treatment as their unincorporated counterparts.[10] Until such measures are enacted, however, it seems likely that the owner of the "one-man corporation" will be restricted for tax purposes to his chosen form of organization.

THOMAS O. LINDBURG (August 1957)

[10] See U.S. Code Cong. & Ad. News, No. 3 March 20, 1957, V. It should be noted, however, that at the time §1361, *supra* note 9, was introduced, it had a companion provision allowing corporations to be taxed as partnerships. Sen. Rep. No. 1622, 83d Cong., 2d Sess. 118-119, 452-458 (1954). This provision was eliminated in the Conference Committee. H. R. Rep. No. 2543, 83d Cong., 2d Sess. 72 (1954).

THE "NO EYEWITNESS" RULE IN IOWA

The purpose of this article is twofold: first, to give the reader a summary of the Iowa decisions on the "No Eyewitness" Rule in a nutshell, and second, to examine the possibilities of extending the Rule to persons not presently included within its scope.

Application of the Rule in Iowa

The Iowa Supreme Court has consistently applied the "No Eyewitness" Rule in the following form:

> "In the absence of eyewitnesses or of any obtainable direct evidence as to what the deceased did or failed to do, by way of precaution, at and immediately before his injury, there arises a presumption or inference that he, prompted by his natural instinct, was in the exercise of due care for his own safety."[1]

The Rule and its resulting inference of due care has been limited by the Court solely to the question of the plaintiff's freedom from contributory negligence.[2] The reason for this limited use of the Rule in Iowa is based upon a desire by the Court to avoid what it feels is an injustice of our contributory negligence doctrine[3] in cases where there is no evidence whatsoever as to the care exercised by the decedent.[4]

An examination of the Rule indicates that there are two conditions where the plaintiff's decedent cannot get the benefit of the "No Eyewitness" Rule: (1) when there are eyewitnesses, or, (2) when there is any obtainable direct evidence from the

[1] Riedesel v. Koch, 241 Iowa 1313, 1316, 45 N.W.2d 225, 228 (1950); Spooner v. Wisecup, 227 Iowa 768, 288 N.W. 894 (1940); Edwards v. Perley, 223 Iowa 1119, 1128, 274 N.W. 910, 915 (1938).

[2] DeBuhr v. Taylor, 232 Iowa 792, 5 N.W.2d 597 (1942).

[3] Plaintiff must prove defendant's negligence and his own freedom from contributory negligence.

[4] Rickabaugh v. Wabash R.R., 242 Iowa 746, 749, 44 N.W.2d 659, 661 (1950); Ames v. Waterloo and Cedar Falls Rapid Transit Co., 120 Iowa 640, 646, 95 N.W. 161, 162 (1903).

physical facts as to what the decedent did or failed to do by way of precaution.

The Court at first defined an eyewitness as a person who observed what the decedent did or did not do by way of precaution during the material moments immediately before his injury.[5] This definition worked well as long as the victim was a pedestrian; but when the witness only observed the movement of the decedent's automobile, he was unable to tell what the decedent personally did or did not do in the way of precaution just before the accident. The Court resolved this problem by concluding that a person who observes the material movements of the vehicle in which the decedent is traveling is also an eyewitness to the decedent's conduct under the "No Eyewitness" Rule.[6] However, a person who observes the decedent only a split second before the impact is not an eyewitness within the Rule.[7]

A person is not disqualified as an eyewitness because he is unable to recall some detail of the decedent's conduct.[8] The Rule will apply, however, even though there is an actual eyewitness if his injuries result in retrograde amnesia. In *Prewitt v. Rutherford*[9] the Court indicated by its language that any mishap rendering the survivor of an accident incapable to testify about the accident must be shown to be attributable to the accident before the "No Eyewitness" Rule will be applied. The American Law Reports Annotation[10] that was quoted in the *Prewitt* case cites cases from other jurisdictions applying the "No Eyewitness" Rule where the survivor of the accident had suffered loss of memory, power to concentrate, or an inability to speak, which was shown to be attributable to the accident. From this it appears that if in the future the Iowa Court is faced with a decision concerning a surviving eyewitness who subsequently becomes incapable of testifying from causes other than amnesia, the "No Eyewitness" Rule will be applied if the witness' condition is attributable to the accident.

Even though a person qualifies as an eyewitness, the testimony of what he saw is still a question of fact to be evaluated by the jury. This was particularly significant in *Smith v. Darling & Co.*[11] where the Iowa Supreme Court held that the defendant can qualify as an eyewitness within the Rule. At the trial the defendant's testimony contradicted his earlier written statement

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[5] Graby v. Danner, 236 Iowa 700, 18 N.W.2d 595 (1945); Hayes v. Stunkard, 233 Iowa 582, 10 N.W.2d 19 (1943).

[6] Rickabaugh v. Wabash R.R., 242 Iowa 746, 44 N.W.2d 659 (1950); Van Wie v. U.S., 77 F. Supp. 22 (N.D. Iowa 1955).

[7] Hackman v. Beckwith, 245 Iowa 791, 64 N.W.2d 275 (1954); Larimer v. Hutchinson Ice Cream Co., 216 Iowa 384, 249 N.W. 220 (1933).

[8] Turbot v. Repp, 72 N.W.2d 565 (Iowa 1955); Spooner v. Wisecup, 227 Iowa 768, 288 N.W. 894 (1940).

[9] 238 Iowa 1321, 30 N.W.2d 141 (1947).

[10] 141 ALR 872 (1942).

[11] 244 Iowa 133, 56 N.W.2d 47 (1952).

as to how the accident occurred. The jury brought in a verdict for the plaintiff and on appeal the defendant insisted that the jury is bound by an eyewitness' testimony. The Court, considering the inherent dangers and temptations when the defendant is the sole testifying witness, reiterated that the jury is to be the sole judge of the credibility of a witness' testimony. However, it must be kept in mind that the testimony of the defendant, no matter how self-serving, renders the Rule inapplicable.

The second condition which denies the plaintiff the benefit of the inference of care furnished by the Rule is when there is obtainable direct evidence from the physical facts as to what the decedent did or failed to do by way of precaution. In dealing with this condition, the Iowa Court has applied at least two different tests. One test is whether the mute physical facts show that the decedent *could not* have exercised due care.[12] The other test is merely whether there is obtainable direct evidence of the decedent's conduct for the jury to consider.[13] Close examination of the cases which have applied the *could not* rule as stated above indicates that these cases involve instances where the Court directed a verdict against the plaintiff on the question of contributory negligence. Thus it would appear that the *could not* rule is actually the test for a directed verdict rather than a test for the "No Eyewitness" Rule. It naturally follows that when the verdict is directed the "No Eyewitness" Rule would have no application.

An example holding that the mute physical facts indicated that the decedent *could not* have exercised due care is *Van Gordon v. City of Fort Dodge*.[14] In this case the plaintiff's decedent at night struck a railroad signal device which sat on a concrete platform in the center of the highway. The plaintiff requested the benefit of the "No Eyewitness" Rule since there were no eyewitnesses. The request was refused. The Court concluded that since the signal was equipped with an amber light in addition to the overhead street lights, the physical facts themselves indicated that the decedent was driving down the center of the road, and directed a verdict because the plaintiff could not have exercised due care.

When the physical facts are such that a verdict is not directed, then the second test stated above would appear to control the application of the Rule. Thus, if the defendant does not introduce enough evidence from the mute physical facts to show that the plaintiff's decedent could not have exercised due care, when the jury is instructed on the "No Eyewitness" Rule they are instructed to the effect that if they find that there is some obtainable direct evidence indicating what the plaintiff's decedent did or did not do

[12] Van Gordon v. City of Fort Dodge, 216 Iowa 209, 245 N.W. 736 (1933); Oaks v. Chicago R.I.&P.R.R., 174 Iowa 648, 156 N.W. 740 (1916); *cf.* Hittle v. Jones, 217 Iowa 598, 250 N.W. 689 (1933).

[13] Azeltine v. Lutterman, 218 Iowa 675, 254 N.W. 854 (1934).

[14] 216 Iowa 209, 245 N.W. 736 (1933).

by way of precaution at and immediately prior to the accident, the inference of care from the rule is not to be considered.[15] Therefore, the defendant can deprive the plaintiff of the benefit of the jury's consideration of the Rule by introducing evidence from the physical facts as to the conduct of the plaintiff's decedent, even though this evidence falls short of the amount needed for a directed verdict. From these decisions it appears there may be a middle ground yet to be explored in future cases wherein the question of contributory negligence could go to the jury but the jury would not get an instruction on the "No Eyewitness" Rule. Certainly factual situations will arise wherein the defendant will introduce enough obtainable direct evidence from the physical facts to show as a matter of law what the decedent did or did not do by way of precaution at and immediately before his injury, although not enough evidence to show that the plaintiff's decedent was guilty of contributory negligence as a matter of law, and in such a case it would seem that the Court should omit the "No Eyewitness" Rule from its instruction to the jury.

An understanding of the relationship of the "No Eyewitness" Rule to the procedural aspects of a lawsuit is necessary. The "No Eyewitness" Rule does not shift the burden of proof. The plaintiff still has the burden of proving the negligence of the defendant and his decedent's freedom from contributory negligence.[16] The inference of due care supplied by the Rule in favor of the plaintiff's decedent is rebuttable.[17] However, if the defendant does not go forward with evidence which shows what the plaintiff's decedent's actions actually were, the inference of due care supplied by the Rule is to be regarded as substantial evidence which the jury may consider as bearing on the question of care.[18]

It is important to note that when the "No Eyewitness" Rule goes to the jury the presumption of care under the Rule is no more than an inference of fact which is to be considered by the jury as an item of evidence.[19] In relation to the "No Eyewitness" Rule the word "presumption" is used in its popular sense as being synonymous with the word "inference", rather than in its strict legal sense as having a qualifying effect on the burden of proof. In

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[15] See note 13 *supra*.

[16] Spooner v. Wisecup, 227 Iowa 768, 288 N.W. 894 (1940); Anderson v. Fort Dodge D.M.&S.R.R., 208 Iowa 369, 226 N.W. 151 (1929).

[17] Nicholson v. City of Des Moines, 246 Iowa 318, 67 N.W.2d 533 (1954); Although the "No Eyewitness" Rule may be conclusively rebutted, an item worthy of note is that opinion evidence does not conclusively rebut the inference of due care in the decedent's favor, even though it is uncontradicted. The reason being that since opinion evidence, expert or otherwise, is not conclusive; it is for the jury to evaluate it.

[18] Carpenter v. Loetscher-Jaeger Mfg. Co., 178 Iowa 320, 157 N.W. 938 (1916); Breen v. Iowa Central R.R., 163 Iowa 264, 143 N.W. 846 (1913); Christopherson v. Chicago M.&St.P.R.R., 135 Iowa 409, 109 N.W. 1077 (1907).

[19] Merchants Transfer & Storage Co. v. Chicago R.I. & P.R.R., 170 Iowa 378, 150 N.W. 720 (1915).

Anderson v. Chicago Rock Island & Pacific Railroad[20] the Court stated that an instruction to the jury must make it clear that the presumption of care under the "No Eyewitness" Rule is but an inference of fact and not of law.

In instructing the jury on the "No Eyewitness" Rule, it has been held to be reversible error to limit the inference of due care only to the time of collision. While such an instruction leaves an inference that the deceased exercised due care at the time of the collision, it also leaves the possibility that what led up to the collision was the decedent's failure to exercise due care. For this reason the instruction to the jury must extend the inference of due care to all the material moments prior and up to the time of the accident.[21]

Does Case Precedent in Iowa Exclude the Defendant From the Benefit of the "No Eyewitness" Rule?

The relationship between the "No Eyewitness" Rule and a defendant was first examined seriously in *Vance v. Grohe*.[22] In this case the trial court instructed the jury that the defendant was entitled to the inference of due care arising out of the "No Eyewitness" Rule. There were, however, surviving eyewitnesses, including the defendant himself, to the fatal auto-train collision. The Supreme Court held that the instruction was erroneous, not because a defendant would never be entitled to the benefit of the Rule, but because the Rule had been improperly applied. The Court cited several Iowa cases to the effect that the "No Eyewitness" Rule is not applicable under any circumstances where there is direct evidence available concerning the material moments before the collision. The Court concluded the opinion with the observation that although the "No Eyewitness" Rule usually arises in connection with the question of contributory negligence, there was no reason why the same principle would not be applicable in any case. While this comment was dicta, it is clear that the Court felt that a defendant also should be able to claim the benefit of the "No Eyewitness" Rule.

In *DeBuhr v. Taylor*[23] the Court made a concerted effort to destroy the value of the dicta set out in the *Vance* case. The *DeBuhr* case was one of first instance where the defendant's decedent was killed, and the circumstances were such that the surviving plaintiff was not an eyewitness. The trial court instructed the jury to give the defendant the benefit of the "No Eyewitness" Rule. The Supreme Court held the instruction to be erroneous and cited the *Vance* case as its authority! The Court said that the

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[20] 189 Iowa 739, 175 N.W. 583 (1920).
[21] See note 19 *supra*.
[22] 223 Iowa 1109, 274 N.W. 902 (1937) (dictum); See also Bennett v. Atchison T.&S.F.R.R., 191 Iowa 1333, 183 N.W. 424 (1921).
[23] 232 Iowa 792, 5 N.W.2d 597 (1942).

Vance decision recognized the fact that the "No Eyewitness" Rule applied solely to the question of freedom from contributory negligence because it quoted *Burk v. Walsh & Oltrogge*[24] in it opinion.

The Court reached this conclusion from one of the several passages from the *Burk* case, all of which were quoted in the *Vance* case which stated:

> ". . . the instinct of self preservation is to be taken into account as tending to show freedom from contributory negligence *only* where direct evidence as to whether the injured party did or did not exercise reasonable care is not attainable." *(Italics added)*

The essential question is whether the term "only" as used in the above statement modifies the first phrase concerning contributory negligence or the last phrase of the sentence concerning obtainable direct evidence. The Court in the *DeBuhr* case decided that "only" referred to contributory negligence, thus rendering the Rule inapplicable to defendant. However, examination of the *Burk* and *Vance* cases from which this rule was derived, clearly indicates that "only" was used to modify and refer to the phrase concerning obtainable direct evidence. The controversy in those cases was clearly concerned with the inapplicability of the Rule because there was obtainable direct evidence in the form of eyewitnesses. It would appear that the Court in making the above statement had no intention of limiting the application of the Rule to the question of contributory negligence.

It would seem that the dissenting opinion in the *DeBuhr* case stated the better reasoned rule in pointing out that there is nothing in the wording of the "No Eyewitness" Rule itself that limits it to the issue of contributory negligence.

When the passage from the *Burk* case which was cited in *DeBuhr v. Taylor* is read with an understanding of why it was inserted in the *Vance* case, and in conjunction with its own facts, it appears that *DeBuhr v. Taylor* should be seriously re-examined concerning the applicability of these authorities to support that decision.

The *DeBuhr* case also interpreted *In re Estate of Hill*[25] as supporting the position that the "No Eyewitness" Rule only applies to the question of contributory negligence. In the *Hill* case both the plaintiff's and the defendant's decedents were killed in an auto-train collision to which there were no eyewitnesses. The Court initially held against the plaintiff on the ground that where there is no evidence whatsoever, the "No Eyewitness" Rule and its inference of due care is available to both the plaintiff and the defendant. Subsequently, in denying the plaintiff's motion for rehearing, the Court retracted this original statement and substituted for it a ruling that the plaintiff had failed to make out his

[24] 118 Iowa 397, 92 N.W. 65 (1902).
[25] 202 Iowa 1038, 208 N.W. 334, 210 N.W. 241 (1926).

case because he failed to prove freedom from contributory negligence. The Court did not discuss or refer to the applicability of the "No Eyewitness" Rule.

The majority in *DeBuhr v. Taylor* reasoned that since the Court withdrew its original language on rehearing, it indicated that the Court in the *Hill* case was opposed to giving the defendant the benefit of the "No Eyewitness" Rule. This conclusion does not necessarily follow and it is submitted that silence as to the "No Eyewitness" Rule on rehearing could well be explained on the ground that the Court preferred not to discuss a point which was unnecessary to its ultimate decision.

Since the *Hill* case was ultimately decided without reference to the "No Eyewitness" Rule and since the *DeBuhr* case was based upon a misinterpretation of the language used in prior cases, it appears that the question of whether a defendant is entitled to the benefit of the "No Eyewitness" Rule is still worthy of argument.

Should the Rule be Extended to Include the Defendant?

There would appear to be no practical reason for believing that the plaintiff's decedent would exercise greater care for self-preservation that would the defendant's decedent under the same circumstances. Thus it seems that the defendant is treated unjustly when he is denied the benefit of the Rule and the plaintiff in similar circumstances is allowed to benefit by the Rule. This is especially true in the Iowa cases which hold that the "No Eyewitness" Rule creates an inference of fact to be considered by the jury as evidence.[26] Is it fair to allow the plaintiff to have the benefit of this invisible, uncross-examined witness in the form of the Rule's inference of care, while the defendant cannot avail himself of any like advantage?

If the Rule were extended to include the defendant, practical considerations would seem to indicate that the situations wherein it would be an advantage to the defendant would be limited. This is true because the Rule would be applicable to the defendant only where there was no obtainable direct evidence as to what the defendant did or did not do by way of precaution. If the plaintiff failed to put in this amount of evidence a verdict would often be directed in the defendant's favor. Thus in such a case the application of the Rule would become a nullity.

However, the fact still remains that cases may arise wherein the defendant could qualify to receive the benefit of the Rule and the plaintiff has introduced enough evidence to get to the jury. In such a case it appears doubtful that the defendant should be denied the advantage of the inference of due care created by the "No Eyewitness" Rule which the plaintiff would enjoy under similar facts.

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[26] See notes 19 and 20 *supra*.

The Views of Other Jurisdictions on the Iowa Application of the Rule

Other jurisdictions have assailed the Iowa position of allowing the plaintiff an inference of due care under the "No Eyewitness" Rule because of the instinct of self-preservation theory. The "No Eyewitness" Rule and its resulting inference of due care is based upon the instinct of self-preservation. This basic law of nature supposedly dictates that a sane man will not knowingly expose or subject himself to those risks that he might reasonably expect would inflict mortal injuries.[27] The assailing Courts point out that the motive for personal safety does not operate upon the minds of men until they can clearly see that they are endangered by their own carelessness.[28] Thus what actually happens is that the careless acts usually precede the moment when the natural instinct for self-preservation is aroused. It is a truism that man is quite prone to take risks. Some cases have refused to give the plaintiff an inference of due care in the absence of eyewitnesses, even though he has the burden of proving freedom from contributory negligence, because of the observation that it is human experience that persons exposed to danger frequently forego the ordinary precaution of care for their safety.[29]

In *Wright v. Boston & Maine Railroad*[30] the New Hampshire Court cited and then attacked the Iowa concept that a plaintiff's decedent should be presumed to have exercised due care because of the instinct of self-preservation. The Court pointed out that while a person's natural desire to protect himself from harm would probably prevent a person from consciously committing suicide, it would not prevent a person from attempting a negligent act. The Court went on to say that it is strange logic to presume that since a plaintiff desired to avoid death, he was free from acts of contributory negligence, since it is just as probable that the decedent's acts were negligent as it is that they were careful.

The Court felt that it would be more consistent to adopt the rule that contributory negligence is an affirmative defense rather than nominally retain the present system and indirectly deprive it of all its vigor. The Court said in substance that to hold that the plaintiff sustains his burden of proof of freedom from contributory negligence by submitting no evidence of it, except conjecture and speculation, is little less than an entire change of our procedure and throws the burden of proving the plaintiff's conduct on the defendant.

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[27] 45 C.J., Negligence §§ 743-746.

[28] McLane v. Perkins, 92 Me. 39, 42 A. 255 (1898); Chase v. Maine C.R.R., 77 Me. 62, 52 Am.R. 744 (1885).

[29] Wiwirowski v. Lake S.&M.S.R.R., 124 N.Y. 420, 26 N.E. 1023 (1891); *cf.* Geoghegan v. Atlas Steamship Co., 146 N.Y. 369, 40 N.E. 507 (1895).

[30] 74 N.H. 128, 65 A. 687 (1907).

[31] Fielder v. Kapsa, 255 Wis. 559, 39 N.W.2d 682 (1949); Stall v. Andro, 250 Wis. 26, 26 N.W.2d 162 (1947).

Wisconsin has made use of the "No Eyewitness" Rule purely as a procedural device. Their courts recognize that the general experience of mankind does not warrant a presumption that either party in a negligence case was acting under a stronger desire to continue to live than the other, or that the deceased was naturally more careful than the survivor. But in order to solve the stalemate caused by the lack of evidence, they have fashioned a procedural device in the form of a presumption of due care in favor of the deceased, whether it be the plaintiff or the defendant.[31] This presumption is not evidence, but serves the purpose of a prima-facie case until the other party has gone forward with the evidence he has in his control.

Conclusion

While it may be true that other jurisdictions have criticized the application of the "No Eyewitness" Rule in Iowa, the fact remains that the Iowa Court has consistently applied the Rule as originally defined, at least in so far as the plaintiff is concerned. However, some question is presented by the restriction of the Iowa "No Eyewitness" Rule to the question of freedom from contributory negligence and the prohibition against extending the benefit of the Rule to the defendant on the question of his negligence. This is apparently the result of a misinterpretation of several key Iowa cases on the subject and may not be justified since there is no greater reason to infer that a plaintiff's decedent was more careful during the material moment before an accident than the defendant's decedent. Therefore, it would seem that the application of the "No Eyewitness" Rule could profitably be re-examined in future cases.

GEORGE G. FAGG (June 1958)

EDITORIAL NOTES

Supplemental Notes to Articles Previously Published

1. *Subrogation: A Landlord-Tenant Problem,* 4 DRAKE L. REV. 79 (1955), discussed the problem of a tenant's liability as a result of a fire caused by the tenant's own negligence, especially in regard to subrogation by the insurer against the tenant. The article was concerned with the protection of the tenant, including proper drafting of the lease to protect the tenant.

The recent Iowa case of *Sears, Roebuck and Company v. Poling,* 81 N.W.2d 462 (Iowa 1957), before the court on a motion by the defendant to adjudicate law points under R.C.P. 105, involved the interpretation of a lease drafted by the tenant, Sears. The landlord had insured the premises for $25,000 but suffered a loss of $75,000 when fire destroyed the premises. The lease provided that the landlord would "at his expense keep the demised premises insured at all times during the term hereof against destruction or damage by fire or tornado for the full insurable value thereof".

The lease also included the following provision: "Tenant agrees . . . upon the termination of this lease the demised premises will be in substantially as good condition as received, loss by fire, tornado, earthquake, or any unavoidable casualty and ordinary wear and tear excepted."

The alleged cause of the fire was Sears' negligence in cutting holes in the fire wall between the defendant's building and the adjoining building in violation of the terms of the lease. This allegedly allowed the fire to spread into defendant's building from the adjoining building which was also occupied by Sears. The action originated as a suit at law by Sears, and defendant counterclaimed for its loss as a result of the fire. Sears contended that the provisions of the lease relieved it from liability.

The Court conceded that it was not contrary to public policy for the tenant to contract to relieve itself of liability for its own negligence. However, the court said that a contract relieving a party of its own negligence should be strictly construed, and also noted that the contract was drafted by Sears and so should be strictly construed against that firm. In affirming the lower court decision for the landlord, the Court said that the contract did not clearly relieve Sears of its own affirmative negligence in case of fire, pointing out that every cause specified in the exception to the above-quoted clause except fire is one "wholly unrelated to any act of the tenant, negligent or otherwise" and concluded that the contract could be interpreted as relieving the tenant only of unavoidable casualties.