ANNOUNCEMENT

The Review takes pleasure in announcing the election to the Editorial Board of the following members of the Third Year Class: Stanley B. Cooper, Walter Edward Greenwood, Daniel Miller, Raymond deS. Shryock and Theodore Voorhees.

NOTES

WHAT CONSTITUTES A TRANSFER UNDER THE FEDERAL ESTATE TAX?—In the recent case of Tyler v. United States, it was necessary for the court to decide whether the Revenue Act of 1916 required the value of a tenancy by the entireties in personal property, created in Maryland after the passage of the Act, to be included in determining the value of the taxable estate of the decedent at the time of his death, and if so whether the statutory provision was constitutional. The court held that the statute purported to include such tenancies as part of the decedent's estate for the purpose of the estate tax, that by the law of Maryland there was no transfer from the decedent to the surviving spouse, and that therefore this provision of the Act was unconstitutional.

The federal estate tax is not a tax upon the property of the decedent, for as such it would be unconstitutional as an unapportioned direct tax. For the same reason it is inaccurate to describe the tax as imposed upon an interest which has ceased by reason of death. Nor is it a tax on the privilege of the devisee or legatee to succeed to the decedent's property, as are the legacy or succession taxes imposed by most states. It is sustained as a tax imposed upon an event, namely, the transfer or transmission of the decedent's interest in property by will or descent from the decedent.

1 U. S. D. C., Md., October 30, 1928.
2 39 STAT. 777 (1916), U. S. COMP. STAT. (1918) § 6336½a.
3 Shwab v. Doyle, 258 U. S. 529, 42 Sup. Ct. 391 (1922) holds that the act does not apply to transactions consummated before its passage.
4 Blount v. U. S., 59 Court Claims 328, 346 (1924): "It would hardly be contended that this statute imposes a tax on an estate for life held by one at the time of his death on the theory that the tax is upon an interest which ceases by reason of the death."
5 Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747 (1900); Lederer v. Northern Trust Co., 262 Fed. 52, 54 (C. C. A. 3d, 1920), where it was said that the tax "is imposed not upon the interest of the recent owner, or upon the privilege to dispose of it, but upon the transfer of the interest in its devolution."
How can the federal government impose such a tax? The power is not based upon the right to regulate the succession of property after death by will or descent; that is a right reserved to the states, there being no grant of such power to the federal government in the Constitution. But the United States has the power to levy taxes, duties, imposts and excises. This power is coextensive with the general taxing power of a sovereignty which extends to all usual subjects of taxation. The tax as shown above is based on the transmission and not upon the right to regulate, and the transmission of property occasioned by death has always been a usual object of taxation among the sovereignties of the world.

The estate tax is an indirect tax. Historically it "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." Other than capitation taxes, direct taxes have been held to be those levied on a person solely because of his general ownership of real or personal property. And in a later declaration of the same rule the word "general" is omitted and direct taxes are said to be those imposed by reason of ownership. The estate tax is not a tax on the ownership of property but on an event; namely, the transfer from the decedent. Not being a direct tax it is not necessary that it be apportioned among the several states, provided it is uniform, and provided it is levied on the transfer as measured by the value of the decedent's property actually transmitted.

In the Tyler case, the first decision of the court was one of statutory construction. It construed the Revenue Act of 1916 as at
tempting to include, as part of the decedent's estate, tenancies by the
entireties in which the decedent had an interest before death. In arriv-
ing at this interpretation the court discarded dicta to the contrary\(^{18}\) and read the statute in the light of the later acts which in clear lan-
guage seem to include such tenancies as part of the decedent's estate.\(^{19}\) An appellate court might decide that the 1916 Act should
not be interpreted to include tenancies by the entireties as part of the
decedent's estate,\(^{20}\) where under the law of the state there is no
transfer, and thus avoid considering the constitutional question other-
wise raised. Indeed, the Act of 1916 and all subsequent revenue acts,\(^{21}\) in imposing the estate tax, provide that the tax is "imposed upon
the transfer of the net estate of every decedent dying after the passage
of this act." It would seem that under this section, which in the
various acts imposes the tax, that it would be a possible con-
struction of the statutes that the tax is only to be levied when under
the state law an interest is transferred from the decedent to others
at his death by will or descent.\(^{22}\)

Considering the constitutional problem involved, the court first
laid down the proposition that only such interests may constitutionally
be included in determining the value of the gross estate as are trans-
ferred from the decedent to others at his death,\(^{23}\) and then applied
the second proposition that in order to determine whether the death

\(^{18}\) Blount v. U. S., supra note 4; Appeal of Root, 5 B. T. A. 696; Appeal of
Murphy, 5 B. T. A. 952; Appeal of Dyer, 5 B. T. A. 711; Appeal of Providence
Trust Co., 5 B. T. A. 1004.

\(^{19}\) In the 1924 and 1926 Acts the words "in the entirety" are changed to "by
the entirety" and the words "any other person" to "spouse."

\(^{20}\) It would seem, however, that the language of the statute, supra note 17,
is reasonably open to the interpretation given it by the court in the Tyler case.
However the appellate court might emphasize the enacting clause which de-
scribes the tax as a transfer tax.

1097 (1919); Revenue Act of 1921, 42 Stat. 277 (1921); Revenue Act of 1924,
Stat. 69 (1926).

\(^{22}\) Under the revenue acts, with the exception of that of 1926 which omits
this provision, the value of the gross estate (from which certain deductions are
allowed in determining the net estate) is to be determined by including the
value at the time of the decedent's death of all his property "to the extent of the
interest therein of the decedent at the time of his death which after his death is
subject to the payment of the charges against his estate and the expenses of its
administration and is subject to distribution as part of his estate." In this con-
nection see the recent case of Harrelson v. Crooks, 28 F. (2d) 510 (D. C. W.
D. Mo. 1928) holding that real estate not subject to the expenses of administration
under state law cannot be included in the gross estate in determining the federal
estate tax under the revenue act of 1918.

\(^{23}\) On the authority of the cases cited supra note 7.
of a tenant by the entirety involves a transfer to the surviving tenant, the federal courts must look to the law of the state where the property is located. In regard to this second proposition, the court said, "it is necessary . . . to understand the exact nature of a tenancy by the entireties as such an estate is understood by the law of Maryland, for the construction which the Maryland courts give to such tenancy is binding upon the court in this proceeding." Having determined that by the law of Maryland there was not a transfer of any interest from the decedent to the surviving spouse both having taken, not by moieties, but by the entirety, the court reasoned that the imposition of the tax would not be in the nature of an excise or indirect tax levied upon the occurrence of an event, but would be a direct tax on property because of the decedent's former ownership thereof, which would be invalid since not apportioned as required by the Constitution.

The argument of the Government was that a complete transfer of all the privileges attaching to the ownership of property was not essential to the constitutional validity of a federal excise tax, but that if the decedent's death operated to endow a survivor with certain substantial privileges incident to a complete sole ownership of property, which he did not have in the lifetime of the decedent, then there was a sufficient event on which to constitutionally impose an excise tax as opposed to a direct tax. The argument is thus expressed by counsel:

"In effect there accrued to the widow upon the decedent's death something which she did not have in his lifetime, namely, the unrestricted right to dispose of the whole property and give good title thereto. That which fixed the wife's right was the husband's death—death completed the transfer. It is true only in a highly technical sense, that nothing passed to the wife on the husband's death. The transfer thus completed by death is in the nature of a testamentary disposition. The purpose of creating an estate by the entireties is to secure the right of survivorship. That is, to direct the devolution of property at death. Therefore when a person purchases property with his own money and transfers it to himself and his wife as tenants by the entireties [as the decedent did in the Tyler case] he in effect exercises the right of post-mortem disposition and gives his wife the absolute title contingent upon his death."

No direct precedent exists on the question whether an unapportioned federal death duty may constitutionally be imposed when a tenant by the entirety dies, although a dictum from another district court would tend to the same conclusion as that reached by the court

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in the *Tyler* case.\(^{28}\) However, there are decisions on analogous problems which involve the same principles. These cases almost uniformly hold that in determining whether there has been a transfer within the purview of the federal estate tax acts the federal courts must look to the law of the state wherein the property is located, and if, under the state law, there is no transfer, no death duty may constitutionally be imposed, except as a direct tax. Thus in two cases,\(^ {27}\) cited by the court in the *Tyler* case, it was held that including as part of the decedent's estate, the dower right accruing to the wife upon the decedent's death, is unconstitutional as attempting direct taxation. In both of these cases, under the law of the states in which the property was located, a widow's dower was not transferred to her upon the death of her husband but was an inchoate right arising out of the marriage contract, and this was the basis of the decisions. A devise or bequest in lieu of dower, not being diminishable for purposes of state taxation by the value of the widow's dower right, it was held that, when the widow took an interest in lieu of dower, the value of her dower was properly included in computing the value of the estate subject to the federal estate tax.\(^ {28}\) Under the law of Louisiana the usufruct of a widow in half of the community property not devised by her husband being part of the transfer of that property devolving from the husband to her upon his death, it was held not to be deductible under the federal revenue act.\(^ {29}\) And again, it was held that under the law of California a wife has not such a vested interest in the community property as to prevent that property being subject in its full value to the estate tax on the death of the husband.\(^ {30}\) In cases involving joint tenancies, the same principles have been adopted in determining to what extent the value of the property may be included in ascertaining the taxable value of the decedent's estate.\(^ {31}\)

Only one case, in a lower federal court,\(^ {32}\) has been found which is somewhat out of line with the authorities just considered. That case


\(^{27}\) Munroe v. U. S., 10 F. (2d) 230 (D. C. D. Neb. 1925); Hibbard v. Crooks, 25 F. (2d) 896 (D. C. W. D. Mo. 1927). These cases involved the constitutionality of the provisions of the Revenue Act of 1918, which was the first to specifically include the wife's dower as an interest to be included in determining the value of the decedent's gross estate. *Cf.* Randolph v. Craig, 267 Fed. 993 (D. C. M. D. Tenn. 1920), decided under the Revenue Act of 1916 which did not specifically include dower as a part of the taxable estate of decedent.


involved the Revenue Act of 1918, which provided that the gross value of the decedent’s estate should be determined by including the value of all property “to the extent of any property passing under a general power of appointment exercised by the decedent.” The state law held that the property passes from the donor of the power to the appointee and not from the donee of the power. The court, however, sustained a federal tax on the estate of the donee of the power including in its value the property passing under the exercise of the power, on the theory that the 1918 Act showed a Congressional intention of “measuring the tax paid by the gross value of all the property of the decedent which passed by will plus the value of all property which passed in practical effect by the same will, although it passed, not by virtue of domain over the property, but by virtue of a power of appointment.” The court did not consider the question whether such a tax was an unapportioned direct tax.

In spite of this somewhat inconsistent decision, the Tyler case appears to be correctly decided, though the Supreme Court has never passed on the point. Where the incidents of property ownership which vest in one person by the death of another are as few as in that case, it is difficult to describe the tax as not levied directly on the ownership of property, where according to the state law there is not a complete transfer of all the incidents of the ownership of property. However, since such a result places a premium on property located in certain states and there makes possible the avoidance of the estate tax, it is regrettable if legally sound. It would seem that the Supreme Court, if the question is raised before it, must affirm the principle of the Tyler case, but one cannot speak with assurance in a field that is full of so many artificial distinctions.

E. S. L., Jr.

LIABILITY OF MANUFACTURERS OF DEFECTIVE ARTICLES FOR INJURY TO PURCHASERS FROM MIDDLEMEN—Injury caused by a defect in a manufactured article purchased not from the manufacturer but from a middleman, is a very common source of litigation. Where the requisite elements are present, of course the middleman may be held either in tort or assumpsit. But for various reasons,

33 Compare the question of the constitutionality of inheritance taxes on trust estates, discussed in Note (1925) 74 U. of Pa. L. Rev. 176.

34 In Pennsylvania, for example, tenancies by the entireties are still recognized. Joint tenancies may also be created. See (1928) 77 U. of Pa. L. Rev. 290.

1 The Uniform Sales Act, which has been widely adopted, purports in general to codify the common law on this subject. Section 12 deals with express warranties, and section 15 with implied warranties of quality. The decisions under these sections, particularly the latter, are by no means uniform. For discussions of the problems raised by these sections, see Mechem, Implied Warranties in Sale of Goods by Trade Names (1927) 11 Minn. L. Rev. 485; Brown, Implied Warranties of Quality in Sales of Articles Under Patent or Trade Names (1924) 2 Wis. L. Rev. 385; Note (1922) 70 U. of Pa. L. Rev. 219; Note (1927) 1 U. of Cin. L. Rev. 491.
both to establish a theory of recovery and from practical considerations, it is often desirable to sue the manufacturer, with whom the person injured has had no contractual relationship. The effort to hold the manufacturer liable has resulted in a host of conflicting decisions, both in tort and contractual forms of action. Generally the absence of privity of contract has proved a stumbling block in the way of recovery, whether the manufacturer has been sued in tort or for breach of warranty.

The early English case of Winterbottom v. Wright,\(^2\) generally understood to hold that the manufacturer owed no duty of care as to defects of original construction to persons not in privity of contract with him, has often been cited as authority for the non-liability of the manufacturer in an action *ex delictu*. Although the case does not support this proposition,\(^3\) it had a profound effect upon the cases that followed. Gradually, however, the courts whittled away this theory of non-liability of the manufacturer, and came, in certain circumstances, to impose a duty upon him toward persons not in privity of contract with him. In 1903,\(^4\) Judge Sanborn, summing up the law as it then existed, found that the cases established three exceptions to the rule that one supplying goods to another was not liable to persons with whom he was not in privity of contract for injuries caused them by negligent defects in the goods: (1) the negligent act of a manufacturer which is imminently dangerous to the life or health of mankind, and which is committed in the preparation of articles intended to preserve, destroy or affect human life;\(^5\) (2) the presence of negligently defective appliances upon the premises causing injury to a business guest;\(^6\) (3) where the manufacturer knows of the defect and can reasonably anticipate injury to life or limb to others than those in contractual relationship with him.\(^7\) This was the state of the law until the decision in the case of *MacPherson v. Buick Motor Co.*\(^8\) In that case the article sold was an automobile,

\(^{2}\) 10 M. & W. 109 (Eng. 1842).


\(^{7}\) Citing for this exception, Langridge v. Levy, 2 M. & W. 519 (Eng. 1837); Wellington v. Oil Co., 104 Mass. 64 (1870); Lewis v. Terry, 111 Cal. 39, 43 Pac. 398 (1896).

\(^{8}\) 217 N. Y. 382, 111 N. E. 1050 (1916).
which certainly is not an article intended to preserve, destroy or affect human life and hence "inherently dangerous," nor did the manufacturer know of the defect, nor, of course, was it a case of injury to a business guest caused by defective appliances upon the premises. The case, therefore, clearly does not fall within any of the three exceptions pointed out by Judge Sanborn. The court, however, held that the manufacturer owed a duty of care not only to the subpurchaser from the dealer to whom the manufacturer had sold the car, but to all others who were rightful users of it. In the words of Judge Cardoza:

"If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger . . . If to the element of danger there is added knowledge that the thing will be used by persons, other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully." 10

This clearly should be the real inquiry in order to determine the manufacturer's liability, regardless of whether or not privity of contract exists, for important as that element may be in establishing liability *ex contractu*, it is difficult to see how it has any logical application in the determination of tort liability. Although *MacPherson v. Buick Motor Co.*, was decided quite recently, it has already exercised considerable influence.11 And even in jurisdictions which have not as yet adopted the rule of this case, there is a tendency to extend liability beyond that imposed by the three exceptions previously alluded to. Thus in California, where the courts have failed to adopt the rule of *MacPherson v. Buick Motor Co.*, the recent case of *Kolberg v. Sherwin Williams Co.*12 held that the "inherently dangerous" doctrine applied to articles inherently dangerous to property as well as to human life. This case is very interesting in view of the fact that in a recent case,14 the New York Court of Appeals, in a *dictum* stated that it was uncertain whether the doctrine of *MacPherson v. Buick Motor Co.*, would be extended so as to establish liability for damage to property rights as distinguished from personal injuries. Certainly there seems to be no valid distinction between danger to life and danger to property, which should relieve the manufacturer of a duty of care where the latter is involved.

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9 The italics are the writer's.
10 Supra note 8 at 389, 111 N. E. at 1053.
12 See (1928) 2 So. CALIF. L. REV. 92.
13 269 Pac. 975 (Cal. 1928).
Even if the liability of the manufacturer in tort were conceded, it is often desirable to bring a contractual form of action, because of the difficulty of proving negligence, especially where the "res ipso loquitur" doctrine cannot be applied. However, in actions ex contractu as for breach of warranty, courts are again confronted with that troublesome problem, lack of privity between the parties, and in this situation with a great deal more reason than in tort actions. The great majority of cases have held there cannot be an action for breach of warranty, unless there is a contractual relationship between the parties. But in actions for breach of warranty, lack of privity between the parties should not necessarily be fatal. As Williston points out, the original bases of actions on warranties sounded in tort, being based on the warrantor's deceit. Moreover, in many cases warranties are imposed by law, regardless of whether they are in accordance with the parties' intentions. This is sufficient indication that warranties are not so essentially part of a contract that they cannot be dissociated from it, so as to accrue to the advantage of one who has suffered from a breach of the warranty, even though he was not a party to the contract.

A number of cases have made an exception in the case of food, holding the manufacturer liable, even in the absence of privity. However, there is no logical reason for distinguishing food from other articles in actions for breach of warranty. Courts that make this distinction really are confusing tort liability with contract liability when they hold that manufacturers of food are under a stricter duty of care, and hence liable to the ultimate consumer for breach of warranty. If an action for breach of warranty should be available to the subpurchaser in one case, it should be available in all cases. Hence, two recent cases, granting a right of action for breach of an implied warranty to the subpurchaser, on reasoning broad enough to cover any type of article sold, are very significant. Both cases reached the same result, but the decisions in the two cases are based on different and unrelated theories. In Coca-Cola Bottling Works v. Lyons, the plaintiff was treated by a friend to a bottle of soft drink manufactured by the defendant, and purchased by the friend from a middleman. Here the relation-

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32 Many courts apply the res ipso loquitur doctrine in cases where foreign articles are found in food. See annotation in (1919) 4 A. L. R. 1559.
34 I Williston, Sales (2d ed. 1924) § 244.
36 Ill. So. 305 (Miss. 1927).
ship between the plaintiff and the defendant was more remote than in the ordinary case, for the plaintiff was not even a purchaser. However, the court held that the defendant was liable for breach of the implied warranty that the contents of the bottle were fit as a beverage, stating that there was no necessity for privity between the plaintiff and the defendant, for all warranties passed together with title to the article sold, in the same manner that a covenant running with land, passes with title to the land. In *Ward Baking Co. v. Trizzino*, the plaintiff bought from a retailer, a cake manufactured by the defendant, and was injured by a needle lodged in the cake. The court permitted the plaintiff to recover for breach of an implied warranty on the theory that the contract between the manufacturer and the middleman was for the benefit of the ultimate consumer, and hence that he could take advantage of all warranties which were part of the contract.

Unfortunately, the law extending a right of action to third persons, for whose benefit a contract was made, does not sustain the position of the court in *Ward Baking Co. v. Trizzino*. The main object of the contract between the manufacturer and the middleman obviously was not to benefit in any way the ultimate consumer, who if he is a beneficiary at all, which seems very doubtful, is only an incidental beneficiary. And it is well settled that third persons who are only incidentally benefited by a contract have no right of action on that contract. However, the law of third party beneficiaries may be cited as an analogous situation, in which the doctrine of privity of contract stood in the way of recovery and was discarded by the courts in aid of what they considered substantial justice. As Corbin has shown in a recent article, the entire development of the law of third party beneficiaries has been a conflict between two opposing doctrines, one requiring privity of contract, the other establishing the rights of third parties for whose benefit a contract is made, and in most American jurisdictions, the courts have definitely brushed aside, in this situation, any necessity for privity of contract. Why should not the rule requiring privity of contract be relaxed also in the situation where a subpurchaser sues the manufacturer for breach of warranty? If all that stands in the way of permitting a right of action to the subpurchaser is want of a sufficient legal theory, it is submitted that the case of *Coca-Cola Co. v. Lyons* offers a suitable one. It is true that the analogy of covenants running with land is not a very close one, for there the purchaser of land succeeds to an

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20 161 N. E. 557 (Ohio, 1928).
21 See 1 Williston, *Contracts* (2d ed. 1924) § 347 et seq.
22 See 1 Williston, *Contracts* (2d ed. 1924) §§ 402, 403, and cases cited thereunder.
24 Ibid.
obligation, while in this case the purchaser of the chattel becomes invested with an additional right. But in both situations it is equally true that the successor to title, finds himself in a quasi-contractual relationship with some person other than his immediate grantor of title. The theory adopted by the court in the Coca-Cola Co. case would seem to be sufficiently sound to bear successfully any legal analysis, and has the advantage of simplicity of application.

There is no reason, either logical or practical, to adhere to the doctrine of privity of contract, to defeat recovery by the subpurchaser in a situation where it seems clear that, to meet the ends of justice, the manufacturer should be liable. Without venturing to decide what is the soundest theory on which to explain such a recovery, plainest justice demands that such a recovery be sustained.

J. M.

Application of the "Imminent Peril" Doctrine Where Damage to Property is Threatened—In the recent case of Johnson v. Terminal Railroad Association, an employee of the defendant railroad negligently failed to "chock" a moving freight car, and the plaintiff, another employee, seeing that a collision between the moving car and other stationary cars was imminent, voluntarily left his place of safety and attempted to avert the disaster. It did not appear that the plaintiff was guilty of rash or reckless conduct, either in making the effort to save the property, or in the manner of making it. Having been injured in the attempt, he brought suit against the defendant under the federal Employer's Liability Act. The Supreme court of Missouri held that the plaintiff could not recover. The court reasoned that it could not be foreseen that the plaintiff would voluntarily leave a place of safety in the defense of mere property, and that therefore the plaintiff's intervention, not the negligence of the defendant, was the proximate cause of the resultant injury. Blair, J., said, "This state does not recognize the application of the 'imminent peril' doctrine where mere property damage is involved."

In analyzing this type of situation, at least four inquiries are involved, which must be distinguished with as much precision as possible. These four problems are (1) whether the defendant violated any duty to the plaintiff to use due care (2) whether the defendant's act was the proximate cause of the plaintiff's injury (3) whether the

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1 8 S. W. (2d) 891 (Mo. 1928).
2 35 Stat. 65 §§ 1-8 (1908) and 36 Stat. 291 §§ 1-2, U. S. C. (1925) Tit. XLV §§ 51-59. These acts in effect abolish the common law "fellow servant" doctrine as far as persons engaged in interstate commerce are concerned, thus enabling a servant to sue his principal for injury caused by his fellow servant's negligence. The acts give the state courts concurrent jurisdiction with the federal courts in this matter.
3 Under the Employers' Liability Act, the question involved in the Missouri case is the same as if the plaintiff had been injured by any negligent tortfeasor.
plaintiff was guilty of contributory negligence, and (4) whether the plaintiff's recovery is barred by voluntary assumption of risk. In particular, the problem here is to determine how to describe such a decision as was handed down by the Missouri court in the principal case.\(^4\) It would seem conducive to clear analysis to confine the concept of "voluntary assumption of risk" to those cases where a person has full freedom of volition, and where by an unconstrained consent on his part, he may destroy the element of non-consent requisite to the tort.\(^5\) When, on the other hand, the plaintiff has acted under an exigency caused by the defendant's wrongful misconduct, as in the principal case, and the inquiry is whether the plaintiff had a legal right or a legal or social duty to so act, the question involved is best described as whether or not the defendant violated any duty of care to the plaintiff.\(^6\) It is well to distinguish the problem involved from the already vexatious problem of "proximate cause."\(^7\)

To quote Professor Bohlen: \(^8\)

"To say that an act is the proximate cause of an injury only as between the parties is to add a new element of confusion to a subject already difficult. If the act and the consequences are the same, the legal proximity of the one to the other, depending as it does on the foresight of the normal man or on the course of nature, cannot be affected by the personality of the plaintiff, who it is true, may for other reasons, be barred by it."

The question whether contributory negligence on the part of the plaintiff is present is even more separate and distinct from the problem involved in the decision of the Missouri court. For even if a person has a legal right or a legal or social duty to protect certain interests, yet he cannot recover if under the particular circumstances, it was rash to attempt to exercise the right, or he did not go about it with ordinary care.\(^9\) The concept of "contributory negligence" is best confined to these latter elements.

It would seem, then, that the most appropriate way to describe the decision of the Supreme Court of Missouri would be to say that under the circumstances the defendant's servant violated no duty of care to the plaintiff. However the description used by the Missouri court, that the plaintiff's act, and not the defendant's servant's act, was the proximate cause of the injury, is the language used by most

\(^4\) For a thorough consideration of this problem and an analysis on which the discussion here is based, see Bohlen, Studies in the Law of Torts (1926) 441 et seq.
\(^5\) Ibid. at 451.
\(^6\) Ibid. at 443.
\(^7\) For a concise statement of the various theories of legal proximity, see Note (1926) 74 U. of Pa. L. Rev. 485.
\(^9\) Ibid. at 445-447 and 501 et seq.
of the decisions. Regardless of how the result is described, the question remains to be discussed whether the principal case is in accord with the general judicial opinion, when it decides that an employee who leaves a position of safety to save his master's property which has been endangered by the negligence of a fellow servant, may not recover on the theory of the fellow servant's negligence, for an injury that he sustains in so acting.

Before proceeding with this investigation, it will be well to distinguish it from several analogous situations involving the so-called "imminent peril" doctrine. The first of these is the situation where a rescuer is injured in an attempt to save a human life from danger, the courts in such cases universally allowing a recovery. The most forceful exposition of the reason for the rule is made by Cardoza, J., in a recent New York case, the learned judge saying:

"Danger invites rescue. The cry of distress is the summons of relief. The law does not ignore these reactions in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable . . . Continuity in such circumstances is not broken by the exercise of volition . . . It is enough that the act, whether impulsive or deliberate, is the child of the occasion."

In these cases, in addition to holding that the intervening act is foreseeable, the courts generally hold that, as the desire to rescue is so consuming, the rescuer will not be bound to observe a high degree of regard for his own safety. Such a conclusion, of course, indicates that the courts feel that the intervention of the rescuer is a most reasonable one, and will do all in their power to aid a recovery. The second type of situation which should be distinguished from that in the principal case is where a person attempts to save his own property from damage which has been threatened by the negligence of the defendant, and receives personal injuries in so doing. In such cases, a recovery is generally granted, the reason being that the plaintiff is under a positive legal duty to use reasonable efforts to mitigate the amount of defendant's damages to himself, and, further, to prevent other damage which the original wrongful act may cause. A third type of case to be distinguished is that in which an

12 See Note (1922) 19 A. L. R. 4.
14 See Note (1908) 15 L. R. A. (N. S.) 819.
employee intervenes to save property of his master, but does so under direct commands from one of his superiors, and receives injuries in the course of the undertaking. In such cases a recovery is always granted, because not only is the intervening act foreseeable, but in fact it was authorized and directed by a representative of the negligent defendant, and therefore the propriety of the plaintiff's recovery is unquestioned.

Having distinguished the problem from cognate questions, an examination of the authorities discloses that very few courts have passed on the precise point raised by the Johnson case. In the leading case of Pullman Palace Car Co. v. Laack, an employee voluntarily left his place of safety and attempted to save his master's property from fire, and was injured in so doing. In allowing a recovery, the court, treating the problem as a question of causation, said:

"It is contended, however, that defendant's negligent act was not the proximate cause of the injury. A new cause, it is said, intervened between such negligence and the injury to appellee... We cannot assent to this contention. Where the acts and events that intervene between the first cause and the injury are the natural result of such first cause, and follow it in an immediate and unbroken sequence, such first cause must be held to be the proximate cause of the injury."

To the argument that, although the defendant was not guilty of contributory negligence, he could have chosen a safer method of saving the property, the court answered:

"Justice will not permit appellants to escape the consequences of their own negligence, and defeat appellee's claim for reparation, by urging against him his faithful endeavor to protect their property from a danger which their negligence created."

Several other decisions are substantially to the same effect. Of course, if the damage threatened is trivial, and the risk involved in

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17 Also distinguish between the case in which an employee intervenes to save life and the case in which he intervenes to save property. On this point, see St. Louis R. R. v. Morgan, 115 Ark. 602, 174 S. W. 540 (1915); Note (1906) 2 L. R. A. (n. s.) 954; Bohlen, op. cit. supra note 4, at 444, n. 6.

18 The next case with facts substantially in point which allowed a recovery was the case of Pepgram v. Seaboard Airline Railway, 139 N. C. 303, 51 S. E. 975 (1905). In that case the court approved of the following instruction: "The only limitation of the rule that an employee or servant or other person may incur risk to save property is that one must not recklessly expose himself to
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attempting to save it is substantial, an employee is not justified in inter-
vening. These cases are in obvious conflict with the rule of the Mis-
souri court in the principal case, to the effect that intervention
could never be foreseen.

It is necessary at this point to examine a few cases which do not
allow a recovery, to determine whether such cases are in accord with
the decision in the principal case. The case of Chattanooga Light &
Power Co. v. Hodges is often cited as an authority for the propo-
sition that an employee who voluntarily attempts to save his master's
property, and is injured in making the attempt, cannot recover, because
his attempted rescue is the proximate cause of his own injury. How-
ever, it is believed that the court in that case never intended to lay
down the broad principle that has been attributed to it. The facts
show that the plaintiff rushed into a burning building to save prop-
erty, and the court said:

"Where the injury results from an act committed by the
injured party so obviously fraught with peril as should be suf-
cient to deter one of reasonable intelligence ... it would
seem impossible to find any ground upon which to maintain
that the person guilty of the first negligence should be held
liable to the party injured ... In such a case the intervening
act of the party injured should be treated as the proximate cause
of his injury."

This language is perfectly in accord with the principles outlined in
the cases which do allow a recovery. Under the facts in the Chat-

danger. When he does not recklessly expose himself to danger, because of the
duty he owes his employer to attempt to save his property, his act is relieved of
the character of legal cause, and the liability is remitted to the negligence of the
defendant."

where an employee seeing a freight car about to be smashed intervened and
attempted to save the property and was injured in so doing, the court, finding
that the plaintiff was not guilty of contributory negligence, allowed a recovery.
This case is particularly interesting as it is clearly evident in the opinion of the
court that, because of the emergency and necessity for quick action, the plaintiff
would not be required to act as carefully as he would be in an ordinary situation.
See also dictum to same effect in Stevens v. Henningsen Co., 53 Mont. 306, 163
Pac. 470 (1917).

In the cases of Hollenback v. Stone Emergency Corp., 46 Mont. 559, 129
Pac. 1058 (1913) and Martin v. North Jersey Street Railway Co., 81 N. J. L.
562, 80 Atl. 477 (1911), the plaintiffs were allowed to recover, when, as em-
ployees, they were injured in voluntarily attempting to save property of their
masters from destruction. In both cases the courts expressly stated that it was
a duty of every faithful employee to reasonably attempt to conserve the property
of his master.

Judkins v. Maine Central R. R., 80 Me. 417, 14 Atl. 735 (1888); McCon-
nell v. Block Co., 26 Ga. App. 550, 106 S. E. 617 (1921). This is merely an
application of the principle that if the risk is not proportionate to the damage
threatened, the intervener is guilty of contributory negligence.

109 Tenn. 337, 70 S. W. 616 (1902).
hanooga case, the risk was so great that the plaintiff's assumption to act branded him with contributory negligence. The recent Michigan case of Bacon v. Payne \(^{21}\) is to same effect.

The above cases fairly represent those in which a recovery has been denied, and it is believed that, even though the intervener is not justified in taking as great a risk when property as contradistinguished from human life is endangered, if a case arises in which the intervening act of the employee is shown to be reasonable and careful, the courts in those jurisdictions will not follow the Missouri rule, but will allow a recovery. Only one case \(^{22}\) has been found in which the decision is strictly in accord with the principal case, and no valid reasons for the holding were there presented.

Whether a person in some other relationship to the owner of property than that of employee can recover from a tortfeasor, when injured in an attempt to save property endangered by said wrongdoer, would seem to be subject to the same fundamental tests. The inquiry in such case should be whether, considering the particular relationship in question, the plaintiff was under such a legal or social duty to intervene, that his intervention may not be considered his voluntary act. If that inquiry is answered in the affirmative, then it would seem that the intervener should be able to recover. In accordance with this principle it was held in Liming v. R. R. \(^{23}\) that one who was injured in reasonably attempting to defend a neighbor's property from fire, caused by the negligence of the defendant, could recover.

In conclusion, therefore, it may be said that most jurisdictions are apparently in harmony concerning the right of an employee to intervene to save his master's property, the differences in result being caused solely by variances in the facts. It would seem, not only upon strict legal principles, but upon the broader ground of public policy, that any decided shift in favor of the Missouri rule would be most regrettable, not only because it appears to be rankly unjust to the employee, but because it also places a premium on his unfaithful service.

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\(^{21}\) 220 Mich. 672, 190 N. W. 716 (1922). In that case the plaintiff was injured while attempting to turn a switch in order to avert a disaster to property. The court clearly indicates that a recovery was not allowed, only because the plaintiff's conduct was unreasonable under the circumstances, for it says: "The rule for exoneration from negligence where the injured party acted in an emergency does not apply where his conduct is rash and reckless."

\(^{22}\) 26 Ga. App. 739, 107 S. E. 276 (1921).

INFRINGEMENT OF COPYRIGHT IN LAWBOOKS—Anderson Co. v. Baldwin Law Publishing Co., recently decided, held that where the plaintiff had published an eleven volume annotated edition of the Ohio code and where the defendant had made lists of the citations of cases found in the plaintiff's books to supplement the defendant's own inadequate search of the original reports for all cases construing Ohio statutes, thereafter reading the reports cited and writing up his own original notes in his two volume edition of the Ohio code, the plaintiff was entitled to an injunction to restrain what was an unfair use of his volumes.

In order to properly discuss the suggested problem as to what constitutes unfair use of copyrighted material, it is necessary to first inquire into the legal bases of copyright. Under the Constitution of the United States Congress has the power:

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

Copyright property is purely statutory and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred by the Constitution. Each copyright statute creates a new right and does not extend or continue a previously existing right. The Act of March 4, 1909 is the last of a series of acts, inaugurated by the original Act of May 31, 1790, attempting to cover the field of copyright. Section 1 (a) of the Act of 1909 sets forth as the privileges conferred upon authors by the statute, the right "to print, reprint, publish, copy and vend the copyrighted work." Section 5 of the Act includes as matter subject to copyright, "books, including composite and cyclopedic works, directories, gazateers and other compilations."

The accepted short definition of the nature of copyright is the exclusive right to multiply or reproduce copies. It is clear that a

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1 27 Fed. (2d) 82 (C. C. A. 6th, 1928).
2 The court considered a mass of conflicting evidence upon the question whether there had been further use in the form of direct copying of plaintiff's annotations which if proven would clearly have constituted unfair use, but the primary ground for the decision stated in the text is expressly independent of this matter. However, the presence of this element in an equity case partially weakens it as a holding for the proposition stated.
3 Art. 1, Sec. 8 (8).
7 1 Stat. 124 (1790).
8 The English Copyright Act now in force, 1 & 2 Geo. V, c. 46 (1911), is largely similar in scope and content to our Act of 1909.
9 Jeffrey v. Boosey, 4 H. L. Cas. 815, 920 (1854); Walter v. Lane [1900] A. C. 539, 550.
copyright in any sort of law book is infringed when there is an actual copying of the words as they appear in the copyrighted work; the act expressly reserves to the author the exclusive right to copy his production. Classical language descriptive of copyright is that, "the subject of property is the order of words . . .; not the words themselves, they being analogous to the elements of matter which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."  

But if we accept the theory that copyright exists in the order of the words, and that infringement consists in an exact reproduction of those words, we are met with the difficulty of being unable to explain cases where it has been held an infringement, first, to copy the thought set forth in a copyrighted work disguising and paraphrasing the first author's language so as to present a superficially different expression, and second, to appropriate the prior author's ideas of arrangement or selection. In neither of these cases is there any actual copying or reproduction of words. It would therefore be more accurate to conclude that copyright exists in the succession of ideas expressed and in the arrangement of the ideas, as well as in the particular mode of expression.

Furthermore, copyright is not in the nature of an absolute monopoly. Unlike a patent or trade-mark which confers monopoly for all purposes, copyright enables an author to monopolize the ideas expressed in his book only partially. His monopoly on his ideas is limited to a right to have enjoined a misuse of the work employed by him in expressing the ideas. Thus, while a patent is held to be infringed when its principle is duplicated, independently or not, two authors may each consistently evolve and copyright substantially identical productions, provided their work was independent, and the copyright of neither of them will be infringed. Furthermore, the publisher of a copyrighted book often intends that his work be copied for certain purposes by members of the public; his book would be of no value to him and would not effectuate the purpose of his composition if it were not so used. It is of the utmost importance that this circumstance be kept in mind when we seek to ascertain the exact limits of the monopoly conferred by copyright.  

When we proceed to consider the rule according to which the use of a copyrighted book is judged to be fair or otherwise, it appears that there is no one inclusive test to determine what in law is an infringement. Partly because of the impracticability of the thing and partly because of the indefinite and particular statement of the limits

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of permissible use would invite schemes and devices to use unfairly within the spirit of such rule, courts have regularly refused to go much further than to decide each case according to its facts and in the light of general fairness in its natural sense. Section 25 of the Copyright Act of 1909 simply enacts:

"That if any person shall infringe the copyright of any work protected under the copyright laws of the United States such person shall be liable."

in certain civil proceedings. The original draft of the Act defined infringement as

"doing or causing to be done, without the consent of the copyright proprietor first obtained in writing, any act the exclusive right to do or authorize which is by 'copyright' laws reserved to such proprietor." 12

This comprehensive, but not especially helpful definition, was stricken out before the bill was enacted. However, the English Act 13 contains such a provision with a number of exceptions.

Realizing, then, that Congress has seen fit to lay down no general rule by which to determine "unfair use," it will be well to consider the factors which are involved in making such a determination. The first of these factors is the character of the copyrighted book. The cases have drawn a distinction between publications which are primarily the product of literary, creative or imaginative ability and works which are compilations or collections of facts and statements found elsewhere. 14 For example, in text-books, treatises and encyclopedias the literary element predominates; in digests, law reports, annotated statutes and form books the clerical element is primary. But the two groups are not mutually exclusive. A certain class of books cannot necessarily be put entirely in one group or the other in every case. Thus, a form book, which is usually a compilation of forms used in practice, may have to be classified as a literary creation in a case where the author conceives his own forms. Nor can any one particular publication be conclusively labeled either as a literary work or as a compilation. Thus, a text-book is in the nature of a compilation in so far as it has been composed through the routine of finding and citing authorities; a digest, which is primarily a compilation, must be treated as a literary creation in so far as its text and scheme of arrangement are original. The theory behind this distinction is that while each type of work is protected in some degree, yet work in the nature of a compilation must submit to a broader use,

12 Sec. 23, Copyright Bill, Copyright Office Bulletin No. 12, p. 41.
13 Supra note 8.
since it is impliedly dedicated to use as a tool to lead other persons to the original sources, in a manner which more nearly approximates copying than is true in the case of literary creations.\textsuperscript{15}

A second factor to be considered is the character of the person who uses the copyrighted publication and his purpose in so doing. It is clear that a lawyer might fairly copy the material in a digest in the preparation of a brief, for the reason that the digest was dedicated to such use. On the other hand, it is clear that one compiler cannot fairly copy material as it appears in a prior compilation of the same kind. But assuming that a person uses a prior book merely as a guide, verifies the facts stated and then expresses them in his own fashion, is such use, otherwise deemed fair, to be considered unfair because of the circumstance that the two books in controversy are similar in scope and nature and their authors are competitors?

The English cases, after a period of uncertainty, have reached the conclusion that the prior editor of a literary work or a compilation is protected against servile copying of the material found in his book, but may not complain against the use to which his volume was dedicated, namely, use as a means of leading others to the original sources, even though the means is adopted by the editor of a rival publication.\textsuperscript{16}

There is a great deal of language in the American cases which would seem to lend color to the view that competitive disadvantage suffered by a copyright proprietor is a positive factor to be considered.\textsuperscript{17} But practically without exception such expressions were made by way of \textit{dictum}, the cases being explainable on the ground that there was a direct or indirect copying of material. For example, in \textit{West Publishing Co. v. Lawyers' Co-Op. Co.}\textsuperscript{18} it was held an infringement for defendant to copy into his law reports syllabi found in plaintiff's reports, paraphrasing the language; this was clearly

\textsuperscript{15}This is true for the added reason that it is a bit arbitrary to say that compilations of fact "promote the progress of science and useful arts" and that therefore it was a stretch of the Constitution to have allowed such works to be copyrighted in the first place. See \textit{Hartford Printing Co. v. Hartford Publishing Co.}, 146 Fed. 332, 333 (C. C. Conn. 1905).

\textsuperscript{16}Pike v. Nicholas, L. R. 5 Ch. App. 251 (1870); Morris v. Wright, L. R. 5 Ch. App. 279 (1870); see Lewis v. Fullerton, 2 Beav. 6 (Eng. 1830); Jarrold v. Houlston, 3 Kay & J. 708 (Eng. 1857). But see Kelly v. Morris, L. R. 1 Eq. 697 (1866).

\textsuperscript{17}Banks v. McDivitt, Fed. Cas. No. 961 (C. C. S. D. N. Y. 1875) (annotated rules of court); List Pub. Co. v. Keller, 30 Fed. 772 (C. C. S. D. N. Y. 1887) (social registers); Callaghan v. Myers, 128 U. S. 617 (1888) (law reports); George Bisel v. Welsh, 131 Fed. 564, (C. C. Pa. 1904) (dissent of Pennsylvania laws). The case of \textit{Mead v. West Publishing Co.}, 80 Fed. 380 (C. C. Minn. 1896), appears to be curiously out of line even with the holding of the foregoing cases; here defendant copied a number of plaintiff's citations, the books being rival editions on Stephen on Pleading, without reference to the original reports, but the court refused to enjoin defendant's publication, though there was a clear case of copying.

\textsuperscript{18}64 Fed. 360 (C. C. N. D. N. Y. 1894), reversed on other grounds, 79 Fed. 756 (C. C. A. 2d, 1897).
copying, but the court strongly emphasized the so-called unfair appropriation of plaintiff’s labor and finds the offense to lie in such practice rather than in the simple reproduction of plaintiff’s thought and language. Although in these cases the wrongful act was a direct copying, the courts go out of their way to emphasize the fact that the effect of such practice was to enable the subsequent compiler to unfairly compete with his predecessor by obtaining a similar result with considerably less effort.

Several American cases do recognize the validity of the contention that copyright in a compilation can be infringed only by an actual copying, which is not present when the prior work is used merely as a lead to original sources. Thus, in Dun v. International Mercantile Agency, defendant’s use of plaintiff’s credit book for the purpose of discovering the names of firms and associations engaged in business, to be inserted in defendant’s publication which it was preparing, was not such unfair use as to entitle plaintiff to an injunction.

It would seem that a competitor should not be forbidden all use of a prior work, even though it is no more than a collection of facts. He should not be denied the privilege of using the prior work as a tool to lead him to the original sources simply on the ground that he is a competitor. The prior work was impliedly dedicated to this very use without respect to any distinctions as to the persons who may happen to have occasion to so employ it. An often repeated dictum in Moffatt v. Gill goes to the root of the matter:

“You cannot, where another man has compiled a directory, simply take his sheets and reprint them as your own, but you are entitled, taking the sheets with you, to go and see whether the existing facts concur with the description in the sheets, and if you do that you may publish the result as your own.”

39 Again, in Jewelers’ Publishing Co. v. Keystone Publishing Co., 281 Fed. 83 (C. C. A. 2d, 1922), the court held it an infringement of plaintiff’s trademark directory for defendant to copy portions and to adopt the classification of it; the court said that no one can legally take the results of the labor and expense which another has incurred in publishing his work, and thereby save himself the trouble of working out and arriving at those results by some independent road. Such language would seem to be too inclusive and the court itself admits specifically that the first directory might have been used as a guide to the original sources. Followed in American Hotel Directory Co. v. Pub. Co., 4 Fed. (2d) 415 (D. C. S. D. N. Y. 1925), another case of copying. The dissent in the Jewelers’ case is based partially on the ground that the instances of copying seemed too few to be the basis of an injunction. This thought illustrates the rule that whatever be its nature an infringement must be substantial before a court of equity will enjoin it, the law taking no cognizance of trifles.


And the proper investigation in cases of this kind is whether the defendant really verified the facts so that he could state them as a result of an independent judgment of his own. If under all the facts, the court concludes that the defendant did not exercise an independent judgment in the matter, but relied on the prior book, then he must be charged with substantially copying the plaintiff's work. Where the defendant admits that he used a prior work as a tool, the burden of proof should be put on him to show that he verified the facts to such an extent that he could state them on his own authority.

There are two conflicting public policies involved in the question of copyright infringement. First, in common fairness a subsequent author should not be allowed to reap the benefits of a prior author's work, whatever may be its nature, without assuming some of the burden. Second, it will retard rather than promote progress in science and useful arts if we impose unreasonable limitations upon the use of copyrighted material. If the law of copyright is applied so as to deny a subsequent compiler the right to make ordinary use of a prior compilation, that law becomes an instrument of retrogression because it hampers the use of previously accumulated knowledge. The public policy favoring the facilitation of the propagation of learning should outweigh the private disadvantage incurred by any publisher by reason of such practice as was condemned in the *Ander son* case.

*D. M.*