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Recent Cases

CONFLICT OF LAWS—THE APPLICATION OF STATE LAWS AS TO IMPLIED WARRANTIES OF WHOLESOMENESS OF CIGARETTES IN A FEDERAL COURT UNDER THE ERIE DOCTRINE

Ross v. Philip Morris Co.¹

Plaintiff in his complaint against Philip Morris Company claimed damages for personal injuries resulting from breach of implied warranty of fitness for the purpose of human consumption. Plaintiff alleged that defendant's cigarettes when smoked and consumed were not wholesome and fit, but were dangerous and unsafe, and that defendant, because of its special skill and superior knowledge knew of such fact but this was not known to the plaintiff. On defendant's motion for summary judgment, held, motion granted. Since jurisdiction was based upon diversity of citizenship, the court, pursuant to the doctrine established in Erie R.R. Co. v. Tompkins,² sought out and determined the applicable Missouri law. What would a Missouri state court hold in this or a similar case?

Plaintiff had sought to bring his case within the “food and drink” cases in which Missouri intermediate appellate courts have permitted recovery on the theory of breach of implied warranty.³ Plaintiff contended that the “food and drink” cases:

... set forth a well recognized and firmly entrenched Missouri doctrine with regard to products manufactured and sold for human consumption, and show that the ultimate purchase-consumer can recover against a manufacturer of products on the theory of breach of implied warranty of wholesomeness and fitness. . . . ⁴

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² 304 U.S. 64, 78 (1938): “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law....”
⁴ 164 F. Supp. at 691.
However, the court was not persuaded that such was the progression to be given to Missouri law. The court pointed out that it had previously examined and surveyed the right of action for breach of implied warranty in Missouri in *McIntyre v. Kansas City Coca Cola Bottling Co.*, and did not see that the law had changed since that case:

The only difference between the situation considered in the McIntyre case, supra, and the case at bar is that plaintiff here undertakes to bring cigarettes within the food and drink cases, supra. As to this, we only say that if a lady's blouse containing a deleterious dye, injurious to health, is not a particular object that is the subject matter of a contract, as to which the doctrine of implied warranty is applicable, then plaintiff's attempt to bring cigarettes within the food and drink cases as distinguished from an object of ordinary retail sale, is futile. . . .

The lady's blouse referred to by the court was the subject matter of suit in *State ex rel. Jones Store Co. v. Shai*, which was deemed decisive of Missouri law in the *McIntyre* case. In the instant case the court was again convinced by the *Shai* case and by *Zesch v. Abrasive Co. of Philadelphia*, decided a short time later, that the controlling law of Missouri precluded plaintiff's recovery on the theory of breach of implied warranty. Bringing his case within the "food and drink" cases would not aid the plaintiff the court said; because, under the view expressed by the Supreme Court in the *Shai* case recovery would not be permitted in those cases.

Since *Erie R.R. Co. v. Tompkins*, a federal court in a diversity of citizenship case must apply the substantive law of the state in which it sits as established by the state's highest court. Whatever doubt may have at one time existed, it is now well decided that a federal court in such a case also must follow the decisions of the state's intermediate appellate courts in the absence of persuasive data that the state's highest court would reach a contrary decision. After recognizing that the courts of appeals have permitted remote vendees to recover against the manufacturer in food and drink cases on the theory of breach of implied warranty, the court became convinced by the *Shai* case that the supreme court would not follow the courts of appeals and that their decisions did not represent the law of Missouri. The court did not seem so assured in the *McIntyre* case that the *Shai* case was to be given that effect, indicat-

6. 164 F. Supp. at 691.
7. 352 Mo. 630, 179 S.W.2d 19 (1944) (en banc).
8. 353 Mo. 558, 183 S.W.2d 140 (1944).
9. The basis of decision in the *Shai* case was that the wearing of the blouse was an "ordinary use" thus, it was sold for a general purpose, not a particular purpose. Overstreet, Some Aspects of Implied Warranties in the Supreme Court of Missouri, 10 Mo. L. Rev. 147, 189 (1945), reached the same conclusion from the *Shai* case as the court did here: "If the opinion of the court in the instant case is to be read in the same literal fashion in which the authorities cited by the court were by it read, all of the case law built by the Courts of Appeal in the food and drink cases will fall, because of the fact that food sold for immediate consumption is adapted to, and sold for a general, and not a particular, purpose. . . ."
ing that the question might still be undecided.\textsuperscript{11} Nor have the courts of appeals taken the Shain case as an answer to the question of whether or not the supreme court would sustain the position they have taken in the "food and drink" cases. Although the Shain case has been cited in at least one case involving a breach of implied warranty of fitness for a particular purpose decided by a court of appeal,\textsuperscript{12} in "food and drink" cases it has not been mentioned and recovery has been permitted as before.\textsuperscript{13} In fact, it appears that in one instance there has been an extension beyond the "food and drink" cases.\textsuperscript{14} Thus it does not appear that the Shain case has been deemed determinative of Missouri law in this area by the courts of appeal. A case can, of course, lose its persuasive effect without being expressly overruled.\textsuperscript{15} That,

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11. McIntyre v. Kansas City Coca Cola Bottling Co., supra note 5, at 713-14: "[I]n the only decision of the Supreme Court of Missouri in which implied warranty in that class of litigation [food and drink] has been dealt with, that Court gave no expression of its mind so far as liability under the doctrine was concerned, but contended [sic] itself to dispose of the case on a question of sufficiency of proof. See Stewart v. Martin, 353 Mo. 1, 181 S.W.2d 657. Rightfully, the query is made, in light of the application of the doctrine in State ex rel. Jones Store Co. v. Shain, supra, and Zesch v. Abrasive Co. v. [sic] Philadelphia, supra, whether 'the failure, or refusal, of the Court, to state what it thought the law on this point should be, has . . . a rather ominous meaning;' and that the action of the Court there taken can be interpreted 'as indicating that it may, in the future, strike down the courts of appeals' authorities on (the) point.' See Overstreet, supra, loc. cit. p. 164 . . . ."


14. Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (St. L. Ct. App. 1952). A right of recovery by a remote vendee against a manufacturer on breach of warranty theory was recognized where use of a detergent resulted in skin injury. However, it should be noted that it is not clear whether the theory proceeded upon was express or implied warranty.

15. In Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957), cert. denied, 355 U.S. 815 (1957) the United States district court for the District of Rhode Island made a determination of the local law of Mississippi on the question of the ordinary negligence tort liability of a manufacturer to a plaintiff in the absence of privity. Relying upon the decision of the Supreme Court of Mississippi in Ford Motor Co. v. Myers, 151 Miss. 73, 117 So. 862 (1928), holding against such liability, the district court "reluctantly" concluded that it was bound to apply Mississippi law as declared in the Ford case, and entered an order dismissing the complaint. The court of appeals, vacated the order dismissing the complaint and remanded the case to the district court for further proceedings. It was pointed out that the Supreme Court of Mississippi in the more recent case of E.I. DuPont Nemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954) had in dictum recognized and spoken approvingly of the modern trend, represented by Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946), toward holding the remote manufacturer liable despite the absence of privity. The court of appeals concluded that the Ford case was no longer controlling, saying at page 909:

[\textsuperscript{1}I]t is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is. A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction. . . .

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however, does not seem to be the explanation here. It would seem rather that the
courts of appeal were never persuaded in the first place that the Shain case was any
more than an expression or interpretation of the general rule, and that it had no
binding effect upon the exception they have formulated in the "food and drink"
cases. It seems, in those courts, if cigarettes were found to be sufficiently analogous
to "food and drink" to come within that line of cases, the Shain case would not be
deemed controlling. Probably a different result would be reached in our state
courts than has been reached in this case.

The underlying theory of the Erie doctrine is that it should make no difference
in result whether a case is brought in a state court or in a United States court sitting
in that state. It is submitted that United States courts in determining the law of
the state in which they sit might reach a result more consistent with that doctrine by
evaluating a decision of the state's highest court in light of the application and effect
the decision is given by the state's intermediate appellate courts.

John E. Burruss, Jr.

FEE SPLITTING—"FINDER'S FEE"—EFFECT OF MISSOURI
SUPREME COURT RULE 4.34
McFarland v. George

Defendant had been allowed a substantial fee by a probate court for legal
services rendered in a will contest. Plaintiff brought an action to effect division

1. But see Polk County, Georgia v. Lincoln Nat'l Life Ins. Co., 262 F.2d 486 (5th Cir. 1959).
Cf. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) (Frankfurter, J., con-
curring).
16. Fidelity Union Trust Co. v. Field, 311 U.S. 169, 180 (1940): "It is inadmissible
that there should be one rule of state law for litigants in the state courts and another
rule for litigants who bring the same question before the federal courts owing to the
17. After this note was completed, and, of course, after the decision was
handed down in the instant case the Supreme Court of Missouri in Midwest Game Co.
v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959) gave what would appear to be the
strongest indication to date of its thinking on the food and drink cases. In that case
plaintiff brought suit for breach of implied warranty of fitness, among other
theories, seeking damages for the loss of its fish which died because defendant's fish
food allegedly was "incomplete" when there was a custom in the trade to manufacture
and sell such food as a complete formula. The court said at page 550:
It is an established rule that in a sale of food for immediate human con-
sumption there is generally an implied warranty that the food is wholesome,
is fit for the purpose, and is of merchantable quality. And a buyer of pack-
aged food products may recover from the manufacturer upon an implied
warranty of fitness even though there is no express privity of contract
App., 139 S.W.2d 1025.

1. 316 S.W.2d 662 (St. L. Ct. App. 1958).
of the fee, alleging that defendant and he had been either special partners or joint adventurers for the duration of the will contest, and demanding one-half of the fee awarded defendant. The evidence indicated that plaintiff had merely forwarded or referred the will contest client to defendant, but had neither actively participated in the handling of the case nor assumed any responsibility therefor. The trial court found for the plaintiff, and awarded judgment in the amount of one-third of the fee.

On appeal, reversed, the court of appeals holding that plaintiff was not entitled to a division of fees, regardless of the nature of the action, when such division would be violative of Missouri Supreme Court Rule 4.34.

There has long been a custom among attorneys whereby the forwarding or referring attorney receives one-third of the fee received by the attorney who actually performs the service or assumes the responsibility of handling the case, said one-third being paid merely for the recommendation. The custom is still prevalent and, in many jurisdictions, is apparently considered neither unethical nor unlawful. It apparently is so common as to be admissible as evidence of an obligation owing to the forwarder, or even sufficient to support an action.

Canon 34 of the American Bar Association Canons of Professional Ethics was formulated, inter alia, to eliminate this custom. Canon 34 has repeatedly been construed as intended to prevent a division of fees with an attorney who merely recommends or forwards. The Missouri supreme court adopted Canon 34 as its rule and has adopted a consistent construction in holding, apparently, that either attorney may be subjected to the court's inherent power to discipline attorneys.

2. Id. at 669. Plaintiff had described himself as "the procuring and referring lawyer."

3. Id. at 670. The amount, said the court, indicated that the trial court relied on the custom of a finder's fee.

4. Mo. Sup. Ct. R. 4.34 reads: "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."


7. DRIK, LEGAL ETHICS 185 (1953). For cases involving division where service or responsibility has been shared, see Annot., 10 A.L.R. 1357 (1921).


9. Ibid. The custom is considered unethical in only seven of twenty-five states reporting.


14. Id. at 97, 153, 204, 265. But see app. A. at 353 (if client specifically agrees to such a division, no objection under Canon 34).

15. 342 Mo. vii, xiii (1937); 352 Mo. xxxi, xxxvi (1944). See rule quoted supra note 4.
for a division of fees without a division of service or responsibility.\textsuperscript{16} That a division of fees in the principal case would have been unethical would seem clear.\textsuperscript{17}

In the \textit{McFarland} case, however, rule 4.34 has apparently been applied as substantive law. The court has seemingly held that an obligation will be unenforceable by an attorney when enforcement would necessitate violation of rule 4.34, even where the practice is not unlawful apart from the rule,\textsuperscript{18} and that an attorney may defend, against another attorney, on the ground that performance would be violative of the rule.

The supreme court has construed its rules as having the force and effect of a judicial decision of that court.\textsuperscript{19} That the various prohibitions of rule 4.34 may be applied as substantive law would seem to follow,\textsuperscript{20} but only to controversies between attorneys.\textsuperscript{21} That performance would involve breach of the rule would probably not be, \textit{per se}, an effective defense in an action by a layman.\textsuperscript{22}

Although Canon 34 has been adopted in nearly all jurisdictions, several methods of adoption have been utilized,\textsuperscript{23} with the apparent result of a variance of legal effect. In the states adopting the Canon by legislative enactment, a decision consistent with the \textit{McFarland} case would probably be reached.\textsuperscript{24} Some of the courts adopting the canon by supreme court rule would, however, apparently deny it the effect of substantive law.\textsuperscript{25} In the jurisdictions in which Canon 34 is a voluntarily assumed standard, the courts might well recognize the canon, and apply it to reach a result consistent with the principal case.\textsuperscript{26} Some of the latter jurisdictions purport to

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16. \textit{In re} Ellis, 359 Mo. 231, 221 S.W.2d 139 (1949) (en banc).


18. Compare \textsection 484.150, RSMo 1949 (fee-splitting with a layman a misdemeanor); \textit{see State v. McCarthy}, 255 Wis. 234, 38 N.W.2d 679 (1949).

19. \textit{In re} Ellis, supra note 16; \textit{State v. Shain}, 343 Mo. 542, 122 S.W.2d 882 (1938) (en banc).


21. DRINKR, \textit{op. cit. supra} note 7, at 30; \textit{see Reilly v. Beckman}, 24 F.2d 791 (2d Cir. 1928). On the effect and validity of contracts between attorneys and laymen to divide legal fees, see Annot., 86 A.L.R. 195 (1938).


23. \textit{For a recent compilation, see BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES—ORGANIZATION, ETHICS, DISCIPLINE} 843-45 (1956). The majority of states, including Missouri, have integrated state bar associations. \textit{i.e.}, every attorney is required, either by statute or current rule, to maintain membership in order to practice law. \textit{Mo. SUP. CT. R. 7; DRINKR, LEGAL ETHICS} 20, 21 (1953).


distinguish between the effect of a canon as a disciplinary standard and as substantive law.\footnote{27}

The result of the McFarland case would seem desirable. There would appear to be little justification for judicial sanction of such a custom, when it will necessarily result either in an overcharge to the client or in inadequate compensation to the forwardee. Quaere whether a payment to one who merely forwards might not be, in effect, a reward for solicitation?\footnote{28}

\textbf{HEIRS AT LAW—EFFECT OF STATUTORY CHANGES IN DEFINITION}

\textit{Thomas v. Higginbotham}\footnote{1}

The problem of the effect of a statutory change in the meaning of the term "heirs at law" (other than the simple case of direct devolution) arose for the first time in Missouri in connection with a devise which became effective in possession at the termination of an intermediate life estate. The father of Robert and Charles devised a one-half interest in all his real estate to each of them for life, and at the death of either, the estate was to vest absolutely in his [the son's] \textit{child} or \textit{children}, but should one son die without issue, the estate was to pass to the surviving brother for life and was at his death to vest absolutely in his \textit{heirs at law}. The father died in 1905, and Robert died in 1935 without issue, the estate going to his brother Charles for life under the provisions of the will. Charles died in 1956 leaving a widow (the defendant) and two children (the plaintiffs). At the time the father died the term "heirs at law" did not include the spouse of either son,\footnote{2} but when Charles died in 1956 and the remaindermen could be determined, the widow of Charles claimed a share as an "heir at law," within the meaning of that term under the new probate code.\footnote{3} She only claimed a share in the estate received by her husband from Robert in 1935, since the estate granted directly to Charles expressly gave the children a remainder and excluded any right she might claim in that estate. Charles' children brought this action to quiet and determine title to the whole estate and the widow


28. See Mo. Sup. Ct. R. 4.28 ("... disreputable ... to pay or reward, directly or indirectly, those who ... influence the bringing of such cases to his office. ... ").

1. 318 S.W.2d 234 (Mo. 1958).

2. Before the 1956 probate code the wife or husband of the deceased shared in the estate only, if there were no children, or their descendants, or father, mother, brother or sister, or their descendants. § 1, at 518, GS 1866.

3. Under the 1956 probate code the wife or husband of the deceased takes one-half of the intestate's estate if the deceased is survived by issue, father, mother, brother or sister or their descendants, but all of the estate if the decedent is not survived by issue, father, mother, brother or sister. § 474.010, RSMo 1957 Supp.
brought a cross action to quiet and determine title in one-fourth of the estate. The trial court granted Charles' widow a fourth of the estate. On appeal held: affirmed. The statutory definition of "heirs at law" at the time of the life tenant's death was controlling, and not the definition at the time the will was written or at the testator's death.

The plaintiffs contended that the general plan of the will demonstrated that the testator desired the land to go to his own descendants. The court dismissed this contention, pointing out that the testator did not provide that the remainder should go to his own heirs, but instead, to the life tenant's heirs. Also, the testator expressly provided that a portion of his estate should go to the sons' children and on certain conditions a portion of his estate should go to sons' heirs. The distinction in the use of the terms convinced the court that the testator used the term "heirs" in a technical sense, meaning those individuals who would inherit the property in dispute if the owner or life tenant died intestate, and did not limit it to the life tenants' issue. The testator could have used such terms as children, descendants, issue, or words of a similar nature to express an intention that the estate should go to his descendants but he did not do this.

The question brought up for the first time in Missouri in this case is: which statutory meaning of the term "heirs at law" should control when there is a change in the statute made between the testator's death and the termination of the intermediate estate? The Missouri supreme court decided that the weight of authority elsewhere favors the view that the statutory definition in effect at the death of the life tenant should control.

Various reasons have been expressed by the courts in other jurisdictions for adopting the statutory definition of terms in effect at the time of the life beneficiary's death. Probably the most logical reason is that the gift to the heirs of a living person necessarily refers to a future time when the heirs first come into existence or can be determined. To apply the repealed statutory definition of an earlier time to a situation occurring many years later would certainly be unusual. The testator is also presumed to know the legal effect of his language and that the legislature can change the meaning of general terms which depend upon a statute for their mean-

4. If the will had provided that the testator's own heirs should take in the event of failure of issue, the class would be determined under the statute in effect at the time of the testator's death. The testator would be the designated ancestor of the class RESTATEMENT, PROPERTY § 308 (1940).

5. Gillilan v. Gillilan, 278 Mo. 99, 114, 212 S.W. 348, 351 (1919) (en banc). "We do not question the rule that the terms 'children' and 'heirs' may be construed to have been used the one for the other whenever such a construction is necessary to carry out the dominant thought of the testator as shown by the language employed in his will." The court said this case was not decisive because there was no language used in the will showing an intention that the terms were used interchangeably.


ing. A few courts have reached contrary results by evaluating all the circumstances under which the will was made in an effort to find the true intent of the testator. A New York court said, "The intention of the testator is to be construed in the light of the statute and the decisions applicable at the time he [the testator] wrote his will and codicils." In these cases the language of the will was clear enough to convince the court that the testator intended the will to be construed in the light of the then existing law.

The limitation as actually drawn provided for cross remainders under certain conditions, but did not do this effectively and an anomalous situation might have arisen. Thus, if the first son to die is not survived by children to take his half by way of remainder, the half goes by way of cross remainder to the other brother for life, with remainder to his heirs at law. Thus a widow of the first son to die would take nothing. Thereafter, if the second son dies not survived by issue, his widow takes the whole as an heir at law of such son. Thus, with two childless marriages, one daughter-in-law is completely excluded and the other daughter-in-law takes the whole. This is an anomalous situation the testator certainly would not have intended. The construction of "heirs" as adopted in the principal cases does not resolve this problem and correct the deficiencies of the original limitation, but a construction that "heirs" means "children" or "issue" would have made a much more reasonable distribution of the property in this situation, leaving a reversion in the testator which would descend equally to the two daughters-in-law. This problem, was not considered or discussed by the court.

Julius F. Wall

INDIANS—CIVIL ACTIONS—JURISDICTION OF STATE COURTS

William v. Lee

Plaintiff, a non-Indian merchant operating a store on the Navajo Indian Reservation in Arizona under a license required by federal statute, brought an action in an Arizona state court against a Navajo Indian and his wife, who resided on the reservation, to collect for goods sold to them on credit. Defendants' motion to dismiss

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10. 1 PAC. WILLS § 31 (3d ed. 1941).

Whether or not testator means that the beneficiaries, classes, or property interests, shall be determined by the law in force when the will is made, by the law in force when testator dies, or by the law in force when the beneficiary is fixed, or the property interest vests, is a question of testator's intention to be deduced from the language of the will, when read in the light of the surrounding facts and circumstances.


on the ground that jurisdiction lay in the tribal court rather than in the state court was overruled; judgment was entered for the plaintiff and affirmed by the Supreme Court of Arizona. The Supreme Court of the United States granted certiorari and reversed the decision. The Court began by stating that the United States has complete power over the whole intercourse between this nation and the Indians. This power has been held to emanate from the "commerce clause" of the federal constitution and the recognized relation of tribal Indians to the federal government. Pursuant to this rule, where a crime is committed in "Indian country" by or against an Indian, tribal jurisdiction or that expressly conferred by Congress has remained exclusive. Thus federal courts have jurisdiction to convict white men for crimes against Indians committed on Indian reservations. The federal jurisdiction even extends to small tracts of land allotted in severalty to named Indians and held for them in trust by the United States, such a situation having been described as giving...
rise to "government in spots." However the power of the federal government expires at the perimeter of the "Indian country" and when an Indian ventures outside his sanctuary he is amenable to the criminal laws of the state wherein he finds himself.

As to civil jurisdiction over Indians, one would assume that the same rule should apply as governs criminal jurisdiction, i.e., that in regard to suits against Indians on reservations, jurisdiction exist solely by virtue of congressional grant. This is the view expressed by the Supreme Court of the United States in the case under consideration. However it should be noted, in fairness, that the Arizona courts were not without support in their determination that they could entertain the suit in question. The Supreme Court of the United States supported its denial of jurisdiction to the Arizona courts in this case by asserting that Congress has pursued a policy "calculated eventually to make all Indians full-fledged participants in American society." Under such a plan criminal and civil jurisdiction over Indians is granted to individual states as they become willing and competent to assume the burdens attendant to such jurisdiction. That eventual state jurisdiction over Indians is the district court had jurisdiction to convict a white man for the murder of an Indian thereon. The federal government's policy of allotting lands to the Indians in severality was described by Mr. Justice Brewer in In the Matter of Heff, 197 U.S. 488, 499 (1905) to be one "... which looks to the breaking up of tribal relations, the establishing of the separate Indians into individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States."

10. Ailshie, J., in State v. Lott, 21 Idaho 646, 660, 123 Pac. 491, 496 (1912). A jurisdictional maze arises when these Indian tracts become interspersed with white homesteads. For a general survey of "Indian problems" see Brown, The Indian Problem and the Law, 39 Yale L.J. 307 (1930).


12. Bates v. Printup, 31 Misc. 17, 64 N.Y. Supp. 561 (County Ct. 1900); Stacy v. La Belle, 99 Wis. 526, 75 N.W. 80 (1899); 42 C.J.S. Indians § 8(b) (1944).

13. 358 U.S. at 220.

14. 62 Stat. 1224 (1948), 25 U.S.C. § 233 (1953) grants to the State of New York "... jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York..." 64 Stat. 845 (1950), 25 U.S.C. § 233 (1953) makes an identical grant of civil jurisdiction to New York. 18 U.S.C. § 1162 (Supp. V, 1958) grants jurisdiction over offenses committed by or against Indians on enumerated areas of the Indian country in the named states, to the states of Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. 28 U.S.C. § 1360 (Supp. V, 1958) grants civil jurisdiction over causes between Indians or to which Indians are parties, which arise on the same enumerated areas of the Indian country, to the same group of states. The reasons behind the latter two statutes are briefly set out in H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953), published in 2 U.S. CONG. & AD. NEWS 2409-14 (1953). It seemed to be the opinion of the Committee on Interior and Insular Affairs, based on findings of its Indian Affairs Subcommittee, that H.R. 1063, which became 18 U.S.C. § 1162, supra, would facilitate a more uniform enforcement of criminal laws on the Indian reservations since, prior to the granting of state jurisdiction, federal courts alone could act in regard to such offenses, and the federal jurisdiction was limited to ten major crimes set out by Congress. 18 U.S.C. § 1153 (1953) enumerated the crimes of murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny. Thus many offenses on the Indian country were not punishable in any tribunal except the tribal court.
goal of Congress is evidenced in a general statute enacted in 1953 permitting any state, under certain conditions, to assume jurisdiction over "Indian country." The presence of such a statute indicates that the policy of the United States is one of prohibition of state authority over "Indian country" until qualification of the individual state to assume it. The Supreme Court asserted that this policy had been applied to the Navajos, pointing to a treaty signed June 1, 1868, at Fort Sumner in the New Mexico Territory between General William T. Sherman for the United States and certain chiefs and headmen of the Navajo tribe. The Court stated:

Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. State of Georgia, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

Thus it seems that in addition to relying upon the exclusive power of the United States over this nation's intercourse with the Indians, the Court sought additional strength for its decision by drawing upon the above treaty. That the United States has in the past made countless treaties with the several Indian tribes is a well known historical fact. The concept of one nation executing a treaty with another group within the former's sovereign territorial limits may seem a bit incongruous, yet

15. Act of Aug. 15, 1953 §§ 6-7, 67 Stat. 588, 590, provides: Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be. ... The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Arizona has an express disclaimer of jurisdiction over Indian lands in its enabling act, 36 Stat. 569 (1910), and in its constitution, Ariz. Const., art. 20(4).

16. 15 Stat. 667 (1868). In 16 Stat. 566 (1871), 25 U.S.C. § 71 (1953) Congress declared that no Indian tribe or nation within the United States should thereafter be recognized as an independent power with whom the United States could execute a treaty, but provided that this should not impair the obligations of any treaty previously ratified. Thus the 1868 treaty with the Navajos is still existing and valid.

17. 358 U.S. at 221-22.

18. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), it was decided that the Cherokee Nation was not a "foreign state" within the meaning of U.S. Const. art. III, § 2; therefore it could not sue on that basis in the Supreme Court of the United States. The Court also asserted that the Cherokee were not a State of the Union. But the Court added that this nation had recognized the Cherokees as "a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements ..." 30 U.S. (5 Pet.) at 16. As previously pointed out in note 16, supra, this nation abandoned the concept that the Indian tribes were sovereign powers in 1871.
from the beginning this nation has considered Indian tribes to be proper parties to execute treaties with the United States.19

That the Indian Territory composed a part of the United States was asserted as early as 1831.20 This raises another question: If the Indians were, on the one hand, an independent power with whom this nation could execute treaties and, on the other hand, a part of the United States insofar as foreign nations were concerned, who owned the land which the Indians occupied? The concept of a landlord-tenant relationship between two sovereign powers is certainly unique. Yet in Johnson v. M'Intosh21 the Supreme Court of the United States early decided that “Indian title” to land was a right of occupancy only, with the ultimate fee in the sovereign. This doctrine was asserted at a time when the sovereign landlord was having substantial difficulty evicting its Indian tenants in numerous instances.22

With the Supreme Court here deciding that the action against the reservation Indian could not be maintained in the Arizona state courts the plaintiff is likely to inquire as to where he should go to collect his debt. Should he be sent to the federal district court? Will he be able to invoke federal jurisdiction on the ground of diversity of citizenship?23 Historically Indians were not considered citizens of the United States or of the state wherein they resided.24 Thus the action here would not

19. At least until 1871; see note 16 supra.
20. Cherokee Nation v. Georgia, supra note 18, at 16-17. The Court stated that the Indians and the land they occupied were considered “so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.”
21. 21 U.S. (8 Wheat.) 543 (1823). In this case Chief Justice Marshall reviewed the fundamental principles upon which land titles in the new world were based, saying that by agreement among the European countries, discovery gave title to the government by whose authority it was made, subject to the Indian right of occupancy. For a detailed analysis of ownership of Indian lands in the several states see 3 AMERICAN LAW OF PROPERTY §§ 12.16-12.23 (Casper ed. 1952).
22. The Removal Act of May 28, 1830, 4 Stat. 411 (1830) authorized the president to negotiate with the Indian tribes east of the Mississippi River on a basis of payment for their lands and improvements and a grant of land west of the Mississippi, to which perpetual title would be secured. While this act was not in itself coercive it was enforced by military action wherever resistance was met. A later era beginning about 1850 was marked by frequent raids and skirmishes up and down the great western plains, culminating with the capture and imprisonment of Geronimo in 1887 and the death of Sitting Bull in 1890. 12 ENCYCLOPAEDIA BRITANNICA Indians, North American 208 (1958).
23. 28 U.S.C. App. § 1332 (Supp. IV, 1957) gives federal district courts jurisdiction over civil actions where the matter in controversy exceeds $10,000, exclusive of interest and costs, and is between (1) citizens of different states; (2) citizens of a state, and foreign states or citizens or subjects thereof; and (3) citizens of different states and in which foreign states or citizens or subjects thereof are additional parties.
24. Under U.S. Const. amend. XIV, § 1, “All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” In Elk v. Wilkins, 112 U.S. 94 (1884) it was held that Indians did not come within the purview of this section because they were not completely subject to the jurisdiction of the United States.
be one between "citizens" of different states. And if Indian tribes are "domestic dependent nations" the action would not be one involving citizens of a foreign state. By act of Congress in 1952 all Indians now born in the United States are citizens of this nation at birth. While presumably this statute does not apply to the defendant Lee in this case, it may in the future remove the "citizenship" incapacity in this type of case. Yet the problem remains as to whether or not the Indian becomes at birth a citizen of the state wherein he is born, or of any state at all. As to this the 1952 act is silent. Since this act seemingly does not enter into this case the question of state citizenship of Indians born in the United States need not here be speculated upon.

With diversity of citizenship discarded in this case it is difficult to see any other basis for federal jurisdiction. Thus one is led to the conclusion that the only tribunal in which the plaintiff can seek redress is the tribal court. This seems to be what the Supreme Court had in mind. The Court pointed out that today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants. Perhaps the decision here will encourage states such as Arizona to attempt to secure jurisdiction over reservation Indians under the provisions of the 1953 act.

JOHN CHARLES CROW

RIGHT OF PRIVACY—UNAUTHORIZED USE OF PHOTOGRAPH

Annerino v. Dell Publishing Co.

A photograph of the plaintiff, taken while she was in a state of shock and grief, was later used without her consent or knowledge to illustrate a fictional article in defendant's magazine, Inside Detective. The trial court sustained defendant's motion to strike the complaint for invasion of privacy on the ground the story was of a newsworthy occurrence. On appeal, held, reversed and remanded. The Illinois

27. As pointed out in note 24 supra, the 14th amendment was held not to apply to tribal Indians. Therefore until the 1952 act of Congress, supra note 26, Indians were neither citizens of the United States nor of the state wherein they resided. The 1952 act has made all Indians born in the United States citizens of this nation, but it does not provide for any accompanying state citizenship.
28. 358 U.S. at 222.

2. The plaintiff was in emotional shock when told her detective-husband had been shot to death in a gun duel with an escaped felon, one Amadeo. The chain of events, including Amadeo's initial capture, a girl friend smuggling a gun to him under her slip, his escape and the gun duel in which plaintiff's husband was killed, was legitimate news. These occurrences received wide publicity at the time. Plaintiff's only identification with this drama was that she was widow of the deceased detective.
appellate court, holding the complaint alleged a cause of action, stated that the article as suggested by its title, "If You Love Me, Slip Me a Gun," was in fact a commercial exploitation of the news story and not subject to the protection afforded valid news reporting.  

In an earlier case of first impression, Illinois joined, as Judge Schwartz said, "this massive weight of authority" recognizing an individual's right of privacy. There the plaintiff's photograph was used without her permission in an advertisement by the defendant in promoting the sale of dog food. It was stated: "A person may not make an unauthorized appropriation of the personality of another, especially of his name or likeness, without being liable to him for mental distress as well as the actual pecuniary damages which the appropriation causes."

The Annerino decision extended the cause of action for invasion of the right of privacy to include "commercial exploitations" other than for advertising purposes.

Two recent federal court cases in Illinois denied recovery. In one the unauthorized use of a photograph of plaintiff's automobile was too blurred to be identified. In the other an unauthorized use of a photograph of plaintiff's son was held not to invade the privacy of the father; there Court of Appeals, Seventh Circuit, said: "In our opinion [plaintiff-father] had been catapulted into an area of legitimate public news interest." Quaere whether the father of a son, who has become the subject of a legitimate news spotlight, ipso facto is "catapulted" to that same spotlight?

3. Although recognizing that the individual's right of privacy may be invaded by the legitimate dissemination of news or a proper exercise of freedom of the press, the court observed: "The 'story' impression and fictional value are further heightened by the subtitle in bold type and sharing near equal prominence on the first page of the 'account' which reads, 'She lifted her ballerina skirt. "There, honey, fastened to the garter..."'" 17 Ill. App. 2d at 209, 149 N.E.2d at 763.


5. Id. at 296, 106 N.E.2d at 744.

6. The plaintiff was a blind girl, and the advertising depicted her as a prospective donee of a "Master Eye Dog." Plaintiff alleged that she already had a seeing eye dog, and as result of the unauthorized use of her photograph in this advertising, it "caused her to lose the respect and admiration of those who knew her and to suffer humiliation and mental anguish." Id. at 294, 106 N.E.2d at 743.

7. Id. at 299, 106 N.E.2d at 745.


9. Rozhon v. Triangle Publications, 230 F.2d 359 (7th Cir. 1956). The snapshot involved showed the plaintiff's son standing before the mantel in the living room. After his son died from narcotic poisoning, this picture was used by defendant to illustrate an article entitled "The Fight Against Teen-Age Dope Addiction". The plaintiff alleged that the use of this picture in conjunction with other pictures of narcotics and paraphernalia suggested to the reader that they were also in his home, which was identifiable from the background in the photograph. Apparently the district court had found the background unidentifiable. The decision indicates that a father cannot claim invasion of his right of privacy predicated upon an unauthorized use of his son's photograph. Contra, Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930), holding a mother's right of privacy was invaded by defendant's unauthorized use of a photograph of her deformed child.

10. 230 F.2d at 361.
In 1890 right of privacy was born. From out of the warp of the legal past, Samuel D. Warren and Louise D. Brandeis conceived this invasion as a separate tort. Its fruition is legal history.

Missouri early recognized such a common law right. In 1911 the Kansas City Court of Appeals, in an opinion by Judge Ellison, held that a five-year-old plaintiff's right of privacy was invaded by an unauthorized use of his picture in defendant's advertisement. Conceiving this to be in incorporeal property right, the court continued:

It is spoken of as a new right, when, in fact, it is an old right with a new name. Life, liberty and the pursuit of happiness, are rights of all men. The right to life includes the pursuit of happiness. . . . He may adopt that of privacy, or, if he likes, of entire seclusion.

Today it is well recognized that one's right of privacy does not extend to "entire seclusion." His right of privacy must yield to the public interest in the dissemination of legitimate news occurrences. One who is thrust into the spotlight will find his right of privacy proportionally relinquished.

In Barber v. Time, Inc., the Supreme Court of Missouri, in an opinion by Judge Hyde, recognizing the constitutional right of freedom of the press as well as the right of the individual to privacy, held that the defendant had abused its constitutional right. The plaintiff was under treatment in a general hospital for an unusual ailment which gave her an unique appetite. Illustrating a medical article on her condition, defendant ran a photograph taken of her in the hospital bed by a third party without her consent. Editorial comment by Time provided these additional titles and cutlines: "Starving Glutton," "Insatiable-Eater Barber," and "She eats for ten." Approving the Restatement of Torts, the court recognized necessary elements apart from unauthorized use. "[L]iability exists only if the defendant's conduct was such that he

13. Id. at 659, 134 S.W. at 1078-79.
14. RESTATEMENT, TORTS § 867, comment c at 400 (1939). "[T]hey are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims."
15. 348 Mo. 1199, 159 S.W.2d 291 (1942), 8 Mo. L. Rev. 74 (1943).
16. "Thus, establishing conditions of liability for invasion of the right of privacy is a matter of harmonizing individual rights with community and social interests. We think they can be harmonized on a reasonable basis, recognizing the right of privacy without abridging freedom of the press. . . . If the court decides that the matter is outside the scope of proper public interest and that there is substantial evidence tending to show a serious, unreasonable, unwarranted and offensive interference with another's private affairs, then the case is one to be submitted to the jury. . . . [T]his rule . . . only limits its abuse; . . ." Id. at 1206-07, 159 S.W.2d at 295.
17. RESTATEMENT, TORTS § 867 (1939). "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."
should have realized that it would be offensive to persons of ordinary sensibilities."\textsuperscript{18} The court, while admitting the unusual illness to have been legitimate news interest, determined that the appropriation of plaintiff's personality—name and picture—was added solely to attract the reader's attention.\textsuperscript{19}

The public may want spice in its news, but the fourth estate may be well advised to spice with discretion if additional flavor is to be derived from appropriations of protected private interests. The Annerino case has extended protection of privacy in Illinois to include this area of "commercial exploitation" as the Barber case extended it for Missouri. In New York, which has a substantial part of the publishing industry, the courts allow some "commercial exploitations" which do not constitute "advertising" or "trade" within the meaning of the New York statute.\textsuperscript{20}

Although Missouri courts have but twice spoken on the issue of photography v. privacy, this does not indicate any doubt of the right or of its breadth. The Barber case has served journalistic notice. Two basic questions are posed: (1) the extent of intrusion upon the individual who is a proper subject of news spotlight; (2) the extent of intrusion beyond this individual to fortuitously linked non-actors.\textsuperscript{21}

These questions will become of increased importance if and when the television camera invades the courtroom. What of the privacy of those at trial but not on trial? Can it be said that a witness present only because of subpoena has waived all right of privacy? When the Missouri courts consider the issue of canon 35 of the canons of judicial ethics\textsuperscript{22} the case for privacy should be an integral part of that question.

M. Randall Vanet

\textsuperscript{18} Id. comment d. The comment of the restatement continues at 401: "It is only where the intrusion has gone beyond the limits of decency that liability accrues. These limits are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public, or where photographs of a person in an embarrassing pose are surreptitiously taken and published."

\textsuperscript{19} The court ordered a remittitur of the $1,500 allowed for punitive damages, and if complied with, affirmed the $1,500 allowed as actual damages. The court held that the qualified privilege had rebutted the presumption of implied malice and the plaintiff had failed to prove express malice which was requisite for recovery of punitive damages.


\textsuperscript{21} Metzger v. Dell Publication Co., 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955). Defendant-publisher in its magazine, \textit{Front Page Detective}, ran an article entitled "Gang-Boy," depicting Brooklyn juvenile delinquency. Plaintiff, not a juvenile delinquent, gave consent to be photographed standing on a street corner. Defendant's use of this photograph to depict a typical gang scene was held to invade plaintiff's right of privacy. However, in Jacova v. Southern Radio & Television Co., 83 So. 2d 34 (Fla. 1955), plaintiff, while in a cigar store to purchase a newspaper, found himself amidst a gambling raid where he was questioned by police as a suspect. The Florida supreme court held the plaintiff's right of privacy was not invaded by the "on-the-spot" filming and later showing in a television news program.

\textsuperscript{22} The issue basically is one of the propriety of broadcasting and televising from the courtroom.