1956

Recent Cases

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation

*Recent Cases*, 21 Mo. L. Rev. (1956)
Available at: https://scholarship.law.missouri.edu/mlr/vol21/iss2/4

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
Recent Cases

CONTRACTS—SUBSTANTIAL PERFORMANCE—HONEST EFFORT TO COMPLY WITH CONTRACT

Cross v. Robinson

Plaintiff, a building contractor, contracted to construct a small house for the defendant. The contract price was $2,950, one-half being paid at the signing of the contract, with the remainder to be paid on completion of the building. The plaintiff constructed the house, but the defendant, evidently dissatisfied with the manner in which the work had been performed, refused to pay the balance of the contract price. Thereupon the plaintiff removed from the house certain bathroom fixtures, bathtub, stool and basin, which had an approximate value of $115. Plaintiff was permitted to recover on the contract, in the trial court, on the basis of substantial performance. On appeal the defendant assigned as error the refusal of her motion for a directed verdict, because of the plaintiff’s removal of the fixtures. In affirming the holding of the trial court, the Kansas City Court of Appeals purported to follow the rule of substantial performance declared in an earlier Missouri case, which had stated: “The contractor in a building contract need not literally and precisely perform the contract in order to recover thereon. Slight or trivial defects, imperfections or variations will not bar him of his action on the contract, if he has made an honest endeavor to comply and has substantially done so.” Applying this rule the court said: “We think this act [removal of bathroom fixtures] falls within the category of trivial or inconsequential failure to perform and would certainly not defeat plaintiff’s right to recover on the contract.” The court did not discuss the requirement of “an honest endeavor to comply.” It seems that the taking out of the bathroom fixtures should have been considered, if an honest effort to comply with the contract is actually a requirement for a recovery on the basis of substantial performance in Missouri.

Missouri has few cases dealing with substantial performance, and as a result the doctrine is not well defined. There is no case in point where recovery was denied to a contractor because there was not an honest endeavor to comply. How-

1. 281 S.W. 2d 22 (Mo. App. 1955).
4. For definitions of what constitutes substantial performance see: Mitchell v. Caplinger, 97 Ark. 278, 133 S.W. 1032 (1911); Littell v. Webster County, 152 Iowa 206, 131 N.W. 691 (1911); Depuy v. Shilling, 27 S.W. 323 (Tex. Civ. App. 1930); White v. Mitchell, 123 Wash. 630, 213 Pac. 10 (1923); Foeller v. Heintz, 137 Wis. 169, 118 N.W. 543, 24 L.R.A. (N.S.) 327 (1908).
ever, in other jurisdictions wilful or intentional deviations are considered such bad faith that recovery for substantial performance is denied.  

The view taken by a court of the duties and obligations imposed by the contract is important in determining the significance of the requirement for good faith performance. Under one view literal compliance is considered the essence of the contract, which means that a party never fulfills his obligations completely by less than full performance, even though the requirements may be relaxed to the extent of permitting a recovery for substantial performance. The other view regards substantial performance as the essence of the contract, the same as if it was full performance, although a deduction is made from the contract price for the deficiency in the work performed.

The courts use different standards to determine what constitutes bad faith. In some cases an objective standard is used, in others a subjective standard. The objective standard looks to see if the variation was wilful or intentional; if so, bad faith is implied. The subjective standard looks to the reason why, and considers the motive for making the deviation. If the motive was to serve the best interest of the owner, a contractor would be considered to have been in good faith, but in bad faith if it was to make a gain for himself.

Basically the good faith requirement is just to assure that a contractor has retained his incentive, and has tried to perform properly. This can be obtained by either standard, depending upon the view taken of the duties and obligations imposed by the contract. The feeling seems to be that if a person, by his own free choice and volition, chooses not to comply with the contract he is not entitled to any


6. “The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damages, and will not always be a breach of a condition followed by a forfeiture.” Jacob & Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429 (1921). “[Proprietor] is entitled, in strict right, to just what he contracted for and in the form agreed upon.” Manning v. School Dist. No. 6 of Ft. Atkinson, 124 Wis. 84, 102 N.W. 355, 364 (1905).


9. For such a deviation many courts have refused to find bad faith. Stewart v. Breckenridge, 69 Colo. 108, 169 Pac. 543 (1917); Cassinelli v. Stacy, 238 Ky. 827, 38 S.W.2d 980 (1931); Morello v. Levakia, 293 Mass. 450, 200 N.E. 271 (1936); Zartiar v. Saliba, 282 Mass. 558, 185 N.E. 367 (1933); Holt v. Sims, 94 Minn. 157, 102 N.W. 386 (1905).
compensation," but he may recover when his performance has been in good faith, for then he would be without fault. If the literal compliance view were taken, use of the objective standard would be more consistent with the theory of recovery, for any wilful or intentional variation would be serious. However, if substantial performance were considered the essence of the contract, application of the subjective standard would be most proper, as strict adherence to a good faith requirement would be inconsistent, as all the parties contracted for was an approximation to what was called for in the contract to start with.

Probably the proper application of the good faith requirement would be to deny recovery where the contractor has not attempted to perform properly, where he has attempted to gain at the expense of the owner by the substitution of inferior materials, where he has neglected to remedy obvious defects that could not be easily overlooked, or where actual dishonesty is shown. This would be bad faith under the subjective test, under either view of the duties and obligations imposed by the contract.

To avoid a forfeiture of the contractor's labor and materials is the primary reason for permitting a recovery for substantial performance. If a quantum meruit recovery were allowed, there would be less necessity for permitting a contract recovery, although quantum meruit may not include the contractor's expected profits. Quantum meruit has been recommended as the recovery when there is less than full performance. In many jurisdictions a wilful default by the contractor will prevent recovery on a quantum meruit basis, so there could be real hardship imposed by rigidly enforcing the good faith requirement. Missouri does not follow this view. Quantum meruit would then protect the contractor in Missouri. Thus there is no need to relax the requirements for a contractual substantial performance recovery in Missouri.

If an honest endeavor to comply is required for contractual substantial performance recovery in Missouri, it is difficult to see how the plaintiff's action, in

10. "The wilful transgressors must accept the penalty of his transgression. For him there is no occasion to mitigate the rigors of implied conditions." Jacob & Youngs v. Kent, supra. "If the judgment can be said to be a hardship on plaintiff in error it is quite evident that it brought it upon itself." Artercraft Re Roofing Co. v. Williams, 264 Ill. App. 477 (1932).
15. 3 WILLISTON, CONTRACTS § 805 (Rev. Ed. 1936).
16. Yeats v. Ballentine, 56 Mo. 530 (1874) (reasonable value of labor and materials not exceeding contract price less damages for breach).
19. RESTATEMENT, CONTRACTS, MO. ANNOT. § 357 (1933).
In this case, can be supported. His act might be considered honest, but it could not be considered as an honest effort to comply with the contract under either standard of good faith. Removing the fixtures was not a benefit to the defendant, but would seem to be an attempt to benefit himself. Justly, by such action, it should be held that he gave up his right to recover on the contract, because of his bad faith, for at the time he removed the fixtures he disregarded it altogether.

In the past where there was substitution of something different than what was called for in the contract, or when the work was defective, the owner was permitted the cost of doing the work over as it should have been done according to the contract. Substantial performance was not invoked, but the courts recognized that a person was entitled to receive what he contracted for. On this basis alone this defendant should have been permitted the cost of installing other fixtures according to the contract. The decision in this case is not in accord with the long favored policy of protecting obligations imposed by contract.

L. D. Estep

CRIMINAL LAW—MURDER UNDER FELONY-MURDER RULE

*Commonwealth v. Thomas*

Defendant Henry Thomas, Jr., and another man, Henry Jackson, Jr., robbed the grocery store of Frederick Cecchini in Philadelphia. Jackson displayed a revolver and defendant took money from the cash register. The two robbers then ran from the grocery store; defendant ran east after leaving the store and Jackson ran west. Cecchini obtained his pistol or revolver from under the counter, chased Jackson, one of the robbers, and killed him in an exchange of gunfire. Defendant was indicted for murdering Jackson in the Court of Oyer and Terminus of Philadelphia County. A judgment sustaining the defendant’s demurrer to the evidence was entered, and the commonwealth appealed. The Supreme Court of Pennsylvania, in a four to three decision, reversed the judgment and ordered a new trial.

The majority of the court held that the killing of Jackson by Cecchini was chargeable to Thomas under the familiar felony-murder rule. Thomas apparently did not have a weapon; at least, he did not show or use it (the opinion does not mention his being armed, at any rate). The Pennsylvania law, Penal Code of


2. The court divided five to two on this admittedly insignificant fact. Justice Jones, with whom Justice Chidsey concurred in dissent, referred to a "revolver". The majority opinion refers to a "pistol". There was a four to three split in the court's decision on the law.
1939, P.L. 872, 18 P.S. § 4701 provides: “All murder . . . which shall be committed in the perpetration of . . . any . . . robbery . . . shall be murder in the first degree.” (Emphasis supplied.) Commission of felony-murder in Pennsylvania is a common law offense. The Pennsylvania statute last referred to merely classifies or categorizes the various types of murder into degrees. At common law the felony-murder rule came into play when an individual killed another while committing, or attempting to commit, a felony. Murder at common law required two things: 1. An unlawful killing of a human being by the accused; and 2. Malice aforethought, express or implied. The court in the principal case defines malice as “. . . a malignant state of mind—a mind filled with a wicked malevolent intent to commit . . . a felony which according to the experience of mankind, will naturally and likely result in the killing of some person.” Malice has been defined in Missouri to mean “. . . a wrongful act done intentionally without just cause or excuse.”

The Pennsylvania case under scrutiny here holds, in effect, that the robbery supplies the malice necessary for the killing of Jackson to be deemed murder, and that the killing is chargeable to the defendant because his act of robbery was the proximate cause of the death of Jackson. Is this sound? Legally and logically, yes. It is foreseeable that a robbery will invite resistance on the part of the one robbed, a law officer, passerby, etc. It is also foreseeable that the person robbed will intervene, defend himself and that this defense will result in the death of one or more of the robbers. Two arguments can be perceived to subvert these principles—

4. Supra, note 1 at pages 204, 209.
5. Blackstone wrote: “. . . if one intends to do another felony, and designedly kills a man, this is also murder.” 4 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 200-201 (1822). Note that Blackstone referred to the felon himself killing another. See also MILLER, HANDBOOK OF CRIMINAL LAW 454-460 (1947). Neither contemplates a situation as in the principal case. Cf. CLARK AND MARSHALL, A TREATISE ON THE LAW OF CRIMES §§ 239 and 248 (5th ed. 1952), where Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595, 12 A.L.R.2d 183 (1949) is cited. That case will be discussed later in this note.
6. See CLARK AND MARSHALL, supra, note 5, at § 239.
7. Supra, note 1, p. 207.
8. State v. Schoenwald, 31 Mo. 147, 157 (1860); State v. Kinder, 184 Mo. 276, 83 S.W. 964, 969 (1904). Malice is evil intent, and not spite or ill-will, as malice is commonly thought of.
9. See CLARK AND MARSHALL, supra note 5 at § 234 and State v. Frazier, 339 Mo. 966, 98 S.W.2d 707 (1936), where defendant struck a hemophiliac who bled to death and a conviction of manslaughter was upheld.
10. See CLARK AND MARSHALL, supra, note 5 at §§ 235, 236 and 237. Note that the authors criticize four cases relied on by Justice Jones in his dissent: Butler v. People, 125 Ill. 641, 18 N.E. 338, 1 L.R.A. 211, 8 Am. St. Rep. 423 (1888); Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); Commonwealth v. Campbell, 7 Allen 541, 89 Mass. 451, 83 Am. Dec. 705 (1863); and State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924). See also 24 Col. LAW REV. 801 which states: “To
contributory negligence of, and assumption of risk by, the person killed. Contributory negligence of the deceased is not a sufficiently strong argument upon which to base relief for the defendant.\textsuperscript{11} Assumption of risk by the deceased (in "shooting it out" with a captor) is no defense for the other felon because the latter can foresee that his hoodlum companion will engage in a gun battle rather than give himself up to a captor.

Where does all this leave us? It leaves us in a position of having the common law felony-murder rule applied beyond its intended scope by a 1955 common law decision. This decision is the only one of its kind the court or the writer of this note could find. \textit{Commonwealth v. Almeida,}\textsuperscript{13} relied heavily upon the court, is distinguishable because in that case an \textit{innocent party} was killed. \textit{Commonwealth v. Bolish}\textsuperscript{12} is likewise distinguishable, because in that case the death of a co-arsonist by an \textit{accidental} fire is traceable to the defendant whether he or his accomplice set the fire, since the act of one is the act of the other (the accessory or confederate concept). Also, the \textit{Almeida} case is based on dictum in the case of \textit{Commonwealth v. Moyer.}\textsuperscript{14} The \textit{Moyer} case dictum is this: "A man or men engaged in the commission of such a felony as robbery can be convicted of murder in the first degree if the bullet which causes death was fired not by the felon but by the intended victim in repelling the aggressions of the felon or felons."\textsuperscript{15} It is correct, as the majority opinion states, that the court in the \textit{Moyer} case had the duty to decide whether or not it mattered who (the robbers or the owner of the filling station) fired the shot that killed an innocent employee of the station. But in deciding this issue the \textit{Moyer} court did not confine its language as it should have. The last quotation says "which causes death" but fails to state to whose death it refers—an innocent person (as it should have) or the death of a felon, as the \textit{Almeida} court relies upon. It was a dictum in the sense that it was too generally and broadly put and not restricted to the precise facts in issue.

The common law felony-murder rule was never meant to cover situations as present here, and the Pennsylvania court is enlarging and broadening the common law rule. The felony-murder rule was formulated to furnish the required criminal

\footnotesize

\textsuperscript{11} See \textit{Regina v. Longbottom}, 3 Cox C.C. 439 (1849), where the contributory negligence of the deceased was not a defense to a manslaughter conviction.

\textsuperscript{12} \textit{Supra}, note 5. In that case an officer of the law while off duty attempted to apprehend the defendant and his accomplices and was shot and killed either by one of the robbers or another policeman. The court held that it was immaterial who fired the shot, that defendant's act was the proximate cause of the policeman's death and convicted defendant of first degree murder.

\textsuperscript{13} \textit{Supra}, note 3.


\textsuperscript{15} \textit{Id.}, p. 741. There is more dictum on the same page to the same effect.
intent for a felonious homicide in the perpetration of some other felony of violence. It is difficult to see how the robbers' felonious intent can be applied to the killing of another robber by an innocent victim. The innocent victim has no felonious intent. The robber charged with first-degree murder certainly had no intent to kill his accomplice and thereby cause the failure of their scheme.

This case is "judge-made law", as Justice Bell stated in his concurring opinion at page 211, note 7. Disapproving of this particular "judge-made law", it is submitted that a conviction for robbery would suffice. Will the Pennsylvania court convict the wounded robber or his accomplice of attempted murder if the robber is wounded and not killed? Construing the Pennsylvania statute properly, the answer should be "no", but a "yes" answer by the court would not be surprising, considering the present case. The felony-murder fiction could not be used directly, but perhaps the court will use it as an analogy, in view of the present decision, to reach another decision beyond the scope of the existing law.

**ALLEN S. PARISH**

---

**DAMAGES—INSTRUCTION THAT AWARD OF DAMAGES WOULD BE TAX EXEMPT**

*Maus v. Chicago & St. Louis Railroad*

A recent decision in the Ohio courts presents a question of increasing importance and interest to lawyers. In an action under the Federal Employer Liability Act for personal injuries, the principal issue raised on appeal was whether or not it was permissible for the jury to be instructed that the award of damages, if any were allowed, would be tax exempt under the Internal Revenue Code of 1954, specifically as to awards for future wages.

16. See People v. Ferlin, 203 Cal. 587, 265 Pac. 230 (1928) which reaches a result contrary to the Bolish case and poses some similar questions. See also People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920), reversing a manslaughter conviction where one robber was killed by another robber or by an unknown person.

17. Penal Code of 1939, P.L. 872, P.S. § 4710: "Whoever administers, or causes to be administered by another, any poison or other destructive thing or stabs, cuts or wounds any person . . . with intention to commit murder, is guilty of felony . . ." "Any person" means any person other than the robber or his accomplice since the intention to murder is required. There can be no intent to murder one's self because murder is the killing of another with malice. There will be no intent to murder the accomplice in the case put. The statute clearly refers to an act by the "shooter" ("whoever administers, or causes to be administered by another . . .") or his accomplice.

1. 128 N.E.2d 166 (Ohio App. 1955).
2. 45 U.S.C.A. § 51 et seq.
4. Another issue frequently presented in cases of this type is whether future
This problem has arisen in the courts of this country on surprisingly few occasions. There was precedent for the decision in this case in the Ohio courts, and the court said that "to permit an instruction as requested herein, there should be an inquiry as to the amount allowed for actual loss of wages plus probable future loss of earnings, for, as to those matters, the injured person, if he had not been injured and had he continued to work, would have paid income taxes on all his earnings." But the court went on to reach the prevalent result in these cases, saying further, that "the result of several such inquiries would so complicate the trial of a personal injury action into an intricate discussion of tax and non-tax liability, and so confuse the ordinary jury with technical tax questions as to defeat the purpose of a trial."

Courts confronted with this problem generally have followed the leading English case of Bingham v. Hughes which disapproved such an instruction to the jury on the ground that the income tax was a matter between the plaintiff and the taxing authorities in which the defendant, the tortfeasor, had no interest. The courts following this reasoning have gone on to indicate that the matter of taxes is too conjectural to be properly considered by the jury in assessing damages. It is felt, due to the likelihood of changes in taxes and deductions and the fear of confusing the jury with this purportedly collateral matter, that it is perhaps better for the jury not to consider the matter at all. It is on these bases, and the resulting possibility of benefiting the tortfeasors through a possible reduction in damages, that the courts have generally been reluctant to permit this practice.

Taking a contrary view is the Missouri case of Dempsey v. Thompson, in which wages are to be calculated using net or gross income as a basis. It would seem that nearly all of the decided cases agree that the damages for future income are to be determined from the gross income. Southern Pac. Co. v. Guthrie, 180 F.2d 295 (9th Cir. 1949), rehearing 186 F.2d 926 (9th Cir. 1951), Chicago & N.W. Ry. v. Curl, 178 F.2d 497 (8th Cir. 1949); Stokes v. U.S., 144 F.2d 82 (2d Cir. 1944); O'Donnell v. Great Northern Ry., 109 F. Supp. 590 (D. R.I. 1951).

5. Pfister v. City of Cleveland, 113 N.E.2d 366 (Ohio App. 1953). Smith v. Penn. R.R., 99 N.E.2d 501 (Ohio App. 1950). In the Pfister case, the court said: "Perhaps the jury should be so told and instructed to make an allowance in its general verdict for such item, but the formula for determining such tax element is so complicated that an instruction with respect to it would be most confusing to the jury and at best most difficult of ascertainment ... the tax factor is ignored by the trial court in charging the jury."


7. Ibid.

8. 1 K.B. 645 (1949).


10. 363 Mo. 339, 251 S.W.2d 42 (1952). See also Hall v. Chicago and N.W. Ry., 349 Ill. App. 175, 110 N.E.2d 654 (1953) reversed 5 Ill.2d 135, 125 N.E.2d 77 (1955), and McDaid v. Clyde Navigation Trustees, (Scot) 1946 S.C. 462.

https://scholarship.law.missouri.edu/mlr/vol21/iss2/4
which the court, though not going as far as is often urged, did state that "... to avoid any harm ... it would be competent and desirable to instruct the jury that an award of damages for personal injury is not subject to Federal and State income taxes." [emphasis added] The court reasoned that the plaintiff had no right to receive an enhanced award due to a possible and probable misconception of tax liability on the part of the jurors. This feeling is based on the idea that with the impact of taxes being felt by nearly all citizens and the likelihood of juries being aware of any exemption in the Internal Revenue Code, they would award plaintiff a larger sum than he would be entitled to compensate him. It is thus felt that to protect the defendant from this possibility, it is desirable to permit such an instruction as suggested. The Missouri court in the Dempsey case expressly overruled an earlier Missouri case.

While it would seem that the Dempsey case takes the more desirable position, it is contrary to that taken by most courts. As was stated in the case of Hall v. Chicago and N.W. Ry., a case going further than the Missouri court indicated they were willing to go: "It is difficult to perceive how the law is distorted by advising the jury of a simple and concise provision of a statute." It would seem to be begging the question to refuse cautionary instructions in these cases on grounds of "conjectural, speculative, prejudicial, or not a concern of the defendant", as the courts holding contrary to the Missouri holding seem to do. As juries are likely to consider the amount the plaintiff will get to keep in assessing damages, it would not seem to be unreasonable to permit defense attorneys so to instruct the jury. Damages are inherently a matter of indefiniteness and approximation, but when juries are considered capable of assessing damages for pain and suffering et cetera, it would not seem that consideration of tax liability would be too great an obstacle to overcome. It should be kept in mind that under the Missouri decision, the instruction is used to prevent juries from assessing extra damages to include possible tax liability.

Perhaps, with increased concern and interest in income taxes in more recent

11. The Missouri court indicated that they would not permit the attorneys to argue the question of income tax before the jury or examine witnesses thereon, thereby limiting the defense attorney to the benefit of a cautionary instruction.

12. 363 Mo. 339 at p. 346, 251 S.W.2d 42 at p. 45 (1952). The court suggested the following instruction would be proper: "You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to Federal or State income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make."

13. See note 12.


16. See cases cited in note 9, supra.
years, this question will be more fully developed and a more satisfactory solution will be found.\textsuperscript{17}

\textbf{ELVIN S. DOUGLAS, JR.}

\section*{FEDERAL TAXATION—ESTATE TAXATION OF LIFE INSURANCE PROCEEDS}

\textit{Kohl v. United States}\textsuperscript{3}

Action by executors of decedent to recover federal estate taxes. Decedent procured life insurance policies in 1921 and 1922 and paid premiums until December 29, 1940. On January 21, 1941 he made an absolute assignment of the policies to his children. He paid the gift tax. All subsequent premiums were paid by the children. He died September 18, 1943. The government assessed an estate tax on the aliquot part of the proceeds represented by the premiums paid by him. The statute\textsuperscript{3} provided that the gross estate should include proceeds of life insurance receivable by other beneficiaries

\begin{quote}
"... purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance. . . ."
\end{quote}

The court held that the statute was unconstitutional as imposing a direct tax without apportionment,\textsuperscript{3} that it was retroactive and so arbitrary and capricious as to be violative of due process of law.

\textsuperscript{17} This problem may be found noted in 33 B.U.L. Rev. 114 (1953); 32 Neb. L. Rev. 491 (1953); 4 Syracuse L. Rev. 350 (1953); 32 Tex. L. Rev. 108 (1953), commenting on Dempsey v. Thompson, 336 Mo. 339, 251 S.W.2d 42 (1952), and in 8 Ark. L. Rev. 174 (1954); 42 Geo. L.J. 149 (1953); 15 Ohio St. L.J. 81 (1954); 21 U. Chi. L. Rev. 156 (1953), and 11 Wash. & Lee L. Rev. 66 (1954), commenting on Hall v. Chicago & N.W. Ry., 349 Ill. App. 175, 110 N.E.2d 654 (1953). Also, an annotation may be found in 9 A.L.R.2d 320 (1950). The case of Combs v. Chicago, St. P., M. & O. R. Co., 135 F. Supp. 750 (N.D. Iowa 1955) is probably the most recently decided case on this subject. That case presents an excellent review of most of the cases herein discussed, and though it quoted from the Dempsey case at length, that court adopted the prevailing view in denying such instructions. There was little in the opinion to indicate the basis of the court's reasoning, other than from the extensive quotations of other cases.

\textsuperscript{1} 226 F.2d 381 (7th Cir. 1955), affirming Kohl v. United States, 128 F. Supp. 902 (E.D. Wis. 1954).

\textsuperscript{2} INT. REV. CODE OF 1939, 26 U.S.C. § 811 (g) (1952), as amended by the Internal Revenue Act of 1942, § 404, 56 STAT. 944 (1942).

\textsuperscript{3} Kohl v. United States, supra note 1, at p. 384: "Such construction would require that the insurance, regardless of its ownership at the time of the decedent's death, must be included in his gross estate. . . . A tax imposed on property or the income therefrom only by reason of its ownership is direct. . . . Such taxes bear
Under the 1954 Code these proceeds would clearly not be taxable unless the deceased retained "incidents of ownership." But this case reminds us that revenue statutes must be read contemporaneously.

In discussing the early development of this tax, it has been said that three tests were used more or less consistently between 1918 and 1942, a period during which the statute was virtually unchanged. They were: 1) Did the decedent sign the application? 2) Did the decedent own the policies at the time of his death? 3) Did the decedent pay the premiums?

The law was drastically changed effective October 22, 1942:

"... the entire proceeds of life insurance payable to specific beneficiaries are included in the decedent's gross estate: (a) if the decedent possessed at his death any of the incidents of ownership with respect to such insurance, or (b) if the decedent paid all of the premiums either directly or indirectly."

This act abolished the $40,000 insurance exemption for estates of decedents directly upon persons, upon their possession and enjoyment of rights, whereas indirect taxes are levied upon the happening of an event such as an exchange or transmission of property. ... In the present case no transfer, no transmission of property rights in and to the policies in question, occurred upon the decedent's death." See also Paul, Life Insurance and the Federal Estate Tax, 52 HARV. L. REV. 1037 (1939).

4. INT. REV. CODE OF 1954, § 2042 (2).
6. Id. at p. 227: "The original (and present) provision includes in the value of a decedent's gross estate: "... the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." See also Note, Life Insurance and the Federal Estate Tax, 40 COL. L. REV. 86 (1940); Forster, Taxation—Federal Estate Taxation of Life Insurance—Effect of Treasury Decision 5032 Amending Articles 25 and 27 of the Estate Tax Regulations, 40 MICH. L. REV. 1221 (1942); and Murphy, Life Insurance—Slave or Master of Section 811 (g) ?, 7 TAX L. REV. 131, 134 (1952).

7. 55 HARV. L. REV. 226, at p. 229, cit. supra, note 5. See also Wells, TD 5032 and the Lang Case, 20 TAXES 86 (1942). (The law was apparently settled for a time by Lang v. Commissioner, 304 U.S. 264 (1938). TD 5032, Art. 25, para. 2, issued in 1941, says: "Insurance receivable by beneficiaries other than the estate is considered to have been taken out by the decedent when he paid, directly or indirectly, all the premiums or other consideration wherewith the insurance was acquired, whether or not he made the application." Art. 27, para. 2 describes legal incidents of ownership to include "... the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possessed a legal incident of ownership if his death is necessary to terminate his interest in the insurance, as for example, if the proceeds would become payable to his estate, or payable as he might direct, should the beneficiary predecease him.")

dying after its effective date. It established the “incidents of ownership” and “payment of premiums” tests.

By its terms it clearly attempted to tax all insurance on which the decedent had paid premiums. This court has quite plainly held that attempt to be unconstitutional. The government is apparently resigned to the decision since there is no mention of it in subsequent Supreme Court Reports.

Its effect is to validate all absolute gifts of life insurance for federal tax purposes. Apparently the major insurance pitfall remaining for the estate planner is the doctrine of gifts causa mortis. The adverse effect of this doctrine may generally be avoided by making the transfer before the donor has attained an advanced age or is in failing health.

Fred H. Maughmer, Jr.

______________________________

FEDERAL TAXATION—INCOME TAX—DEDUCTIONS—
—TRAVELING EXPENSES—TEMPORARY
EMPLOYMENT

Ford v. Commissioner of Internal Revenue

In this case the Circuit Court of Appeals for the Fourth Circuit affirmed a decision of the Tax Court denying taxpayers Ford and wife, who filed a joint return, the right to deduct certain living and travel expenses of Ford for the tax years 1949 and 1950. Ford, superintendent for the Rust Company, had a home in Roanoke, Virginia. His employer obtained a contract to construct a sewage disposal plant and do other work for American Viscose Company at Front Royal, Virginia, and Ford worked there continuously from December 1948 to early 1951. During this time his wife and two dependents continued to reside in Roanoke while he rented lodgings in Front Royal and went home for weekends. Ford sought to deduct from his tax returns of 1949 and 1950 the sum of $1820 for lodging and meals for each of those years plus automobile expenses of $1127 for 1949 and $1038 for 1950. The Tax Court found that when Ford accepted employment


1. 227 F.2d 297 (4th Cir. 1955).
with Rust Company, he agreed to go to whatever city he was assigned, that he was to train a supervisor to take over his duties in the event he should be ordered to another job, that he had been ordered to various construction jobs from time to time, and that when he arrived at the American Viscose job in December 1948 he was told that from 12 to 14 months would be required to complete the job.

The circuit court affirmed the decision saying that the expenses failed to meet the requirements for deduction as traveling expenses incurred in pursuit of a trade or business as interpreted by the Supreme Court in the Flowers case, and in particular the third requirement set out in that decision, which is, "The expense must be incurred in pursuit of a trade or business". In interpreting this requirement the court said that this means there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or his employer and that such expenditure must be necessary and appropriate to the development and pursuit of the business or trade.

Where the employment is of an obviously temporary duration the Tax Court has held the Flowers rule to be inapplicable, although there are no decisions on this point in the courts of appeal or in the Supreme Court. Thus in the Leach case such expenses were held deductible, the Tax Court following the Schurer case although the latter was decided prior to the Flowers decision. In both of these cases the employment was of a similar nature as in the case under discussion but the Tax Court distinguished them on the facts. Thus it seems that where only one post of employment is involved, deductibility turns on the fact question of whether or not such employment is temporary. The Tax Court has given this doctrine of temporary employment very limited application as is

3. INT. REV. CODE § 23(a)(1) (1939). This is presently provided for in § 162(a)(2), I.R.C. of 1954.

4. The court in the Flowers case set out three requirements for deduction as traveling expenses under this section, saying that if the expense failed to meet any one of them it would not qualify as a traveling expense. These requirements were: (1) Reasonable and necessary traveling expenses as that term is generally understood. (2) incurred while away from home, (3) the expense must be incurred while in pursuit of a trade or business. "This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or his employer. Morever, such an expenditure must be necessary and appropriate to the development of the business or trade." Commissioner of Internal Revenue v. Flowers, 326 U.S. 465 (1946), noted 32 CORN. L. Q. 451 (1947), 44 MICH. L. REV. 882 (1946).

5. Employee on construction company assignments in other cities, such assignments being both temporary and indefinite and not involving a regular post of duty. Allowed to deduct cost of lodging only. E.G. and Frankie Leach, 12 T.C. 20 (1949).

6. Journeymen plumber by trade, maintained a home in Pittsburgh and accepted temporary employment in Indiantown Gap, Pa., Aberdeen, Md., etc. in each case returning to Pittsburgh upon completion of each assignment. Allowed deduction for board, bus fare, railroad fare, and lodging. Harry F. Schurer, 3 T.C. 544 (1944).
illustrated by the Albert, Bark, and Jones cases. Since it is a question of fact, and the Supreme Court held that findings and inferences on a question of fact should not be disturbed by a reviewing court, this may raise the question in the mind of the practitioner of the advantages or disadvantages of a jury trial in the federal district court, a discussion of which is beyond the scope of this note.

Aside from this, such a narrow interpretation of what constitutes temporary employment creates serious hardship on some taxpayers. This is aptly pointed out by Judge Murdock's dissent in the Jones case where he emphasizes that while the taxpayer was actually employed for 357 days of the tax year at Oak Ridge, he had no intention to remain there permanently and no expectation or assurance that the employment would continue for more than a relatively short period of time, too short to justify moving his home. Thus the taxpayer is faced with the alternative of either suffering the expense of maintaining a second home for himself during these periods, or of suffering equal or greater expense in moving his family to each of these locations for short periods. This hardship is what Congress apparently intended to relieve when they adopted the section on traveling expenses in its present form in the 1921 Act.

7. Taxpayer employed by War Department in Chemical Welfare division was appointed for assignment anywhere in New England. She was advised not to make any commitments such as leases, etc. as she was subject to be moved at any time. The court said that while her employment lacked permanence, it was indefinite rather than temporary and was not the sort of employment in which termination within a short period could be foreseen. Beatrice H. Albert, 13 T.C. 129 (1949).

8. Taxpayer lived in Pittsburgh and went to Philadelphia to a temporary job for 3 or 4 months. He stayed on for another short job and then for another job expected to take 12 months or more. The court held that this job had changed from temporary to indefinite employment and that the Schurer case was not applicable. Arnold P. Bark, 6 T.C. 351 (1946).

9. Taxpayer was a construction worker who spent relatively short periods at various jobs doing heavy construction work. Maintained a home in Bakewell, Tenn. and worked at Oak Ridge, Tenn. He had no idea when he would be moved but had no intention to stay in Oak Ridge permanently. Also there was no available housing for his family at Oak Ridge. Willard S. Jones, 13 T.C. 880 (1949).


11. Note 9 supra.

12. Internal Revenue Act, § 214(A) (1921). In the discussion of this section in the House it was referred to as a relief section and discussed in relation to traveling salesmen and other commercial travelers, since it was thought that their traveling expenses were a proper deduction and that their meals and lodging should also be included. 61 Cong. Rec. 5201 (1921). However, it does not appear that the section was intended exclusively for traveling salesmen since there was discussion to the effect that it might also apply to Congressmen but for the disagreement as to whether you could consider being a congressman as being a trade or business. 61 Cong. Rec. 6672-6673 (1921).

Hence, it would appear that the section was designed to give relief to all those persons who would be forced to maintain a second home due to the exigencies of their trade or business. This would seem to include the case of an employee temporarily away from his post of employment, or one whose post of
Since each case will depend on its own facts, it is doubtful if any more definite standard than "temporary" can be devised by legislative means, other than to clarify intent or prescribe a policy of interpretation, since in any event it will remain for the court to apply the standard to the facts. However, a more liberal interpretation by the courts would alleviate the hardship facing these taxpayers, and still allow the court the discretion it must have to differentiate between bona fide traveling expenses due to the exigencies of the taxpayer's business, and increased personal living expenses due to the taxpayer's pattern of living.

Dwight L. Larison

FEDERAL TAXATION—INCOME TAX—DEDUCTIONS—TRAVELING EXPENSES—TWO OCCUPATIONS OR BUSINESSES—WHILE AWAY FROM HOME

Chandler v. Commissioner of Internal Revenue

Petitioner (taxpayer) was employed as high school principal by the city of Attleboro, Massachusetts, where he lived. He was also employed by Boston University at Boston, 37 miles distant, two evenings a week as instructor. He used his personal automobile in traveling between the two cities. His duties at Boston did not require him to be away overnight and on no occasion did he remain overnight in Boston. Taxpayer was not required by either of his employers to incur any travel expense in connection with his duties and the performance by him of services as an employee. Neither was he separately reimbursed for the expense and operation of his automobile. Taxpayer deducted the automobile expenses incurred as traveling expense from gross income under § 22 (n) (2) of the Internal Revenue Code of 1939. The Tax Court disallowed the deduction on the ground that these expenses were not incurred "in connection with the performance by him (taxpayer) of services as an employee." The Tax Court did not find it necessary to determine if the expenses were incurred "while away from home." The Court of Appeals for the First Circuit reversed the Tax Court and allowed the deduction.

employment was of a temporary nature, or at a temporary location. Thus, if the exigencies of the business make it necessary that the taxpayer make such temporary or short term changes in location and they are of such short duration that it would be a hardship on him to have to move his home and family each time, it would seem that the expense of maintaining himself at his temporary location while maintaining a separate home for his family should be deductible.

1. 226 F.2d 467 (1st Cir. 1955).
2. Sections 22(n) and 23(a)-1 (§ 162(a) (2) of 1954 Code) allows trade and business deductions for employees. The deduction allowed consists of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance of services by him as an employee.
Two questions seem to be presented in the *Chandler* case. One deals with whether the expenses were incurred by taxpayer in connection with the performance by him of services as an employee; the other deals with whether the expenses were incurred "while away from home." The Tax Court in answering the first question in the negative did not find it necessary to answer the second. It reasoned that the employment as a teacher did not carry with it the necessity to travel, comparing the case to the normal commuter situation. The circuit court in refuting the Tax Court's argument said that the Tax Court seemed to rely upon *Commissioner of Internal Revenue v. Flowers* for its decision. The circuit court said that the test set out in the *Flowers* case was not applicable to the *Chandler* case due to the dissimilar factual situations; therefore, the *Flowers* case was not controlling. The court, instead, held that this case was analogous to the *Sherman* case. The Tax Court in the *Sherman* case stressed the point that the taxpayer had, in effect, a primary and secondary place of employment. The court held that where the taxpayer has two occupations or businesses which require him to spend a substantial amount of time in each of two cities, he is entitled to deduct those travel-

3. 326 U.S. 465 (1946). The *Flowers* case involved a lawyer (taxpayer) living in Jackson, Mississippi, but employed in Mobile, Alabama. Taxpayer lived at Jackson for his own convenience. A condition of the employment was that he be permitted to live in Jackson, although his office and the employer's home office were in Mobile. This arrangement made it necessary for taxpayer to travel to Mobile. Taxpayer still maintained a law office in Jackson, but did little private work there. Taxpayer deducted as traveling expense the automobile expenses incurred in making the trips from Jackson to Mobile and the expenditures for meals and hotel accommodations while in Mobile. In disallowing these deductions the court set out three conditions that must be met before a traveling expense deduction may be made under § 23 (a) (1) (A), 326 U.S. 465, 470:

"(1) The expense must be a reasonable and necessary traveling expense.

"(2) The expense must be incurred 'while away from home.'

"(3) The expense must be incurred in pursuit of business. This means there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

The court found it unnecessary to determine whether the expenses were incurred "while away from home", since it found that they were not incurred in pursuit of business, but were merely personal expenses of the taxpayer. (The *Flowers* case was not mentioned specifically in the opinion written by the Tax Court in the *Chandler* case, although the decision follows it closely.)

For a discussion of the *Flowers* case in connection with the "away from home" provision, see 32 CORN. L. Q. 461 (1947) and 44 MICH. L. REV. 882 (1946).

4. Joseph H. *Sherman*, Jr., 16 T. C. 332 (1951). In the *Sherman* case the taxpayer lived and was employed in Worcester, Massachusetts, but also operated as sole proprietor a part sales business in New York City. Although he had a mailing address in New York, he had no office or place of business, and had no employees. While in New York he stayed at a hotel, generally several days at a time. The court held that taxpayer's "home" for tax purposes was in Worcester and could deduct his expenses for travel to and from New York City, for meals and lodging, while there, and certain expenditures made in carrying on his New York business under the provision of I.R.C. § 23(a) (1) (A).
ing expenses incurred in attendance at the one removed from his residence. The Internal Revenue Service has acquiesced in the decision of the Sherman case.  

In analyzing the Sherman case, the circuit court in the Chandler case said the Tax Court in the former case must have found the expenditure to be reasonable and necessary traveling expenses because of the impossibility of the taxpayer being in two widely separate business locations simultaneously and without any necessity that a duty to travel be imposed upon the taxpayer by his employer. The court in stating that the reasoning of the Sherman case would apply in the Chandler case said, at page 469:

"We believe that a taxpayer who is required to travel to get to a place of secondary employment which is sufficiently removed from his place of primary employment is just as much within the statutory provision as an employee who must travel at the behest of his employer."

A further requirement is that the expense must be incurred "while away from home." An employee may deduct reasonable traveling expenses (including the cost of board and lodging) incurred while away from home in the performance of his employment. He may deduct such expenses from gross income and, in addition, may take the standard deduction. Interpretation of "while away from home" has been the subject of much debate and uncertainty. The Internal Revenue Service interprets it to mean "away from home overnight." The circuit

5. Revenue Ruling 55-604, Oct. 3, 1955. The acquiescence is qualified to the extent that it substitutes "principal post of duty" for "residence" in the statement to the effect that a taxpayer having two occupations or posts of duty which require him to spend a substantial amount of time in each of two cities may deduct his traveling expenses incurred in connection with attendance upon the one removed from his "residence." The substitution would have no effect in the Chandler case since the residence and principal post of duty were the same. It would be of considerable importance where they were not the same.

6. For further discussion of the "two business" concept see: Walter F. Brown, 13 B.T.A. 832 (1928); Joseph W. Powell, 34 B.T.A. 655, 94 F.2d 483 (1st Cir. 1938); Stairwalt, 11 T.C.M. 902 (1952); D.C. Jackling, 9 B.T.A. 312 (1927); Chester D. Greisemer, 10 B.T.A. 356 (1928); Fred Dennett, 7 B.T.A. 1173 (1927); Charles E. Duncan, 17 B.T.A. 1088 (1929); Elmer L. Potter, 18 B.T.A. 549 (1929).

7. Sections 22 (n) and 23 (a) (1) of the 1939 Code or Sections 62 and 162 of the 1954 Code.

8. For 1954 and later years, transportation costs are deductible in determining adjusted gross income in the same manner as traveling expenses, so that it is immaterial whether such transportation costs were incurred while "away from home."

9. YOUR FEDERAL INCOME TAX (1946 EDITION), published by the Bureau of Internal Revenue, which states on page 45: "If you pay or incur expenses for travel, meals, and lodging while away from home on your employer's business, you may deduct them in computing the adjusted gross income on which your normal tax and surtax are based. However, expenses incurred by an employee while away on trips to various cities from which he returns to his home at the end of each day, regardless of the distance travelled, do not qualify as having been incurred 'while away from home' and, therefore, are not deductible in computing adjusted gross income; . . . ."
court in the *Chandler* case felt that this interpretation may have been changed by the approval of the *Sherman* case. 10 In the *Sherman* case there was no attempt to emphasize the “overnight” aspect of the case (though the taxpayer was in fact away overnight), but instead emphasis was upon the distance involved between two “widely separated locations”. The circuit court in the *Chandler* case in reference to requiring the “overnight” test said at page 470:

“If so, the apparently plain meaning of a simple and unambiguous phrase is transformed thereby from ‘while away from home’ into something like ‘while far away from home overnight.’

“It seems to us that such changes are more in the nature of legislation than interpretation and accordingly go beyond the rule-making powers of the Internal Revenue Service.”

The circuit court said that it is only necessary that the taxpayer come within the scope of the *Sherman* case. In the *Sherman* case the taxpayer’s business and primary occupation were “widely separated” and he did in fact remain away overnight, but the court in the *Chandler* case did not consider that controlling, saying at page 470:

“In our view, taxpayer Sherman is to be regarded merely as one example of a man who was ‘away from home’; and not as representing the absolute and definitive minimum limit short of which the statutory requirement could not be satisfied as a matter of law.

“We hold that the petitioner Chandler was clearly ‘away from home’ in the statutory sense when he traveled to Boston from his tax home in Attleboro despite the fact that he did not remain in Boston overnight.”

The court cited approvingly the *Waters* case11 which said at page 416:12

“‘Travel . . . while away from home’ in its ‘plain, ordinary, and popular’ sense means precisely what it says. It means travel while away from one’s home. There is no connotation that the trip must be an overnight one, nor do we think Congress intended such a connotation. Surely it would be absurd to say that an employee who flies from Boston to

---

11. *Kenneth Waters*, 12 T.C. 414 (1949). In this case the taxpayer was employed in 1944 by a chain of grocery stores in Independence, Kansas, where he resided. He worked on a salary basis, without any reimbursement of expenses. During 1944, under the orders of employers, he made trips each Sunday from Independence, Kansas, to Parsons, Kansas, 36 miles away, to confer with them at their headquarters on business matters, using his own private automobile as a conveyance and returning home the same day. Court held that taxpayer was entitled to deduction of expenses incurred in the operation of the automobile, under the provisions of § 22 (n) (2) of the Internal Revenue Code.
Washington on business and returns to Boston the same day is not entitled to the deduction, but that if he takes two days for the whole trip, he is entitled to the deduction."

It seems, then, that the two business or two occupation concept is clearly established by the courts, although there has been no United States Supreme Court decision on the matter. Such a decision is not likely, due to acquiescence by the Internal Revenue Service. That this is an entirely logical and just interpretation is indicated by the language of the Sherman case. On the other hand, it is not so clear that the interpretation of "away from home" is definitely established. The Chandler case represents the highest court decision on the subject that this writer was able to find. The Internal Revenue Service has not acquiesced in the decision; therefore, a United States Supreme Court test is not unlikely. There seems to be no real reason for using the "overnight" test, except to exclude the commuter from the deduction. To accomplish that result would not seem to require such an inflexible guide. It could be based on a reasonable determination from the particular situation. This would provide flexibility to meet all situations, while still subject to review by the Internal Revenue Service. This would seem to be a desirable and practical arrangement, but, if not, Congress should clarify the question.

RAYMOND M. ASHER

FEDERAL TAXATION—INCOME TAX—PUNITIVE DAMAGES AS INCOME

Commissioner of Internal Revenue v. Glenshaw Glass Co.

Punitive damages gained either through a judgment or a settlement under anti-trust laws were, in the principal case, held to be taxable income within the meaning of Section 22 (a) of the 1939 Internal Revenue Code. The Supreme Court found a statutory basis for such a decision in the broad language of Section 22 (a), which refers to "... income derived from any source whatever." The Court in the Glenshaw case asserts previous recognition by courts of a congressional intent to tax all gains except those specifically excepted and cites a number of supporting cases.

By so holding and on the same day affirming on the same basis the lower court's holding in General American Investors Company v. Commissioner of

**Internal Revenue,** the Supreme Court ended a conflict as to the sources available for taxable income involving a definition of income set out in *Eisner v. Macomber.* This definition limited to three the sources of income available for taxation. The Court in the instant case restricts the definition to its original context, "... distinguishing gain from capital..." It was primarily used in the *Eisner* case to establish such a distinction in regard to a stock dividend, the court holding that the shareholder realized thereby no taxable gain.

The Supreme Court in the *General American Investors* case, decided the same day, recognizes no "... significant difference in the nature of these receipts..." to the corporation in the anti-trust punitive damage recovery and the recovery of statutory short swing insiders' profits by a corporate taxpayer. This ends a series of attempts by courts to distinguish the two as far as being sources of taxable income.

A logical adherence to the *Eisner* definition precludes taxation of either source of gain.

The Tax Court in the *General American Investors* case attempted to distinguish a holding that income recovered by a corporation under Section 16 (6) of the S.E.C. Act was taxable, from decisions holding punitive damage recoveries were not taxable under the *Eisner* definition, by pointing to a provision in that statute stating "... any profit realized shall inure to and be recoverable by issuer;" and reasoned that since the profits to the "insider" conformed to the *Eisner* defined sources they would also be so when recovered by the corporation. Yet writers point out that the statutory method of computing this recovery is not the "net profit realized by the insider" and that recoveries in both cases are penalties, there being a difference only of degree.

Once the *Eisner* limitation upon sources of taxable income is dismissed then "to say that a recovery for actual damages is taxable" but not the additional.

---

5. 252 U.S. 189, 207 (1920).
7. See note 1, supra at page 472.
8. See Note 4 supra.
9. See Note 4 supra, 348 U.S. at 436.
10. The courts would first characterize the receipt as a "windfall" in the punitive damage cases, then apply the Eisner definition. But cf. Park & Tilford Distillers Corp. v. United States, 107 F. Supp. 941 (U.S. Ct. of Claims 1952) which held all "windfalls" to be within the meaning of income.
12. Note 4 supra.
14. See Note 6 supra.
15. Ibid.
16. Even under the *Eisner* Regime courts used an "in lieu of" theory so that if damages were in lieu of lost profits they were taxable.
amount extracted as punishment for the same conduct which caused the injury" "would be an anomaly that could not be justified in the absence of clear congressional intent."

The Supreme Court finds no specific exemption of punitive damages in the Tax Code. In the General American Investors Co. case, the Court does not distinguish the two sources of receipts (that is, a settlement for actual and punitive damage under the anti-trust laws and recovery by a corporation of "short swing" insiders' profits), and says at page 479 "as in Glenshaw, the tax payer realized the money in question free of any restrictions as to use. The payments in controversy were neither capital contributions nor gifts." The Third Circuit in the Glenshaw case had stated punitive damages were a gift from the injured party taken from his pocket by law, in disregard of any lack of voluntary intent. They had also said they were analagous to a contribution by the sovereign in the general public interest to an individual, citing Edwards v. Cuba R.R. Yet the payments to a corporation in the latter case were not compulsory and were on a basis of mileage completed indicating an intent to reimburse for capital expenditure while the theory in anti-trust recoveries is that the damages before computing are supposed to fully restore lost capital and profits.

In footnote 8 at page 432 of the Glenshaw decision the court refutes any theory that rulings holding personal injury recoveries non-taxable because they correspond to return of capital will support an exemption of punitive damages following injury to property. This is because damages for personal injury are defined as compensatory only while punitive damages are in addition to compensatory damages.

JAMES HARRINGTON

PROPERTY—ADVERSE POSSESSION—HOLDING OVER
AFTER EXPIRATION OF "EASEMENT"

Matter of City of New York (Harlem River Drive—Coogan)

In 1919, when Harriet J. Coogan was owner in fee of the land in question, the Eighth Avenue Railroad Company condemned it for use as a power plant and car barn. Under the law then in effect the condemnation gave the railroad com-
pany an easement so long as used for railroad purposes. In 1921 the railroad company gave a mortgage, purporting to cover the fee, to the Columbia Trust Company for $280,000. In 1926 the railroad company purported to convey the fee to Railways Realty Company, its subsidiary, by warranty deed with full covenants. Railways Realty Company gave the railroad company a purchase money second mortgage on the fee and leased the premises back to the railroad company. In May, 1932, the Irving Trust Company, successor to Columbia Trust Company, assigned the $280,000 first mortgage to the New York Title and Mortgage Company. The latter company was placed in rehabilitation in 1933 and the Superintendent of Insurance was subsequently ordered to liquidate it. On May 31, 1935 the railroad company ceased operations by court order. In June, 1936, the Superintendent of Insurance entered into possession on an assignment of rents and profits by Railways Realty Company. The Superintendent subsequently foreclosed the first mortgage, bought in at the foreclosure sale, and received a deed.

The City of New York instituted condemnation proceedings in 1952 to acquire title to the land in question. A dispute as to title arose between the Superintendent of Insurance and the heirs of Harriet J. Coogan, the original owner. The court of appeals affirmed the trial court's order adjudging the Superintendent of Insurance owner in fee, two judges dissenting. The majority based the decision on the ground that when the railroad ceased operations the easement expired by its own limitation and the Coogans were entitled to take possession on that date. Having failed to do so for the statutory period, they were barred by the adverse possession of the Superintendent and his predecessors in title.

It appears that the court, without expressly so stating, treated the easement as being of the same character and effect as a possessory estate on special limitation and applied law applicable to such an estate. This would seem to be a proper analogy as the railroad was entitled to exclusive possession of the premises. At common law an easement is an incorporeal, that is, non-possessory, interest in land. Under the English decisions a right to exclusive possession is a possessory estate, not an easement, and at least one American case adopts the same view

3. A possessory estate on special limitation is created by the use of words such as "until", "so long as", followed by the named event. Words providing that the estate shall revert are sometimes used but are not absolutely necessary. On happening of the named event the estate automatically reverts to the grantor without any action being taken on his part. In contrast, the possessory estate subject to a condition subsequent is created by the use of words such as "but if", "provided that", followed by the named event, followed by provision that the grantor may re-enter and terminate. The estate in this case does not automatically revert to the grantor but remains in the grantee until the grantor effects a re-entry. In the former case the grantor has a possibility of reverter, in the latter he has a right of entry. RESTATEMENT OF PROPERTY §§ 23, 24, 56, 57 (1935).
4. See Reilly v. Booth, 44 Ch. D. 12 (C.A. 1889); 1 SIMES, FUTURE INTERESTS § 184 (1936); Fratcher, Legal Servitudes as Devices for Imposing Use Restric-
with respect to railroad rights of way.\textsuperscript{5} Although some American decisions and statutes denominate a railroad right of way as an "easement",\textsuperscript{6} it is, at least for most purposes, really a possessory estate. In the case of the possessory estate on special limitation, it is the happening of the event itself which terminates the possessory estate, revests title in the owner of the possibility of reverter, and gives him an immediate right to possession. This also starts the statute of limitations running and there is no requirement of notice to the holder of the possibility of reverter that the stipulated event has occurred. This rule has been held to apply to bar recovery of an interest following a life estate on special limitation.\textsuperscript{7} Another similar situation in which the rule is applied is where the grantee in fee of a life tenant holds over after the death of the life tenant.\textsuperscript{8} Any of these situations would seem to be a proper analogy since in each case the preceding estate expires by its own limitation and the right to possession arises in the remainderman, reversioner, or holder of the possibility of reverter, at that time.

In the principal case a dissenting opinion took the position that the Superintendent's possession should not be deemed adverse, on the ground that it was originally permissive and hence did not become adverse, even after the term expired, unless actual notice of an adverse claim was brought home to the owner. Possession begun with permission is presumed to remain permissive until notice to the contrary is given. This has been held to apply as between landlord and tenant, co-tenants, mortgagee and mortgagor, vendor and purchaser, and trustee and beneficiary.\textsuperscript{9} A similar rule exists in the acquisition of prescriptive easements by adverse user.\textsuperscript{10} On this ground there may be some question as to the propriety of the decision.\textsuperscript{11} However, there is some authority to the effect that actual or express notice is not always required and that constructive notice may be sufficient. This has been held in Missouri where a widow and children held over

\textit{tions in Michigan, 2 WAYNE L. REV. 1, 708 (1955); FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 395 (1954).}

8. A person entering as grantee of a life tenant cannot hold adversely to remainderman during life of life tenant but immediately upon his death, such possession, if continued becomes adverse to the remainderman. Ontelanne Orchards v. Rothermell, 139 Pa. Super. 44, 11 A.2d 543 (1940); Griffen v. Reynolds, 107 S.W.2d 634 (Tex. Civ. App. 1937); Barrett v. Stradl, 73 Wis. 385, 41 N.W. 439 (1889). The rule against disputing the title of one's lessor does not apply to such a remainderman. Christie v. Gage, 71 N.Y. 139 (1877).
9. 3 AMERICAN LAW OF PROPERTY §§ 15.6, 15.7 (1922).
after the death of the husband, the husband's original possession having been permissive.\textsuperscript{12} In so holding, the court stated that if the acts of possession were sufficient to apprise the people in the community wherein the land was situated that they were claiming the land as their own, the owner was bound to take notice of it and no actual or express notice need be proved. The court then qualified this by saying that there might be cases where the particular facts might require actual notice but did not indicate what those facts might be. There are also decisions in Missouri holding that there is no requirement of actual notice in the case of co-tenants, even though one of them resides in a distant state.\textsuperscript{13}

The available reports of the principal case do not give sufficient facts to determine if it would fall within the doctrine of constructive notice developed by the Missouri cases shown above. The only facts given are the facts that the conveyance to Railways Realty Company and the mortgages were properly recorded. The trial court held that such recording was constructive notice to the fee owner. The court of appeals did not comment on this view in their decision and made no indication that this was the basis of their decision. If such was the basis, the decision is doubtful indeed since the almost universal rule is that record of an instrument is constructive notice to subsequent purchasers and encumbrancers only and does not affect prior parties.\textsuperscript{14} To hold otherwise would place a burden on every landowner to have his title searched periodically. Therefore, it would appear that the recording would not constitute such notice as is required. Also, there are no cases which would indicate that the doctrine of constructive notice is recognized or applied in New York when the original possession is permissive. In light of this, it would appear that unless the court, in fact, based its decision on the ground that this easement should be treated as a possessory estate on special limitation, the decision is, at best, doubtful.

A note on the principal case\textsuperscript{15} states that the rule that possession originally permissive presumptively remains so, has been applied to a determinable fee. Since the possessory fee simple on special limitation is commonly referred to as a determinable fee, this would seem to be contrary to the theory advanced in the preceding portion of this discussion. However, the New York case relied upon for this statement\textsuperscript{16} involved a possessory fee simple subject to a condition subsequent, which, while also sometimes referred to as a determinable fee, is quite a different situation. In that case the court held that when a conveyance

\textsuperscript{12} Eaton v. Cates, 175 S.W. 950 (Mo. 1915).
\textsuperscript{13} Misenheimer v. Amos, 221 Mo. 362, 120 S.W. 602 (1909); Dunlap v. Griffith, 146 Mo. 283, 47 S.W. 917 (1898).
\textsuperscript{14} Ackerman v. Hunsicker, 85 N.Y. 43, 39 Am. Rep. 621 (1881); A landowner is not compelled to watch the records for conveyance of his own property, Lewis v. New York & H. R.R., 162 N.Y. 202, 56 N.E. 540 (1900).
\textsuperscript{15} 19 ALBANY L. REV. 74 (1955).
is made upon a condition subsequent, the fee remains in the grantee until the happening of the event and a re-entry by the grantor, and that the mere happening of the event does not divest the estate. The grantor and his heirs may not choose to take advantage of the breach, and until they do so, by entry or its statutory equivalent, there is no forfeiture of the estate. It is obvious then that if the fee remains in the grantee, his possession can be adverse to no one, hence the court properly held that there was no real question of adverse possession. 17

CONCLUSION

If the interest of the railroad was a true easement, that is, an incorporeal or non-possessory interest, it is difficult to see how the Superintendent, who exercised no more control over the land than did the railroad company, could acquire, by adverse user, more than a prescriptive easement. It is therefore concluded that the decision can be justified only on the ground that the easement in question is analogous to a possessory estate on special limitation. If such analogy cannot be drawn, then according to the rule in New York requiring actual notice to the fee owner where the possession or user is originally permissive, the case would appear to be wrongly decided. If such a case were to arise in Missouri, it is submitted that constructive notice by notoriety of use might well be held sufficient and no direct or actual notice would be necessary even where the possession was inceptively permissive.

Dwight L. Larison

TORTS—AN EXTENSION OF THE RESCUE DOCTRINE?

Hammonds v. Haven 2

Plaintiff, while driving home, encountered a tree which had blown down upon the highway. He knew that defendant would be passing along the same road soon. Consequently plaintiff and another decided to warn approaching motorists of the dangerous condition. Shortly afterwards, plaintiff saw a car approaching 500 or 600 feet away and began waving his arms to stop the car. The night had been stormy and it was quite dark at the time of the accident. Defendant was driving at the rate of 55 to 60 miles per hour and did not see plaintiff, who was standing about the center of the road waving his arms, until he was within 50 feet of him. By that time it was too late for the defendant to avoid hitting him. The recovery of damages by the plaintiff in the trial court

17. In Missouri this result might not obtain since there is authority that the grantor may lose his right to elect to re-enter by laches, or by waiver. See note, 13 Mo. L. Rev. 76 (1948).

2. 280 S.W.2d 814 (Mo. 1955).
was affirmed on appeal to the supreme court, which held that under the rescue doctrine the issue of plaintiff's contributory negligence was properly submitted to the jury.

This type of case is different from the usual "rescue case" in which the rescuer is injured while trying to rescue a third person who is in need of rescue as a result of the negligent act of the defendant. The courts are unanimous in allowing recovery in that type of situation.  

The problem of allowing recovery to a person injured while attempting a rescue is further complicated when the defendant negligently places himself in a position necessitating his rescue. Those courts refusing recovery in this type of situation do so because they are unable to find a legal duty on the part of the defendant to refrain from injuring himself. However, the defendant in this situation owes a duty not to himself but to a rescuer to refrain from placing himself in a position which demands his rescue, and the rescuer in most courts is allowed to recover for injuries received in the course of the attempted rescue.

However, the principal case does not involve a "rescue" under either of these situations. There was no negligence whatsoever on the part of the defendant in causing the dangerous condition. The tree fell on the highway as the result of a storm. Normally the so-called "rescue doctrine" is applicable only to situations in which the defendant's tortious act is the cause of the necessity for rescue. "The rescue doctrine has been held to be applicable only where the situation which invites rescue is created by the tortious act of defendant or one for whom he is responsible, and in order to invoke doctrine where defendant is not responsible for peril to the one sought to be rescued, defendant must be guilty of negligence toward rescuer after he has begun to attempt the rescue".

The value or function of the "rescue doctrine" is to free the rescuer from the charge of contributory negligence. The law regards human life so highly that it will not impute negligence to the rescuer provided his attempt is not made under such circumstances as to constitute utter recklessness in the judgment of prudent persons. It is immaterial whether the rescuer deliberated before attempting the rescue or acted spontaneously. "The law does not discriminate between the

2. Rovinski v. Rowe, 131 F.2d 687 (6th Cir. 1942); Eversole v. Wabash R.R., 249 Mo. 523, 155 S.W. 419 (1913); Donahoe v. Wabash, St. L. & P. Ry., 83 Mo. 560 (1884); Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921); Alford v. Washington, 238 N.C. 694, 78 S.E.2d 915 (1953); 11 Mo. L. Rev. 317 (1946). The cases are annotated in 19 A.L.R. 1 (1921).
5. 65 C.J.S. 738, § 124.
rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion."

The doctrine is limited by the requirement that the danger must appear imminent and real, not speculative or imaginary. The plaintiff in the instant case knew that the defendant would be using the road in a short time. Taking into consideration the weather conditions on that night, the probability of danger and injury to the defendant was quite real and imminent.

Inasmuch as the doctrine is used to relieve the rescuer of the charge of contributory negligence, it should be extended cautiously on the part of the courts in those instances in which the defendant did not cause the dangerous condition. However, where the danger to the defendant is real and imminent as in the present case, there does not seem to be any objection to extending the doctrine to cover this situation.

ELDEN STERNBERG

---

TORTS—APPLICATION OF RES IPSA LOQUITUR TO MULTIPLE DEFENDANTS

Barb v. Farmers Insurance Exchange and Farmers Exchange Building, Inc.

Whether the res ipsa loquitur doctrine is applicable to multiple defendants was the question in Barb v. Farmers Insurance Exchange and Farmers Exchange Building, Inc. In that case plaintiff’s action was for damages for personal injuries received by falling boxes while walking in a passageway in the basement of the Insurance Exchange Building. The boxes, which were the property of Farmers Insurance Exchange (hereinafter referred to as “lessee”), were placed in the passageway by lessee in violation of its lease agreement. The lease agreement stated that the lessor had “exclusive control” of the passageway, and provided that the passageway should not be obstructed by the lessee. Farmers Exchange Building, Inc. (hereinafter referred to as “lesser”) was the owner and lessor of the building. The passageway provided by lessor was to be used by the public, including the patrons and employees of various tenants. Plaintiff, an em-

---

9. For a consideration of the factors determining the quantum of risk which a rescuer may incur, see RESTATEMENT, TORTS § 472 (1934). The instant case is also noted in 1955 WASH. U. L. Q. 427.

---

1. 281 S.W.2d 297 (Mo. 1955).
ployee of one of the tenants, brought this action for personal damages alleging general negligence by both lessee and lessor. The trial court submitted the case to the jury under the res ipsa loquitur doctrine. The lessee conceded that the doctrine was applicable to it, but the lessor excepted to the instructions. On appeal to the supreme court it was held that the doctrine was applicable to both defendants.

The two basic requirements for the application of the res ipsa loquitur doctrine are: (1) the occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care; and (2) the instrumentalities causing the injury were in the sole control and management of the defendants. The question presented in the instant case is whether sole control and management can be said to exist in each defendant.

The lessor contends that it did not have exclusive control nor actual control of the boxes, therefore, the doctrine cannot apply. However in a leading case involving the doctrine, McCloskey v. Koplar, it was said “that the requirement that the instrumentality be under the management and control of defendant does not mean, or is not limited to, actual physical control, but refers to the right of control at the time the negligence was committed.”

The court points out that the meaning of exclusive control does not mean that there must be only one defendant involved, but that the inference may be permitted against multiple defendants who share and are in concurrent control of the instrumentality involved. That each of the defendants would have a legal right to control would seem obvious. The lessee would have a legal right to control due to its ownership of the boxes. The lessor, likewise, would have a legal right to


3. The lessor contended that res ipsa loquitur could not apply because it did not have superior knowledge. The plaintiff in reply, however, points out that by the terms of the lease and by the testimony of the superintendent of the building the lessor exercised control over the passageway and had the right of control over everything placed therein. The court accepted the plaintiff's contention. The lessor also contended that the doctrine should not be applied since the plaintiff would then be placed in a more advantageous position than if actually proved that the boxes had been negligently stacked by the lessee.

4. See State ex rel. and to Use of Brancato v. Trimble, 332 Mo. 313, 18 S.W.2d 4 (1929); Hart v. Emery, Bird Thayer Dry Goods Co., 233 Mo. App. 312, 118 S.W. 2d 509 (1938); Weisbrot v. Katz Drug Co., 223 S.W.2d 97 (Mo. App. 1949); 52 Col. L. Rev. 537 (1952); 63 HARV. L. REV. 643 (1950).

5. 329 Mo. 527, 46 S.W.2d 557 (1932).

6. See Meny v. Carlson, 6 N.J. 82, 77 A.2d 245, 22 A.L.R.2d 1160 (1950); Schroeder v. City and County Savings Bank of Albany, 293 N.Y. 370, 57 N.E.2d 57 (1949); Biondini v. Amship Corp., 81 C.A.2d 751, 185 P.2d 94 (1947); Smith v. Claude Neon Lights, 110 N.J.L. 326, 164 Atl. 423 (1933); Frenkil v. Johnson, 175 Md. 592, 3 A.2d 479 (1939); PROSSER ON TORTS § 43, p. 299; 65 C.J.S., Negligence, § 220(8) bb, at page 1018. For a discussion of the application of res ipsa loquitur where only one of the defendants could have breached his duty, see 23 So. CALIF. L. REV. 429 (1955).
control due to its exclusive right of control of the passageway as provided in the lease.

It is clear that both defendants owed duties to plaintiff, but their duties are of a different factual basis. The lessee had a duty to use due care in stacking and maintaining the stacked boxes. The lessor's control of the passageway imposed a duty to exercise due care in making the premises reasonably safe for invitees, and in removing obstructions or remedying unsafe conditions in the passageway of which it knew or should have known.7

Thus it would seem, as the court concludes, that the two defendants "were in concurrent control in a legal sense and in a factual sense with incidental duties to plaintiff although their duties were of different factual bases in the circumstances surrounding the occurrence."

RAYMOND ASHER

TORTS—LIABILITY OF OWNER OF AUTOMOBILE FOR NEGLIGENCE OF THIEF

Gower v. Lamb1

There was presented in this case a question of first impression in the Missouri courts. The defendant left his car parked on a busy thoroughfare in St. Louis early one morning, leaving the keys in the ignition. Upon returning a short time later, he discovered that the car had been stolen. It developed that the car had collided with the car owned by the plaintiff, the defendant's car having been driven in a careless manner by the thief. The plaintiff, in seeking damages from the defendant for negligence, alleging such negligence as being the "direct and proximate" cause of the damage to his car, based his action on both statutory and common law negligence. The court denied recovery under both theories. The Missouri statute involved2 makes it unlawful in cities over 75,000 to leave a car


1. 282 S.W.2d 867 (Mo. App. 1955).
2. Id. at p. 868.
3. Mo. Rev. Stat. § 304.150 (1949): "No person shall leave a motor vehicle unattended on the highway without first stopping the motor and cutting off the electric current, and no person shall leave a motor vehicle, except a commercial motor vehicle, unattended on the highway of any city having a population of more than 75,000 unless the mechanism, starting device or ignition of such motor vehicle shall be locked. The failure to lock such motor vehicle shall not be used to defeat a recovery in any civil action for the theft of such motor vehicle, or the insurance thereon, or have any other bearing in any civil action."
unattended with the keys in the ignition. There is further presented, however, an exclusionary sentence unlike that in most states with similar statutes:

"The failure to lock such motor vehicle shall not mitigate the offense of stealing the same, nor shall such failure be used to defeat a recovery in any civil action for the theft of such motor vehicle, or the insurance thereon, or have any other bearing in any civil action." [emphasis added]4

Interpreting this statute, the court denied recovery on the cause of action based on statutory negligence. The court recognized that in many states with similar statutes, though without the exclusionary sentence, courts have allowed recovery under factual situations similar to the one at bar.6 However, Missouri's statute appears to be unique, and the court gave the statute a literal reading. The court said that the sentence emphasized above clearly made the statute irrelevant in a civil action. This question was presented in a California case7 where a city ordinance contained similar words. The Missouri court followed the reasoning of the California case, in denying recovery for negligence based on the statute. If the statute is to be given a literal interpretation, this would seem the logical conclusion.

The court then found it necessary to decide the case based on common law negligence principles. In this area of the law, there have been several recent decisions in the several jurisdictions reaching different results.7 The opinion in the instant case followed the one line of cases which have held that the defendant owes no duty, absent actual knowledge of the presence of thieves or some other particular circumstances that might reasonably indicate a foreseeable risk of harm to the plaintiff.

4. Id.
6. Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954). This was a case with facts similar to those presented in the principal case, with an ordinance similar to the Missouri statute.
7. Zuber v. Clarkson Construction Co., 363 Mo. 352, 251 S.W.2d 52 (1952), defendant was held liable on common law negligence; Schaff v. R.W. Claxton, 144 F.2d 532 (Ct. of App., D.C. 1944), held to be a question for the jury on defendant's duty; Midkiff v. Watkins, 52 So.2d 573 (La. 1951), defendant held not liable; Curtis v. Jacobson, 142 Me. 351, 54 A.2d 620 (1947), defendant held not liable; Reti v. Vaniska, 14 N.J. Super. 94, 81 A.2d 377 (1951), defendant held not liable; Walter v. Bond, 292 N.Y. 574, 54 N.E.2d 691 (1944), holding that the defendant was not liable on common law negligence principles.
Many of the decided cases, and perhaps most of them, have been decided on the question of causation, with little, if any, consideration being given to the question of the duty.8 The court in the instant case quoted with approval the Missouri case of Zuber v. Clarkson Construction Co.,9 which involved a closely related factual situation: "It seems to us it could be reasonably said the person, defendant, the owner and responsible for these machines with knowledge that curious intermeddlers were making the practice of operating the machines, had reason to anticipate or foresee that other intermeddlers would start the machines and that, among those who operated the machine some person . . . would be reckless or unskilled. It is not too much to say that, in the circumstances averred, a reasonably prudent person should take into account these probabilities, and would foresee that some injury was likely to ensue."10

Were the incident one that occurred near a place that the third person's acts were likely, or reasonably foreseeable, such as near a school, on in an area where crime prevailed, then a duty might be imposed. In an Indiana case, the court said that only where "the surrounding circumstances clearly point to both a high probability of intervening crime, and of like pursuant negligent operation of the vehicle by the thief" would it be likely to find negligence on the owner of the vehicle.11

If such a factual situation were presented to the court, then the important question would seem to be one of causation. The intervening acts of the thief, being foreseeable, would not break the chain of causal relation of the defendant's negligence and the damage to the plaintiff. The injury to the plaintiff would be the natural and probable consequences of the negligence of the defendant.

Some of the courts allowing recovery have attempted to distinguish between those cases where the injury resulted while the thief was in flight and when he was later "on his own", but later cases would appear to have repudiated this distinction, or at least indicate that it is a minority view.12 If such a distinction

8. See 282 S.W.2d 367, at p. 372 where the court said that the "plaintiff failed to adduce sufficient evidence of negligence or of proximate causation to make a submissible case." It would seem that any considerations of causation are unnecessary without a showing of negligence.

9. 363 Mo. 352, 251 S.W.2d 52 (1952), noted 18 Mo. L. REV. 205 (1953). In this case a tractor earth moving machine was left parked without being "turned off" in a place that the defendant knew, or reasonably should have known, of the tendency of persons to "meddle" with the machine. In such a case, the court found a duty that arose to use reasonable care to avoid danger that might result from the acts of the persons starting the machine.

10. Id. at p. 56.


were to be followed, it would be a question of causation, needing no determination unless negligence has first been established.

Absent actual knowledge or circumstances stronger than those presented in the instant case, there would seem to be no duty owed the plaintiff to remove the car keys from the ignition, if he cannot reasonably foresee a risk of harm to the plaintiff. Assuming, however, negligence may be found, there is still the question of causation which would depend on the particular facts for proper determination, as the cases cited from other jurisdictions indicate.13

ELVIN S. DOUGLAS, JR.

TORTS—NEGLIGENCE—THE CARE WHICH A POSSESSOR OF LAND MUST ACCORD TO A SOCIAL GUEST CONCERNING DANGEROUS CONDITIONS

Wolfson v. Chelist

The defendant, in feeding a cat on the evening of August 10, 1951, threw some hamburger meat onto a concrete landing or stoop by which access was gained to her home. The cat did not consumne all of the hamburger, and a small spot of grease and food particles remained, blending into the color of the concrete. On the following day, she invited her sister, plaintiff, to come over so that they might take a ride and have lunch together. Plaintiff did so upon this invitation and, as the defendant and the plaintiff were leaving the house, plaintiff slipped on this spot and fell, sustaining the injuries complained of. A judgment of $2000 was recovered in a subsequent action against the estate of the defendant, the case having been submitted to the jury on straight negligence instructions.

The St. Louis Court of Appeals reversed this judgment,2 holding that plaintiff was a social guest, and as such was entitled only to the care due a gratuitous licensee, who "takes the premises as he finds them, and in the absence of wanton or wilful acts or active or affirmative negligence . . . he cannot recover." The court further said, by way of dictum, that "failure of the licensor to warn his guest of a hidden peril highly dangerous to life or limb, such as a trap, pitfall or dangerous hole would subject him to liability under this rule." Jones, J., dissented, stating that he deemed the majority opinion in conflict with the supreme court's decision in Glaser v. Rothschild,3 and the case was transferred to the Supreme Court of Missouri.

13. A helpful annotation on this problem may be found in 158 A.L.R. 1374 (1945) and 26 A.L.R. 912 (1923). Also see 43 CALIF. L. REV. 140 (1955).

1. 284 S.W.2d 447 (Mo. 1956).
2. 273 S.W.2d 39 (Mo. App. 1955).
3. 221 Mo. 180, 120 S.W. 1 (1909).
The question of a possessor's liability to one upon his premises is one of the older areas of tort liability⁴ and, due to long established concepts of property rights, is one which in certain situations still resists the modern law of negligence.⁵ The amount of care which a possessor is required to accord to a social guest today depends upon the degree of modification that the particular jurisdiction has given to the governing rules which came into the law in a period which still emphasized the protection of interests in property.

The Restatement of Torts has adopted a view which classifies persons coming onto premises into two general categories: trespassers⁶ and licensees.⁷ This second class in subdivided into (a) gratuitous licensees⁸ (which includes social guests), and (b) business visitors.⁹ Concerning dangerous conditions, the social guest, as a gratuitous licensee, is owed a duty of being warned or having made safe any condition which the possessor knows and realizes involves unreasonable risk to him.¹⁰

Notwithstanding the case of Smith v. Southwest Missouri Ry.,¹¹ in which the Missouri Supreme Court seems on first impression to have adopted the view of the Restatement,¹² Missouri has not followed that view either as to the classification of,¹³ or the duty owed to¹⁴ a person upon the premises by license other than a business visitor.

The leading Missouri case on the question has been Glaser v. Rothschild,¹⁵ where the supreme court seems to have reaffirmed and crystallized the previous rulings within the jurisdiction. By this case,¹⁶ a person coming onto the premises

---

4. For a survey of this field in Missouri, see McClarkey, The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land, 1 Mo. L. Rev. 45 (1936). See also the Annotations in 25 A.L.R.2d 599 (1962); 92 A.L.R. 1005 (1934); 60 A.L.R. 103 (1929); 12 A.L.R. 987 (1921).
7. Id. § 330.
8. Id. § 331.
9. Id. § 332.
10. Id. § 342.
11. 333 Mo. 314, 62 S.W.2d 761 (1933). This was a case involving a boy, the plaintiff, who was permitted to visit and aid his grandfather in defendant's station. In showing a friend through the station, plaintiff was severely burned by defective electrical equipment. The court apparently adopted the Restatement view of the duty owed to a gratuitous licensee, but indicated that they viewed plaintiff as coming within a higher classification, an "unpaid employee."
12. Section 329.
15. Supra, note 3.
16. Here, a business visitor (invitee), in following defendant's directions to a rest room, fell down an unguarded elevator shaft. It was held that he went beyond his invitation and became a bare licensee to whom no duty was owed concerning dangerous conditions.
of another is classified into one of three categories: trespasser, licensee, and invitee. The trespasser is, of course, one who comes upon the premises under no authority from the possessor to do so. The licensee is one who comes there with either the express or implied consent of the possessor. An invitee, on the other hand, is one whose presence upon the premises is of benefit to the possessor. In the court's language: "The rule applicable to that change is that a licensee, who goes upon the premises of another by that other's invitation, and for that other's purposes, is no longer a bare licensee. He becomes an invitee. . . ." The court did not decide whether or not a social guest might confer a benefit upon the possessor sufficient to bring him within the classification of invitee.

The Kansas City Court of Appeals, in the case of Twine v. Norris Grain Co., held that to be considered an invitee the purpose must be of some real benefit to the possessor, indicating that it must be a substantial economic benefit. A number of Missouri cases have also used the term "business visitor" as synonymous with invitee. Therefore, it seems clear that a social guest must be considered a gratuitous licensee, though the point was never previously directly ruled.

The court in the Glaser case held that a bare licensee takes the premises as he finds them barring wantonness, or some form of intentional wrong or active negligence by the possessor, in contrast to the additional obligation in the case of an invitee to warn or make safe any unreasonably dangerous condition.

17. 221 Mo. 180, 182, 120 S.W. 1, 3 (1909).
18. Supra, note 14. This case involved a boy who was permitted upon the premises to catch pigeons, which defendants admitted were a nuisance to their grain business. The court held that this was not sufficient benefit to make the boy an invitee, stating: "An invitee (sometimes called a business guest) is one who enters the premises... for some purpose of real benefit or interest to the possessor or the mutual benefit of both."
20. Mann v. Pulliam, 127 S.W.2d 426 (Mo. 1939), noted in 4 Mo. L. Rev. 470 (1939), where a social guest fell from the front steps of defendant's home allegedly due to poor lighting. The supreme court disposed of the case on the basis that no risk of injury could be foreseen and hence there was no duty concerning the condition. There is nothing in the decision which would indicate that even had there been a foreseeable risk of injury defendant would be held liable.
22. The distinguishing test in Missouri of whether the injury was caused by a dangerous condition or by active negligence seems to rest in the nature of the physical object or instrumentality which directly produced the injury. If the object is stationary it is a dangerous condition; but if it is not so fixed, it may be an affirmative activity or active negligence. Held to constitute affirmative activity were: dredging a pond, Henry v. Disbrow Mining Co., 144 Mo. App. 360, 128 S.W. 841 (1910); operating a tramway for hauling logs, Schaffer v. St. Louis Basket and Box Co., 151 Mo. App. 35, 131 S.W. 936 (1910). Held to be dangerous conditions only were: digging and maintaining an open pit on premises.
The decision of the court of appeals in the principal case squarely presented the question of a possessor’s duty to a social guest to the supreme court for the first time. The court, in affirming the decision of the St. Louis Court of Appeals, undoubtedly applied the existing Missouri rule as to gratuitous licensees to the case. The decision by Van Osol, C., reiterated the existing classifications of trespasser, licensee and invitee, relying upon the Missouri cases of Prochey v. Kelling,23 and Glaser v. Rothschild,24 and tracing the rule back to the English cases of Southcote v. Stanley,25 and Indermaur v. Dames.26 The opinion clearly states that a social guest does not confer such “material benefit” as will bring him within the classification of an invitee and hence a social guest is a licensee who must accept the premises in the same manner as a member of the host’s family.27

In deciding the case, the court distinguished McLaughlin v. Marlatt,28 stating that that case involved active negligence, and held that Mann v. Pulliam29 was decided upon a different basis. In the principal case the court clearly indicated that the Glaser case remains ruling case law in Missouri.

The modern trend in this area of the law of torts seems to be with the position taken by the Restatement.30 It does not seem to be an unreasonable burden used by pedestrians, Porchey v. Kelling, supra note 19; maintaining dangerous electrical equipment, Twine v. Norris Grain Co., supra note 14.

23. Supra note 19.
24. Supra note 3.
25. 1 H. & N. 247, 156 Eng. Rep. 1195 (1956). This case involved a licensee who was injured due to the negligent maintenance of a glass door. Some of the court’s language indicates that the rule concerning the duty owed to a licensee has its origin in a confusion of the law of torts and contracts: “To render the defendant liable, the declaration ought to have shown some contract between the plaintiff and the defendant, which imposed on the latter the obligation of taking care that the door was secure; ...”
26. Law Rep. 1 C.P. 274, 35 L.J.C.P. 184 (1866), aff’d. Law Rep. 2 C.P. 311, 36 L.J.C.P. 181 (1867), where a workman on defendant’s gas furnace who fell through an unguarded elevator shaft was allowed recovery.
27. The court was quick to point out that the existing classification was not so inflexible as to preclude exceptions, citing cases as illustrations: Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d (Mo. 1952); Ahnefeld v. Wabash Ry., 212 Mo. 280, 111 S.W. 95 (1908); Hull v. Gillioz, 344 Mo. 1227, 130 S.W.2d 623 (1939); Wells v. Henry Kuhs Realty Co., 269 S.W.2d 761 (Mo. 1954).
28. 296 Mo. 656, 246 S.W. 548 (1922), where defendant accidentally shot plaintiff, thinking him a fox. It was also held in this case that there is an implied license for neighbors to make social visits in various rural areas. See note 22, supra.
29. See note 20 supra.
30. In Gudwin v. Gudwin, 14 Conn. Supp. 147 (1946), it was held that a guest is a licensee to whom the host was under an obligation to remove such conditions as might reasonably create danger not apparent to the guest, or to warn the guest against such a condition. In Goldberg v. Straus, 45 So.2d 882 (Fla. 1950), it was held that the host is liable for injuries caused by natural or artificial conditions on the premises of which he has actual knowledge and which he realized involved an unreasonable risk to his guest when he fails to exercise reasonable
upon property rights to require one who has knowledge of a dangerous condition upon his premises to impart such knowledge to a guest there by his invitation when he realizes, or should realize, a danger is thereby presented to his guest. It has even been advocated, and not without merit, that all classification should be abolished in this field, and the cases dealt with in accord with modern tort theory, basing the duty upon the magnitude of the risk.\textsuperscript{31}

RAYMOND ROBERTS

care to warn or make safe. In Faber v. Meiler, 278 App. Div. 849, 104 N.Y.S.2d 485 (2nd Dep't 1950), it was held that if the defendant realizes that the condition involved an unreasonable risk, and he failed to use reasonable care to correct it or to warn the plaintiff of the condition and risk, the host is liable for injury caused thereby. In Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 463 (1951), it was held that a social guest should fall within a separate classification. "The duty actually owed is to exercise ordinary care . . . coupled with the duty to warn the guest of any condition known to the host and which one of ordinary prudence and foresight in his position would reasonably consider dangerous."

31. Prosser, \textit{Business Visitors and Invitees}, 26 \textit{Minn. L. Rev.} 573 (1942). Marsh, \textit{The History and Comparative Law of Invitees, Licensees and Trespassers}, 69 \textit{L. Q. Rev.} 182, 199 (1953): "The limitations inherent in the principles set out (the distinction between invitees, licensees and trespassers) . . . have today no necessary relevance to (although they have in fact been allowed to preclude) the question: 'How far should an occupier be liable \textit{in negligence} for injury suffered by visitors to his property?'." See also Law Reform Committee, \textit{Third Report} ("Occupiers' Liability to Invitees, Licensees and Trespassers") (England).