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Recent Cases

COPYRIGHT-INFRINGEMENT-BURLESQUE AS "FAIR USE"

Benny v. Loew's Inc.1

In October 1945 appellant, Jack Benny, broadcast a fifteen minute parody or burlesque of appellee, Loew's, copyrighted movie, "Gaslight." Consent for this broadcast had been obtained. Six years later, in January 1952, Benny televised "Autolight," another burlesque of "Gaslight," without consent. Loew's promptly notified Benny they considered the program an infringement; Benny replied that his burlesque was "fair use." No action was brought until June 1953, when Benny commenced remaking "Autolight," this time in the form of a film to be shown on his television program. An injunction to restrain Benny from using the television film was granted by the federal district court.2 On appeal to the Court of Appeals for the Ninth Circuit, held, affirmed. A substantial taking of copyright material by use of burlesque constitutes an infringement; this burlesque was not "fair use." The Supreme Court of the United States granted certiorari April 29, 1957.3

This is a case of first impression and is of importance due to the expansion of television and its quest for material, which often conflicts with that of the motion picture industry. Burlesque is widely used in the field of entertainment and this decision could restrict future comedy programs in television as well as those in other fields of entertainment.

Copyright today is entirely statutory4 and was created in this country through the power vested in Congress by the United States Constitution.5 The copyright statute gives the creator exclusive rights to his copyright material,6 but this has been somewhat limited by judicial decisions.7 The courts, in limiting this statutory monopoly, hold that "fair use" may be made of the copyright material. However, the courts have not been consistent in deciding what constitutes "fair use." They seem to confuse infringement, the violation of the copyright, with "fair use,"8 a defense to an injunction for infringement.9

1. 239 F.2d 532 (9th Cir. 1956).
5. Art. I, § 8, para. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").
Infringement occurs when it is shown that a valuable and substantial part of the copyright material has been copied without authority.10 The court in the instant case found infringement by a detailed comparison of the scripts and a viewing of the two programs.11 Infringement was not a major issue in this case however, as the trial court recognized that this point was virtually conceded by the appellant.12

After determining infringement, it is necessary to see whether the doctrine of "fair use" applies to the situation. "'Fair use' is a privilege in others than the owner of a copyright, to use the copyrighted material in a reasonable manner, without his consent, notwithstanding the monopoly granted to the owner by the copyright."13 This use is not provided for in the statute, but has been authorized by judicial decisions from the beginning.14

Determination of "fair use" has been termed as "... the most troublesome in the whole law of copyright. ..."15 Emphasis, in this determination, is placed on the quantity of material taken, the competitive or superseding effect of the works, the economic detriment, and/or the lessening of demand for the original.16 In a recent decision, a court decided "fair use" by saying that the "... law looks to the character of the two works, the nature and object of the selections made, and quantity and value of the materials used."17

Applying the above tests, the courts have held that quotation for the purpose of review and criticism was "fair use."18 The use of an eight line chorus in an article supporting a professional football team was found to be "fair use."19 On the other hand, when a pamphlet quoted three lines from a copyrighted book, the court said that such use was not fair.20

In deciding whether burlesque was "fair use," the court in the instant case, approving the language of the trial court, said "... 'parodized or burlesque taking is to be treated no differently from any other appropriation...'"21 However, this same trial court seven months later, in another opinion by the same judge stated:

"Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original."22

11. 239 F.2d at 536.
12. 131 F. Supp. at 171.
21. 239 F.2d at 537.
This case involved the Sid Caesar television program, with Caesar's "From Here to Obscurity" a burlesque on the movie, "From Here to Eternity." The trial court found the following similarities: locale, settings, situations, principal members of the cast, incident, development, treatment, and expression. Yet the court says this "... does not constitute a taking of a substantial portion..."24

In reading the two cases, one wonders why different results were reached at the trial level. Was it due to Judge Yankwich's article25 asking "for an expanded test" in the field of "fair use"? Did the younger comedian, Sid Caesar, appeal more to the judge's sense of humor than the older, Jack Benny?26 Or was there actually a measurable difference in the amount of taking?

Even if there were some difference in the amount of material taken, it is difficult to see why different results should be reached. Each burlesque copied material, the original play was apparent in both cases, and demand was not lessened for the original. Burlesque, due to its natural infringing nature, should either be a defense per se, or no defense at all. This is based on the fact that burlesque either causes injury, or it does not. If injury was done to "Gaslight," then like injury occurred to "From Here to Eternity." It is submitted that burlesque causes no appreciable injury to the copyright material and therefore should fall under the doctrine of "fair use" and be a defense per se. Until the boundaries of "fair use" are determined in this and related fields, we must agree with Judge Morrow, who over sixty years ago said: "What constitutes a 'fair use' is often a very difficult question to answer."27

STANLEY A. GRIMM

CORPORATE DISSOLUTION-SURVIVAL OF REMEDY

Levy v. Liebling1

A Kentucky corporation had a money decree entered in its favor against defendant in 1939 in Illinois but this judgment was never satisfied. The corporation proceeded voluntarily to dissolve in 1942, the pertinent statutes2 requiring the corporation to collect its assets and pay or provide for the payment of its debts, the remaining assets to be distributed to the shareholders according to their respective rights and interests. A certificate of dissolution, issued to the corporation by the Secretary of State, was properly recorded on November 28, 1942. In 1955 the former shareholders joined with the corporation in an action in district court to recover the amount owing on the judgment ($28,862.26) plus interest thereon and costs.

23. Id. at 352.
24. Ibid.
26. Caesar is 35, Benny is 63.
27. Simms v. Stanton, 75 Fed. 6, 10 (C.C.N.D. Cal. 1896).

1. 238 F.2d 505 (7th Cir. 1956).
Defendant's motion to quash was allowed as to the corporation for want of capacity to sue but denied as to the individual plaintiffs. Defendant failed to answer further whereupon the court entered a default judgment against defendant sixteen years after judgment originally was entered. On appeal, held, affirmed. The former shareholders were not lacking in capacity to enforce a judgment received by them as an asset of a now dissolved corporation.

Kentucky statutes provide for an extension of corporate life for a period of two years after dissolution, whether by issuance of a certificate of dissolution, decree of court, or by expiration of the corporate period of duration. The object is to save unimpaired for this added period only, remedies available to or against the corporation, its directors, or shareholders, for any right or cause existing, or any liability incurred, prior to such dissolution. The problem here, then, was whether the shareholders had a remedy for a right or cause of action that was in existence before the dissolution of the corporation.

If, upon the voluntary dissolution of the corporation, the assets are distributed as required by statute, it would seem that the distribution would take place prior to dissolution, since the statute provides that the corporation shall distribute its assets either in cash or in kind before the state issues a certificate of dissolution. In this case, then, if the statute had been complied with, the unsatisfied judgment, as an asset of the corporation, would have gone to the shareholders prior to dissolution, and, having existed as a shareholders' right or cause of action before dissolution, their remedy thereon, saved for a two year period, would thereafter be lost to the shareholders.

If the statute is not complied with and the remaining assets are not distributed by the corporation to its shareholders, then, according to the cases, title to the assets passes to the shareholders by operation of law upon or after dissolution. In the instant case, then, the judgment coming to the shareholders after dissolution, there was no remedy available to the shareholders for a right existing prior to such dissolution, to be lost by failure to bring suit within two years after the date of dissolution.

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5. Ibid.
7. Kash v. Lewis, 224 Ky. 679, 6 S.W.2d 1098 (1928) (property of business corporation vests in stockholders on dissolution, subject to corporate liabilities); cf. Milgram v. Jiffy Equipment Co., 362 Mo. 1194, 247 S.W.2d 668 (1952) (on dissolution and payment of expenses and corporate liabilities, title to corporate assets vests automatically in shareholders and their right to receive the remaining assets is absolute; a shareholder may sue at law and recover his proportionate share of corporate assets); Goodstein Millinery Company v. Berkley, Inc., 324 Ill. App. 229, 57 N.E.2d 756 (1944) (on dissolution of a corporation, its assets belong to the shareholders subject to the rights of corporate creditors); Wittich v. Wittich, 263 S.W. 1001 (Mo. 1924); 16 FLETCHER, PRIVATE CORPORATIONS § 8134 (1957 Supp.); 13 AM. JUR., CORPORATIONS § 1352 (1938). Contra, Simms v. Coastal Oil & Fuel Corp., 200 La. 1080, 9 So. 2d 428 (1942).
Accordingly, suit may be brought within the usual statutory period allowed for judgments. This is the result the court seems to reach in this case, allowing a recovery some sixteen years after dissolution.

However, in the course of its opinion the court stated,

"... We think it can be hardly open to doubt but that the stockholders, at the time Imperial became extinct for all purposes including the two-year period allowed by Kentucky law for the winding up of its business, acquired the title to and became the owners of the judgment which they now seek to enforce." (Emphasis added.)

This language is unfortunate and seems to be contrary to the Kentucky cases cited by the court. The corporation could have enforced the judgment within the two year period but failed to do so. Moreover, the shareholders could have initiated a derivative suit to enforce the corporate right, but failed to do so. After the expiration of the two year period, the remedy for the right was lost, and if, as the quoted language has it, the right only then passed to the shareholders, it would seem that it came to them subject to the same attribute of unenforceability which it had as a corporate asset.

DONALD HOEL

EQUITY—RESCISSION OF LAND SALE
TRANSACTION—FRAUD, MENTAL INCAPACITY
AND INADEQUACY OF CONSIDERATION

Hudspeth v. Zorn

Plaintiffs Hudspeth (husband and wife) conveyed to defendant Zorn 230 acres of land for $1,000.00, following his representations as to the value and condition of the land. Plaintiffs had not seen the land for about ten years and had no knowledge of land values. Zorn, having farmed the land for about twenty-seven years, had plaintiffs' complete confidence in the use of the land and the profits thereby derived. Mr. Hudspeth was subsequently found to be of unsound mind and a guardian was appointed. Mrs. Hudspeth and the guardian brought this suit to set aside the deed and to recover one-fourth of the crops raised as rent for the use of the land. The Supreme Court of Missouri held that Mr. Hudspeth was mentally incapable of executing the deed, that the Hudspeths had relied on Zorn's representations as to the value and condition of the land, that these representations were untrue, and that the consideration paid by Zorn was grossly inadequate. The final decree set aside the deed, ordered the consideration (which had been paid into court) returned to Zorn, and denied a recovery for rent due to certain improvements made by Zorn.

9. 238 F.2d at 507.
1. 292 S.W.2d 271 (Mo. 1956).
Three major factors involved made this a strong case for setting aside the deed: 1) inadequacy of consideration; 2) mental incapacity to execute the deed; and 3) false representations and reliance thereon. The presence of all three, interrelated as they are, raises a question as to the minimum grounds sufficient to justify such an action. Let us consider these factors individually.

I. INADEQUACY OF CONSIDERATION

In Missouri inadequacy of consideration, standing alone, does not furnish sufficient basis for invalidating a deed unless it is so great that under the circumstances it amounts to fraud. Relief is granted not for inadequacy of consideration but on grounds of fraud.

Despite dictum to this effect no Missouri case could be found in which gross inadequacy of consideration, without other indication of inequity, was sufficient to set aside a deed. This justifies a conclusion that inadequacy of consideration, in and of itself, serves merely as a badge of fraud demanding careful scrutiny, and may, in conjunction with other inequitable conditions, constitute grounds for rescinding a conveyance.

II. MENTAL INCAPACITY TO EXECUTE DEED

The weight of authority supports the view that conveyances of an insane person are voidable, subject to certain conditions. They may be disaffirmed by him or in his behalf, but they are not void, and they remain in full force until disaffirmed. Where such a conveyance has been executed in good faith, and for a fair consideration, it will not be set aside unless the parties can be restored to their original position.

Great mental weakness in the grantor, although not amounting to incapacity as such, when coupled with a gross inadequacy of consideration, is sufficient grounds for setting aside a conveyance. From this it would appear that the combination in the instant case of Hudspeth's mental incapacity plus the extreme inadequacy of consideration would be a sufficient ground for setting aside the deed.

2. Meyer v. Schaub, 364 Mo. 711, 720, 266 S.W.2d 620, 624 (1954); Frey v. Onstott, 357 Mo. 721, 730, 210 S.W.2d 87, 93 (1948); Wigginton v. Burns, 216 S.W. 755 (Mo. 1919).

3. Frey v. Onstott, supra note 2; Bussen Realty Co. v. Benson, 349 Mo. 58, 159 S.W.2d 813 (1942); see Kerr, FRAUD AND MISTAKE 187 (1872).

4. Meyer v. Schaub, supra note 2; Frey v. Onstott, supra note 2; Bussen Realty Co. v. Benson, supra note 3.

5. State ex rel. United Mut. Ins. Ass'n v. Shain, 349 Mo. 460, 469, 162 S.W.2d 255, 259 (1942); Jamison v. Culligan, 151 Mo. 410, 52 S.W. 224 (1899).


7. Wright v. Brown, 242 S.W.2d 486 (Mo. 1951); Colquitt v. Lowe, 184 S.W.2d 420, 421 (Mo. 1945); Jones v. Belsche, 238 Mo. 524, 141 S.W. 1130 (1911); Ryan v. Ryan, 174 Mo. 279, 73 S.W. 494 (1903).
III. FALSE REPRESENTATION AND RELIANCE THEREON

The court in the instant case states that the real issue involved is the right to the rescission of a transaction induced by false representations and the decision is predominantly based thereon. Where a party is induced to enter into a transaction with another party, when under no duty to do so, by means of the latter's fraud or material misrepresentation, the transaction is voidable as against the latter.

It appears that Zorn had full control of the farm, decided how it was to be farmed, rented part of it to others, sold the crops, determined the Hudspeths' share, and sent them the proceeds. There was a complete reliance upon him in these matters indicating a confidential fiduciary relationship. This relationship of trust and confidence is important in finding reasonable reliance on the part of the Hudspeths. Moreover, Mr. Hudspeth's mental weakness, which placed him at a distinct disadvantage in dealing with Zorn, simplified the finding of reliance.

It is not necessary to find an intent to deceive on the part of Zorn or even a knowledge of the falsity of his representations. All that need be shown is that the representations were false and actually misled the person to whom they were made. There is no requirement that the parties be restored to their original position.

Here the court finds material misrepresentation and reasonable reliance based upon the confidential fiduciary relationship existing between the Hudspeths and Zorn. This would suffice for setting aside the deed without resort to the other inequitable factors involved.

CONCLUSION

We have seen that inadequacy of consideration, standing alone, does not constitute a sufficient ground for setting aside a deed. Mental incapacity without other circumstances is likewise insufficient, at least, unless the parties may be restored to their original position. When combined, these two factors justify rescission. False representation inducing reliance also appears to be ample justification for setting aside a deed. Thus the court could have based its decree for rescission on any two of the three inequitable factors present without regard to restoring the parties to their original position.

G. DALE REESMAN

8. 292 S.W.2d at 275.
10. 292 S.W.2d at 275. See also, Machens v. Machens, 263 S.W.2d 724, 730 (Mo. 1954); Armstrong v. Logan, 115 Mo. 465, 22 S.W. 384 (1893).
12. See Schellhardt v. Schellhardt, 253 S.W.2d 181, 184 (Mo. 1952).
FUTURE INTERESTS—CONTINGENT REMAINDERS
IMPLIED CONDITION OF SURVIVORSHIP

In re Trust Estate of Yeater

The will of John J. Yeater provided that after the death of the testator's widow (who was given an estate for life) the property was to be distributed in four equal parts: one-fourth to each of the testator's two sons, Charles and Merritt, and two-fourths to the sons in trust for their sisters, Laura and Stella. It further provided:

"Upon the death of either of my said daughters, her interest shall pass to the heirs of her body on the attainment of their respective majorities and shall not vest until then, and should she have no such heirs, to her sister and brothers and their heirs."

After the death of the widow, the sons acquired their own quarter-interests and assumed their duties as trustees of the others. Stella died survived by two bodily heirs. Charles and Merritt subsequently assigned all their interests under the Laura trust to Stella's children. Charles died survived by issue. Merritt and Laura died in that order, neither survived by issue.

The trial court ruled that, by virtue of the assignment from Charles and Merritt, Stella's two children were entitled to all the remainder of the Laura Yeater trust estate. On appeal by the issue of Charles the Kansas City Court of Appeals reversed the judgment and entered a decree granting half to the issue of Charles and half to the children of Stella. All parties agreed that the will created alternative contingent remainders, the first alternative being to pass the estate to such of Laura's bodily heirs as reached majority, and, in default thereof, to "her sister and brothers and their heirs." The court of appeals accepted the additional contention of the appellants that, besides the above contingencies, the brothers' remainder interests were subject to the further condition of survivorship. As neither assignor survived Laura, the court held that the assignors' contingent interests never vested and that their heirs took by purchase rather than by descent. The court arrived at this conclusion by construing the words "and their heirs" as words of purchase, designating a group which was to take upon Laura's death in the event that the other sister and brothers were then deceased. The effect of this construction was to make it necessary for Charles and Merritt to survive Laura for their interests to vest. As Laura died without issue, thus causing failure of the first alternative, and as neither brother survived her, which was a failure to fulfill the condition precedent to their taking, the court found that the remainder in Laura's trust estate passed directly by purchase to this third group.

The case thus turned on two issues: (1) whether a future interest, contingent on some other fortuitous event, should be construed as subject by implication to the additional condition that the devisee survive the preceding particular estate, and

2. Id. at 583.
(2) whether the words "and their heirs" in a will should be construed to be words of purchase or limitation. Since future interests can be created in personality as well as in real property, an interest analogous to a remainder after a life estate is valid. Thus the fact that personal property is involved in the Laura Yeater estate does not alter the result from that which would be reached if the litigation concerned real property.

Regarding the first issue, the Supreme Court of Missouri in Tapley v. Dill, construing a similar will, held that the devisee took an alternative contingent remainder, freely alienable and devisable and not subject to any condition that he survive the preceding particular estate. The court pointed out that where the contingency refers to the time of possession and not the time for title to pass or for the determination of the person taking, it is not logically sound to consider the contingent remainder subject to an implied condition that the donee survive the preceding estate. This view is in accord with the great weight of authority. In the past a few jurisdictions have held otherwise but one of them has since remedied the situation by statute.

The Kansas City Court of Appeals, having interpreted the desire of John J. Yeater as being to keep the property in his blood line as long as possible, and knowing that they should so construe the will as to give effect to this desire, apparently sought some means of circumventing the doctrine of Tapley v. Dill. In so doing they seized upon the words "and their heirs," holding that the intended meaning was "her sister and brothers or their heirs." As the heirs were held to have acquired alternative contingent remainders by purchase (which remainders would vest upon the double contingency of Charles predeceasing Laura and her dying without issue) it became necessary for Charles to survive Laura in order for his contingent interest in her trust estate to vest. However, in the attempt to by-pass Tapley v. Dill, it seems that the court ran afoul of another well settled doctrine in Missouri, that even when used as to personal property and not necessary to create an interest of the duration desired, the word "heirs" is considered as a word of limitation and not of purchase unless the will shows clearly that it is used to designate a new class of beneficiaries. It can be questioned whether any such meaning was clearly intended in the Yeater will.

JOHN CHARLES CROW

3. BLACK, LAW DICTIONARY (4th ed. 1951) (words which denote the person who is to take the estate).
4. BLACK, op. cit. supra note 3 (words which have the effect of marking the duration of an estate).
5. 1 Simes & Smith, Future Interests § 360 (2d ed. 1956); Burbay, Real Property § 308 (1943); see 2 Restatement, Property § 153 (1936) (defining the term future interest to include an interest in a thing other than land). See also 2 Restatement, Property 814–20 (1936).
7. 358 Mo. 224, 217 S.W.2d 369 (1949), discussed in Eckhardt, Tax Titles, 15 Mo. L. Rev. 376, 387 (1950). Testator left to Joe Tapley, as trustee, two one-fourth
INSURANCE—ACCIDENT—VOLUNTARY EXPOSURE TO DANGER

Baker v. National Life & Accident Insurance Co.1

The beneficiary sued under the double indemnity provision of a life insurance policy which provided for additional payment “upon receipt of due proof that the death of the insured resulted directly and independently of all other causes, from bodily injuries effected solely through external, violent, and accidental means . . .” The insured had invited a friend to shoot a pepper can off his head at close range. Immediately before the gun was fired, the can slipped forward, and when he jerked his head up to balance it, the bullet entered his forehead, causing instant death. The company’s only defense was that death did not result from accidental means. The supreme court affirmed dismissal of plaintiff’s cause. It declared that the company insured for death caused by accidental means rather than for death commonly thought to be an accident; and where the injury is the natural result of an act in which the insured intentionally engages it is not produced by accidental means.

Insurance companies in double indemnity provisions of life policies and in straight

shares of his estate, one each in trust for his grandson, Harry Mitchell, and his bodily heirs, and his granddaughter, Mary Mitchell, and his bodily heirs. It was further provided that if Mary died without heirs of her body, her trust estate was to become part of Harry’s, and in case he should at that time be deceased, then it was to become the property of Joe Tapley. The latter died leaving his estate to his widow. Mary and Harry died in that order, neither survived by issue. Joe Tapley’s widow was declared owner of all of the trust estate on the theory that her husband, at his death, owned a contingent remainder in the estates, and this interest was capable of being devised to her.

8. 2 Simes & Smith, op. cit. supra note 5, § 594 (“Certainly there is no rule of law that a condition precedent of survivability is implied wherever a gift is subject to any other condition precedent.” This would make every contingent future interest inalienable which in the hands of the original devisee or legatee); Fulton v. Teager, 183 Ky. 381, 209 S.W. 535 (1919); Fisher v. Wagner, 109 Md. 243, 71 Atl. 999 (1909); Tapley v. Dill, supra note 7; Colony v. Colony, 97 N.H. 386, 89 A.2d 909 (1952); In re Wilkinson’s Will, 114 N.Y.S.2d 423 (Surr. Ct. 1952); In re Massey’s Estate, 235 Pa. 269, 83 Atl. 1087 (1912); Loring v. Arnold, 15 R.I. 428, 8 Atl. 335 (1887).


11. § 468.620, RSMo 1949; Ott v. Pickard, 361 Mo. 823, 237 S.W.2d 109 (1951); In re Bernheimer’s Estate, 352 Mo. 91, 176 S.W.2d 15 (1943); First Trust Co. v. Myers, 351 Mo. 889, 174 S.W.2d 378 (1943); Gannett v. Shepley, 351 Mo. 286, 172 S.W.2d 857 (1943); Graves v. Graves, 349 Mo. 722, 163 S.W.2d 544 (1942); Gardner v. Vanlandingham, 334 Mo. 1054, 69 S.W.2d 947 (1934).

12. Gregory v. Borders, 345 Mo. 699, 136 S.W.2d 306 (1940); Garrett v. Damron, 110 S.W.2d 1112 (Mo. 1937); Eckle v. Ryland, 256 Mo. 424, 165 S.W. 1035 (1914); Union Trust Co. v. Curby, 255 Mo. 393, 164 S.W. 485 (1914); Roberts v. Crume, 173 Mo. 572, 73 S.W. 662 (1903); Jarboe v. Hey, 122 Mo. 341, 26 S.W. 968 (1894); Chew v. Keller, 100 Mo. 362, 13 S.W. 395 (1890).

1. 298 S.W.2d 715 (Tenn. 1957).
accident policies have adopted the term *accidental means* to restrict the risk assumed to those cases where the *cause* of death or injury was accidental. It is not enough that the loss was accidental in the sense of being unexpected or unforeseen. A majority of the courts have followed this distinction between cause and result. A substantial minority dissents, reasoning that: (1) the words should be given their common meaning as understood by the average man when he takes out an accident policy with all ambiguities resolved against the insurer, and (2) the distinction is technical and if carried to extreme nothing physical in nature could be an accident.

The Missouri supreme court in *Caldwell v. Travelers' Ins. Co.* accepted the majority or less liberal view. The essence of the Missouri test is that where the insured intentionally does an act which produces an unusual result, the loss therefrom is not caused by accidental means, unless "a mischance, slip, or mishap occurs in doing the act itself."

Three distinct classes of cases can be found to which this test has been applied. The first of these is the self-inflicted harm or suicide case. It has been held that if the insured commits suicide while sane there can be no recovery, while if insane such death is by accidental means. In the former case the insured has full control over the causes of death and therefore they cannot be accidental. If the insured is insane the insured's lack of control brings the causes into the area of the accident.

Those cases in which the insured voluntarily engages in acts which are inherently dangerous and which are likely to produce loss represent the second group considered under the Missouri rule. Their facts are analogous to the *Baker* case. If the insured is an aggressor the test used is not that of negligence, but, it seems, whether the insured should have expected the quality of resistance he got. An important factor considered is the ferociousness of the insured's attack. Recovery is denied more

3. 5 Couch, Encyclopedia of Insurance Law § 1137, at 3975 (1929).
6. 305 Mo. 619, 267 S.W. 907 (1924). This leading Missouri case adopts the rule laid down in Mutual Accident Ass'n v. Barry, 131 U.S. 100 (1899).
7. See New Amsterdam Casualty Co. v. Jones, 135 F.2d 191 (6th Cir. 1943) (clarifying the problem that an accident occurs from the standpoint of the one suffering rather than from the one inflicting it.) In suicide cases these two ways of looking at the loss are combined.
9. Compare Camp v. John Hancock Mutual Ins. Co., 165 S.W.2d 277 (St. L. Ct. App. 1942) with Podesta v. Metropolitan Life Ins. Co., 159 S.W.2d 596 (St. L. Ct. App. 1941). For a possible exception to the rule see Lovelace v. Travelers' Protective Ass'n, 126 Mo. 104, 28 S.W. 877 (1894) (however, there the risk assumed was broader the policy covering an "accident" and not "accidental means").
strictly on a negligence basis in the instance of the insured's foolhardy act, but usually the negligence must be of a high degree so that the insured is said to be held responsible for the natural and probable consequences of his act. The courts view the loss from this type of conduct as foreseeable and not in any sense the result of accidental means.

Difficulty arises in the interpretation of accidental means in the third class of cases, for here the insured does something not likely to produce injury, but which, nevertheless, does. The slip, mishap, or mischance may sometimes be easily discerned in the intentional act, but if it cannot be found recovery is denied. When the Missouri test is applied to the close case, its efficacy seems to have been weakened. The Missouri supreme court has held death by sunstroke (barring intentional over-exposure) to be by accidental means. But the United States Supreme Court in *Landress v. Phoenix Mut. Life Ins. Co.*, also purportedly following the before-mentioned majority rule, has come to an opposite conclusion. These decisions cannot, it seems, be reconciled. The Missouri court simply has allowed a more equitable result in sunstroke cases.

The decision here noted represents a class of cases in which, because of the nature of the insured's conduct, the courts (recognizing the distinction between "accident" and "accidental means") have been able to devise a relatively uniform standard. The Missouri test denies recovery if the insured's actions are such that the resulting loss follows naturally and probably from them. The injury is foreseeable and not in any sense caused by accidental means. Negligence per se is not spoken of in the decisions.

10. Callahan v. Connecticut General Life Ins. Co., 357 Mo. 187, 207 S.W.2d 279 (1947); Perringer v. Metropolitan Life Ins. Co., 241 Mo. App. 521, 244 S.W.2d 607 (Spr. Ct. App. 1951); Pope v. Business Men's Assur. Co., 131 S.W.2d 887 (St. L. Ct. App. 1939). For another possible exception, see McKeon v. Nat'l Casualty Co., 216 Mo. App. 507, 270 S.W. 707 (St. L. Ct. App. 1925) (again the policy covered the broader term "accidental event." Also the case can be distinguished on its facts for though the insured fired back at police, they had originally, while not in uniform and without a warrant, given chase, firing over the insured's head). To the insured the event of death was an accident.


17. See Note, 13 TEMPEST L.Q. 125, 131 (1938).

but usually a high degree of it is present. In the not so clear case, the Missouri decisions committed to the majority view have in some instances crossed over to the minority view confusing this branch of the law. Solutions have been offered, but it has been suggested the essence of the problem might be that the term “accidental means” is like the term “proximate cause” and incapable of precise judicial definition. Progress in this field of the law will be made either by judicial interpretation, a more lengthy insurance contract, or public regulation, but the risk assumed should be commensurate with the premium paid, whatever method is used.

HARRY D. PENER

NECESSARIES—RIGHT OF WIFE TO SUE HUSBAND FOR REIMBURSEMENT

Smith v. Smith

Plaintiff—wife’s petition charged that defendant—husband abandoned her without cause and did not thereafter contribute anything for her support, by reason of which plaintiff was required to expend her own funds for the necessities of life. Plaintiff asked that defendant be required to reimburse her for the money she had so expended. The trial court dismissed plaintiff’s petition because of failure to state a claim upon which relief could be granted. On appeal, held, reversed. Since the disabilities of the wife have been removed by the married women’s acts, there is no reason why she cannot now maintain this action against her husband.

A husband, at common law, has the duty to support his wife. This duty is created by the marriage relation and depends upon no other theory of law to support it. The liability continues even though the wife has a separate estate and is capable of supporting herself. It is not ended by a separation of the parties, unless the separation be the fault of the wife alone. It is not ended by the adultery of the

1. 300 S.W.2d 275 (Spr. Ct. App. 1957).
wife, if cohabitation continues,⁶ and it was not relieved by the passage of the married women’s acts or the family expense statutes.⁷

The husband’s duty has been expressed as a duty to supply necessaries. The term “necessaries” is not capable of exact definition, but generally it includes those things, excluding money,⁸ which the husband would normally supply to the wife, measured by the station of life which he enjoys.⁹

If the husband fails to supply these necessaries, the common law allows the wife—if she can—to obtain them from a merchant, pledging the husband’s credit therefor. The merchant then can collect from or bring an action against the husband for their reasonable value.¹⁰

In some jurisdictions, a third person who has loaned money to the wife for the purchase of necessaries may recover against the husband by a bill in equity praying to be subrogated to the rights of the merchant supplying those necessaries. The third person must show that the money was actually used to buy the necessaries.¹¹ Massachusetts has refused to allow this action to a third person, saying that no merchant acquired a right to which a third person could be subrogated.¹²

These methods of enforcement have obvious disadvantages for the wife, as merchants are not anxious to involve themselves in litigation, and the wife may not always be able to find a friend who will lend her money.

Since the passage of the married women’s acts, the wife can sue the husband in

law or in equity except as to personal tort, and some courts have allowed her to sue even for a tort by the husband against her person. Therefore, since her common law disability as to actions against her husband has been removed, some courts, including now the Springfield Court of Appeals, have allowed the wife to enforce her right to support more directly by an action against her husband for reimbursement of monies expended out of her own estate for her support. Other courts have refused to allow this action, chiefly on the ground that the married women's acts have not so emancipated the wife as to allow an action such as this, or that the statutory remedies provided the wife are exclusive of any other remedies.

An Illinois case, cited by the Missouri court to support its holding, has ruled that a wife may not maintain an action for reimbursement of payments voluntarily made by her for family expenses during the time the parties were living together. Other courts seem to support this view. However, an Oklahoma decision, also cited in the principal case, is to the effect that it makes no difference whether the parties were living together at the time of the wife's expenditures.

Another factor worthy of note is that the court in the principal case held plaintiff's petition good even though she did not allege that she expended her money in expectation of repayment from her husband. A Minnesota court, deciding a case in which the parties were living together at the time of the expenditures, has ruled that such an allegation is necessary to a valid cause of action.

Perhaps the chief reason for the distinction which seems to have been made between cases where the parties are living together when the expenditures are made by the wife, and cases where the parties are separated at that time, is that in the former there is a strong presumption of a gift by the wife, which presumption does not naturally arise when the parties are separated. If this presumption could be rebutted, it would seem that the wife should be able to recover in any case.

David A. Eggers

13. Ex parte Badger, 286 Mo. 139, 144, 226 S.W. 936, 938 (1920). In ruling on count two of plaintiff's petition in the principal case, the court held that a wife, living apart from her husband, can maintain an action against him for conversion of personal property.


NUISANCE—PARKING ON PUBLIC STREET IN FRONT OF
PLAINTIFF'S HOUSE

Loosian v. Goudreault

Plaintiff sought an injunction to restrain defendant from parking oil trucks on the street in front of plaintiff's residence while delivering oil to defendant's adjacent property. Defendant, operating under proper license, had stored oil in underground tanks on his property for 18 years. The oil deliveries were accomplished in approximately 35 to 45 minutes and usually were made before 6 p.m. It was possible for the trucks to be emptied while standing upon defendant's land, but it would consume more time in consequence of the peculiar lay of the land. From time to time spots about two feet in diameter appeared on the sidewalk as a result of oil drippings from the hose. The street in question was a public way with each abutting owner holding a fee to the center. The trial court determined that oil odors were annoying the plaintiff, that these odors were emitted from the deliveries of the trucks, the storage tanks, and the operation of the pumps, but it could not determine what ratio was emitted by each. An injunction was granted on the ground that the odor issuing from the oil trucks disturbed and annoyed the plaintiff. The Supreme Judicial Court of Massachusetts affirmed. In using the public easement, defendant did infringe upon the abutting owner's right by parking trucks for such an extended and recurring period in front of his property. The court realized that the street where defendant parked his truck was a public highway and that the public enjoys an easement of travel with attendant and incidental powers in the exercise of this travel or passage right. But conduct which cannot be termed as reasonably incidental to travel interferes with the rights of the public and constitutes a wrong to the abutting owner. The court inferred by the cases cited that an injunction is a proper remedy in such an instance.

Massachusetts takes a stride in the nuisance field. In this age of automobiles parking creates a dilemma, but more vital is our aged and honored protection of the home and the reasonable enjoyment thereof. Surely the right of the abutting owner to park in front of his property should be superior to that of the user of the public way who repeatedly and habitually appropriates this space. When the abutting owner frequently comes home, or is visited by friends or business callers, and there is no space to park in front of his property as a result of the aforementioned habitual user, the right to the reasonable enjoyment of his property has been uprooted. Picture this legal paradox: an individual unreasonably using his property to the annoyance of his fellow citizen can be restrained by injunctive relief, but the individual unreasonably using a public easement uprooting the reasonable enjoyment of his fellow citizen's property cannot.

In defining a nuisance the Supreme Court of Missouri has stated, "There is no exact rule or formula by which the existence of a nuisance or the non-existence of a

1. 139 N.E.2d 403 (Mass. 1957).
nuisance may be determined. 'Necessarily each case must stand upon its own special circumstances, and no definite rule can be given that is applicable in all cases, but when an appreciable interference with the ordinary enjoyment of property, physically, is clearly made out as the result of a nuisance, a court of equity will never refuse to interfere. . .'"2 Reasonableness is the criterion.3

Applying this reasonableness test, Missouri courts have enjoined various activities as nuisances. A music shop located directly across from a clinic and hospital was enjoined from using a loudspeaker for commercial purposes in any manner so as to disturb the hospital personnel.4 The operation of a parking lot built for its customers by a grocery company, located in a residential section and used by the general public, was enjoined as a nuisance by reason of the dirt, dust, gasoline fumes, poisonous vapors and noises emitting therefrom to the damage and annoyance of the adjacent residential property owner.5 A barbecue stand located in a residential area was ordered removed because the smoke, gases, burning grease odors and fumes, coupled with noises from automobiles late at night seriously injured a neighboring landowner.6 Four Missouri cases have ordered cessation of operations of a funeral home when located in a residential area;7 such activity is said by the courts to interfere with normal happy enjoyment of the ordinary home. In two instances the operation of quarries has been enjoined, the dust, smoke, noise and vibration, coupled with the danger involved, causing excessive discomfiture to surrounding residents.8

Missouri courts have recognized limitations in the use of public streets. The Kansas City Court of Appeals stated, "The rights that arise from the establishment of a public highway constitute a public easement to travel the same throughout its whole surface and by any method of travel which is reasonable and proper in the use of public roads not prohibited by law or dedicatory restrictions and available equally to all persons, consonant with the safety and convenience of each other."9 The Supreme Court of Missouri has stated that an abutting owner has the identical right in the use of the throughfare that the public enjoys and that he also has the

2. Crutcher v. Taystee Bread Co., 174 S.W.2d 801, 805 (Mo. 1943) (injunction denied); see Biggs v. Griffith, 231 S.W.2d 875 (Spr. Ct. App. 1950) (injunction granted).
4. Ibid.
7. Leffen v. Hurlbut-Glover Mortuary, Inc., 363 Mo. 1137, 257 S.W.2d 609 (1953); Clutter v. Blankenship, 346 Mo. 961, 144 S.W.2d 119 (1940); Streett v. Marshall, 316 Mo. 698, 291 S.W. 494 (1927) (en banc); Tureman v. Ketterlin, 304 Mo. 221, 263 S.W. 202 (1924).
additional right of ingress and egress, which he may protect.\textsuperscript{10} It has further stated, "an obstruction in a street or highway may be both a public and private nuisance, and in such cases the private citizen who is specially injured may have injunctive relief."\textsuperscript{11} The Kansas City Court of Appeals, in granting an injunction against a transit company for obstruction of a public street, stated, "It is not meant to say that defendant so obstructed the way that plaintiff could not possibly get to and from his property, or that others could not do so. . . But a property owner is entitled to a safer and more convenient use of an abutting street than that. He is entitled to have it not materially obstructed."\textsuperscript{12}

Missouri cases indicate numerous instances where interference with a property owner's reasonable enjoyment of his property will be regarded as a nuisance and enjoined as such. Unreasonable public parking in front of the owner's property, in line with the limitations on the use of public streets recognized in other Missouri cases, fits into this concept of nuisance. Thus one finds ample justification for the belief that Missouri courts, should the occasion arise, will follow the lead of the Massachusetts decision and find that extended and recurring parking in front of another's property falls within the nuisance field and can be enjoined.

\textit{Edson Carter Botkin}

**REFORMATION OF DEEDS FOR OMISSION-MUTUAL MISTAKE**

\textit{Zahner v. Klump}\textsuperscript{1}

Grantees sued in equity to reform a deed to include a 7.86-acre tract allegedly omitted from the deed by mutual mistake. The grantor, now deceased, listed his farm with a broker for its sale. Grantees dealt only with the broker. The broker testified that the entire farm was for sale, and that the grantor had said nothing about keeping part of it. As the land was described in four deeds, the broker had an abstractor draft the deed and describe the land in one deed. Some twelve years after the deed was delivered and recorded the grantees sought to convey an easement over the tract in question. It was then they discovered that the 7.86-acre tract had been omitted from the deed. The grantees then communicated with the abstractor who said he would try to straighten out the matter. He attempted to do this by securing quitclaim deeds from the heirs of the grantor for the tract in question, but the grantor's widow and child refused to execute them. As a result the grantees brought this action. There was further testimony that a check of the records of the county assessor and collector indicated there was no land other than the farm assessed to the


\textsuperscript{11} See note 10 supra.


\textsuperscript{1} 292 S.W.2d 585 (Mo. 1956).
grantor at the time of the conveyance. The Supreme Court of Missouri allowed the deed to be reformed to include the 7.86 acres.

For reformation of a written instrument a prior agreement between the parties must be established and a mistake in reducing that agreement to writing. The establishment of such agreement has in some cases required proof that is clear, cogent, and convincing; other cases required that the proof need not be beyond a reasonable doubt; while others required proof such as to leave no reasonable doubt either as to the mistake or its mutuality. In City of Warsaw v. Swearngin, decided November 12, 1956, the Supreme Court of Missouri used language indicating that the proof be beyond a reasonable doubt. In any event, the testimony of the broker and abstractor and the action of the abstractor in securing quitclaim deeds to the land in question satisfies any of these tests.

As previously stated reformation depends on the establishment of a prior agreement between the parties, but here one of the parties is deceased and the action is against his heirs. This in itself will not preclude reformation for if the prior agreement is established equity will reform the writing not only between the original parties, but also those that claim in interest under them. Included among these are heirs, assigns, personal representatives, grantees, and purchasers with notice.

The agency of the scrivener has been a source of difficulty in an action for reformation. It has been stated that where the scrivener, in drawing the instrument, acts as the agent of only one of the parties the mistake is not mutual, but unilateral and in such case reformation will be denied. In the instant case, however, and also in City of Warsaw v. Swearngin the test for reformation is the establishment of the prior differing agreement of the parties. Where this is done the agency of the scrivener is deemed unimportant. In fact his agency is a controlling factor only when his mistake is the sole basis for pleading mutual mistake.
The grantee's laxity in not inspecting the deed until some years later raises the question of whether he should be precluded from reformation on some type of estoppel theory. Mere failure of inspection is not of itself a sufficient reason for denying reformation. The court indicates, however, that where the grantee was grossly negligent in failing to examine the deed, or the grantor was injured by the grantee's delay in discovering the mistake, the grantor may preclude reformation by showing such injury and pleading laches. Also the lapse of time between the issuance of the deed and discovery of the mistake will not without more preclude reformation.

In Lauffer v. Smith a delay in bringing an action for reformation was excused because of lack of knowledge of the mistake and prompt bringing of the action after its discovery. Here too, however, the court intimates that should there be more than a mere lapse of time, such as injury to the other party resulting from the delay, the one seeking reformation may be barred.

In reformation cases since a writing is to be altered by oral testimony the parol evidence rule presents a problem. As a general rule oral evidence may not be used to alter a written instrument. However, it seems to be the rule in Missouri that mistake establishes an exception to the general rule, and oral testimony is admissible to vary the terms of the written instrument.

In the principal case reformation is sought in order to conform the deed to the oral agreement of the parties. Since an oral agreement concerning the sale of land is involved, a question arises whether the statute of frauds would be a defense. Tucker v. Dolan indicated it would not. In that case a verbal agreement for the sale of land was made and a deed executed. The court held that the delivery of the warranty deed removed the sale from the statute of frauds. The removal of the case from the statute of frauds was bolstered by the fact that the grantee had taken possession of the land. The same situation prevails in the instant case.

In conclusion it appears that the right to reformation of a written instrument based on mistake is predicated on the establishment of a prior agreement between the parties and the failure of the written instrument to embody the terms of that agreement. Once such agreement is established, by whatever standard of proof required, the written instrument will be reformed to coincide with the original agreement of the parties.

Gustav J. Lehr

14. 337 Mo. 22, 85 S.W.2d 94 (1933).
15. Bellows v. Porter, 201 F.2d 429 (8th Cir. 1953).
16. Miller v. Haberman, 359 Mo. 1012, 1017, 224 S.W.2d 1002, 1005 (1949) ("The rule precluding the consideration of extrinsic evidence of the intention of the parties to a deed as stated in the case of Rummerfield v. Mason, supra, is not applicable in the case wherein relief is sought on the ground of mistake." (Emphasis added)); McCormick v. Edwards, supra note 13; Employers' Indemnity Corp. v. Garrett, 327 Mo. 874, 38 S.W.2d 1049 (1931).
17. 109 Mo. App. 442, 84 S.W. 1126 (St. L. Ct. App. 1905).
TORTS—LIABILITY OF AIR CARRIERS FOR INJURIES TO PASSENGERS CAUSED BY TURBULENCE DURING FLIGHT

Cudney v. Braniff Airways, Inc.¹

Plaintiff was thrown from her seat and injured when defendant-air-carrier's airplane, in which she was riding as a passenger, encountered a severe downdraft while flying through a storm. Plaintiff alleged defendant's pilot was negligent in flying through the storm. At the first trial of the case, plaintiff attempted to use the doctrine of res ipsa loquitur to make out her case.² The Missouri supreme court held res ipsa loquitur was not applicable in this type of situation, but remanded the case so that the plaintiff might plead specific negligence. At the second trial, plaintiff submitted her case for specific negligence and had the verdict, but judgment was directed for defendant. On appeal, held, reversed. The court held that failure by an air carrier to take precautions, shown to have been available, to guard against the hazards of dangerous turbulence of which it had been forewarned by scientific weather information, constituted negligence.

The principal case involves a type of injury which has been the subject of very little litigation. Contrary to the experience of railroad and motor carriers, air carriers have not been hampered by large numbers of personal injury suits arising from injuries incurred by passengers during transit. Such injuries during air transit are usually caused by turbulence of the air, and may be classified generally with the railroad jolt, jar, and jerk cases.³

A major difference between a railroad and an air jerk or jolt case is that the plaintiff is not given the benefit of the doctrine of res ipsa loquitur in the air cases as he is in the surface cases.⁴ Consequently, he must plead and prove specific negligence on the part of the carrier in order to recover.

The duty of care owed by the air carrier to its passengers is the same as for carriers in general—to exercise the highest degree of care consistent with the practical operation of the plane and the protection of its passengers.⁵ While the law demands a high degree of care for the safety of passengers, it does not require the air carrier to exercise all the care, skill, and diligence of which the mind can conceive nor such as will relieve passengers from all possible perils.⁶ The carrier is not an insurer of the safety of its passengers, but is only liable for negligence.

1. 300 S.W.2d 412 (Mo. 1957).
2. Cudney v. Midcontinent Airlines, Inc., 363 Mo. 922, 254 S.W.2d 662 (1953) (en banc). Between the two trials of this case, Midcontinent Airlines was merged with Braniff Airways and the latter corporation assumed the liabilities of, and was substituted as defendant in place of, Midcontinent.
The difficulty which the plaintiff has historically faced in attempting to recover from the air carrier for injuries caused by turbulence will be illustrated by a consideration of two early cases in this field. The case of Hope v. United Air Lines, Inc., decided in 1936, is a case very similar to the principal case on its facts. The plaintiff-passenger allegedly received injuries by being thrown around in her seat as a result of defendant-carrier's negligence in flying through rough weather. No expert witnesses were used by plaintiff, who relied mainly on her own story of what happened. The defendant's evidence contradicted that of plaintiff on all vital points. Yet the trial judge ruled that plaintiff had made out a case sufficient to go to the jury. The jury found for the defendant, showing that it was not willing to accept the generalized, inexpert story of the passenger as opposed to the more expert and detailed evidence presented by the airline in its own defense.

In the case of Kimmel v. Pennsylvania Airlines & Transport Co., decided in 1937, the defendant-carrier's plane, on which plaintiffs were riding as passengers, encountered a severe downdraft and plaintiffs were thrown from their seats and injured. Negligence was alleged in that the pilot could and should have averted the injuries by warning the passengers to fasten their seat belts before the downdraft was encountered. The state of the evidence is not clear in the report of the case, but it does not appear that plaintiffs made use of expert witnesses, although weather reports were in evidence. The question for the jury to decide was whether the pilot should have foreseen the adverse weather conditions and warned the passengers of them in the exercise of the degree of care the law imposed upon him. As in the preceding case, the jury found for the defendant-carrier.

In contrast to these unsuccessful efforts of plaintiffs to recover for injuries from turbulence, two more recent cases and the principal case illustrate that it is possible for a plaintiff to make out a case without the aid of res ipsa loquitur.

Small v. Transcontinental and Western Air, Inc., decided in 1950, again involved the charge of failure of the pilot to warn passengers to fasten their seat belts. The plaintiff showed that the weather became rough, but that the "Fasten Seat Belt" sign was not turned on. Then a severe downdraft was encountered, causing plaintiff to be thrown to the floor and injured. Defendant's pilot and co-pilot testified that there was no need for the sign to be illuminated before the drop because the flight was smooth and routine, and that they had no notice of adverse flying conditions. In finding for the plaintiff, the jury accepted the passenger's evidence of the flight conditions over the contrary testimony of the pilots.

A more recent case is that of Urban v. Frontier Air Lines, decided in 1956, in which the passenger charged that while the "Fasten Seat Belt" sign was on, the

7. 8 J. Air L. 132 (1937).
8. See Note, 8 J. Air L. 139 (1937) (criticizing this case as an application of the so-called mild form of res ipsa loquitur).
stewardess gave her permission to leave her seat to go to the lavatory, and that while she was out of her seat, the plane hit a downdraft causing plaintiff to fall and break her ankle. Plaintiff alleged that the stewardess was negligent in granting such permission. There was much conflicting evidence as to whether the stewardess had in fact given the permission alleged. Defendant contended that plaintiff assumed the risk of leaving her seat during rough weather. Judgment was for plaintiff. The district judge in his opinion stated that the defense of assumption of risk might have been valid during the earlier development of air travel, but that considering its present development, “it can no longer be said that a passenger entering upon the modern commercial plane voluntarily assumes a risk with respect to the plane itself or its operation.”12 In concluding that the stewardess was negligent in granting permission for plaintiff to leave her seat under the existing conditions, the judge said, “that a reasonable and prudent person would have known or should have known that rough and turbulent weather would have likely reoccurred before plaintiff returned to her seat.”13

There is thus some indication that in later cases courts may be more prone to find the air carrier negligent where a passenger receives injuries from turbulence. The principal case is important in that it shows what detailed facts a plaintiff can prove in support of his charges of specific negligence. The plaintiff in the principal case was able to show the following: (1) the weather forecast given to the pilot before take-off; (2) the actual weather conditions encountered before the sudden lurch; (3) the weather conditions gave warning of the likelihood of encountering downdrafts on the course the plane was following; (4) it was the custom of pilots to avoid flying through such conditions as were forecast, or, if necessary to fly through them, to reduce speed; (5) the pilot had discretion to deviate from course and to reduce speed to avoid the hazards from such conditions; (6) the pilot neither attempted to circumnavigate the stormy area, nor reduced speed; (7) plaintiff’s seat belt was fastened in accordance with defendant’s instructions; (8) the seat belt became unfastened (apparently from the motion of her hands from being thrown about during the storm); (9) plaintiff was thrown from her seat and injured; and (10) after encountering the downdraft the pilot did reduce speed and veer off course and in a few minutes was out of the storm.

Considering the advances which have been made in the fields of aircraft design, electronics (particularly radar) and meteorology, with the knowledge and forewarning of adverse flying conditions they afford, no longer does it seem too much to require air carriers to exhaust all the means available to detect extreme weather conditions, and to take steps by way of warnings and changes of course to protect passengers from the hazards of these turbulent conditions.

MELVIN E. CARNAHAN

12. Id. at 289.
13. Id. at 290.
RECENT CASES
Missouri Law Review, Vol. 23, Iss. 1 [1958], Art. 10
TORTS—WIFE'S LIABILITY TO HER HUSBAND FOR PERSONAL INJURIES

Leach v. Leach

Action to recover damages for personal injuries sustained through the alleged negligence of the defendant. Plaintiff and defendant were husband and wife, and, on the ground that a husband could not sue his wife, the trial court sustained defendant's demurrer to the complaint. On appeal, held, reversed. The court held that a husband has a right to sue his wife in tort for personal injuries.

Most jurisdictions have adopted the common law rule and have not allowed the spouses to sue inter se for personal torts. The reason given for this disability at common law was that the husband and wife were one person; that the husband was that one person; and that the wife, having no legal identity, could neither sue nor be sued. It would seem that the married women's acts have destroyed this unity-of-person concept. However, the courts following the majority view have refused to construe these acts as abrogating the common law rule. The considerations are that the spouses already have an adequate remedy in a criminal proceeding or in an action for divorce; that to allow the spouses to sue each other would be to encourage fraudulent claims; that if such a change is to be wrought in the law it should be by specific legislation and not by judicial interpretation; and finally and most important, that the common law rule is necessary to preserve domestic harmony in the home.

1. 300 S.W.2d 15 (Ark. 1957).
2. Prosser, Torts § 101 (2d ed. 1955); 27 Am. Jur., Husband and Wife § 589 (1940); 41 C.J.S., Husband and Wife § 396 (1944); Annots., 43 A.L.R.2d 632 (1955); 160 A.L.R. 1406 (1946); 89 A.L.R. 118 (1934); 33 A.L.R. 1406 (1924); 29 A.L.R. 1482 (1924); 6 A.L.R. 1038 (1920).
3. Laughlin v. Eaton, 54 Me. 156 (1866); Stockton v. Farley, 10 W. Va. 171 (1877); 1 Blackstone, Commentaries *442.
5. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Abbott v. Abbott, 67 Me. 304 (1877); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915).
8. Corren v. Corren, 47 So. 2d 774 (Fla. 1950). In this case the court said at p. 776: "When one ponders the effect upon the marriage relationship were each spouse free to sue the other for every real or fancied wrong springing even from pique or inconsequential domestic squabbles, one can imagine what the havoc would be to the tranquility of the home." See also Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945); Sink v. Sink, supra note 4; Rogers v. Rogers, supra note 5; Wright v. Davis, 132 W. Va. 722, 53 S.E.2d 335 (1949).

Many courts following this reasoning as to personal torts nevertheless allow the spouses to sue each other to protect their respective property rights. See Annots., 109 A.L.R. 882 (1937); 41 A.L.R. 1054 (1926).
A minority of jurisdictions allow the spouses to sue each other with impunity.\(^9\) It is this group of decisions that the principal case follows.

The court in the principal case treated the problem as being one primarily of construing their married women’s act. This act uses rather broad language: "Every married woman . . . shall have all the rights . . . to sue and be sued . . . as though she were a femme sole. . . ."\(^10\) It was the court’s belief that, since the statute in "explicit" terms had made the wife vulnerable to a suit by her husband, it only remained for them to follow the wishes of the legislature and to permit such an action.

In *Fitzpatrick v. Owens*,\(^11\) which was decided by the Arkansas supreme court forty years before the principal case, it was held that this same statute gave the wife a right to sue her husband for negligence and that

". . . it would be doing violence to their [the legislature’s] manifest purpose to further apply the rule of restriction on account of the statute being in derogation of the common law . . . We have . . . nothing to do with the policy of the law; for that is controlled entirely by the legislative branch of government. It cannot be said that there is any such fixed policy on the subject that the Legislature has not the power to change."\(^12\)

The same reasoning was used in the principal case in overruling the defendant’s demurrer and holding that a husband can sue his wife. This is so, it was declared, because "There can be no sound basis for a different conclusion when the shoe is on the other foot . . . ."\(^13\)

Other courts adopting the minority rule have similarly construed the married women’s act of their respective state as abrogating the common law rule.\(^14\) Missouri, however, with a statute\(^15\) embodying broad language similar to the Arkansas statute, has refused so far to adopt this construction.\(^16\)

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11. 124 Ark. 167, 186 S.W. 832 (1916).

12. Id. at 176, 186 S.W. at 835.

13. 300 S.W.2d at 17.

14. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Rains v. Rains, supra note 9; Brown v. Gossler, 262 S.W.2d 480 (Ky. App. 1953); Courtney v. Courtney, supra note 9.

15. § 451.290, RSMo 1949 ("A married woman shall be deemed a femme sole so far as to enable her . . . to sue and be sued . . .").

16. Mullally v. Langenberg Brothers Grain Co., 339 Mo. 582, 98 S.W.2d 645 (1936); Willott v. Willott, 333 Mo. 896, 62 S.W.2d 1084 (1933); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Rosenblum v. Rosenblum, 231 Mo. App. 276, 96 S.W.2d 1082 (K.C. Ct. App. 1936).
The dissenting opinion in the principal case took the same view as the Oregon courts in contending that the spouses should be able to sue each other for intentional torts but not for unintentional torts. As to intentional torts the judge agreed that when one spouse intentionally injures the other, the harmony of the marital relationship is so broken that it will remain so even though the injured spouse is not allowed to sue; thus for intentional torts he thought that there was no good reason to bar a suit. But as to unintentional torts, he saw only two possible results, both of which he considered as being against public policy: (1) if the wife is financially independent, the husband will sue her, thus destroying the tranquility of their marriage; or (2) if the family has personal liability insurance, it would open the gate for unscrupulous couples to "make a joint raid upon an insurance company."

Admitting there are valid arguments against letting the spouses sue each other as a matter of policy, the fact remains that the legislature has declared by the married woman's act what policy shall be. And when the legislature has determined the policy that a married woman shall be able to sue and be sued as if she were a feme sole, the common law considerations against such actions no longer apply. Speaking of this in Thompson v. Thompson, Mr. Justice Harlan, dissenting, said:

"I repeat that with the policy, wisdom, or justice of the legislation in question this court can have no rightful concern. It must take the law as it has been established by competent legislative authority. It cannot, in any legal sense, make law, but only declare what the law is, as established by competent authority."

Ted M. Henson, Jr.

UNAUTHORIZED PRACTICE—INJUNCTION—RIGHTS OF MEMBERS OF LICENSED PROFESSIONS TO ENJOIN UNAUTHORIZED PRACTICE

Delaware Optometric Corporation v. Sherwood

Plaintiffs, a corporation made up of twenty-four out of the twenty-seven licensed optometrists in Delaware, and three individual optometrists, brought suit to enjoin defendant opticians from fitting contact lenses, an act of optometry for which defendants were not licensed. Plaintiffs' contention was that the Delaware optometric law conferred upon them as licensed optometrists a franchise or property right

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19. 218 U.S. 611 (1910) (Mr. Justice Holmes and Mr. Justice Hughes concurred in the dissent).
20. Id. at 623.

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1. 128 A.2d 812 (Del. 1957).
comparable to a lawyer's license. According to plaintiffs' argument this property right afforded optometrists, like attorneys, protection from unauthorized competition. The trial court dismissed the complaint. On appeal, the Supreme Court of Delaware affirmed. The unauthorized practice of a licensed profession, including law, can not be enjoined on the theory that the injunction is to protect a property right. The court based its ruling on an interpretation of the Delaware optometric law which was construed as having been enacted for the benefit of the public as a protection from incompetent practitioners. This law establishes a board of examiners to recommend applicants for licensing and to regulate the practice generally. Unlicensed practice is made a criminal offense to be prosecuted by the attorney general. The court was unable to find in the law any grant of a property right entitling optometrists to be free from unlicensed competition.

The court went one step further and said that a lawyer has no property right in his license. This conclusion resulted from a review of the historical development of the legal profession as compared to optometry. The legal profession was created as a result of the need to protect the public from incompetence and to promote the administration of justice. Financial gain to the licensed attorney is only incidental to the real purpose of the regulation. The Delaware court referred, however, with apparent approval, to a recent New Jersey decision which held that while the individual lawyer was without standing to enjoin unauthorized practice on a property right theory, the state bar association, suing on behalf of the public, was able to do so. The concurring opinion took the position that the majority unnecessarily ruled on the status of the attorney's license, distinguishing the practice of optometry from that of law and contending that such an important question as the nature of the attorney's rights in his license should not have been resolved in this case when it was only incidental to the main issue.

Dworken v. Apartment House Owners' Ass'n of Cleveland was an early and important case in this area. There, the Ohio Court of Appeals sustained an individual attorney's request for injunctive relief from unauthorized practice of law on the ground that he had a property right in his license to practice. Since then, numerous injunctions have been granted to restrain the unauthorized practice of various

4. See note 2 supra.
7. New Jersey State Bar Ass'n v. Northern N. J. Mortgage Associates, 22 N.J.2d 184, 123 A.2d 498 (1956) (action by the state bar association and five individual plaintiffs to enjoin the defendant from engaging in the unauthorized practice of law). It was held that the rights enjoyed by attorneys are only incidental to the public welfare and that the individual lawyers have no basis for complaint of irreparable injury to themselves through unauthorized practice in the absence of special injuries. As a class, however, attorneys were held to be in a position to discover violators and, through their bar association, perform the public function of prosecuting them.
professions on a plaintiff's contention that he was protecting his property rights. 9 This theory has met with considerable opposition. 10 Apparently, in Missouri a licensed member of a profession, including the legal profession, cannot, either individually or through representation by the professional association, obtain an injunction against unauthorized practice on the ground that there is a property right to be protected. 11

Courts denying injunctions to the individual practitioner or to the professional association follow much the same reasoning employed by the Delaware court in the instant case. These courts feel that the professional man has received his license by statutory authorization in the interest of the public welfare and in the case of the lawyer in the interests of the administration of justice. This gives the practitioner no interest in the subject matter of an action concerning his license other than the interest possessed by each member of the public. As he can show no special injury, it must be left to the state to institute an action on a public nuisance theory, 12 or to prosecute for crime under the appropriate statute. Unauthorized practice of law, being also a violation of the court's exclusive right to license, is a contempt of the court's authority and so punishable. 13

Arguments for injunctions are based on a practical analysis of the profession. In Burden v. Hoover 14 the court said that one holding a license to practice medicine

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11. Liberty Mut. Ins. Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945, 125 A.L.R. 1149 (1939) (action for declaratory judgment defining unauthorized practice of law as to insurance adjustors). The state bar association filed a cross bill to enjoin the insurance company from unauthorized practice. The court refused to grant the injunction. Unauthorized practice is forbidden in order to protect the public interests. State ex rel. Schneider's Credit Jewelers, Inc. v. Brackman, 280 S.W.2d 800 (St. L. Ct. App. 1953) (information in nature of quo warranto filed by prosecuting attorney at the relation of state board of optometry and individual optometrists for forfeiture of defendant's charter for alleged illegal practice of optometry). Here the court held that the state board of optometry had the special interest required to act as relator. The individual optometrists acting for themselves and for others similarly situated, did not have the requisite special interest. The licensing law was held to be for the benefit of society. Missouri Veterinary Medical Ass'n v. Glisan, 230 S.W.2d 169 (St. L. Ct. App. 1950) (action by the association to enjoin defendant from unlicensed practice of veterinary medicine). The court said that the association had no property rights which would enable it to enjoin unlicensed practice. Clark v. Reardon, 231 Mo. App. 666, 104 S.W.2d 407 (K.C. Ct. App. 1937) (contempt proceeding against defendant for unauthorized practice of law). It was held that restrictions on the practice of law are not primarily for the benefit of the lawyer but are for the benefit of society.
13. Clark v. Reardon, supra note 11; Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 Atl. 139 (1935).
14. 9 Ill. 2d 114, 137 N.E.2d 59 (1956) (action by five licensed chiropractors to enjoin defendants from practicing chiropractic without being licensed). The court held that this unlicensed practice was an infringement of the plaintiffs' rights for which equitable relief could be secured.
has a property right in that laws affecting him in his practice must satisfy due process of law. Also, the license confers a franchise in that it gives the licensee a privilege to do something the general public cannot do. Because the license to practice a profession is granted only for merit, it is, therefore, different from the ordinary regulatory license. Whether it be called a franchise, license, or privilege it should be protected as a valuable interest.

The Delaware court apparently wished to strengthen the dignity of the professions. To consider the license a property right would contradict the reasons which caused professions to be created and make them into businesses. This approach might be criticized as unrealistic when compared to the reasoning used in the Burden case. The majority in the Delaware decision made no attempt to explain two cases admitted by the court to support plaintiff’s position. These cases were dismissed by the statement that the court declined to follow them. The court purported to interpret the Delaware optometric law in accordance with the Restatement of Torts. But the statement in comment d of the Restatement section that the Delaware court thought applicable, indicates that one of the purposes of the law may be to protect the professional prestige and reputation of licensed members; if so, then unlicensed practitioners are liable to those licensed. This would appear to question the correctness of the Delaware decision. With the legal and optometric professions springing from two separate sources, the courts and legislatures respectively, there is merit in the idea expressed in the concurring opinion that attorneys’ rights should not have been considered along with the rights of licensed optometrists.

The Delaware case represents one of the two approaches to this problem. The solution seems to depend upon whether the emphasis is placed on a narrow construction of the appropriate statute granting the license or on a realistic analysis of what the license means to the practitioner. Both the Delaware and New Jersey courts offer relief at least to the lawyer through his bar association. Refusing to recognize a similar right in other professions can be criticized. The effect of encroachment by those not licensed is much the same in all professions. This effect should be given greater recognition than it was in the Delaware case.

WILLIAM J. ESELY

UNAUTHORIZED PRACTICE OF LAW—ATTORNEYS—DUTY OWED OTHERS THAN CLIENT TO USE CARE IN PERFORMING FUNCTIONS OF AN ATTORNEY

Mickel v. Murphy

An action for $17,000.00 damages was commenced by a complaint alleging that

16. 128 A.2d at 814.
18. 3 Restatement, Torts § 710 (1938).

the defendant, who was not a lawyer, “did advise regarding, draw, prepare and notarize” an instrument purporting to be the will of plaintiff’s husband and to give her his entire estate, worth some $34,000.00 “and did not advise [the husband] that a will required attestation thereto of two witnesses,” because of which the husband died intestate and plaintiff inherited only half the estate. Judgment sustaining a demurrer to the complaint was affirmed. The court, after remarking that it was not clear from the complaint that defendant undertook to do more than act as a scrivener at the husband’s dictation, held that, even if he did undertake to perform the function of a lawyer in drafting and seeing to the execution of the will, defendant was not liable for injuries caused by his mere ignorance or want of care to anyone except his client; that the duty of care is owed only to the client and that a lawyer is not liable for malpractice to third parties in the absence of fraud, collusion, malice or tort. It rejected a contention that liability could be predicated upon violation of a statute making it a misdemeanor to practice law without a license.

It is well settled that an attorney is liable to his client for injuries caused by failure to use ordinary care in performing his functions. By the great weight of authority, before an attorney will be held liable for injuries caused by his failure to use care, he must owe a duty to the person injured to use care, and that duty will only arise as to persons with whom he holds some privity such as his client or other person who employs him.

In Buckley v. Gray it was specifically held that an attorney who was grossly negligent in not drawing the will so as to correctly express the desires of the testatrix, was not liable to a beneficiary who suffered a great pecuniary loss thereby. There are numerous decisions that an attorney or an abstractor is not liable to third

2. E.g., Re Fitzpatrick, 54 Ont. L. Rep. 3 (1923); see 5 Am. Jur., Attorneys at Law, §§ 120, 124 (1936); 7 C.J.S., Attorney and Client, § 155 (1937); Annots., 45 A.L.R.2d 5 (1956), 43 A.L.R. 932 (1926) (liability of attorney for mistake or error in drafting contract, will or the like).


4. 110 Cal. 339, 42 Pac. 900 (1895).

5. National Savings Bank v. Ward, supra note 3; Dundee Mortgage & Trust Co. v. Hughes, supra note 3; Kendall v. Rogers, supra note 3; Wlodarek v. Thrift, supra note 3; Gordon v. Livingston, 12 Mo. App. 267 (St. L. Ct. App. 1882) (liability of grain inspector for negligent certification limited to person with whom he contracted); see Annots., 34 A.L.R. 67 (1925) (liability of one making a certificate or report and a third person relying thereon), 5 A.L.R. 1389 (1920).

persons for negligence in failing to discover defects in or encumbrances on titles to land that they were hired to investigate, although it has been held that an attorney is liable to the mortgagor for negligence in title search, even when hired by the mortgagor, when he knew it was for the benefit of the mortgagor.7

There is considerable authority for the proposition that an attorney without actual knowledge of the malice, is not liable to third persons for suits maliciously prosecuted by his client, even when the attorney should have known that the suit was being maliciously prosecuted had he been exercising due care. If the attorney had knowledge that the suit was malicious or colluded with the client in his wrong doing, he would be liable to the third person.8

As to the liability of public accountants, it seems that the accountant only owes a duty to use care as to the person who employs him9 although there are decisions holding the accountant liable to third persons whom he knew would rely on his financial statement.10

To the decisions holding that an attorney is only liable to his client for his negligent acts and not to third persons who are injured by his failure to exercise the reasonable care of a man in his profession, there is one well-recognized exception. An attorney is liable to a third person who sustains an injury in consequence of his wrongful act when the attorney has been guilty of fraud or collusion, or of a malicious or tortious act.11 The decisions seem to imply that "tortious," as used here, means intentional or malicious. This exception, of course, would not apply to the case at bar because there was no such malicious intent evidenced as to the beneficiary of the will.

The recent case of Biakanja v. Irving12 has somewhat weakened any precedent established by the case at bar by holding on almost identical facts that a notary who was negligent in drawing a will was liable to the legatee with whom he was not in

7. Lawall v. Groman, 180 Pa. 532, 37 Atl. 98 (1897)
10. See Annots., 120 A.L.R. 1262 (1939); 74 A.L.R. 1153 (1931).
privity for injuries caused to the legatee by the notary's negligence. The case would not seem to alter the proposition that an attorney is only liable to those with whom he is in privity because the court seemed to rest the liability of the notary solely on the basis of a violation of a statute defining the unauthorized practice of law.\(^\text{13}\)

The court also distinguished the case of *Buckley v. Gray\(^\text{14}\)* by reiterating that that case dealt with the liability of an attorney and this decision dealt with a layman practicing law in violation of a statute which was intended to protect the public from the practice of law by one other than a licensed attorney.\(^\text{15}\)

The court also pointed out that the *Mickel* case\(^\text{16}\) was decided on the pleadings and that this court was not going to follow the dicta in that case to the effect that civil liability cannot be predicated upon the violation of an unauthorized-practice-of-law statute, but instead this court based liability solely upon violation of that statute. From an analysis of both cases, it appears that the feeling of the court in the *Biakanja* case is contrary to that of the *Mickel* case on the problem despite its attempt to distinguish the earlier decisions.

A rather anomalous situation is now before us in that the testator cannot recover for injuries caused by the negligence of an attorney in drafting a will because he is dead and the cases on the subject preclude the legatee from recovery because of lack of privity. The court in *Biakanja v. Irving* recognizes this problem, but while it is unable to overrule the decision of the state supreme court in *Buckley v. Gray*, it does, by way of dictum, imply that an attorney should also be liable for an injury caused to a legatee by the negligence of an attorney in drafting a will and giving advice concerning it. In spite of this dictum, the great weight of authority seems to limit an attorney's liability for negligence only to persons with whom he is in privity.

William M. Howard


\(^{14}\) 110 Cal. 339, 42 Pac. 900 (1895).

\(^{15}\) 310 P.2d at 65.
