Notre Dame Law Review

Volume 29 | Issue 2 Article 11

2-1-1954

# Recent Decisions

Norman H. McNeil

David N. McBride

Robert J. Hepler

John P. Coyne

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

## Recommended Citation

Norman H. McNeil, David N. McBride, Robert J. Hepler & John P. Coyne, *Recent Decisions*, 29 Notre Dame L. Rev. 309 (1954).
Available at: http://scholarship.law.nd.edu/ndlr/vol29/iss2/11

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Related taxpayers as defined in the statute include, among others, husband and wife, partners, and fiduciary and beneficiary.[89] The requirement of a determination within the statutory time and by one of the prescribed methods must be complied with.[90]

Section 3801 has been widely criticized,[91] principally on the ground that its application is too narrow.[92] The new amendment goes far in remedying this objection.

*Conclusion*

Most of the changes made by the Technical Changes Act of 1953 are minor, some of them affecting only one or two persons. All major revisions of the Code have been postponed until 1954. This Act, however, does remedy several unjust provisions in the Code and is at least a step toward a more equitable revenue law.

*Edward L. Burke*

---

# RECENT DECISIONS

EVIDENCE — ADMISSIBILITY OF WIRETAP EVIDENCE — PLEA OF FABRICATION. — *People v. Feld*, ....N.Y....., 113 N.E.2d 440 (1953). The defendant, a police officer of the City of New York, was indicted by the Grand Jury of Kings County, charged with the crime of perjury. He had allegedly given false testimony before the grand jury that he had not seen one Karp, a professed book-maker, on the 14th day of September, receive a bribe. At the trial Karp testified on behalf of the prosecution that the bribe had been offered and accepted on that date. His testimony was corroborated by two of his friends, both of whom were involved in the bribe transaction. In pursuance to a court order wire taps had been placed on Karp's telephone connections and recordings were taken on the day the alleged bribe took place. Oral testimony was first presented concerning the conversations that took place and the defendant was implicated. However, the defense effectively showed that each of the prosecution witnesses had a motive to testify falsely, namely, leniency. The prosecution then introduced the recordings to refute the implication of fabrication.

Wire taps pursuant to a court order are admissible in New York. N.Y. CODE CRIM. PROC. § 813-a. The recording covered a five minute tele-

---

[89] INT. REV. CODE, § 3801(a)(3).

[90] Estate of J. B. Weil, P-H 1943 TC MEM. DEC. ¶ 43,207 (1943), *aff'd*, 145 F.2d 240 (6th Cir. 1944), *cert. denied*, 323 U.S. 793 (1945).

[91] *Report of the Committee on Federal Taxation*, 24 A.B.A.J. 711, 712 (1938).

[92] Landman, *Tax Relief from the Statute of Limitations*, 5 Tax L. Rev. 547, 554 (1950), contains a history of §3801 and suggestions for possible improvements.

phone conversation between Karp and one of the corroborating witnesses. The name of defendant, Feld, was spoken only once during the conversation, and this was at the end of a forty-five second pause. The prosecution explained the pause by the fact that the corroborating witness was, at the time, talking on two telephones, relaying Karp's information to a "higher up." The defense contended, however, that the long pause suggested a "dub-in" of Feld's name, supporting that contention by the fact that the mention of a police officer's name in the conversation was necessary to substantiate the testimony of the prosecution's witnesses. The trial court refused to allow the defendant to question an officer who had heard a play-back of the recording to the trial as to whether he had in fact heard Feld's name mentioned at that time. A wire tap expert witness called by the defendant said that he could not say whether the record had been duplicated or mutilated, but he was not allowed to say why he could not tell nor was he permitted to give his opinion as to the forty-five second pause.

The Supreme Court, Appellate Division, in a 3 to 2 decision affirmed the conviction, saying the trial court erred in not allowing the above testimony, but that such were technical errors which did not affect the substantial rights of the defendant. 112 N.Y.S.2d 912 (1952). The Court of Appeals affirmed in a 4 to 3 decision, in effect holding that there were no errors at all because the pause had been accounted for by the prosecution.

The first case concerning wire tap evidence reached the United States Supreme Court in 1928 on a conspiracy conviction in violation of the NATIONAL PROHIBITION ACT, 41 STAT. 305 (1919), *Olmstead v. United States*, 277 U.S. 438 (1928). A majority of the court held that the admission of such evidence, that is, "projected voices," did not violate the unreasonable search and seizure provision of the Fourth Amendment, nor did such evidence constitute forcing the accused to be a witness against himself within the meaning of the Fifth Amendment to the Constitution. Justices Brandeis and Holmes dissented. Justice Holmes' sentiments are clearly shown where he said: 277 U.S. at 470, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Justice Brandeis was more vehement, 277 U.S. at 473, 474:

> Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosures in court of what is whispered in the closet.
>
> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

At common law the illegality in securing evidence does not affect its admissibility. *Legatt v. Tollervey,* 14 East. 302, 104 Eng. Rep. 617 (K.B. 1811); *Commonwealth v. Dana,* 2 Metc. 329 (Mass. 1841) (alternative holding). The Supreme Court departed from the rule in *Weeks v. United States,* 232 U.S, 383 (1914), allowing the defendant to compel the return of illegally obtained evidence, (Federal officers participating). In *Angello v. United States,* 269 U.S. 20 (1925), it was decided that evidence illegally obtained might not be used. Then came the *Olmstead* case, *supra,* where a Washington criminal statute prohibited tapping telephone wires, but the court reverted to the common law rule that the wrongful methods used to gain this evidence would not affect its admissibility; that wire tapping, at least in the absence of an incidental trespass, does not come within the "persons, houses, papers, and effects" provisions of the Fourth Amendment. The decision has never been overruled. Thus the defendant, in such case, is left with only a cause of action against the officer for what would amount to a breach of the right of privacy or for illegal seizure where the conduct is unlawful. As to the remedy against the officer, see: *People v. Gonzales,* 20 Cal.2d 165, 124 P.2d 44 (1942); and as to the effectiveness of the remedy against the officer, *People v. Hebberd,* 96 Misc. 617, 162 N.Y. Supp. 80 (Sup. Ct. 1916).

To Congress remained the duty of rendering intercepted communications inadmissible in Federal Courts. Congress accordingly enacted the COMMUNICATIONS ACT OF 1934, 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1946): ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ." Section 605 has been held to establish a rule of evidence where interstate and foreign messages are concerned and establishes the rule that the prohibition in the statute against communications "to any person" applies to testimony before the courts. *Nardone v. United States,* 302 U.S. 379 (1937); 308 U.S. 338 (1939), (two separate attempted convictions). *Weiss v. United States,* 308 U.S. 321 (1939), extended the rule in a Federal court to intrastate messages. *United States v. Coplon,* 185 F.2d 629 (2d Cir. 1950), *cert. denied,* 342 U.S. 920 (1952), reiterated that recordings cannot furnish leads to any of the evidence introduced. *But cf. Goldman v. United States,* 316 U.S. 129 (1942), where it was held that the use of a detectaphone violated neither § 605 nor the Fourth Amendment; *On Lee v. United States,* 343 U.S. 747 (1952), held evidence consisting of conversation relayed by concealed radio transmitter admissible; *Goldstein v. United States,* 316 U.S. 114 (1942), held the testimony of two witnesses admissible, although they had been induced to testify by being confronted with recordings of their telephone conversations, provided the defendant had not been a party to any of the intercepted conversations. Thus it appears that wire taps can be made by federal officers, the only restriction re-

maining intact being the rule that "telephone" conversations cannot be used as evidence. See Westin, *The Wire Tapping Problem: An Analysis And A Legislative Proposal,* 52 COL. L. REV. 165 (1952); McCabe, *Wire Tapping,* 1 LAW. GUILD REV. vol. 3, p. 4 (1941).

An unreasonable search and seizure committed by state and local officers has been said to present no federal question, *National Safe Deposit Co. v. Stead,* 232 U.S. 58, 70 (1914), for the reason that the Fourth Amendment does not apply to states. It has been recently ruled that the due process clause of the Fourteenth Amendment does not preclude a state from using evidence obtained by an illegal search and seizure in a prosecution in a state court for a state crime, providing there is no "police incursion into privacy." *Wolf v. Colorado,* 338 U.S. 25 (1949); accord, *Stefanelli v. Minard,* 342 U.S. 117 (1951); *People v. Sica,* 112 Cal. App.2d 574, 247 P.2d 72 (1952). *Harlem Check Cashing Corp. v. Bell,* 296 N.Y. 15, 68 N.E.2d 854 (1946); *People v. Defore,* 242 N.Y. 13, 150 N.E. 585 (1926). For a general review of state positions concerning the admissibility of illegally obtained evidence see Note, 150 A.L.R. 566 (1944).

History, therefore, shows us the general objections to wire tap evidence, as follows: (1) it is an unreasonable and illegal search and seizure, (2) it is an undue burden upon the right of privacy of both the innocent and those under suspicion, (3) it literally forces the defendant to be a witness against himself, and (4) it allows officers of the law to break what they are sworn to uphold, providing a rather perverted example for citizens to follow. There are other, more practical objections to this problem of permissive wiretapping and the principal case is an example. Scientific evidence is difficult to refute, especially in the eyes and ears of a jury. When the problem of accepting a tender of phonograph recordings into evidence was faced by the New Jersey courts it refused the tender, *State v. Simon,* 113 N.J.L. 521, 174 Atl. 867, 872 (Sup. Ct. 1934):

> One good reason may be that it [the recording] cannot be cross-examined as to whether the whole conversation was reproduced. Such machines may be thrown in and out of gear at the will of the operator.

The inference directed at the operator of a scientific device as to his qualifications and integrity becomes of intense importance when any person may be subject to a deprivation of his rights because of evidence recorded by such device. The scientific principles related to fingerprinting are accepted without question, *State v. Huffman,* 209 N.C. 10, 182 S.E. 705 (1935), as is ballistics, *People v. Fiorita,* 339 Ill. 78, 170 N.E. 690 (1930), whereas the lie detector (polygraph) is generally excluded because there is no reasonable certainty that can follow this test. See generally, 3 WIGMORE, EVIDENCE § 999 (3d ed. 1940). Drunkometer tests, which require a high degree of care and depend conclusively upon the person conducting the test, are being accepted, but the process is not without the probability of human error. *State v. Hunter,* 4 N.J. Super.

531, 68 A.2d 274 (1949). Use of the radar speedmeter in obtaining evidence against speeding motorists is criticized since the mechanics of the device are susceptible to error because of weather conditions and location, and that operators of the machines receive only about two hours training, hardly enough to qualify as an expert. Note, 30 N.C.L. REV. 385 (1952).

Thus there are two very practical areas of objection: First, the certainty of the evidence received; secondly, the certainty as to the qualifications of the operator, his integrity and ability.

In the principal case the authenticity of the recordings is questioned not only on the thesis that the witnesses implicated Feld purposely, but also that there has been dubbing; the obvious inference being that officers of the law have been overzealous in preparation of evidence. That officers would be capable of such acts to secure desired convictions was an extreme which the trial court would not look into. However, police tactics have often come under the scrutiny of the courts. From this standpoint the recent case of *Rochin v. California,* 342 U.S. 165 (1952), is of interest. Here law enforcement officers surprised the defendant in his bedroom and upon their entry he swallowed two capsules containing narcotics. The enforcement officers, after subduing the defendant and being unable to force him to regurgitate, took him to a hospital and got the capsules by use of a stomach pumping process. Despite this, the defendant was convicted. The Supreme Court reversed the conviction unanimously on the grounds that the methods were offensive to human dignity and hence within the purview of the due process clause of the Fourteenth Amendment. Justices Black and Douglas, concurred in the ruling, reasserting their argument which had been rejected by the majority of the Court in *Adamson v. California,* 332 U.S. 46 (1947), that the Fifth Amendment prohibition against compulsory self-incrimination applied to state as well as federal action. See also, *Coplon v. United States,* 191 F.2d 749 (D.C.Cir. 1951), *cert. denied,* 342 U.S. 920 (1952), where the FBI monitored conversations between Miss Coplon and her counsel.

Although the evidence in the instant case aside from the recording may present a clear case for justified conviction, its whole truth depends upon the veracity of the prosecution's witnesses. It may have been a complete fabrication, Karp and Michaelson intending to implicate Feld. Both men had been indicted and both expected leniency. The recordings were the major item of evidence against the defendant. Of its very nature, the "physical" or scientific end product of this recording machine creates a deep impression upon a jury. Where taken secretly, the recording achieves a personal characteristic, in fact, placing the jury at the very scene of the conversation. The normal reaction would be to believe in the recording, or what it says, as true. The Court had this to say in *Lisenba v. California,* 314 U.S. 219, 236 (1941):

> The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence whether true or false. . . . As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.

Our nation is often impressed these days with the scientific gadgets which are capable of expert testimony, yet these gadgets are operated by man, who is susceptible to error, intellectually and morally. In all "fundamental fairness" the court of appeals should have allowed the defendant to seek and find the answers he sought, not so much for the reason that his attack upon the conduct of the officers is far-fetched, but that he seeks to establish the truth, in his favor or not. In accordance with self-incriminatory and personal characteristics of such mechanically obtained evidence as this, the defendant should have been given every opportunity to test and refute, if possible, its veracity.

*Norman H. McNeil*

---

GIFT — COMPLETED INTER VIVOS TRANSFER — PASSAGE OF TITLE PREVENTING CONVEYANCE BY WILL TO THIRD PARTY. — *Bolen v. Humes*, ....Ohio App....., 114 N.E.2d 281 (1951). Harry Irwin, the decedent, gave to Louise Pollock a diamond ring several weeks prior to their marriage in 1942. Miss Pollock accepted and wore this engagement ring until the day before the marriage when, since it was too valuable to take on their proposed wedding trip, she asked Irwin to place the ring in his safe-deposit box. Mrs. Irwin had not worn the ring at any time thereaftei for the reason that it was too expensive to risk injury or loss while performing menial tasks upon their farm. The ring had remained continuously in her husband's safe-deposit box, to which he had exclusive access. Irwin died nine years later; his will, made subsequent to his marriage, professed to convey this same diamond ring to Doris R. Bolen, the plaintiff here. However, the defendants, executors of Irwin's estate, maintain that there was no effective conveyance to the plaintiff for the reason that there had been a completed inter vivos gift of the ring to the decedent's wife; title, therefore, was not Irwin's to bestow upon the plaintiff. The lower court found for the defendant and the court of appeals here affirms, holding that the inter vivos gift to the widow was complete and irrevocable, and any subsequent provision in the defendant's will was an ineffective attempt to bequeath the ring to the plaintiff.

The present case, in holding as it did, followed strong and well defined precedent on the subject of inter vivos gifts. For example, the court relied heavily upon *Bolles v. Toledo Trust Co.*, 132 Ohio St. 21, 4 N.E.2d 917, 920 (1936) where it was held:

> . . . to support a gift inter vivos, there must be clear and convincing proof, first, of an intention on the part of the donor to transfer the title and right to possession of the particular property to the donee then and there, and, second, in pursuance of such intention, a delivery by the donor to the donee

> of the subject-matter of the gift to the extent practicable or possible considering its nature, with relinquishment of ownership, dominion, and control over it.

In accord is In re *Green's Estate,* 51 N.E.2d 754, 756 (Ohio App. 1942), which further pointed out that when these elements of donative intent and delivery are present the gift becomes perfect and complete immediately.

Therefore, the present case resolves itself into the simple question as to whether or not a valid inter vivos gift was made. It is believed the court was correct in finding that such transfer had been executed.

First, there is no question on the facts that the essential element of delivery was satisfied. The ring was accepted and worn publicly for several weeks, during which time the donee exercised complete control over the subject matter.

The requisite of donative intent was also present. The guiding principle in this determination is stated in *Berman v. Leckner,* 193 Md. 177, 66 A.2d 392, 393 (1949):

> The intention of the donor, however, need not be expressed in any particular form. It may be manifested by words or acts, or both, or may be inferred from the relation of the parties and the facts and surrounding circumstances of the case.

*Accord, Bowline v. Cox,* 248 Ala. 55, 26 So.2d 574, 576 (1946); *Copprell v. Copprell,* 87 Cal. App.2d 4, 195 P.2d 868, 870 (1948).

No intent other than donation can be inferred from the facts of the instant case. A mature man was desirous that this particular woman would become his wife, and upon her agreement he gave her an engagement ring. This was a completed gift, subject only to the general condition that the donee remain willing to perform the marriage, the theory being that it would be unjust enrichment for a donee to retain the fruit of a broken promise. *Schultz v. Duitz,* 253 Ky. 135, 69 S.W.2d 27, 29 (1934); *Gikas v. Nicholis,* 96 N.H. 177, 71 A.2d 785 (1950). This condition was also fulfilled in the present case. The parties were married as agreed, and at that time the inter vivos gift became free from all conditions. The ring was the property of the donee with no reservations whatsoever.

Considering the possibility of subsequent revocation by the donor, we find that the law is authoritatively established on this point. Generally, there is no revocation possible by the donor, his heirs, or personal representatives of a completed inter vivos gift. *Patterson v. Leonard,* 240 Ala. 652, 200 So. 759, 761 (1941). And certainly a gift is not revocable because the donor later considers it too generous or has a desire to allow other heirs to share therein. *Guenther v. Guenther,* 244 Wis. 386, 12 N.W.2d 727 (1944).

However, revocation is allowed if undue influence is shown. *Patterson v. Leonard, supra.* But a special relation exists between engaged persons,

the male being in the dominant position, and there must be clear evidence to overthrow the presumption that there was no undue influence. *Kelso v. Kelso,* 96 N.J. Eq. 354, 124 Atl. 763 (Ct. Err. & App. 1924).

An example of the reluctance of the courts to find evidence overthrowing the presumption of no undue influence is *Takach v. Radice,* 140 N.J. Eq. 308, 54 A.2d 188 (Ch. 1947). The court there held that an elderly widow, sick and unlikely to recover, may convey a residence and an automobile to her fiance without an inference of undue influence.

Futhermore, a completed gift to one's fiance cannot be revoked even if there is evidence to show transfer was made without benefit of adequate advice. *Kelso v. Kelso, supra,* 124 Atl. at 764. Similarly, the case is not influenced by the fact that the ring was redelivered to the donor for reasons of safety and remained there under his exclusive control. *Lynch v. La Fronte,* 37 F. Supp. 499, 502 (S.D. Cal. 1941):

> Where delivery of the property has once been made and possession transferred, the gift is irrevocable, and is not affected by the fact that the donor immediately thereafter comes into physical possession and control of the property, without any retransfer of the ownership by the donee.

*Accord, Edson v. Lucas,* 40 F.2d 398, 404 (8th Cir. 1930); In re *Norman's Estate,* 161 Ore. 450, 88 P.2d 977 (1939).

Once it has been established that there was a complete and irrevocable gift made at the time of delivery, the question arises as to the effect of the subsequent will. The answer to this query is easily understood when we consider that title passes to the donee when the gift becomes complete. Therefore, an inter vivos gift when complete cannot be revoked by the property being mentioned in a will. *Sanborn v. Goodhue,* 28 N.H. 48 (1853). The theory behind this rule is, of course, that the testator cannot convey more than that to which he has title. If title has previously passed by means of an inter vivos gift there then remains nothing which can be passed in the will.

It is clear to the writer that the decision of the court in this case is correct. When the established rules of law, as stated above, are applied to the facts of the present case this conclusion seems inevitable. Transfer of a traditional gift, an engagement ring, was made. Delivery was actual and uncontested, while intent was presumed from all the circumstances, which here offered no evidence of undue influence or possible revocation on such grounds. Undue influence could not be shown in the face of the dominant position of the donor, and redelivery after several weeks for purposes of safety was no indication of revocation. Therefore, the essentials of intent and delivery being present, the gift became complete and irrevocable. As such, title in the subject matter was not upset either by redelivery to the donor or by the donor's mention of the same subject matter in a subsequent will.

*David N. McBride*

REAL ESTATE BROKERS — COMPENSATION — STATUTORY INTERPRETATION OF LICENSE REQUIREMENT — SALE OF A GOING BUSINESS AND A LEASE OF THE PREMISES. — *DeMetre v. Savas*, ....Ohio App....., 113 N.E.2d 902 (1953). The defendant owned and operated a restaurant known as "Kate's Restaurant," located in the Public Square Building in the city of Cleveland. The plaintiff negotiated the sale of this restuarant to a third party on the condition that the lease of the premises, which still had about eight years to run, could be assigned to the purchaser. An agreement for sale was made by the defendant's attorney, unknown to the plaintiff, in which a price of $27,000 was to be paid for the fixtures, equipment, stock, and good-will, including the lease of the restaurant. A special section in the agreement provided for the assignment of the lease by a written instrument to be signed by the lessor. Plaintiff, an unlicensed broker, brought this action to recover his commission as a "business broker" for the sale of the going business. The trial court directed a verdict for the defendant, and the broker appealed. He contended that he was not selling "real estate" under the Ohio Code and therefore was not a "real estate broker" required to have a license to recover in a court of law. The court of appeals held that the sale of the restaurant would be null and void without the assignment. The broker under these facts was a "real estate broker" and within the statute barring unlicensed brokers from maintaining actions for commission, OHIO GEN. CODE ANN. § 6373-48 (1945).

The main issue in this case, as stated by the court, 113 N.E.2d at 903, is ". . . whether a business broker who sells a going business, the sale of which is conditioned upon the transfer and assignment of a leasehold interest in the premises, becomes subject to the Real Estate Broker's License Law. . . ."

In the absence of statutory control a person has just as much right to enter into the field of brokerage as any other business. With the advent of state statutes limiting this right the problem of statutory interpretation devolves upon the courts. They must determine when a broker's license is needed. The Ohio statute pertinent to the instant case is a comprehensive one that seems to include almost any transaction, ". . . which does or is calculated to result in the sale, exchange, leasing or renting of any real estate." OHIO GEN. CODE ANN. § 6373-25 (1945).

The instant decision, based on the statute above, represents a jurisdictional split of interpretation. Whether the sale of a "going business" is a real estate transaction so as to require the services of a licensed broker has been previously adjudicated in four jurisdictions having similar statutes. While they conflict in their holding they reveal a definite pattern.

The New York broker's law is strictly interpreted as shown in the decision of *Weingast v. Rialto Pastry Shop*, 243 N.Y. 113, 152 N.E. 693

(1926). This case involved the sale of a pastry shop and the transfer of the lease along with fixtures, equipment, stock, and good will of the business. The court said that the broker in this case was only acting to sell the business and the lease was not an integral part of the general sale. Recovery was allowed because this type of transaction was held not to be within the intended scope of the act. Following this decision the latest case held an unlicensed broker who helped obtain a going business to manufacture bowling and billiard equipment was entitled to recover his commission. The acts of the broker were held to be in no sense a real estate transaction within the purview of the statute. *Clagget v. American Bowling & Billiard Corp.*, 48 N.Y.S.2d 856 (Sup. Ct. 1944). The main issue of these decisions is whether or not the lease was an integral part of the transaction. In *Reed v. Watson,* 244 App. Div. 522, 279 N.Y. Supp. 863 (4th Dep't 1935), obtaining the lease of a hotel was held to be a real estate transaction under the act because the court felt the lease was more than an incident to obtaining a going business, thereby distinguishing it from the rule of the *Weingast* case, *supra.*

Recovery was allowed in Washington on different grounds. The common law held a leasehold interest to be only personal property. It was held that the legislature did not change the common law by an original statute, *Salisbury v. Alskog,* 144 Wash. 88, 256 Pac. 1030 (1927), nor in subsequent revisions which clearly manifested its intention to exclude leaseholds from its purview. *Wachob v. Griner,* 35 Wash.2d 309, 212 P.2d 781 (1949); *Johnson v. Rutherford,* 32 Wash.2d 194, 200 P.2d 977 (1948). These cases involved the transfer of a lease as an incident to the sale of a going business. The lease was treated as an element of personal property so a broker selling a going business would not have to be licensed. However, one case not involving a lease denied recovery because plaintiff was held to be an agent "negotiating" under the terms of the statute for the sale of real estate, a going business concern. *Grammer v. Skagit Valley Lumber Co.,* 162 Wash. 677, 299 Pac. 376, 379 (1931).

At one time a rule similar to that of New York was in force in California. The sale of a pool room, furniture, and lease to the premises was not a real estate transaction under the then existing statute, and no license was required to sue for broker's commission. *Pike v. Psihogios,* 68 Cal. App. 145, 228 Pac. 722, 723 (1924). In *Nittler v. Continental Casualty Co.,* 94 Cal. App. 498, 271 Pac. 555, 558 (1928), the rule of *Pike v. Psihogios, supra,* was nullified. The reason given was that the legislature did not agree with this interpretation as manifesting its intention and thus had amended the act to include interest in a leasehold. Now CAL. BUS. & PRO. CODE ANN. § 10131 (1951). Thus in the sale of a service station and premises the broker was barred from recovery because he had no license. The lease was considered an integral part of the transaction since the sale had been held up a year awaiting a determination of the assignability of the lease. Following this case California

courts have barred recovery because the transfer of the lease was a substantial part of the transaction, *Rench v. Harris*, 79 Cal. App.2d 125, 179 P.2d 341 (1947), and because, in the most recent instance the sale of a milling company was a complete transaction not severable into real and personal property, *Abrams v. Guston*, 110 Cal. App.2d 556, 243 P.2d 109 (1952).

The New Jersey courts followed the *Nittler* case, *supra*, in *Kenney v. Paterson Milk & Cream Co.*, 110 N.J.L. 141, 164 Atl. 274 (1933). Where one third of the value of the sale of a milk company concerned real estate the statute was held to bar recovery. The *Kenney* case, *supra*, cited both the *Nittler* case, *supra*, and the *Weingast* case, *supra*, adopting the rule of the former and rejecting that of the latter. The transaction was said to differ from the latter because it was substantially, rather than incidentally, a transfer of real estate. The *Weingast* case, *supra*, was said to represent the narrow view on barring recovery by unlicensed brokers while the New Jersey statute was meant to cover a much wider scope. In 1951 a lower court reiterated this view, commenting that the supreme court had approved it and that the legislature had revised the law without change — thus approving the court's interpretations, *Cohen v. Scola*, 13 N.J. Super. 472, 80 A.2d 643 (App. Div. 1951).

In *Kaplan v. Meranus*, 136 N.J.L. 425, 56 A.2d 589 (Sup. Ct. 1948), an unlicensed broker was allowed to recover his commission for an unconsumated sale. It was a question of fact, whether the business was to be carried on at the same location. The broker's dealings were solely with the going business and had no relation to its location. On these facts the case was distinguished from the *Kenney* case, *supra*.

There is a thread of consistency running through all of these decisions setting forth a guide for interpretation. Each is decided on whether or not the lease is an integral, substantial, and necessary element of the transaction, or merely incidental and severable. The magnitude of the dependence on this guide is relative to the scope of the statute. The New York statute being narrow in its interpreted scope leaves great room for recovery and has little need for this guide. On the other hand, in California, New Jersey, and Ohio, the statutes are all-inclusive. The result is a greater need for the guide. The Washington statute, meanwhile, leaves little room for any interpretation on this issue as it allows recovery no matter how great or little the leasehold interest.

Denial of recovery in the instant case follows the broad rule of statutory construction. The guiding principle embodied in each of these cases is also utilized.

The court in the instant case well summed up their position, 113 N.E.2d at 900:

> It is idle we think to claim a commission for affecting the sale in one breath and in another to deny responsibility for the negotiation of the

> assignment of the lease with the consent of the lessor, without which the sale could not have been consummated.

Thus in the majority of jurisdictions where the lease is an integral, substantial, and necessary part of the transaction the broker must be licensed if he expects the court to aid him in recovering his commission.

*Robert J. Hepler*

---

TORTS — NEGLIGENCE — INTERVENING CAUSE. — *Wilcox Oil Co. v. Bradberry*, ....Okla....., 257 P.2d 1096 (1953). Plaintiff brought this action to recover damages for the destruction by fire of a tractor and plow. The plaintiff, a farmer, started a fire to burn off his pasture. The fire got out of control and he left the field he was plowing and went to the pasture with his tractor and plow. He started to plow a fire break furrow but his plow struck the defendant's pipe line. The pipe line broke; the tractor stalled, and both plow and tractor were drenched with oil and destroyed before he could move them. The pipe line easement acquired by the defendant provided that the pipe line "shall be buried to such a depth as not to interfere with the ordinary cultivation of said land." This stipulation had been complied with on that part of the farm which was cultivated annually, but in the pasture the lines were either completely uncovered or in some places covered only by weeds and grass.

The defendant company appealed the trial court's verdict for the plaintiff on the grounds that the latter's act in setting the fire was an independent, intervening, and unrelated act which superseded the primary negligence of the company. The court in a per curiam decision affirmed the verdict for the farmer holding that it was the company's duty to bury the pipe line to the required depth over the entire easement whether it was cultivated or pasture land, and that from the very words of the lease such an injury was anticipated, hence ruling out any possibility of the claimed intervening cause.

The decision reached in this case, that the original negligent actor is not relieved of liability where he reasonably anticipated an intervening cause, is in line with the weight of authority on this point. *Crawford v. Woodrich Const. Co.*, 57 N.W.2d 648, 655 (Minn. 1953); *Eads v. Marks*, 39 Cal.2d 807, 249 P.2d 257, 260-1 (1952). This rule was more succinctly stated in *Ney v. Yellow Cab Co.*, 348 Ill. App. 161, 108 N.E.2d 508, 511 (1952):

> The injury must be the natural and probable result of the negligence and such as an ordinarily prudent person ought to have foreseen as likely to result, and an intervening act will not itself become the proximate cause if it was itself probable and foreseeable.

*Cf. Chandler v. Dugan*, 41 Wyo.2d 780, 251 P.2d 580, 586 (1952).

Following the weight of authority, the court quite rightly decided the instant case on the basis of foreseeability. However, other courts find subtle distinctions in the question as to when does an intervening cause excuse the original tortfeasor from liability. An analysis of very recent cases reveals that the courts follow various rules on intervening cause, which rules, while not at all times following a fixed pattern, nevertheless merit consideration in deciding cases on this point.

Probably the most important and logical rule is that for an intervening cause to excuse the original negligent conduct of the actor it must be a superseding negligent act. 1 SHERMAN AND REDFIELD, NEGLIGENCE 101 (Zipp's Rev. ed. 1941) states that an intervening cause ". . . is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury." One court stated that no intervening act could break the chain of cause and effect of the original negligence unless the intervening negligent act was the superseding cause of the injury. *Louisville & N. Ry. v. Powers*, 255 S.W.2d 646, 648 (Ky. 1952). This point on superseding cause will be seen to run throughout most cases on intervening causation and is an excellent rule to follow in determining the proximate cause of negligence by original actors and intervening third parties.

Another rule that is given attention by many courts is that if the act of the original negligent actor would not of itself have produced the injuries to the injured party, the negligence of the actor is not the proximate cause and he is not liable. *Irwin v. Georgia Power & Light Co.*, 84 Ga. App. 665, 67 S.E.2d 151, 154 (1951); *Wallace v. Electric Power Board*, 259 S.W.2d 558, 561 (Tenn. 1953). The distinction between this rule and that of superseding cause is that in the former the plaintiff's injuries could not have resulted solely nor primarily from the defendant's actions whereas in the latter the negligence of the defendant alone might have produced the injury. In the sole proximate cause rule, discussed *infra*, defendant's negligent acts alone and independently would have been the proximate cause of the plaintiff's injuries had not another actor been concurrently negligent.

In regards to the original negligent actor rule the Supreme Court of Oklahoma has held that if the original negligence furnished only a condition giving rise to a possible injury and an independent negligent act committed subsequent to the original negligence was the real cause of the injury, then the original negligence was not the proximate cause of the injury. *Phillips Petroleum Co. v. Robertson*, 207 Okla. 80, 247 P.2d 501, 503 (1952). In this case the plaintiff was injured when a wheel came off a car that was going in the opposite direction to the plaintiff. The instant danger of the wheel hitting his car caused the plaintiff to swerve

into the other lane on the highway and he crashed head-on into the defendant's truck which was unable to stop in time to avert the collision. The broken wheel in this case was determined to be an intervening cause, independent of the original negligent act of speeding by the defendant. What might distinguish this case from the instant case is the fact that the truck driver in the *Phillips* case, *supra,* did not or should not have foreseen that the car in front of him would lose a wheel, whereas the oil company in the present case, by entering into the easement agreement, did or should have anticipated the injury to the farmer. The distinction, admittedly, is conjectural.

A third rule is that of "sole proximate cause." In *Kisor v. Tulsa Rendering Co.,* 113 F. Supp. 10, 18 (W.D. Ark. 1953), the court said that where the defendant's act greatly enhanced the possibility of harm from third parties then the defendant might be liable. But where the original negligence is that of the defendant, and an intervening act of a third person is really the sole proximate cause of plaintiff's injuries, defendant was not liable as his negligence could not be the proximate cause of the injuries to the plaintiff. Accord, *Huffman v. Sorenson,* 76 S.E.2d 183, 188-9 (Va. 1953); *Webb v. Sessler,* 63 S.E.2d 65, 69 (W.Va. 1950). In the latter case the decedent was killed while sitting in an auto parked next to an airport. Through the negligent and careless flying of a third party defendant, the plane crashed into decedent's car. Holding that the defendant's negligent repairs on the plane were not the proximate cause of death, the court said that where there exists a sole, effective intervening cause, there can be no other proximate causes.

Closely allied to the second rule mentioned previously is the "new and independent" cause rule. Although courts do not break down the topic of intervening causes so minutely, this phrase has appeared occasionally. In *Bryant v. Banner Dairies,* 255 S.W.2d 271, 275 (Tex. Civ. App. 1953), the plaintiff was injured when the car in which he was riding collided with defendant's trailer, which was parked on the highway without flares. The court said that the bright lights of an on-coming truck blinded the plaintiff who otherwise would have seen the trailer, and that this act was an intervention of a new and independent cause which destroyed the causal connection between the original negligent act of the defendant and the injury of the plaintiff. However, the court affirmed the trial court's ruling that the "new and independent" cause was a concurring cause of the collision and the defendant was still held liable. See also *Wilson v. Edwards,* 77 S.E.2d 164, 172 (W.Va. 1953).

A fifth rule, which really seems to be the superseding intervening cause rule viewed from a different perspective is where a duty upon the original actor has been transferred or devolved upon the intervening third party. *Shupe v. Antelope County,* 59 N.W.2d 710, 716 (Neb. 1953); *Thrash v. U-Drive-It Co.,* 158 Ohio St. 465, 110 N.E.2d 419, 422 (1953). The plaintiff in the *Thrash* case was injured while driving

his father's truck when a lock ring on one of the front wheels blew off causing the truck to crash down an embankment. The truck had originally been sold by the defendant to a used car dealer, who in turn sold it to the father of the plaintiff. The court held defendant liable and stated that where a duty devolves on a third party subsequent to the original negligent act and the third party fails to perform this duty, the chain of causation is broken by the intervening agency of the third party, which in this case was the used car dealer.

Where the intervening act is unrelated to the act of the defendant in bringing about plaintiff's injury another rule is cited. In *Jackson v. Jones*, 61 So.2d 557, 560 (La. 1952), while playing "follow the leader," the plaintiff was injured when she fell from a pile of lumber stacked helter-skelter on the school grounds. The fall was a result of a push by a fellow classmate. The court ruled out the attractive nuisance theory holding that even if the act of the defendant in stacking the lumber on the ground amounted to negligence, the efficient cause of the accident was brought about by a distinct and separate cause wholly unrelated to the defendant's act. This rule, while capable of separate application, is like many of the rules in such type cases inasmuch as they may complement the other rules cited *supra*, in their use throughout the cases already mentioned.

The final rule as to when an intervening cause arises is the test of foreseeability. This rule is well stated in *Hines v. Westerfield*, 254 S.W.2d 728, 729 (Ky. 1953):

> If, however, the ultimate injury is brought about by an intervening act or force so unusual as not to have been reasonably foreseeable, the intervening act is considered as the superseding cause and the original actor is not liable.

*Accord*, *Livingston v. Seaboard Air Line R.R.*, 106 F. Supp. 886, 891 (E.D.S.C. 1952). In *Ranney v. Habern Realty Corp.*, 281 App. Div. 278, 119 N.Y.S.2d 192, 198 (1st Dep't 1953), the plaintiff rigger was working on top of a sidewalk storage shed, when a third party company's metal cable on its crane broke and dropped both the rigger and the stones to the sidewalk. The defendant had failed to procure a permit for a storage-type sidewalk shed in violation of a city ordinance. The New York court held that the facts and the jury's finding that the bridge was not overloaded showed that it was a safe place in which to work; that the accident would not have occurred without the intervening act of the third party; and that the intervening negligent act was not reasonably foreseeable and thus defendant was not liable for the injuries to the plaintiff.

As has been stated the court in the instant case was correct in its decision which merely followed one of the above enumerated rules, namely that of foreseeability, which ruled out any possibility of intervening cause. From these rules and their applications in various courts,

it can be seen that there is no stereotyped rule defining an intervening cause. The rules regarding foreseeability and superseding cause seem to be the better and more generally accepted rules. Certainly a judge's instructions to a jury would be more easily understood by the panel along the lines of foreseeability and superseding cause than those of the unrelated act or transfer of original duty rules.

*John P. Coyne*

---

TORTS — NEGLIGENCE — LIABILITY OF SELLER OF USED CARS. — *Thrash v. U-Drive-It Co.*, 158 Ohio St. 465, 110 N.E.2d 419 (1953). This action for personal injuries was brought by the minor son of a purchaser of a used truck against both prior owners of the truck. The truck originally belonged to the U-Drive-It Co. which had rented the truck to the public for some years before selling it to the used car dealer. The U-Drive-It Co. sold the truck without warranty, "as is" to the dealer. The dealer sold the truck to the father of the injured plaintiff. The accident occurred when a lock ring suddenly blew off the left front wheel ultimately causing the truck to leave the road and plunge down an embankment. The lock ring was alleged to have been defective when the truck was in the possession of the U-Drive-It Co. The trial court rendered judgment in favor of both defendants. On appeal the judgment was affirmed for the U-Drive-It Co. and reversed for the used car dealer. On this appeal the judgment of the court of appeals as to each defendant was affirmed.

The question to be discussed is whether an owner of a used motor vehicle who sells the vehicle to a used car dealer should be held liable to a third party who purchases the car from the used car dealer and subsequently is injured due to a defect in the vehicle which existed during the original owner's possession. The court answered no in the instant case.

The rules relied on by the plaintiff in the instant case are found in the numerous cases which limit the general rule concerning the liability of manufacturers and sellers. The rule is found in *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842) where the court held that a manufacturer or seller is not liable to an injured third person who has no contractual relation with him for negligence in the construction, manufacture or sale of an article. One of the first cases in America to limit the so-called "general rule", *Thomas v. Winchester*, 6 N.Y. 397 (1852), marked the beginning of the "dangerous instrumentality doctrine." There a drug dealer who had mislabeled a bottle containing poison was held liable for injuries sustained from the poison by a third person. The court said that there was a duty on a manufacturer or seller of such items to protect the public.

A further limitation of the rule in *Winterbottom v. Wright, supra,* was brought out in the now famous case of *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916). This case extended the liability of a manufacturer to goods that were not inherently dangerous but might become dangerous if not properly constructed. In that case the court held a manufacturer of a new car liable to a remote vendee for injuries caused by failure to properly inspect a wheel, bought from another manufacturer, which has a discoverable defect. In accord is *General Motors Corp. v. Johnson,* 137 F.2d 320, 322 (4th Cir. 1943) where the court states that the manufacturer of a new truck owes a duty to the public to use reasonable care in its construction and to make a reasonable inspection of such construction in the plant where it was manufactured.

It is difficult, however, to draw an analogy between a seller of a used truck to a used car dealer without warranty and furthermore, as in the instant case, with the specific stipulation "as is", and the manufacturer of a new automobile furnishing cars to his dealers. A new car dealer is generally not liable for any inherent defects of the cars he sells and seldom, if ever, is he liable for the defects caused by the manufacturer's negligence. The new car dealer is not expected to assume the duty placed on a manufacturer to protect the public against defects in the new automobile. *Gordon v. Bates-Crumley Chevrolet Co.,* 158 So. 223 (La. App.), *aff'd,* 182 La. 795, 162 So. 624 (1935); *accord, McLean v. Goodyear Tire & Rubber Co.,* 85 F.2d 150 (5th Cir.), *cert. denied,* 299 U.S. 600 (1936).

A used car dealer, while not an insurer of the safety of the car he sells, must exercise reasonable care for the safe condition of such cars. In *Flies v. Fox Bros. Buick Co.,* 196 Wis. 196, 218 N.W. 855 (1928), the defendant was a used car dealer who sold the plaintiff a car which had defective brakes. Plaintiff was injured in an accident caused by the defective brakes. The court held the used car dealer liable. It reasoned that a used car dealer must take reasonable care to discover defects in any car he sells. The court said that the law would show scant consideration of human life if it did not lay this degree of care on the seller of the car for the benefit of all who were likely to come in contact with it. In *Benton v. Sloss,* 38 Cal.2d 399, 240 P.2d 575 (1952) a used car dealer was held liable for the defects in a car he had sold, and it was stated that although he had no duty to disassemble the car, he should have made reasonable inspection for defects that would make the car dangerous on the highways. *Accord, Egan Chevrolet Co. v. Bruner,* 102 F.2d 373 (8th Cir. 1939); *McLeod v. Holt Motor Co.,* 208 Minn. 473, 294 N.W. 479 (1940).

It can be seen from these cases that a used car dealer constitutes an efficient intervening agency between his vendor, in this case the U-Drive-It Co., and his vendee, the plaintiff. The new car dealer on the other hand

has no such duty to his vendee and any liability for defects falls on the manufacturer.

In a case more analogous to the instant case, *Ford Motor Co. v. Wagoner,* 183 Tenn. 392, 192 S.W.2d 840 (1940), the court considers the situations when an intervening efficient agency will insulate the liability of the original wrongdoer. The Ford Motor Co. had put a defective catch on the hoods of a particular style of car. After learning of the dangerous propensities of the hood latch, the company offered to put a safety catch on all the cars free of charge. A salesman of one of the manufacturer's dealers bought a car with the defective latch. The salesman refused to have the safety latch put on his car because he felt it wasn't necessary. The salesman thereafter severed his relationship with the dealer and started working for another dealer. At this point he sold the car to a friend of the plaintiff without notifying him of the defective latch. The court held the salesman to be an independent intervening agency which insulated the liability of the manufacturer to the plaintiff. It was held that the intervening agent would destroy the manufacturer's liability if the action of the agent was, "(1) independent, (2) efficient, (3) conscious and (4) not reasonably to have been anticipated." *Ford Motor Co. v. Wagoner, supra,* 192 S.W.2d at 844.

Another case holding a used car dealer to be an efficient intervening agent is *McGuire v. Hartford Buick Co.,* 131 Conn. 417, 40 A.2d 269 (1944). A secondhand car dealer was held liable for his vendee's injuries which were caused by faulty tire lugs on a used car. An independent contractor had caused the defect in the car by installing faulty lugs, but the dealer had regained possession of the car after the negligence of the contractor. This possession, coupled with the duty of a secondhand car dealer to use reasonable care in inspecting the cars he sells, was enough to hold the dealer liable for his vendee's injuries. *Cf. Stultz v. Benson Lumber Co.,* 6 Cal.2d 688, 59 P.2d 100 (1936); *Moore v. Jefferson Distilling and Denaturing Co.,* 169 La. 1156, 126 So. 691 (1930).

It is submitted that the stipulation "as is" that was made by the U-Drive-It Co. would relieve it of any reasonable anticipation of negligence on the part of the used car dealer. This fact coupled with the rule holding used car dealers to be efficient agents would seem to be the "insulating factor" which would exonerate the U-Drive-It Co. from liability to any remote vendee. The U-Drive-It Co. had no duty toward the purchaser in this case and logically the purchaser should not look to it when buying the truck. The decision in this case seems to be sound. It does not seem to be too harsh a rule to expect a used car dealer to exercise reasonable care in inspecting the cars he sells. The court in this case has placed the liability where it belongs; the used car dealer who has or should have the facilities for inspecting the cars he sells is fixed with the responsibility for such inspection.

*Allan Schmid*