weakened and the theory seems more vulnerable to criticism.\textsuperscript{22}

With or without Ellis \textit{v.} Harrison, a third party beneficiary will undoubtedly be entitled to recover directly from the promisor, but a discussion of the matter raises the query as to whether it would not be desirable for the third party beneficiary to be subject to some of the same limitations that would be imposed on him were he required to sue the promisor through the promisee. If so, \textit{United States v. Scott} might have been differently decided.

\textbf{Richard J. Watson}

\textbf{Criminal Law—Search Incident to Arrest}

\textit{State v. Carenza}\textsuperscript{2}

Defendant was arrested at his home by an officer of the St. Louis police department at 12:45 a.m. on April 13, 1948. The arrest was valid, the defendant being accused of the murder of a storekeeper. For about twenty-five minutes after the arrest, the arresting officer made a search of defendant's home for a pistol believed to be the murder weapon, but this search was unsuccessful. A policeman remained at the home, and the arresting officer left, returning about eight hours later. At that time, he began an extended and extensive search which lasted for three hours, and which met with no success. The defendant's wife was then brought in by the police, for unexplained reasons. The wife claimed that she had to unlock the house to let the police in, but this was denied. The opinion did not state which fact was found. At any rate, shortly after the wife came to the home, the pistol was found and used as evidence at the trial. The defendant moved for suppression of the pistol as evidence, but this motion was overruled, and the defendant was convicted of murder. The supreme court upheld the ruling of the trial court, saying, "There was no search warrant, but defendant's arrest was lawful, and when the arrest is lawful a search of a defendant's premises may be made without a search warrant."

At least two important questions are raised by this decision in which the Supreme Court of Missouri has given far-reaching and possibly dangerous powers to police officers. First—How thorough a search is permitted when the search is without warrant, but is incident to arrest? Second—When, in point of time, is a search incident to arrest?

The first problem was discussed, and in the opinion of this writer, wrongly decided, by the United States Supreme Court in a recent case,\textsuperscript{2} which involved the arrest of one Harris under valid warrants for forging and cashing checks. The officers making the arrest believed that Harris was using stolen checks for models.

\textsuperscript{22} For a fuller discussion and criticism of the real party in interest statute as a basis for a third party beneficiary recovering see: 2 \textit{Williston}, \textit{op. cit. supra} note 12, § 366; \textit{Clark}, \textit{op. cit. supra} note 19, § 22; \textit{Parks, supra} note 15, at p. 15, n. 22.

1. 212 S.W. 2d 743 (Mo. 1948).
For five hours after the arrest, the officers thoroughly searched Harris' three room apartment, virtually turning the place inside out in a most minute inspection. During the course of the search, the officers discovered stolen draft registration and classification cards in an envelope in one of the dresser drawers. Harris was charged with the possession, concealment and alteration of these cards, and he promptly moved for suppression of the evidence. The motion was denied, and by a five to four decision the United States Supreme Court sustained the ruling. The majority opinion said that since the items being searched for as incidents of the arrest (i.e., the checks) were very small, a thorough and complete search was in order. Since the cards were found during this legal search, they were admissible in evidence. However, the minority opinions in this case go much farther in protecting citizens from being deprived of the prohibition against unreasonable searches and seizures. Justices Frankfurter and Rutledge held the search unreasonable and stated that such searches should be limited to the person and those immediate physical surroundings which are "... in a fair sense, a projection of the person." Justice Murphy believed that allowing such searches and seizures as incident of lawful arrest converts the right to arrest into a general search warrant, which is contrary to the Constitution. He, too, would limit such searches to the person, or to those objects which are visible and accessible. Justice Jackson said that the majority opinion goes beyond any previous one and throws a home open to search on a warrant that does not in any respect comply with the constitutional requirements of a search warrant and does not even purport to authorize any search of the premises. Justice Jackson added, "It would seem also to permit such search incidentally to an arrest without a warrant if the circumstances make such arrest a lawful one. ... I cannot escape the conclusion that a search, for which we can assign no practicable limits, on premises and for things which no one describes in advance, is such a search as the Constitution considered 'unreasonable' and intended to prohibit."

While similar objections could be made to the broad language used by the Missouri court in the Carenza case, it is only fair to point out that there is a difference in the facts of the Harris and Carenza cases, which does tend to justify the decision in the Carenza case. In the noted case, the officers were searching for the murder weapon, an instrumentality of the crime for which the arrest was made. However, the language of the opinion does not place any restriction on the thoroughness of the search, or stipulate the time within which it should be made in order to be incident to the arrest. By using such broad language, the court has impliedly given officers the right to make a search, as incident to an arrest, that

3. The cases cited by the court as authority for the search in the Carenza case are by no means so broad in their holding as is the Carenza case. State v. Williams, 328 Mo. 627, 14 S.W. 2d 434 (1929) limited search to person and place where arrested for articles likely to connect with the crime for which arrested. State v. Wright, note 4, infra. State v. Raines, 339 Mo. 884, 98 S.W. 2d 580 (1936), also limited search to person and room for articles connecting person with the crime for which arrested.
could not be made under a search warrant. It should be observed that the proposed Rules of Criminal Procedure for the courts of Missouri would remedy the statutory defect by adding to the list of objects for which a search may be made those which are “designed or intended for use, or which is or has been used, as the means of committing a criminal offense, including, but not limited to,” those items set forth in Sec. 4173 of the Missouri Revised Statutes. But even if such addition were made to the statutory law, the language of the court should be in accordance with the limitations of the statute, and here again, the Carenza holding would be too broad.

While the Carenza case gives one answer to the first question, it does not directly answer the second question as to when in point of time the search is incidental to the arrest. Apparently there is no case in which this is answered, so it becomes a matter of conjecture as to how long after the arrest a search is incident to the arrest in Missouri. Since the search in the Carenza case was resumed by the arresting officer after a hiatus of eight hours, such delay should be enough to make the later search not incident to the arrest. It is reasonable to assume that under the Carenza decision relays of police officers could have continued the search for days, and have made an inch by inch inspection of the defendant’s premises.

It may be that lack of provision in the statutes for warrants to search for the particular instrumentalities of crime influenced the court in the Carenza case. The adoption of the new rules providing for such a warrant should clear up this problem. Since general search warrants have long been abolished in England and the United States, and both state and Federal constitutions have provisions

4. “Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place, if such magistrate shall be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property.” Mo. Rev. Stat. § 4159 (1939).

Mo. Rev. Stat. § 4173 (1939) provides that a search warrant may be issued allowing search for and seizure of certain property or articles deemed illegal. Specifically named are gambling devices, obscene literature, contraceptive devices, abortive medicines and devices, and machinery or materials used in manufacture of prohibited articles. “The function of such a search warrant is to cause a search to be made by an officer at a particular place for personal property stolen or embezzled, and to secure the production of the property, if found, before the magistrate.” Boeger v. Langenberg, 97 Mo. 390, 11 S.W. 223 (1889). “It is needless to say that no statute sanctions the issuance of a warrant to search the home of one charged with murder in order to secure evidence against the accused while he is in jail.” State v. Wright, 336 Mo. 135, 77 S.W. 459 (1934).

5. Sec. 29.67 (italics added). This is the language of Sec. 41 b of the Federal Rules Criminal Procedure.

6. For a history and full discussion of the subject see comment by Hency, Search and Seizure at Incident of Lawful Arrest, 13 Mo. L. Rev. 302 (1948).

7. Article I, Par. 15 of the 1945 Constitution of Missouri provides, “That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.”
protecting citizens against broad exploratory searches, it would seem that the court should, in future cases, strictly limit the power to search without warrant as incident to arrest.

E. S. Van Matre

INSURANCE—WAIVER OF DELIVERY IN GOOD HEALTH CLAUSE
Quirk v. Columbia Nat. Life Ins. Co.¹

On October 31, 1939, after solicitation by the general agent of the defendant, the plaintiff's husband signed an application for life insurance on a monthly premium basis which contained among other things the not unusual "delivery and payment of first premium in good health" clause. At that time upon examination by the defendant's examining physician the applicant was said to have passed a satisfactory examination. On November 23 the defendant company issued from its home office the policy applied for, making the application a part thereof. This policy and another on an annual premium basis (issued with the hope that the applicant would accept it also) were mailed to the general agent in Kansas City who received them on November 24 or 25. Shortly thereafter the agent took the policy to the applicant's home to deliver it, but failing to find him there did not leave it. On another occasion the agent telephoned the applicant and told him the policy had arrived and offered to deliver it, but the applicant was occupied on that particular evening and declined the offer. Sometime between November 26 and the first part of December the defendant through its department charged with the collection of premiums mailed the applicant at his office the customary notice of the second monthly premium due on the policy. The notice set forth the number of the monthly premium policy, stated that a premium would become due on December 23, that unless such premium was paid to the defendant insurer or its authorized agent (the general agent in Kansas City) on the date due or 31 days thereafter "the policy and all payments thereon" would become "forfeited and void . . . as provided in the policy," and that the notice was in no way to change the contract. The applicant had been confined to his home since December 2 with illness and as a result had no knowledge of the notice. It was delivered to the home of the applicant from his office on December 20, some five days after he had been removed from his home to the hospital. Upon receiving the notice at the home the plaintiff, the applicant's wife, mailed her check for $16.88 (the amount of the alleged premium due), payable to the defendant company, to the general agent at his office. It was received by the general agent on December 23, a Saturday. The applicant died that evening of bronchial pneumonia.

Neither the general agent nor the defendant insurer knew of the applicant's confinement to the hospital until after the death, although there was evidence that both possessed knowledge after the sixteenth of December that the applicant was not well and was confined to his home. Further evidence revealed that communi-

₁. 207 S.W. 2d 551 (Mo. App. 1948).
cations had passed between the agent and home office which had resulted in the confirmation by the agent that the policies held by him would not be delivered or released until the applicant had made a complete recovery as verified by the defendant’s examining physician. Upon learning of the death the general agent informed the home office and was thereupon notified by it to return the check to the plaintiff with the explanation that the policy having remained un-delivered had never been in force. This he did on December 29. The check was promptly returned to him by the plaintiff with the contention that the insurance had been in force at the time of the death; such contention being subsequently based on the fact that the defendant had waived the conditions inserted in the policy pertaining to “delivery of the policy and payment of the first premium while the proposed insured is in good health.” The Kansas City Court of Appeals sustained the lower court’s directed verdict for defendant insurance company.

“Sound health” clauses inserted as conditions in insurance policies have been in the main a source of litigation in two respects. The first arises when the insurance company attempts to avoid an obligation by showing that “sound health” did not in fact exist at the designated time. A second source originates when the insured attempts to show a waiver of such a condition by the company in an effort to collect on an otherwise worthless policy. It is the second contention that is invoked in the instant case.

The chaos surrounding the use of the term “waiver” arises, no doubt, from the fact that it is used to denote several different factual situations which have as a sole common consequence the “relinquishment of a known right” aside from that common factor each situation varies in some respect from other situations which are said to constitute “waiver.” Thus, it would seem a pre-requisite to any problem in which “waiver” is to be asserted as giving rise to a cause of action or to a defense, that the exact scope of the term as applied to the particular facts should be ascertained. Since the instant case involves not the question of the operation of an existing contract, as is often the issue in insurance cases, but a question concerning the

That “sound health” clauses are not always applicable as of the same time: Reed v. Prudential Ins. Co., 229 Mo. App. 90, 73 S.W. 2d 1027 (1934) (sound health at the time of application); Kirk v. Metropolitan Life Ins. Co., supra (sound health at time of issuance of policy); Carpenter v. St. Joseph Life Ins. Co., 212 Mo. App. 336, 246 S.W. 623 (1923) (sound health at time of delivery of policy).
3. Note 6 Mo. L. Rev. 115 (1941).
4. 2 Williston, CONTRACTS § 679 (1920).
5. Several rather important factors exist in the case where the contract has been in force and the issue is one of present liability thereon that are absent in the case wherein the question is merely whether a contract was ever consummated in the first instance. One of the most decisive facts in the former case often is the reluctance of a court to forfeit an existing contract; Curtis v. Prudential Ins. Co. of America, 55 F. 2d (C.C.A. 4th 1932). This reluctance can not be present if there has been no contract. Another point to support the upholding of the operation
inception of the contract, "waiver" denotes that the insurer-offeror has given up a right to a given mode of acceptance.\(^6\) Waiver in this sense as well as any other may be made out by conduct as well as by express assertion. It is the former that gives rise to holdings that reliance by the insured is a necessary element of so-called implied waiver, thus creating an estoppel.\(^7\) However, it would appear that if such reliance by the insured is necessary, its purpose is to show a mutuality of assent and not to show such reliance as would support estoppel.\(^8\) An adoption of the former reasoning bears out the theory that waiver, like a contract, has as its basis a consensual agreement by the parties thereto as distinct from estoppel which is founded on a misrepresentation or deceit. No doubt the indiscriminate use of the terms "estoppel" and "waiver" arises because the same factual situation often serves to support with validity not only the idea of a manifestation of consent by the insurer, but the idea of misrepresentation to the insured and a subsequent reliance thereon. It becomes clear that where such a situation exists, regardless of choice of the two theories advanced in support of a particular cause, the resulting conclusions will be the same.\(^9\) Drawing on the analogy to a contract, one might be forced to conclude that an operative waiver may arise from what would appear to the party asserting the doctrine as a reasonable manifestation of intent to relinquish, just as he could validly accept what appeared as reasonably being an offer although in fact there existed no actual intent to make an offer.\(^10\)

The court in the principal case, relying on Carpenter v. St. Joseph Life Ins. Co.,\(^31\)

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<th>of an existing contract is the refusal to allow parol evidence to show a condition which has been breached. Of course any amount of extrinsic evidence may be introduced to show what terms constituted an offer and thereby show that it was never effectively accepted. A third difference results from an idea that &quot;waiver&quot; when used to relieve the obligor of his obligation under an existing contract requires consideration. An absence of such consideration makes invalid the &quot;waiver&quot; and is often determinative in the refusal to hold the obligor-insurer liable on the contract. If the question is one of the presence or absence of a contract, however, &quot;waiver&quot; means only that some term of the offer has been dispensless with and obviously no consideration is necessary to alter or change an offer before it is accepted; 2 Williston, Contracts § 679 et seq.; see McGeechie v. North American Life Assurance Co., 20 Ont. A.R. 187, 192 (1893) (English view treating the two problems more nearly the same).</th>
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<td>8. Vance, op. cit., supra note 6, sec. 127-130.</td>
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<td>9. Ibid.</td>
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<td>10. Michigan Savings &amp; Loan Ass'n. v. M.K. &amp; T. Trust Co., 73 Mo. App. 161, 165 (1898) Gill, J., speaking for the Kansas City Court of Appeals: &quot;In Stiepel v. Life Ass'n, 55 Mo. App. 224, Judge Rombauer says that 'waiver depends solely upon the intention of the party against whom it is invoked, and it is in that respect different from estoppel.' It is not meant by this, however, that one's secret understanding is to control, for a party's intent will be construed from his acts or what he may do or write.&quot;</td>
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states the waiver necessary where the issue is one of the inception of a contract is one of "pure waiver, which is the 'intentional relinquishment of a known right'... a waiver by estoppel will not do..."\(^12\) That such actual intent on the part of the defendant in the instant case was not present is evidenced by the correspondence and the conclusion resulting therefrom to refrain from delivering the policy until it was determined that the applicant had regained his good health. The plaintiff, not knowing of this communication and decision, had no knowledge of such intent on the part of the insurer. The plaintiff could only rely on conduct of the insurer which would reasonably support the appearance that it intended to relinquish the conditions inserted in the policy.\(^13\) The contention made in support thereof, and the one that gave the court the most concern, was that the mailing of the notice of a premium due on the policy, when in fact the policy had not been delivered as required by the conditions in the application and in the policy itself, constituted an apparent relinquishment of these conditions.

The court in declining this contention cited Curtis v. Prudential Life Ins. Co. of Am.\(^14\) wherein the reasoning was that in a large insurance company the sending of notices of premiums due is a mechanical and routine act, and as such will not conclusively support a waiver of the payment of the first premium and delivery of the policy while in good health.\(^15\) The Missouri Supreme Court had previously applied the theory of the Curtis case, but where the plaintiff, prior to the receiving of such notice, had been expressly notified by the insurer that the policy had lapsed.\(^16\) There was no apparent intention to waive under those circumstances. Possibly an assumption inherent in the holding of the Curtis case is that actual knowledge of the facts is necessary before the insurer can "intentionally relinquish a known right."\(^17\) This necessary knowledge of the facts as a condition precedent to waiver would seem a firmer basis for the instant case than the absence of apparent intention arising from the sending of the notice of a premium due.\(^18\) It seems

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12. Id. at 343, 246 S.W. at 626.
13. Fulkerson v. Lynn, 64 Mo. App. 649, 653 (1886). Although not an insurance case Judge Ellison's citation from West v. Platt, 127 Mass. 367, 372 (1879), seems applicable: "A waiver is indeed the intentional relinquishment of a known right; but the best evidence of intention is to be found in the language used by the parties. The true inquiry is, what was said or written, or whether what was said indicated the alleged intention... the secret understanding, or intent, of the defendants, or their agents, could not affect his (plaintiff's) rights."
15. Id. at 100.
17. Hortsmann v. Capitol Life Ins. Co. of Colorado, 194 Mo. App. 434, 184 S.W. 1164 (1916); Benson v. Metropolitan Life Ins. Co., 161 Mo. App. 480, 144 S.W. 122 (1912); see Vance, supra note 6, sec. 132 (e).
18. Professor Williston says at § 697 of his work: "If a so-called waiver, which is merely promise, unsupported by consideration or promissory estoppel, to give up a matured right or a defense, is ever valid... it can only be so where the promisor clearly manifests an intent to promise with full understanding of the facts." (italics added); accord Kirk v. Metropolitan Life Ins. Co., supra note 2.
worthy of note in this respect that if the foundation of waiver is one of estoppel, then there is no necessity for a requirement of actual knowledge of the facts by the insurer.\textsuperscript{19}

A further argument made by the plaintiff, evidently in the alternative to the plea that the delivery had been waived, was that the mailing of the policy from the home office to the agent in Kansas City constituted a delivery to the applicant. The court was content to say that the contention was without merit. An apparently uncontradicted support is clearly stated in American Jurisprudence: "A delivery is not effected, however, by a transmission of the policy to the agent of the insurer under instructions to turn over the policy to the insured only after the compliance with certain conditions, such as that the applicant shall be in good health at the time, or that the premium shall be paid."\textsuperscript{20} Although not present in the principal case, a question which yields some peculiar Missouri law arises when the policy is mailed from the home office to the agent with unconditional instructions to deliver to the applicant. The prevailing view under these circumstances is that such mailing constitutes a constructive delivery to the applicant.\textsuperscript{21} The rationale behind these holdings is that the mailing to the agent is such an act as will show an intention on the part of the insurer to be bound by a fully executed policy.\textsuperscript{22} The Missouri concept, on the other hand, seems to be that the policy must actually pass from both the physical and legal control of the insurer before there is said to be a delivery.\textsuperscript{23} The result of such a view of course is that no constructive delivery can arise in Missouri from the mailing of any type of policy by the insurer to its agent and that the contract is consummated only when the agent actually delivers the policy to the applicant, in the absence of some other expressed or implied intent by the parties.\textsuperscript{24}

Whatever may be the difference of opinion as to the components or as to the

\textsuperscript{19} 2 Williston, Contracts § 692.
\textsuperscript{22} Vance, supra note 6, sec. 70.
\textsuperscript{24} The rule finds application frequently in determining the proper jurisdiction in which the contract was consummated. Horton v. New York Life Ins. Co., supra note 23; Bearup v. Equitable Life Assur. Soc. of U. S., 351 Mo. 326, 172 S.W. 2d 942 (1943). That the doctrine should be extended to include policies having binder receipts is advocated by Professor Evans, \textit{Premium Date of Missouri Policy}, 12 Mo. L. Rev. 95, 103 (1947).
applicability of "waiver" or delivery, the result reached in the case seems sound. The very reason for the conditions as part of the insurer's offer (the policy) was to control the risk that would fall on it at the time the contract of insurance was consummated. To allow an acceptance of the offer while the applicant is in ill health, even though all the other conditions would be fulfilled, is to deny the insurance carrier its control of the risk that it would assume at the given price. 25

JOE BEAVERS

TORTS—AUTOMOBILE AS AN ATTRACTIVE NUISANCE

McGuire v. Parker 2

This action was brought by McGuire, and others, against Parker for death and injuries which occurred in an automobile accident. The defendant was the non-resident owner of an automobile brought into Missouri and used by him while sojourning in the state. It is averred that on the 7th day of November, 1947, while the defendant was in the charge of the use, management, and the operation of the automobile on the highways of this state, the defendant negligently loaned and intrusted the automobile to one John Cummins and Earl McGuire, who were then 14 and 15 years of age respectively, for their use in operating it and driving it on the public highways of the state. Other minors were in the automobile at the time the driver lost control on a steep grade with the result that some of the occupants were killed and others seriously injured. It is charged in substance in each of the complaints that the defendant negligently and carelessly loaned the automobile to the said minors, "... when the defendant knew, or by the exercise of ordinary care should have known, that they and each of them were of immature age, and incompetent or incapable of properly and safely operating said automobile upon the public highways of this State." In the decision rendered by the court, a motion to dismiss the complaints was overruled, the court stating that, "... the defendant, in placing an automobile in the hands of inexperienced boys, brought himself within the attractive nuisance or turn-table doctrine which obtains in this state, and thus again negligently used his automobile while sojourning in the state."

The attractive nuisance doctrine, which is now well established in this country, is a method the courts have devised to place liability upon property

25. To give effect to such conditions several ideas are advanced: Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311 (1928) (an insurance contract is one demanding "utmost good faith"); Equitable Life Assur. Society v. McElroy, 83 F. 631 (C.C.A. 8th 1897) (continuing representation); cases cited note 2 supra (the insured's good faith compliance is not sufficient if the condition has not in fact been fulfilled); WILLISTON, op. cit. supra note 4 sec. 689 says "To bring the case within the reason of the rule (waiver) it is essential that the promisee could and would have performed the condition ... had it not been for the promisor's waiver."

1. 78 F. Supp. 199 (W.D. Mo. 1948).
2. Historically the attractive nuisance doctrine was based on the English case of Lynch v. Nurdin, 1 Q. B. 29, 113 Eng. Rep. 1041 (1841). In this case the defendant left a horse and wagon in the street. Plaintiff and infant climbed into

https://scholarship.law.missouri.edu/mlr/vol14/iss1/9
owners for maintaining either on their own premises or in a public place, a condition or instrumentality which is likely to cause injuries to children, when such liability cannot be predicated upon the ordinary grounds of negligence or nuisance. It is recognized by the courts that the law imposes no duty upon the owners of land toward trespassers except to refrain from "willful and wanton" conduct and from intentional injury. The attractive nuisance doctrine squarely conflicts with this generally adopted doctrine of trespassers, and to sustain the attractive nuisance idea the courts have adopted many theories, such as regarding the child as an "implied invitee," or some courts maintain the failure of an owner or occupant to guard against a dangerous condition likely to attract children amounts to an intention to injure or a "reckless disregard," while other courts have adopted the view that a trespasser of tender years cannot be regarded more than a mere "technical trespasser." There are many other theories advanced which attempt to sustain the doctrine on a logical legal basis but the soundest basis is a socially moral one, the preservation of the lives and soundness of body of the children of the community by regulating to a certain extent the use of property by its owners.

the wagon which was led away by another boy. Plaintiff was injured and brought suit. In discussing the issue of the boy being a trespasser the court stated: "He (the defendant) has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shewn these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it." Although severely criticized it was followed by later courts in extending the doctrine. The doctrine was first recognized in the United States in the case of Sioux City & P. R. R. v. Stout, 17 Wall. 657, (U. S. 1874). The court allowed recovery for injuries sustained by a child upon a railroad turntable, although the child was a trespasser on the railroad.


6. Apparently the theory is based on the reasoning in the English case of Townsend v. Wathe, 9 East 277, 103 Eng. Rep. 579 (1808), which case involved the baiting of traps by the defendant to kill trespassing dogs. Later attractive nuisance cases used an analogy of the English case and the case of a possessor of land leaving a dangerous instrumentality which would attract children on the land See City of Shawnee Creek, 41 Okla. 227, 137 Pac. 724 (1913); also Bottom's Adm'r. v. Hawks, 84 Vt. 370, 79 Atl. 858 (1911). This view is severely criticized in Smith, Liability of Landowners to Children Entering Without Permission, 11 Harv. L. Rev. 349 (1898).


8. Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330 (1925); Kelly v. Southern Wis. Ry., 152 Wis. 328, 140 N.W. 60 (1913); and Buddy v. Union Term. Ry., 276 Mo. 276, 207 S.W. 821 (1918), the court stated, "... it rests solely, though firmly and beneficiently, upon the humane sentiment of putting humanity above property; but it ignores legal landmarks and all other known and settled grounds of legal liability..."
Although the attractive nuisance doctrine is well established at the present time, the subject is one upon which there has been a remarkable diversity of opinion. The broadest view on the subject is presented by the Restatement of Torts. A few of the states have flatly rejected the attractive nuisance idea, while the majority, including Missouri, have accepted the doctrine with some limitations.

In the instant case several problems are presented by the decision of the court. The first of these is the question of the application of the attractive nuisance doctrine to children who are not trespassers, but who occupy the position of bailee to the owner of the instrumentality which caused the injury.

The position of the children, in the instant case, can be regarded as none other than bailees of the automobile, which was held by the court to be an attractive nuisance, and they cannot be regarded as trespassers. There are no cases in which

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

"a. The place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and"

"b. the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and"

"c. the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and"

"d. the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."


11. Prior to the year 1939, Missouri refused to apply the attractive nuisance to anything other than railroad turntables. See 4 Mo. L. Rev. 466 (1939) for a complete discussion of the early cases. The doctrine was greatly extended in Hull v. Gillizos, 344 Mo. 1227, 130 S.W. 2d 623 (1939). In that case the Missouri court adopted the Restatement of Torts view with two added limitations. First, it is limited to instrumentality and conditions which are inherently dangerous, and second, it is limited to situations where children trespassers can see the instrumentality or condition from a place where the children have a right to be, and thus the object is an allurement to the children before they become trespassers. The first limitation was based on the language of the court in a previous Missouri case, O'Hara v. Laclede Gaslight Co., 244 Mo. 395, 148 S.W. 884 (1912). The second limitation which was new in this state was based on Justice Holmes (much criticized) opinion in the United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 Sup. Ct. 299 (1922), in which Holmes stated: "It seems reasonable to say that an artificial condition, created by a landowner on his land, becomes an attractive nuisance only when it is both inherently dangerous and so located as to attract children to it."
the attractive nuisance doctrine has been applied to predicate liability for other than trespassing children. It is well established that a bailor of an automobile is negligent when he places the automobile in the hands of an incompetent operator. In the instant case the defendant was negligent in placing an automobile in the hands of incompetent children, as bailors, and it is difficult to see why the court did not use straight negligence principles in holding the defendant liable for the injuries to the children.

Another problem raised by the instant case is the application of the attractive nuisance doctrine to conditions or instrumentalities maintained in public places which are likely to cause injuries to children. The language of the Restatement of Torts indicates the doctrine is only applicable to the owner or possessor of land who maintains upon his premises a condition or instrumentality likely to cause injury to trespassing children. The actual trend of authority does not so limit the application of the doctrine. The first case upon which the doctrine was founded was a case in which the injuries occurred in a public place. A few of the states which have refused to recognize the attractive nuisance doctrine in regard to private property have extended liability for dangerous conditions or instrumentalities which were maintained in public places.

The most interesting problem raised in the instant case is the application of the attractive nuisance doctrine to automobiles. Where the vehicle was moving the courts have uniformly held that although such vehicles are tempting to children to catch rides thereon, they are not attractive nuisances. The element of motion seems generally to be conceded to impart to such instrumentalities a danger which is obvious to children even of tender years.

In the event of standing automobiles which are in use the courts are not in accord. In determining whether any instrumentality falls within the attractive nuisance doctrine the test relied upon by the courts is whether the social utility

16. The court refused to apply it to a motor truck in motion in Czarniski v. Security Storage & Transfer Co., 204 Mich. 276, 170 N.W. 52 (1918); also in Gamble v. Uncle Sam Oil Co., 100 Kan. 74, 163 Pac. 627 (1917); not applicable to moving rail cars, Emerson v. Peteler, 35 Minn. 481, 29 N.W. 311 (1886); also Jefferson v. Birmingham R. & Elec. Co., 116 Ala. 294, 22 So. 546 (1897).
of the object outweighs the magnitude of the risk to trespassing children. The tremendous social utility of the automobile has probably influenced the reasoning of the great majority of the courts which have held the automobile is not such an instrument which falls within the attractive nuisance doctrine. The courts have always been hesitant in applying the doctrine to any type of vehicles left in a public street. The early cases almost uniformly refused to apply the attractive nuisance theory to a team and wagon left in a street. The view which the American courts have generally adopted in regard to vehicles on a public street is expressed in one of the leading cases on the subject, Schlatter v. City of Peoria, where the court refused to apply the attractive nuisance doctrine when a child of eight years fell from a city garbage truck which had been parked near the curb on a public street when the truck started moving. In the words of the court, "Motor vehicles are the common method of transportation, and to say that they constitute such an allurement to children of tender years as to give rise to the application of the doctrine of attractive nuisance, when the motor vehicle is in use, is not warranted."

Not all the courts adopt a strict view in absolutely declaring a motor vehicle falls outside of the attractive nuisance doctrine. Where the automobile is not in use, but was abandoned in a city street and the city knew, or should have known of these facts, the courts found no difficulty in holding an automobile an attractive

18. Harris v. Roberson, 139 F. 2d 529 (App. D.C. 1943) (trailer and truck); Ice Delivery Co. v. Thomas, 290 Ky. 230, 160 S.W. 2d 605 (1942) (ice truck not an attractive nuisance); Rapczynski v. W. T. Cowan, 138 Pa. 392, 10 A. 2d 810 (1940) (infant plaintiff climbing on defendant's truck which was parked near curb); De Francisco v. La Face, 128 Pa. Super. 538, 194 Atl. 511 (1937) (child falling from truck while at play); Roscovich v. Parkway Baking Co., 107 Pa. Super. 493, 163 Atl. 915 (1933) (infant climbing on an electric car after driver had left car, and either jumping or falling from the car at it started moving); Wright v. L. C. Powers & Sons, 238 Ky. 572, 38 S.W. 2d 465 (1931) (inapplicable to boy cranking truck); Jackson v. Mills-Fox Baking Co., 221 Mich. 64, 190 N.W. 740 (1922) (inapplicable to heavy delivery truck); Wind v. Steiert & Son, 71 Pa. Super. 194 (1918) (attractive nuisance not applicable where boy was injured while riding on truck); Gamble v. Uncle Sam Oil Co., 100 Kan. 74, 163 Pac. 627 (1917) (ordinary truck on street); Seaboard Air Line Ry. v. Young, 20 Ga. App. 291, 93 S.E. 29 (1917) (heavy truck used for moving freight not an attractive nuisance); Ostrander v. Armour & Co., 176 App. Div. 122, 161 N. Y. Supp. 961 (Sup. Ct. 2d Dep't 1916) (no duty of the driver of an automobile to make sure that none of the children who had been playing about it, and whom he told to get off, had remained on running board); Bruhnke v. La Crosse, 155 Wis. 485, 144 N.W. 1100 (1914) (attractive nuisance inapplicable to municipal dump wagon).
nuisance. Some of the recent cases are much more liberal in their attitude toward the infant trespassers, the view being that it should be a question for the jury to decide if the automobile should be considered an attractive nuisance, and the factors to be taken into consideration by the jury are the length of time the automobile was left unattended, whether or not safety precautions were taken by the operator, such as removal of the safety switch key, and probably the most important factor, whether the operator knew or should have known of the likelihood that infants would trespass upon vehicles in that particular area.

The statement made in the instant case that an automobile is an attractive nuisance when placed in the hands of incompetent children by the operator of such automobile was gratuitous since the theory of the plaintiffs cause of action was in permitting a known incompetent child to operate the automobile.

Norman R. Jones

Torts—Failure to Stop, Look and Listen as Contributory Negligence

Doyel v. Thompson

Plaintiff, as administrator of the estate, brought action against defendant for alleged negligence in the operation of their train at a highway crossing, resulting in a collision with an automobile in which the deceased, the son of the plaintiff, was riding. Plaintiff was driving and testified that because of certain box cars and other obstructions his line of vision was greatly impaired; that he had stopped the car before coming to the track and had then put down the window to listen but had heard no bell or whistle; that he then drove on to the tracks and was struck by defendant’s train. Deceased died a few days later of injuries received in the accident. The action was based solely on defendant’s failure to give the warning required of trains approaching a highway crossing. Defendant contended that plaintiff, the


22. In Tierney v. N. Y. Dugan Bros., 288 N. Y. 16, 41 N.E. 2d 161 (1942), the court stated that persons leaving vehicles near the sidewalk owe a duty of care to children playing on the street since their proclivities might draw them to such object in play; and in Garis v. Eberling, 71 S.W. 2d 215, 18 Tenn. App. 1 (1934), the court held that an automobile was not an attractive nuisance, but added in dicta that persons exposing automobiles so that children are likely to come in contact with it under circumstances obviously dangerous should anticipate injuries likely to result and exercise care to prevent it; also in Lee v. Van Buren & N. Y. Bill Posting Co., 190 App. Div. 742, 180 N. Y. Supp. 295 (Sup. Ct. 1st Dep’t 1920), where the court left it to the jury whether or not a truck left standing in front of the defendant’s premises was an attractive nuisance when the defendant knew that children frequently played on the truck; see also Campbell v. Model Steam Laundry, 190 N.C. 649, 130 S.E. 638 (1925); Grumbrill v. Clausen Flanagan Brewery, 199 App. Div. 778, 192 N.Y. Supp. 451 (Sup. Ct. 2d Dep’t 1922); Ziehm v. Vale, 98 Ohio 306, 120 N.E. 702 (1918).

1. 211 S.W. 2d 704 (Mo. 1948).

administrator, was guilty of contributory negligence as a matter of law because he had failed to stop, look, and listen at a time and place where he could have learned of the train's approach. The court held for plaintiff in that he had discharged his duty by stopping, looking and listening at a reasonable place. The fact that plaintiff did not stop, look, and listen a second time or did not get out of the car and go forward on foot to look could not be said to constitute contributory negligence as a matter of law under the circumstances.

The duty of a driver to stop if necessary to aid listening and looking where the view at a crossing is obstructed is generally recognized. However, there are situations where the obstruction is such that a driver cannot obtain a clear view at any point short of the tracks themselves, even though he stops. In these cases, the question of whether there is a duty to go forward on foot to get an unobstructed view has been a subject of judicial conflict. Some courts apply the so-called Pennsylvania rule, which has been announced to be not a rule of evidence, but an absolute and unbending rule of law. These courts take the position that if a driver cannot otherwise get a good view of the tracks, he must get out of the vehicle and walk to a spot where he can secure such a view. Failure to do so is held to be contributory negligence per se.

It was this rule that Mr. Justice Holmes expressed in his famous dictum in *Baltimore & Ohio R. R. v. Goodman,* in which he sought to "lay down a standard once for all" that the driver must get out of the car if he cannot otherwise be sure no train is approaching the crossing. The case attracted much adverse comment and it soon became clear that no such inflexible rule should be applied. It was, therefore, discarded in a subsequent case, Mr. Justice Cardozo saying, "To get out of a vehicle and reconnoiter is an uncommon precaution, as everyday experience informs us." Cardozo then points out that occasions exist when it would be "futile and

4. See Note, 56 A.L.R. 647 (1928), and later decisions in 91 A.L.R. 1049 (1934).
6. In Pennsylvania R. R. v. Beale, 73 Pa. 504 (1873) the court said, "If the traveller cannot see the track by looking out, whether from fog or other cause, he should get out, and if necessary lead his horse and wagon. A prudent and careful man would always do this at such a place"; and in Lohrey v. Pennsylvania R. R., 36 Pa. Super. 287 (1908), it was held that the driver was not relieved of this duty even though the safety gates were open. For a collection of cases applying this view see 52 C.J. 497 n. 82(b).
8. See BOHLEN, STUDIES IN THE LAW OF TORTS (1926) at p. 612, where, in condemning the establishment of fixed standards, the author says, "This is particularly true of the very minute and rigid codes of standards, judicially established in some jurisdictions to which plaintiffs must conform to clear themselves of contributory negligence. Often these standards tend to degenerate into an etiquette or ritual having little or no relation to what any normal person would regard as being obligatory under the various circumstances which they cover."
even dangerous” to get out and look; and then, in obvious reference to the Goodman case says, “Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law.”

This case brought the federal rule into harmony with that of a majority of the states. These states have refused to apply any such inflexible standard as the Pennsylvania rule; instead they hold that a driver is not contributorily negligent because of failure to stop and go ahead to look unless the existing circumstances required it in the exercise of due care. The Missouri decisions do not require the driver to adhere to the rigid formula in order to guard against a charge of contributory negligence. This is not to say that the court will allow every case of alleged contributory negligence at a crossing to go to the jury. It has been held that where looking and listening are so easily accomplished failure to do so in crossing a track is negligence per se. However, the court does not require a driver to stop unless both seeing and hearing are ineffectual without so doing. Where the view of the traveler is obstructed, even ordinary prudence might demand greater care be used than would otherwise be the case.

10. Citing Dobson v. St. Louis S. F. Ry., 223 Mo. App. 812, 10 S.W. 2d 528 (1928), in which there was no safe place short of the track where a clear view could have been obtained.

11. In Georgia Pac. Ry. v. Lee, 92 Ala. 262, 9 So. 230 (1891), the court said, “We do not believe it is the custom of prudent men in approaching such crossings, under ordinary circumstances, in a vehicle, to do more than stop and listen, and to look only when that may be done without alighting from and without leaving their conveyance;” and in Ft. Worth & R. G. Ry. v. Sageser 18 S.W. 2d 246 (Tex. 1929), the court stated that there should be no hard and fast rule by which a person could be declared contributorily negligent as a matter of law because each case is different and “... there is no authority possessed with the power or knowledge to anticipate and determine in advance what quality of human conduct should be condemned as negligent or (considered) prudent.” See the cases collected in 52 C.J. 497.

12. In Burge v. Wabash Ry., 244 Mo. 76, 148 S.W. 925 (1912), the driver was held guilty of contributory negligence as a matter of law when he failed to see or hear the train approaching the crossing but could have if he had looked or listened; and see in accord, Maclay v. Missouri Pac. Ry., 299 S.W. 626 (Mo. App. 1927), certiorari quashed in State ex rel. Maclay v. Cox, 19 S.W. 2d 940 (Mo. 1928), and Hook v. Missouri Pac. Ry., 162 Mo. 569, 63 S.W. 360 (1901). But exceptional circumstances may exist when it is not negligent to fail to look and listen: Kenney v. Hannibal & St. J. R. R., 105 Mo. 270, 15 S.W. 983 (1891); Jennings v. St. Louis, I. M. & S. Ry., 112 Mo. 268, 20 S.W. 490 (1892).

13. It was held that the driver was not guilty of contributory negligence because of failure to stop when he could have heard the train’s signal without stopping if it had been given. Russell v. Atchison T. & S. F. R. R., 70 Mo. App. 88 (1897); See, in accord Swigart v. Lusk, 196 Mo. App. 471, 192 S.W. 138 (1917); Stepp v. St. Louis S. F. Ry., 211 S.W. 730 (Mo. App. 1919); Brice v. Payne, 263 S.W. 1005 (Mo. App. 1924).

14. Farris v. St. Louis & S. F. Ry., 167 Mo. App. 392, 151 S.W. 979 (1912); State ex rel. Hines v. Bland, 237 S.W. 1018 (Mo. 1922), quashing opinion in Sandry v. Hines, 226 S.W. 646 (Mo. App. 1920), the court said: “What is ordinary care upon the part of one approaching a railroad crossing depends upon the circumstances of the particular case, and, where there are obstructions which add to the danger, ordinary care requires a commensurate precaution on the part of the traveler.”
Still, the question of contributory negligence is for the jury when reasonable men could draw different conclusions either from the facts presented or the inferences to be drawn from them.\(^{15}\)

In regard to the necessity of going forward on foot where a view of the tracks cannot otherwise be obtained, the Missouri Supreme Court, in an early case,\(^{16}\) said that a situation might arise where ordinary prudence would require that such a precaution be taken. However, the circumstances in that case were held not sufficient to clearly indicate that this "extraordinary precaution" should have been taken. Whether or not the omission constituted contributory negligence was properly left to the jury.

Under the Motor Vehicles Act\(^ {27}\) drivers are now required to exercise the highest degree of care,\(^{18}\) and failure to do so at crossings has been held to constitute negligence per se.\(^ {19}\) Still, the court has consistently rejected arguments favoring establishment of a rigid standard of care.

The instant case shows continued adherence to the flexible rule that the facts of the particular case must determine whether the driver has exercised the required degree of care. It seems that this is the view best adapted to present conditions. In the days of the horse and buggy, a requirement that one stop and investigate on foot, if the tracks could not otherwise be seen, might not have been impracticable. Today, however, with the great increase of railroad trackage and of public highways crossing them, and with the replacement of the horse by the automobile, such a requirement, if followed by the average motorist, would act to impede traffic. At busy city crossings compliance with a judicial standard of such strictness might act to create a situation involving more danger than that which the court attempted to guard against. Too, if such judicial standard is ignored by the average motorist, then the net effect of such a requirement is to deprive the injured plaintiff of his right to be indemnified for the injury caused him by the proven negligence of the defendant. Neither of these possibilities under a rigid standard seem to have much to commend its adoption by the court.

Robert Lee Smith

15. Dobson v. St. Louis S. F. Ry., 223 Mo. App. 812, 10 S.W. 2d 528 (1928); Nicholas v. Chicago B. & Q. Ry., 188 S.W. 2d 511 (Mo. App. 1945).
18. See Perkins v. Kansas City Southern Ry., 329 Mo. 1190, 49 S.W. 2d 103 (1932), defining highest degree of care as "... such as a very careful person would use under same or similar circumstances but not such as would in all circumstances prevent accident."
19. In Robertson v. St. Louis S. F. Ry., 264 S.W. 443 (Mo. App. 1924), the court points out that by judicial construction the act of 1911 was held to require the driver to exercise the highest degree of care for his own protection, as well as for the protection of others, and that the act of 1921 is to be similarly construed so that lack of such care in crossing tracks is contributory negligence; and in Rowe v. St. Louis S. F. Ry., 41 S.W. 2d 631 (Mo. App. 1931), the driver was held guilty of contributory negligence as a matter of law when the evidence clearly showed that he had failed to exercise the care required by the statute in crossing the tracks.
Defendant parked his automobile outside of his place of business, unlocked, and
with the key in the ignition switch, in violation of a traffic ordinance. The auto-
mobile was stolen and the thief, while later driving the car, collided with the
plaintiff's automobile parked a short distance away. The court held defendant liable
on the ground that the violation of the traffic ordinance was the "proximate" cause
of the damage to plaintiff's automobile.

The primary purpose of traffic regulations in the operation of an automobile
is to prevent accidents and injuries to the public. What may be said to be the
purpose of an ordinance requiring motor vehicles to be locked when parked? Is it
to prevent theft for the sake of the owner, or is it to promote the safety of the
public in the streets? But assuming that violation of an ordinance intended to pro-
mote public safety is negligence as to injuries to persons for whose protection the
ordinance was passed, before plaintiff can recover he must show that the violation
of the ordinance was the proximate cause of the injury. Furthermore, the same

1. 333 Ill. App. 359, 77 N.E. 2d 537 (1948).
2. ILL. REV. STAT. Chap. 95 1/2, § 185, par. 189(a) (1947): "No person driv-
ing or in charge of a motor vehicle shall permit it to stand unattended without first
stopping the engine, locking the ignition, and removing the key. . ." See Mo. Rev.
STAT. § 8401(k) (1939).
3. "The proximate cause of an event must be understood to be that which,
in a natural and continuous sequence, unbroken by any new cause, produces the
event, and without which that event would not have occurred." Dickson v. Omaha
& St. Louis Ry., 124 Mo. 140, 27 S.W. 476 (1894).

Negligence is the proximate cause of an injury when it appear thats the injury
is the natural and probable consequence of the negligence and that it ought to have

RESTATEMENT, TORTS § 431 (1934), "The actor's negligent conduct is a legal
cause of harm to another if (a) his conduct is a substantial factor in bringing about
the harm, and (b) there is no rule of law relieving the actor from liability because
of the manner in which his negligence has resulted in the harm."

4. "The Legislature in enacting statutes regulating operation of motor vehicles
intended to prevent danger and injuries on highways." (Italics supplied.) State v.
Ball, 171 S.W. 2d 787 (Mo. App. 1943). "The Motor Vehicle Act is a police regu-
lation, primarily for the benefit of the public welfare." Pearl v. Interstate Securi-
ties Co., 198 S.W. 2d 867 (Mo. App. 1946). For other cases interpreting statutes
regulating the operation of motor vehicles see Hochberger v. G. R. Wood, Inc., 124
N.J.L. 518, 12 A. 2d 689 (1940); City of Rochester v. Alling, 170 Misc. 477, 10 N.Y.S.
2d 373 (City Ct. 1939); State v. Wells, 146 Ohio St. 131, 64 N.E. 2d 593 (1945);

5. Instant case at p. 540; Ross v. Hartman, 78 App. D. C. 217, 139 F. 2d

McMasters, 40 Minn. 103, 41 N.W. 543 (1889); Huckleberry v. Missouri Pac. Ry.
324 Mo. 1025, 26 S.W. 2d 980 (1930); Beck v. Wurst Coal & Hauling Co., 293
S.W. 449 (Mo. App. 1927); Anderson v. Wells, 220 Mo. App. 19, 273 S.W. 233
(1925); Evans v. Klusmeyer, 301 Mo. 352, 256 S.W. 1036 (1923); Gorriss v. Scott,
L. R. 9 Exch. 125 (1874); 38 AM. JUR. NEGLIGENCE § 168 (1941); 132 A.L.R. 871
(1941).
principles apply in the determination of proximate cause, regardless of whether the alleged negligence consists of a violation of statutory duty or of a duty imposed by the common law.7

An automobile owner will be held liable for injuries to children resulting from their meddling with the vehicle, where he knows or has reason to know of children playing in the vicinity.8 However, in cases involving the theft of the automobile, the majority of the cases have held that, in the absence of knowledge by the driver, of a dangerous situation, the conversion and use of the car by the thief is an independent, intervening cause,9 which relieves the owner from liability.10

Thus, it has been held, in a recent Maine case, that "... the proximate cause of the injury was the willful and illegal act of the thief or thieves, over whom the defendant had no control, and for whose act he was not responsible."11 The Massachusetts court has stated that "... the larceny of the automobile and its use by the thief were intervening independent acts which the defendant was not bound to anticipate and to guard against,"12 and that "Theft of the automobile was undoubtedly a consequence intended to be prevented by the statute if not by the traffic regulation. But it is quite another thing to say that injuries sustained through the operation of the automobile by thieves ... were consequences intended to be prevented."13 The same result has been reached where no statutory violation was involved.14

It has been stated that a practical reason for imposing liability on the car owner is that it "... tends to make the streets safer by discouraging the hazardous conduct which the ordinance forbids. It puts the burden of the risk, as far as may be, upon those who create it."15 Query as to whether the risk of injury is created by the negligent parking by the defendant or by the negligent driving of the thief?

7. Larsen v. Webb, 332 Mo. 370, 58 S.W. 2d 967 (1932).
9. RESTATEMENT, TORTS § 447(g) (1934).
It is submitted that the decision in the principle case is contrary to the better authority, and "... goes far towards making the defendant an insurer as to the consequences of every accident in which his automobile might become involved while operated by the original thief or his successors in possession."  

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